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Ruling against Heathrow expansion – impacts and significance

Friends of the Earth won its campaign to protect the climate from Heathrow's planned third runway. Lawyer Katie de Kauwe reflects on the significance of the win – and what it might mean for other projects.

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Heathrow appeal: the result

The government's policy giving the green light to Heathrow expansion (set to be one of the country's largest infrastructure projects) and establishing the need for more airport capacity in the south east has been ruled unlawful by the Court of Appeal on climate grounds. The ruling follows years of work by the legal team at Friends of the Earth (myself included), along with our external solicitors at Leigh Day, and our barristers (David Wolfe QC at Matrix Chambers, Peter Lockley at 11KBW and Andrew Parkinson at Landmark Chambers).

In the year that the UK is to host vital UN climate talks, the court accepted our submissions that:

- The Secretary of State for Transport (at the time Chris Grayling) failed to consider important climate factors in the decision to allow the building of a third runway at Heathrow Airport, already one of the biggest single sources of carbon emissions in the UK.
- Specifically, the Secretary of State should have taken into account the Paris Climate Agreement, the non-CO_2 warming impacts of Heathrow expansion, and the climate impacts of the project beyond 2050.
- The Secretary of State also breached their duty to undertake a lawful strategic environmental assessment (in accordance with legal requirements).

This ruling shows that government has systematically and illegally failed to consider its obligations under the Paris Agreement in producing their Airport National Policy Statement (ANPS) and their decision to support a third runway at Heathrow. The Court of Appeal has declared the adoption of the ANPS as **unlawful** and ruled that it ceases to have any legal effect (until such time as the government conducts a review to correct the legal errors identified by the Court in relation to climate). The Secretary of State was also ordered to pay our legal costs.

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With the ANPS deemed unlawful, there will be no third runway at Heathrow as currently set out.

The Court of Appeal also rejected the applications for permission to appeal made by 2 developers: Heathrow Airport Limited and Arora Holdings Limited. That means their only option is to apply for permission to the Supreme Court, but the Secretary of State **is not challenging the decision,** and this undermines the developers' position considerably. We're prepared to fight on to the Supreme Court if needs be, but the Supreme Court may not even grant the developers permission to appeal.

The road to victory

The road to this victory has not been short. The government's ANPS was made in June 2018, and we started proceedings to challenge it a few weeks later. The High Court hearing was in March 2019. On 1 May 2019 – the same day that Parliament declared a national climate emergency – the High Court handed down its judgment rejecting the totality of our case. The result came as a real blow to all of us, especially the local groups whose health and welfare were very much on the frontline, but we decided to appeal. The hearing before the Court of Appeal was in October 2019, and we waited with bated breath until today to hear the result. You can imagine how ecstatic we are about this!

What does the Heathrow ruling mean for other projects?

This historic judgement has implications way beyond Heathrow airport.

The Court did not constrain its findings on the relevance of Paris, non-CO_2 impacts and post-2050 climate impacts to decisions under the Planning Act which is incredibly exciting, as it means those arguments could be relevant to other decisions on aviation, and beyond.

Just a few weeks ago (in January 2020), Bristol councillors refused an application for airport expansion. If the developer appeals, then the relevance of Paris and non-CO_2 climate impacts may need to be factored into the decision, increasing the chance that the appeal will fail.

And it's not just aviation that these arguments could apply to. Following this judgment, Paris will need to be considered **whenever** a National Policy Statement is created or reviewed,The requirement to consider Paris springs from the obligations in section 5(8) (Plan B's case) and section 10 (Friends of the Earth's case), but the requirement to consider Paris during a review is owing solely to section 10 (our claim). We believe that other NPS's must be reviewed – this case shows they are completely out of date. and we think it will be relevant to decisions on big pieces of carbon-intensive infrastructure, such as energy projects.

For example, Friends of the Earth is currently bringing a challenge against the government in relation to its decision to provide $1 billion funding for a major fossil fuel project in Mozambique. We are arguing that this decision is incompatible with the Paris Agreement.

We also think that Town and Country Planning projects could be impacted.

Listen to our podcast on the wider implications:

The legal arguments

We weren't the only organisation or group to appeal the decision to go ahead with Heathrow's expansion. Other claimants challenged the decision to allow a third runway based on factors such as the habitats directive, planning arguments, and non-climate related problems with the strategic environmental assessment. However, together with environmental litigation organisation Plan B, we were the only ones to challenge the ruling on the grounds of climate – and win (other claimants were unsuccessful in their challenges).

The Paris Agreement and Sustainable Development

In winning, we have strengthened sustainable development as applied in the Planning Act 2008 and generally, including the need to safeguard impacts on future generations as well as the requirement to assess the environmental, economic, and social factors in a balanced way. In particular, the High Court endorsed the Brundtland definition of sustainable development:

"*The objective of sustainable development can be summarised as meeting the needs of the present without compromising the ability of future generations to meet their own needs".*

This is an important re-statement of this principle in a modern-day planning context.

Together with Plan B, we've also strengthened the domestic application of the **Paris Climate Agreement.** The Court found that Paris needed be considered as part of the sustainable development duty in section 10 of the PA and in relation to the strategic environmental assessment (our case), and also when a National Policy Statement is created under section 5(8) (Plan B's case).

