

Climate Change as a Material Consideration

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(Context provided by David Forsdick QC with thanks to Ben Fulbrook for extensive assistance)

Introduction

- The Key Context
- Policy Formulation vs DCO and s.78 Decision Making
- What is a material consideration?
- Early consideration of climate change in planning decisions
- The (original) airports cases
- Current position - on s.78; on DCO and on Policy/NPS
- Conclusion

Key Context

- Stern – need for early, robust and consistent steps across economy including LUP to avoid/reverse entrenching of carbon.
- Climate Change Act 2008 s.1 - 80% reduction 2050.
- CCC and carbon budget - based on trajectories which evolve over time to meet the end point - the later action is taken the steeper the trajectory
- Inevitable flash points – aviation, coal, green energy
- Changing targets – net neutral 2050 (2040/2030?? after election); including aviation and shipping (?) - major change since relevant NPSs adopted
- Progress to delivery– major debate as to whether CCC too optimistic; early “easy” wins in electricity generation; masking underperformance elsewhere
- Graphs already much steeper than in 2008 – deliverable?

Key Context (2)

- Initial view 2008– wholesale change inevitable in form and location of development and whether infrastructure (responding to demand) could carry on “business as usual”
- Policy making and individual decision making would have to place carbon centre stage from the outset
- Otherwise trajectories get more expensive, difficult and must steeper
- Hence a flurry of aviation related litigation in 2009 – 11 aimed at putting CC centre stage - but failed.

Key Themes

- Policy vs Decision Making
 - High level policy says the right things but not translated into practice
 - policy claimed to be “inconsistent” with achieving CC goals
 - Individual decisions impacting trajectory

- Green development promoted, carbon intensive development avoided – supposed to be two sides of same coin:
 - Encouraging green development despite some harm–
e.g. wind turbines/nuclear
 - Preventing development in wrong location and which was inconsistent with climate change goals

Material Considerations

- Plan Making: s.19 (1A) PA 2008 requires development plan to expressly requires policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change; and s.19(2) to take into account govt policy.
- NPSs - s. 5(8) must set out how it takes account of policy relating to the mitigation of climate change; s10(2) SoS must exercise functions with objective of mitigating climate change
- Decision Making S. 70 TCPA 1990 and s.38(6) expressly requires decision maker to take material considerations into account
- DCO: S.104 - SoS must determine in accordance with NPS unless breach of international obligation, breach of a duty of SoS, unlawful under any statute, or adverse impact outweighs benefits

Material Considerations

- Key distinction between potentially relevant and necessarily relevant considerations: see Carnwath LJ in ***Derbyshire Dales DC v SSCLG*** [2010] EWHC 1729 (Admin), §17.
- Decision maker has very wide discretion to take into account anything related to land in decision making. The question is when does the law force the decision maker to take into account climate change.
 - Potentially relevant – not unlawful to take into account
 - Necessarily relevant – unlawful not to take into account

Both subject to ***Wednesbury*** test, unless statute indicates otherwise:
Baroness Cumberlege v SSCLG [2018] EWCA Civ 1305, §§20-6

Early consideration of climate change

R (Littlewood) v Bassetlaw DC [2008] 1812 (Admin)



Laing O'Rourke concrete manufacturing, Steetley

Early consideration of climate change

R (Littlewood) v Bassetlaw DC [2008] 1812 (Admin)

- JR against the grant of planning permission for the construction of a concrete manufacturing plant
- One ground of challenge was that the Council and the ES did not consider the adverse effect of pre-cast concrete production on climate change – specifically from CO2 emissions
- Context important – CC not raised in objections - “an afterthought” in the challenge; and the focus was not on the development per se but on the product from the factory. Akin to attacking the use of pre-cast concrete in the economy.
- So not a particularly propitious first case based on CC – global impact of the product not the local impact of the factory.
- Sir Michael Harrison (sitting as a High Court Judge) held (§67):
 - I do not consider that the omission of the effect of the production of concrete on climate change renders the Environmental Statement as a whole so deficient that it could not reasonably be described as an Environmental Statement*
- Not a promising start - just before CCA 2008

