The Heathrow Judgment: A Breakthrough for UK Climate Change Law?

The Court of Appeal's ruling that the Government's choice of Heathrow's third runway was unlawful because it ignored the UK's commitments to the Paris Agreement is the most significant climate change case in English law to date.

It is the first case in which a legal duty to address climate change has been imposed on the UK Government by the judiciary.

But although a breakthrough for the judiciary's approach to climate change policy, the judgment also illustrates the wide discretion courts continue to allow government ministers when balancing pollution against economic gain, a discretion that appears incompatible with meeting climate change targets or restoring the UK's biodiversity.

What did the Court of Appeal decide?

Lord Justices Lindblom, Singh and Haddon-Cave found that the decision by then Secretary of State for Transport Chris Grayling to designate a third runway for Heathrow under the Airport National Policy Statement (ANPS) was unlawful because it breached section 5(8) of the Planning Act 2008 that requires, "an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change."

It was agreed by all sides that the Secretary of State had not taken the UK's commitment to the Paris Agreement, the international climate change treaty ratified by the Government in November 2016, into consideration when designating the third runway at Heathrow on 26 June 2018.

Indeed, the Government argued that it was under an obligation *not* to consider its commitments under Paris (para.218) because the Agreement was an international treaty that had not yet been incorporated into domestic law by a specific act of Parliament. This was a conventional legal argument relying on the UK's dualist legal system, whereby international law is not directly enforceable in domestic courts. That argument was accepted by the lower Divisional Court in its judicial review of the case, ruling that the only binding government policy on climate change was that set out in the Climate Change Act 2008.

The Court of Appeal rejected that reasoning, holding that "Government policy" for the purposes of section 5(8) of the Planning Act at the time of the designation of the ANPS included a commitment to the Paris Agreement. The difference is significant: Under the Climate Change Act at the time, the UK was committed to an 80% reduction in greenhouse gas emissions by 2050; under Paris that commitment, as recognised by the Climate Change Committee (para.206), would need to be greater.

In other words, the Court found that Government policy on climate change is not restricted to the governing act of parliament, but includes statements by ministers expressing commitment to an unincorporated international treaty. This is likely to prove the most important and enduring aspect of the decision for the relationship between the rule of law and climate change policy.

Who brought the original claim and why?

The original judicial review of the runway decision was brought by five London boroughs, the London Mayor, environmental groups Friends of the Earth, Plan B Earth and Greenpeace, and a member of the public.

The ten original claimants sought judicial review of the designation on 22 grounds, including the relationship between the Climate Change Act and the Paris Agreement, the law governing air quality, the requirements of Strategic Environmental Assessments (SEA), and the role of the Human Rights Act 1998.

In terms of climate change, the choice of third runway at Heathrow would have produced the highest carbon emissions in absolute terms, as opposed to a second runway for Gatwick which the Airports Commission (AC) concluded "was associated with the lowest additional emissions". However, a second runway at Gatwick would not meet the Government's objective of maintaining the UK's status as a transit hub for international aviation (para.65).

Campaigners have been fighting the expansion of Heathrow since 2002, arguing the airport already produces unacceptable levels of noise and air pollution impacting some 700,000 local residents, and its expansion is unpopular, expensive and unnecessary.

The case is a classic example of competing priorities: the Government arguing that GDP growth and further globalisation is in the public interest, and a group of citizens and environmental campaigners warning of the harms and future dangers caused by increasing pollution.

The ANPS committed the Government to delivering the third runway within the UK's climate change obligations. Yet in 2026, when the new runway was due to be open, the original judicial review heard evidence from the Climate Change Committee (CCC) October 2016 report on the implications of the Paris Agreement that:

"Current policy in the UK is not enough to deliver the existing carbon budgets that Parliament has set … Current policies would at best deliver around half of the emissions reductions required by 2030, with no current policies to address the other half." (para.583)

Similarly, even if aviation emissions in 2050 were no higher than the level of 2005 (known as the Aviation Target) and were included at this level in the aggregate 2050 carbon budget, then compliance with the 2050 target could only be achieved through reducing emissions in other sectors by 85% on 1990 levels.

The CCC advice was that this reduction of 85% "is at the limit of what is feasible, with limited confidence about the scope for going beyond this." (para.574)

As such, the facts appeared to offer a strong case for the application of the precautionary principle to the decision to license a heavily polluting project. The precautionary principle, first set out in the 1992 Rio Declaration and now entrenched in environmental law in both common law and civil jurisdictions, says that where serious threats of environmental harm exist, lack of full scientific certainty shall not be used as a reason to delay action to prevent that harm.

However, the Divisional Court found only two grounds (habitats; consultation) and two-sub-grounds (SEA) as arguable, and rejected the substantive application in those, and dismissed all other 20 grounds, including the submission that the Paris Agreement was Government climate change policy, as not arguable.