What does this mean? It means the government can no longer claim it is committed to the Paris Agreement and tackling the climate emergency, while systematically failing to take this into account in vital decisions, and green-lighting high carbon infrastructure projects such as major roads, coal mines and gas power stations. Some of these projects may now be legally called into question by the Court of Appeal's judgement – at the very least they should all be reconsidered in light of the ruling.

The Paris Agreement was also ruled "obviously material" to a decision that had climate change consequences, such as those that would have been brought on by a third runway. This makes it possible to argue in any future cases that Paris is an obviously material consideration in other planning decisions where there are significant or large climate change impacts.

Precautionary Principle

The Precautionary Principle advocates a cautious approach when considering issues or projects which may cause serious damage, but where full scientific knowledge and certainty of the impacts is lacking. It advocates that in such situations, measures should be adopted to prevent environmental harm.

In winning the case against Heathrow, we've strengthened the application of the Precautionary Principle in law. As the non-CO_2 warming impacts of expansion were significant and of a similar magnitude to those of CO_2, it was not lawful for the Secretary of State to discount them entirely on the basis that their exact impact was difficult to quantify. Following this judgment, it is possible that the Precautionary Principle can be applied beyond aviation to other contexts involving decisions

which may have high risks for the environment.

Non-CO_2 impacts of Heathrow

We have established that non-CO_2 impacts, such as nitrogen oxides, need to be considered in the context of aviation matters – analysis cannot be limited to CO_2 alone. The Court was clear that non-CO_2 impacts were an obviously relevant factor, and that this was not confined to the specific wording of the section 10 duty under the Planning Act (PA). Therefore, this is likely to affect aviation decisions beyond the PA too. Given that the combined warming impact of non- CO_2 and CO_2 could be double that of CO_2 alone, we cannot conceive how Heathrow expansion could possibly be feasible without substantial efficiency improvements in planes that are not currently available.

Climate impacts beyond 2050

In winning our case against government on Heathrow, we have established that the climate impacts of a National Policy Statement need to be considered for the full lifetime of the project, and in accordance with sustainable development (which requires consideration of the needs of future generations). Climate impacts cannot be ignored after the expiry of the net zero 2050 target, not least because climate change will continue. Again, the Court made this finding in relation to section 10 of the PA, but also classified post-2050 impacts as “obviously relevant”. This means again, that this principle is likely to be applicable to other projects which may have long-lasting climate impacts, whether or not they are governed by the PA or a National Policy Statement.

Role of the Court

The ANPS has been found unlawful because of an error in law, not because the judges have waded into a political debate. The Secretary of State did not discharge its duties under an Act of Parliament (the Planning Act 2008) in relation to sections 5 (Plan B's claim) and Section 10 (ours). In other words, government skipped steps when it came to drawing up the airport policy. The fact that this was found unlawful demonstrates just how important our independent judiciary and court system are in providing an effective forum to challenge the abuse of State power. The government broke the law and could have proceeded with a hugely damaging development, but the Court held them back and enforced the law as set by Parliament.

Local justice and the power of campaigning

We have been resisting Heathrow expansion for years, both internally and in our wider grassroots network. We brought a successful legal challenge in 2007 to knock back injunctions that unlawfully stifled protest against expansion, and our dedicated West London local groups network has been campaigning tirelessly on this for decades, owing to the clear and unacceptable impacts on the environment and their wellbeing. Our case has supported those efforts and stopped expansion. This means there are associated environmental justice gains that go beyond climate.

In 2008 we successfully campaigned for the inclusion of the sustainable development duty in section 10 of the Planning Act. And years later, we brought the challenge against Heathrow expansion using this very duty. In other words, we've won this hugely significant case off the back of legal work we did years ago. It just goes to show how important our "behind the scenes" wrangling over legal terms and definitions is, and demonstrates how the law can help protect our climate.

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Global justice

This country’s legal system is highly respected around the world, and our case-law is cited in the courts of many other countries. Therefore, this judgment has the potential to influence decisions abroad as well.

Climate litigation is a global phenomenon. In the simplest of terms, it’s a response to government inaction on the climate emergency. Our case against Heathrow was about climate justice and challenging a climate-wrecking infrastructure project. It is therefore of great interest to the wider global climate justice community who are resisting similar projects and developments.

And crucially, the emissions that will no longer happen are of benefit to the whole international community, and not just the UK.

What next?

Following the judgement, we think that government should now signal an end to all airport expansion and urgently produce an airport policy which takes into account, and is consistent with, our international climate commitments under the Paris Agreement and sustainable development.

They should also now review other national policy statements, such as on energy.

In the year that the UK hosts vital UN climate talks,After this article was written, the UN climate talks were subsequently postponed to November 2021 owing to the COVID-19 pandemic. and with communities across the UK suffering extreme flooding, it's clear we need transformative action to deal with the climate crisis. Our international climate commitments must take centre stage in all Government decisions - including the forthcoming Budget and Comprehensive Spending review.

There’s no time to waste. The climate emergency is real and it’s happening now.

With your support, we'll continue to fight planet-wrecking decisions like Heathrow's third runway. Donate today.