

# The Heathrow Case in the Supreme Court: Climate Change Legislation and Administrative Adjudication

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In *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* the UK Supreme Court allowed an appeal against the Court of Appeal's decision that there had been a series of legal errors in the designation of the Airport National Policy Statement. This case note analyses the case from an 'internal' doctrinal perspective and argues that the Supreme Court could have engaged more explicitly with the legal issues that arise from climate change legislation for administrative law adjudication. For courts to adjudicate well in such circumstances they need to be prepared to develop administrative law doctrine, particularly in light of the issues of integrating climate change into public decision-making and of scientific/policy uncertainty which lie in the background of climate change legislation.

Climate change litigation generates a good deal of scholarly interest.<sup>1</sup> This is unsurprising, reflecting not only common law legal scholarship's preoccupation with case law,<sup>2</sup> but also the way in which court cases have been understood as a means of catalysing 'regulatory pathways' to a lower carbon future.<sup>3</sup> The UK Supreme Court's decision in *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* (the *Heathrow* case)<sup>4</sup> does not fit easily into this narrative.

While the Court did conclude that the Secretary of State for Transport had not breached his legislative obligations in relation to climate change in promulgating the Airports National Policy Statement (ANPS), that outcome must be seen in context. Under the Planning Act 2008 (PA 2008), the developer must still obtain a development consent order (DCO).<sup>5</sup> Assessment of compatibility with up-to-date climate targets – including the net-zero carbon

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1 An overview of much of that literature can be found in J. Setzer and L. Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 *WIREs Climate Change* e580.

2 See J. Waldron, *The Dignity of Legislation* (Cambridge: CUP, 1999) 11.

3 J. Peel and H. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge: CUP, 2015).

4 [2020] UKSC 52.

5 PA 2008, Parts 4-7 and *Heathrow* *ibid* at [10], [157].

target introduced through amendment to the Climate Change Act 2008 (CCA 2008)<sup>6</sup> in 2019 – will be an important part of the process. There are no clear winners and losers in the case and the case is difficult to pigeon-hole.<sup>7</sup> This is particularly when the Government were not a party to the appeal.

But as the first time the UK Supreme Court has engaged directly with the legally disruptive nature of climate change,<sup>8</sup> *Heathrow* warrants reflective scrutiny. In this analysis, and with the benefits of time for reflection, we examine the legal reasoning in the *Heathrow* case to assess, in the words of Fisher, Scotford, and Barritt, how ‘well’ the Court adjudicated on the issues before them.<sup>9</sup> Attention needs to be paid to the quality of legal reasoning in light of the legal disruption caused by climate change, recognising both the dispute resolution and expository justice roles of adjudication. The questions before the Supreme Court concerned the interpretation and application of climate change legislation, but the Court in their analysis tended to side-line the nature of that legislation in favour of more general administrative law approaches to review. The judgment underscores both the importance of courts being prepared to develop mainstream administrative law doctrine when the context calls for it, and the need for environmental and public lawyers to interact more with each other.

### CLIMATE CHANGE LEGISLATION AND THE *HEATHROW* CASE

The *Heathrow* case arose from a statutory review<sup>10</sup> of the ANPS, supporting the building of a third runway at Heathrow.<sup>11</sup> The Court of Appeal, in a much-publicised (albeit in places quite brief) judgment, had overturned the Divisional Court,<sup>12</sup> concluding that the Secretary of State for Transport (SST) had acted in breach of legislative duties requiring consideration of climate change.<sup>13</sup> The Supreme Court allowed the developer’s appeal. We analysed the Court of Appeal’s judgment previously in the *Modern Law Review*.<sup>14</sup> In both the Court of Appeal and the Divisional Court the arguments put before the Court concerned not only climate change, but a range of environmental impacts. Before the Supreme Court however, the arguments focused solely on climate change legislation. Ground (i) concerned the statutory interpretation of

6 The Climate Change Act 2008 (2050 Target Amendment) Order 2019.

7 See the variety of perspectives on the case in the five short commentaries in (2021) 33 JEL 437; and D. Campbell, ‘Temperature Tantrum’ (2021) 137 LQR 380.

