

A Third Runway for Heathrow? To build or not to build?

A Brief Review of the Supreme Court's Recent Judgment

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On Wednesday 16th December 2020, the Supreme Court delivered its judgment on the planned development of a third runway at Heathrow airport. In a disappointing blow to environmentalists, the Supreme Court overturned the Court of Appeal's earlier judgment which had ruled the plans illegal, thus paving the way for the controversial runway to be built. This article will review the decision of the Supreme Court, highlighting the key legal grounds for it, whilst also considering the background to the dispute.

1. Background

On Wednesday 16th December 2020, the Supreme Court delivered its judgment on the planned development of a third runway at Heathrow airport.² In a disappointing blow to environmentalists, the Supreme Court overturned the Court of Appeal's earlier judgment which had ruled the plans illegal,³ thus paving the way for the controversial runway to be built. The judgment comes amidst the worldwide coronavirus pandemic's decimating impact on the international aviation sector, with global air transport's seat capacity in 2020 decreasing by 67% on the previous year.⁴

The plan for a new third runway at Heathrow airport, the Heathrow Northwest Runway, stems from successive governments identifying a need for an expansion in airport capacity in the South East of England in order to ultimately boost the nation's economy and bolster its status as a global aviation hub.⁵ A third runway at Heathrow airport depicts only one such opportunity for expansion, with other possibilities mooted by the 2012 established Airports Commission, including extending the two existing runways at Heathrow and building a second runway at Gatwick,⁶ though it quickly became the government's preferred option⁷. An alternative idea of building a new airport in the Thames Estuary,

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² See *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.

³ *Ibid*, para. 167.

⁴ See ICAO, *Effects of Novel Coronavirus (COVID-19) on Civil Aviation: Economic Impact Analysis*, Montréal, Canada, 24 December 2020, Air Transport Bureau, p. 5. Available at: https://www.icao.int/sustainability/Documents/Covid-19/ICAO_coronavirus_Econ_Impact.pdf. Last Accessed 18 January 2021. In this regard, it was noted by Heathrow Airport Ltd that aviation demand is expected to have been restored before the third runway would become operational: cf. *Ibid*, para. 18.

⁵ Cf. *Ibid*, para. 2. Also see Heathrow Expansion. Available at: <https://www.heathrowexpansion.com/expansion-plan/the-vision/>. Last Accessed 18 January 2021; Department for Transport (June 2018), *Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England*, Presented to Parliament pursuant to Section 9(8) of the Planning Act 2008, p. 21 f. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/858533/airports-nps-new-runway-capacity-and-infrastructure-at-airports-in-the-south-east-of-england-web-version.pdf. Last Accessed 18 December 2021. For background, see S. Griggs/D. Howarth (2013), *The Third Runway at Heathrow*. In: S. Griggs/D. Howarth, *The politics of airport expansion in the United Kingdom: Hegemony, policy and the rhetoric of 'sustainable aviation'*, Manchester University Press, Manchester/New York.

⁶ *Ibid*, para. 3.

⁷ GOV.UK (25 October 2016), *Government decides on new runway at Heathrow*. Available at: <https://www.gov.uk/government/news/government-decides-on-new-runway-at-heathrow>. Last Accessed 18 January 2021.

which was famously plugged by the now Prime Minister Boris Johnson and thus became colloquially known as ‘Boris Island’, was earlier rejected by the Airports Commission.⁸ The plan to construct a third runway was then included within the Airports National Policy Statement 2018 and became national policy.⁹ A new runway at Europe’s busiest airport,¹⁰ the government alleged, has the potential to contribute £61 billion to the UK economy, with additional benefits inter alia including 77,000 new jobs being created locally, lower passenger fares and the improved connectivity of Heathrow as a global transport hub.¹¹

Environmentalists, on the other hand, argue that to build such a third runway would undermine the UK’s commitment to its environmental obligations under the Paris Agreement Under the United Nations Framework Convention on Climate Change (henceforth ‘the Paris Agreement’)¹², in particular in relation to CO₂ emissions targets¹³, produce significant air and noise pollution and contribute significantly to climate change without the prospect of certain significant economic benefits.¹⁴

2. The Three-Pronged Jurisprudence

2.1. The Divisional Court and Court of Appeal

⁸ Airports Commission: Interim Report (December 2013), Crown Copyright, para. 43. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/271231/airports-commission-interim-report.pdf. Last Accessed 18 January 2021.

