

Plan B Earth v Secretary of State for Transport: Airport Expansion, the Paris Agreement and the Planning Act 2008

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Abstract: This case analysis considers the Court of Appeal's decision in *R (Plan B Earth and ors) v Secretary of State for Transport* [2020] EWCA Civ 214, which followed the High Court challenge to the Secretary of State's designation of the UK Airports National Policy Statement. The Court of Appeal found that the Secretary of State's failure to take into account the UK's commitment to the Paris Agreement when carrying out his duties under the Planning Act 2008 was unlawful. Whilst permission to appeal this decision has been granted, it remains a notable judgment. The *Plan B Earth* case confirms the interaction between the UK's climate change commitments and the statutory framework of the UK's planning system. It also highlights the complexity of the Court's institutional role in the context of environmental problems. Analysing the implications of this decision through a policymaking lens risks overlooking the role of public law principles that shaped the Court's reasoning, defining the relationship between the Paris Agreement and the Planning Act.

Key words: climate change, adjudication, UK planning policy, Paris Agreement, judicial review, administrative law.

1. Introduction

The addition of a third runway at Heathrow Airport has been controversial for decades. As the busiest two-runway airport in the world, it ordinarily operates at full capacity.¹ Its expansion has been described as 'critical to this country's long-term economic prosperity',² reflecting the magnitude of its national symbolism in the UK. The airport is situated 23km west of Central London. A third runway at Heathrow would facilitate up to 113,000 additional flight movements per day, and involve diverting rivers, moving roads, demolishing homes, and the release of millions of tonnes of additional carbon dioxide emissions.³ The proposed expansion presents a political, economic, and environmental minefield.

The recent judgment of the Court of Appeal in *R (Plan B Earth and ors) v Secretary of State for Transport*⁴ (*Plan B Earth*) is an important case that confirms the interaction between the UK's climate change commitments and the statutory provisions of the UK Planning Act 2008. The implications of the Court's findings for the Secretary of State's obligations when designating a national policy statement for airports are twofold. First, the judgment identifies the UK's commitment to the Paris Agreement⁵ as part of UK Government policy, which must be taken into account by the Secretary of State in this planning context. Second, it determines that the Paris

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¹ The Court of Appeal handed down its judgment on this case on 27th February 2020. In the weeks that followed, the Covid-19 epidemic triggered strict travel bans across the world, resulting in significant reductions in air transport. The facts and figures relied upon in the judgment and this case note, particularly in relation to aviation, were correct at the time of the judgment.

² HC Deb 15 January 2009, vol 486, col 356.

³ Department for Transport, *Airports National Policy Statement* (2018) paras 3.20, 5.172-5.177, 3.35 – 3.43; Department for Transport, *Appraisal of Sustainability: Revised Draft Airports National Policy Statement* (2017) para 6.3.1.

⁴ [2020] EWCA Civ 214.

⁵ United Nations, FCCC/CP/2015/L.9/Rev.1 (12 December 2015) < <https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> > accessed 7 June 2020.

Agreement was a material consideration for the Secretary of State to take into account when carrying out his duties prior to the designation of the Airports National Policy Statement (ANPS). On both counts, the Secretary of State's decision not to consider the Paris Agreement within the scope of his obligations under the Planning Act 2008 was held to be unlawful. This does not generally bind the UK Government to the unincorporated obligations of the Paris Agreement. However, it has delayed the expansion of Heathrow until the Government reviews the ANPS in accordance with the Planning Act 2008.

Plan B Earth was hailed 'a ground-breaking result' for climate justice.⁶ Campaigners declared that the expansion 'had been stopped in its tracks'⁷ and commentators described 'the legally binding' character of the Paris Agreement that had the potential for 'global effects'.⁸ This is characteristic of a narrative in both scholarship and legal practice that frames litigation and courts as instrumental tools for strengthening 'global climate governance',⁹ and achieving climate change policy goals.¹⁰

Whilst the policy implications of this decision appear striking, it is important to reflect on the legal questions raised in this case. The key issues concerning climate change required statutory interpretation of sections 5(8) and 10(3) of the Planning Act, and their interaction with domestic and international climate change commitments. As well as engaging in a close exercise of statutory interpretation, the Court emphasised its appropriate institutional role, reflecting the complex interaction between courts and the executive in reviewing high-level policy. This is particularly important in the context of the Paris Agreement, an unincorporated treaty. Public law principles such as the separation of powers, alongside relevant legislative provisions, ultimately shape the way that the Paris Agreement is legally mainstreamed into the UK government's planning decision-making. It is important not to overlook these features in our understanding of adjudication in 'climate change cases', as they are fundamental to the nature of the court's role in climate change governance.

An overview of the legal and factual background is outlined in Section 2. Sections 3 and 4 analyse the decision and its implications. Section 5 considers the recent appeal to the Supreme Court.

2. Legal and Factual Background

2.1. Chronology

⁶ Friends of the Earth, 'Friends of the Earth wins campaign to protect the climate from Heathrow Third Runway' (27 February 2020) < <https://friendsoftheearth.uk/climate-change/friends-earth-wins-campaign-protect-climate-heathrow-third-runway> > accessed 14 May 2020.

⁷ Friends of the Earth, 'Heathrow third runway: UK government actions ruled "illegal"' (27 February 2020) < <https://friendsoftheearth.uk/climate-change/heathrow-third-runway-uk-government-actions-ruled-illegal> > accessed 14 May 2020.