8 E. Fisher, E. Scotford, and E. Barritt, ‘The Legally Disruptive Nature of Climate Change’ (2017) 80 MLR 173.

9 *ibid*, 196–200.

10 PA 2008, s 13.

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

12 *Spurrier, R (On the Application Of) v The Secretary of State for Transport* [2019] EWHC 1070 (*Spurrier*).

13 *Plan B Earth v Secretary of State for Transport* [2020] EWCv Civ 214 (*Plan B Earth*).

14 J. Bell and E. Fisher, ‘The ‘Heathrow’ Case: Polycentricity, Legislation, and the Standard of Review’ (2020) 83 MLR 1072.

section 5(8) of the PA 2008. Grounds (ii) and (iv) concerned section 10(3) of the PA 2008 and ground (iii), concerned whether there was a breach of the Strategic Environmental Assessment Directive<sup>15</sup> (SEA Directive) and domestic implementing legislation.<sup>16</sup> As this summary illustrates, the arguments before the Supreme Court focused closely on legislation, specifically, climate change legislation.

Legislatures around the world are enacting an array of legislative provisions addressing climate change,<sup>17</sup> with the UK regarded as a world leader.<sup>18</sup> Scotford and Minas draw a useful distinction between two types of climate change legislation.<sup>19</sup> ‘Direct’ climate change legislation encompasses ‘national laws that explicitly address or consider climate change.’<sup>20</sup> This may be in the form of standalone legislation or legislative obligations in statutes on other matters. Reference to climate change is in the text. There is thus no question of climate change’s legal significance. Legislation can also make ‘indirect’ provision for climate change. Indirect climate legislation ‘intersect[s] with climate change but do[es] not address it explicitly.’<sup>21</sup> For example, environmental impact assessment legislation may require decision-makers to have regard to climate impacts. The distinction between direct and indirect climate change legislation is not a ‘bright line’, although indirect climate change legislation has not had the analytical attention it deserves.<sup>22</sup> Whether legislation is direct or indirect, the consequence is that climate change has legal significance – it cannot be characterised as a ‘political’ or ‘scientific issue’. It raises legal questions, most obviously about how legislation should be interpreted.

The UK has enacted numerous examples of direct climate change legislation. Most obviously, the CCA 2008. This Act is the legal centrepiece of climate law and policy in the UK and makes provision for, among other things, long<sup>23</sup> and short-term carbon targets,<sup>24</sup> a Climate Change Committee (CCC),<sup>25</sup> and a series of reporting requirements.<sup>26</sup>

The PA 2008, the Act at the heart of *Heathrow*, is another example of ‘direct’ climate change legislation. The PA 2008 is an ambitious legislative scheme,<sup>27</sup> enacted on the same day as the CCA 2008. Its main aim was to introduce

15 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.

16 Environmental Assessment of Plans and Programmes Regulations 2004 SI 2004/1633.

17 See <https://climate-laws.org> (last visited 16 July 2021); T. Muinzer (ed), *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation* (Oxford: Hart, 2020).

18 A. Averchenkova, S. Fankhauser and J. Finnegan, ‘The Impact of Strategic Climate Legislation: Evidence from Expert Interviews on the UK Climate Change Act’ (2021) 21 *Climate Policy* 251.

19 E. Scotford and S. Minas, ‘Probing the Hidden Depths of Climate Law: Analysing National Climate Change Legislation’ (2019) *RECIEL* 67.

20 *ibid.*, 74.

21 *ibid.*, 70.

22 *ibid.*, 70.

23 CCA 2008, s 1. See C. Reid, ‘A New Sort of Duty? The Significance of “Outcome” Duties in the Climate Change and Child Poverty Acts’ [2012] PL 749.

24 CCA 2008, s 4.

25 CCA 2008, s 32.

26 CCA 2008, ss 16, 36, 56.

27 See the analysis in Bell and Fisher, n 14 above.

a novel two-stage procedure – involving the designation of National Policy Statements (NPS) followed by the grant of Development Consent Orders (DCO) – to streamline decision-making about nationally significant infrastructure projects.<sup>28</sup> It also contains provisions dealing explicitly with climate change.

