

Climate change and nationally significant infrastructure projects: *R (on the application of Plan B Earth) v Secretary of State for Transport*

Environmental Law Review

2020, Vol. 22(2) 125–132

© The Author(s) 2020



Article reuse guidelines:

sagepub.com/journals-permissions

DOI: 10.1177/1461452920931325

journals.sagepub.com/home/elj**Edward Mitchell**

School of Law, University of Essex, UK

Abstract

In *R (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] 2 WLUK 372, the Court of Appeal held that the Secretary of State had acted unlawfully by failing to take into account the UK's commitments in the 2015 Paris Agreement when he decided to designate a policy formulated to enable the construction of a third runway at Heathrow airport as a 'national policy statement' under the Planning Act 2008. An appeal to the Supreme Court is pending. The outcome of that appeal should help to clarify the legal significance of the Paris Agreement and will have significant implications both for expansion at Heathrow airport, for other major infrastructure projects and for other planning and environmental litigation.

Keywords

Airports national policy statement, climate change Act 2008, development consent order, habitats directive, heathrow airport, national policy statement, Paris agreement, planning Act 2008, SEA directive

Airport expansion in South East England

In *R (on the application of Plan B Earth) v Secretary of State for Transport* (the Court of Appeal Judgment), Lindblom LJ, Singh LJ and Haddon-Cave LJ noted that expansion of Heathrow airport was necessary, at least in the view of the UK Government, to preserve the country's status as a 'leading aviation "hub"'.¹ In a joint judgment, however, they decided that a national policy statement (NPS), formulated to enable the construction of a third runway at Heathrow, was unlawful. In doing so, they compelled the Government to reconsider that policy statement before construction of the runway could commence. The Lord Justices recognised that their judgment might be interpreted as an instance of judicial meddling in political decision-making and explained

1. [2020] EWCA Civ 214, [2020] 2 WLUK 372 at [2].

Corresponding author:

Edward Mitchell, School of Law, University of Essex, Colchester, UK.

Email: edward.mitchell@essex.ac.uk

that, although they had been asked to adjudicate on various planning and environmental law issues, their decision rested on a single issue. While the Supreme Court has granted permission to appeal,² the Court of Appeal judgment raises significant questions about expansion at Heathrow, other major infrastructure projects and the UK's decarbonisation and climate change mitigation commitments

Facts of the case

Construction of a third runway at Heathrow has been a long-standing ambition for UK Governments.³ In 2012, the Conservative and Liberal Democrat Coalition Government established the Airports Commission to make recommendations as to how the UK's airport capacity might be increased 'to maintain the UK's position as Europe's most important aviation hub'.⁴ The Airports Commission shortlisted three proposals: a proposal from Gatwick Airport Ltd for a new runway at Gatwick airport (the Gatwick Proposal); a proposal from Heathrow Airport Ltd for a new runway north west of Heathrow's northernmost existing runway (the Heathrow NWR Proposal); and a proposal from Heathrow Hub Ltd for an extension to the northern runway to enable that runway to, in effect, operate as two runways. The Airports Commission concluded that the Heathrow NWR Proposal was the most likely to achieve the hub objective.⁵ To provide the policy framework for the proposal's implementation, the Secretary of State for Transport published an Airports National Policy Statement (the ANPS) on 5 June 2018. Parliament debated the ANPS and voted, by a majority of 296, in favour of its designation as an NPS.⁶ The Secretary of State then decided to designate it, pursuant to section 5 of the Planning Act 2008 (PA 2008), on 26 June 2018.⁷

Case history

The High Court considered five judicial review claims related to the Secretary of State's decision in two separate hearings and in two separate judgments. Heathrow Hub Ltd and Runways Innovations Ltd (the promoters of the Heathrow extended northern runway scheme) brought one claim to challenge the Secretary of State's decision to designate the ANPS.⁸ While that claim reached the Court of Appeal,⁹ it is not considered here because it does not pertain directly to environmental law issues.

