

Briefing

Heathrow expansion

Introduction

The historic decision of the Court of Appeal on 27 February 2020 means that the expansion of Heathrow has been halted. Friends of the Earth brought its case to protect the 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:

1. the successful outcome at the Court of Appeal in '*R (oao Friends of the Earth) v Department for Transport & Others*', and another appeal on climate grounds by Plan B Earth;
2. some wider implications of the judgment for other cases or situations;
3. the forthcoming Supreme Court appeal by Heathrow Airport Ltd.

‘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, para. 277)

1) The Judicial Review and Court of Appeal judgment

The “Airports National Policy Statement” (‘ANPS’) is a policy framework created under the Planning Act 2008 by the Secretary of State for Transport to allow expansion at Heathrow Airport.

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

- the Paris Agreement on climate change,
- the non-CO₂ warming impacts of aviation, and
- the climate impacts of the operation of the airport into the future beyond 2050,

made the decision/ANPS unlawful on each count, because they each breached section 10 of the Planning Act 2008, and also the ‘Strategic Environmental Assessment Directive’ (regarding Paris only). Plan B Earth ran a separate argument that the failure to consider the Paris Agreement breached section 5(8) of the Planning Act 2008.

The Court of Appeal agreed with both claimants on all arguments advanced. The ANPS is now of no legal effect unless and until reviewed – it is effectively a ‘zombie policy’.

Climate change and ‘sustainable development’ context

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.

“...(2) The Secretary of State must, in [designating or reviewing NPS], do so with the objective of contributing to the achievement of sustainable development... [and] must (in particular) have regard to the desirability of...mitigating, and adapting to, climate change”. (Planning Act 2008; section 10 (2) and (3))

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 and is the first-time sustainable development had been defined for the Planning Act (although the definition has been applied in other planning contexts too).

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)

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 containing proscribed information must be produced by the public authority involved. 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-CO₂ warming impacts

Aviation is scientifically recognised as having a non-CO₂ 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 the carbon emissions alone. The Secretary of State accepted this but decided that due to scientific uncertainty over the precise calculation of the non-CO₂ 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 key principle of 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-CO₂ impacts (as above) would need to be considered in any redetermination. Applying the same reasoning it found that these failures breached section 10 as they were mandatory considerations that were irrational to discount.

Plan B Earth's claim

Plan B claimed that Paris was already part of government policy given its ratification, and various documentary evidence mentioning it (such as the 'Clean Growth Strategy') and supportive ministerial statements, leading up to the decision to expand Heathrow. Failure to consider it breached s5(8) of the Planning Act, which required consideration of government policy on climate change when making an NPS. The Secretary of State said that whilst broad commitments had been made government policy was in fact 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 can be limited by the Government's policy position at any given point in time, this is a significant finding (see section below) and embarrassing for the Government to have been told it does not know what its own policy on climate change amounts to.

2) Wider implications of the judgment

There are several important wider implications for the climate movement in the UK.

First, before summarising those, it is important to state that each possible situation is dependent on the specific facts in each case, and the strength of argument will vary depending on the issues. Anyone contemplating litigation should take appropriate legal advice from their chosen legal representative.

In addition, the Court of Appeal judgment stands as law unless and until the Supreme Court rules otherwise. The Supreme Court result is expected at the end of 2020/start of 2021.

PLANNING ACT 2008 IMPLICATIONS

For the making of all new infrastructure NPS the Paris Agreement must now be taken into account and its application explained, as it is government policy (due to section 5(8) of the Planning Act); and, in order to contribute to the achievement 'sustainable development' with regard to the desirability of mitigating climate change (due to s10 of the Planning Act).

Similarly when any of the other existing old infrastructure NPS (such as those on energy or roads) are reviewed, the Paris Agreement must now be taken into account and its application explained in order to contribute to 'sustainable development' with particular regard to mitigating (etc) climate change (again due to s10).

If further climate negotiations occur that produce successor agreements to Paris, there are now strong arguments that the same requirement to take them into account would apply to those subsequent international treaties on climate change.

In any future airports NPS, regard must be had to the non-CO₂ impacts and the effects of emissions beyond 2050 in its making or review. Failure to do so would be irrational and breach s10 and the precautionary principle (re: non-CO₂ impacts).

It is now clear that regard must also be had to emissions beyond the 2050 target date in the Climate Change Act 2008, where material for the purposes of satisfying the s10 duty, when making any other non-aviation specific NPS or reviewing an old one.

OTHER IMPLICATIONS

Generally

Where other statutory contexts provide for similar legal duties or requirements the judgment now lends support to arguments that the Paris Agreement, Non-CO₂ emissions (aviation only), and all emissions beyond the Climate Change Act 2050 target cannot be ignored where climate change is a very important factor. For example, it may be argued that Paris is "obviously material" in those situations too. The stronger the parallels with the Heathrow situation (e.g. high climate impact *vis a vis* national targets, or very similar wording in the legal provision) the easier this may be.

