A lesson in un-creativity: (R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd [2020] UKSC 52

Joanne Hawkins
School of Law, University of Leeds, Leeds, UK

Abstract
Plans for a third runway at Heathrow airport have been the subject of ongoing melodrama. In the latest instalment, (R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd [2020] UKSC 52), the Supreme Court comprehensively reversed the Court of Appeal’s judgment, rejecting the finding that the decision maker acted unlawfully in designating the Airport National Policy Statement (ANPS). This commentary highlights that the Supreme Court judgment signals a missed opportunity to develop a more creative approach to the polycentric and dynamic issue of climate change in the context of nationally significant infrastructure projects. It argues that the decision is, if not wholly unexpected, a disappointing one.

Keywords
Airports national policy statement, Heathrow, climate change, Paris Agreement, Planning Act 2008

Case history
Following the judgment of the Supreme Court (SC), the Airport National Policy Statement (ANPS) stands steadfast. However, the ANPS, and its favouring of Heathrow’s North West Runway (or Heathrow ‘third runway’), has been the subject of notable tension since its designation in June 2018.1 This is despite successive governments repeatedly arguing that there is a need for increased airport capacity in the South East of England to maintain the UK’s position as ‘Europe’s most important aviation hub’.2 Following the establishment of the independent Airports Commission in 2012, three main candidates for development were

1. Designated under section 5 of the Planning Act 2008.
2. Airports Commission Airports Commission Final Report (Airports Commission, London, July 2015) Para 1.3; R (on the application of Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214 [2]; R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd [2020] UKSC 52 [2].

Corresponding author:
Joanne Hawkins, School of Law, University of Leeds, Leeds, UK.
Email: J.Hawkins@leeds.ac.uk
identified: building a new additional runway at Heathrow (the NWR scheme), extending the existing northern runway at Heathrow (the ENR scheme), and building a second runway at Gatwick airport (the G2R Scheme). In 2015 the Secretary of State (SoS) announced that the Government would accept the overall case for airport expansion and would give further consideration to the shortlisted options. In 2016, the Government’s preferred option was declared to be the north-west runway scheme at Heathrow. This led to two draft ANPS in 2017 setting out the policy framework for development (including why the north-west runway at Heathrow Airport best met the needs of airport expansion, and the specific requirements that any applicant would need to meet to gain development consent). The final ANPS was designated in June 2018.

In 2019, a rollercoaster of a judicial review process began: four claims were dealt with in a rolled-up hearing during which ten claimants raised a total of 22 grounds of challenge in relation to the designation of the ANPS (and the favouring of the Heathrow third runway). None of these grounds were successful at the High Court. A subsequent appeal was launched, and the Court of Appeal (CoA) considered three key sets of grounds:

1. Relating to the Habitats Directive.4
2. Relating to the Strategic Environmental Assessment Directive.5
3. Relating to climate change. This final set of climate change grounds were the only ones to be upheld resulting in a declaration by the CoA which prevented the ANPS from having legal effect until the policy had been reviewed by the Secretary of State. The Court held that for the purposes of s5(8) of the Planning Act 2008, the Paris Agreement (an international treaty setting targets for limiting global average temperature increase) did in fact represent Government policy. As such the Secretary of State’s failure to take such commitments into account, when designating the ANPS, rendered it unlawful.6 The commitments pursuant to the Paris Agreement were ‘so obviously material’ to the question of designation that the failure to consider them also breached section 10(3)(a) of the Planning Act (PA) 2008 relating to sustainable development and the requirement to have regard to the desirability of mitigating, and adapting to climate change.7 Further, the Paris Agreement was held to be an international ‘environmental protection objective’, and failure to consider the commitments during the environmental assessment informing the ANPS was unlawful.8 The final ground upheld by the CoA made clear that in failing to consider the effect of carbon dioxide emissions beyond 2050, or the non carbon dioxide climate change impacts of aviation, the Secretary of State had again acted unlawfully.9

The Supreme Court judgment

Notably, the Government made a declaration that it would not appeal the CoA decision. However, Heathrow Airport Ltd (the owners of Heathrow Airport) did. The result: a comprehensive and resolute reversal of the CoA judgment. The key issues were dealt with as follows:

