

# The ‘Heathrow’ Case: Polycentricity, Legislation, and the Standard of Review

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**Abstract:** The recent Court of Appeal (CA) decision in *Plan B Earth v Secretary of State for Transport* (the ‘Heathrow’ case) is an illustration of the challenges of reviewing polycentric and expert decision-making. The Planning Act 2008 issues raised in the case are an illustration of a court’s expository role in such contexts. The CA tackled directly a series of interpretive questions concerning the Planning Act 2008’s obligations regarding the consideration of climate change. The Habitats and Strategic Environmental Assessment (SEA) Directive issues raised in the appeal, in contrast, were presented with the question of the intensity of review foregrounded in legal argument. The CA therefore sought to articulate the ‘standard of review’ and to apply it to the government’s decisions. This way of framing the issue unfortunately side-lined the courts’ expository role in relation to interpreting the Habitats and SEA Directives, leaving key provisions under-analysed.

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Large-scale infrastructure projects have diverse benefits and impacts. Making decisions about infrastructure projects is an exercise in polycentric and ‘expert’ analysis.<sup>1</sup> Such decisions are also inevitably controversial as they involve incommensurable values and uncertainties about the future. Legislation plays a key role in ensuring that, while polycentric, infrastructure decision-making is not legally unstructured.

When infrastructure decisions are judicially reviewed, challenging questions arise about the role of the courts. Judicial review cannot and should not be a review on the merits.

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<sup>1</sup> Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353. See the legal analysis in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48 in which polycentricity was used to structure review of a large scale mining development.

Its province is errors of law. Polycentricity and expertise are often used as indicators that an issue is not easily subject to legal analysis.<sup>2</sup> But that does not mean errors of law do not arise. The courts play two interrelated roles in this field. First, courts have an important *expository* role by providing authoritative interpretations of the legislative regimes that regulate decision-making.<sup>3</sup> Second, while these regimes afford discretion in regards to polycentric issues that require expert input, this discretion is not unregulated. The courts must ensure any exercise of discretion is consistent with the legislation that grants discretion.

The recent Court of Appeal (CA) decision in *Plan B Earth v Secretary of State for Transport* (the *Plan B Earth* case)<sup>4</sup> is an illustration of these expository and discretion-reviewing roles in action. Colloquially known as the ‘Heathrow’ case, the case concerned a challenge to the Government’s Airport National Policy Statement (ANPS),<sup>5</sup> a document which sets out a policy directing that a third runway should be built at Heathrow airport. In the case, the CA, as had the Divisional Court below,<sup>6</sup> considered whether in the process of creating and designating the APNS the government had complied with its obligations to consider climate change under the Planning Act 2008 (the Act under which the ANPS was formulated) and its

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<sup>2</sup> Fuller, above n. 1. *Mott, R (on the application of) v Environment Agency & Anor* [2016] EWCA Civ 564, [77] although see [78]. C.f. Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012) Chapter 7.

<sup>3</sup> Elizabeth Fisher, Eloise Scotford and Emily Barritt, ‘The Legally Disruptive Nature of Climate Change’ (2017) 80 *MLR* 173, 198.

<sup>4</sup> [2020] EWCA Civ 214. Note *Plan B Earth* was only one of a number of claimants and appellants to the case (see the text accompanying notes 21-26 below). Furthermore, alongside this judgment was another judgment which considered a set of other administrative law issues arising from the ANPS. See *Heathrow Hub Ltd & Anor, R (On the Application Of) v The Secretary of State for Transport* [2020] EWCA Civ 213 which was an appeal of *Heathrow Hub Ltd & Anor, R (On the Application Of) v The Secretary of State for Transport* [2019] EWHC 1069 (Admin). Neither of these cases is the subject of this analysis.

<sup>5</sup> Department of Transport, *Airports National Policy Statement: New Runway Capacity and Infrastructure at Airports in the South East of England* (June 2018).

<sup>6</sup> *Spurrier, R (On the Application of) v The Secretary of State for Transport* [2019] EWHC 1070 (Admin).

assessment obligations under the Habitats Directive<sup>7</sup> and Strategic Environmental Assessment (SEA) Directive.<sup>8</sup>

This short analysis provides an overview of the case, showing how it is an illustration of the two roles courts play in infrastructure judicial reviews. The Planning Act 2008 issues are an illustration of a court's expository role. The CA tackled directly a series of interpretive questions concerning the Planning Act 2008's obligations regarding the consideration of climate change. The Habitats and SEA Directive issues, in contrast, were presented with the question of the intensity of review foregrounded in legal argument. The CA therefore sought to identify the appropriate 'standard of review' and to apply it to the government's decisions. This way of framing the issue unfortunately side-lined a court's expository role in relation to the Habitats and SEA Directives, leaving key provisions under-analysed.

### ***Plan B Earth in Outline***

The polycentric impacts of large infrastructure projects, such as airport expansion, make them 'conceptually unruly'.<sup>9</sup> We value infrastructure because it enables people and objects to move from place to place. In doing so it provides the 'economic foundation'<sup>10</sup> for much activity in a society. Infrastructure is also often reworked and expanded so as to ensure it maintains its role

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<sup>7</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ 206/7 as implemented in The Conservation of Habitats and Species Regulations 2017 SI 2017/1012.

