

Squaring the Circle? Regional Airport Expansion, Climate Change and the Planning Regime

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Airports are contested infrastructures. They are regarded both as icons of modernity and as a threat to a climate-neutral future. Judicial review is increasingly relied upon to determine the legality of planning permissions for further airport development in light of climate obligations. Focusing on regional airport development and the review of planning approvals for expansion at Bristol, Southampton and Stansted airports, this article shows how the relevant policies and legislation, as well as the courts in applying these, find cohesion between airport expansion and climate action. These efforts, nonetheless, are tantamount to an attempt at squaring the circle: the fundamental disconnect between climate commitments and the increase in greenhouse gas emissions from regional airport expansion remains unsettled.

INTRODUCTION

Airports are deeply engrained in modern life and the way in which societies operate and integrate. Seen as icons of modernity, they have facilitated the development of a global economy, enabled the movement of goods and people, and accordingly, reshaped the way people think about the world around them and their own place in it.¹ In the UK, airports are entrenched in the government's vision for growth, global competitiveness and connectivity.² But like any infrastructure ultimately based on fossil fuels, or the 'energy choices of the past',³ airports, and especially plans for their expansion, sit uncomfortably with the net-zero obligations to which countries around the globe, including the UK,⁴ are committed. Local campaigners against expansion at Bristol airport put the

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- 1 Sonja Dümpelmann, *Flights of Imagination: Aviation, Landscape, Design* (Charlottesville, VA: University of Virginia Press, 2014) ch 1.
- 2 See the next section below.
- 3 Sheila Jasanoff and Sang-Hyun Kim, 'Sociotechnical Imaginaries and National Energy Policies' (2013) 22 *Science as Culture* 189, 189.
- 4 Climate Change Act 2008 (2050 Target Amendment) Order 2019, s 1.

matter bluntly: such plans lead to an increase in greenhouse gas emissions and show a 'total disregard for the climate emergency we are in'.⁵

This disjunction is brought to the fore in judicial review of airport development planning permissions in England, which is the focus of the present study. In total, the UK has more than 60 licensed airports.⁶ Here, we zoom in on recent planning permissions for airport development in Bristol,⁷ Southampton,⁸ and Stansted⁹ that have been challenged before the High Court and dismissed. Applications for appeal in all three cases have been denied. There is more, however, in the way of airport development planning. In August 2022, the Secretary of State granted permission for the Manston airport to open as a freight hub (after having been closed for 15 years) following the High Court's order to quash the initial development consent order.¹⁰ Judicial review of the Secretary of State's decision was dismissed, which the campaigners have announced they will appeal.¹¹ Luton airport has submitted a planning application to increase its passenger cap, which, at the time of writing, is being reviewed by the Planning Inspector. Also Farnborough, an airport that caters mainly for private jets, has submitted a formal application to increase its flight limits. Moreover, Gatwick airport has submitted its development consent order to further expand, and Heathrow airport is expected to do the same 'in the near future'¹² following the high-profile Supreme Court decision on the legality of the Airport National Policy Statement (ANPS).¹³ In light of these expansion plans, it is reported that the 'UK's top airports aim to fly 150 [million] more passengers a year' – a figure that would lift current numbers by 60 per cent.¹⁴ This shows the high ambition to expand on the part of the aviation sector but also some of the legal pushback, in the form of judicial review of planning approvals and development consent orders, which such plans attract.

This article stems from an interest in exploring how two seemingly contradictory objectives – on the one hand, addressing climate change, and on the other, stimulating growth and connectivity through airport expansion that

5 As cited in Amber Hill, 'Bristol Airport Expansion Sparks Environmental Outrage' *North Somerset Times* 2 February 2023.

6 See the UK Civil Aviation Authority for further statistical finds on the topic at <https://www.caa.co.uk/data-and-analysis/uk-aviation-market/airports/> [<https://perma.cc/A399-8UQA>].

7 *Bristol Airport Action Network Coordinating Committee (acting through Stephen Clarke) v Secretary of State for Levelling Up, Housing and Communities, Bristol Airport and North Somerset Council* [2023] EWHC 171 (Admin) (Bristol).

8 *Goesa Ltd, R (On the Application Of) v Eastleigh Borough Council and Southampton International Airport Limited* [2022] EWHC 1221 (Admin) (Southampton).

9 *Ross and Sanders v Secretary of State for Transport and Uttlesford District Council and Stansted Airport Limited* [2020] EWHC 226 (Admin) (Stansted).

10 Department of Transport, Application for the Proposed Manston Airport Development Consent Order (18 August 2022).

11 See Jenny Dawes, 'Support Judicial Review of SECOND Manston Airport DCO' (CrowdJustice) at <https://www.crowdjustice.com/case/support-judicial-review-of-sec/> [<https://perma.cc/GXF2-LCZL>].

12 For updates on UK airport development, see Aviation Environment Federation, 'UK Airport Expansions' at <https://www.aef.org.uk/uk-airport-expansions/> [<https://perma.cc/PJ4Z-BNL8>].

13 *R (on the application of the Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52 (Heathrow).

14 Philip Georgiadis, 'UK's Top Airports Aim to Fly 150mn More Passengers a Year' *Financial Times* 19 March 2023.

increases greenhouse gas emissions – are understood in the relevant legal and policy framework and by the courts in applying these. From the viewpoint of anti-expansion campaigners, the English planning system concerning airport expansion has been ‘rigged by the government to ignore the climate crisis’.¹⁵ The concern that the planning regime favours ‘economic benefits’ frames is not unwarranted.¹⁶ Yet, an inquiry into regional airport development – and more precisely, judicial review of planning approvals for expansion at Bristol, Southampton and Stansted airports – shows that the reason why it is difficult for these legal challenges to succeed is not only because the relevant government policy is pro-aviation but also because the local planning authorities are not under any statutory obligations to ensure that climate neutrality is achieved by the target date. Rather, their task is merely to assess that the aviation emissions resulting from regional airport development would not be so significant as to have a material impact on the government’s ability to meet its climate target. The planning framework does not give the local decision-makers much guidance as how to assess such impact, which has left the reviewing courts to rely on the rather blunt test of *Wednesbury*-unreasonableness¹⁷ in scrutinising these planning decisions. It is thus a combination of statutory detail, policy, and the court’s review-standards that permits the fundamental disconnect between climate commitments and an increase in greenhouse gases due to regional airport development to remain unsettled.

This article is structured as follows. The following section demonstrates the contested nature of airport expansion, most recently in light of climate obligations and how, in the relevant policies, the UK government attempts to reconcile the two through reliance on offsetting, technological advancement and market-based mechanisms. As shown in the third section, these policies are significant, and weigh heavily in the decision-making processes concerning airport expansion approvals but without providing any criteria for how planning authorities should assess aviation emissions in this context. This section also shows that, while neither climate legislation nor planning law sanctions airport development, deciding *how* to regulate climate impacts from increased aviation due to airport expansion, and *who* carries this obligation is not straightforward. Nor has it been satisfactorily resolved. That is all brought to the fore in judicial review of planning approvals to expand Bristol, Southampton and Stansted airports, discussed in the fourth section. In the fifth section the implications of this line of case law are considered, with particular attention to what it shows in terms of the role of judicial review in this context, and the need for the regulatory and policy landscape to more rigorously address the question of how planning authorities are to factor aviation emissions into their decisions. The final section concludes.

15 Lewis Clarke, ‘Campaigners Fighting Bristol Airport Expansion Plans Have Appeal Dismissed by Courts’ *Bristol Live* 18 May 2023.

16 See Chris Hilson, ‘Framing Fracking: Which Frames Are Heard in English Planning and Environmental Policy and Practice?’ (2015) 27 *Journal of Environmental Law* 177.

17 *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223.

AIRPORTS – A SITE OF CIRCLES AND SQUARES

Airports have long been a symbol of progress, modernity and power.¹⁸ They are important drivers of economic development and have facilitated connectivity not only in labour markets but also between individuals, cultures and countries. As such, airports are deeply embedded in social practices around the world.¹⁹

In the UK, governments – on both side of the political spectrum – have long treated airports as ‘sacrosanct’.²⁰ This is reflected in the long list of national policies on aviation, and transportation more generally. In *Flightpath to the Future*, a policy document laying out the strategic framework for the UK aviation sector, it is explained how commercial aviation – and by extension airports – ‘has been fundamental to the growth and prosperity of the UK’ and how, ‘by providing fast, direct links to hundreds of destinations worldwide, it has helped make [the UK today] one of the world’s best-connected and most successful trading nations, and among the ten most visited countries globally’.²¹ Similarly, the *Aviation Policy Framework* recognises the aviation sector as a major contributor to the economy, and stresses the need to ensure that the UK maintains its position as ‘one of the best connected countries in the world’.²² This is regarded as particularly important post-Brexit.²³ Along the same lines, the *General Aviation Strategy* projects the aviation sector as ‘a flourishing, wealth generating and job producing sector of the economy’.²⁴ Out of more than 60 airports in the UK, Heathrow is considered the ‘jewel in the crown’.²⁵ it is not only the key national airport but a significant global hub – that is, an airport through which airlines choose to connect flights. Seen this way, building Heathrow’s Terminal 5 was a process of creating ‘a new gateway to Britain’.²⁶

Regional airports may not enjoy the same international status as hubs but they too are entrusted important connectivity tasks. Besides alleviating congestion at major airports, including Heathrow,²⁷ they are prescribed a vital role in helping to assure domestic cohesion,²⁸ promising to ‘bring ... us closer

18 Alain de Botton, *A Week at the Airport* (New York, NY: Vintage, 2010) 13.

19 Dümpelmann, n 1 above, 6.

20 Steven Griggs and David Howarth, *The Politics of Airport Expansion in the United Kingdom: Hegemony, Policy and the Rhetoric of ‘Sustainable Aviation’* (Manchester: Manchester University Press, 2013) 57.

21 Department of Transport, *Flightpath to the Future* (May 2022), Ministerial foreword at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1079042/flightpath-to-the-future.pdf [<https://perma.cc/JUT8-XXKV>].

