JUDICIAL PUSHBACK – NATIONAL AIRPORTS POLICY GROUNDED

IT is sometimes said that hard cases make bad law. The Court of Appeal's decision in *R. (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 supports another proposition: big cases make lots of law. And *Plan B Earth* is big: it concerned a challenge on environmental grounds to the decision of the Secretary of State to designate a National Policy Statement under the Planning Act 2008, proposing a third runway at Heathrow Airport (the Airports National Policy Statement, "the ANPS"). The Official Transcript runs to 83 pages. The substantive grounds before the Court were grouped around three main topics: compliance with EC Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206 p.7 ("the Habitats Directive"), compliance with EC Council Directive 2001/42/EC on the assessment of the effect of certain plans and programmes on the environment, OJ 2001 L 197 p.30 ("the SEA Directive"), and issues relating to climate change. Arguments relating to climate change (and a related point under SEA) were successful.

A National Policy Statement (NPS) can be produced by the Secretary of State in order to provide guidance for the determination of applications for development consent under the Planning Act 2008 for a nationally significant infrastructure project (NSIP). An NPS does not itself grant consent for a particular development, and conversely an application for a Development Consent Order can be made where there is no relevant National Policy Statement in place. However, where there is a relevant NPS, an application must be decided in accordance with it unless a number of exceptions apply; set out in section 104 of the Planning Act 2008. In the absence of a relevant NPS, the Secretary of State must merely have regard to matters specified in section 105(2).

Despite their name, national policy statements can be specific. The ANPS concerned major airport development at Heathrow, London and the south-east. It supported the expansion of aviation capacity at Heathrow through the development of a third "north-west" runway. There are important environmental considerations, both in relation to Heathrow specifically, and the climate change impacts of airport expansion.

In relation to the Habitats Directive, the Court found that the standard of review was *Wednesbury* unreasonableness, applying existing authority. The Court rejected an argument that a different approach was required by the decision of the Court of Justice of the European Union (CJEU) in Judgment 26 June 2019 *Craeynest*, C-723/17, EU:C:2019:533, [2020] Env. L.R. 4. The UK courts are entitled to set the standard of review for the protection of EU law rights (at [75]).

More significantly, the Court considered the Secretary of State's consideration of "alternatives" for the purposes of Article 6(4) of the Habitats Directive. The existence of an alternative will mean that a developer cannot rely on the existence of imperative reasons of overriding public importance (IROPI) to justify developments which would have an adverse effect on the integrity of sites protected under the Habitats Directive. The Court's approach was that, if an aspect of a proposal was a central purpose (or a "genuine and critical objective" of it), then an alternative which does not meet that purpose will not be an alternative. The objective of the ANPS was that the UK maintain its status as an aviation hub, an objective that the expansion of Gatwick could not meet. That said, the Court suggests that if the objective is deliberately constructed with such narrowness as to exclude other operations, then this will be unlawful (at [93]). This provides a good balance between environmental protection and development aims which must still satisfy the IROPI test.

The Court held that the Secretary of State had acted lawfully in taking a different approach to alternatives under the Habitats Directive and the SEA Directive, since the provisions in those Directives were different "in substance and effect" (at [116]). The appellants raised the question of the intensity of the role of a reviewing court in the context of SEA. The *Wednesbury* standard of review applied (at [140]). Two other grounds of challenge under SEA failed essentially on their facts. The Court stressed the margin of appreciation where a decision-maker is making evaluative judgments using predictive techniques (at [171], [177]).

At the time of the designation of the ANPS, section 1 of the Climate Change Act 2008 imposed a duty upon the Secretary of State to ensure that the net UK carbon account for the year 2050 was at least 80% lower than the 1990 baseline, meaning that there was a target to reduce emissions by 2050 to at most 80% of 1990 levels. The arguments in relation to climate change boiled down to whether the Secretary of State was obliged to consider the Paris Agreement, namely to restrict the increase in global average temperature to "well below 2°C above pre-industrial levels and [to pursue] efforts to limit the temperature increase to 1.5°C above pre-industrial levels". The Secretary of State was clear that this had not been considered, relying on the duty in section 1 of the Climate Change Act.

The Divisional Court had refused permission to apply for judicial review on these points, finding them unarguable. The Court of Appeal disagreed, dismissing concerns regarding the legal effect of unincorporated treaties to find that the Paris Agreement did constitute Government policy and was a relevant consideration which the Secretary of State was obliged to take into account. It held that policy as expressed in the Paris Agreement was not inconsistent with the requirement in the Climate Change Act, which set only a minimum reduction.