<sup>8</sup> Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30 as implemented in the Environmental Assessment of Plans and Programmes Regulations 2004 SI 2004/1633.

<sup>9</sup> Brian Larkin, 'The Politics and Poetics of Infrastructure' (2013) 42 *Annual Review of Anthropology* 327, 329.

<sup>10</sup> Keith Lindblom and Richard Honey, 'Planning for a New Generation of Power Stations' [2007] *JPL* 843, 843.

in a wider system.<sup>11</sup> At the same time, infrastructure has a very real physical presence. The adverse impacts on the environment and specific property owners are significant. But there is a disjunction between infrastructure as part of a system and its physical presence, making attempts to create a frame in which these different issues can be considered challenging.

Expansion at Heathrow Airport is an illustration of these complexities. Heathrow airport is the busiest airport in Europe, and has long been understood as being a major driver of economic growth due to it ensuring global connectivity.<sup>12</sup> That connectivity has been maintained through periodic expansion in response to perceptions that the airport lacked capacity.<sup>13</sup> Given its location on the edge of a densely populated part of West London, where there are also areas protected for their environmental value, any expansion inevitably has a range of adverse impacts that require the careful consideration of incommensurable values.

The need for a third runway at Heathrow has been the subject of heated debate and ongoing analysis for the last decade. Between 2012 and 2015, the Airports Commission conducted a lengthy process of consultation and analysis, leading it to recommend that there was a need for greater airport capacity in the South East. The Commission compiled a shortlist of three options (building a north-west runway at Heathrow, extending Heathrow's existing northern runway, and expansion at Gatwick) and concluded that the first was the most desirable.<sup>14</sup>

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<sup>11</sup> Akhil Gupta, 'The Future in Ruins: Thoughts on the Temporality of Infrastructure' in Nikhil Anand, Akhil Gupta, and Hannah Appel, Hannah (eds) *The Promise of Infrastructure* (Durham: Duke University Press, 2-18) 62.

<sup>12</sup> Department of Transport, above n. 5. On the way in ideas of connectivity are embedded in infrastructure see Penny Harvey and Hannah Knox, *Roads: An Anthropology of Infrastructure and Expertise* (Ithaca: Cornell University Press, 2015) 22.

<sup>13</sup> For an overview see Tim Marshall, 'Airport Expansion and the British Planning System: Regime Management' (2018) 89 *The Political Quarterly* 446, 447-8

<sup>14</sup> Airports Commission, *Final Report* (July 2015) 9.

The ANPS, designated in June 2018, built on the Commission's recommendations.<sup>15</sup> The ANPS states there is a need to maintain airport capacity and connectivity.<sup>16</sup> It states that this should be done through the building of a new Northwest Runway at Heathrow Airport, so as to ensure Heathrow retains its 'hub status'.<sup>17</sup> The ANPS also sets out a series of assessment principles and stipulations for how different impacts should be assessed.<sup>18</sup> As part of the ANPS process, a series of assessments were carried out including a 'strategic level' Habitats Regulation Assessment<sup>19</sup> and the compilation of an 'Appraisal of Sustainability' which incorporated a strategic environmental assessment.<sup>20</sup>

Shortly after designation, the ANPS was subject to a number of legal challenges by commercial operators, environmental non-government organisations (NGOs), and local authorities.<sup>21</sup> The various challenges were heard together in a 'rolled-up' proceeding in the Planning Court. Hickinbottom LJ and Holgate J delivered a judgment<sup>22</sup> quite rightly described by the CA as a 'tour de force'.<sup>23</sup> Over 669 paragraphs, the Court considered 22 legal arguments<sup>24</sup> encompassing issues to do with the standard of review, Article 9 of the Bill of Rights, surface access, air quality, the Habitats Directive, the SEA Directive, flaws in consultation, bias, human

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<sup>15</sup> Department of Transport, above n. 5, 18.

<sup>16</sup> Ibid, Chapter 3.

<sup>17</sup> Ibid, 22.

<sup>18</sup> Ibid, Chapters 4 and 5.

<sup>19</sup> Department of Transport, *Airports National Policy Statement - Habitats Regulations Assessment, Statement to Inform Appropriate Assessment* (June 2018)

<sup>20</sup> Department of Transport, *Appraisal of Sustainability: Airports National Policy Statement* (June 2018). The appraisal is required under section 5(3) of the Planning Act 2008.

<sup>21</sup> Note an earlier challenge was dismissed as inconsistent with s 13 of the Planning Act 2008. *R (London Borough of Hillingdon) v Secretary of State for Transport* [2017] EWHC 121 (Admin). [2017] 1 WLR 2166.

<sup>22</sup> *Spurrier*, above n. 6.

<sup>23</sup> *Plan B Earth*, above n. 4, [7].

<sup>24</sup> *Spurrier*, above n.6, Appendix A.

rights, and climate change. Copious evidence was also presented to the court.<sup>25</sup> In all cases permission was either refused, or if granted, the application was refused.