⁹ Department for Transport (June 2018), Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England, Presented to Parliament pursuant to Section 9(8) of the Planning Act 2008, p. 13 f. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/858533/airports-nps-new-runway-capacity-and-infrastructure-at-airports-in-the-south-east-of-england-web-version.pdf. Last Accessed 18 January 2021.

¹⁰ Cf. R (Spurrier and Others) v Secretary of State for Transport [2019] EWHC 1070 (Admin), para. 43.

¹¹ GOV.UK (25 October 2016), Government decides on new runway at Heathrow. Available at: <https://www.gov.uk/government/news/government-decides-on-new-runway-at-heathrow>. Last Accessed 18 January 2021. Also see Department for Transport (2016), Heathrow Northwest Runway: Economic Benefits. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/562567/heathrow-north-west-runway-economic-benefits.pdf. Last Accessed 18 January 2021. Cf. Heathrow (2014), Taking Britain Further, Heathrow’s plan for connecting the UK to growth, p. 2 f. Available at: https://www.heathrow.com/content/dam/heathrow/web/common/documents/company/about/airports-commission/taking_britain_further.pdf. Last Accessed 18 January 2021. For an evaluation of these proposed benefits, see for example S. Cairns (2016), The Third Heathrow Runway, the Need for Clarity, The Journal of the Town and Country Planning Association, Vol. 85, No. 12, pp. 511-515.

¹² Adopted in Paris on 12 December 2015, entered into force on 4 November 2016, UNTS Vol. No. 54113. The Paris Agreement is a legally binding international treaty governing climate change which as of January 2021 has 189 state parties, including the UK.

¹³ Cf. 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, paras 8 and 76.

¹⁴ See for example W. Rundle (14 January 2020), The problem with Heathrow expansion, Friends of the Earth. Available at: <https://friendsoftheearth.uk/climate/problem-heathrow-expansion>. Last Accessed 18 January 2021. Rundle is the Head of Legal at Friends of the Earth. For further information on the Friends of the Earth’s position, also see Friends of the Earth (28 May 2020), Briefing: Heathrow Expansion. Available at: <https://cdn.friendsoftheearth.uk/sites/default/files/downloads/Friends%20of%20the%20Earth%20Legal%20Briefing%20-%20Heathrow%20Judgment%20-%2028%20May%202020.pdf>. Last Accessed 18 January 2021.

Environmentalists embarked on a legal challenge to the government's Heathrow expansion plans, with Friends of the Earth¹⁵ and Plan B Earth¹⁶ acting as the respondents before the said Supreme Court appeal. The three-pronged jurisprudence saw environmentalists' judicial review claims first dismissed before the Divisional Court.¹⁷ The Court of Appeal, however, allowed an appeal, which was upheld on the following four grounds:

1. The Secretary of State violated his duty under Section 5(8) of the Planning Act 2008¹⁸ to provide an explanation as to how the policy accounted for government policy in relation to the Paris Agreement's emissions targets
2. The Secretary of State breached his duty under Section 10 of the Planning Act 2008 by failing to have regard to the Paris Agreement
3. The Secretary of State violated his duty under Art. 5 of the Strategic Environmental Assessment Directive (SEA Directive) (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 environment¹⁹) to provide a suitable environmental report for public consultation on the plans by failing to refer to the Paris Agreement
4. The Secretary of State breached his duty under Section 10 of the Planning Act 2008 by failing to have proper regard to the desirability of climate change mitigation post-2050 and the desirability of climate change mitigation by way of a restriction of non-CO₂ emissions from aviation.²⁰