⁸ Tanya Powley, Jim Pickard and Kate Beioley, 'Government will not appeal as court blocks third runway at Heathrow' *Financial Times* (27 February 2020) < <https://www.ft.com/content/b0f89152-594b-11ea-a528-dd0f971febbc> > accessed 14 May 2020.

⁹ Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' [2019] *American Journal of International Law* 1.

¹⁰ See eg Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38 *Oxford Journal of Legal Studies* 841; Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 *Journal of Environmental Law* 483; Joana Setzer and Lisa Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' [2019] *Transnational Environmental Law* 1.

The factual background demonstrates a major tension that has developed between climate change policy and planning policy, both of which are core elements of the UK's high-level policy priorities. This chronology demonstrates how they have evolved in conflict, rather than in tandem, with one another. This tension is at the heart of the *Plan B Earth* case.

The Government has built its case for Heathrow expansion for almost two decades. The 2003 White Paper on *The Future of Air Transport* identified an 'urgent need for additional runway capacity in the South East' and a 'strong case for...the addition of a third runway at Heathrow'.¹¹ In the years that followed, the legislative and policy landscape relevant to airport expansion and climate change underwent considerable development.

First, the Planning Act 2008 established the new procedure for the development of 'nationally significant infrastructure projects', replacing the previous scheme under the Town and Country Planning Act 1990. This enshrined in statute the Secretary of State's obligation to produce a 'national policy statement' (NPS) that would provide the policy framework for development consent projects such as airport expansion. On the same day, the Climate Change Act 2008 was passed. This established the Committee on Climate Change (CCC), an independent public body to advise the Government on matters related to statutory carbon reduction targets, as well as the treatment of greenhouse gas emissions from aviation.

Following a 2009 consultation on 'Adding Capacity at Heathrow Airport',¹² the Secretary of State made a statement confirming the Government's commitment to the expansion of Heathrow Airport, drawing specific attention to the need to maintain its function as an 'aviation hub' in Europe.¹³ This same statement announced a target to bring aviation emissions in 2050 below 2005 levels.¹⁴ In *R (London Borough of Hillingdon and ors) v Secretary of State for Transport*,¹⁵ the claimants unsuccessfully challenged the legality of this statement due to the exclusion of climate change concerns from the consultation. In his judgment for the Court, Carnwath LJ determined that developments in climate change policy were 'clearly' matters for the Secretary of State to consider in designating the ANPS, which was yet to happen.¹⁶

Following the establishment of the Airports Commission in 2012, the Aviation Policy Framework was developed to set government climate change policy on aviation.¹⁷ In 2015, the Airports Commission Final Report identified Heathrow as the 'best answer'¹⁸ to meet the need for additional runway capacity. The Paris Agreement was concluded in December 2015, setting a long-term temperature goal to keep the increase in global average temperature to well below 2°C above pre-industrial levels. In October 2016, the Secretary of State announced the Government's preference for a third runway at Heathrow. It was emphasised that this scheme would deliver the 'hub capacity that the UK needs'.¹⁹ In the same month, the CCC published 'UK climate action following the Paris

¹¹ Department for Transport, *The Future of Air Transport* (White Paper, CM 6046, 2003) pp 13, 120.

¹² Department for Transport, *Adding Capacity At Heathrow Airport* (2009).

¹³ HC Deb 15 January 2009, vol 486, col 356.

¹⁴ *ibid* col 360.

¹⁵ [2010] EWHC 626 (Admin).

¹⁶ *ibid* [77].

¹⁷ Department for Transport, *Aviation Policy Framework* (2013).

¹⁸ Airports Commission, *Airports Commission: Final Report* (2015), 4.

¹⁹ HC Deb 25 October 2016, vol 616, col 356.

Agreement'. The document considered the implications of the Paris Agreement for the carbon targets of the UK, concluding that there was no need for 'new UK emissions targets now'.²⁰

The Paris Agreement was ratified in November 2016. Ministerial statements in the lead up to its ratification indicated there was a 'need to take the step of enshrining the Paris goal...in UK law'.²¹ The Government's 2017 *Clean Growth Strategy* stated that the Paris commitments meant that the shift to clean growth 'will be at the forefront of policy and economic decisions made by governments'.²²

On 26th June 2018, the Secretary of State designated the ANPS, identifying the Heathrow third runway as the Government's preferred scheme for expanding airport capacity in South East England.²³ The Secretary of State did not consider the Paris Agreement when designating the policy. Five judicial review challenges of this designation were filed with the Divisional Court.²⁴ The length of the Divisional Court's 'tour de force'²⁵ judgment is a painstaking appraisal of arguments that were advanced across all claims on: the appropriate standard of review; air quality; surface area; habitats; strategic environmental assessment; human rights; and climate change. This was a complex decision; it considered the interaction between knotty statutory frameworks, the development of high-level strategic policy, and the appropriate standard of review of these policies by the judiciary. All claims were dismissed.

Three appeals were made to the Court of Appeal, involving nine claimants: five London Boroughs, the Mayor of London and Greenpeace (the 'Hillingdon' claimants); Friends of the Earth, an environmental NGO; and Plan B Earth, an environmental campaigning organisation. WWF-UK was granted permission to intervene. The defendant was the Secretary of State for Transport, with Heathrow Airport Ltd and Arora Holdings Ltd as interested parties.

The main issues before the Court were grouped into four categories and concerned: the operation of the Habitats Directive;²⁶ the requirements of the SEA Directive;²⁷ the UK's climate change commitments; and relief. The arguments on climate change advanced by Plan B and Friends of the Earth were successful, which prevents the ANPS from having legal effect until it is reviewed in accordance with Section 6 of the Planning Act. In May 2020, the Supreme Court granted the interested parties, Heathrow Airport Ltd and Arora Holdings Ltd, permission to appeal the findings on climate change and relief.²⁸ The UK Government did not seek to appeal the decision.