22 *Aviation Policy Framework* Cm 8584 (March 2013) at [9] at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/153776/aviation-policy-framework.pdf [<https://perma.cc/DW6F-NWCJ>].

23 *Flightpath to the Future*, n 21 above.

24 Department for Transport, *General Aviation Strategy* (March 2015), 8 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/417334/General_Aviation_Strategy.pdf [<https://perma.cc/JH7Y-FQFG>].

25 Griggs and Howarth, n 20 above, 83.

26 Richard Rogers+ Architects, *From the House to the City* (Chipping Campden: Fiell Publishing, 2010) 183.

27 See M. Nadia Postorino, *Regional Airports* (Southampton: WIT Press, 2011).

28 See Steve Melia, *Roads, Runways and Resistance: From the Newbury Bypass to Extinction Rebellion* (London: Pluto Press, 2021) 106.

together'.²⁹ In the view of the *Aviation Policy Framework*, 'For more remote parts of the UK, aviation is not a luxury, but provides vital connectivity'.³⁰ Moreover, regional airports are described as providing critical stimuli to the local economy, and in this way, operating as 'cities in themselves, creating local jobs and fuelling opportunities for economic rebalancing in the wider region or area',³¹ especially through tourism. This point was stressed in *R (on the application of Doncaster Metropolitan Borough Council) v Doncaster Sheffield Airport Ltd*,³² which is a case involving a challenge by the local authorities to the closure of an airport by a private company. It was argued that the closure of the airport would have a detrimental impact on 'the local and regional economy, resulting in the loss of jobs and opportunities for local people, negatively impacting economic prosperity in the South Yorkshire region and beyond, at a time where many are already struggling with the cost of living crisis'.³³ Although the case is unusual, and the challenge ultimately failed, it still shows the economic significance ascribed to regional airports not only by the central government but also by some local authorities.

Airport development is not without controversy, however. The Environmental Justice Atlas – an online database of environmental conflicts – currently reports more than 100 global airport projects that have generated serious conflicts involving land acquisition, displacement of people, environmental degradation, air pollution, health issues and climate.³⁴ Some of these conflicts are dramatic and violent.³⁵ Others accrue slowly. In tracking 2,000 years of history of the Heathrow region, Philip Sherwood shows how, in more recent years, Heathrow airport changed the social structure of the communities and those living around it,³⁶ with tensions eventually erupting into a battle against the construction of a third runway.³⁷

Popular resistance to airport expansion in the UK first took hold in the 1960s when local residents and conservation campaigners called for 'the protection of rural areas, agricultural land and traditional ways of life'.³⁸ Until the 1990s, most grievances and legal actions against airport development concerned noise and air pollution,³⁹ but since the early 2000s,⁴⁰ climate concerns have emerged

29 *Aviation Policy Framework*, n 22 above at [1.21].

30 *ibid* at [1.20].

31 *ibid*. Similar support is cited in Manston Development Consent Order, n 10 above at [50].

32 [2022] EWHC 3060 (Admin).

33 *ibid* at [5].

34 See 'Map of Airport-Related Injustice and Resistance' (Global Atlas of Environmental Justice) <https://ejatlas.org/featured/airport-conflict-around-the-world> [<https://perma.cc/VD7V-KLKK>].

35 See for example the violent history of the building of the Narita airport in Japan, David E. Apter and Nagayo Sawa, *Against the State: Politics and Social Protest in Japan* (Cambridge, MA: Harvard University Press, 1986).

36 Philip Sherwood, *Heathrow: 2000 Years of History* (Cheltenham: The History Press, 2nd ed, 2011).

37 Philip Sherwood, 'Letters: Heathrow and the "Aviation Mafia"', *The Guardian* 8 June 2018.

38 Griggs and Howarth, n 20 above, 99.

39 *ibid*. See also later cases on noise pollution that went before the Strasbourg court: *Hatton and Others v United Kingdom* Application No 36022/97, Merits and Just Satisfaction, 8 July 2003; *Trevor Allen and Others v United Kingdom* Application No 5591/07, Admissibility, 6 October 2009.

40 See for example *The Queen (on the application of Anne Marie Griffin) v London Borough of Newham and London City Airport Ltd* [2011] EWHC 53 (Admin).

– recently in the shape of judicial review of planning approvals (or development consent orders for projects characterised as ‘nationally significant’)⁴¹ for airport expansion. These ‘climate wars’⁴² are waged between what one side regards as ‘indulgent environmentalists – blissfully unaware of ... economic plight’ and the other as ‘ecological vandals, divorced from the reality of our climate emergency’.⁴³

Obviously, it is possible to both enjoy the connectivity provided by airports and be concerned about the climate impact of air travel; but still, there is a high level of polarisation to these debates.⁴⁴ This finds expression in the question whether airport expansion is lawful in light of climate obligations and policy. In challenging the planning permission to expand Stansted airport, local litigants – one acting as chairman of the ‘Stop Stansted Expansion’ campaign – argued that in order to comply with the government’s climate obligations, the planning decision-maker would have to ‘refuse to authorise any further increases in aircraft or passenger movements’ – at least until the emissions trading scheme, which had yet to be implemented at the time, became ‘an effective reality’.⁴⁵ That aviation (and thereby airport) expansion should be paused is not the position of the UK government, however. On the contrary, as per the *Net Zero Aviation Strategy*, dealing with climate change is ‘not intended to clip the wings of the [aviation] sector’.⁴⁶ This is not to say that climate commitments are ignored – the same strategy sets the ambition for ‘all domestic flights to achieve net zero by 2040 and for all airport operations in England to be zero emissions by the same year’.⁴⁷ Yet the policy is ‘thin’⁴⁸ on legal detail as to how exactly further airport development is reconcilable with climate obligations and there is a high degree of uncertainty, as discussed in the next section, regarding the effectiveness of the proposed climate measures to deal with aviation emissions from regional airport development.

41 See the following section below.

42 Jack Shenker, ‘Meet the “Inactivists”, Tangling Op the Climate Crisis in Culture Wars’ *The Guardian* 11 November 2021.

43 *ibid.*

44 Paul Chiambaretto and others, ‘Where Does Flygskam Come From? The Role of Citizens’ Lack of Knowledge of the Environmental Impact of Air Transport in Explaining the Development of Flight Shame’ (2021) 93 *Journal of Air Transport Management* 102049.

45 *Carol Barbone and Brian Ross (on behalf of Stop Stansted Expansion) v The Secretary of State for Transport and others* [2009] EWHC 463 (Admin) (*Barbone*) at [74].

46 Department of Transport, *Jet Zero Strategy: Delivering Net Zero Aviation by 2050* (19 July 2022) at <https://www.gov.uk/government/publications/jet-zero-strategy-delivering-net-zero-aviation-by-2050> [<https://perma.cc/ZF5R-H53Q>].

47 *ibid.*, foreword.

48 As described in Elizabeth Fisher, ‘Through “Thick” and “Thin”: Comparison in Administrative Law and Regulatory Studies Scholarship’ in Peter Cane and others (eds), *The Oxford Handbook of Comparative Administrative Law* (Oxford: OUP, 2020) 615, 624.

Indeed, in addition to carbon-trading and carbon-capping scenarios,⁴⁹ compatibility between aviation and climate neutrality is found by relying on ‘rapid technology development’,⁵⁰ including sustainable fuels and offsetting. The *Net Zero Strategy*, which sets out policies and proposals for decarbonising all sectors of the UK economy by 2050, predicts that by mid-century, flying will be ‘guilt-free’ thanks to ‘planes [that] will be zero emission’.⁵¹ This vision is adhered to both in the revised *Net Zero Growth Plan* and the *Decarbonising Transport Strategy*,⁵² which have a similarly optimistic outlook on climate action, insisting that climate neutrality will be met without having to sacrifice the things we love – flying included.⁵³ The UK is not alone in relying on offsets and technological advancement to achieve net zero – working groups of the Intergovernmental Panel on Climate Change similarly insist on these as a ‘necessary element of a mitigation portfolio to achieve net zero’.⁵⁴ The government pigeonholes aviation as one of the sectors, alongside agriculture and industry, which is ‘difficult to decarbonise completely by 2050’,⁵⁵ presenting offsetting as the viable option to ensure climate neutrality. This position is guided by a dominant vision where the ‘priority is typically to decarbonise the energy system and to do so without changing existing “standards” of living’.⁵⁶ At the same time, it is acknowledged that there ‘is significant uncertainty over the likely future costs of these measures and their impact on carbon’.⁵⁷ Climate campaigners have long branded the reference to technology in this regard

49 The carbon trading scenario involves trading aviation emissions as part of the UK ETS scheme, and carbon-capping is the idea that aviation emissions would be limited to the Committee on Climate Change’s planning assumptions regarding greenhouse gas emissions levels, see HM Government, *Beyond the Horizon: The Future of UK Aviation. Making Best Use of Existing Runways* (June 2018) at [1.15]–[1.16] at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714069/making-best-use-of-existing-runways.pdf [<https://perma.cc/TGU3-9FXL>] (*Making Best Use of Existing Runways*).

50 HM Government, *Powering Up Britain: The Net Zero Growth Plan* (March 2023) at [64], [68] at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147457/powering-up-britain-net-zero-growth-plan.pdf [<https://perma.cc/A9F3-Z2FJ>].

51 HM Government, *Net Zero Strategy: Build Back Greener* (October 2021), foreword at [9] at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033990/net-zero-strategy-beis.pdf [<https://perma.cc/682C-K7AT>] (*Net Zero Strategy*).

52 Department for Transport, *Decarbonising Transport: A Better, Greener Britain* (July 2021), part 2 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1009448/decarbonising-transport-a-better-greener-britain.pdf [<https://perma.cc/R4TK-VNSU>].

53 *Net Zero Strategy*, n 51 above at [10]. This ‘win-win’ approach is prevalent in UK climate action, see Sanja Bogojević, ‘Legal Dilemmas of Climate Action’ (2023) 35 *Journal of Environmental Law* 1.