The High Court considered the four other claims in a 'rolled-up' hearing in which Hickinbottom LJ and Holgate J examined both the applications for permission and the substantive issues.¹⁰ Ten claimants presented grounds for review: the London Borough of Hillingdon and four adjacent London Boroughs; the Mayor of London; Greenpeace Ltd; Friends of the Earth Ltd (FoE); Plan B Earth (Plan B); and Mr Neil Spurrier, a litigant-in-person. Heathrow Airport Ltd, the Secretary of State for the Environment, Food and Rural Affairs, Transport for London, and Arora Holdings Ltd (which owns substantial landholdings on the site to be

2. Supreme Court, *Permission to appeal decisions* (7 May 2020). Available at: <https://www.supremecourt.uk/news/permission-to-appeal-decisions-07-may-2020.html> (last accessed 10 May 2020).

3. In 2003, for example, the Labour Government proposed a new runway and terminal building at Heathrow (Department for Transport, *The Future of Air Transport* (December 2003), 13–14).

4. Airports Commission, *Final Report* (July 2015) at para. 1.3. 'Hubs' are airports where airlines transfer passengers and cargo to other flights.

5. *Ibid.* at para. 13.3.

6. The Court of Appeal Judgment, above n. 1 at [35].

7. *Ibid.* at [3].

8. *R (on the application of Heathrow Hub Ltd) v the Secretary of State for Transport* [2019] EWHC 1069 (Admin), [2019] 4 WLUK 429.

9. *R (on the application of Heathrow Hub Ltd) v the Secretary of State for Transport* [2020] EWCA Civ 213, [2020] 2 WLUK 347.

10. *R (on the application of Spurrier) v the Secretary of State for Transport* [2019] EWHC 1070 (Admin), [2020] PTSR 240 (the High Court Judgment).

developed and which would construct and operate a new terminal building) appeared as Interested Parties, with WWF-UK also intervening. The claimants raised 22 grounds challenging the decision to designate the ANPS:

- The London Boroughs, the Mayor of London and Greenpeace jointly claimed that the conclusions on surface access and air quality were unlawful, that the assessment of and conclusions on habitats and species conservation were unlawful, that the strategic environmental assessment that informed the ANPS and the conclusions in that assessment were unlawful and that the consultation informing the ANPS was flawed.¹¹
- FoE claimed that the Secretary of State had breached duties in the PA 2008 by failing either to explain how he had taken into account Government policy relating to the mitigation of, and adaptation to, climate change¹² or to conduct a broader enquiry of the need to mitigate and adapt to climate change,¹³ and that the Secretary of State had erred by failing to consider the UK's commitments in the 2015 Paris Agreement¹⁴ (or, alternatively, by failing to explain how he had considered those commitments).¹⁵
- Plan B claimed that the UK's commitments in the Paris Agreement represented Government policy on mitigating and adapting to climate change and that the Secretary of State had erred in failing to consider those commitments.¹⁶
- Mr Spurrier claimed that the decision was unlawful because of a failure to consult, actual and/or apparent bias, human rights violations, flawed air quality appraisals, and because policy in the ANPS would lead to a breach of the Kyoto Protocol, the Paris Agreement and the Climate Change Act 2008 (CCA 2008).¹⁷

None of the grounds of challenge were successful.

The Appeal Case

The London Boroughs, the Mayor of London, Greenpeace, FoE and Plan B appealed. Mr Spurrier did not.

The first set of grounds to be raised concerned issues related to Council Directive 1992/43/EEC (OJ L 206 20.7.92) on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive). The Lord Justices rejected these grounds and concluded that:

- The 'Wednesbury' irrationality standard of review applies to matters arising under articles 6(3) and 6(4) of the Habitats Directive;¹⁸
- The Secretary of State did not act unlawfully by concluding that the Gatwick Proposal was not an 'alternative solution' to be considered in a habitats regulations assessment for the purposes of article 6(4) because the Government's 'hub' objective was a long-standing and legitimate aim that the Gatwick Proposal would not fulfil.¹⁹ The 'overriding' nature of that objective also obviated

11. *Ibid.* at Appendix A at [1]–[10].