3. R (on the application of Spurrier and others v Secretary of State for Transport [2019] EQHC 1070 (Admin) [2020] PTSR 240; For a more detailed discussion of these grounds see E. Mitchell, ‘Climate Change and Nationally Significant Infrastructure Projects R (on the application of Plan B Earth) v Secretary of State for Transport’ (2020) 22(2) Environmental Law Review 125, 127.
4. Council Directive 1992/43/EEC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7.
5. Directive 2001/42/EC (SEA Directive) of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment OJ L 197/30).
6. Plan B v Secretary of State for Transport [2020] (n2) [228].
7. Ibid. [237].
8. Ibid.; SEA Directive (n5), para e Annex I.
9. Plan B v Secretary of State for Transport (n2) [256-257].
1. Defining Government policy: interpretation of s5(8) of the Planning Act 2008 – the court held that Government policy referred to carefully formulated written statements of policy which had been cleared by the relevant departments on a Government-wide basis. The ministerial statements relied upon did not meet this minimum standard. Although not pursued as an argument at the Supreme Court stage, the court clarified that they did not consider international treaty commitments (in this case, the Paris Agreement) to be a statement of Government policy.\(^\text{10}\)

2. Requirement to designate national policy frameworks with the aim of contributing to the achievement of sustainable development, including the desirability of mitigating and adapting to climate change: S10(2) and (3) of the Planning Act 2008 – the Secretary of State had met the obligation under s10(2) and (3) of the Planning Act 2008.\(^\text{11}\) There was no requirement that the SoS take into account the Paris Agreement beyond the obligations already covered by measures within the Climate Change Act (CCA) 2008.

3. Consideration of post 2050 and non carbon dioxide emissions: s10 of the Planning Act 2008 – there was no breach of duty by a failure to have regard to the effect of greenhouse gas emissions created by the NWR scheme after 2050 and the effect of non-CO\(_2\) emissions.\(^\text{12}\) At the time of designation, the UK’s policy relating to the Paris Agreement and global goals, which included those post 2050, was in the process of being developed. It was not irrational to decide not to assess post 2050 emissions when the relevant policies remained unformulated.\(^\text{13}\) The approach to addressing non-CO\(_2\) emissions was also still in progress at the time of designation meaning there was no breach by the failure to consider these.

4. The environmental report and obligations under s5(3) of the Planning Act and SEA directive – the reference to CCA targets in the appraisal of sustainability was sufficient to take the UK’s obligations under the Paris agreement sufficiently into account in meeting the SoS’ obligation to produce an environmental report in respect of major plans and proposals such as the ANPS.\(^\text{14}\)

**Discussion**

The Supreme Court (SC) decision reinforces the judicial aversion to being seen to interfere with political decisions involving the difficult balance between economic/social factors and the climate emergency. The tension over the relationship between the courts and issues of policy is a particularly pertinent one given the aftermath of the *Miller* judgment and the independent review of judicial review commissioned by the Government.\(^\text{15}\) Whilst the Court of Appeal were keen to demonstrate that their decision had not, and could not, decide that there would be no third runway at Heathrow, or that such a plan would necessarily be incompatible with the UK’s political commitments on climate change, the Supreme Court judgment removes any lingering risk that the Heathrow decision could become a source of discontent/feed the populist narrative of elite courts and judges interfering in matters of politics.\(^\text{16}\)

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\(^\text{10}\) *Friends of the Earth Ltd and others v Heathrow Airport Ltd* [2020] (n2) [108].

\(^\text{11}\) Ibid. [115].

\(^\text{12}\) Ibid. [151] [156] [166].

\(^\text{13}\) Ibid. [155].

\(^\text{14}\) Ibid. [149].

\(^\text{15}\) *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5; Independent Review of Administrative Law launched in July 2020.

