16 December 2020

PRESS SUMMARY

R (on the application of Friends of the Earth Ltd and others) (Respondents) v Heathrow Airport Ltd (Appellant)
[2020] UKSC 52
On appeal from: [2020] EWCA Civ 214

JUSTICES: Lord Reed (President), Lord Hodge (Deputy President), Lady Black, Lord Sales, Lord Leggatt

BACKGROUND TO THE APPEAL

This appeal concerns the lawfulness of the Airports National Policy Statement (the "**ANPS**") and its accompanying environmental report. The ANPS is the national policy framework which governs the construction of a third runway at Heathrow Airport. Any future application for development consent to build this runway will be considered against the policy framework in the ANPS. The ANPS does not grant development consent in its own right.

Successive governments have considered whether there is a need for increased airport capacity in the South East of England. The Secretary of State for Transport (the "**Secretary of State**") declared that the Government accepted the case for airport expansion in 2015. He announced that the North West Runway ("**NWR**") scheme was the preferred scheme in October 2016.

The UK was separately developing its policy on environmental issues and climate change. On 22 April 2016 the UK signed the Paris Agreement under the United Nations Framework Convention on Climate Change (the "**Paris Agreement**"). The UK ratified the agreement on 17 November 2016. The agreement sets out various targets for the reduction of greenhouse gas emissions, particularly carbon dioxide, and the reduction of temperature increases resulting from global warming (the "**Paris Agreement Targets**"). Two Government ministers – Andrea Leadsom MP and Amber Rudd MP – made statements about the Government's approach to the Paris Agreement in March 2016.

Against this background, the Secretary of State designated the ANPS as national policy on 26 June 2018. Objectors to the NWR scheme, including Friends of the Earth Ltd ("**FoE**") and Plan B Earth, challenged the lawfulness of the Secretary of State's designation on a number of grounds. The Divisional Court dismissed all of the objectors' various claims in two separate judgments. The Court of Appeal upheld the main parts of these judgments on appeal but allowed some of FoE and Plan B Earth's grounds. It held the Secretary of State had acted unlawfully in failing to take the Paris Agreement into account when designating the ANPS. Accordingly, the ANPS was of no legal effect.

The Secretary of State does not appeal the Court of Appeal's decision. However, the company which owns Heathrow Airport, Heathrow Airport Ltd ("**HAL**"), is a party to the proceedings and has been granted permission to appeal to the Supreme Court. HAL has stated that it has already invested a large sum of money in promoting the NWR scheme and wishes to make an application for development consent to carry the project through.

JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Hodge and Lord Sales give the main judgment (with which Lord Reed, Lady Black and Lord Leggatt agree).

REASONS FOR THE JUDGMENT

Government policy

The Secretary of State designated the ANPS under section 5(1) of the Planning Act 2008 (the "**PA 2008**") **[12]**. Section 5(7) of the PA 2008 provides that national policy frameworks such as the ANPS must give reasons for the policy adopted. Section 5(8) states that these reasons must include an explanation of how that policy takes account of existing "*Government policy*" relating to the mitigation of and adaptation to climate change **[25]**.

The Court rejects Plan B Earth's argument that the reasons in the ANPS needed to refer to the Paris Agreement Targets in order to comply with section 5(8). The March 2016 statements of Andrea Leadsom MP and Amber Rudd MP and the formal ratification of the Paris Agreement do not mean that the Government's commitment to the Paris Agreement constitutes "*Government policy*" in the sense in which that term is used in the statute **[102]**.

The meaning of "*Government policy*" is a matter of interpretation of the statutory provision **[101]**. The phrase needs to be construed relatively narrowly in context to allow section 5(8) to operate sensibly. Otherwise it would create a "*bear trap*" for civil servants and ministers, who would have to consider all ministerial statements given in any context which might be characterised as "*policy*" in a broad sense **[105]**. The Court explains that "*Government policy*" in the context of section 5(8) refers to carefully formulated written statements of policy which have been cleared by the relevant departments on a Government-wide basis **[105]**. The epitome of "*Government policy*" is a formal written statement of established policy. The absolute minimum standard is a statement which is clear, unambiguous, and devoid of relevant qualification **[106]**.

The Court does not consider that the statements of Andrea Leadsom MP and Amber Rudd MP meet this minimum standard. They were not clear, did not refer to the Paris Temperature Targets at all, and did not explain how the Paris Agreement goal of net zero emissions would be incorporated into UK law **[106]**.