Also, specifically, where public authorities have similar legal duties to take account of government policy, that must surely also now include Paris. They can be expected to explain any departure from or failure to consider Paris in situations where climate change (and so Paris objectives) is an important factor to the decision in question.

Other high-carbon plans or projects

The determination of large-scale planning applications, or, making of governmental strategies/plans with the potential to impact significantly on the UK's ability to mitigate climate change, and where the Paris Agreement has not been taken into account (and, arguably, where any departure from the objectives from the Paris Agreement has not been explained), this can, if the context is right, present a valid argument that the decision is unlawful.

Aviation specific high carbon plans or projects

In similar fashion to the points made above, where there is an aviation proposal that has large climate implications for the UK from planes in flight (as is the case with Heathrow), then the fact that they will inevitably cause non-CO₂ warming impacts too (which can be of a similar magnitude) may no longer be *completely* discounted on the basis of scientific uncertainty. The Court of Appeal's ruling on the precautionary principle means they can't be ignored altogether.

STRATEGIC ENVIRONMENTAL ASSESSMENTS (SEA)

Where an SEA relevant plan or programme has important implications for the ability of the UK to reduce its carbon (or other relevant GHG) emissions, it is now much more likely that the Paris agreement and its environmental objectives must be taken into account and its application explained in those circumstances too. Whilst this is not absolute and will depend on the circumstances, a failure to do so could be unlawful, in particular, for plans and programmes which have very large climate implications. The Heathrow decision indicates strongly that in relation to the vast majority (if not all) of such aviation plans/programmes, the decision-maker will act irrationally if the Paris Agreement is not treated as relevant. However, this wider implication to take Paris into account need not be solely related to infrastructure or aviation SEA plans or programmes.

3) The Supreme Court Appeal

On 6 May 2020, Heathrow Airport was granted permission for an appeal in the Supreme Court against the judgment. This essentially means a re-run of the climate case at the top of the court system.

The Government withdrew following the Court of Appeal judgment, and the case brought by Greenpeace with several London Boroughs and the London Mayor has been dismissed. Arora Holdings, a developer, has also dropped out of the case despite receiving permission to proceed with Heathrow in the Supreme Court.

Is Heathrow expansion now dead?

Much will depend on the outcome of the Supreme Court appeal. Friends of the Earth is confident that the judgment of the Court of Appeal was sound and will vigorously resist Heathrow's case. If the current end result is retained by the Supreme Court (even though it may form a different view on some of the arguments) the ANPS will remain unlawful and of no legal effect unless and until it is reviewed by the Secretary of State for Transport.

The Government will then need to decide what it wants to do next. Does it want no specific policy on Heathrow and airports in the South East of England? It seems likely it will proceed with reviewing the existing ANPS (or producing an entirely new one) but this

must be done in line with any court ruling. Following the statutory process set out by the Planning Act 2008 any amendment would eventually return to Parliament for approval. The wider climate policy context, such as any new national aviation strategy, the now tighter 'net zero' target for climate change mitigation, updated advice from the CCC on how to meet it; these must all be taken into account in due course too.

Friends of the Earth strongly believes that the expansion of Heathrow Airport is incompatible with our national and international climate commitments, so a reviewed ANPS should exclude it.

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 remains the case unless and until the Supreme Court rules otherwise. The ANPS is unlawful because the Secretary of State failed to consider the Paris Agreement, non-CO₂ warming impacts of aviation, and the effects of climate change beyond 2050.

Importantly, the Court ruled in Friends of the Earth's case that the Paris Agreement is an "*obviously material*" consideration, and the Secretary of State acted irrationally by ignoring it. Strong condemnation indeed. The fact that Paris must now be taken into account puts consideration of climate change issues more firmly at the heart of infrastructure policy development, as Paris is more ambitious and encompassing in delivering sustainable development than our own Climate Change Act 2008.

Any reconsideration or re-making of the ANPS must also address climate emissions beyond 2050 and the Non- CO₂ warming impacts of aviation as "*obviously material*" and independently important too.

Friends of the Earth and Plan B's cases represent a massive victory 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";
- 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.
- potential wider implications as explained above.

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 the UN Convention on the Rights of the Child. These issues were not decided in the end.*
3. *The London Boroughs (incl. Mayor of London) and Greenpeace Ltd; they were all unsuccessful on appeal. Their case has now been dismissed.*
4. *The Airports National Policy Statement is one NPS, others cover Energy, Waste, Water, Transport. A list is on the Planning Inspectorate's website:*
<https://infrastructure.planninginspectorate.gov.uk/legislation-and-advice/national-policy-statements/>.