

Briefing

Heathrow Expansion - Supreme Court Judgment

At a glance:

- The Supreme Court has overturned the decision of the Court of Appeal, which would have forced an early rethink of plans for expansion at Heathrow Airport on climate grounds.
- The judgment is no 'green light' for expansion – it makes clear that full climate considerations still remain to be addressed and resolved, though now at the planning permission stage.
- Given the CCC's advice to Government on the 6th Carbon Budget (9 December 2020) in the context of a new Net Zero national target, advising that there should be no net expansion in UK airport capacity going forwards, the picture is looking difficult for Heathrow Airport Ltd's plans.
- Through the litigation, Friends of the Earth have ensured that not only must all climate impacts now be considered at planning stage, and also that the damaging proposals could not be rushed through in 2018/19 whilst national climate policy and a Net Zero target was yet to catch up.
- Heathrow expansion remains very far from certain.

This briefing updates readers on the Friends of the Earth climate litigation (2018 – 2020) against Heathrow expansion with the following sections:

1. Background
2. The Supreme Court stage
3. The practical effect of the Supreme Court judgment
4. Should the ANPS be reviewed?
5. Conclusion

1. Background

The Airports National Policy Statement (ANPS) is the policy framework, created under the Planning Act 2008 by the Secretary of State for Transport to allow consideration of plans for expansion at Heathrow Airport. It directs how a development consent application should be evaluated.

Section 10 of the Planning Act required the Secretary of State (SofS) to contribute to sustainable development with particular regard to mitigating climate change when making the ANPS. In the Court of Appeal, Friends of the Earth successfully argued that the Secretary of State had not done this. This was because it had:

- failed 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 beyond 2050; and
- had not complied with the Strategic Environmental Directive by not considering the Paris Agreement.

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

Legal action charity 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 case went before the Court of Appeal in October 2019, and was heard by three Lord Justices of Appeal, including the most senior planning judge in the Court of Appeal: the Supervising Lord Justice for Planning, Lord Justice Lindblom.

In February 2020, the Court of Appeal unanimously agreed with both those claimants on the grounds of challenge they advanced, and ruled that the ANPS was of no legal effect unless reviewed. The Government said it would not challenge that decision.

2. The Supreme Court stage

Heathrow Airport Limited (“Heathrow Airport”) obtained permission to appeal and challenged all successful grounds. The hearing was heard via video-link on 7 and 8 of October 2020 before five Supreme Court Judges.

The Secretary of State was not involved, as it had not sought permission to appeal. The case became even more clearly about commercial interests vs climate justice.

Summary of arguments

Heathrow Airport challenged all four of the Court of Appeal climate grounds advanced by Friends of the Earth, and the one ground brought by Plan B.

In Friends of the Earth’s case, due to the way that the case had evolved, the questions to be determined were whether or not it was correct for the Court of Appeal to have ruled that the SofS had unlawfully ignored the Paris Agreement, based on the legal advice it had received, and also whether its approach had been *irrational* in any exercise of discretion it had over what factors to consider. The arguments also centred again on the warming impacts of non-CO₂ emissions from planes in flight, and the overall climate impacts for the full lifetime of the project beyond 2050 (the target date in the Climate Change Act) as associated issues.

In relation to Plan B’s case, the main question to decide was whether or not the Paris Agreement was correctly ruled by the Court of Appeal as being “government policy” according to the specific meaning of s5(8) and for the purposes of the Planning Act 2008. And if it was “government policy”, had lawful account been taken of it?

In essence, Heathrow Airport invited the Supreme Court to overturn the full result of the Court of Appeal, and attacked both factual and evaluative judgments that had been made. However, given that the Secretary of State itself was no longer involved in the

proceedings, the Supreme Court did not have the benefit of any direct explanation from the Government.

Judgment of the Supreme Court

The Supreme Court allowed Heathrow's appeal and reversed the Court of Appeal ruling.

In relation to Friends of the Earth's grounds, the Supreme Court has held that:

