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Case Summary posted by the Task Force on Access to Justice

United Kingdom: UK *R (on the application of Friends of the Earth Ltd.) v Secretary of State for Transport and (1) Heathrow Airport Ltd. (2) Arora Holdings Ltd. (Interested Parties) and WWF-UK (Intervener)* [2020] EWCA Civ 214

1. Key issue	The Secretary of State for Transport erred in law in failing to take the Paris Agreement into account when designating the Airports National Policy Statement (NPS) under the Planning Acts 2008
2. Country/Region	UK (England and Wales)
3. Court/body	Court of Appeal
4. Date of judgment /decision	2020–02-27
5. Internal reference	
6. Articles of the Aarhus Convention	Article 9(4) –as the case qualified for costs protection under the Aarhus Costs regime
7. Key words	National Policy Statement; Paris Agreement; climate change

8. Case summary

On 26th June 2018, the Secretary of State for Transport for England designated the "Airports National Policy Statement (ANPS): new runway capacity and infrastructure at airports in the South East of England" under s.5(1) of the Planning Act 2008.

The ANPS set out a policy which preferred Heathrow over Gatwick and which was designed to steer planning processes thereafter in support of a new (third) runway at Heathrow. Heathrow is a major international airport – the busiest in Europe, and the busiest in the world with two runways (each year it handles about 70% of the UK's scheduled long-haul flights, 80 million passengers and up to 480,000 air traffic movements.

National Policy Statements are designed to sets the fundamental framework within which further decisions will be taken. Those further decisions include the grant of permission for particular projects through the Development Consent Order (DCO) process.

There were originally five claims for Judicial Review challenging the designation decision. Four of them came before the Divisional Court in March 2019 and one of those four cases (brought by Heathrow Hub Ltd) raised issues of a very different nature to the others. Of these three, broadly speaking "environmental claims, the first was brought by seven claimants - five Local Planning Authorities (the London Borough of Hillingdon Council and the Councils of four adjacent London boroughs, Greenpeace Ltd and the Mayor of London. The second was brought by Friends of the Earth Ltd and the third by Plan B Earth. The Divisional Court dismissed all of these claims on 1 May 2019.

The Hillingdon claimant's, Friends of the Earth and Plan B Earth all appealed and following a hearing on 17, 18, 22 and 23 October 2019, the Court of Appeal handed down its judgment on 27th February 2020.

The unsuccessful challenges

There were various challenges to the ANPS brought by the Hillingdon claimants on the basis that it foreclosed various issues, under the Habitats Directive and the Strategic Environmental Assessment (SEA) Directive, from later consideration, but the Court of Appeal rejected all these contentions. Paragraphs [66]-[183] of the judgment set out the background to these challenges but, essentially, the CA adopted a traditional and non-intrusive approach to public body decision-making under those directives. Despite the EU origin of the provisions, and whatever the precise question, the test was the classic *Wednesbury* test of irrationality.

The successful climate change challenges

The ANPS was made in 2018, but the run-up to it lasted many years (see paras [15]-[36] of the judgment. Most crucially, the Paris Agreement on Climate Change was adopted by consensus in December 2015, by all 195 participating member states (including the UK) and the EU. On 17 November 2016, the UK duly ratified the Paris Agreement. Even though these processes were taking place in parallel, the Government did not take the Paris Agreement into account when it designated the ANPS. The Court of Appeal summarised neatly the Paris Agreement's main provisions as:

"It enshrines a firm commitment to restricting 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" …, as well as an aspiration to achieve net zero greenhouse gas emissions during the second half of the 21st century – a "balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century")… It requires each state to determine its own contribution to this target…".

The UK passed domestic climate change legislation in form of the Climate Change Act 2008 (which was enacted on the same day as the Planning Act 2008, which set out the National Policy Statement (NPS) system. In any given NPS, the Planning Act 2008 requires the Government (a) to explain how it takes account of its policy on climate change (s.5(8)) and (b) to exercise its NPS functions with regard to the desirability of mitigating and adapting to climate change (s.10(3)).

At paragraph [227] of the judgment, the Court of Appeal notes that the then Secretary of State for Transport (Chris Grayling) had received legal advice "that not only did he not have to take the Paris Agreement into account but that he was legally obliged not to take it into account at all…. In our view, that was a clear misdirection of law and there was, therefore, a material misdirection of law at an important stage in the process. That misdirection then fed through the rest of the decision-making process and was fatal to the decision to designate the ANPS itself."

As such, the Government's commitment to the Paris Agreement by the time of the ANPS was clearly part of government "policy", within the terms of s.5(8) of the Planning Act. The UK had ratified the Agreement and relevant ministers had endorsed the Agreement in the House of Commons.

The Court therefore rejected the Secretary of State's submission that taking the Paris Agreement into account involved giving legal status to an international agreement which had not yet been incorporated into domestic law.

The Court also took the view that the failure to take account of the Paris Agreement was a failure to have regard to a material consideration under s.10(3) of the Planning Act.

One of the Interested Parties (Heathrow Airport Ltd) (but not by the Secretary of State) argued that the outcome would not have been substantially different, had the Paris Agreement been taken account of. Part of this asserted that climate change issues could be taken into consideration later in the process, at the DCO stage. The Court of Appeal firmly rejected this assertion at [275], maintaining that it is incumbent on the Government to approach the decision-making process in accordance with the law at each stage, not only in any current review of the ANPS or at a future development consent stage. The

stages of the decision-making process are inter-dependent. And, more so, at [276]: the Secretary of State's error was a "basic defect" and "a fundamentally wrong turn in the whole process". The Court of Appeal granted a declaration that the ANPS should not have legal effect unless and until the Secretary of State had reviewed the ANPS against the background of what the Court of Appeal had decided its obligations were. **Note:** Of course, the Court of Appeal is not saying that the Paris Agreement required the Secretary of State to reach any particular decision on the proposal; indeed [238] it suggests that the Secretary of State was not required to act in accordance with it. But what the Secretary of State could not do is to "airbrush it" out of his considerations.	
9. Link to judgement/ decision	https://www.judiciary.uk/wp-content/uploads/2020/02/Heathrow-judgment-on-planning-issues-27-February-2020.pdf http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/UNITED_KINGDOM/ANPS/UK_2020_ANPS_judgment.pdf