54 *Climate Change 2022: Mitigation of Climate Change*, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, ch 12.

55 According to the *Net Zero Strategy*, n 51 above at [184], ‘sectors such as industry, agriculture and aviation will be difficult to decarbonise completely by 2050’.

56 Elizabeth Shove, Frank Trentmann and Matt Watson, ‘Infrastructure in practice: Implications for the future’ in Elizabeth Shove and Frank Trentmann (eds), *Infrastructure in Practice: The Dynamics of Demand in Networked Societies* (Abingdon: Routledge, 2019) 210, 210–211.

57 *Making Best Use of Existing Runways*, n 49 above at [1.20].

as ‘greenwashing’⁵⁸ – ClientEarth used the term in a judicial review of the legality of the Net Zero Strategy, which, on this particular point, failed.⁵⁹

Pushback against the government’s plans to marry aviation and airport expansion with environmental demands is not a recent development. Tracing the government’s politics of airport expansion since the Second World War, Steven Griggs and David Howarth show how the government’s twin policy support for aviation expansion and climate commitment is simply ‘a desire to have their cake and eat it’⁶⁰ or, indeed an attempt at ‘squaring the circle’.⁶¹ These policies, as the next section shows, weigh heavily in the decision-making on airport expansion, but they provide limited detail on how to assess aviation emissions when deciding and reviewing planning decisions on regional airport development.

THE ‘LEGALNESS’⁶² OF AIRPORT EXPANSION

The planning regime ‘shapes the nature and location of any infrastructure’.⁶³ To understand the lawfulness of regional airport expansion in England thus requires understanding the ‘grammar’ of English planning law.⁶⁴ This includes sorting out how the regime defines ‘development’ and how this determines who decides on planning applications; which considerations must, may, and may not be taken into account; the role entrusted to various forms of policies; the relationship to other legal frameworks – for our purposes, climate law – how disputes are resolved; and much else. The planning regime, in other words, is a dense legal and policy space. This section is not a general course in planning-law language but rather sets out to make two points relevant to the debate about regional airport development in light of climate obligations.

First, the planning regime is concerned with projects relating to *a* place whereas, infrastructure, such as airports, are ‘things and also the relation between things’ which makes regulating them tricky.⁶⁵ To put it differently, airports have both local and global impact – they relate to a particular place but also enable movement elsewhere and determining the relationship between the two is not

58 Helen Coffey, ‘COP26: Climate Activists to Target 10 UK Airports this weekend to Protest Expansion’ *Independent* 3 November 2021.

59 *The Queen (on the application of Friends of the Earth Limited, ClientEarth, Good Law Project and Joanna Wheatley) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841.

60 Griggs and Howarth, n 20 above, 300.

61 *ibid.*

62 The term is borrowed from Fisher, who argues that the legal frames provided by the planning regime determine the ‘legalness’ of, in her case, wind turbines, Elizabeth Fisher, ‘Law and Energy Transitions: Wind Turbines and Planning Law in the UK’ (2018) 38 *Oxford Journal of Legal Studies* 528.

63 Maria Lee, ‘The Importance of Taking English Planning Law Scholarship Seriously’ in Maria Lee and Carolyn Abbott (eds), *Taking English Planning Law Scholarship Seriously* (London: UCL Press, 2022) 3, 6.

64 Joanna Bell, ‘Embracing the Unwanted Guests at the Judicial Review Party: Why Administrative Law Scholars Should Take Planning Law Seriously’ in Lee and Abbott *ibid.*, 229.

65 Brian Larkin, ‘The Politics and Poetics of Infrastructure’ (2013) 42 *Annual Review of Anthropology* 327, 329.

straightforward.⁶⁶ Arguably, airports are best seen as ‘glocal’ in that they sit at the nexus between the local and the global.⁶⁷ This, however, leaves open the legal question of *who* carries the climate responsibility for their operation – is it the global, national or, in the case of regional airports, local authorities – and *how* to account for this in a planning context.

Second, and following from the above, *who* decides whether the application for airport development is approved will depend on whether the set infrastructure is deemed ‘nationally significant’ or not. Projects that are ‘nationally significant’ are decided by the Secretary of State, who is also responsible for ensuring that climate obligations are met under section 1 of the Climate Change Act 2008. Other airport development projects, often including regional airports, are instead assessed by local authorities, who, as will be explained next and in the subsequent section, have limited jurisdiction to assess aviation emissions. This not only creates discrepancies in how different airport development projects are approached in planning law, it also leaves the question of the legal effects of increased greenhouse gas emissions from ‘non nationally significant’ infrastructures in limbo.

Aviation emissions, planning law and regional airport expansion

When the UK enacted the Climate Change Act in 2008, it became the first country to provide a national climate framework underpinned by legally binding targets, which, following revision, are set to achieve climate neutrality by 2050. Its working model is to reach this target through five-year cycles of carbon budget planning. Notably, aviation emissions were not included in the original budgeting beyond the obligation on the part of the Secretary of State to make a statement to parliament about how aviation emissions would be treated in each five-year carbon budget.⁶⁸

Pinpointing *who* carries the responsibility to address aviation emissions is a long standing legal dilemma. The dominant view has been that it is an international matter due to the global nature of air travel and its climate impacts.⁶⁹ Even so, it has not been obvious *which* international regime is best suited to address this. The international climate framework was deemed inappropriate due to its underpinning principle of differential treatment of developed and developing countries, which a regulatory framework for aviation emissions was thought to undermine.⁷⁰ This is why in 1998, the Kyoto Protocol delegated

66 A case in point is the jurisdictional battle regarding whether aviation emissions should be addressed at the global or the EU level, see Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* ECLI:EU:C:2011:864.

67 Dimpelmann, n 1 above, 2.

68 Climate Change Act 2008, s 10(2)(i).

69 This view is often expressed in the form that ‘[c]limate change is a global phenomenon, which can only be tackled on a global basis’, as seen in *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 at [560].

70 Beatriz Martinez Romera and Harro van Asselt, ‘The International Regulation of Aviation Emissions: Putting Differential Treatment into Practice’ (2015) 27 *Journal of Environmental Law* 259.

the issue of aviation emissions to the International Civil Aviation Organisation (ICAO)⁷¹ – an organisation established in 1944 with the aim to serve as the ‘constitutional framework for international airspace’ and ensure the ‘safe and orderly’ development of international civil aviation.⁷² Whether the ICAO has an obligation to address climate change is open to debate, as is the scope of the ICAO’s jurisdiction on climate matters.⁷³ In any case, in 2016, it launched the ‘Carbon Offset Reduction Scheme for International Aviation’ (CORSIA) – a global market-based measure to offset greenhouse gas emissions that ‘cannot be reduced through the use of technological improvements, operational improvements, and sustainable aviation fuels’.⁷⁴ The UK is a participant in the scheme,⁷⁵ but at the time of writing, the scheme is still in its pilot stage.

To complement these international efforts, and in line with recommendations from the Committee on Climate Change,⁷⁶ from 2033 onwards aviation emissions will, for the first time, be included in the government’s carbon budgeting. To ensure that these targets are met, the regulatory approach includes market-based efforts and technology-focused initiatives. The former is the UK’s emissions trading scheme (UK ETS), which operates as a national market where emissions allowances to emit greenhouse gases, including those from the aviation sector, can be traded.⁷⁷ Under this scheme, the aviation industry receives allowances free of charge, which, together with other market-design choices, prompts the question whether the scheme will be effective in reducing greenhouse gas emissions – a point raised in the case law that will be discussed in the next section below.⁷⁸

The second approach covers technology-based initiatives, found in the government’s ‘decarbonising transport’ pledge, and includes the establishment of the so-called Jet Zero Council – ‘a pioneering partnership between the government and the aviation sector’ – that seeks to ‘fast-track zero emission flight and the production of sustainable aviation fuels’.⁷⁹ This is not uncontroversial. It

71 Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997, 2303 UNTS 162, Art 2(2).

72 Baine P. Kerr, ‘Clear Skies or Turbulence Ahead? The International Aviation Organization’s Obligation to Mitigate Climate Change’ (2020) 16 *Utrecht Law Review* 101, 103.

73 Beatriz Martinez Romera, *Regime Interaction and Climate Change: The Case of International Aviation and Maritime Transport* (London: Routledge, 2019); Alejandro Piera Valdes, *Greenhouse Gas Emissions from International Aviation: Legal and Policy Challenges* (The Hague: Eleven International Publisher, 2015).

74 See ICAO’s website at <https://www.icao.int/environmental-protection/CORSIA/Pages/default.aspx> [<https://perma.cc/U3LS-6K4P>].

75 Air Navigation (Carbon Offsetting and Reduction Scheme for International Aviation) Order 2021.

76 Committee on Climate Change, ‘Letter: International Aviation and Shipping and Net Zero’ 24 September 2019 at <https://www.theccc.org.uk/publication/letter-international-aviation-and-shipping/> [<https://perma.cc/M32A-NQG5>].

77 The Greenhouse Gas Emissions Trading Scheme Order 2020.

78 Although civil penalties can be issued for the failure to, for example, make and comply with aviation emissions monitoring plans and report these, see, *ibid*, ch 2. For a report on the effectiveness of the UK ETS, see UK Government, *Report on the Functioning of the UK Carbon Market for 2021 and 2022* (July 2023) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1174408/functioning-of-the-uk-carbon-market.pdf [<https://perma.cc/KC9Z-MKKR>].

79 *Decarbonising Transport: A Better, Greener Britain*, n 52 above at [116].

is warned that relying on technologies that have yet to be operational on a large scale risks missing the legally binding climate target.⁸⁰ What is more, sustainable aviation fuels raise their own set of legal conundrums regarding how to secure access to large quantities of agricultural land for the production of renewable fuel, as well as renewable electricity – both of which are in high demand for other uses.⁸¹

This is all to say that addressing aviation emissions – both globally and domestically – is beset by legal complexities. These legal frameworks are in a constant state of flux due to new scientific findings and subsequent legal developments, meaning that decision-makers operate ‘in conditions of persistent uncertainty’⁸² when deciding airport expansion applications. However, whether the decision concerns a ‘nationally significant’ infrastructure or not permits different decision-making routes.