²⁰ Committee on Climate Change, 'UK climate action following the Paris Agreement' (Committee on Climate Change, October 2016), 7 <<https://www.theccc.org.uk/publication/uk-action-following-paris/>> accessed 12 May 2020.

²¹ HC Deb 14 March 2016, vol 607, col 725.

²² Department for Business, Energy and Industrial Strategy, *The Clean Growth Strategy: Leading the way to a low carbon future* (2017), 8.

²³ *Airports National Policy Statement* (n 3).

²⁴ *R (Spurrier and ors) v Secretary of State for Transport* [2019] EWHC 1070 (Admin).

²⁵ *Plan B Earth* (n 4) [7].

²⁶ EC Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7.

²⁷ Directive 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment [2002] OJ L 197/30.

²⁸ Supreme Court, 'Permission to Appeal decisions' (7 May 2020) <<https://www.supremecourt.uk/news/permission-to-appeal-decisions-07-may-2020.html>> accessed 13 May 2020.

This case analysis focuses on the climate change issues considered by the Court of Appeal in its decision handed down on 27th February 2020.

2.2. The Planning Act 2008

The majority of the climate change issues examined in *Plan B Earth* concerned the Court's interpretation of the Planning Act. The Act establishes the legal architecture for planning nationally significant infrastructure projects, including airport-related development. Part 2 provides for NPSs, which form the policy framework within which an application for development consent is to be decided. The Secretary of State must 'have regard' to the NPS when determining an application.²⁹

Section 5 gives the Secretary of State power to designate an NPS and governs its content. In particular, sections 5(7) and 5(8) provide:

(7) An NPS must give reasons for the policy set out in the statement.

(8) The reasons 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.

Furthermore, Section 10 provides:

(1) This section applies to the Secretary of State's functions under sections 5 and 6.

(2) The Secretary of State must, in exercising those functions, do so with the objective of contributing to the achievement of sustainable development.

(3) For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of—

(a) mitigating, and adapting to, climate change [...]

The Planning Act includes additional provisions for the process for designating an NPS, including public consultation,³⁰ laying the NPS before Parliament,³¹ and an appraisal of sustainability.³²

Section 13(1) of the Act provides that 'a court may entertain proceedings for questioning a national policy statement or anything done, or omitted to be done, by the Secretary of State in the course of preparing a [national policy statement]'.³³

3. The Court of Appeal Decision

The Court of Appeal's judgment was a succinct yet highly complex assessment of sixteen different legal issues. All of the grounds challenged the Secretary of State's approach to designating the ANPS. The focus of the Hillingdon claimants was on the issues relating to the Habitats and SEA Directives, particularly in relation to the process of selecting Heathrow as the preferred option to Gatwick. In reasoning these issues, the Court placed significant focus on the appropriate standard of review. This

²⁹ The Planning Act 2008 s 104.

³⁰ *ibid* s 7.

³¹ *ibid* ss 5(4), (9).

³² *ibid* s 5(3)

³³ *ibid* s 13(1).

is briefly outlined below, highlighting the complexity of the task that the Court faced in adjudicating this dispute.

Plan B Earth and Friends of the Earth challenged the designation on climate change grounds. This is the focus of this analysis, as the Court of Appeal's reasoning on these issues departed from the Divisional Court, and prevents the current ANPS from having any legal effect until it is reviewed. These issues entailed an exercise in statutory interpretation of sections 5(8) and 10(3) of the Planning Act 2008. The decision has important implications for the operation of the statutory planning framework in relation to climate change considerations, and is a significant development in environmental law jurisprudence. This is discussed further in Section 4 below.

3.1. The Habitats Directive

Article 6(3) of the Habitats Directive requires the Secretary of State to undertake an Appropriate Assessment under the Habitats Regulations³⁴ prior to the designation of an NPS, to show that the policy would not 'adversely affect the integrity of the site concerned'.³⁵ This is because the potential for Heathrow expansion to negatively affect 'special areas of conservation' (SACs) could not be ruled out.³⁶

The key question for the Court was whether the selection of the Heathrow third runway as the preferred scheme was consistent with Article 6(4) of the Habitats Directive. This provides: 'if, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest'. The Hillingdon claimants were particularly concerned about the Secretary of State's dismissal of Gatwick Airport as an 'alternative solution'.

The majority of the legal analysis focused on the appropriate standard of review. The Divisional Court had recognised the 'great public importance' of the claimants' arguments but ultimately accepted that the ANPS was carried out at a 'high, strategic level and involves political judgment as to what is in the overall public interest'.³⁷ This was accepted by the Court of Appeal and the appropriate standard of review to be applied was *Wednesbury* irrationality.

The Hillingdon claimants' central challenge concerned the Secretary of State's selection and use of the 'hub objective' (outlined in sub-section 2.1 above) as a criterion by which to measure 'alternative solutions' in formulating the ANPS. Gatwick expansion was disregarded due to its inability to achieve the necessary 'hub status' to meet the essential aim of the ANPS.³⁸ The claimants alleged that this had the effect of deliberately narrowing the options available for the preferred scheme.³⁹ The Court of Appeal found that the 'hub objective' was a 'genuine and critical' objective of the ANPS.⁴⁰ The Court agreed with the first instance decision that 'it would certainly be insufficient for a policy-maker to exclude an option because the preferred option would meet the policy objective to a greater extent. However, this differs significantly to an option not meeting a core policy objective at all' (as in the case of Gatwick).⁴¹

³⁴ Conservation of Habitats and Species Regulations 2017, SI 2010/490, reg 63.