Section 5(8) requires that the reasons accompanying an NPS: ‘... 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.’<sup>29</sup>

Ground (i) raised the question of how to interpret this provision, and specifically whether it required the reasons to engage with the UK’s commitment to the Paris Agreement. The reasons accompanying the ANPS had endorsed the view expressed in 2015 by the Airports Commission (AC) that Heathrow expansion would be consistent with UK climate change legislative targets then in force.<sup>30</sup> However, post the AC report, the UK had both signed and ratified the Paris Agreement, committing the UK to more ambitious international targets. A series of Ministerial statements had also affirmed the Government’s commitment to introducing a net-zero-by-2050 carbon target.<sup>31</sup> None of these developments were mentioned in the ANPS, giving rise to the question of whether any constituted ‘Government policy’.

The PA 2008 also includes section 10(3) which required the SST to: ‘(3) ... have regard to the desirability of – (a) mitigating, and adapting to, climate change ...’. This provision underlay the second and fourth grounds of appeal. The SST’s consideration of climate change had been limited to considering the AC report from 2015, and advice from the CCC in 2016 to the effect that existing legislative targets *may* be sufficient to comply with the Paris Agreement.<sup>32</sup> The challengers argued that this was insufficient to discharge the obligation to ‘*have regard*’ because the SST failed to properly grapple with the compatibility of airport expansion with the Paris Agreement (ground (ii)), the post-2050 carbon impact of expansion (ground (iv)(a)), and the non-carbon climate impacts of Heathrow expansion (ground (iv)(b)).

Ground (iii) concerned the SEA regime, an example of indirect climate change legislation. SEA builds on the existing environmental impact assessment regime by requiring ‘upstream’ assessment of, and public consultation on, the environmental impacts of plans and programmes. Ground (iii) concerned the legal adequacy of the Appraisal of Sustainability (AoS) which preceded the ANPS. The challengers argued that the outright failure to make any mention of the Paris Agreement in the AoS constituted a breach of the Annex I requirement to refer in an environmental report to any ‘*environmental protection objectives, established at international, Community or Member State level, which are*

28 PA 2008, s 14.

29 PA 2008, s 5(7).

30 Airports Commission, *Final Report* (July 2015).

31 Later introduced by Climate Change Act 2008 (2050 Target Amendment) Order 2019.

32 *Heathrow* n 4 above at [74]; Climate Change Committee, *UK Climate Action Following the Paris Agreement* (October 2016). However, see also Climate Change Committee, ‘An independent assessment of the UK’s Clean Growth Strategy: From ambition to action’ (January 2018), discussed in *Heathrow* *ibid* at [79].

relevant ... and [how] those objectives and any environmental considerations have been taken into account.<sup>33</sup>

## CLIMATE CHANGE, CLIMATE CHANGE LEGISLATION, AND LEGAL DISRUPTION

The *Heathrow* case therefore illustrates how climate change legislation – both direct and indirect – can give rise to legal questions. The construction of climate change legislation requires an appreciation of the nature of, and challenges posed by, climate change. Climate change is often described as a ‘wicked’<sup>34</sup> or ‘hot’<sup>35</sup> legal problem. The polycentric nature of climate change, its multivalent nature,<sup>36</sup> the uncertainty over future impacts, and the socio-political conflicts which climate change engender all make it ‘legally disruptive.’<sup>37</sup> Two challenges posed by climate change are particularly important to an understanding and critique of *Heathrow*.