The Planning Act 2008 was introduced to simplify decision-making for large-scale infrastructure deemed ‘nationally significant’, and foremost the development of Heathrow airport. To this effect, it created a two-stage process involving, first, the designation of National Policy Statements (NPS), and second, the Development Consent Order (DCO) with explicit references to climate change under section 5(8), requiring that NPS ‘include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaption to, climate change’, and under section 10(3) to ‘have regard to ... climate change’. In *Heathrow* the ANPS (published by the Secretary of State for Transport and supporting the building of a third runway at Heathrow), relied on views expressed in 2015 by the Airports Commission that such expansion would be consistent with the UK’s climate obligations – this, however, predated the UK’s net-zero commitment, and the inclusion of emissions aviation therein. On a narrow interpretation of what counts as ‘Government policy’ the Supreme Court decided that the minister had not breached his statutory duties in relation to his climate obligations.⁸³ The relevant point here is that the planning decision-making process for ‘nationally significant’ airports, such as Heathrow, is streamlined and centralised – two characteristics absent from the process of determining planning applications for regional airports.

The Planning Act 2008 lays down the criteria for infrastructure projects classified as ‘nationally significant’. This covers ‘the construction of an airport’; ‘the alteration of an airport’; and ‘an increase in the permitted use of an airport’ that will ‘increase by at least 10 million per year the number of passengers

80 Element Energy, ‘The Role of Aviation Demand Reduction in UK Decarbonisation’ (Report for Aviation Environment Federation (AEF) (April 2022) at <https://www.aef.org.uk/uploads/2022/05/The-Role-of-Aviation-Demand-in-Decarbonisation-Full-Report.pdf> [<https://perma.cc/BR3Y-LGLQ>].

81 The Royal Society, *Net Zero Aviation Fuels – Resource Requirements and Environmental Impacts* (Policy Briefing, February 2023) at <https://royalsociety.org/-/media/policy/projects/net-zero-aviation/net-zero-aviation-fuels-policy-briefing.pdf> [<https://perma.cc/5DKX-GN4U>].

82 Joanna Bell and Elizabeth Fisher, ‘The Heathrow Case in the Supreme Court: Climate Change Legislation and Administrative Adjudication’ (2023) 86 MLR 226, 231.

83 *Heathrow*, n 13 above at [105]–[106]. This is not to overlook that a number of issues of substance were postponed by the court. See Bell and Fisher, *ibid* for a detailed discussion of the judgment.

for whom the airport is capable of providing air passenger transport services'.⁸⁴ Regional airport developments, as outlined in the following section, tend to involve projects that aim to facilitate and improve air travel, for example, by extending existing runways and terminals, or enlarging existing car parks adjacent to airports, but that do not necessarily reach the quantity threshold required by statute to be considered 'nationally significant'. This has important legal implications: it means that regional airport planning applications fall not to the Secretary of State as outlined in the Planning Act 2008 but to local planning authorities.⁸⁵

Section 70(2) of the Town and Country Planning Act 1990 (TCPA 1990) outlines the key obligations under which local authorities operate in this context: they shall have regard to 'the provisions of the development plan, so far as material to the application', as well as 'any other material considerations' in deciding a planning permission application.⁸⁶ In contrast to the ANPS, which outlines the government's support for (in this case) expansion at Heathrow, the development plan is a locally prepared document, made up largely of local plans, as well as neighbourhood plans, which typically cover the area of a parish council.⁸⁷ The development plan does not always describe how planning applications should be decided, or in this case, the role that aviation emissions should play in the decision-making process. As stated in the North Somerset Core Strategy relevant to the *Bristol* case, 'Development of the [Bristol] Airport is led by its owners whose responsibility it is to ensure that the environmental impacts of growth are addressed to the satisfaction of the council or other relevant decision-maker'.⁸⁸ Yet no guidance is provided of what counts, or could count as 'environmental impacts', nor is there any mention of benchmarks to help streamline such assessments.

As explained in *Barratt Development Plc v The City of Wakefield Metropolitan District Council*, development plans are subject to 'national policies and guidance issued by the Secretary of State',⁸⁹ including the National Planning Policy Framework 2021 (NPPF 2021), which is a material consideration.⁹⁰ The NPPF 2021 insists on 'promoting sustainable transport' but adds little on the subject of airports beyond stipulating that '[p]lanning policies should ... recognise the importance of maintaining a national network of general aviation airfields, and

84 Planning Act 2008, s 23 (emphasis added).

85 Although, as discussed in the next section below, there are three exceptions to this rule.

86 Planning and Compulsory Purchase Act 2004 (PCPA 2004), s 38(6) adds that planning applications must be determined in accordance with the development plan 'unless material considerations indicate otherwise'.

87 Alistair Mills, 'The Interpretation of Planning Policy: The Role of the Court' (2022) 34 *Journal of Environmental Law* 419, 421.

88 North Somerset Council, *Core Strategy* (January 2017) at [3.296] at <https://www.n-somerset.gov.uk/sites/default/files/2022-06/A1%20-%20North%20Somerset%20core%20strategy.pdf> [<https://perma.cc/J37G-TNDG>].

89 *Barratt Development plc v The City of Wakefield Metropolitan District Council* [2010] EWCA Civ 897 at [6].

90 Ministry for Housing, Communities & Local Government, *National Planning Policy Framework 2021* (NPPF 2021) at [4] at <https://webarchive.nationalarchives.gov.uk/ukgwa/20230830172251/> <https://www.gov.uk/government/publications/national-planning-policy-framework-2> [<https://perma.cc/VX4J-SSS2>]. Note that the NPPF has since been updated for the 2023 version.

their need to adapt and change over time'.⁹¹ Whether this is meant as support for further development of airports or for the need for increased climate adaption is not specified, though elsewhere the document lists 'Meeting the challenge of climate change'⁹² as one of its objectives and adds, in a footnote, that this should be 'in line with the objectives and provisions of the Climate Change Act 2008'.⁹³ In the section about airports, nonetheless, it states that the General Aviation Strategy needs to be 'tak[en] into account'. This strategy envisions a far less ambiguous role for airports and the aviation sector. The latter is seen as 'a flourishing, wealth generating and job producing sector of the economy',⁹⁴ which requires support '[t]hrough deregulation' and 'infrastructure that is appropriate in its extent, capability and location to deliver a mixed, modern fleet of aircraft flying between appropriately equipped aerodromes'.⁹⁵

The Aviation Policy Framework,⁹⁶ which planning authorities must also consider, starts with a stark assertion: 'The Government's primary objective is to achieve long-term economic growth'.⁹⁷ It then continues, explaining that the aviation sector 'is a major contributor to the economy and we support its growth within a framework which maintains a balance between the benefits of aviation and its costs, particularly its contribution to climate change'.⁹⁸ How exactly such a balance should be struck and by whom is, however, left undressed.

The most detailed policy on the implications for the UK's carbon commitments in the case of further airport expansion beyond Heathrow is found in *The Future of UK Aviation: Making best use of existing runways* (MBU). In line with the ANPS,⁹⁹ this brief, seven-page document expresses the government's encouragement for airports beyond Heathrow 'making best use of their existing runways' yet 'leaves it up to the local, rather than national government, to consider each case on its merits ... taking careful account of all relevant considerations, particularly economic and environmental impacts and proposed mitigations'.¹⁰⁰ Against this background, MBU sets out three significant but problematic points on the relationship between airports and climate commitments, to which we will return in the next section. First, and somewhat clumsily, it states 'There are, however, some important environmental elements which should be considered at the national level. The government recognises that airports making the best use of their existing runways could lead to increased air traffic which

91 *ibid* at [106(f)].

92 *ibid* at [14].

93 *ibid* at [45].

94 *General Aviation Strategy*, n 24 above at [8].

95 *ibid* at [9].

96 *Aviation Policy Framework*, n 22 above.

97 *ibid* at [5].

98 *ibid*.

99 Department for Transport, *Airport 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, June 2018) at [1.39] 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 [<https://perma.cc/7B44-RVQ2>].

100 *Making Best Use of Existing Runways*, n 49 above at [1.20].

could increase carbon emissions.¹⁰¹ This suggests that whereas airport expansion beyond Heathrow needs to be considered on a case-by-case basis by the local authorities, aviation emissions are a *national* matter. The document, however, leaves open the question whether aviation emissions may still be relevant for the local planning authorities to consider in this context. Second, it explains that the Aviation Strategy will be used to ensure progress on policies ‘towards tackling aviation carbon’.¹⁰² This is somewhat cryptic since aviation strategies, as outlined the preceding section, are continuously updated and MBU does not specify (beyond capitalising ‘Aviation Strategy’) *which* strategy should be considered in the case of revision. On this note, it is recognised that ‘[o]ther [aviation emission] measures are likely to be available and may turn out to be more cost effective or have greater abatement potential’ than what, at the time of publication, is considered in MBU. But this does not address the question which measures should be assessed with reference to ‘mitigation’ considerations. Rather, the vague promise is made that ‘[o]n balance ... it is *likely* that these or other measures would be available to meet the planning assumption under this policy’.¹⁰³ Third, the forecasts made about the ability of said climate measures meant to deal with aviation emissions are based on modelling by the Department of Transport. There is no guidance, however, regarding how planning decision-makers should use this data, nor whether alternative aviation emissions-forecasts should be relied on or, at least, considered.

As flagged by Alistair Mills, the development plan may ‘pull in different directions’ and national policy may indicate ‘a different result to the development plan, and a policy document (including national policy) may have aims which cannot be reconciled’ meaning that planning authorities will have to rely on documents that are not ‘internally consistent’.¹⁰⁴ The Court of Appeal makes a similar point in *Corbett v Cornwall Council*.¹⁰⁵ The issue here, however, does not concern the lack of uniformity in the relevant policy but the lack of detail. This is significant as the broad brush used to explain how aviation expansion and climate obligations will be reconciled creates uncertainty – both for the planning authorities in deciding planning applications for regional airport development, and for the courts in reviewing these.