³⁵ Directive 92/43/EEC (n 26), art 6(3).

³⁶ *Plan B Earth* (n 4) [94].

³⁷ *Spurrier* (n 24) [152].

³⁸ *Airports National Policy Statement* (n 3) paras 3.19, 3.73, 3.74.

³⁹ *Plan B Earth* (n 4) [92].

⁴⁰ *ibid* [93].

⁴¹ *ibid* [92].

The remainder of the grounds concerning the Habitats Directive were also dismissed. This included the challenge to the decision to exclude the Gatwick second runway scheme because of its potential harm to the Mole Gap to Reigate Escarpment SAC,⁴² the Divisional Court's distinction between 'alternative solutions' under the Habitats Directive and 'reasonable alternatives' under the SEA Directive,⁴³ and the request to refer the issue to the Court of Justice of the European Union.⁴⁴

3.2. The SEA Directive

The SEA Directive requires environmental assessments of plans and programmes, including high-level policy such as the ANPS. It is undertaken at an early stage in the decision-making process and provides the overarching framework for considering the environmental implications of the plan. The Government conducted an Appraisal of Sustainability (AoS) to fulfil its obligations under the Directive.

The Court of Appeal dismissed all but the climate change issues concerning the SEA Directive; this is discussed further in subsection 3.3 below. The Hillingdon claimants' submissions were largely concerned with the adequacy and quality of the AoS against the criteria for an 'environmental report' under Article 5 of the SEA Directive.⁴⁵

A major part of the Court's analysis on this issue once again focused on the appropriate 'depth and rigour of the court's enquiry'.⁴⁶ Referring to the CJEU decision in *Inter-Environnement Bruxelles ASBL v Region de Bruxelles-Capitale*⁴⁷ and observations of AG Kokott in *Holohan and others v An Bord Pleanála*,⁴⁸ the claimants argued for a broad and purposive interpretation of the SEA Directive, and that the intensity of review ought to be more demanding than the standard of Wednesbury irrationality.⁴⁹ The Court of Appeal rejected this, finding that the court's standard of review must reflect the 'breadth and depth' of discretion afforded to the Secretary of State in deciding what information 'may reasonably be required'.⁵⁰

The Court adopted the approach in *Blewett*,⁵¹ which considered the adequacy of an environmental impact assessment (EIA) under the EIA Directive.⁵² It was held that, although more information could have been provided in the AoS for the ANPS, this did not render it legally inadequate as an environmental report.⁵³ It was *not* the court's task to adjudicate on the content of an environmental statement, unless there was a patent defect in the assessment.⁵⁴ The Court reaffirmed that the principle in *Blewett* applied, despite its development in the context of the EIA Directive.⁵⁵

⁴² *ibid* [94]-[106].

⁴³ *ibid* [107]-[119].

⁴⁴ *ibid* [120]-[124].

⁴⁵ *ibid* [125].

⁴⁶ *ibid* [135].

⁴⁷ Case C-567/10 *Inter-Environnement Bruxelles ASBL v Region de Bruxelles-Capitale* [2012] 2 CMLR 30.

⁴⁸ Case C-461/17 *Holohan and others v An Bord Pleanála* [2019] AELR 16, Opinion of AG Kokott, para 90.

⁴⁹ *Plan B Earth* (n 4) [131]-[133].

⁵⁰ *ibid* [136].

⁵¹ In *R (on the application of Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin), it was held that the matter 'is simply a practical application of conventional ["Wednesbury"] principles of judicial review'.⁵¹

⁵² Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance [2011] OJ L 26/1 ('EIA Directive').

⁵³ *Plan B Earth* (n 4) [140].

⁵⁴ *ibid* [137].

⁵⁵ *ibid* [127].

In light of the Court of Appeal's adoption of the Divisional Court's approach to the standard of review, two further matters were dismissed. First, it was within the Secretary of State's discretionary powers to assess the cumulative, rather than individual, effects of the planned Heathrow expansion on local plans and programmes.⁵⁶ The second matter concerned the challenges to the scientific and technical evidence relied upon by the Secretary of State in relation to noise impact assessments. It was held that 'a classic exercise in planning judgment' allows the decision-maker a 'substantial margin of appreciation',⁵⁷ and the court's reviewing role 'does not stretch to determining disputed issues of technical, expert evidence'.⁵⁸ The Court also agreed with the defendants that a more detailed assessment under the regime for EIA at the development consent order stage would enable representations about the likely effects on the environment.⁵⁹

3.3. Climate Change

The climate change grounds advanced by Plan B Earth and Friends of the Earth were successful. The Court of Appeal held that the decision to designate the ANPS was unlawful, which prevents the policy from having legal effect in its current form.

To the extent that this judgment is a 'climate change case', the legal issues mainly concerned the temperature goals enshrined in the Paris Agreement, which requires governments pursue efforts to limit global temperature rise to 1.5°C above pre-industrial levels. The Court considered its interaction with sections 5(8) and 10(3) of the Planning Act.

