

Climate change legal challenges: update



Siân McGibbon



R (Finch) v. Surrey County Council & Ors [2022] EWCA Civ 187

An appeal to the Supreme Court heard in June 2023:

- The critical issue is whether, under Directive 2011/92 EU of the European Parliament and of the Council and the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, it was unlawful for the Council not to require the environmental impact assessment for a project of crude oil extraction to include an assessment of the impacts of downstream greenhouse gas emissions resulting from the eventual use of the extracted oil.
- The Court of Appeal dismissed the appeal, holding that the question is one of the degree of connection between the development and its putative effects, so that the question whether ‘scope 3’ emissions required assessment was one of fact and evaluative judgment for the planning authority (at [57]).
- But the Court of Appeal could not agree (Moylan LJ dissenting) as to the application of these principles of the facts. Judgment from the Supreme Court is awaited...



R (Friends of the Earth) v. Secretary of State for Levelling-Up, Housing, & Communities (judgment awaited)

A three day rolled-up hearing in October 2023 in this challenge to a decision to grant planning permission West Cumbria Mining Ltd for a new coalmine just south of Whitehaven:

- Carbon offsetting – whether reliance on international projects is permitted in assessing the net carbon impact of the new development as ‘net zero’.
- International impact – whether the Secretary of State was required to consider the ‘negative international impact’ of the decision in terms of ‘the UK’s claims to climate leadership’ and the ‘damaging precedent’ which it is said to establish.
- Demand for coal – whether the Secretary of State had adequately considered evident of global demand for coal which challenged the claim that the new mine would substitute for US coal and therefore have a ‘net neutral’ impact.
- And finally the question of assessment of end-use emissions, the answer to which we await from the Supreme Court in *Finch*...



Bristol Airport Action Network Co-Ordinating Committee & Secretary of State for Levelling Up v. Bristol Airport Ltd & Anor [2023] EWHC 171

Statutory review of the government’s decision to allow an expansion to Bristol Airport dismissed by the High Court. Lane J recognised that climate change is “a matter of very great importance”, but:

- Consideration of the impact of additional aircraft fell to be considered within relevant local plan policies;
- The policy focus was on whether the aviation emissions would be likely to have a material impact on the Secretary of State’s ability to meet his obligations under the Climate Change Act 2008, including the carbon budgets. The Panel had lawfully concluded that the additional emissions would not have such an impact.
- The Panel lawfully excluded consideration of non-carbon-dioxide emissions from that assessment.



R (Dawes) v. Secretary of State for Transport [2023] EWHC 2352

The High Court rejected a challenge to the Secretary of State's decision to grant development consideration for the reopening of Manston Airport as a freight facility:

- The ground relating to climate change was based on the advice from the Climate Change Committee that there should be no net expansion of airport capacity unless the aviation industry was on a trajectory to outperform net emissions targets, which would enable additional demand to be accommodated.
- The court rejected this argument and held that the Secretary of State had been entitled to rely on the newly adopted “jet zero strategy” as justification for his conclusion that he could expect an acceleration in the decarbonisation of the aviation sector.
- On the evidence as a whole the Secretary of State was entitled to place very little weight on the potential for expansion at other facilities in making his decision – this potential was not obviously material given the level of uncertainty involved.



R (Boswell) v. (1) Secretary of State for Transport (2) National Highways [2023] EWHC 1710

Clarity on the approach to assessment of cumulative carbon emissions from infrastructure development:

- Failure to carry out an assessment comparing combined carbon emissions from three major road projects (all along the A47 in Norfolk) against national carbon budgets was *not* a breach of environmental impact assessment requirements under Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.
- It is for the Secretary of State to determine what (if any) impacts should be assessed cumulatively, and how they should be assessed is a matter of evaluative judgement.
- Thornton J: A reminder that “the courts must be astute to avoid being drawn into the arena of the ‘forbidden merits’. Decisions [regarding infrastructure projects] and their effect upon climate change is a subject attracting many widely differing views, whether for or against” (at [84]).



And look out for...

Levelling-Up and Regeneration Act 2023

- New duties for the planning system to have ‘special regard’ to the need to ‘mitigate and adapt to’ climate change and secure public health and wellbeing;
- Additional scrutiny of proposed national development management policies.

Net Zero Litigation

- Following the judgment in *R (Friends of the Earth Ltd & Ors) v. Secretary of State for Business, Energy, and Industrial Strategy* [2022] EWHC 1841 (Admin), the government has revised its net zero strategy;
- The revised strategy now faces a fresh challenge lodged in July 2023 by the same three organisations. The claim is based on the lack of detail as to the level of risk posed by each policy and alleged breach of the sustainable development duty.





And beyond the planning context – Client Earth v. Shell Plc & Ors [2023] EWHC 1137



Thank you

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