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Covid-19, net zero, and a third runway – thoughts on the role of climate litigation after the pandemic

One noted side effect of the coronavirus lockdown has been the fall, over recent months, of CO2 emissions. Some campaigners have called for the post-lockdown world to maintain and build on these falls in CO2, and ultimately to push for the UK to have net zero carbon emissions earlier than the present target of 2050. There have been increasing calls for climate change to be addressed through post-pandemic financial recovery packages.

While a change of public mindset is important in itself, long term systemic change often comes about through legal regulation as well as individual action. With climate change litigation becoming a recognised tool for environmental campaigners, this note looks at one especially significant ongoing case involving Heathrow expansion and speculates on the impact of such litigation on the post-pandemic economic recovery packages to come.

Plan B Earth vs Heathrow – the litigation to date

On 7 May 2020, the Supreme Court granted Heathrow Airport permission to appeal in a major challenge to its plans for a third runway, presently on hold following the success of a group of environmental charities in the Court of Appeal at the end of February 2020. Authoritative estimates indicate that keeping aviation at 2005 levels in 2050, whilst trying to limit 2050 greenhouse gas emissions to 80% of 1990 levels (the previous target before the government adopted "net zero" in 2019), would have meant that aviation alone would constitute 25% of the UK's total emissions. The effect on UK emissions of Heathrow expansion being blocked could therefore be highly significant in its own right. The case may also have a wider impact as explored below.

In *Heathrow Airport v Plan B Earth, Secretary of State for Transport and others*, the Supreme Court granted permission to Heathrow Airport to appeal against elements of the Court of Appeal's decision in *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214. That decision essentially put Heathrow's plans to build a third runway on hold because the Secretary of State had not considered the UK's climate change commitments under the Paris Agreement when committing to support Heathrow's plans for a third runway. We understand that the hearing is due to take place on 7 and 8 October 2020. It's notable that the appeal was brought by Heathrow itself – as indicated by the case title, the decision maker and originally principal Defendant was the Secretary of State himself, not the airport. It isn't yet clear what the Secretary of State's position on the issue actually now is and whether or not the government continues to support its own expansion plan.

The litigation in the Divisional Court and Court of Appeal consisted of multiple challenges to what was essentially a decision in principle to grant permission for a third runway at Heathrow (as opposed to an expansion of Gatwick, or potentially not allowing major airport expansion at all). Over a long period of various consultations, beginning in 2003, the Secretary of State

had developed a high-level policy on airport expansion in southeast England which became the Airports National Policy Statement or ANPS. In June 2018, the ANPS was 'designated' by the Secretary of State under s5 Planning Act 2008. That designation made development of a third runway at Heathrow a matter of national policy, making it significantly more likely that planning permission to build the runway will ultimately be granted. The designation followed a vote in the House of Commons, memorable for Boris Johnson, then Foreign Secretary and previously a vocal opponent of a third runway, finding himself in Afghanistan when it took place. That vote may have been politically memorable, but as the Court of Appeal pointed out, it had no legal significance.

Various relevant changes to environmental law took place between 2003, when the airport consultation process began, and 2018, when the ANPS was designated. In 2008, the UK passed the Climate Change Act 2008, enshrining in law (at the time) a statutory obligation to reduce greenhouse gas emissions by 80% compared to 1990 levels by 2050. In December 2015, the Paris Agreement was concluded, in which states including the UK committed to restrict the average increase in global temperature to well below 2C, with the aim being 1.5C above pre-industrial levels. The UK ratified the Paris Agreement on 17 November 2016 but did not make any change to its greenhouse gas emissions target. In June 2019, the Climate Change Act obligation was amended to oblige the UK to achieve "net zero" rather than an 80% reduction by 2050.

A plethora of challenges to the decision to designate Heathrow for expansion were initially brought by a huge variety of parties including environmental charities, London local authorities, and the operators of Gatwick. In a highly detailed judgment in 2019, the Divisional Court dismissed all of the challenges, thereby opening the way for Heathrow to proceed with applying for planning permission for its detailed construction plans. However, the Divisional Court's decision was then appealed on multiple bases, ranging from the proper approach to applying EU law in planning disputes to details of the orchid population beside the M25. On 27 February 2020, the Court of Appeal rejected almost all those appeals but, crucially, found that the Secretary of State had been legally obliged to take account of the Paris Agreement obligation to limit the global rise in temperature to "*well below 2C*". It was common ground that the Paris Agreement had not been taken into account when designating the ANPS, as it was thought (at least) unnecessary and (at most) unlawful for the Secretary of State to do so. Given the Court of Appeal's view on this point, the ANPS was held to be of no legal effect unless and until the government reviews it in line with its Paris obligations.