First, addressing climate change necessarily requires an integrated approach.<sup>38</sup> Climate change is a global and polycentric problem that requires ‘small, incremental responses across all levels of governance’.<sup>39</sup> Coordination must occur *vertically*. To that end, the Paris Agreement has created a multi-level framework in which the temperature target in Article 2 frames national action and in particular the development of ‘nationally determined contributions.’<sup>40</sup> *Horizontal* integration – that is, cooperation across decision-making sectors within government – is also necessary. International and domestic targets will not be met if climate change is not seriously factored into decision-making in different areas. In the UK, ‘high-level’ policy relating to climate change falls primarily within the purview of the Department for Business, Energy and Industrial Strategy and the Department for Environment, Food and Rural Affairs.<sup>41</sup> Meanwhile, the development of transport policy, as the ANPS attests, occurs within the Department for Transport, which continues work on its *Aviation Strategy*.<sup>42</sup> There is also a relationship between the vertical and horizontal. For example, policies

33 Annex I, para (e) (emphasis added).

34 R.J. Lazarus, ‘Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future’ (2009) 94 Cornell L Rev 1153.

35 E. Fisher, ‘Environmental Law as “Hot” Law’ (2013) 25 JEL 347.

36 G. Marshall, *Don’t Even Think About It: Why Our Brains Are Wired to Ignore Climate Change* (London: Bloomsbury, 2014) 228.

37 Fisher, Scotford and Barritt, n 8 above.

38 Scotford and Minas, n 19 above, 70–71.

39 B. Preston, ‘Climate Conscious Lawyering’ (2021) 95 ALJ 51.

40 Paris Agreement, Art 4. See L. Rajamani, ‘The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations’ (2016) 28 JEL 337.

41 Although also see Prime Minister’s Office, ‘PM to chair new Cabinet Committee on Climate Change’ Press Release, 17 October 2019 at <https://www.gov.uk/government/news/pm-to-chair-new-cabinet-committee-on-climate-change> (last accessed 20 February 2021).

42 Department for Transport, *Consultation Response on Legislation for Enforcing on Development of Airspace Change Proposals* (October 2019).

bearing on the relationship between aviation and climate change have been developed, and are developing, at the national<sup>43</sup> and international levels.<sup>44</sup>

Section 5(8) of the PA 2008 can be seen as a clear legislative expression of the importance of integration. It requires the SST to explain how ‘policy’ developed across government has been considered in the NPS process. The question arises about *what kind* and *how much* integration is required. In developing the ANPS the SST had not *ignored* developments elsewhere in government: the pre-ANPS AC report had directly considered the compatibility of airport expansion against targets enacted by Parliament and the SST had factored in early post-Paris advice by the CCC. The question was whether this was legally *enough* to ensure a sufficiently integrated approach under section 5(8). By the time the ANPS was designated, the CCC had altered its position,<sup>45</sup> the Paris Agreement had been signed and ratified, and plans to introduce a legislative net-zero carbon target<sup>46</sup> were underway in other Ministerial departments.

Second, climate change can require decisions to be made in conditions of persistent uncertainty. This uncertainty takes at least two forms. First, scientific uncertainty: ‘while scientific understandings of climate change are relatively settled, assessments of future climate change are not straightforward.’<sup>47</sup> Bodies such as the national CCC and international Intergovernmental Panel on Climate Change play an important role in stabilising understanding of future impacts. However, major gaps in understanding remain. Most relevantly, the climate impacts of non-CO<sub>2</sub> emissions from aviation remain poorly understood. Here, ‘the uncertainties remain large, and new effects have been identified that potentially have large impacts but for which no best estimates are available.’<sup>48</sup>

A second form of uncertainty is policy uncertainty. Legislation and strategy documents play an important role in erecting ‘institutional guardrails’<sup>49</sup> which shape public decision-making. An important aspect of this is the role played by law in stabilising understandings of time. Climate change is both a future problem and one which requires urgent action.<sup>50</sup> Law – including both international and domestic law – can serve to stabilise time frames, setting parameters for what needs to be done, and by when.

Legal frameworks relating to a problem as complex as climate change do not, however, emerge quickly or easily. The UK’s CCA 2008 plays an important role in setting both long and short-term binding targets. However, at the time of ANPS designation, targets were not in place for the aviation industry, non-carbon emissions, and carbon emissions post-2050. Underpinning the second and fourth issues on appeal in *Heathrow* were questions about whether

43 Department for Transport, *Decarbonising Transport: Setting the Challenge* (March 2020) 32.

44 UN International Civil Aviation Organisation, *Carbon Offsetting and Reduction Scheme of International Aviation* at <https://www.icao.int/environmental-protection/CORSIA/Pages/default.aspx> (last accessed 20 February 2021).