Four broad sets of legal questions were raised before the CA.<sup>26</sup> Although this order is not reflected in the judgment, the first consider whether the government had complied with obligations in the Planning Act 2008 to consider climate change. The CA found a breach of these obligations, giving rise to the second issue of relief. We examine these issues first in our analysis of the judgment. The third and fourth sets of legal questions concerned the Habitats Directive and the SEA Directive. We consider these issues after our consideration of the climate change issues. Before analysing the judgment however it is necessary to introduce the Planning Act 2008. That is what we do in the next section.

## **The Planning Act 2008**

As noted above, infrastructure decision-making is conceptually unruly. It requires consideration of both the value of infrastructure to a wider network as well as its physical impacts. Having a workable legislative scheme, which structures decision-making by making clear what is to be considered and when, is vital. Historically, this legal structure was provided by the conventional planning regime. However, by the 2000s, the system was perceived as ungainly.<sup>27</sup> A major trigger for reform was the planning inquiry for the building of Terminal Five at Heathrow. The proceedings took 524 days, as the inquiry grappled with broad policy questions concerning capacity and economic growth.<sup>28</sup>

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<sup>25</sup> Ibid, [14]-[15].

<sup>26</sup> Note, different appellants raised different legal arguments. Given limited space we have not generally identified who raised which argument.

<sup>27</sup> Paul Thompson, 'Major Infrastructure Projects - Where to Now?' [2002] *JPL (Supp)* 25.

<sup>28</sup> HM Government, *Planning for a Sustainable Future White Paper* (Cm 7120, May 2007) 29.

The perceived need for a more structured framework for decision-making about major infrastructure projects led to the passage of the Planning Act 2008.<sup>29</sup> At the heart of the Act is a broad distinction between two levels of decision-making. First, the Act creates a process for designating ‘national policy statements’<sup>30</sup> (NPSs). NPSs settle ‘policy’ issues concerning infrastructure needs and their relationship to wider economic, environmental and social policy objectives.<sup>31</sup> Second, the Act introduces a single development consent order (DCO) procedure for the authorisation of particular projects that replace obligations of requiring consent under multiple regimes.<sup>32</sup>

The NPS manages the unruliness of infrastructure decision-making by framing and closing off the issues to be considered in the ‘consent’ process.<sup>33</sup> To that end the Act allows, among other things, for an NPS to set out ‘a specified description of development’; ‘the relative weight to be given to specified criteria’; and it can identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development’.<sup>34</sup> The ANPS at the heart of *Plan B Earth* is an illustration of how specific the content of a NPS can be. This lead one commentator to comment of the draft ANPS that it was a DCO ‘in disguise’.<sup>35</sup> While that is an extreme comment, the DCO process is significant in itself, it does underscore that an NPS is not a statement of generic policy. One way of thinking about an NPS is that much of its virtue lies in it providing an explicit articulation of the value of infrastructure to a wider network. Thus the Airport NPS is a statement that Heathrow airport’s value to the network of

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<sup>29</sup> Ibid.

<sup>30</sup> Planning Act 2008, section 5

<sup>31</sup> Ibid, Part 2.

<sup>32</sup> Ibid, Parts 4-7.

<sup>33</sup> Ibid, section 104(2).

<sup>33</sup> Ibid, section 106(1)(b). See also ss 87(3)(b) and 94(8).

<sup>34</sup> Ibid, section 5(5).

<sup>35</sup> Marshall, above n. 13, 450.

transport infrastructure lies in its ‘hub status’. With that said, the obligations under the Planning Act 2008 do require the NPS process to consider the physical impacts of any development it outlines.<sup>36</sup>

Precisely because an NPS structures decision-making at the DCO stage, the process and outcome of an NPS is of considerable practical importance. The design of the Planning Act 2008 acknowledges this by creating obligations which must be complied with in the course of designating an NPS. Sections 5 and 10 set out a specific list of matters which must be considered. Sections 7-9 also lay down consultation and Parliamentary approval requirements. Section 13 introduces a specific process for judicially reviewing NPSs.<sup>37</sup> The challenges in *Plan B Earth* were pursuant to that section.

## Climate Change and Relief

*Plan B Earth* is an illustration that, although the decision-making process created by the Planning Act 2008 structures the ‘conceptual unruliness’ of infrastructure decision-making, it does not resolve all issues. Questions remain over how to frame and structure assessment. The Act also needs to be given an authoritative interpretation.<sup>38</sup> As mentioned above, the Act specifies a series of considerations which decision-makers must have regard to in the NPS process. One such consideration is climate change. Section 5(8) of the Planning Act 2008 requires that reasons given for a policy in a NPS ‘must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change’. Furthermore, section 10 provides that the

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<sup>36</sup> Planning Act 2008, section 5.

<sup>37</sup> Ibid, section 13.

<sup>38</sup> In this regard such legislation could be thought of as akin to a thin ‘constitution’. See Elizabeth Fisher, ‘Towards Environmental Constitutionalism: A Different Vision of the Resource Management Act 1991’ [2015] *Resource Management Theory and Practice* 63 arguing that similar New Zealand legislation – the Resource Management Act 1991 takes this form.