- the Secretary of State had a broad discretion on what to consider as part of climate change and sustainable development in relation to the section 10 duty, and whether and how far it should consider the Paris Agreement. As such, the Secretary of State acted rationally in the way it had made its decision including on the basis that all climate change impacts would be assessed as part of consideration of the actual planning application.
- Surprisingly, the Court concluded that the Secretary of State had not completely ignored Paris despite what had been said in the lower courts, on the basis of its own interpretation of witness evidence previously filed by the Secretary of State. The Secretary of State had considered Paris, but simply decided to give it no weight to it beyond its overlap with the Climate Change Act 2008, under which carbon budgets and a 2050 carbon reduction target are set for the UK.
- Similarly, the Secretary of State had acted rationally in not referring to the Paris Agreement in the environmental report for the strategic environmental assessment. Contrary to what the Court of Appeal had decided, it had lawfully exercised a discretion on this point, again because the matters to which it gave rise would still anyway be considered later. The Court of Appeal had concluded that the Paris Agreement was "obviously relevant" (and so irrational to discount) and should have been referred to in the environmental report itself.
- It was rational of the Secretary of State to decide not to attempt to assess post 2050 climate impacts by reference to "future, as yet unformulated policies" (Judgment at para. 155) – again, these would be considered at the next stage. Again, the Court of Appeal had concluded that the ANPS text itself should have referred to these climate impacts, due to the section 10 duty.
- It was rational for the Secretary of State not to address non-CO₂ impacts in the ANPS, given the uncertainty regarding their quantification and given that (even though not specifically mentioned in the NPS) they too could be assessed as part of the planning application process. By contrast, the Court of Appeal had concluded that given the scientific consensus of highly significant climate change impacts associated with non-CO₂ emissions (which – on the evidence available at the time – could be of a similar magnitude to those of CO₂ alone), then on the basis of both the precautionary principle and common sense, it was not open to the Secretary of State to ignore them altogether.

In relation to Plan B Earth's ground of challenge, the Supreme Court held that the Government's commitment to the Paris Agreement was not a part of "government policy" for the purpose of section 5(8) of the Planning Act 2008. They disagreed with the Court of Appeal's conclusion that these were words of the ordinary English language, and instead held that a "relatively narrow meaning" should be applied, and that it referred to "carefully formulated written statements of policy" (Judgment at para. 105). They did not comment, however, on whether or not the published "Clean Growth Strategy" had qualified in this regard, but the other evidence also relied upon such as ministerial statements in Parliament were not sufficient.

3. The practical effect of the judgment

There is no onward appeal from the Supreme Court. The 2018 ANPS has been reinstated. It is open to Heathrow to make a planning application for a Development Consent Order (DCO), and so the battle against expansion may now move to the planning arena.

However, we are in the teeth of a pandemic which has seen demand for passenger flights dramatically decline, and this will either take time to recover or it may not recover at all. It is unclear what effect new patterns of working will have on demand for business travel in particular. Furthermore, the government is yet to settle its national aviation policy in the light of the Net Zero Target and the new advice from the Climate Change Committee (CCC) related to the Sixth Carbon Budget and how to achieve Net Zero. The CCC has advised the Government to set demanding targets for the aviation sector, that would mean actual emissions (regardless of offsetting) need to fall steadily from pre-pandemic levels. To achieve this, the Government will need to limit the growth in passenger numbers and crucially, the CCC has advised that there should be no net expansion of UK airport capacity. The CCC has also advised that there should be a separate target to halt the growth in non-CO₂ warming emissions from flights.

It also remains possible for the Government to either specifically abandon its policy of Heathrow expansion in light of this advice, or change the policy context further in some other way.

Friends of the Earth's case has clearly revealed the extent of disagreement between judges on the interpretation of the same legal issues related to climate change. Friends of the Earth went from losing in the Divisional Court *on all grounds*, to winning *on all grounds* in the Court of Appeal, to losing *on all grounds* in the Supreme Court. This shows the growing field of climate litigation is yet to find consist and predictable treatment in English courts.

Importantly, the Supreme Court's judgment has not endorsed the expansion of Heathrow airport, nor given Heathrow the green light to start building. Planning consent is still required, and the judgment makes clear that the developer's proposal will be assessed by reference to the state of knowledge, the climate change impacts, climate targets and policies which are in place *at the time that the application is determined*. This has built on a key part of Friends of the Earth's case as was advanced in the Divisional Court, and provides welcome clarity that "all is up for grabs" on climate issues – the NPS has not "straight-jacketed" consideration of these matters such that Heathrow expansion is effectively a "done deal". Without this litigation having taken place, a developer might have argued that the runway had been given a green light when it came to climate change questions through the NPS designation. The litigation has shown that is absolutely not the case. The developer will have to match up to the latest assessment of the impacts of its proposals and the latest climate change science if it wants to proceed.

Since the ANPS was designated in June 2018, climate policy has significantly tightened and events have overtaken the litigation looking at the decision made at that time. We now have a more stringent 2050 target of Net Zero, and it is clear from the CCC's advice published on 9 December 2020 on the Sixth Carbon Budget, that Heathrow expansion is very far from certain. In particular, the CCC has advised the Government that:

“Unless faster than expected progress is made on aircraft technology and SAF [sustainable aviation fuel] deployment, such that the sector is outperforming its trajectory to Net Zero, **current planned additional airport capacity would require capacity restrictions placed on other airports.**”

Going forwards, there should be no net expansion of UK airport capacity unless the sector is assessed as being on track to sufficiently outperform a net emissions trajectory that is compatible with achieving Net Zero alongside the rest of the economy, and is able to accommodate the additional demand and still stay on track.”