The (original) Airports Cases

Background

- Series of cases between 2009-11 – all post CCA and explicitly relied on it
- Air Transport White Paper 2003 (ATWP) indicated government's views on airport expansion in the UK – major expansion
- Pre-dated Climate Change Act 2008 which introduced carbon emissions targets for 2050 (albeit not directly for aviation)
- Climate Change Committee Report 2009 on reducing aviation emissions concluded that to meet the targets Air Traffic Movements in the UK should not increase by more than 55% to 2050 – based on what have proved to be optimistic assumptions from aviation industry as to technological improvements (SAR)
- 55% was significantly less than the increase which would arise from the government's expansion policy as set out in the ATWP
- Led to a series of challenges –on the basic proposition that there was a disconnect between the level of aviation expansion in the ATWP and achievement of s.1 80% requirement. And that that was a necessary material consideration for decision making.

The (original) Airports Cases

R (Barbone) v SSfT [2009] EWHC 463 (Admin)



The (original) Airports Cases

R (Barbone) v SSfT [2009] EWHC 463 (Admin)

- Challenge to decision by planning inspector to grant planning permission for Stanstead expansion
- Challenge – failure to take into account the greenhouse gas emissions which would arise from operating the expanded airport –the focus was on the global impact of the flights from the development not the local impact of the airport.
- Applicant contended that there was a disconnect (1) ATWP and PP; and (2) CC which the decision and the govt ignored.
- Judges’s starting point was that no global climate change effects could be demonstrated (axiomatic)
- Court considered that the challenge was in effect to govt policy in ATWP (73)
- Court held that the inspector had been entitled (indeed bound) to apply the ATWP as government policy, even if it pre-dated the new climate targets – irrespective as to the disconnect.
- How to address CC was **only** a matter for policy not individual decision making – based on *Bushell*
- The issue then as now (78).
- Matters affecting the global climate (such as CO2 emissions) were properly **only** matters for parliament and national policy, rather than for local planning.

The (original) Airports Cases

R (Hillingdon LBC) v SSfT [2010] EWHC 626 (Admin)



The (original) Airports Cases

R (Hillingdon LBC) v SSfT [2010] EWHC 626 (Admin)

- Stated conclusion that CC global implications was only to be determined through policy was rejected.
- JR of decision by the SoS to confirm policy support for a third runway and 6th terminal at Heathrow. Claim overtaken by Govt promise to pursue an NPS before grant
- Nevertheless Carnwath LJ held that decision makers did not have to ignore MCC since ATWP and consistency with CCA was not immune from interrogation in the local planning context. Climate change arguments could be relevant – Bushell did not count them out:

52. Further, common sense demanded that a policy established in 2003, before the important developments in climate change policy, symbolised by the Climate Change Act 2008, should be subject to review in the light of those developments...

63. I do not find it necessary to consider how a planning inspector or the IPC might deal with arguments directed to the merits of aspects of the 2003 ATWP or the 2009 Decision in advance of Airports NPS. I would only observe that I find it hard to see why arguments based on material changes since 2003 should carry less weight merely because the operator has chosen to pre-empt the NPS process.” In other words CC could be raised at the planning stage....

Hillingdon (3)

- The Court considered but did not have to resolve the competing arguments (given that the Govt promised an NPS on Aviation to replace ATWP).
- He recorded the detailed “disconnect” arguments – for the Applicants, one could not have aviation expansion consistent with CC objectives and the Govts response.
- Concluding that the “Claimant’s submissions add up... to a powerful demonstration of the potential significance of developments in climate change policy since the ATWP” which would have to be resolved in the NPS”.
- The stage was set for the current Heathrow battle on climate change grounds.

The (original) Airports Cases

R (Griffin) v Newham LBC [2011] EWHC 53 (Admin)



City Airport

The (original) Airports Cases

R (Griffin) v Newham LBC [2011] EWHC 53 (Admin)

- Challenge to increase number of flights at City Airport.
- Claimant relied on *Hillingdon* to argue that climate change was necessarily material consideration at individual application stage pending NPS. Argument rejected by the Divisional Court (Pill LJ):

44. I do not consider that the Hillingdon decision assists the claimant. Carnwath LJ referred to matters, particularly the 2050 target, which will need to be taken into account under a new National Policy Statement but Carnwath LJ was not required to focus, and did not focus, on a decision such as the present to be made in the meantime.