JUDICIAL REVIEW OF PLANNING DECISIONS FOR REGIONAL AIRPORT DEVELOPMENT

As outlined in the section above, airports are contested infrastructures. In law, this contestation is often manifested in the form of judicial review of planning permissions or, in the case of ‘nationally significant’ infrastructure, development consent orders. A version of the question how to reconcile airport expansion and climate obligations found its way to the Supreme Court in *Heathrow* where

101 *ibid* at [1.11].

102 *ibid* at [1.12].

103 *ibid* at [1.21] (emphasis added).

104 Mills, n 87 above, 421.

105 [2022] EWCA Civ 1069.

the Court, more precisely, allowed an appeal against the Court of Appeal's decision that there had been a series of legal errors in the designation of the ANPS, including a failure to explain how the set national policy 'takes account of Government policy relating to the mitigation of, and adaption to, climate change', as required by the Planning Act 2008.¹⁰⁶ This case has received much attention from legal scholars and tends to be the obvious starting point when debating aviation expansion in England in light of climate concerns.¹⁰⁷ There are many good reasons for this.

After all, Heathrow is the key national airport and a significant global hub. In this vein, airport policy in the UK is largely viewed 'as a problem of the south-east development and ... that of London Heathrow and its international competitiveness'.¹⁰⁸ *Heathrow* is also particularly interesting as plans to expand the airport, in this case adding a fifth terminal, saw a 'mammoth public inquiry'¹⁰⁹ that ultimately led to the revision of the statutory planning regime that was put into practice in the case.¹¹⁰ What is more, *Heathrow* is arguably 'the first time the UK Supreme Court has engaged in the construction of climate change legislation'.¹¹¹ In addition, proceedings following the case were similarly gripping and provided soap-opera level drama, including contempt of court proceedings against Mr Crosland – an unregistered barrister in the case – for leaking the judgment and the UK Supreme Court being asked to review its own decisions.¹¹² At the same time, and as outlined in the previous section, *Heathrow* only addresses a narrow question concerning the legal implications of specific climate provisions in the Planning Act 2008. To put it differently, it does not consider how climate impacts of airports beyond Heathrow should be assessed in local planning decisions. It is these questions that the cases discussed next consider. These cases may not have enjoyed the same scholarly limelight as *Heathrow* but as Chris Hilson notes, even if not all cases 'leap out in a memorable way', they still hold importance as accounts of 'how we tackle climate change and where power lies to decide that'.¹¹³ This is indeed the story that the three cases examined next will tell.

An overview of the case law

The three cases in focus here, which, for simplified referencing are listed as *Bristol*, *Southampton* and *Stansted*,¹¹⁴ share a similar fact pattern. They are brought

¹⁰⁶ *Heathrow*, n 13 above at [101ff].

¹⁰⁷ See a series of commentaries in (2021) 33 *Journal of Environmental Law*; as well as Bell and Fisher, n 82 above.

¹⁰⁸ Bell and Fisher, *ibid* 86.

¹⁰⁹ Antonia Layard, 'Planning and Environment at the Crossroads' (2002) 14 *Journal of Environmental Law* 401, 401.

¹¹⁰ As briefly outlined in the previous section, a separate planning process was created for 'national significant infrastructure projects', including airports, as per Planning Act 2008, s 14.

¹¹¹ Bell and Fisher, n 82 above, 237.

¹¹² *Her Majesty's Attorney General (Respondent) v Crosland (Appellant)* [2021] UKSC 58.

¹¹³ Chris Hilson, 'The Role of Narrative in Environmental Law: The Nature of Tales and Tales of Nature' (2022) 34 *Journal of Environmental Law* 1, 10.

¹¹⁴ *Bristol*, n 7 above; *Southampton*, n 8 above; and *Stansted*, n 9 above.

by applicants representing local community interests against airport expansion in their respective local councils based on a variety of climate-related legal arguments. In *Bristol*, the claimant is a 'network of groups' comprised of members of various environmental organisations in the south-west region of England, as well as residents of local communities,¹¹⁵ bringing a statutory challenge to the planning permission to expand Bristol airport to allow an increase in passengers of about 20 per cent on current numbers, on the basis that it would have 'a serious and unacceptable effect on climate change'.¹¹⁶ The underlying legal questions are, more precisely, 'whether and to what extent aviation emissions should play a role in deciding whether [planning] permission should be granted under the 1990 [TPCA] Act'.¹¹⁷ In *Southampton*, the claimant is a legal entity – the 'Group Opposing the Expansion of Southampton Airport' (GOESA) – that represents local residents and was set up to pursue judicial review 'to have the planning permission [to extend the existing runway at Southampton airport] quashed'.¹¹⁸ This was pursued on four grounds, including that the planning decision was unlawful in terms of how aviation emissions were assessed, and that the local planning authority, in granting planning permission, was under the duty, and had breached a legitimate expectation, to not issue the planning decision until the Secretary of State had 'fully had the time' to decide whether or not to call in the application and request that a public local inquiry to be held.¹¹⁹ The latter ground of challenge is not obviously climate-specific but it raises the important question of 'where power lies' to decide regional airport planning applications, here concerning climate impact. A similar legal question arose in *Stansted* – a claim for judicial review pursued by the chairman of the campaign group 'Stop Stansted Expansion',¹²⁰ not of a planning decision but rather the decision of the Secretary of State for Transport *not* to treat the planning application to expand Stansted airport, including increasing its annual passenger cap, as 'development' under the Planning Act 2008, which meant that the planning application had to be decided by the local planning authorities and not the Secretary of State. As the claimants are third parties to the planning application, or, as in the case of *Stansted*, the decision by the Secretary of State, judicial review is the only route available for them to challenge the decisions in question.¹²¹ More precisely, *Southampton* and *Stansted* are instances of common law judicial review, whereas *Bristol*, as outlined, is an example of statutory review on a question of law – but, as the court has clarified, there is little difference in substance between the two.¹²² As such, these cases will be analysed jointly.

It should be noted that development plans for Stansted airport have been challenged in the past with reference to climate change¹²³ and by the same

115 *Bristol* *ibid* at [4].

116 *ibid* at [5].

117 *ibid* at [7].

118 *Southampton*, n 8 above at [8].

119 *ibid* at [18].

120 Later renamed 'Stansted Airport Watch'.

121 An applicant to a planning permission has a right of appeal to the Secretary of State under TPCA, s 78.

122 See *E v Secretary of State for the House Development* [2004] EWCA Civ 49; [2004] QB 1044 at [42].

123 *Barbone*, n 45 above.

litigant (the chairman of the campaign group ‘Stop Stansted Expansion’).¹²⁴ Moreover, in 2021, the Uttlesford District Council made a request for statutory review of the Planning Inspectorate’s decision to approve expansion at Stansted airport, which the High Court dismissed.¹²⁵ This is to say that the three cases are not the only signs of judicial activity on the subject. Although some of these previous deliberations will occasionally be referred to, the three cases are in focus for the following three reasons.

First, these judgments were issued in 2020, 2022 and 2023, meaning that they provide a sequential overview of the High Court’s adjudication on the topic. Second, the three cases have all been denied appeal meaning that these judgments offer a settled account of the role that aviation emissions play in deciding regional airport applications and the level of scrutiny with which the court reviews these. Third, and as explained by Mr Justice Lane in *Bristol*, the legal dilemma brought to the fore in this case law concerns ‘*how and by whom*’ aviation emissions from further airport development should be addressed.¹²⁶ It is on these two questions that *Bristol*, *Southampton* and *Stansted* provide guidance and in doing so, show how the disconnect between climate obligations and the climate impacts of regional airport expansion remains unsettled.

The question ‘how’

The case law discussed makes two general points regarding regional airport development and ‘how’ aviation emissions feature in such planning decision-making processes. The first point is that there is no national policy seeking to limit or cap airport expansion,¹²⁷ or, differently put, there is no embargo on airport development in light of climate commitments. Second, and in line with the MBU, it underlines that aviation emissions should be considered at a national level. As the court in *Bristol* explained, this follows section 1 of the Climate Change Act 2008, which places an obligation on the Secretary of State – and not local planning decision-makers – to ensure that the carbon budgets are met and climate targets achieved.¹²⁸ To shift authority from the national to the local in this context ‘would not merely be to duplicate the system of controlling aircraft emissions’, the court continued, but it would also ‘lead local planning decision-makers into an area of national policy, with which they are not directly concerned’.¹²⁹ The obvious question that subsequently

124 In *Barbone* *ibid* this is done together with Carol Barbone, and in *Stansted* n 9 above, together with Peter Sanders.

125 *Uttlesford District Council v Secretary of State for Housing, Communities and Local Government and others* CO/2356/2021 (*Uttlesford District*) at https://www.uttlesford.gov.uk/media/11058/Judicial-Review-Acknowledgement-of-Service-filed-on-behalf-of-The-Secretary-of-State-for-Housing-Communities-and-Local-Government/pdf/20210907110703A_RedactedA.pdf?m=638175908708630000 [<https://perma.cc/BD6H-HJV9>].

126 *Bristol*, n 7 above at [258] (emphasis added).

127 *ibid* at [32].

128 *ibid* at [144]. A similar view is expressed by the court in deciding to reject the appeal for review of the Planning Inspectorate’s approval of Stansted airport expansion plans; see *Uttlesford District*, n 125 above at [5].

129 *ibid*.

arises is whether aviation emissions have any role to play in the context of local planning decision-making.