***Heathrow* – the Supreme Court appeal**

In keeping with the complex procedural history of this matter, the Supreme Court received multiple applications from various parties for permission to appeal, but only granted the application from Heathrow. The technical point of law, as to whether or not the government was obliged to take account of the Paris Agreement as an international treaty which had not been incorporated by statute into UK law (in circumstances where the Climate Change Act 2008 did set a clear target in UK law, although that target then changed in 2019) is of great

importance to international lawyers, and may be the main reason which persuaded the Supreme Court to grant permission. Normally international treaties have no direct effect in English law and only take effect through any implementing legislation passed in Parliament (which makes them "incorporated" in UK law), so that arguable breaches of international agreements on climate change by the British government would not normally be actionable by litigants in UK Courts.

If the Claimants are successful in resisting this appeal, they could open the way for international agreements on climate change to have a more direct effect on major government decisions than they have done to date. On 20 December 2019, the Dutch environmental NGO Urgenda obtained an order in the Netherlands Supreme Court that the government must urgently reduce national CO2 emissions in light of the climate situation, relying in part in its judgment on the Paris Agreement. In general terms, the Dutch legal system makes it much easier for litigants to rely on international law in domestic Courts. Could the *Heathrow* case pave the way for *Urgenda*-style challenges in the UK? The Supreme Court may think that a step too far.

Climate Change Act 2008 challenges – the future

Even if the appeal on that narrow but important point of the effect of unincorporated international law on planning decisions in *Heathrow* is successful and the airport expansion ultimately proceeds, though, the principle that a major decision on national policy can be challenged by individual litigants under the Climate Change Act 2008 now appears to be well established. The Divisional Court in Heathrow described UK policy on climate change as "*entrenched*" in that Act. With the move to enshrine the commitment to net zero in s1 of the Act from 27 June 2019, the need for government and local authorities to consider how any long term project, from airport or power station construction through to pedestrianisation and the area covered by the London Congestion Charge, will contribute towards the goal of net zero has become all the more acute.

The ability for litigants to challenge projects by reference to the net zero goal in future may have a significant impact, as can be seen by comparison with the *Clientearth* litigation over air quality in London. That litigation arose out of the British government's failure to achieve compliance with a European Directive on air quality, Directive 2008/50/EC. It made clear, over two trips to the Supreme Court in [2013] UKSC 25 and [2015] UKSC 28, that the requirement to comply with the standards set out in the Air Quality Directive was not a vague policy goal but a matter of law. Those judgments, and further litigation in the High Court on the policies produced as a result, have led to changes such as London's Ultra Low Emissions Zone and to the removal of government support for diesel cars. While air quality in London has improved over recent years, the present position tends to suggest this litigation may not yet be at an end.

The scope for concerned citizens to enforce compliance with the net zero obligation may be becoming wider than was previously thought. In the immediate aftermath of the 2008

financial crash, the environmental group People and Planet brought a judicial review of the Treasury's handling of its major investment in the Royal Bank of Scotland in *R (People and Planet) v HM Treasury* [2009] EWHC 3020 (Admin). The government owned 70% of the bank but considered that it should adopt a commercial approach to managing it rather than preventing the bank from making loans to businesses which pursued activities which were harmful to the environment. The Court in *People and Planet* said that s1 of the Climate Change Act 2008 created a "*broad duty on the Secretary of State*" but that to claim that it created a legitimate expectation that the government would not allow the bank to support environmentally harmful activities was "*hopeless*". Whatever the outcome of *Heathrow* in the Supreme Court may be, it would seem most unlikely that such a claim could be brushed off so easily today.

The UK Committee on Climate Change (UKCCC), established under the Climate Change Act 2008 with a statutory remit to advise the government on emissions targets and progress to reduce emissions, wrote to the Prime Minister on 6 May 2020 specifically calling for the reduction of greenhouse gas emissions to be a central part of any post-covid recovery package. The government's response to that remains to be seen. Litigants may well be able to establish some level of obligation on the government to have regard to the UKCCC's views on major policy decisions which tend to shape the future of the economy. Further complex litigation over the compatibility of whatever economic recovery package follows the covid-19 pandemic with the commitment to net zero by 2050 appears highly likely, whatever the fate of Heathrow's third runway plans may be.

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