4. Should the ANPS be reviewed?

It is hard to see how Heathrow expansion could be granted planning permission with these developments in climate policy, advice and targets since the ANPS was determined. However, with so much having changed since June 2018, Friends of the Earth believes that these developments are also compelling reasons for the Government to review the ANPS itself. While the Supreme Court has ruled that the decision to grant the ANPS was a lawful one based on the situation at the time, we consider that the context has changed so significantly that the basis for the decision has been superseded, and the policy itself needs to be reviewed. The Government may do this under the Planning Act 2008 s.6, if they think it is appropriate to do so and if they decide “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”.

The Government is due to consult on its entire aviation policy in 2021 for the Net Zero Aviation Decarbonisation Strategy. It must commit to no new airport expansion, and review the ANPS to finally scrap the third runway at Heathrow.

5. Conclusion

In bringing this case, Friends of the Earth and sector allies have helped push the climate emergency significantly up the political agenda. We have shown that it is possible to mount a credible and legitimate climate case against an enormous piece of climate-wrecking infrastructure. It has exposed Heathrow expansion as a major climate justice issue, and therefore one of national and international importance.

Crucially, the pause created as legal issues were decided has meant that instead of rushing forwards with one of the largest high-carbon and long-lived developments – *at a time of climate crisis* – the decision on whether it should go ahead will now be taken in the context of more appropriate (and safer) national carbon reduction targets. That is in all our interests and had been a key concern of Friends of the Earth’s. This had not been guaranteed at the outset when the ANPS was announced in June 2018.

As explained by the Supreme Court: “the designation of the NWR Scheme in the ANPS did not immunise the scheme from complying with future changes of law and policy. The NWR Scheme would fall to be assessed against the emissions targets which were in force at the date of the determination of the application for a DCO” (Judgment at para. 157). Thanks to the litigation it is also clear that this must include all emissions from planes in flight, including international flights. This is very important, given that the

carbon budgets and the Net Zero target do not at the time of writing expressly include these emissions (despite CCC advice that they should).

Non-CO₂ emissions remain an issue to be confronted at planning stage too. It is unclear how the developer will be able to account for the effect that these emissions have, which on the latest scientific understanding mean that aviation's total warming impact could be up to triple that of its carbon emissions alone.

And finally, if Heathrow applies for planning consent, it will need to address the climate impacts of expansion by reference to the state of knowledge and the carbon reduction targets in place at the time. Given the CCC's recent advice on the Sixth Carbon Budget, including that there should be no net increase in airport capacity going forwards, it is very hard to see how Heathrow expansion can become a reality.

William Rundle, Head of Legal
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End notes:

- 1. Friends of the Earth were represented by David Wolfe QC (Matrix), Peter Lockley (11KBW), Andrew Parkinson (Landmark), and Leigh Day LLP.**
2. In order to pass the test at the planning stage, the developer's proposal must not have a material impact on the ability of the Government to meet its carbon reduction targets (see para 86 of the Judgment and 5.82 of the ANPS).
3. The Airports National Policy Statement is one NPS. Others cover energy, waste, water, and transport. A list is on the Planning Inspectorate's website: <https://infrastructure.planninginspectorate.gov.uk/legislation-and-advice/national-policy-statements/>.
4. The latest CCC advice: *Policies for the Sixth Carbon Budget and Net Zero*, Committee on Climate Change, published on 9 December 2020; [is available here](#). The above quotation from the CCC's advice is from the '*Policies for the Sixth Carbon Budget and Net Zero*' p170.
5. The **latest** analysis on the extent of non-CO₂ warming impacts quoted in the Conclusion above, is from: Lee et al (2020) 'The contribution of global aviation to anthropogenic climate forcing for 2000 to 2018', *Atmospheric Environment*, Volume 244. There is uncertainty to the precise impacts of non-CO₂ and the use of different metrics further confuses the picture. For example, the GWP*metric suggests that aviation emissions are currently warming the climate at approximately three times the rate of that associated with aviation CO₂ emissions alone, whereas the different metric GWP100 suggests the total warming effect is 1.7 times above aviation CO₂ alone. Regardless of whichever metric is used the picture remains the same that non-CO₂ emissions increase the warming from aviation and should be accounted for in decision-making.
6. For more information, contact the Friends of the Earth press office on 020 7566 1649 / 07718 394786 (out of hours – please do not text this number) or at <mailto:media@foe.co.uk>.
7. About Friends of the Earth: Friends of the Earth is an international community dedicated to the protection of the natural world and the wellbeing of everyone in it. We bring together more than two million people in 75 countries, combining people power all over the world to transform local actions into global impact. For more information visit: <https://friendsoftheearth.uk/> follow us at @friends_earth, or like our Facebook page.