\(^\text{16}\) V. Heyvart, ‘Beware of populist narrative: the importance of getting the Heathrow ruling right. British Policy and Politics at LSE’ (*LSE blogs*, 29 Feb 2020). https://blogs.lse.ac.uk/politicsandpolicy/getting-the-heathrow-judgment-right/ (last accessed 01 August 2021); *Plan B v Secretary of State for Transport* (n2) [285].
However, the decision is a disappointing one. It neglects to pursue an approach to climate change which, through the use of existing laws and structures, responds in a more creative manner to the increasingly complex and polycentric issue. Lords Hodge and Sales, in a joint judgment, made clear that a ratified international agreement, in this case the Paris Agreement, was an unincorporated treaty which did not give rise to direct domestic law obligations and rights. Nor (as outlined above) did it constitute Government policy. A reversion to this narrow interpretation signals a blockade on the more dynamic approach proffered by the Court of Appeal.

Further, the SC held that with regards to the section 10 duty and sustainable development, the Government’s consideration of the Climate Change Act (CCA) 2008 (the only established government policy on climate change at the date the ANPS was designated in June 2018) meant that, albeit in a somewhat masked manner, they had in fact taken into account the Paris Agreement. Their reasoning lay in the construction of the Secretary of State’s discretion as to whether to take into account the Paris Agreement beyond the consideration already contained within the CCA 2008. The court concluded that there had been no error of law in exercising that discretion, finding that there was no need to look beyond the CCA itself, an Act which the Independent Climate Change Committee had previously advised was compatible with the Paris Agreement. Underpinning this, was the emphasis that the ANPS did not equate to permission for the runway to be developed. No development could take place without first passing through the Development Consent Order (DCO) process. This decision over whether to grant a DCO, and permit the development, would require, amongst other things, consideration of any relevant up-to date carbon targets under the CCA at the time of any application. The result being that developing science and changes in the UK’s international obligations under the Paris Agreement would be taken into account before any kind of development actually took place. The ANPS was not the end game, and the role of the DCO allowed for flexibility in relation to updated standards/commitments. Similar reasoning was also applied in relation to the lack of consideration of post 2050 carbon emissions and non-CO2 emissions.

Whilst this approach may allow flexibility without requiring the constant rewriting of national policy statements, it acts to highlight the fragmentation present in the planning system. When dealing with nationally significant infrastructure projects (NSIPs) and an issue as dynamic as climate change, this presents a fundamental and worrying problem. Given the weight afforded to the recognised need for the infrastructure identified within national policy statements (such as the ANPS) any balancing of this need against other considerations (such as emissions) at the later DCO stage is conducted in the shadow of an established policy presumption in favour of the development. The issues presented by this are illustrated by DCO decisions such as that granting permission for two new gas fired generating units at the Drax Power Station in Selby. Despite a legal challenge to the DCO, the court held that whilst CO2 emissions could be given due weight when considering a DCO application, they did not, of themselves, provide an automatic or insurmountable obstacle to consent where the need for such infrastructure had already been identified by a

17. L. Fisher, ‘Imagining the Future of UK Environmental Law’ (brexitandenvironment.co.uk, 16 May 2019). https://www.brexitenvironment.co.uk/2019/05/16/imagining-environmental-law/ (last accessed 1 August 2021); J. Bell and E. Fisher, ‘The “Heathrow Case”: Polycentricity, Legislation, and the Standard of Review’ (2020) 83(5) The Modern Law Review 1072.
18. Friends of the Earth Ltd and others v Heathrow Airport Ltd (n2) [108].
19. Ibid [126] [132].
20. Ibid. [132].
21. A DCO is the means of obtaining permission for a development that has been categorised as a nationally significant infrastructure project and is the subject of a national planning policy statement such as the ANPS. Applications for development consent are submitted to the Planning Inspectorate and the relevant Secretary of State is the decision maker on applications.
22. Friends of the Earth Ltd and others v Heathrow Airport Ltd (n2) [157] [166].
23. Drax Power (Generating Stations) Order 2019 (SI2019/1315).
national policy statement.\textsuperscript{24} Clearly, the policy preference established in relevant NPSs can and does forcibly weight the scales in favour of the ‘needed’ infrastructure.