2.2. The Supreme Court Judgment

An appeal to the Supreme Court was then permitted, with Heathrow Airport Ltd joining the proceedings as an interested party.²¹

The conclusions of the Supreme Court drew greatly on those of the Divisional Court.²² The Supreme Court highlighted the UK's recognition of the desirability of climate change mitigation, reflected for example in the Climate Change Act 2008.²³ Furthermore, it stressed that the British government has deferred making a decision as to whether to include emissions from international aviation in its 2050

¹⁵ Friends of the Earth is a non-governmental organisation with the aim of tackling climate change: cf. *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, para. 14.

¹⁶ Plan B Earth is a charity with the aim of tackling climate change: cf. *Ibid*, para. 14.

¹⁷ See *R (Spurrier and Others) v Secretary of State for Transport* [2019] EWHC 1070 (Admin), para. 668. Environmentalists' claims concerned surface access, air quality, habitats, the Strategic Environmental Assessment conducted, the UK's obligations under the Paris Agreement 2015, the UK's human rights obligations under both the Human Rights Act 1998 and the European Convention on Human Rights 1950 (Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Opened for Signature on 04 November 1950, Entered into Force on 03 September 1953, UNTS Vol. No. 213, p. 221) and the obligation to consult. Some of the claims were denied permission, whilst others were rejected on the merits.

¹⁸ Planning Act 2008 C. 29.

¹⁹ Official Journal L 197, 21/07/2001, pp. 0030 – 0037. Domestically, this directive has been given legal effect by way of the Environmental Assessment of Plans and Programmes Regulations 2004, No. 1633, which remain in force despite the UK's recent departure from the European Union and the end of the corresponding transition period.

²⁰ *R (on the application of Plan B Earth) v Secretary of State for Transport and Others* [2020] EWCA Civ 214. Cf. *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, para. 15.

²¹ *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, para. 17.

²² *Ibid*, para. 19 f.

²³ *Ibid*, para. 39 f. See Climate Change Act 2008 C.27.

target, instead opting to initially allow sufficient headroom for such emissions to be included in meeting said target.²⁴

In relation to the obligation to conduct an environmental assessment under the aforementioned Strategic Environmental Directive, the court held that the content of the information contained in said environmental assessment, in particular whether or not a reference to the Paris Agreement should be included, is subject to the discretion of the relevant planning authority²⁵ and the Secretary of State²⁶. Moreover, the public was held to have been consulted and responses duly taken into account.²⁷ This ground of appeal was thus upheld and the Secretary of State was held not to have acted in breach of his obligations under the SEA Directive.²⁸

Though the court acknowledged that the Paris Agreement and indeed its core aim to reduce global average temperature lies at the heart of the legal challenge, it also highlighted that the Paris Agreement does not bestow upon the UK a legally binding domestic emissions target,²⁹ with the UK having pledged its commitment to internationally coordinated action in this respect³⁰. In any case, when the plans for a third runway were incorporated into the Airport National Policy Statement in 2018, the UK's policy as to how to translate its international commitment to the Paris Agreement into national policy still found itself in a state of evolution.³¹ Moreover, the court emphasised the evolving nature of the UK's aviation strategy in the light of its efforts to tackle climate change, in addition to a relevant future planning application relating to the third runway requiring reference to updated carbon emissions targets and compliance with current law and policy.³²

Importantly, the Supreme Court disagreed with the Court of Appeal's definition of the term 'government policy'. This, it held, should be interpreted narrowly and should thus be confined to a formal written statement rather than ordinary words as advocated by the Court of Appeal.³³ Furthermore, the UK's ratification of the Paris Agreement could also not *per se* be held to constitute an expression of government policy and thus Heathrow Airport Ltd's appeal on this ground succeeded.³⁴ A further argument based upon Articles 2 and 8 Human Rights Act 1998³⁵, which was put forward by the Director of Plan B Earth, was also dismissed because it had not been appealed to the Court of Appeal and because any such human rights violation would not arise from the designation of the Airport National Policy Statement as such.³⁶

Moreover, the court held that the UK's obligations under the Climate Change Act 2008 already met and even surpassed its obligations under the Paris Agreement being transformed and granted legal

²⁴ 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, para. 47.