12. An alleged breach of ss 5(7) and (8) of the PA 2008.

13. An alleged breach of s. 10(3)(a) of the PA 2008.

14. Adopted 12 December 2015; ratified by the UK Government 18 November 2016.

15. An alleged breach of Sch. 2 para. 5 of the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004, No. 1633). FoE's grounds are summarised in the High Court Judgment, above n. 10, Appendix A at [11]–[13].

16. An alleged breach of ss 5(8) and 10(3)(a) of the PA 2008 and s. 3 of the Human Rights Act 1998. Plan B's ground are summarised in the High Court Judgment, above n. 10, Appendix A at [14]–[16].

17. *Ibid.* at Appendix A at [17]–[22].

18. The Court of Appeal Judgment, above n. 1 at [75]–[79].

19. *Ibid.* at [87]–[88].

any need to assess whether the Gatwick Proposal would harm Special Areas of Conservation,²⁰ and

- The High Court did not err in finding that the requirement to consider alternative solutions in the Habitats Directive imposed a different obligation to the requirement to consider ‘reasonable alternatives’ in article 5(1) of Council Directive 2001/42/EC (OJ L 197 21.7.01) on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive). Similarly, the High Court did not err by concluding that the Secretary of State had not acted unlawfully by treating the Gatwick Proposal as a reasonable alternative under the SEA Directive but not as an alternative solution under the Habitats Directive. The SEA Directive required the identification of a broad range of reasonable alternatives for consultation purposes whereas the Habitats Directive required only a consideration of viable alternatives.²¹

The second set of grounds concerned matters raised under the SEA Directive, which the Lord Justices also dismissed, concluding that:

- The Wednesbury irrationality standard applied to the Secretary of State’s conclusion as to the information that ‘may reasonably be required’ under article 5(2) and Annex I of the SEA Directive;²²
- The Secretary of State did not act unlawfully for the purposes of article 5(1) and Annex I either by concluding that consideration of carbon budgets adopted by the Greater London Authority would have made no material difference to the environmental assessment or by conducting a cumulative appraisal rather than a more comprehensive assessment of the relationship between the Heathrow NWR Proposal and relevant local plan policies for administrative areas likely to be severely affected by the proposal;²³ and
- The Secretary of State did not breach article 5(1) or paragraph (c) of Annex I by relying upon a noise impact statement that considered indicative flight paths and noise thresholds based on expert advice and that assessed the numbers of people and buildings, rather than the specific land uses, likely to suffer significant noise effects.²⁴

The final set of grounds concerned climate change matters. The Lord Justices upheld these grounds and made a declaration preventing the ANPS from having legal effect unless the Secretary of State reviewed the policy in the statement.²⁵ Specifically, the Lord Justices concluded that the commitments in article 2(1) of the Paris Agreement represented Government policy for the purposes of section 5(8) of the PA 2008 because the Government had ratified the Paris Agreement and ministerial statements had affirmed the Government’s ‘policy of adherence’ to those commitments.²⁶ The Secretary of State had consequently acted unlawfully by failing to consider those commitments when deciding to designate the ANPS. The commitments were also ‘so obviously material’ to the decision to designate that the Secretary of State’s failure to consider them breached section 10(3)(a) of the PA 2008.²⁷ Similarly, the Paris Agreement represented an international

20. *Ibid.* at [101].

21. *Ibid.* at [116].

22. *Ibid.* at [136].

23. *Ibid.* at [155]–[162].

24. *Ibid.* at [175]–[183].

25. *Ibid.* at [280].

26. *Ibid.* at [228].

27. *Ibid.* at [237].