45. When making his announcement on 15 January 2009, the Secretary of State expressly requested the CCC's advice as to policy. It was not for the Council to work out a new policy in the meantime. The Council would, in my judgment, have been wrong to do so. The important questions which arise call for national guidance and not speculation by a local planning authority as to the effect of a target announced for 2050."

Thus issue was only to be addressed through policy making by which individual decision maker was bound.

The (original) Airports Cases

R (Stop Bristol Airport Expansion) v N.Somerset DC [2011] EWHC 3356

(Admin)

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The (original) Airports Cases

R (Stop Bristol Airport Expansion) v N.Somerset DC [2011] EWHC 3356

(Admin)

- Challenge to permission allowing increase in capacity at Bristol Airport
- Similar to ***Griffin***
- Considered at a rolled up hearing before Collins J.
- Officer's report had expressly stated that the global climate effects of the expansion were not a matter for planning committee.
- Collins J endorsed this approach and expressed "*no doubt*" that ***Griffin*** was correct

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By Roger Harrabin
BBC environment analyst

12 June 2019

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Climate change



Greenhouse gas emissions in the UK will be cut to almost zero by 2050, under the terms of a new government plan to tackle climate change.

Climate Change Act 2008 (2050 Target Amendment) Order 2019 – net zero CO2 emissions by 2050.



Increased public awareness



Increased climate litigation

A New Approach to infrastructure? Northumberland Coal

Minister cites climate change in rejection of opencast coal mine

**Sajid Javid says environmental impact of Northumberland plan
outweighs economic benefits**



An evolving approach? Northumberland Coal 2018

- Application for planning permission for open-caste coal mine in Northumbria. Inspector recommended grant. Recall the key issue was CC effects from the burning of the product (coal); not the extraction itself. Called in by the SoS, who refused permission (emphasis added) differing from his inspector on only that issue. So climate change impacts of burning the product was central to refusal:

The Secretary of State has given careful consideration to the Inspector's analysis at IRC112-C115. For the reasons given he agrees that Green House Gas (GHG) emissions from the proposed development would adversely impact upon measures to limit climate change. He further agrees that most of the GHG emissions would be emitted in the short term, resulting in an adverse effect of substantial significance, reducing to minor significance in the medium term; and that Green House Gas emissions in the long term would be negligible, but that the effects of carbon in the atmosphere would have a cumulative effect in the long term (IR115). Given that cumulative effect, and the importance to which the Government affords combatting climate change, he concludes that overall the scheme would have an adverse effect on Green House Gas emissions and climate change of very substantial significance, which he gives very considerable weight in the planning balance.

- Appears a seminal decision? Bears reading. Very strong reliance on climate change impacts. However, overturned in High Court albeit not on the principle of materiality of CC effects.
- See Friday 1/11/19 decision not to call in grant for colliery in Cumbria....

Backtracking? Drax Power

Drax: Block on power station development overruled

By Roger Harrabin
BBC energy and environment analyst

7 October 2019

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Climate change



Drax power station near Selby in North Yorkshire produces 7% of the UK's electricity

Four new gas-fired turbines at Drax power station have been approved by the UK government – against a ruling from its Planning Inspectorate.

A New Approach to infrastructure?

Drax Power

- Distinction s.78 and NPS/DCO. Application for Development Consent Order to introduce gas-powered generating plant at former coal-powered station. Decided by BIS not DHCLG.
- Significant objections based on climate change impact of the development. Examining Authority recommended refusal (after considering the effect of the new climate change target):
 - Climate change. The Proposed Development would result in a significant increase in GHG emissions and would have a significantly adverse negative effect on climate change... Considerable weight is attached to this negative effect.*
- Ex Authority effectively following the Northumberland line and that was determinative for it BUT...

Backtracking?