Secretary of State must exercise his functions with ‘the objective of contributing to the achievement of sustainable development’<sup>39</sup> and in doing so ‘must (in particular) have regard to the desirability of ... mitigating, and adapting to, climate change’.<sup>40</sup>

These provisions do not compel the Secretary of State to reach any particular conclusion. Their significance lies in how they require climate change and sustainable development to be considered in the formulation of an NPS. These provisions give rise to interpretative questions. Specifically, section 5(8) requires that the reasons accompanying an NPS must address the ‘Government’s policy on climate change.’ Administrative lawyers do not use the term ‘policy’ consistently. Sometimes the term is used as a reference to a particular political endpoint a law should achieve.<sup>41</sup> Often, it is used as shorthand to reference things – papers, values, politics - that are not ‘law’. And sometimes it is used to refer to specific documentation, some of which is created by a process governed by legislation.<sup>42</sup> The adjective ‘Government’ is rarely used in such discussion (and needs to be distinguished from government with a small g). Given, ‘Governments’ change with elections it would suggest a dynamic interpretation is expected. Policy is not fixed. That is not surprising. Climate change policy is a work in progress and evolves as part of a bottom up process of global co-operation.<sup>43</sup> The arguments by WWF, an intervenor in *Plan B Earth*, also adds a further issue – whether the

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<sup>39</sup> Ibid, section 10(2).

<sup>40</sup> Ibid, section 10(3)(a).

<sup>41</sup> Ronald Dworkin, *Taking Rights Seriously*, (London: Duckworth, 1977), 22.

<sup>42</sup> The diverse forms of ‘policy guidance’ in the planning context being a prime example of this. See Richard Harwood QC and Victoria Hutton, *Planning Policy* (Oxford: Bloomsbury, 2018).

<sup>43</sup> Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28 *JEL* 337.

requirement to pursue sustainable development requires consideration of the 1989 UN Convention on the Rights of the Child.<sup>44</sup>

The answers to these questions were of practical importance in *Plan B Earth*. Climate change, and specifically the legal obligations under the Climate Change Act 2008, had been considered in the NPS process,<sup>45</sup> but the Government conceded explicitly that it had received advice not to consider its commitment to the Paris Agreement 2015, which reflects a more ambitious set of targets.<sup>46</sup> A number of parties argued that this was a misconstruction of the obligations in the Planning Act 2008.<sup>47</sup> The challenge had been rejected by the Divisional Court, which concluded that ‘Government policy in respect of climate change targets was and is essentially that set out’ in the Climate Change Act 2008.<sup>48</sup>

The CA disagreed with the Divisional Court. In its view, the concept of policy in section 5(8) was ‘necessarily broader than legislation.’<sup>49</sup> The commitment to the Paris Agreement was part of ‘Government policy,’<sup>50</sup> and was evidenced by its ratification and various statements by Ministers.<sup>51</sup> That commitment effectively resulted in Government policy being more ambitious than that in the Climate Change Act 2008 at that point in time.<sup>52</sup> The advice that the Secretary

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<sup>44</sup> Ibid, [240]. This argument was not dealt with as it was made in relation to the argument concerning a breach of section 10(3) which was successful on other grounds.

<sup>45</sup> Eg Department of Transport, *Airports National Policy Statement*, above n. 5, 30-31, 41-42, 58-60.

<sup>46</sup> *Plan B Earth*, above n. 4, [227].

<sup>47</sup> Ibid. [191].

<sup>48</sup> *Spurrier*, above n. 6, [612].

<sup>49</sup> *Plan B Earth*, above n. 4, [224].

<sup>50</sup> Ibid, [228]. It may be argued that this results in an unincorporated treaty being implemented via the ‘back door’. That argument ignores that was not the interpretative question before the Court. The interpretative question was what was “Government policy” on an issue that inevitably involves international co-operation.

<sup>51</sup> Ibid, [228] and for the statements see [212] and [213].

<sup>52</sup> Ibid, [185]. Note after the ANPS was designated the Climate Change Act 2008 was amended to revise the target in section 1 to make it more ambitious. See The Climate Change Act 2008 (2050 Target Amendment) Order 2019, S.I. 2019/1056.

of State received to not consider the Paris Agreement was therefore found to be a ‘a material misdirection of law at an important stage in the process’<sup>53</sup> leading to breaches of both sections 5(8) and section 10(3).<sup>54</sup> The CA also concluded that the Paris Agreement should have been considered due to Annex I of the SEA Directive<sup>55</sup> and that the ANPS revision process should have considered the non-CO<sub>2</sub> climate impacts of aviation.<sup>56</sup> While such impacts were difficult to quantify, the precautionary principle required their consideration.<sup>57</sup>

This aspect of the case is a reminder of that while the Planning Act 2008 was an attempt to structure polycentricity, it could never eradicate the legal uncertainties such polycentricity creates. Sections 5 and 10 need to be interpreted so as to establish what it is the government must consider. In *Plan B Earth* the CA confronted these questions of construction directly, offering an authoritative view on the meaning of key terms. This is not to say that the case offers perfect clarity. The case settles that ‘policy’ is to be understood as a term of ‘ordinary English language,’<sup>58</sup> but the CA does not venture a definition of ‘policy’, nor provide a detailed analysis of what it does and does not include. Difficult cases may therefore arise in the future. For these and other reasons, the CA’s interpretation of the Planning Act 2008 may attract critics. With that said, it is important to remember that the analysis of the CA is an ‘entirely conventional exercise in public law’.<sup>59</sup> They gave legal effect to the legislative obligations in the Planning Act 2008 and SEA Directive. But while the exercise is conventional, the legal obligations themselves are not, structuring as they do polycentric analysis.

