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AIRPORTS POLICY DECLARED UNLAWFUL ON CLIMATE GROUNDS – POLICY AND PROJECT IMPLICATIONS

The Court of Appeal has declared the Airports National Policy Statement unlawful due to its failure to take into account the Government's commitment to the Paris Agreement on climate change. We understand that Heathrow Airport Limited, an interested party to the Court of Appeal proceedings, has applied for permission to appeal the decision to the Supreme Court. This briefing summarises the Court of Appeal's decision and considers what it means for other national policy statements (NPSs) and decisions on major infrastructure projects including expansion at Heathrow, pending the outcome of any further Supreme Court appeal.

Key issues

- Court of Appeal rules Airports National Policy Statement unlawful due to failure to take into account the Government's commitment to the Paris Agreement on climate change
- National Policy Statements (NPSs) in preparation will need to take the decision into account
- Secretary of State may have to review other NPSs on basis of 'change in circumstances'
- Climate change concerns are becoming an ever more important consideration for major infrastructure projects

Key Elements of the Court of Appeal's Decision

On Thursday 27 February 2020 the Court of Appeal handed down two judgments on a number of related proceedings concerning the proposed expansion of capacity at Heathrow Airport by the addition of a third runway under the policy set out in the Airports National Policy (ANPS) designated by the Secretary of State in June 2018. The first of these two judgments related to a challenge by Heathrow Hub Limited (and others) to how expansion should be delivered at Heathrow Airport. This briefing considers the second judgment which concerned challenges brought by Friends of the Earth (and others) to the ANPS and the planning processes for its designation (see the end of this briefing for the full case references).

The Friends of the Earth judgment originates from five judicial review claims brought before the High Court which sought to challenge the Secretary of State's decision to designate the ANPS on various grounds relating to the Habitats Directive, the Strategic Environmental Assessment Directive and issues relating to climate change; all of these were initially unsuccessful at first instance.

On appeal, the Court of Appeal agreed with the conclusions of the High Court that the challenges relating to the operation of the Habitats Directive and the Strategic Environmental Assessment Directive must fail. However, the Court of Appeal concluded that the challenges with respect to the UK's commitments to climate change should succeed.

The Court of Appeal's decision primarily turned on its interpretation of "Government policy" and the requirement at section 5(8) of the Planning Act 2008 that the reasons for the policy set out in the ANPS must "*(in particular) include 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*". The Court of Appeal concluded that the Government's commitment to the Paris Agreement was "*clearly part of Government policy*" by the time of the Secretary of State decided to designate the ANPS. This was evident by the UK's ratification of the Paris Agreement in November 2016 and a number of statements by relevant Ministers re-iterating Government policy of adherence to the Paris Agreement. The Secretary of State's failure to take into account the Paris Agreement, a fact commonly accepted by the parties, was therefore fatal to the decision to designate the ANPS.

Separately, the Court of Appeal also upheld submissions alleging a further error of law because the Secretary of State never asked himself whether he could take into account the Paris Agreement pursuant to his obligation at section 10 of the Planning Act 2008. Section 10 requires that, in exercising his functions in section 5 and 6, the Secretary of State "*must (in particular) have regard to desirability of mitigating, and adapting to, climate change.*" It was submitted that had he asked himself this question, the only reasonable answer open to him was that the Paris Agreement was so obviously material to the decision he had to make that it was irrational not to take it into account. The Court of Appeal accepted these submissions stating that "*It is well established in public law that there are some considerations that must be taken into account, some considerations that must not be taken into account and a third category, considerations that may be taken into account in the discretion of the decision-maker*". Previous case law had recognised that there can be some unincorporated international obligations that are "so obviously material" that they must be taken into account and the Court of Appeal held that the Paris Agreement fell into this category. As such, "*the only reasonable view open to [the Secretary of State] was that the Paris Agreement was so obviously material that it had to be taken into account*".

In light of this failure by the Secretary of State to take into account the Paris Agreement, the Court of Appeal declared the designation decision unlawful and the ANPS of no further legal effect unless and until the Secretary of State undertakes a review of it. Interestingly, the Court of Appeal stopped short of quashing the ANPS or issuing a mandatory order requiring the Secretary of State to review it. Instead it deferred to the general discretion of the Secretary of State under section 6(1) of the Planning Act 2008 pursuant to which the Secretary of State must undertake a review of the ANPS "*whenever [he] thinks it appropriate to do so*".

The Government has confirmed that it will not seek permission to appeal the decision to the Supreme Court, although we understand that Heathrow Airport Limited has sought permission to appeal as an interested party. Subject to the outcome of this application, whether and if so, how the Secretary of State takes up the Court of Appeal's invitation to review the ANPS, however, remains to be seen.

