

R (FRIENDS OF THE EARTH) v SECRETARY OF STATE FOR TRANSPORT AND OTHERS

27th February 2020

Lord Justice Lindblom, Lord Justice Singh and Lord Justice Haddon-Cave

SUMMARY OF JUDGMENTS

NOTE: This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. References in square brackets in this summary are to paragraphs of the judgment. Judgments are public documents and are available at: <https://www.judiciary.uk/judgments>

1. This morning we are handing down the judgments of this court in a number of related proceedings that have come before us from the Divisional Court, which concern the proposed expansion of capacity at Heathrow Airport by the addition of a third runway under the policy set out in the “Airports National Policy Statement: new runway capacity and infrastructure at airports in the south east of England” (“the ANPS”). That document, designated by the then Secretary of State for Transport in June 2018, is a national policy statement prepared under section 5(1) of the Planning Act 2008. It was subject to a number of legal challenges brought by claims for judicial review in accordance with the procedure that Parliament has provided for such challenges to be brought, in section 13(1) of the Planning Act.
2. The first judgment addresses a challenge brought by Heathrow Hub Ltd. and Runway Innovations Ltd., who proposed extending the northern runway at Heathrow. The second deals with several challenges, brought by a number of local authorities, the Mayor of London, Greenpeace Ltd., Friends of the Earth Ltd. and Plan B Earth, concerning the planning aspects of the ANPS and its process.
3. In the first judgment we have concluded that the arguments put forward by the appellants on legitimate expectation, the materiality of the absence of any assurance

from Heathrow Airport Ltd. to implement Heathrow Hub's scheme for an extended northern runway, and various grounds concerning the law of competition must all fail.

4. As to legitimate expectation, the Divisional Court rejected Heathrow Hub's argument that the Secretary of State's request that Heathrow Hub obtain an assurance from Heathrow Airport Ltd to implement their extended northern runway scheme amounted to a breach of a "legitimate expectation" that the Secretary of State would not take into account any risks arising from the fact that Heathrow Hub depended upon Heathrow Airport Ltd to deliver its extended northern runway scheme in making the decision to prefer the north-west runway scheme (paragraphs 78 to 80 of the judgment in the appeal by HUB). Heathrow Hub challenged this conclusion on appeal (paragraphs 81 to 86). We have upheld the Divisional Court's conclusion that there was no express or implied promise or any regular pattern of behaviour amounting to a representation that this would never be a consideration in the preference decision process, still less a clear and unambiguous representation devoid of any relevant qualification such as to justify a finding in law of legitimate expectation (paragraphs 87 to 92).
5. As to materiality, the Divisional Court held that if the Secretary of State had not requested an assurance or if Heathrow Airport Ltd had given an assurance this would have made no difference to the preference or designation decisions, because the objective merits of the extended northern runway scheme remained the same (paragraphs 97 to 100). Heathrow Hub challenged this finding on appeal (paragraphs 101 to 104). We have held that the Divisional Court was entitled to find on the evidence that the absence of an assurance was immaterial to the preference and designation decisions (paragraph 141). We have also held that it was "highly likely" that the designation decision would be the same whether or not an assurance had been requested or forthcoming, and accordingly, under section 31(2A) of the Senior Courts Act 1981, the Divisional Court would have been bound to dismiss Heathrow Hub's claim for judicial review in any event (paragraph 177).
6. In the second judgment, we have emphasized the long-established limits of the court's role when exercising its jurisdiction in claims for judicial review (paragraphs 135 to 137 of the judgment on planning issues). As an appellate court, we operate within the

same limits. We have made it clear that we are not concerned in these proceedings with the political debate and controversy to which the prospect of a third runway being constructed at Heathrow has given rise. That is none of the court's business. We have emphasized that the basic question before us in these claims is an entirely legal question. We are required – and only required – to determine whether the Divisional Court was wrong to conclude that the ANPS was produced lawfully.

7. Our task therefore – and our decision – does not touch the substance of the policy embodied in the ANPS. In particular, our decision is not concerned with the merits of expanding Heathrow by adding a third runway, or of any alternative project, or of doing nothing at all to increase the United Kingdom's aviation capacity. Those matters are the Government's responsibility and the Government's alone (paragraphs 2 and 281 to 285).
8. To a substantial extent, for the reasons we have set out, we agree with the analysis and conclusions of the Divisional Court. Like the Divisional Court, we have concluded that the challenges to the ANPS must fail on the issues relating to the operation of the Habitats Directive, and also on all but one of the issues concerning the operation of the Strategic Environmental Assessment Directive (paragraph 283).
9. However, we have concluded that the challenges should succeed in one important respect. This relates to the legislative provisions concerning the Government's policy and commitments on climate change, in particular the provision in section 5(8) of the Planning Act, which requires that the reasons for the policy set out in the ANPS "must ... 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". We have concluded, in particular, that the designation of the ANPS was unlawful by reason of a failure to take into account the Government's commitment to the provisions of the Paris Agreement on climate change, concluded in December 2015 and ratified by the United Kingdom in November 2016 (paragraphs 222 to 238 and 242 to 261).
10. We have concluded that the ANPS was not produced as the law requires, and indeed as Parliament has expressly provided. The statutory regime for the formulation of a

national policy statement, which Parliament put in place in the Planning Act, was not fully complied with. The Paris Agreement ought to have been taken into account by the Secretary of State in the preparation of the ANPS and an explanation given as to how it was taken into account, but it was not (paragraph 283).

11. That, in our view, is legally fatal to the ANPS in its present form. As we have explained, the normal result in a successful claim for judicial review must follow, that the court will not permit unlawful action by a public body to stand. Appropriate relief must therefore be granted, as normally it will be where unlawfulness in the conduct of the executive is established (paragraph 284). The Secretary of State did not contend that, if this was our conclusion, the outcome would or might have been no different – though such an argument was pursued by Heathrow Airport Ltd. In our view, it is necessary to grant a suitable remedy at this stage to ensure, at least, that the ANPS does not remain effective in its present unlawful form pending the outcome of its statutory review – under section 6 of the Planning Act – in the light of the Paris Agreement (paragraph 278). Section 6(5) of the Planning Act states that “[after] completing a review of all or part of a national policy statement the Secretary of State must do one of the following ... (a) amend the statement; (b) withdraw the statement’s designation as a national policy statement; (c) leave the statement as it is” (paragraph 39).
12. The parties have had an opportunity in the light of our draft judgments to make submissions to us on the appropriate remedy to reflect the conclusions we have reached. In the light of those submissions, we have concluded that the appropriate remedy is a declaration, the effect of which will be to declare the designation decision unlawful and to prevent the ANPS from having any legal effect unless and until the Secretary of State has undertaken a review of it in accordance with the relevant statutory provisions, including the provisions of section 6, 7 and 9 of the Planning Act 2008. Any such review would have to be conducted in accordance with the judgment of this court. The initiation, scope and timescale of any review must and will be a matter for the Secretary of State to decide (paragraphs 279 to 280).
13. Our decision should be properly understood. We have not decided, and could not decide, that there will be no third runway at Heathrow. We have not found that a

national policy statement supporting this project is necessarily incompatible with the United Kingdom's commitment to reducing carbon emissions and mitigating climate change under the Paris Agreement, or with any other policy the Government may adopt or international obligation it may undertake. The consequence of our decision is that the Government will now have the opportunity to reconsider the ANPS in accordance with the clear statutory requirements that Parliament has imposed (paragraph 285).

14. We should add finally that, having seen our judgment in draft, the Government has not opposed the grant of a remedy. Nor has the Government sought permission to appeal from our decision to the Supreme Court.