‘environmental protection objective’ under paragraph (e) of Annex I of the SEA Directive so the Secretary of State acted unlawfully by failing to consider the UK’s commitments in the environmental assessment that informed the ANPS.²⁸ Finally, the Secretary of State had acted unlawfully by failing to consider either the effect of carbon dioxide (CO₂) emissions beyond 2050 or the non-CO₂ climate change effects of aviation.²⁹ If the Secretary of State reviewed the ANPS, he or she would have to take these matters into account.

On 7 May 2020, Heathrow Airport Ltd and Arora Holdings Ltd were granted permission to appeal to the Supreme Court so that the court could determine whether the Secretary of State’s failure to consider the Paris Agreement did make the decision to designate the ANPS unlawful (the Supreme Court Appeal).³⁰ The Government has not appealed.³¹

Discussion

The Supreme Court Appeal will address important questions about the regime for authorising ‘nationally significant infrastructure projects’ (NSIPs), about airport expansion in South East England and about the UK Government’s climate change commitments.

Before the Secretary of State decided to designate the ANPS, the Airports Commission had advised that the Government’s preferred runway proposal would need ‘planning consent’ before construction could begin.³² The Commission identified two options. The Government could exercise powers under the PA 2008 to publish an NPS detailing the policy framework to which the Secretary of State should ‘have regard’, pursuant to section 104(2)(a) of the 2008 Act, in deciding whether to grant a ‘development consent order’. Or the Government could use a Hybrid Bill akin to those enacted for the Channel Tunnel Rail Link, Crossrail and the HS2 railway.

On 25 October 2016, the Secretary of State announced that the Government favoured the Heathrow NWR Proposal and that it would publish an NPS to provide the policy framework within which an applicant could apply for development consent.³³ Under section 14(1)(i) of the PA 2008, the expansion plans would constitute an NSIP. A development consent order authorises NSIPs by grouping planning permission, highways orders, scheduled ancient monuments orders, listed building consents and compulsory purchase orders into a single statutory instrument.³⁴ An NPS should thus provide the policy framework not just for the grant of planning permission but also for the grant of other rights and powers. However, before designating a statement as an NPS, the Secretary of State must ‘have regard to the desirability of mitigating, and adapting to, climate change’.³⁵ Alongside this, an NPS must provide reasons for the policy in the statement,³⁶ including an explanation of how the policy ‘takes account of Government policy relating to the mitigation of, and adaptation to, climate change’.³⁷

The Secretary of State accepted that the PA 2008 obliged him to consider existing domestic legal and policy obligations related to climate change when designating the ANPS. These obligations could be found, the Secretary of State argued, in section 1(1) of the CCA 2008.³⁸ Since the designation of the ANPS, the

28. *Ibid.* at [246].

29. *Ibid.* at [256]–[257].

30. *Above* n. 2.

31. HC Deb 27 February 2020, vol. 672, cols. 23WS–24WS.

32. Airports Commission, *above* n. 4 at para. 16.22.

33. HC Deb 25 October 2016, vol. 616, cols. 162–166.

34. PA 2008 at s. 33(1). See s. 122(1) in relation to compulsory purchase orders.

35. *Ibid.* at s. 10(3)(a).

36. *Ibid.* at s. 5(7).

37. *Ibid.* at s. 5(8).

38. The Court of Appeal Judgment, *above* n. 1 at [218].

Climate Change Act 2008 (2050 Target Amendment) Order 2019 has amended section 1(1) of the CCA 2008 to oblige the Government to reduce greenhouse gas (GHG) emissions to a level at least 100 per cent lower than a 1990 baseline (the CCA Amendment).³⁹ However, when the Secretary of State decided to designate the ANPS, the CCA 2008 obliged the Government to reduce emissions, against the 1990 baseline, by 80 per cent by 2050 (the Pre-Amendment Obligation). The sustainability appraisal accompanying the ANPS had thus concluded that the Heathrow NWR Proposal could be delivered in compliance with the Pre-Amendment Obligation.⁴⁰ On the other hand, however, neither the ANPS nor the accompanying sustainability appraisal referred to any of the UK's commitments in the Paris Agreement. In article 2(1) of that Agreement, participating nations agreed 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 Secretary of State argued that he had not ignored this commitment but that he had concluded that it was not relevant to the decision to designate the ANPS unless and until the Government amended section 1(1) of the CCA 2008.⁴¹ The Lord Justices concluded, however, that sections 5(8) and 10(3)(a) of the PA 2008 did impose a legal obligation on the Secretary of State to consider the commitments in the Paris Agreement, which meant that the decision to designate was unlawful.