3.3.1. Section 5(8)

Plan B Earth submitted that the Secretary of State failed to undertake his duty under section 5(8) of the Planning Act due to his decision not to take into account the Paris Agreement. The 'true issue' for the Court was whether the Government's commitment to the Paris Agreement constituted 'Government policy', which the Secretary of State was required to take into account under section 5(8).⁶⁰

The Divisional Court emphasised the 'entrenched' character of the UK's climate change policy produced under the Climate Change Act 2008, concluding that this legislatively mandated policy was the only relevant policy that the Secretary of State was required to take into account.⁶¹

The Court of Appeal did not agree. They highlighted that the words 'Government policy' do 'not have any specific technical meaning' and 'should be applied in their ordinary sense to the facts of a given situation'.⁶² They therefore found no warrant in the legislation for limiting the phrase to the carbon reductions set under the Climate Change Act 2008.⁶³ Furthermore, they considered that the Paris Agreement was clearly part of 'Government policy' by the time of the designation of the ANPS, both from its ratification of the Agreement in 2016 and the subsequent ministerial statements re-iterating their commitments to its goals.⁶⁴

⁵⁶ *ibid* [145]-[162].

⁵⁷ *Plan B Earth* (n 4) [177].

⁵⁸ *ibid* [180].

⁵⁹ *ibid* [161]-[162].

⁶⁰ *ibid* [222].

⁶¹ *ibid* [608], [615].

⁶² *Plan B Earth* (n 4) [224].

⁶³ *ibid*.

⁶⁴ *ibid* [228].

In departing from the reasoning of the Divisional Court, the Court of Appeal emphasised that the duty in section 5(8) is to explain how the policy has been taken into account. It does not require the executive to conform to its own policy commitments. According to the Court, their interpretation of the statute was ‘an entirely conventional exercise in public law’,⁶⁵ as it simply required the Secretary of State to comply with what had been enacted by Parliament in section 5(8) of the Planning Act 2008. Regardless of the Paris Agreement’s effect on the designation of the ANPS, the duty was to consider the UK’s commitment to it as part of ‘Government policy’ – which the Secretary of State had failed to do.⁶⁶

3.3.2. Section 10(3)

Friends of the Earth claimed that the designation of the ANPS was unlawful due to the Secretary of State’s failure to consider whether to take into account the Paris Agreement pursuant to his obligations under section 10(3) of the Planning Act 2008. The Court of Appeal accepted this submission, finding that the Paris Agreement was ‘so obviously material’ to the designation of the ANPS that it would have been irrational *not* to take it into account.⁶⁷ This differs from the section 5(8) issue, in that the Court did not need to consider whether the Paris Agreement constituted ‘Government policy’.

The Divisional Court had dismissed the claim. They acknowledged that the Secretary of State was not required ‘to ignore international commitments’ or that the consideration of the international obligations was not restricted to the requirements of section 104(4) of the Planning Act 2008.⁶⁸ However, it was held that ‘a decision-maker has discretion as to whether to take into account a particular consideration’, and that the Secretary of State ‘did not arguably act unlawfully in not taking into account the Agreement’.⁶⁹

The central question relied upon a ‘well established’⁷⁰ principle of public law that concerned the scope of considerations that should be taken into account by a decision-maker. The Divisional Court, relying upon *R v Somerset County Council ex parte Fewings*,⁷¹ had found that the Paris Agreement was a consideration in relation to which the Secretary of State had a discretion in deciding whether to take it into account. He thus did not act unlawfully in not taking it into account.⁷²

In contrast, the Court of Appeal applied *Hurst*,⁷³ stating ‘that there can be some unincorporated international obligations that are “so obviously material” that they must be taken into account’.⁷⁴ The Court, on interpretation of section 10(3), found that the Paris Agreement fell into this category. The failure to even consider whether to take the Agreement into account proved fatal to the lawful designation of the ANPS. The Court once again reiterated that ‘the only legal obligation...was to take the Paris Agreement into account when arriving at his decision.’⁷⁵

3.3.3. Additional climate change issues

⁶⁵ *ibid* [230].

⁶⁶ *ibid* [233].

⁶⁷ *ibid* [234].

⁶⁸ *Spurrier* (n 24) [641].

⁶⁹ *ibid* [648].

⁷⁰ *Plan B Earth* (n 4) [237].

⁷¹ *R v Somerset County Council ex parte Fewings* [1995] 1 WLR 1037.

⁷² *Spurrier* (n 24) [647]-[648].

⁷³ *R (Hurst) v Commissioner of Police of the Metropolis* [2007] UKHL 13.

⁷⁴ *Plan B Earth* (n 4) [237].

⁷⁵ *Ibid* [238].

The Court of Appeal also accepted that failure to consider the Paris Agreement breached the requirements of Annex I to the SEA Directive.⁷⁶ Annex I(e) requires an environmental statement to include information pertaining to ‘environmental protection objectives, established at international level...which are relevant to the plan or programme and the way those objectives *have been taken into account* during its preparation’. The Court accepted the claimant’s submission that this does not necessarily have to consist of particular, precise legal obligations. They also reiterated that, although this leaves the Secretary of State with a wide margin of discretion in deciding what is ‘relevant’ to the plan or programme in question, the Paris Agreement was ‘obviously relevant’, therefore justifying their intervention in the matter.⁷⁷

The final climate change issue concerned the Secretary of State’s consideration of non-CO₂ impacts and the effect of emissions beyond 2050. The Court of Appeal rejected the defendants’ submission that the effect of emissions beyond 2050 will be considered as and when carbon reduction targets are produced for the post-2050 period.⁷⁸ The Court also rejected the argument made by the Secretary of State that non-CO₂ emissions were not assessed due to the uncertain state of scientific knowledge. Relying on the precautionary principle, the Court found that scientific uncertainty is ‘not a reason for not taking something into account at all, even if it cannot be precisely quantified at this stage’.⁷⁹ It concluded that ‘this matter will need to be taken into account’ as part of the Secretary of State’s reconsideration of the ANPS.⁸⁰

3.4. Relief

The Secretary of State conceded that relief should not be refused by the Court should the Paris Agreement grounds succeed (which they did).