As discussed in the previous section, the local planning authorities are bound by section 70(2) of TCPA 1990 in considering regional airport development applications. This provision requires having regard to ‘the provisions of the development plan, so far as material to the application’ and ‘any other material considerations’ in deciding planning applications. As pointed out previously, the imperative to ‘have regard to the development plan’ does not, necessarily, provide much guidance on how to reconcile regional aviation expansion and climate commitments. This was an issue in *Bristol*. The North Somerset Core Strategy, which set out the relevant broad-long term vision and strategic planning policies for the region, commits ‘to reducing carbon emissions’ as one of its key principles guiding development, while the development plan for Bristol Airport, even more broadly, requires ‘the satisfactory resolution of environmental issues’ with regard to expanding the airport.¹³⁰ As the court pointed out, neither of these plans make any attempt ‘to articulate the way in which aviation emissions might be addressed by [the North Somerset Council] as planning authority’;¹³¹ nor do any of the principles contained in the Core Strategy have ‘anything specific to say about aviation emissions’.¹³² The court hinted at the challenges of addressing aviation emissions given that they can ‘occur at any point in an aircraft’s journey to and from Bristol Airport [and so] are of a different character from, for example, carbon emissions that can be addressed by reducing energy demand through good design of buildings in the area of [the North Somerset Council]’.¹³³ This echoes Larkin and his observation that airports are tricky infrastructures as they are ‘things and also the relation between things’,¹³⁴ which makes determining how to address their (climate) impacts challenging.

This case is not unique in having an ambiguous development plan. In *Tesco Stores Ltd v Secretary of State for the Environment* it was memorably noted that ‘development plans are full of broad statements of policy, many of which may be mutually irreconcilable’.¹³⁵ As further elaborated in *Tesco Stores Ltd v Dundee CC* (*Tesco* (2012)), applying provisions from such plans to a given set of facts ‘requires the exercise of judgment [which] fall[s] within the jurisdiction of the planning authorities’.¹³⁶ Coming back to *Bristol*, the court made clear that despite the ‘generality of some of the wording concerning climate change and reducing greenhouse gases’¹³⁷ found in the relevant development plans, the Climate Change Act 2008 and ‘its system of carbon budgets were relevant to explain the key question in respect of the development plan; namely how that plan should apply to aviation emissions occasioned by the implementation of

130 *ibid* at [61], [63].

131 *ibid* at [82].

132 *ibid* at [81].

133 *ibid* at [82].

134 Larkin, n 65 above.

135 *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at [780].

136 *Tesco Stores Ltd v Dundee CC* [2012] UKSC 13 at [19].

137 *Bristol*, n 7 above at [81].

BAL's [Bristol Airport Ltd] proposal for the expansion of Bristol Airport'.¹³⁸ This follows Lord Reed in *Tesco* (2012), who famously declared that broad-brushed development plans do not permit local planning authorities to live 'in the world of Humpty Dumpty'¹³⁹ – that is, construe such plans according to their own liking and thereby act irrationally. In the context of *Bristol*, this meant that aviation emissions become 'relevant for the purposes of the development plan if, and only if, they are likely to be such as to have a material impact on the Secretary of State's ability to meet his obligations under the CCA, including by means of carbon budgets'.¹⁴⁰ The court outlined the same test in the context of accounting for aviation emissions as a material consideration. More precisely, it seemed to accept that an increase in the amount of greenhouse gas emissions from a development project is a material consideration but one that would motivate a dismissal of the development application only if the aviation emissions would be so significant as to have 'a material impact on the government's ability to meet its climate change targets and budgets'.¹⁴¹

This is significant and tricky. As discussed in the previous section, and as the court in *Southampton* acknowledged, there is 'no criteria or thresholds [that have] been set by which to measure the "significance" of the GHG [greenhouse gas] emissions from a particular proposal'.¹⁴² In the absence of guidelines or benchmarks to help determine whether regional airport development would jeopardise national climate commitments, it 'is for the judgment of the decision-maker'¹⁴³ to decide, subject to rationality review by the courts. The three cases examined show the problem with this approach.

In *Bristol* and *Southampton*, as well as in *Stansted*, the planning decision-makers relied on aviation model forecasts for 2050 as found in MBU in assessing the climate impact of regional airport development vis-à-vis national carbon budgets. Notably, MBU was published in 2018, meaning that it is based on the initial climate target in the Climate Change Act 2008, ie a reduction of 80 per cent instead of 100 per cent by 2050, as well as the fifth carbon budget, which did not include emissions from international flights.¹⁴⁴ As a result, in both *Bristol* and *Southampton* the claimants argued that there were better (or more accurate) ways to assess the impact of local development projects – namely considering the airport expansion plans in relation to the *local* carbon budget of a specific council as opposed to the national total,¹⁴⁵ or considering the possibility of the expanded airport infrastructure attracting larger planes that would fly further, rather than in terms of passenger numbers, which was the model relied on in MBU.¹⁴⁶ With regard to the substantive policy in MBU and its related modelling, the court in *Stansted* found it 'robust and lawful', and importantly pointed

138 *ibid* at [86].

139 *Tesco* (2012), n 136 above, and as cited in *Bristol ibid* at [87].

140 *Bristol ibid* at [93].

141 *ibid*.

142 *Southampton*, n 8 above at [122].

143 *ibid*.

144 *ibid* at [114].

145 *Bristol*, n 7 above at [156]. This account showed that the Bristol Airport's plans to expand would consume the local authority's entire carbon budget in the five years following 2028; and by 2040, the entire carbon budget intended for the period 2038–42.

146 *Southampton*, n 8 above at [125].

out that ‘the purpose of the model... was to provide evidence for the MBU policy, not the evaluation of this proposal’,¹⁴⁷ indicating the limited direction that MBU provides to the relevant planning authorities in assessing climate impacts of the mentioned projects.

Along similar lines, in *Southampton* and *Bristol*, the court argued that ‘it is permissible for a planning authority to look at the scale of the GHG [greenhouse gas] emissions relative to a national target and to reach a judgment, which may inevitably be of a generalised nature, about the likelihood of the proposal harming the achievement of that target.’¹⁴⁸ As explained by Justice Holgate:

As a matter of principle there is nothing unlawful in a decision-maker using benchmarks he considers to be appropriate in order to help arrive at a judgment on those issues. The statutory carbon budgets are one example. A decision-maker *may* also decide to use national sectoral figures. Thus, in the present case [the local planning authorities] had regard to national aviation targets (which allowed for a third runway at Heathrow and expansion elsewhere) and also the planning assumption. In my judgment it is impossible to say that [planning authorities] made any ‘Wednesbury’ error in following that approach.¹⁴⁹

These points of law are not a legal novelty. After all, finding that the assessment of significant effects are matters of judgment for the local planning authority is, as the court in *Southampton* insisted, ‘well-established’.¹⁵⁰ Relying on *R (Finch) v Surrey County Council*¹⁵¹ (*Finch*) it added that the applicable standard of review in this context ‘has consistently been held to be the “Wednesbury” standard’.¹⁵² These findings, however, seem to suggest that *Wednesbury*-review is monolithic – a point to which we will return to in the next section. In any case, and referencing *Heathrow*, the court in *Bristol* found that considerations of alternative assessment methods of climate impacts fall under the third category of relevant considerations,¹⁵³ that is, ‘considerations to which the decision-maker may have regard if, in their judgment and discretion, they think it is right to do so’ – the review of which is the *Wednesbury*-irrationality test.¹⁵⁴ A similar point was made in *Southampton*, where it was argued that it is ‘for the decision-maker to decide how far to go in requiring evidence or information to be provided [and that unless] the decision-maker has taken into account a legally irrelevant consideration, essentially the issue boils down to whether he acted

147 *Stansted*, n 9 above at [96]. In the appeal decision by the Planning Inspectorate in an earlier case relating to expansion at Stansted, the Panel finds that ‘MBU has retained Government policy’ and it is for the government to address developments, not local planning authorities, *ibid* at [24]–[25].

148 *Southampton*, n 8 above at [123] and cited in *Bristol*, n 7 above at [115].

149 *ibid* at [122].

150 *Southampton*, n 8 above at [100].

151 *R (Finch) v Surrey County Council* [2022] EWCA Civ 187.

152 *Southampton*, n 8 above at [101].

153 In *Heathrow*, n 13 above, the Supreme Court reiterated that, in determining whether a public authority has failed to take into account a relevant consideration, three categories of consideration can be identified. They are (i) considerations clearly identified by statute as ones to which regard must be had; (ii) considerations so identified as ones to which regard must not be had; and (iii) considerations to which the decision-maker may have regard if, in their judgement and discretion, they think it is right to do so, see *ibid* at [117].

154 *Bristol*, n 7 above at [168].

irrationally’.¹⁵⁵ The court, in other words, is reluctant to allow a more interventionist approach, leaving the tension between aviation emissions and regional airport expansion unresolved.

It should be pointed out that the court in *Bristol*, in particular, agreed that climate change ‘is generally regarded as a matter of very great importance’¹⁵⁶ and recognised that the development project would lead to an increase in greenhouse gas emissions. Here, however, it relied on the national carbon budgets, UK ETS and CORSIA to effectively deal with climate obligations. This, as the court noted, aligns with the NPPE, which stipulates that ‘where other systems of control exist, it is to be assumed that those systems or regimes will operate effectively’.¹⁵⁷ Yet as outlined in the previous section and above, much regulatory action on aviation emissions is in flux and, as such, arguably inadequate or, at least at the stage when this planning decision was taken, ineffective in dealing with the aviation emissions. CORSIA is still in its pilot phase at the international stage; emissions allowances under the UK ETS are issued free of charge to the aviation sector, suggesting that the scheme may not achieve the benefits it was hoped to yield;¹⁵⁸ and, what is more, national carbon budgets will only include aviation emissions starting 2033. In addition, the UK was, at the time of the judicial review hearing, not on track to meet the fourth and fifth carbon budgets, as noted in *Bristol*.¹⁵⁹ In that case, the local planning authorities had considered these ‘shortcomings’ of the climate framework but reached the somewhat optimistic conclusion that ‘given the international and national context it is not unreasonable to assume that something will come forward to fill the [regulatory] space’.¹⁶⁰ This is indeed the message in MBU. Against this backdrop, the court was satisfied that the local planning authorities, as per the reviewing standards outlined, had not acted in a manner which was ‘unreasonable or irrational’.¹⁶¹

Clearly, the fact that local airport development contributes to an increase in greenhouse gas emissions is not by itself a reason to reject planning applications – the project must affect the government’s ability to meet its carbon budget. As shown, appraising individual infrastructure projects against the national carbon budget is not a straightforward exercise, especially as such calculations may rely on different models and units of measurement that lead to different results. Ultimately, how policies should be applied to the facts of proposed development is a matter for the decision-makers. Such decisions are reviewed according to the *Wednesbury* irrationality test, which means that the court will not find planning decisions unlawful just because alternative and more recently updated policies are available, or because the decision-maker relied on climate measures that are not yet fully effective.

