

Planning Act 2008 challenges: the last year



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Introduction

- Busy year for infrastructure related challenges in the Courts
- Both policy-making and NSIP decision-making under scrutiny
- Trend may well continue: is the system starting to be more exposed to challenge?

Policy-making

- R (Friends of the Earth) v Heathrow Airport Ltd [2020] UKSC 52
- R (Transport Action Network) v SST [2021] EWHC 2095 (Admin)
- More in the pipeline...

Heathrow

- Challenge to Airports NPS reached Supreme Court in October with judgment given in December 2020
- Appeal was brought by HAL after SST decided not to appeal against the Court of Appeal's findings that the Airports NPS had been adopted unlawfully
- Central issue was a point of public law which ultimately turned on the facts of the case: the Secretary of State *had* considered whether the Paris Agreement should be taken into account in deciding whether to designate the NPS, and concluded he did not need to for rational reasons

Heathrow: key findings

- The “government policy” on climate change in s 5(8) PA 2008 is found in formal statements of policy, not in a trawl of Hansard, and the ratification of Paris was not a statement of government policy for these purposes
- The duty in s 10 PA 2008 to make NPSs “with the objective of contributing to the achievement of sustainable development” did not make the Paris agreement a mandatory material consideration: it was a matter which the S/S was entitled to take into account or which he was entitled, in his discretion, to treat as not requiring separate consideration
- The same was true of the duties under the SEA Directive: the adequacy of the consideration of climate change obligations was a matter for him.

Heathrow: consequences

- See Joel Semakula's talk
- For the NPS regime:
 - Affirms relatively broad discretion on these matters, with compliance to be assessed on normal public law principles
 - Request for s 6 PA 2008 review of ANPS rejected and that decision not challenged
 - However, no doubt more to come on this topic, including “Jet Zero” (consultation concluded in September)

Transport Action Network

- Not a challenge to an NPS but to the Road Investment Strategy 2
- Set pursuant to a statutory duty in Infrastructure Act 2015 which includes a duty to consider effect on the environment
- The Paris Agreement was not a mandatory material consideration for those purposes
- Matter of judgment as to how far to consider the environmental consequences of road investment: this was not the place to consider the overall effect of the strategic road network on climate change

Policy challenges: what next?

- Note emerging policies across a range of areas including the Energy NPS “suite”
- Possibility of challenge to those emerging policies
- Note also the threat of challenging the failure to review the energy suite
- CCC advice, and CCA targets and budgets, likely to be more important for these purposes than international agreements

DCO challenges

- Rush of decisions being quashed in past year after many years without a single DCO being quashed
- Manston Airport DCO quashed by consent
- Norfolk Vanguard DCO quashed: Pearce [2021] JPL 1229
- A303 Stonehenge DCO quashed: Save Stonehenge [2021] EWHC 2161 (Admin)

Pearce – Norfolk Vanguard

- Vanguard was proposed to share onshore infrastructure location with Boreas scheme, which was the subject of a subsequent application
- S/S decided that the information regarding Boreas was “limited” and therefore the effects of that scheme should be assessed in the context of that application, and not as cumulative effects with the Vanguard scheme
- Holgate J found that there was a breach of Infrastructure Planning (EIA) Regulations 2009 by failing to have regard to the cumulative effects
- It was irrational not to consider the cumulative effects of Boreas and the reasons for failing to do so were legally inadequate

Stonehenge

- Decision found to be unlawful on several grounds following disagreement with ExA recommendation
- S/S failed to take into account the effect on all heritage assets in departing from the ExA's recommendation
- S/S failed to consider all alternatives, taking an unlawfully narrow view in light of the harm to the World Heritage Site
- Rejected other grounds including reasons and failures to take into account various local policies

But not all bad news for Secretaries of State...

- EFW Group Ltd [2021] EWHC 2697 (Admin)
 - Split decision challenged by applicant
 - Held: misdirection on approach to s 104/105 but made no difference to outcome
- ClientEarth [2021] PTSR 1400
 - Court of Appeal upheld High Court finding that Drax repowering DCO decision was lawful

Conclusions

- Key risks for decision-making
- Likelihood of further challenges

Thank you for listening

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