

Case Name: *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214 (27 February 2020)

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Commentary: The Court of Appeal held that the Secretary of State's designation, under the Planning Act 2008, of the Airports National Policy Statement (the "ANPS") was unlawful. The ANPS was designated in June 2018 and identified a third runway at Heathrow as the Government's preferred scheme for meeting the need to expand airport capacity in South-East England as well as setting the policy framework for development consent order applications in respect of the project.

The Court of Appeal held that the designation was unlawful as the Secretary of State failed to take into account the 2015 Paris Agreement.

The appellants appealed against the Divisional Court's decision to refuse rolled-up claims for judicial review challenging the decision to designate the ANPS. The main issues fell into four groups: firstly, issues on the operation of 'the Habitats Directive' (EC Council Directive 92/43/EEC), secondly, issues on the operation of the 'Strategic Environmental Assessment Directive' (EC Council Directive 2001/42/EC), thirdly, issues relating to the UK's commitments on climate change and, fourthly, questions of relief.

Like the Divisional Court, the Court of Appeal agreed that challenges to the ANPS should fail on the issues relating to the operation of the Habitats Directive and on all but one concerning the operation of the Strategic Environmental Assessment Directive. However, the Court of Appeal found that, in failing to take into account the 2015 Paris Agreement (ratified by the UK in November 2016) in the course of making his decision to designate the ANPS, the Secretary of State failed to fully comply with the statutory regime for the formulation of Government policy in a National Policy Statement (as set out in the Planning Act 2008). In short, the Paris Agreement ought to have been taken into account by the Secretary of State in the preparation of the ANPS; this was the extent of the Government's failing.

It was common ground that, in deciding to designate the ANPS, the Secretary of State did not take into account the Government's commitments under the Paris Agreement. The Court of Appeal noted that the Climate Change Act 2008 set the UK a 'carbon target' to reduce its greenhouse gas emissions by 80% from 1990 levels by 2050 (consistent with the global temperature limit in place in 2008 of 2°C) which was contrasted with the more ambitious global temperature goals enshrined within the Paris Agreement. The Government justified its decision not to take into account the Paris Agreement on the basis, inter alia, that the Government was only required to consider existing domestic legal obligations and policy commitments and not an unincorporated, international treaty in the form of the Paris Agreement. Furthermore, the views of the Committee on Climate Change on the implications of the Paris Agreement had not yet been sought or received. The Committee on Climate Change had, however, advised the Government in October 2016 not to amend the targets in the Climate Change Act 2008 for the time being.

Ultimately, the Court concluded that the Government's commitment to the Paris Agreement was clearly part of Government policy by the time of the designation of the ANPS. This followed from ratification of the international agreement and firm ministerial statements reiterating adherence to it. As such, pursuant to section 5(8) of the Planning Act 2008, the Secretary of State was required to take the Paris Agreement into account. The duty did not require the Secretary of State to act in accordance with the Paris Agreement or to reach any particular outcome but it did require him to take it into account and explain how he had done so. Furthermore, the Paris Agreement was also clearly relevant for the purposes of the strategic environmental assessment undertaken in connection with the ANPS and so should have been taken into account for these purposes.

On the basis that it was not possible to conclude that it was 'highly likely' that the ANPS would not have been 'substantially different' had the Secretary of State taken account of the Paris Agreement, the Court held that it was appropriate to grant relief. Accordingly, a declaration would be made to the effect that the ANPS would be of no legal effect unless and until the Secretary of State conducts a review in accordance with the Court's judgment. The timescale for such a review is a matter for the Secretary of State.

In concluding, the Court of Appeal went to some lengths in seeking to ensure a proper understanding of its decision, noting that: "we have not decided, and could not decide, that there will be no third runway at Heathrow. We have not found that a national policy statement supporting this project is necessarily incompatible with the United Kingdom's commitment to reducing carbon emissions and mitigating climate change under the Paris Agreement, or with any other policy the Government may adopt or international obligation it may undertake." It is unclear at present as to whether the Government will consider revising the ANPS to address the failings identified by the Court of Appeal but, although the Government will not appeal the decision, Heathrow Airport has confirmed that it will seek permission to appeal to the Supreme Court.

Case summary prepared by Victoria McKeegan