155 *Southampton*, n 8 above at [192].

156 *Bristol*, n 7 above at [1].

157 *ibid* at [91].

158 In *Barbone*, n 45 above, for example, the claimant made the argument that ‘The history of the EU ETS and the lack of progress in including aviation in the scheme did not justify the Government’s confidence that it would achieve the benefits claimed for it’, at [72].

159 *Bristol*, n 7 above at [113].

160 *ibid* at [151].

161 *ibid*.

The question ‘by whom’

So far, the case law shows that planning decisions of regional airport development falls to the relevant local planning authorities. In the context of climate obligations, and to recap, this is problematic for at least three reasons. First, the local decision-makers are not required under section 1 of the Climate Change Act 2008 to ensure that climate neutrality is achieved by the target date; second, there is no criterion or threshold for how the local planning authorities should appraise the climate impact of individual airport development projects when considering, under the TCPA 1990, whether these would jeopardise national carbon budget; and third, the *Wednesbury*-standard of review by which such decisions are scrutinised entrench a significant emphasis on the evaluative discretion of local planning decision-makers. This may explain why we see a variety of legal challenges to planning decisions on regional airport development on the basis that they should rather have been decided by the Secretary of State.¹⁶²

Specifically, there are four circumstances under which the task of assessing planning applications would fall to the Secretary of State and not the local planning authorities: (1) when the development plan qualifies as ‘nationally significant’ under section 23 of the Planning Act 2008; (2) when the plan is designated as ‘nationally significant’ by the Secretary of State as per their discretionary powers under section 35 of the same act; (3) when, as per section 77 under the TCPA 1990, the Secretary of State ‘calls in’ a planning application; or (4) when the Secretary of State deals with an appeal under section 78 of the Planning Act 2008. The cases examined here show that when it comes to the two first circumstances at least,¹⁶³ their applicability in the context of regional airport development applications is difficult.

For a start, and in relation to section 23 of the Planning Act 2008, it is not obvious that regional airports qualify as ‘nationally significant’ due to their scale. The development plans for Brighton, Southampton and Stansted concern extending terminals, runways, or car parks; improving aircraft stands; and increasing the annual passenger caps, which count as ‘airport-related development’.¹⁶⁴ But the Planning Act 2008 limits the scope of such projects counting as ‘nationally significant’ by requiring that the effect of such ‘alteration of an airport’ increase by at least 10 million per year the number of passengers for ‘whom the airport is *capable* of providing air passenger transport services’.¹⁶⁵ Against this backdrop, the judicial review in *Stansted* centred on the Secretary of State’s decision *not* to consider the proposed airport expansion at Stansted ‘nationally significant’, which, so the claimant argued, was an error in law resulting in the planning application being decided by the local planning

162 Even if, as will be discussed in the following section, the lack of detail in policy and review-standards would be the same.

163 The third scenario, where the Secretary of State ‘calls in’ a planning application, was discussed in *Southampton*, n 8 above, but based on the particularities of the claim, these were quickly dismissed by the court, at [38] and so will not be dwelled upon here. The fourth scenario, on the other hand, was not relevant to the cases discussed.

164 Planning Act 2008, s 14(i).

165 Planning Act 2008, s 23(5)(a) (emphasis added).

authorities under the TCPA 1990, as opposed to requiring a DCO with explicit references to climate change as per the Planning Act 2008.

Here, the court engaged in a statutory interpretation of the meaning of 'capable'. The claimant argued that what is at issue are technical or arithmetical capabilities – that is, what is feasible or technically possible – which, if seen this way, would grant the mentioned planning project 'nationally significant' status. The Secretary of State took a different view, insisting that the provision requires a judgment based on calculations of what is a 'realistic and likely usage of the new runway infrastructure'.¹⁶⁶ The court agreed with the Secretary of State, concluding that the correct construction of section 23(5)(a) 'requires an analysis based on how the infrastructure is likely to perform, not a hypothetical approach assuming speculative figures'.¹⁶⁷ This may be a sensible statutory interpretation but the point here is a different one. Namely, this case shows the difficulty of shoehorning regional airport developments that are not thought capable to accommodate a certain number of passengers into the frame of the Planning Act 2008.

Despite the failure to meet the statutory qualifications for 'nationally significant', the claimants in *Stansted* argued that the Secretary of State 'should nonetheless have exercised his discretionary powers' under section 35 of the Planning Act 2008 to treat the developments as 'nationally significant'.¹⁶⁸ In a letter to the 'Stop Stansted Expansion' group, the Secretary of State had laid out his reasoning for refusing to rely on the mentioned section:

With respect to national significance, although the development of [Stansted] airport would play some role in supporting the international connectivity of London and the South East of England, the passenger capacity would still be less than other large single runway airports such as Gatwick. *The impacts, mitigations and benefits of STALs application appear to be local in nature*, and therefore I believe that adequate mitigation can be agreed between the airport and the council.¹⁶⁹

It was this letter, and in particular the points about the impacts and mitigations appearing local in nature, that triggered the subsequent judicial review. The contention ultimately concerned how the Secretary of State had reached this decision, including its reliance on the MBU, which the claimant deemed flawed due to its modelling of climate impact of aviation emissions. The court, however, dismissed this claim. It explained that the Secretary of State is entrusted 'a broad discretion' under section 35 and to suggest that their judgment in this regard was unlawful 'is daunting'.¹⁷⁰ The court relied on the *Wednesbury*-standard of review,¹⁷¹ and repeatedly referenced *Mott*¹⁷² – a case often relied on as support for deference to the decision-maker.¹⁷³

¹⁶⁶ *Stansted*, n 9 above at [4].

¹⁶⁷ *ibid* at [101].

¹⁶⁸ *ibid* at [4].

¹⁶⁹ *ibid* at [45] (emphasis added).

¹⁷⁰ *ibid* at [106].

¹⁷¹ *ibid* at [77].

¹⁷² *R (on the application of Mott) v Environment Agency* [2018] UKSC 10.

¹⁷³ Joanna Bell and Elizabeth Fisher rightly point out, however, that *Mott* is 'far more about how a court should approach review to expert, polycentric decision-making so as to ensure that the

Ultimately, the courts apply a high threshold when reviewing the Secretary of State's decision not to treat particular airport expansion plans as 'nationally significant', and decisions based on the MBU and the aviation policy outlined in the third section above more broadly. On this view, the courts are at least consistent in placing equal emphasis on the discretion of decision-makers – whether they are local planning authorities acting under the TCPA 1990 or the Secretary of State operating within the ambit of the Planning Act 2008. This, nonetheless, leaves in limbo added aviation emissions due to further regional airport expansion.

THE PROBLEM OF SQUARING THE CIRCLE AND POSSIBLE WAYS FORWARD

In light of the delivery of the judgment in *Bristol*, the representative of the 'Bristol Airport Expansion' group issued the following statement: 'The planning system is not responding to the climate emergency that we are facing. It is clearly outdated, outmoded and not fit for purpose and this now looks like it is by design.'¹⁷⁴ It is tempting to align with this view and see the planning regime as standing in the way of climate neutrality. As discussed above, aviation (and thereby airports) are deeply embedded in the UK's growth plan,¹⁷⁵ and national strategies on 'decarbonising transport' focus not on reducing but *increasing* aviation.¹⁷⁶ Such policy choices weigh heavily in planning decision-making processes and thereby 'inevitably win ... through'.¹⁷⁷ The present study, however, makes a different point, showing that the failure to address the climate impacts of regional airport development is multilayered, and relates not only to planning law and aviation policy, but also to climate obligations and the judiciary's standard of review of decision-making in this area.

As a start, the legal duty under section 1 of the Climate Change Act 2008, which, as revised is set to achieve climate neutrality by 2050, falls only on the Secretary of State, whereas regional expansion plans, as seen in *Bristol*, *Southampton* and *Stansted*, are decided by the local planning authorities. In other words, statutory climate law does not require local planning authorities to consider climate impacts when deciding on regional airport development applications. This does not mean that climate impacts are irrelevant under the TCPA 1990. As the cases discussed show, the local authorities must have regard to aviation emissions for the purposes of the development plan 'if, and only if, they are likely to be such as to have a material impact on the Secretary of State's ability to meet his obligations under the CCA'.¹⁷⁸ Similarly, the court in *Bristol* explained that aviation emissions are a material consideration, but one that would

focus is on the relevant legal questions', see Joanna Bell and Elizabeth Fisher, 'The "Heathrow" Case: Polycentricity, Legislation, and the Standard of Review' (2020) 85 MLR 1072, 1083.

174 Heather Pickstock, 'Bristol Airport Expansion Defeat is Not the End for Campaigners Who are Vowing to Continue Fight' *Somerset Live* 1 February 2023.

175 See for example *Aviation Policy Framework*, n 22 above at [5].

176 See n 52 above, part 2.

177 Hilson, n 16 above, 201.

178 *Bristol*, n 7 above at [93].

point to a dismissal of the development application only if the aviation emissions would be so significant as to have ‘a material impact on the government’s ability to meet its climate change targets and budgets’.¹⁷⁹ This leaves the local planning authorities with the task of assessing individual airport expansion plans against the national carbon budgets but, as was underlined in *Southampton* and in the third section above, they do so with no coordinated benchmarking as to what counts as ‘significant’ in this regard. How they carry out this assessment, including the extent to which they consider alternatives, or updated evidence – which is particularly significant in an area such as climate change where the scientific knowledge base is under constant development – is reviewed by the court in line with a version of the *Wednesbury*-irrationality test, which offers limited scrutiny of the decision-maker’s broad discretion. The result is that the climate impact of further regional airport expansion in light of climate commitments is left unresolved.