Combined, the Drax and Heathrow decisions draw to the fore the challenges of using planning law as a means to engage with climate related issues. Fragmentation, and the constricts of traditional administrative legal framings, only exacerbate the lack of creativity shown in addressing climate change challenges. For a brief period, the CoA judgment offered a glimmer of hope. The decision was not a revolutionary act of policy change, it was an exercise in statutory interpretation, which, without stepping beyond the restricted role afforded to the courts, offered an exemplar of just how international treaty commitments could be woven into domestic law in line with traditional administrative and public law norms.\textsuperscript{25} In light of our exit from the EU, and the likely increased importance of international commitments to domestic law, such a shift offered a pivotal, but now missed, opportunity.\textsuperscript{26}

Despite this, in the context of aviation development, two key questions remain. First, following the Climate Change Act 2008 (2050 Target Amendment) Order (and updated target of reducing greenhouse gas emissions to a level at least 100\% lower than a 1990 baseline) will the s6(1) PA 2008 requirement that the Secretary of State review each national policy statement (whenever the Secretary of State thinks it appropriate to do so) be triggered?\textsuperscript{27} Whilst these more up to date commitments will, as anticipated by the court, be considered at the DCO stage, it would appear that the change in targets set by the Order may well require such an overarching review of the ANPS.\textsuperscript{28} Given the Government’s recent commitment to review their Energy National Policy Statement in the wake of the new targets, this is a prominent issue.\textsuperscript{29} If such a review is triggered, how, if at all, might this affect the substantive content of the ANPS? Second, in a post-Covid world, how might the economic, political, and social realities of travel and aviation shape the need for and direction of development? And what, if any, effect might this have on the UK’s aviation planning policy?

**Conclusion**

The SC judgment is disappointing in its lack of creativity, and in its reinforcement of a fragmented planning approach. The case also illustrates the limitations of using procedural grounds of challenge when the essence of the dispute arguably relates much more to the substance of the decision. The SC judgment is a reminder of the limitations of any such ‘back door’ approach, and the evident reluctance of the courts to interfere in matters of politics.

However, all is not lost. Whilst a decision may be lawful it does not guarantee a development will take place unaffected. Take the Drax project, despite the DCO being upheld for the two new gas fired generating units, we not only saw this prompt a further issuance of proceedings for judicial review of the Government’s

\begin{itemize}
\item \textsuperscript{24} R. (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy Respondents and Drax Power Limited [2021] EWCA Civ 43 [87]; Including updated targets under the Climate Change Act 2008 (2050 Target Amendment) Order 2019 SI 2019/1056.
\item \textsuperscript{25} J. Bell and E. Fisher, ‘The “Heathrow Case”: Polycentricity, Legislation, and the Standard of Review’ (n17) 1082.
\item \textsuperscript{26} Whilst we have seen some success in using the Paris Agreement as a basis for action in other jurisdictions, such as the Urgenda case (Urgenda Foundation v. The Netherlands [2015] HAZA C/09/00456689), there are notable differences. Urgenda for example related to a nationwide climate change mitigation target, whilst Heathrow was a very project specific based litigation. Further Urgenda focussed on substantive issues, whilst Heathrow remained a procedural based challenge.
\item \textsuperscript{27} Climate Change Act 2008 (2050 Target Amendment) (n24); Planning Act 2008 s6(1).
\item \textsuperscript{28} Being sufficient to meet the requisite criteria of a significant change in the circumstances on the basis of which the policy set out in the NPS was decided, being a change that was not anticipated at that time, and one that if it had been anticipated would have resulted in the policy being materially different.
\item \textsuperscript{29} H M Government, ‘Energy White Paper: Powering our Net Zero Future’ (CP 337, December 2020) 55.
\end{itemize}
National Energy Policy Statements, (brought to an end by the announcement of such a review in the Government’s 2021 Energy White paper),\textsuperscript{30} but also a subsequent decision by Drax to abandon the proposed project at Selby.\textsuperscript{31} Evidently, such developments are not immune to the ongoing effects of economic, social, and political pressures/uncertainties. Whilst the current Heathrow legal challenge may be at an end, it seems a question mark still hangs over the head of Heathrow’s third runway.

\textbf{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.

\textbf{Funding}

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

\textsuperscript{30} Judicial review proceedings issued by the Good Law Project in March 2020; H M Government (n29) 55.

\textsuperscript{31} With a corresponding aim of pursuing further decarbonisation and the development of/investment in biomass and carbon capture and storage.