Whilst section 5(8) of the Planning Act does require Government policy on climate change to be taken into account when making an NPS, established principle indicates that this would be a requirement of public law in any event. The logical implication of the Court's decision is that the ratification of a treaty will convert it into Government policy, which may then be required to be taken into account in administrative decision-making. There is tension with the established principle of "dualism" in the British Constitution, that treaties do not form part of domestic law until incorporated by legislation (see *J.H. Rayner (Mincing Lane) Ltd. v Department of Trade and Industry* [1990] 2 A.C. 418). The reasoning in *Plan B Earth* has the impact that ratification can change the *impact* of the law: if the law says (1) that regard must be had to policy and (2) that regard to policy means regard to international obligations, then changing international obligations means altering what a decision-maker must consider. The Court relied upon statements from Ministers that the requirements of the Paris Agreement would be enshrined in law. Orthodox application of the *J.H. Rayner* case would say that, until such time, they were not part of domestic law.

The failure to take into account the Paris Agreement was a breach of the SEA Directive (at [247]). The Court also held that the Paris Agreement was a consideration of such obvious materiality that the Secretary of State had no discretion as to whether to take it into account (at [237]). The Court purported to adopt the view of Lord Brown in *R. (Hurst) v HM Coroner for Northern District London* [2007] 2 A.C. 189, at [58], that some international obligations were so obviously material that they had to be taken into account by a decision-maker. However, in *Hurst*, Lord Brown had found it "quite impossible" to say that the international obligation in question had to be considered directly. This was therefore of questionable support for the Court's view in *Plan B*.

The reasoning in *Plan B Earth* is difficult to reconcile with authority that a domestic court may not decide whether the Government has correctly understood an obligation in an unincorporated treaty: *R. (JS) v Secretary of State for Work and Pensions* [2015] 1 W.L.R. 1449, at [90]. Even an approach requiring a decision-maker to have regard to the Paris Agreement would arguably involve correctly interpreting it (by analogy with the interpretation of policy: *Tesco Stores Ltd. v Dundee City Council* [2012] P.T.S.R. 983, at [17]).

Concerning relief, the Court refused to withhold relief under section 31 (2A) of the Senior Courts Act 1981. The introduction of this subsection has not altered the fundamental relationship between the courts and the decision-maker, and the threshold for refusing relief remains high (at [273]). Indeed, due to exceptional public interest (including the scale of the scheme), the Court would have granted relief event if it were highly likely that the decision would have been the same but for the error (at

[277]). The Court rejected an argument that grant of relief would be unnecessary, given that anything which had to be taken into account could be considered when determining a DCO application, it being "incumbent on the Government to approach the decision-making process in accordance with the law at each stage" (at [275]). The Court expressly declined to quash the ANPS, but granted a declaration that it was unlawful and preventing it from having effect until a review is taken into account. Quite why the Court did not quash in these circumstances is unclear.

The most striking thing about the Court's decision is the most obvious: that it found unlawful a major aspect of Government policy, formulated over a number of years. The Supreme Court has granted permission to appeal on the sole issue of whether not taking into account the Paris Agreement was lawful, so the Court of Appeal's consideration of the relationship between international obligations and public law decision-making is unlikely to be the last word on the matter. In the meantime, the Government will need to consider carefully whether its international agreements are relevant to the decisions it must take.

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FALSE IMPRISONMENT VIS-À-VIS DEPRIVATION OF LIBERTY: SMASHING THE OSSUARY

SINCE the enactment of the Human Rights Act 1998 (HRA), the Supreme Court (and its predecessor) has repeatedly seized the opportunity to affirm the role the common law continues to play in protecting rights. The recent decision in *R. (On the application of Jalloh (formerly Jollah)) v Secretary of State for the Home Department* [2020] UKSC 4, 2 W.L.R. 418 emphatically continues this trend. The Supreme Court was asked to determine the meaning of "imprisonment" for the purposes of the tort of false imprisonment and whether it should be aligned with the concept of "deprivation of liberty" in Article 5 of the ECHR. In dismissing the appeal, the court refused to read down the protections afforded by the common law.

The case arose as a result of a curfew imposed on the claimant, Mr. Jalloh, under the Immigration Act 1971 ("1971 Act"). Following a series of convictions and several custodial sentences, Jalloh – who had previously been granted asylum – was subject to a deportation order and detained by the Secretary of State under the 1971 Act. He was released on bail and, after that bail had expired, was issued with a "Notice of Registration" stating that while he was liable to be detained under the 1971 Act, he would not be. Instead, restrictions would be imposed on him, purportedly under paragraph 2(5) of Schedule 3 to the 1971 Act. In addition to being subjected to reporting