45 *Heathrow* n 4 above at [79].

46 2019 Order, n 31 above.

47 Fisher, Scottford and Barritt, n 8 above, 179.

48 D.S. Lee, ‘The Current State of Scientific Understanding of the non-CO<sub>2</sub> effects of Aviation on Climate’ (Department of Transport, December 2018).

49 Averchenkova, Fankhauser and Finnegan, n 18 above, 256.

50 C. Hilson, ‘Framing Time in Climate Change Litigation’ (2019) 9 *Oñati Socio-Legal Series* 361.

the SST's approach to decision-making – which had involved assessing development against the legislative targets which *were* in force, and postponing consideration of other matters – was rational and lawful.

These features of climate change – integration and uncertainty – are legally relevant in that they underpin the legal provisions that are the focus of *Heathrow*. Surprisingly, the Supreme Court judgment contains very little in the way of detailed discussion of either. Rather, as we now explain, the Court resolved the legal questions before it, by relying on mainstream administrative law thinking and doctrine.

## GROUND (I)

As explained above, the first issue on appeal raised a seemingly narrow question of statutory construction: what constitutes 'Government policy relating to the mitigation of, and adaptation to, climate change' for the purposes of section 5(8) of PA 2008? The Divisional Court and Court of Appeal had been divided on the question. The former adopted a very narrow approach, encompassing only legislative targets enacted pursuant to the CCA 2008.<sup>51</sup> The latter embraced a broad interpretation which required the reasons accompanying the ANPS to explicitly engage with both the Paris Agreement, and Ministerial statements of intention to introduce a net-zero carbon target by 2050.<sup>52</sup>

The Supreme Court, like Goldilocks, adopted a midway position between what it saw as unduly narrow and unduly open-ended readings of section 5(8). Explained briefly, that construction locates government policy in three places. First, legislative targets enacted under the CCA 2008.<sup>53</sup> Second, formalised written statements pointing towards 'policy ... cleared by the relevant departments on a government-wide basis.'<sup>54</sup> Third, in 'exceptional' circumstances, ministerial statements may qualify as 'policy' if they are 'clear, unambiguous and devoid of relevant qualification.'<sup>55</sup>

There is a sense in which this construction is novel. 'Government policy' is not, after all, a legal term of art.<sup>56</sup> It is specific to the PA 2008. It is clear, however, that the three-part construction relies heavily on mainstream administrative law thinking.<sup>57</sup> On the third limb, the test for ministerial statements borrows directly from legitimate expectations case law. Since *R v IRC, ex parte MFK Underwriting Agents Ltd (MFK)*,<sup>58</sup> courts in many cases<sup>59</sup> have determined whether a

51 *Spurrier* n 12 above at [612].

52 *Plan B Earth* n 13 above at [228].

53 *Heathrow* n 4 above at [111].

54 *ibid* at [105].

55 *ibid* at [106].

56 Although sometimes cases have required courts to distinguish policy decisions, from other decisions, often to determine whether consultation was required. See for example *R (Bloomsbury Institute Ltd) v Office for Students* [2020] EWCA Civ 1074.

57 A. Mills, 'Friends of the Earth: At the Intersection of Environmental and Administrative Law?' (2021) 33 JEL 461.

58 *R v IRC, ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 (QBD).

59 See for example Woolf et al, *De Smith's Judicial Review* (London: Sweet & Maxwell, 8<sup>th</sup> ed, 2017) 12-032.

statement or policy document is capable of generating a legitimate expectation by asking whether it is ‘clear, unambiguous and devoid of relevant qualification.’<sup>60</sup> The threshold is a high one and leads to the downfall of many claims.<sup>61</sup> On the second limb, the Court remarked that ‘formal written statement[s] of established policy’<sup>62</sup> such as the National Planning Policy Framework, are to be treated as the ‘epitome’<sup>63</sup> of policy. These are the forms of policy which the courts most commonly engage with in judicial review, in part due to the duty on public authorities to apply policy in the absence of good reason.<sup>64</sup> It is striking, in other words, that the Supreme Court’s construction limits ‘Government policy’ to statements and documents which have long had legal effects in administrative law.