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<sup>53</sup> Ibid, [227].

<sup>54</sup> Ibid, [237]

<sup>55</sup> Ibid, [244].

<sup>56</sup> Ibid, [261]

<sup>57</sup> Ibid, [259]-[260].

<sup>58</sup> Ibid, [224].

<sup>59</sup> Ibid, [230].

Before moving on from the climate change issues, it is important to note briefly the court's discussion of relief. Amendments to the Senior Courts Act 1981 in 2015<sup>60</sup> introduced a new remedial barrier in an application for judicial review: 'if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different'<sup>61</sup> then a court is bound to refuse relief, unless convinced there are 'reasons of exceptional public interest.'<sup>62</sup> The developer behind Heathrow expansion argued this provision barred relief. The CA disagreed. The reasoning emphasises that in cases where the legal error relates to 'the approach the executive had taken to its decision-making process, it will often be difficult or impossible for a court to conclude'<sup>63</sup> that the high-likelihood threshold is satisfied. The CA in the case before them was not in a position to assess the difference that consideration of the Paris Agreement would have made. Part of the issue is that this would have involved 'straying... into the forbidden territory of assessing the merits'<sup>64</sup> of Heathrow expansion. Accordingly, the court issued a declaration preventing the ANPS from having legal effect until the government conducted a review of the ANPS – a process that the Planning Act 2008 provides for.<sup>65</sup> Nothing more was required due to the lack of success of any other arguments.<sup>66</sup>

## **The Habitats and Strategic Environmental Assessment Directives**

The climate change issues in *Plan B Earth* are an illustration of the court's important expository role in infrastructure judicial reviews. The other challenges considered by the CA were understood to be in essence about the intensity of review. This is even though there was

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<sup>60</sup> Section 84, Courts and Criminal Justice Act 2015.

<sup>61</sup> Section 31(2A)(b) Senior Courts Act 1981.

<sup>62</sup> Ibid, Section 31(2B).

<sup>63</sup> *Plan B Earth*, above n. 4, [273].

<sup>64</sup> Ibid, [273].

<sup>65</sup> Ibid, [278]. Such review is under section 6 of the Planning Act 2008.

<sup>66</sup> Ibid, [280].

recognition by both the CA and parties that ensuring the correct interpretation of the Directives is part of a court's role.<sup>67</sup>

The Habitats and SEA Directives are central cornerstones of EU environmental law. They place decision-makers under obligations to assess environmental impacts and to factor those assessments into decision-making. The Habitats Directive, alongside the Wild Birds Directive,<sup>68</sup> is one of two major pillars of EU nature conservation law. Article 6 of the Directives requires decision-makers to conduct an 'appropriate assessment' for any 'plan or project' that is 'likely to have a significant effect' on a site protected under the Habitats Directive. If the assessment concludes that the plan or project 'will not adversely affect the integrity of the site' then it can proceed. If not, it can only proceed if the conditions of the derogation provisions in Art 6(4) are met. Art 6(4) provides that:

...in the *absence of alternative solutions*, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature...

The primary Habitats Directive challenge in *Plan B Earth* related to whether Gatwick expansion should be considered an 'alternative solution' to building a third runway at Heathrow.<sup>69</sup> The government had discarded Gatwick expansion on the basis that it did not meet its 'hub objective'.<sup>70</sup> Related to this was an argument concerned with whether the impact

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<sup>67</sup> Eg Ibid, [47], [94]-[106], [173]-[174].

<sup>68</sup> Habitats Directive, above n. 7, Article 6(3).

<sup>69</sup> *Plan B Earth*, above n. 4, [93], [105],

<sup>70</sup> Ibid, [88].

of Gatwick expansion on a site with a priority species had been properly assessed – a matter complicated by the appropriate assessment being at the strategic level.<sup>71</sup>

The arguments before the CA framed these questions as engaging the court’s discretion-reviewing function. That is, the question of what was an ‘alternative solution’ was taken to be one which fell within the government’s discretion, and the court’s task to be reviewing that discretion. The first issue on appeal accordingly was for the CA to identify the general ‘standard of review’ or ‘test’ to be applied when conducting review under Art 6(4).<sup>72</sup> This approach mirrored that taken by the Divisional Court which framed the standard of review as one of a number of preliminary issues.<sup>73</sup> The arguments of counsel presented the choice for the CA in binary terms. The appellants argued that the European Union dimension of the case meant that the applicable standard was proportionality, particularly as it engaged fundamental principles and fundamental rights of EU law.<sup>74</sup> The respondents, by contrast, argued that approach was not applicable and thus ‘traditional’ *Wednesbury* grounds should apply.<sup>75</sup> Ultimately the CA accepted this later approach,<sup>76</sup> and in the course of doing so explained that it saw ‘no good reason to distinguish between the appropriate standard of review for article 6(3) and that for article 6(4)’.<sup>77</sup> In applying the *Wednesbury* standard, the court took dismissal of Gatwick expansion on the basis it did not meet the narrowly defined ‘hub’ objective at all as rational.<sup>78</sup>

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<sup>71</sup> Ibid, [94]-[106]. Two other arguments were raised, concerning the relationship between the Habitats Directive and the SEA Directive and whether there should be an Article 267 TFEU reference on this point. *Plan B Earth*, above n. 4, [107]-[124].