The Court reiterated that it is incumbent on the Government to ‘approach the decision-making process in accordance with the law at each stage’.⁸¹ Section 31(2A) of the Senior Courts Act was applied:

(2A) The High Court –

a) must refuse to grant relief on an application for judicial review [...]

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirements of subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

The Court found that it was ‘impossible to conclude’ that the ANPS would not have been substantially different had the Government followed the law.⁸² Furthermore, it was decided that, in

⁷⁶ *ibid* [242]-[247].

⁷⁷ *ibid* [246].

⁷⁸ *ibid* [256].

⁷⁹ *ibid* [258].

⁸⁰ *ibid* [261].

⁸¹ *ibid* [275].

⁸² *ibid* [276].

any event, this case was one that enabled the court to grant a remedy on grounds of ‘exceptional public interest’.⁸³

The Court of Appeal declared the designation decision unlawful, preventing the ANPS from having any legal effect ‘unless and until the Secretary of State has undertaken a review of it in accordance with the statutory provisions, including the provisions of section 6...of the Planning Act’.⁸⁴ They did not quash the ANPS, and made it explicitly clear that it was inappropriate to make a mandatory order requiring the Secretary of State to undertake a section 6 review. This is because he has discretion under section 6(1) to decide to undertake a review ‘whenever he thinks it appropriate to do so’.⁸⁵

4. Analysis

Plan B Earth is an important outcome for the integration of the UK’s climate change commitments into high-level planning decision-making. In particular, it demonstrates the nature of the Court’s role in identifying the relationship between the evolving nature of climate change commitments (influenced by scientific development and international agreements) and the planning statutory framework. This analysis explores the implications of the Court’s findings concerning the Paris Agreement, the operation of the climate change provisions in the Planning Act 2008, and the institutional role of courts in disputes of this nature.

The case is a notable contribution to environmental law jurisprudence. As ‘climate change’ litigation is increasingly cast as a ‘response to institutional failure’,⁸⁶ with scholars considering how litigants can ‘repurpose existing legal tools for new climate-related ends’,⁸⁷ it is critical to reflect on the nature of the Court’s contribution in *Plan B Earth*. The dynamic, polycentric and uncertain features of environmental problems have been identified as ‘hot’ or ‘disruptive’ for legal orders that that rely on principles of legal certainty and stability to maintain legitimacy.⁸⁸ Some scholars have suggested that judicial intervention in matters relating to climate change is inappropriate.⁸⁹ This tension should not be overlooked in analysing this decision, as it sheds important light on the role of adjudication in resolving climate change disputes.

Although *Plan B Earth* raised familiar questions of public law, the Court also placed significant emphasis on its appropriate institutional role and the doctrine of the separation of powers, acknowledging the political contention and normative complexity of the issues before it. Whilst the quashing of the current ANPS is socio-politically remarkable, the Court’s primary focus concerned the application of conventional public law principles. This ultimately reflects the challenging nature of legal questions raised by climate change problems, and demonstrates that existing legal frameworks play a defining role in answering them.

⁸³ *ibid* [277].

⁸⁴ *ibid* [280].

⁸⁵ *ibid*.

⁸⁶ Elizabeth Fisher, ‘Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to *Massachusetts v. EPA*’ (2013) 35 *Law & Policy* 236.

⁸⁷ Jacqueline Peel, Hari Osofsky and Anita Foerster, ‘Shaping the “Next Generation” of Climate Change Litigation in Australia’ (2016) 41 *Melbourne University Law Review* 52.

⁸⁸ Elizabeth Fisher, ‘Environmental Law as “Hot” Law’ (2013) 25 *Journal of Environmental Law* 347; Elizabeth Fisher, Eloise Scotford and Emily Barritt, ‘The Legally Disruptive Nature of Climate Change: Climate Change and Legal Disruption’ (2017) 80 *The Modern Law Review* 173.

⁸⁹ Lucas Bergkamp, ‘Adjudicating Scientific Disputes in Climate Science: The Limits of Judicial Competence and the Risks of Taking Sides’ (2015) 3 *Environmental Liability* 80.

4.1. The Paris Agreement

In light of emerging narratives surrounding the role of the judiciary in climate change disputes,⁹⁰ as well as the policy-focused rhetoric surrounding the case,⁹¹ it is important to clarify the implications of the Court's findings relating to the Paris Agreement. Subject to the Supreme Court appeal, the judgment requires the Secretary of State to take into account the Paris Agreement in carrying out their functions under sections 5, 6 and 10(3) of the Planning Act 2008. This will require consideration of the Agreement, an unincorporated treaty, in the development and review of all future and current NPSs. This is in addition to the Court's recognition of the UK's commitment to Paris as 'Government policy'. It is a major step towards reconciling the inconsistency between the UK Government's approach to planning policy and its climate change commitments under the Paris Agreement.

However, the Court did not enforce the obligations of the Paris Agreement. Characterising it as such overlooks the complexity of the public law issues at stake in this dispute. The Court's exercise in statutory interpretation was fundamental in defining the nature of the Paris Agreement's effect on the UK's planning law framework. In particular, the Court held that the Paris Agreement, an unincorporated international agreement, was 'obviously material' to the requirements of section 10(3).⁹² This demonstrates the power of seemingly prosaic legislative provisions to fundamentally shift decision-making contexts; *Plan B Earth* directly affects the Secretary of State's considerations under section 10(3). Most notably, this was reasoned in accordance with the norms of statutory interpretation, placing it firmly within the remit of the Court's interpretive function.