The lower courts were asked to consider whether international treaties which have been formally ratified but have not been incorporated into domestic law – such as the Paris Agreement – are *"Government policy*". FoE and Plan B Earth did not maintain that argument in the Supreme Court. As the Court explains, international treaties are binding only as a matter of international law and do not have an effect in domestic law. Treaty commitments continue whether or not a particular Government remains in office and do not constitute a statement of *"Government policy"* for the purposes of domestic law **[108]**.

Section 1 of the Climate Change Act 2008 (the "**CCA 2008**") sets a national carbon target. Section 4 obliges the Government to establish carbon budgets for the UK **[6]**. These are already more demanding than the limits which the UK is currently obliged to have in place under the Paris Agreement **[71]**. The Court holds that, at the point the ANPS was designated in June 2018, there was no established "*Government policy*" on climate change beyond that already reflected in the CCA 2008 **[111]**.

Sustainable development

Section 10(2) and (3) of the PA 2008 requires the Secretary of State to designate national policy frameworks with the aim of contributing to the achievement of sustainable development. He has to take into account the environmental, economic and social objectives that make up sustainable development. He must, in particular, have regard to the desirability of mitigating and adapting to climate change **[26],[115]**.

The Court dismisses FoE's argument that the Secretary of State breached this duty on the ground that he failed to have proper regard to the Paris Agreement when designating the ANPS. The evidence shows that the Secretary of State took the Paris Agreement into account and, to the extent that its obligations were already covered by the measures in the CCA 2008, ensured that these were incorporated into the ANPS framework **[123]-[125]**. Insofar as the Paris Agreement might in future require steps going beyond the current measures in the CCA 2008, the Secretary of State took it into account but decided that it was not necessary to give it further weight in the ANPS **[126],[129]**. The weight to be given to a particular consideration is a matter which falls within the discretion of the decision-maker, in this case the Secretary of State. His exercise of discretion is lawful unless the decision made is so unreasonable that no reasonable

decision-maker would have made it **[121]**. That could not be said to be the case here **[128]**. The ANPS was carefully structured to ensure that when HAL applied for development consent to construct the runway, it would have to show at that stage that the development would be compatible with the up-to-date requirements under the Paris Agreement and the CCA 2008 measures as revised to take account of those requirements **[87]-[89], [123]-[124].**

Post-2050 and non-CO_2 emissions

The Court dismisses FoE's argument that the Secretary of State separately breached his section 10 duty by failing to have regard to, firstly, the effect of greenhouse gas emissions created by the NWR scheme after 2050 and, secondly, the effect of non-CO_2 emissions **[151],[156],[166]**. The UK's policy in respect of the Paris Agreement's global goals, including the post-2050 goal for greenhouse gas emissions to reach net zero, was in the course of development in June 2018 **[154]**. The Secretary of State did not act irrationally in deciding not to assess post-2050 emissions by reference to future policies which had yet to be formulated **[155]**. The Secretary of State's department was also still considering how to address the effect of non-CO_2 emissions in June 2018 **[166]**. The Court further holds that future applications for development consent regarding the NWR scheme will be assessed against the emissions targets and environmental policies in force at that later date rather than those set out in the ANPS **[157], [166]**.

Environmental report

Section 5(3) of the PA 2008 requires the Secretary of State to produce an appraisal of sustainability in respect of frameworks such as the ANPS **[28]**. This is also required by EU law. Council Directive 2001/42/EC of 27 June 2001 (the "**SEA Directive**") as transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633), requires the Secretary of State to produce an environmental report in respect of major plans and proposals such as the ANPS **[28]**. The report must include information about relevant environmental protection objectives established at the international, EU or domestic level and the way that they have been taken into account during the preparation of the plan as may reasonably be required (Article 5 and Annex I to the SEA Directive) **[57],[58]**. The appraisal of sustainability accompanying the ANPS was intended to meet both the domestic and EU requirements for an appraisal of sustainability and environmental report respectively.

The Court dismisses the respondents' complaint that the appraisal of sustainability accompanying the ANPS was defective because it did not refer to the Paris Agreement **[139]**. Emphasising that the purpose of these reports is to provide the basis for informed public consultation **[137]**, it holds that an unduly legalistic approach should not be taken when assessing their adequacy **[143]**. Whether a report provides a sound and sufficient basis for public consultation is a matter that falls within the Secretary of State's discretion and the exercise of this discretion will only be found unlawful if it is one that no reasonable decision-maker would have made **[144]**. Were this discretion removed, public authorities might adopt an excessively defensive and counterproductive approach by including so much detail that the public would be unable to comment effectively, contrary to the object of the SEA Directive **[146]**. In this instance, the targets set out in the CCA 2008, which were referred to in the appraisal of sustainability, took the UK's obligations under the Paris Agreement sufficiently into account **[149]**. The Court therefore upholds this ground of appeal as well **[150]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html