Broader implications of the Court of Appeal decision

This decision is particularly interesting because of its potentially wide-reaching implications beyond just the ANPS for other national policy statements and possibly decisions on major infrastructure projects more generally.

Other NPSs may be at risk of challenge under section 5(8) of the Planning Act 2008 if it can be demonstrated that, when deciding to designate the NPS, the Secretary of State failed to take into account the Paris Agreement. In this respect, there are currently 11 designated NPSs apart from the ANPS, but judicial review can no longer be brought against them given the six-week time limit for challenge. There remains, however, the requirement at section 6 of the Planning Act 2008 that the Secretary of State must review existing NPSs when he "*thinks it appropriate to do so*" taking into account the matters in section 6(3), one of which is whether there has been a "significant change in circumstances" on the basis of which any of the policy was decided. Whether the Court of Appeal's express recognition that the Paris Agreement forms part of the Government's policy on climate change amounts to a "significant change in circumstance" will be a matter for the Secretary of State to consider.

Of more relevance, however, will be the influence this decision has on future NPSs. We expect that the Government will take particular care in preparing and designating all future NPSs, to include a clear statement as to how the policies in that NPS have taken account of the Government's policy on climate change including, and in particular, the Paris Agreement. Notably, the draft NPS for Water Resources Infrastructure is due for designation shortly while preparation of the seventh energy related NPS is ongoing. We can expect to see shadows of this Court of Appeal decision in those designation decisions.

As for the impact this Court of Appeal decision will have on future decisions on major infrastructure projects, this is difficult to predict. As we saw play out between the conflicting Planning Inspector's recommendation report and the Secretary of State's decision on the Drax Re-Power Development Consent Order (DCO) application, decision-makers are already struggling with how specific projects can and should be assessed from a climate change perspective, against what are high-level and far reaching objectives of the UK's national and international climate change commitments. If nothing else, however, the Court of Appeal decision adds even further impetus to the importance of climate change matters being present in all decision-makers' minds given the current political and social climate. Diligent decision-makers will also be mindful to ensure that their decisions pay due regard to both the UK's domestic and international climate change commitments. As the Drax Re-Power DCO decision heads to the High Court for judicial review, it will be particularly interesting to see how the High Court's decision is informed by this Court of Appeal judgment.

Expansion at Heathrow down but not out

Finally, it is difficult to comment on the implications of the Court of Appeal decision without also addressing the implications for expansion at Heathrow Airport. Despite what much of the mainstream media is reporting, the decision is not fatal to expansion at Heathrow Airport. In fact, the Court of Appeal quite rightly recognises that it has not, and could not decide, that there will be no third runway at Heathrow Airport. This particular matter remains the Government's responsibility.

The decision will, nevertheless, be cause for pause for Heathrow Airport Limited. In the absence (or in advance) of any formal review of the ANPS by the Secretary of State, Heathrow Airport Limited is facing the prospect of making an application for a DCO under section 105 of the Planning Act 2008 (Decisions in cases where no NPS has effect) instead of section 104 (Decisions in cases where a NPS has effect). An application under section

105 is inevitably more difficult because, without clear Government policy prescribed in an ANPS, the Secretary of State's discretion within which to decide an application is far broader, meaning the risks of pursuing such a project are that much greater. This is particularly true where, as is the case of expansion at Heathrow Airport, it is unclear on which side of the fence the political will falls.

In light of this, it is unsurprising that we understand Heathrow Airport Limited has sought permission to appeal the decision to the Supreme Court. Heathrow Airport Limited will be seeking to overturn the Court of Appeal decision such that the ANPS remains valid and its DCO application can proceed under section 104 of the Planning Act 2008. Nevertheless, we can expect to see an easing-off of Heathrow Airport Limited's expansion plans in the short-term pending the outcome of this application for permission to appeal and subject to any further response by the Government to the Court of Appeal's decision.

Conjoined case reference

R (On The Application Of Plan B Earth) (Claimant) V Secretary Of State For Transport (Defendant) & (1) Heathrow Airport Ltd (2) Arora Holdings Ltd (Interested Parties) & WWF-UK (Intervener)

R (On The Application Of Friends Of The Earth Ltd) (Claimant) V Secretary Of State For Transport (Defendant) & (1) Heathrow Airport Ltd (2) Arora Holdings Ltd (Interested Parties) & WWF- UK (Intervener)

R (On The Application Of Hillingdon London Borough Council & 6 Ors) (Appellants) V Secretary Of State For Transport (Respondent) & (1) Heathrow Airport Ltd

Case Nos: C1/2019/1053, C1/2019/1056 and C1/2019/1145. Neutral Citation Number: [2020] EWCA Civ 214

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