It is evident that the major appeal of this construction for the Supreme Court was the degree of certainty it was thought to create. The Court emphasised the importance of section 5(8) provision operating ‘sensibly’<sup>65</sup> and avoiding a reading of the section that would create a ‘bear trap for Ministers’<sup>66</sup> or require civil servants ‘to trawl through Hansard and press statements to see if anything had been said by a minister which might be characterised as “policy.”’<sup>67</sup> That said, the certainty created by this construction should not be overstated. The judgment does not, for instance, explicitly discuss the relationship between section 5(8) and the reporting structure created under the CCA 2008. Whether and which of these reports fall within the Supreme Court’s definition of ‘policy’ may turn out to be a source of controversy in future case law.

The more significant problem with this aspect of the judgment, however, is the thinness of the Court’s engagement with the importance of integration in climate change policy. Integration was not ignored completely. Indeed, the Supreme Court remarked that a virtue of its interpretation of ‘policy’ was that it would ensure a ‘a degree of coherence’<sup>68</sup> in the development of infrastructure and climate change policy. However, the Supreme Court’s interpretation does not demand much by way of integration. In drafting future NPSs a Minister need engage only with a limited subset of documents and statements, even if major plans for reform are well underfoot elsewhere in government.

This lack of detailed engagement with the importance of integration is especially problematic given both the wording and legislative history of section 5(8). Regarding wording, section 5(8), refers to ‘Government policy’ with a capital ‘g’. Arguably, the legislation is referring to the ‘policy’ of the current HM Government and thus warrants a more dynamic definition.<sup>69</sup> Likewise, the section concerns policies ‘relating to the mitigation of, and adaptation to, climate change’ – policies that are recognised to be evolving and involve the UK

60 *MFK* n 58 above, 1569; *Paponette v Attorney-General of Trinidad and Tobago* [2010] UKPC 3 at [30].

61 Woolf et al, n 59 above, 12–034.

62 *Heathrow* n 4 above at [106].

63 *ibid.*

64 *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59 at [29].

65 *Heathrow* n 4 above at [105].

66 *ibid* at [105].

67 *ibid* at [105].

68 *ibid* at [105].

69 Bell and Fisher, n 14 above, 1077.

government operating as part of international and transnational regimes. It is not so much that the UK government is transposing international obligations (which raises fears of breaching a commitment to dualism), but that UK government policy on climate change is a product of participation in international and transnational discourse – discourse that is designed to be multi-level.<sup>70</sup> The UK government is not a policy island where it comes to climate change.

Legislative history also arguably pointed to section 5(8) requiring a far higher degree of integration. The White Paper leading to the PA 2008 refers to the aim behind section 5(8) in the following terms: “NPSs would ... indicate how the Government’s objectives for development in a particular infrastructure sector *had been integrated with other specific government policies*, including other NPSs, national planning policy ... and *any relevant domestic and international policy commitments*. *Climate change policies would be a particularly important issue.*”<sup>71</sup>

It is striking that this paragraph assumes that ‘*international policy commitments*’ – which surely encompasses the Paris Agreement – constitute a form of ‘Government policy’.

### GROUND(S) (II), (IV) AND (III)

The second and fourth issues on appeal concerned the compatibility of the SST’s approach with the section 10(3) obligation to ‘have regard to ... climate change.’ In approaching these issues, the Supreme Court started and ended its analysis with mainstream administrative law doctrine. It drew on what it described as a basic ‘principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight.’<sup>72</sup> According to this approach, as long as the SST had not failed to ‘advert at all’<sup>73</sup> to an ‘obviously material’<sup>74</sup> consideration, the court could only intervene if satisfied the approach was ‘irrational,’ bearing in mind that ‘a court’s view of common sense is not the same as a finding of irrationality.’<sup>75</sup>