²⁵ *Ibid*, para. 59.

²⁶ *Ibid*, paras 142-146. In para. 146, the court refers to a 'significant editorial discretion'.

²⁷ *Ibid*, para. 147.

²⁸ *Ibid*, para. 150.

²⁹ *Ibid*, paras 70-71 f.

³⁰ *Ibid*, para. 84.

³¹ *Ibid*, para. 111.

³² *Ibid*, paras 97, 98 and 157.

³³ *Ibid*, paras 104-107. On the Court of Appeal's definition, see R (on the application of Plan B Earth) v Secretary of State for Transport and Others [2020] EWCA Civ 214, para. 224 f.

³⁴ 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, paras 108 and 112.

³⁵ Human Rights Act 1998 C. 42.

³⁶ 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, para. 113.

effect under domestic law.³⁷ The Secretary of State could therefore not in this regard have failed to consider the Paris Agreement³⁸ and any further consideration of the Paris Agreement was held to be subject to the Secretary of State's discretion³⁹. His exercise of discretion in this respect was deemed both lawful and rational.⁴⁰

In addition, the Supreme Court acknowledged that the Secretary of State could not rationally be expected to evaluate post-2050 emissions in the Airports National Policy Statement as the former have yet to be determined.⁴¹ The decision not to include non-CO₂ emissions was also held to be a rational one, whilst the precautionary principle, which had previously been cited by the Court of Appeal,⁴² was deemed to be of no relevance.⁴³

3. Outlook

The Supreme Court's ruling is clear: it accords the UK a wide margin of discretion in determining how to give legal effect to its international treaty obligations but also accords the Secretary of State discretion in accounting for such obligations. Though the Supreme Court's decision can and will be seen as a heavy blow in the campaign against climate change, it may also be seen as championing state sovereignty as the lynchpin of the international legal system⁴⁴ even in relation to a very international issue requiring international coordination and harmonisation.

Despite the Supreme Court's definitive ruling allowing Heathrow Airport Ltd's appeal, campaigners have vowed to continue to fight the planned expansion, pledging to take their case all the way to the European Court of Human Rights if necessary.⁴⁵ Moreover, it remains to be seen whether the then London Mayor and now Prime Minister Boris Johnson will follow through on his infamous pledge to lie down in front of bulldozers to prevent the construction of the third runway at Heathrow from going ahead.⁴⁶

³⁷ *Ibid*, paras 122 and 123.

³⁸ *Ibid*, paras 125 and 149.

³⁹ *Ibid*, paras 128 and 129. In para. 152, the Secretary of State was also held to possess a 'margin of appreciation' in relation to his Section 10 Planning Act 2008 duty to consider sustainable development.

⁴⁰ *Ibid*, para. 131 f and para. 149.

⁴¹ *Ibid*, para. 156.

⁴² *R (on the application of Plan B Earth) v Secretary of State for Transport and Others* [2020] EWCA Civ 214, para. 258 f.

⁴³ *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, paras 165 and 166.

⁴⁴ Cf. Art. 2 (1) UN Charter, adopted on 26 June 1945, entered into force on 24 October 1945. The fundamental principle of state sovereignty denotes the exclusive control and authority of a state over its territory.

⁴⁵ Cf. The Telegraph (16 December 2020), Heathrow opponents vow third runway won't see 'light of day' as judges rule work can move ahead. Available at: <https://www.telegraph.co.uk/news/2020/12/16/heathrow-airport-third-runway-can-go-ahead-supreme-court-rules/>. Last Accessed 18 January 2021.

⁴⁶ Cf. BBC News (12 May 2015), Boris Johnson to fight bigger Heathrow but will not resign. Available at: <https://www.bbc.co.uk/news/uk-politics-32703425>. Last Accessed 18 January 2021.