If the Supreme Court agrees with the Court of Appeal's conclusions, the case will not prohibit construction of a third runway at Heathrow. Nor will it compel Ministers to avoid decisions that might be incompatible with the UK's international commitments. Instead, the Court of Appeal concluded, for a single reason, that the decision to designate the ANPS was unlawful. The Lord Justices did not quash the ANPS and they did not order the Secretary of State to conduct a review under the review mechanism in the PA 2008.⁴² They did, however, state that the ANPS could not take legal effect unless and until the Secretary of State reviewed it to take account of how the policy affected the UK's commitments in the Paris Agreement. If the Supreme Court agrees with the Court of Appeal Judgment, the Secretary of State could designate an appropriately reviewed statement as an NPS if he felt that a new runway would be compatible with those commitments.

If the Supreme Court disagrees with the Court of Appeal's conclusions, the ANPS would take effect. However, the Secretary of State might then still decide to review the ANPS because he must conduct a review whenever he 'thinks it appropriate.'⁴³ In deciding whether to review, he would have to determine whether the CCA Amendment amounted to a significant change in the basis on which the policy in the ANPS was decided and whether that change would have made a 'material difference' to the policy if it had been anticipated at the time.⁴⁴ Following that review, the Secretary of State could amend or withdraw the statement.⁴⁵

If the ANPS does take effect, with or without a review, the Secretary of State must have regard to it when considering an application for development consent, unless one of the exceptions listed in the PA 2008 applies.⁴⁶ Whether an application for development consent would be forthcoming, in the light of the

39. SI 2019, No. 1056.

40. Department for Transport, *Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England* (June 2018) at para. 3.69.

41. The Court of Appeal Judgment, above n. 1 at [218].

42. *Ibid.* at [280].

43. PA 2008 at s. 6(1).

44. *Ibid.* at ss 6(3) and 6(4).

45. *Ibid.* at s. 6(5).

46. *Ibid.* at s. 104(2)(a). The exceptions arise if granting consent in accordance with an NPS would lead to a breach of either international obligations or domestic legislative commitments or would otherwise be unlawful (s. 104(3)–(6)) or if the adverse effects of the project would outweigh its benefits (s. 104(7)).

implications of the current coronavirus pandemic for global aviation, would remain to be seen: in oral evidence given to the House of Commons Transport Select Committee on 6 May 2020, Heathrow Airport Limited's Chief Executive speculated that aviation demand might justify construction of a third runway at Heathrow within '10 to 15 years'.⁴⁷

Aside from the implications for construction of a third runway at Heathrow, the case has implications for both the designation of future NPSs and for the review of other extant NPSs. The case will clarify if the PA 2008 obliges the Secretary of State to take into account international commitments to which the Government has expressed a 'policy of adherence' when deciding to designate future NPSs. The case will be important for extant NPSs because a court can consider a challenge to a decision by the Secretary of State not to carry out a review.⁴⁸ At the time of writing, three possible claimants have indicated that they will challenge any failure to review the NPSs for major energy infrastructure projects following the CCA Amendment.⁴⁹ That claim may be strengthened if the Supreme Court agrees that designation of the ANPS was unlawful: the Secretary of State might then be required to consider whether the Paris Agreement would also have made a material difference to the basis on which policy in the energy NPSs was decided.