The Supreme Court did not find fault with the Court of Appeal’s statement of the doctrinal test to be applied. Rather, and atypically, the Supreme Court considered that the Court of Appeal had erred in applying this approach to the evidence that was before the Court. Counsel in the Divisional Court had argued for a highly restrictive interpretation of section 5(8) which would have confined ‘Government policy’ to the CCA 2008 carbon targets. The Court of Appeal was said to have taken this as evidence that the Government had taken the Paris Agreement to be legally *irrelevant* to its decision. However, in the

70 Rajamani, n 40 above.

71 HM Government, *Planning for a Sustainable Future* Cm 7120 (2007) 45 (emphasis added). See also 178.

72 *Heathrow* n 4 above at [121].

73 *ibid* at [120].

74 *ibid* at [119]–[120].

75 *ibid* at [165].

Supreme Court's view this improperly blurred the line between legal argument and evidence.<sup>76</sup> In contrast, the Supreme Court was broadly satisfied that the evidence showed 'the Secretary of State certainly did ask himself the question whether he should take into account the Paris Agreement beyond the extent to which it was already reflected in the obligations under the CCA 2008 and concluded in the exercise of his discretion that it would not be appropriate to do so.'<sup>77</sup>

The evidence thus attested that consideration had been given to both the AC report and early CCC advice, albeit the SST had ultimately concluded that the preferable way to proceed was to press ahead with the ANPS, deferring further consideration to the DCO stage. This was a conclusion, the Supreme Court thought, which was rationally open to the SST and was therefore sufficient to discharge the section 10(3) duty.

In our view, this difference of opinion on the evidence before the Court, meant that the Court did not adequately grapple with the question of what does and should constitute a rational approach to decision-making in conditions of persistent uncertainty. As explained above, climate change is plagued by uncertainty, both scientific and policy-based. The approach of the SST, faced with these conditions of uncertainty, had been to work with what *was* settled and to kick everything else down the road to be dealt with at the DCO stage. *Heathrow* treats this approach as well within the broad parameters of rationality afforded to the decision-maker. It is, however, highly questionable whether this was the best approach to either the statutory construction of section 10(3) or to reviewing the exercise of discretion under it.

There can be good reasons to postpone consideration of environmental impacts until a later phase in a multi-staged decision-making process,<sup>78</sup> especially where consideration of impact or mitigation turns on details which have not yet been fleshed out. However, postponement can also have considerable downsides. Consider Heathrow expansion. By the DCO stage, scientific and policy uncertainty relating to the non-CO2 impacts of aviation are unlikely to have dissipated. The question, however, of whether expansion can be supported when potentially significant climate impacts are unknown, must still be grappled with. As the discourse in the case concerning the precautionary principle attests<sup>79</sup> the answer will be far from straightforward and will be contentious. The key point, however, is that the issue *must* be addressed. Postponing consideration of the inevitable has consequences for the developer which may still yet, after investing significant time and resources, be refused consent. Postponement of such matters also sits uncomfortably with one of the fundamental aims of the PA 2008 which was to settle complex and contentious policy issues at the NPS, and well before the DCO, stage.<sup>80</sup>

76 *ibid* at [128].

77 *ibid* at [129].

78 See for instance *Abbotkerswell Parish Council v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 555 (Admin) (*Abbotkerswell Parish Council*).

79 *Plan B Earth* n 13 above at [259]-[260] and *Heathrow* n 4 above at [164]-[166].

80 Bell and Fisher, n 14 above.

The basic problem with the approach to review established by *Heathrow* is that it treats the decision to postpone as exclusively within the purview of the Secretary of State. The decision-maker is not treated as under any justificatory burden to articulate *good* reasons for postponing consideration of whether development should proceed in the face of uncertainty.<sup>81</sup> Closer engagement with an important feature of climate change – the persistence of uncertainty – might have led the court to articulate a more substantive understanding of what it means to ‘have regard’ to climate change and thus a more searching approach to review for compliance with section 10(3).