Drax Power

- Recommendation overturned by SoS saying the issue as to acceptability of the form of development in the CC context had been decided by NPS - EN – which even though adopted prior to nil net change in 2019 still had full effect
- But for our purposes importantly she acknowledged that even so: (§5.7): (4TH October 2019)
The Secretary of State considers that the amendment to the CCA, which sets a new legally binding target of an at least 100% reduction in GHG emissions against the 1990 benchmark (“Net Zero”), is a matter which is both important and relevant to the decision on whether to grant consent for the Development and that regard should be had to it when determining the Application.
- Possibility of legal challenge...
- **Headline – Even BIS accept that even where NPS addresses the matter, CC remains an important material consideration in planning decision making**

Watch this space

R (Spurrier) v SSfT [2019] EWHC 1070 (Admin) pending CA

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A New Approach to infrastructure?

R (Spurrier) v SSfT [2019] EWHC 1070 (Admin)

- Challenge to adoption of Airports National Policy Statement (ANPS) favouring Heathrow expansion.
- Included significant number of grounds based on climate change. Divisional Court dismissed the claims, but did hold (§618) that *“in his decision to designate the ANPS, the Secretary of State did not err in taking the CCA 2008 targets into account; indeed, he would clearly have erred if he had not taken into account the targets as fixed by Parliament.”* (s.5(8))
- Court of Appeal judgment awaited...
- I suspect that the irresolvable and unresolved disconnect identified in the first Heathrow challenge between carbon entrenching infrastructure and the climate change objectives may rear its head again in CA judgment (or in the subsequent DCO process)
- **Headline** - Climate change (where relevant) is now central to policy making and individual decision making. The final question is whether it has become **necessarily** a material consideration that must be taken into account.

Necessarily material planning consideration?

The NPPF

- Not a magic bullet making CC necessarily material but:
- Paragraphs 149-154 contain a section entitled “*Planning for climate change*”
- Para 149 requires local plans to “*take a proactive approach to mitigating and adapting to climate change*” (*query ambit of the underlined words*)
- Para 150 states that new development should be planned for in ways which reduce vulnerability to the impacts of climate change and reduce greenhouse gas emissions (*suggests this is a matter of detailed design rather than in principle*)
- Paras 154-155 deal with individual development and emphasise importance of low-carbon development (ditto).

Statutory scheme

- No express provision saying must take CC into account in decision making but
- S.19 (plan making); s.5(8) NPS; s.104 (DCO) - if CC and s.1 CCA central at all those stages, why not necessarily material in individual decision making

A New Approach to local planning?

R (McLennan) v Medway Council [2019] EWHC 1738

- Householder erected solar panels on his property.
- Neighbour applied for planning permission for an extension.
- This would have reduced the light getting to the solar panels.
- Court required to determine whether this a material planning consideration.



A New Approach to local planning?

R (McLennan) v Medway Council [2019] EWHC 1738

- Lane J held:

36. *What emerges from section 19(1A) and the NPPF is that mitigation of climate change is a legitimate planning consideration. The fact that both section 19 and the NPPF speak in broad terms (as they plainly must) cannot mean their message vanishes at the very point where consideration has to be given to a specific proposal. Such an approach would render the provisions a dead letter. Nor does the fact that they relate to new rather than existing development defeat the rationality challenge. If the issue of climate change is regarded as having a material planning bearing on particular proposed development, it is illogical to regard that issue as suddenly becoming immaterial, once the development had taken place.*

37. *There is, therefore, unanswerable force in Mr Green's submission that, particularly given what is now said at national level about climate change in relation to new development, the first defendant is not entitled to reject as immaterial, in planning terms, the effect that another development proposal may have upon a renewable energy system, such as the claimant's solar panels. That, however, is the stance of the first defendant. It is a stance which, I find, no reasonable authority could take. It is, in short, irrational.*

Is Climate Change Now a Necessarily Material Consideration?

- No direct authority on this – although *McLennan* comes close although does not grapple with the historic case law which court does not appear to have been referred to.
- Necessarily material in plan making, NPS making and DCO decisions
- Recent decisions by the Secretary of State indicate that it can be central in s.78
- All indicators pulling in same direction –
- **Conclusion:** decision makers can take it into account – scope for claiming it is not necessarily material consideration in an appropriate case seems limited.