Ultimately, this study shows the ‘thinness’ of climate obligations in the context of local planning. Arguably, regional airport expansion is not the only infrastructure development that sits uncomfortable with climate commitments,¹⁸⁰ but it provides a particularly challenging case due to the overwhelmingly promotional and pro-aviation-sided policies pushed by the government (and as seen in *Doncaster* local authorities) whilst insisting that climate commitments will be met. There are, however, ways in which we can move forward.

One obvious step is to impose the obligation to meet the climate targets under section 1 of the Climate Change Act 2008 also on local authorities. A similar suggestion is put forward by Laura Mai, who argues in favour of creating an integrated long-term plan between national carbon budgets and local climate action through the introduction of a statutory duty for local government to address climate change.¹⁸¹ Conversely, the status of ‘nationally significant’ airport infrastructure could be dropped and all airport development treated through the Planning Act 2008 and by the Secretary of State. Neither suggestion is a silver bullet. Ensuring alignment with long-term climate targets, such as achieving climate neutrality by 2050, is difficult irrespective of whether it is a duty imposed on the Secretary of State alone, or also on the local planning authorities.¹⁸² What is more, and as shown in the previous section, the level of scrutiny that the court carried out of planning decisions based on the assessment of the climate impacts of airport development is equally low whether such cases are decided by the local planning authorities (*Bristol* and *Southampton*), or the Secretary of State (*Stansted*). As we come closer to 2050, the climate neutrality obligation might shape what the court regards as a ‘reasonable’ approach in assessing climate impacts in this regard, in which case, it would matter whether it is only the Secretary of State or also the local

179 *ibid.*

180 See for example the example of fracking as discussed by Hilson, n 16 above.

181 Laura Mai, ‘Climate Action in England: The Case for Legal Reform and Empowerment of Local Government’ *LSE British Politics and Policy Blog* (18 March 2021) at <https://blogs.lse.ac.uk/politicsandpolicy/climate-action-local-government/> [<https://perma.cc/WL2T-SBDH>].

182 A similar point is made for example in Richard Macrory, *Regulation, Enforcement and Governance in Environmental Law* (Oxford: Hart Publishing, 2010).

planning authorities that are bound by the duty. To make at least one of the two propositions effective in practice, judicial practices in relation to how the court reviews appraisals of significant effects require reassessment.

The three cases examined rely on the *Wednesbury*-irrationality test as a ‘conventional’¹⁸³ standard of review. Indeed, the judiciary in *Finch*, *Heathrow* and *Mott* – cases that *Bristol*, *Southampton* and *Stansted* reference in this regard – holds a similar view, placing significant emphasis on the discretion of decision-makers. This may suggest that the level of scrutiny is monolithic, or ‘well-established’, as noted in *Southampton*. As Dean R. Knight illustrates, however, the level of scrutiny that *Wednesbury* allows is variable and takes its colours from context.¹⁸⁴ Indeed, in the case of *Pham (Appellant) v Secretary of State for the Home Department (Respondent)*, and prior to that in *Kennedy v Charity Commission*,¹⁸⁵ the Supreme Court made clear that ‘common law no longer insists on a single, uniform standard of rationality review based on the virtually unattainable test stated in *Wednesbury*’.¹⁸⁶ Although this was outlined in the case of human rights, it could equally be considered in the context of climate obligations where a less restrictive approach is better fit for purpose when a decision-maker is considering a long term development with potentially grave consequences for the climate. There are at least three contexts in which the court could embrace a different mindset in how to carry out review – even of planning decisions based on scarcely detailed policy.

The first instance is in *Finch*, which at the time of writing is pending before the Supreme Court. Similarly to the regional airport cases discussed here, *Finch* is concerned with the approach to assessing climate impacts of major infrastructure developments. More precisely, it is a judicial review of a planning permission for new oil wells that considered the question whether it was unlawful for the relevant planning authority not to require the environmental impact assessment for the set project to include an assessment of the impacts of greenhouse gas emissions resulting from the eventual use of the refined products of that oil as fuel.¹⁸⁷ The Court of Appeal majority found that it was not, and although Moylan LJ dissented from the majority view, all three judges found that the question of ‘whether a particular impact on the environment is truly a “likely significant [effect]” of the proposed development ... is ultimately a matter of fact and evaluative judgment for the authority’.¹⁸⁸ Entrusting the local planning authorities broad decision-making discretion in this regard is the line followed in both *Bristol* and *Southampton*. In *Finch*, the Supreme Court has the opportunity to clarify whether it was right to leave this to the judgement of the relevant planning authorities; how climate assessments with regard to major infrastructure projects should be carried out; and subsequently, consider whether

183 *Southampton*, n 8 above at [100].

184 Dean R. Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge: CUP, 2018) ch 4. See also Paul P. Craig, ‘Varying Intensity of Judicial Review: A Conceptual Analysis’ [2022] *Public Law* 442.

185 [2014] 2 WLR 808 at [51].

186 *Pham (Appellant) v Secretary of State for the Home Department (Respondent)* [2015] UKSC 19 at [109].

187 *Finch*, n 151 above at [1].

188 *ibid* at [40].

a more interventionist judicial approach could be better utilised to review such projects in light of climate commitments.

Second, there is a case pending against the UK before the Aarhus Convention Compliance Committee (ACCC), in which it is alleged that the UK has failed to comply with several provisions on access to justice under the Convention by 'failing to ensure courts undertake an adequate review of the substantive legality'¹⁸⁹ of various decisions, including on planning. This case was filed in 2017 and the claimant has since updated its submission with recent legal developments, including climate law cases, to illustrate that the unduly narrow interpretation of *Wednesbury*-substantive review relied upon infringes the Convention.¹⁹⁰ As Maria Lee cautions, compliance with the ACCC's findings depend 'significantly on domestic political priorities',¹⁹¹ and so agreeing with the claimant that the UK has breached the Convention as alleged may not have any real, direct legal impact for planning decisions of regional airport development. Such a finding, however, may still help flag that judicial practices in the English planning context are unfit to address the climate impact of aviation emissions.

Third, and hypothetically, one may imagine, or at least hope, that the courts' reluctance to more readily intervene in the type of regional airport cases discussed is likely to change as we move closer towards 2050 and particularly if interim climate budgets are not met. In June 2023, the Climate Change Committee reviewed the Government's Carbon Budget Delivery Plan and provided a gloomy verdict. In summary, its 'confidence in the UK meeting its goals from 2030 onwards is now markedly less than it was in our previous assessment a year ago'.¹⁹² As pointed out earlier, this may influence how the courts understands what makes an approach to considering the climate impacts of regional airport expansion 'reasonable', including pushing for more detail in the relevant policies and guidance for planning decisions that rely on them.

How to reconcile airport expansion plans with climate obligations is not a legal dilemma that will disappear any time soon.¹⁹³ This study does not pretend to offer any exhasutive or magic solutions. What it nevertheless makes clear is that the argument that regional airport development aligns with climate com-

189 ACCC/C/2017/156 United Kingdom.

190 See 'ACCC/C/2017/156 United Kingdom' (UNECE Sustainable Development Goals) at https://unece.org/env/pp/cc/acc.c.2017.156_united-kingdom [<https://perma.cc/3HPQ-XERM>].

191 Maria Lee, 'The Aarhus Convention 1998 and the Environment Act 2021: Eroding Public Participation' (2023) 86 MLR 756, 784.

192 See Climate Change Committee, 'Better transparency is no substitute for real delivery' (28 June 2023) at <https://www.theccc.org.uk/2023/06/28/better-transparency-is-no-substitute-for-real-delivery/> [<https://perma.cc/QE37-6FGG>].

193 In addition to the ongoing airport expansion plans that may be subject to judicial review, outlined in the first section, the West Yorkshire airport campaigners are fundraising to take government to court over 'fantasy' strategy to cut aviation emissions, see Group for Action on Leeds Bradford Airport (GALBA), 'GALBA Takes Government to Court over "Fantasy" Jet Zero Strategy' (Press release, 27 September 2022) at <https://www.galba.uk/post/press-release-galba-takes-government-to-court-over-fantasy-jet-zero-strategy> [<https://perma.cc/X5R2-GMKE>]. Also, London City airport has announced that it intends to appeal the Council's decision dated July 2023 to refuse their development application, see Aviation Environment Federation, UK Airport Expansions, 'London City (refused by local authority)' at <https://www.aef.org.uk/uk-airport-expansions/#londoncity> [<https://perma.cc/WY72-ZET9>].

mitments is one that pretends to square the circle. The first step in moving forward is to recognise that the square – the increased levels of greenhouse emissions from regional airport development – and the circle – the national climate commitments – do not fit.

CONCLUSION

The airport, Alain de Botton writes, is '[the] single place that neatly captures the gamut of themes running through our civilisation ... from our faith in technology to our destruction of nature, from our interconnectedness to our romanticising of travel ... [it is] the imaginative centre of contemporary culture.'¹⁹⁴

From this viewpoint, airports – whether regional or 'nationally significant' – lay down the deep structures of how societies operate and integrate. Considering that airports are built for the long term, their climate impacts need to be taken seriously and carefully assessed in light of climate obligations. This requires multiple action points. It demands a diligent review of the planning regime and how aviation emissions of regional airport development features therein. It requires a thorough examination of how the relevant policies can be 'thickened' to provide detail in assessing such emissions and mitigation efforts. It asks for a judicial reappraisal of the narrow application of *Wednesbury*-irrationality in reviewing the relevant planning decisions. Ultimately, the relevant legal and policy landscape, as well as the courts, all have to stop trying to square the circle.

¹⁹⁴ de Botton, n 18 above, 13.