<sup>72</sup> Ibid, [66]-[80].

<sup>73</sup> *Spurrer*, above n. 6, [141]-[184].

<sup>74</sup> *Plan B Earth*, above n. 4, [72]-[73]. Specific reliance was placed on the Advocate General’s reasoning in *C-723/17 Craeynest v Brussels Hoofdstedelijk Gewest* ECLI:EU:C:2019:168, a case concerning assessment under the Air Quality Directive.

<sup>75</sup> *Plan B Earth*, above n. 4, [74].

<sup>76</sup> Ibid, [74].

<sup>77</sup> Ibid, [70].

<sup>78</sup> Ibid, [87]-[88].

The challenge in relation to the SEA Directive was similarly understood as engaging a court's discretion-reviewing function. The SEA Directive requires an environmental assessment for a plan or programme 'upstream' from decision-making about specific projects.<sup>79</sup> Assessment and consultations on that assessment must be taken into account 'during the preparation of the plan or programme and before its adoption'.<sup>80</sup> The Directive stipulates a series of broadly framed requirements relating to the content of assessments including the provision of 'an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes'<sup>81</sup> and 'the environmental characteristics of the areas likely to be significantly affected'.<sup>82</sup> The appellants in *Plan B Earth* argued that the Appraisal of Sustainability<sup>83</sup> failed to comply with these requirements. Particular complaints included the government's consideration of the impact of the APNS on local plans cumulatively rather individually<sup>84</sup> and use of indicative, rather than actual flight paths.<sup>85</sup>

As with the Habitats Directive, the first issue on appeal was identified as the broad 'standard of review' which applies to an SEA assessment report.<sup>86</sup> The Divisional Court had concluded that the same standard of review for an assessment under the Environmental Impact

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<sup>79</sup> SEA Directive, above n. 8, Articles 2 and 3. Elizabeth Fisher, 'Blazing Upstream? Strategic Environmental Assessment as "Hot" Law' in Gregory Jones and Eloise Scotford (eds), *The Strategic Environmental Assessment Directive: A Plan for Success* (Oxford: Hart, 2017).

<sup>80</sup> SEA Directive, above n. 8, Article 8.

<sup>81</sup> Ibid, Article 5 and Annex I(a).

<sup>82</sup> Ibid, Article 5 and Annex I(c).

<sup>83</sup> Department of Transport, *Appraisal of Sustainability*, above n. 20.

<sup>84</sup> *Plan B Earth*, above n. 4, [154].

<sup>85</sup> Ibid, [173].

<sup>86</sup> Ibid, [126]-[144].

Assessment (EIA) Directive<sup>87</sup> was appropriate because it was ‘no more and no less than a practical application of conventional *Wednesbury* principles of judicial review’.<sup>88</sup> The CA agreed.<sup>89</sup> It concluded that the government had not acted irrationally in either assessing local plans cumulatively<sup>90</sup> or using indicative flight paths.<sup>91</sup>

Two main comments are worth making on the CA’s approach to the Habitats and SEA Directives issues. The first is that the CA could have usefully undertaken a more expository role in relation to the obligations created by these Directives. The arguments before the CA understood the Habitats and SEA Directives challenges as primarily engaging issues to do with the standard of review of discretionary decision-making, leading the analysis to easily side-line questions of how to interpret the legislative obligations that structure that discretion. That is a shame. *Plan B Earth* afforded an opportunity to analyse key provisions in these Directives which admit of considerable uncertainty. As a result, those provisions remain under-analysed.

This is especially true of the Habitats Directive. The obligations in this Directive are drafted in general terms so as to apply to a myriad of circumstances. As a result, it has given rise to an array of interpretive questions.<sup>92</sup> To date, the Court of Justice of the European Union (CJEU) has played an important role in authoritatively settling questions of interpretation so as

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<sup>87</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (as amended) [2012] OJ L26/1.

<sup>88</sup> *Spurrier*, above n. 6, [432]. That test was understood to be set out in *R (Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin); [2004] Env LR 29.

<sup>89</sup> *Plan B Earth*, above n. 4, [143].

<sup>90</sup> *Ibid*, [157].

<sup>91</sup> *Ibid*, [175].

<sup>92</sup> Eg C-323/17 *People Over Wind and Sweetman* ECLI:EU:C:2018:244 (the role of mitigation in screening); *Smyth v The Secretary of State for Communities and Local Government & Ors* [2015] EWCA Civ 174 (reviewing an appropriate assessment); *Morge v Hampshire County Council* [2011] UKSC 2 (local authorities’ duties).



to ensure that the purposes of the Directive are not undermined.<sup>93</sup> Fundamental issues, nonetheless remain unresolved. The ‘alternative solutions’ provision at the heart of *Plan B Earth* is a case in point.