The issue of the legal effect of unincorporated international agreements is a familiar question of constitutional law, and is characterised by the doctrine of the separation of powers underpinning the UK's dualist legal system.⁹³ When interpreting section 5(8), the Court referred to the reasoning in *JH Rayner Ltd*: 'a treaty is not part of English law unless and until it has been incorporated into the law by legislation.'⁹⁴ In its findings concerning section 10(3), the key question was whether the Secretary of State was irrational not to take into account the Paris Agreement. The interaction between the Paris Agreement and the Secretary of State's decision-making process therefore reflected conventional public law questions in judicial review.

Plan B Earth is an important example of how an international treaty such as the Paris Agreement is weaved into domestic legal doctrine in accordance with the rule of law. The question of the role of international commitments in domestic jurisprudence is likely to increase in importance in a post-Brexit legal landscape, particularly in the context of environmental law.⁹⁵ This process will be influenced by the public law principles underpinning the UK's dualist legal system. In *Plan B Earth*,

⁹⁰ Chris Hilson, 'Law, Courts and Populism: Climate Change Litigation and the Narrative Turn' in Susan Sterett and Lee Walker (eds), *Research Handbook on Law and Courts* (Edward Elgar Publishing 2019); Veerle Hayvaert, 'Beware of populist narratives: The importance of getting the Heathrow ruling right' (*LSE British Politics and Policy*, 29 February 2020) <<https://blogs.lse.ac.uk/politicsandpolicy/getting-the-heathrow-judgment-right>> accessed 10 June 2020.

⁹¹ Powley, Pickard and Bejoley (n 8).

⁹² *Plan B Earth* (n 4) [237].

⁹³ *ibid* [230].

⁹⁴ *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 A.C. 418, 500 (Lord Oliver of Aylmerton).

⁹⁵ Richard Macrory and Joe Newbigin, 'Brexit and International Environmental Law' (Brexit: The International Legal Implications Paper No 8, Centre for International Governance Innovation, 2017) <<https://www.cigionline.org/publications/brexit-and-international-environmental-law>> accessed 22 May 2020.

the Court's exercise in statutory interpretation played a defining role in giving effect to the Paris Agreement within the context of the planning statutory framework. This public law process should not be overlooked, and nor should it be mistaken for the Court enforcing the commitments of an unincorporated international agreement.

4.2. Climate Change Policy and the Planning Act 2008

Climate change policy, as demonstrated in subsection 2.1, is in a constant state of development. Developing climate goals is also a complex task; it requires the executive to commit to future reductions in greenhouse gas emissions, and is influenced by international commitments. Furthermore, as climate change issues continue to raise legal questions, it is important that our legal institutions can accommodate them.⁹⁶ In *Plan B Earth*, the Court's exercise in statutory interpretation of sections 5(8) and 10(3) of the Planning Act 2008 recognised this dynamic characteristic of climate change commitments.

This is particularly important in environmental law. Writing in the US context, Richard Lazarus has pointed to 'law-making moments' as being risky, highlighting that 'what Congress and the President do with much fanfare can quickly and quietly slip away in ensuing years'.⁹⁷ It is thus important for Lazarus that lawmakers are able to anticipate and respond to the 'dynamic nature of law-making' for environmental problems. Carnwath LJ, in *Hillingdon*, similarly considered the 'potential significance of developments in climate change policy', in relation to government planning decisions.⁹⁸

Therefore, the Court's broad interpretation of 'Government policy' under section 5(8) is an important and positive step towards recognising the dynamic nature of climate change policies and integrating them with the planning law framework. The Court's finding in relation to section 10(3) is particularly notable, as is the first time that a UK Court has identified the direct applicability of the Paris Agreement, an unincorporated treaty, to the climate change provisions of the Planning Act 2008. Given the Court's relatively brief reasoning on this issue, Supreme Court consideration of this important issue in environmental law would be welcome. The exercise in statutory interpretation in *Plan B Earth* is an important recognition of the nature of climate change problems (and legal accommodation of them) and marks a significant development in environmental law jurisprudence.

4.3. The Institutional Role of the Court

In its reasoning, the Court emphasised the 'long-established limits of the court's role when exercising its jurisdiction',⁹⁹ and placed significant focus on the standard of review in relation to the Habitats Directive and SEA Directive issues. This reflects the complex interaction between courts and the executive when reviewing high-level policy. As litigation is increasingly cast as a tool for climate-related ends,¹⁰⁰ it is important not to take the courts' institutional role for granted.

At its core, *Plan B Earth* is a public law dispute. It was therefore reasoned in accordance with public law principles and processes, including the separation of powers, judicial review principles, and statutory interpretation. The Court of Appeal emphasised the limits of judicial review as confined to that which is 'apt to the provisions themselves'.¹⁰¹ When interpreting the provisions of the Senior

⁹⁶ Fisher, Scotford and Barritt (n 100).

⁹⁷ Richard J Lazarus, 'Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future' (2007) 94 Cornell Law Review 1153, 1156.

⁹⁸ *Hillingdon* (n 15) [77].

⁹⁹ *Plan B Earth* (n 4) [281]

¹⁰⁰ Peel, Osofsky and Foerster (n 99).

¹⁰¹ *Plan B Earth* (n 4) [136].