The judicial review was thus a drastic illustration of the limits of public law to affect Government climate change policy, which is why the Court of Appeal ruling overturning its conclusions on climate change policy is so significant.

What about the other grounds of appeal?

By the time the case was heard before the Court of Appeal, the questions had been narrowed to three main grounds: issues on the operation of the EU's Habitats Directive; issues on the EU's SEA Directive; and issues related to the UK's commitments on climate change.

On the challenge to the Government's decision making under the Habitat's Directive, the Court heard submissions that under article 191(2) of the Treaty on the Functioning of the European Union, the precautionary principle should have been applied to the designation of the ANPS (para.72). Where uncertainty remained about the environmental impacts of the runway, the appropriate standard of review should have been proportionality. The Court held that the Divisional Court had been correct in dismissing this argument, ruling that the correct standard of review remains the test in *Wednesbury* (para.75) whereby a decision by a public body is only unlawful if it is "so unreasonable that no reasonable person acting reasonably could have made it." Furthermore, the Court rejected arguments that the third runway was an interference in any fundamental rights to life or environmental protection enjoyed by the Hillingdon Council claimants under the EU Charter or Treaty.

Along similar lines, the Court heard submissions that it was required to give effect to the precautionary principle when reviewing compliance with the SEA Directive, and that the Divisional Court had thus erred in failing to apply that greater level of scrutiny to the runway decision (para.131). Again, the Court rejected those arguments, stating that it was not for the Court to adjudicate on the content of an environmental statement (para.137), only the procedure by which it is made. Furthermore, an environmental report need not provide "as full a picture as possible" (para.139) in order to be lawful. The *Blewett* approach of applying 'Wednesbury' to environmental reports remains good law. A partially informed environmental report is not caught by the precautionary principle, nor is it legally inadequate (para.141).

The Court's business-as-usual approach to these two major grounds of appeal, asserting that in matters of decision making that negatively impacts on the UK's environment the Government retains a wide margin of discretion under a 72-year-old common law test to which the precautionary principle takes a back seat, illustrates how far the law has yet to develop if the UK is to reverse the degradation of its environment over the decades ahead. That said, the precautionary principle did earn the Court's support in relation to submissions by Friends of the Earth that the Secretary of State had failed to take into account the non-CO2 emissions from the third runway. The Government argued that such emissions had not been taken into account because the science was too uncertain to measure them (para.257). As an obvious and direct contradiction to the precautionary principle, that argument did not persuade the Court (para.258).

How significant could the judgment be for environmental law going forward?

The immediate, narrow impact of the decision is that the ANPS has no legal effect unless and until the Secretary of State undertakes a review of the decision in accordance with the requirements of Planning Act as set out in the Court's judgment (para.280). As in many judicial review cases, the minister is thus only obligated to take the decision again

lawfully, making sure he or she explains how the Government's commitment to the Paris Agreement has been taken into account. The Government could also still appeal the decision to the Supreme Court, although it has said, for now, that it will not.

Of more interest is the immediate wider impact of the decision. Under section 6, "Review", of the Planning Act, the Secretary of State is required to consider whether, since a national policy statement was first published, "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 Court's ruling that the UK's commitment to the Paris Agreement constitutes "Government policy" for the purposes of the Planning Act might represent this "significant change in circumstance", thus requiring the Government to review relevant NPSs.

Indeed, in the wake of the Heathrow ruling, The Good Law Project, alongside Dale Vince, the founder of Ecotricity, and George Monibot, the journalist, have launched a challenge against the Government to test that very conclusion, asking for a review of the Government's 2011 Energy National Policy Statement, which presumed in favour of fossil fuel projects and which the claimants argue discriminates against smaller scale renewable projects.

The longer-term impacts for public accountability for environmental protection are even more intriguing. Although since the Heathrow ANPS the Government has amended the Climate Change Act to commit to net zero greenhouse gas (GHG) emissions by 2050 – a target that is in line with its commitment under the Paris Agreement – the legally binding target is 30 years away. The Act also requires the Secretary of State to set a carbon budget for five-year periods. Up to 2017, the UK has met its first two carbon budgets, and is on course to meet its third. But it is off course to meet its fourth and fifth, starting in 2023, according to the Climate Change Committee.

It is unclear whether a failure to meet a carbon budget could trigger liability on the Government, or indeed whether the Court would rule unlawful a failure to put in place plans to meet upcoming carbon budgets under the Climate Change Act. However, the UK's commitment to the Paris Agreement is now a legally binding aspect of Government decision-making. Paris requires States Parties to submit targets for reducing GHGs, known as Nationally Determined Contributions, every five years, with 2020 set as the deadline for the second set of NDCs. The UK, along with almost every State Party, has yet to submit those updated NDCs. But if and when it does, the Court of Appeal ruling means that the UK's NDCs under Paris could be construed as Government policy for the purposes of the Planning Act, allowing those concerned with future polluting projects to challenge their legality in court.

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