This provision has received little consideration by the CJEU to date.<sup>94</sup> An unsettled question which may have had a bearing on the issues in *Plan B Earth*, is whether once a decision-maker has identified possible options for pursuing a policy objective it is compelled to select the option which does the least damage to protected sites.<sup>95</sup> Aspects of the CA’s judgment may be read as assuming a particular interpretation of the ‘alternative solutions’ provision without the implications of endorsing that interpretation being fully explored. For instance, in reviewing the rationality of the government’s dismissal of Gatwick-expansion the CA placed considerable emphasis on a distinction between dismissing an option because it does not realise a policy objective at all, and dismissing an option because it does not fulfil the objective to the same extent as another.<sup>96</sup> This distinction arguably assumes that once options have been identified a decision-maker is compelled to select the option with the least damaging effects on protected sites. As noted above, that this is the meaning of Art 6(4) has not been settled. It also may give rise to concerns which are only touched on in the case.<sup>97</sup> For instance, the CA’s distinction places a great deal of practical emphasis on how the decision-maker has *framed* its policy objectives. One concern may be that this could incentivise defensive policy-making.

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<sup>93</sup> See Emma Lees, ‘Allocation of Decision-Making Power under the Habitats Directive’ (2016) 28 *JEL* 191.

<sup>94</sup> And what there is, is quite thin in legal analysis. See Case C-239/04 *Commission v Portugal* [2006] ECR I-10183, [36]-[38].

<sup>95</sup> See the opinion of Advocate General Kokott in *ibid*, especially [44]-[45]. The issue was not clarified by the CJEU.

<sup>96</sup> *Plan B Earth*, above, n. 7, [92] citing from *Spurrier*, above, n. 6, [341].

<sup>97</sup> *Ibid*.

A second set of observations on the Habitats and SEA Directives issues concerns the way in which the CA set about identifying the standard of review. The side-lining of interpretive questions had an important impact here too. A court's expository and discretion-reviewing functions are inextricably linked. Legal discretion does not arise in the abstract, but is created and structured by legislative frameworks. A detailed understanding of the contours of a discretion, and the purposes for which it has been conferred, is essential to developing an appropriate approach to review.

In identifying the standard of review applicable to both the Habitats and SEA Directives, however, the CA did not begin with a detailed legal analysis of those legislative frameworks. Rather, the arguments before the courts offered it a menu of two general options – *Wednesbury* and proportionality review – and the CA looked primarily to existing case law in order to determine which to select even when that case law did not directly pertain to the legislative obligations in dispute. One issue with this is that the binary arguments about *Wednesbury* and proportionality review, not only did not make much practical difference to the outcome,<sup>98</sup> but seemed to assume that *Wednesbury* provides an intensity of review which is necessarily much less rigorous than proportionality. This fails to recognise the full force<sup>99</sup> of the Supreme Court's repeated insistence that both standards of review are inherently context-sensitive and thus variable.<sup>100</sup>

Related to this is that viewing the questions about the standard of review in terms of a choice between *Wednesbury* and proportionality lead to important nuances in the reasoning of key case law being overlooked. For example, Beatson LJ's judgment in *Mott v Environment*

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<sup>98</sup> Ibid, [80]

<sup>99</sup> The importance of context is recognized by both the Divisional Court and the CA. See *Spurrier*, above n. 6, [147] and *Plan B Earth*, above n. 4, [66].

<sup>100</sup> *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591, [115]-[117].

*Agency*<sup>101</sup> was understood by the Divisional Court as authority for the proposition that a ‘court should accord an enhanced margin of appreciation to decisions involving or based upon "scientific, technical and predictive assessments" by those with appropriate expertise’.<sup>102</sup> The CA in *Plan B Earth* agreed.<sup>103</sup> But the ‘margin of appreciation’ language is not the crux of the reasoning in *Mott*. In *Mott*, the Divisional Court had overturned the Environment Agency’s assessment of catch limits on the basis of criticisms made by a non-expert applicant.<sup>104</sup> Beatson LJ held that in doing that, the Court had ‘strayed beyond what is proper for a reviewing judge dealing with complex scientific material’.<sup>105</sup> Part of the reasoning was the need to give weight to the assessments of expert decision-makers, particularly in matters of prediction,<sup>106</sup> but much more was to do with how the Divisional Court in *Mott* had reviewed questions of science, a state of affairs not helped by how the Environment Agency had presented their evidence.<sup>107</sup> Beatson LJ also stressed in discussing the approach to review that ‘a reviewing court needs to be given a sufficient explanation by a regulator operating in a technical or scientific area of how the science relates to its decision so that the court can consider whether it embodies an abuse of discretion or an error of law’.<sup>108</sup> The reasoning in *Mott* is thus less about deference and far more about how a court should approach review to expert, polycentric decision-making so as to ensure that the focus is on the relevant legal questions.<sup>109</sup>

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<sup>101</sup> [2016] EWCA Civ 564; [2016] 1 WLR 4338.

<sup>102</sup> *Spurrier*, above n. 6, [179].

<sup>103</sup> *Plan B Earth*, above n. 4, [177].

<sup>104</sup> *Mott*, above n. 2, [70].

<sup>105</sup> *Ibid*, [67].

<sup>106</sup> *Ibid*, [78].

<sup>107</sup> *Ibid* [65]-[67].

<sup>108</sup> *Ibid*, [64].

<sup>109</sup> *Ibid*, [75].