Finally, the case will have important implications for other planning and environmental litigation. The High Court has recently heard a judicial review brought by the environmental charity, ClientEarth, challenging the decision of the Secretary of State for Business, Energy & Industrial Strategy to grant development consent for two gas-fired electricity generating units at Drax Power Station in North Yorkshire (the Drax Proposal).⁵⁰ The Secretary of State appointed two Planning Inspectors to examine the Drax application. Those Inspectors concluded that the Government's energy NPSs contained decarbonisation objectives that outweighed any need identified in those NPSs for additional gas-fired electricity generation capacity.⁵¹ They also concluded that the projected GHG emissions would undermine the Government's legislative commitment to reduce overall emissions.⁵² Since the adverse impacts thus appeared greater than the benefits, the Inspectors recommended that the Secretary of State should withhold consent.⁵³

The Inspectors made their recommendation regarding the Drax Proposal after the UK ratified the Paris Agreement but before the CCA Amendment came into force. The Secretary of State then issued her decision letter after the Government amended its emissions reduction target. Nonetheless, the Secretary of State granted consent.⁵⁴ She concluded, first, that the Planning Inspectors had misinterpreted policy in the NPSs related to decarbonisation, GHG emissions reductions and the need for new energy infrastructure.⁵⁵ She

47. Quoted in Joanna Partridge, 'Expansion debate rumbles on amid hush over Britain's biggest airports', *The Observer* (9 May 2020). Available at: <https://www.theguardian.com/business/2020/may/09/airports-heathrow-gatwick-expansion-coronavirus-airlines> (last accessed 10 May 2020).

48. PA 2008 at s. 13(2).

49. Details of the potential action are available on a case-specific crowdfunding webpage. Available at: <https://www.crowdjustice.com/case/no-new-fossilfuel-projects/> (last accessed 10 May 2020).

50. The Drax Proposal is an NSIP under s. 14(1)(a) of the PA 2008.

51. Planning Inspectorate, *Examining Authority's Report of Findings and Conclusions and Recommendation* (4 July 2019). Available at: <https://infrastructure.planninginspectorate.gov.uk/projects/yorkshire-and-the-humber/drax-re-power/> (last accessed 5 May 2020) at para. 11.1.1.

52. *Ibid.* at para. 11.1.2.

53. *Ibid.* at para. 11.1.4.

54. Department for Business, Energy & Industrial Strategy, *Decision letter related to the application for the Drax Power (Generating Stations) Order 2019* (4 October 2019). Available at: <https://infrastructure.planninginspectorate.gov.uk/projects/yorkshire-and-the-humber/drax-re-power/> (last accessed 5 May 2020) at para. 7.1.

55. *Ibid.* at paras 6.5–6.7.

then concluded that granting consent would not, in itself, lead to a direct breach of the CCA 2008.⁵⁶ ClientEarth has challenged those conclusions.⁵⁷ At the time of writing, the substantive issues have been heard but the High Court has reserved judgment. When that judgment is received, it will provide further insight into how the Government's legislative and policy commitments to decarbonisation and GHG emissions reduction will work in practice.

Conclusion

The legal implications of the 2015 Paris Agreement and the UK's commitment to decarbonisation and climate change mitigation are gradually being worked out. The case discussed here will not compel UK Government Ministers to avoid decisions that might be incompatible with the UK's domestic and international decarbonisation and climate change mitigation commitments. However, the case will confirm if the Secretary of State should, when he decided to designate the ANPS, have considered the policy in that statement in the context of the commitments in the Paris Agreement. This might have important implications for the designation of other NPSs if the court's judgment suggests that the Secretary of State should consider international commitments to which the Government has expressed a 'policy of adherence'. Alongside other current litigation, the case will also clarify the relevant considerations when the Secretary of State either decides to review a designated NPS or applies the policy in a designated NPS to grant development consent for a major infrastructure project.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

56. *Ibid.* at para. 6.12.

57. Francis Taylor Building, *Permission Granted for Judicial Review by ClientEarth of the Drax Power (Generating Stations) Order 2019* (3 February 2020). Available at: <https://www.ftbchambers.co.uk/news/permission-granted-judicial-review-clientearth-drax-power-generating-stations-order-2019> (last accessed 5 May 2020).