Courts Act, the Court noted that Parliament ‘has not altered the fundamental relationship between the courts and the executive’, and courts’ fundamental function is to ‘maintain the rule of law’.¹⁰²

This is particularly evident in the way that *Plan B Earth* integrates the Paris Agreement into domestic legal doctrine. Lord Carnwath has reflected that courts will have an important role to play in giving legal effect to the Paris Agreement ‘so far as possible within the constraints of their individual legal systems’.¹⁰³ The Court’s exercise in statutory interpretation of section 10(3), and its consideration of the principle of the separation of powers, was critical in defining the nature of the Paris Agreement’s effect on UK planning decision-making. It was careful to note that ‘there is no question of giving effect to the Paris Agreement (an unincorporated international agreement) through the back door’,¹⁰⁴ highlighting that the legal obligation is simply to ‘take it into account’.¹⁰⁵ This highlights the Court’s awareness of the socio-political complexity of this dispute, and demonstrates the reality of the public law questions it was required to navigate.

Plan B Earth ultimately reflects the careful balancing act that the Court must perform within the constraints of a statutory framework in the UK. The depth and scope of their review was framed by the construction of the provisions it was required to interpret. It was also underpinned by fundamental principles in public law, such as the separation of powers and norms of statutory interpretation. As the ‘explosion’¹⁰⁶ of ‘climate change’ litigation continues to increase, it is important to acknowledge that courts continue to navigate their institutional role within existing constitutional and legal frameworks. Therefore, rather than reconceptualising our understanding of courts in climate change governance – as for example, portraying courts as key organs of policy change, sometimes in lieu of governments – it is important to recognise the domestic legal principles that shape courts’ reasoning in specific climate disputes.

5. The Supreme Court Appeal

Permission to appeal the findings on climate change was granted to the two private interested parties; Heathrow Airport Ltd and Arora Holdings Ltd. Notably, the Secretary of State did not appeal. The issue for the Supreme Court is whether the Government’s failure to take into account the Paris Agreement when designating the ANPS rendered the decision unlawful. This will require a re-assessment of the climate change grounds considered by the Court of Appeal.

The Supreme Court will also have to determine whether the consideration of the Paris Agreement at the development consent stage could reverse the Court of Appeal’s findings on the issue of relief. Furthermore, the interpretation of section 31 of the Senior Courts Act is also critical to the operation of the current ANPS. While the Court cannot order a review of the policy, it is firmly within the Court’s discretion to grant appropriate relief. This is provided for in the statutory framework, and will be interpreted by the Supreme Court in accordance with the public law principles that define its institutional role.

6. Conclusion

¹⁰² *ibid* [273].

¹⁰³ Lord Carnwath, ‘Climate Change Adjudication after Paris: A Reflection’ (2016) 28 *Journal of Environmental Law* 5, 9.

¹⁰⁴ *Plan B Earth* (n 4) [226].

¹⁰⁵ *ibid* [238].

¹⁰⁶ Jacqueline Peel and Hari Osofsky, *Climate Change Litigation* (Cambridge University Press, 2015) xi.

Plan B Earth resulted in significant disruption to the expansion of Heathrow Airport. It has been described as a ‘moment of truth’¹⁰⁷ for holding the Government to account for its climate change commitments. It has garnered global attention, with campaigners describing the decision a ‘major breakthrough’ for climate justice.¹⁰⁸ This reflects the increasing emphasis on the role of courts in climate change governance,¹⁰⁹ and the importance placed on ‘climate change’ litigation for policy-making.¹¹⁰

Its legal implications are important to reflect on. In accommodating the dynamic nature of climate change considerations within the statutory planning framework, this is a significant development in the environmental law jurisprudence of the UK, and has important implications for the role of the Paris Agreement in domestic legal doctrine. This legal development should not be mischaracterised; the climate change issues, at their foundation, involved questions of statutory interpretation. The task that confronted the Court of Appeal was a complex assessment of its appropriate institutional role in this context. How the Supreme Court approaches this question will be reflective of the doctrinal and constitutional principles that underpin our public law framework, and which fundamentally guide how climate change policy will be lawfully embedded into UK Government decision-making.

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¹⁰⁷ Tim Crosland, ‘The Heathrow decision: a moment of truth’ (*Legal Action Group*, March 2020) <<https://www.lag.org.uk/article/207739/the-heathrow-decision--a-moment-of-truth>> accessed 22 May 2020.

¹⁰⁸ Isabella Kaminski, ‘Heathrow expansion a ‘major breakthrough’ for climate justice’ *The Independent* (London, 27 February 2020) <<https://www.independent.co.uk/independentpremium/uk-news/heathrow-expansion-ruling-climate-change-court-of-appeal-ruling-boris-johnson-a9363421.html>> accessed 22 May 2020.

¹⁰⁹ Hari M Osofsky, ‘Multiscalar Governance and Climate Change: Reflections on the Role of States and Cities at Copenhagen’ (2010) 25(1) *Maryland Journal of International Law* 63; Joana Setzer and Lisa C Vanhala, ‘Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance’ (2019) 10 *Wiley Interdisciplinary Reviews: Climate Change* e580; Joana Setzer and Lisa Benjamin, ‘Climate Change Litigation in the Global South: Filling in Gaps’ (2020) 114 *AJIL Unbound* 56.

¹¹⁰ Peel, Osofsky and Foerster (n 89); Jacqueline Peel and Hari Osofsky, ‘Climate Change Litigation: Lessons and Pathways’ (2017) 29 *Judicial Officers’ Bulletin NSW* 6; Maria Banda and Scott Fulton, ‘Litigating CC in national courts: recent trends and developments in global climate law’ (2017) 47(2) *Environmental Law Reporter* 10121; Peel and Lin (n 9).