To sum up, what all of this shows is that while courts need to be acutely aware not to stray into the merits on infrastructure decisions, they play an important role in conducting review of discretion. That review must be meaningful and must ensure that discretion is exercised in line with the aims of, and obligations created by, legislation.<sup>110</sup> Crafting a ‘standard of review,’ therefore, requires acute sensitivity to legislative context. This is particularly true of infrastructure decision-making where legislation structures polycentric analysis – analysis that could take different forms and encompass numerous factors. Treating the standard of review as a preliminary question, to be addressed in general terms and abstracted from issues of interpretation, overlooks the importance of statutory context. Thus for example, the CA saw no distinction to the standard of review under Articles 6(3) and 6(4) of the Habitats Directive.<sup>111</sup> Lees in contrast, has argued Article 6(4) of the Habitats Directive requires more of a ‘value-driven’ assessment than that required under Article 6(3) – something that will clearly affect how a court approaches and structures review.<sup>112</sup> A similar observation can be made about the CA’s conclusion that the same standard of review applies to the adequacy of an SEA as it does for the adequacy of an EIA.<sup>113</sup> While the CA, did explicitly recognise the importance of the starting with any particular legal obligation,<sup>114</sup> the upfront focus on the intensity of review tends to side-line inquiry into the differences between the legal obligations of assessment under the two regimes.

It is interesting to speculate why the arguments concerning the Habitats and SEA Directive focused centrally on the applicable standard of review, rather than bringing interpretive questions to the forefront. Part of the answer might lie in the sheer volume of

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<sup>110</sup> Joanna Bell, *The Anatomy of Administrative Law* (Oxford: Bloomsbury, 2020).

<sup>111</sup> *Plan B Earth*, above n. 4, [70]

<sup>112</sup> Lees, above n. 93, 201, 212.

<sup>113</sup> *Plan B Earth*, above n. 4, [143].

<sup>114</sup> *Ibid*, [135].

arguments and evidence both courts were required to navigate. There is also currently considerable background interest in the applicable standard of review in planning law challenges as a result of an ongoing complaint before the Aarhus Compliance Committee.<sup>115</sup> More fundamentally, it may also be that, whereas courts are comfortable with their expository role in relation to domestic legislation, such as the Planning Act 2008, exposition of EU Directives has tended to be viewed as the primary responsibility of the CJEU.<sup>116</sup> If this is right, it is arguably a tendency in need of correcting in the post-Brexit UK. The European Union (Withdrawal) Act 2018 now places questions of the interpretation of retained EU law firmly in the hands of the UK courts, with a requirement only to ‘have regard’ to new rulings of the CJEU.<sup>117</sup> Authoritative interpretation of these regimes can therefore now *only* be provided by domestic courts.<sup>118</sup> The numerous arguments put before the Divisional Court and the CA underscore the lack of settled legal understanding and thus the need for such an interpretation.<sup>119</sup>

## Conclusion

*Plan B Earth* has had a high profile as a ‘climate change case’.<sup>120</sup> But like many climate change challenges it is also an administrative law case, concerned with ensuring that a decision-maker

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<sup>115</sup> ACCC/C/2017/156 United Kingdom, <https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2017156-united-kingdom.html> accessed 30 March 2020.

<sup>116</sup> Article 267(1) TFEU.

<sup>117</sup> Section 6(2) European Union (Withdrawal) Act 2018.

<sup>118</sup> Maia Perraudeau, ‘Back to the Future: Brexit, EIA and the Challenge of Environmental Judicial Review’ (2019) 21 *Env L Rev* 6.

<sup>119</sup> This is also flagged in the academic literature. On the Habitats Directive see for example Lees, above n. 93 and Richard Moules, ‘Significant EU Environmental Cases: 2018’ (2019) 31 *JEL* 163, 173. In regards to the SEA Directive see Eloise Scotford, ‘SEA and the Control of Government Environmental Policy’ in Gregory Jones and Eloise Scotford (eds), *The Strategic Environmental Assessment Directive: A Plan for Success* (Oxford: Hart, 2017) and Fisher, ‘Blazing Upstream?’ above n. 79.

<sup>120</sup> Eg. Hannah Taylor, ‘Third Runway Plans at Heathrow and the Paris Agreement’ (The Oxford University Undergraduate Law Journal Blog, 21 March 2020),

has not committed an error of law. Infrastructure decision-making naturally gives rise to challenging questions about the role of a court in judicial review. But the polycentric and expert nature of decision-making should not lead to the conclusion that courts have no part to play. Rather, courts have important functions in both authoritatively expositing the nature of the novel legislative obligations which apply in this area, and reviewing the exercise of discretion so as to ensure that it is exercised in line with the background legislative framework.

In regards to the Planning Act 2008, by confronting the interpretative questions directly, the Court of Appeal has created a good deal more legal certainty. It is now beyond doubt that the Paris Agreement must be considered in the creation of an NPS under the Planning Act 2008. The Habitats Directive and the SEA Directive challenges, by contrast, were approached initially by asking what the applicable ‘standard of review’ was, meaning that ambiguities remain. To be clear, our argument here is not necessarily that the court reached the wrong outcome. Nor is it that the court was not aware of the issues flagged. The argument, rather, is that approaching these challenges by selecting between *Wednesbury* and proportionality as the standard of review has distinct drawbacks.