Instead, the Supreme Court was too quick to deploy general doctrines concerning the review of discretion. Those tests have been applied in the related area of general planning law.<sup>82</sup> But the PA 2008 is not general planning law, and section 10 contains a very specific legislative obligation. The Supreme Court has been keen to stress elsewhere that terms do not necessarily bear the same meaning, regardless of the legislative context in which they appear.<sup>83</sup> Yet *Heathrow* is strikingly lacking in detailed discussion of whether the legal context of the case required the court to adopt a thicker understanding of what it meant to ‘have regard’ to climate change.

A similar point can be made in relation to the third ground, concerning the SEA Directive. The Supreme Court thought the *Wednesbury* standard was not breached by the AoS failing to mention the Paris Agreement.<sup>84</sup> As with section 10, the Agreement had not been ignored by the SST.<sup>85</sup> The Court noted that the absence of any explicit engagement with it did not deny the public an opportunity to comment on the climate implications of expansion<sup>86</sup> and emphasised the importance of not encouraging a ‘defensive’<sup>87</sup> approach to compiling consultation documents. There is an understandable public law logic behind this approach. But it does somewhat negate the purpose of SEA, which is to push consideration of environmental impacts ‘upstream’ in decision-making. Finding that the requirement in Annex I to consider ‘environmental protection objectives’ does not include consideration of a significant international obligation which the government had committed to could be argued to put at risk the commitment to coordinated climate change action.

## CONCLUSION

The Supreme Court’s *Heathrow* decision did not result in obvious winners and losers. While the Court concluded there were no breaches of climate change legislation, the future of the third runway at Heathrow remains unresolved. Given the way that the Supreme Court and CA held different understandings

81 By way of contrast see the recent decision *Pearce v Secretary of State for Business Energy and Industrial Strategy* [2021] EWHC 272 (Admin) (*Pearce*).

82 See *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL).

83 See for example *R (KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2.

84 *Heathrow* n 4 above at [142]–[144].

85 *ibid* at [149]. This also explains the difference with the CA.

86 *ibid* at [147].

87 *ibid* at [147].

of what the SST actually decided it is also not even easy to compare their reasoning. But while the *Heathrow* case might lack the simple dramatic arc of some climate change litigation, it is an important case that raises the question of what it means to ‘adjudicate well’ in relation to climate change legislation and thus to incorporate ‘climate change into the substructure of the law’.<sup>88</sup>

Our argument here has been that the Supreme Court failed to fully engage with the issues of integration and uncertainty which lay in the background of the legal obligations at the centre of the case. On the one hand this argument may appear radical, particularly when the case can easily be seen as an application of mainstream public law doctrine. Indeed, the Court and parties were often in agreement about the relevant legal tests.<sup>89</sup> But on the other hand, judicial review doctrine is always applying in, and shaped by, specific statutory and institutional contexts<sup>90</sup> and the courts have not steered away from adapting their approach to review where necessary.<sup>91</sup> Lord Steyn’s famous remark that ‘in law, context is everything’<sup>92</sup> is as, if not more, relevant in cases involving climate change legislation as it elsewhere in judicial review.

The need to determine the nature and contours of administrative law adjudication in relation to climate change legislation will not go away. Not only is further litigation on Heathrow expansion likely, climate change legislation is figuring, increasingly, in other judicial review cases.<sup>93</sup> A continued discourse, among both environmental and public law scholars, about what it means to adjudicate well in the context of climate change legislation is of the utmost importance. *Heathrow* may be the first time the UK Supreme Court has engaged in the construction of climate change legislation. It will not be the last.

88 Fisher, Scotford and Barritt, n 8 above, 199.

89 *Heathrow* n 4 above at [116], [142]–[144].

90 J. Bell, *The Anatomy of Administrative Law* (Oxford: Hart, 2020).

91 For example *R (A) v London Borough of Croydon* [2009] UKSC 8 and *R (Cart) v Upper Tribunal* [2011] UKSC 28.

92 *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26 at [28].

93 For example *Finch, R (on the application of) v Surrey County Council* [2020] EWHC 3566 (Admin); *Packham, R (on the application of) v High Speed Two (HS2) Ltd* [2020] EWCA Civ 1004; *Pearce* n 81 above and *Abbotkerswell Parish Council* n 78 above.