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Friends of the Earth & Legal Interdisciplinarity: Introduction by the Analysis Editors

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What counts as *environmental law* adjudication? Or to put it differently; how do we decide which cases demand attention in an environmental law journal, such as this one? Is it the relevance of environmental legislation to the court's legal reasoning, or would the mere reference to environmental problems and their related laws do? In either case, the net is cast wide. Environmental disputes are undoubtedly on the rise, and judges are increasingly called on to resolve these in courtrooms around the globe.¹ Our point, however, does not concern the speed or the surge of environmental law jurisprudence but rather the drawing of its outer limits. Take *HS2*,² as an example. Here, the Supreme Court was asked to consider some of the leading decisions of the Court of Justice of the EU on the Environmental Impact Assessment and the Strategic Environmental Assessment (SEA) directives,³ but the case, perhaps more significantly, contributed to the contouring of British constitutional law, and its relationship to the EU legal order.⁴ Is then *HS2* an environmental or a constitutional law case? Obviously, we should not need to make this too sharp a

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1 Climate change litigation is a case in point, see eg the Sabin Center for Climate Change Law database <<https://climate.law.columbia.edu/content/climate-change-litigation>> (accessed 28 May 2021).

2 *R (on the application of HS2 Action Alliance Limited) (Appellant) v Secretary of State for Transport and other Respondents* [2014] UKSC 3 ('HS2').

3 Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2011] OJ L 124, and 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 [2011] OJ L 197.

4 For an environmental and a constitutional law perspective, see eg Mark Elliott, 'Reflections on the HS2 case: a hierarchy of domestic constitutional norms and the qualified primacy of EU law', UK Const L Blog (23 January 2014). For an overview, see Denis Edward, 'HS2: The First Spike: *R (HS2 Action Alliance Ltd) (Appellant) v Secretary of State for Transport and other (Respondents)* UKSC [2014] 3' (2014) 26 JEL 319.

distinction, especially as environmental disputes commonly cut across legal fields. But how we label cases matters in how we understand the nature of the environmental dispute at play. Given the polycentricity of environmental problems and the tendency of environmental disputes to transcend legal fields, we gain much by moving away from studies of cases in silos of distinct legal sub-disciplines towards an approach grounded in legal interdisciplinarity. And so, as a new Editorial team for the analysis section, we invited different legal perspectives on the UK Supreme Court (UKSC) decision in *Friends of the Earth (FOE)*.⁵

The case concerned a challenge⁶ to a National Policy Statement (NPS),⁷ affirming the UK government's commitment to the building of a third runway at Heathrow. The Divisional Court had handed down a 669-paragraph judgment,⁸ described by the Court of Appeal as a 'tour de force',⁹ dismissing 21 wide-ranging grounds of challenge.¹⁰ The Court of Appeal later ruled on the lawfulness of the NPS in two related appeals. The first¹¹ was brought by the disappointed promoters of an alternative proposal. This judgment, which dismissed the appeal, dealt primarily with matters of competition law and legitimate expectations. The second was brought by a range of local authorities, environmental groups and individuals who objected to the runway. The court dismissed grounds of challenge relating to two familiar provisions of environmental law: the Habitats Directive¹² and the SEA Directive.¹³ However, it allowed the appeal on four grounds relating broadly to obligations within the Planning Act 2008 and SEA Directive to consider the climate impacts of an NPS. In the Court of Appeal's view, the NPS was tainted by the following four defects:

- i. Breach of the requirement in section 5(8) of the Planning Act 2008 to include in the reasons for an NPS an explanation of how 'Government policy on the mitigation of and adaptation to climate change' had been taken into account;
- ii. Breach of the requirement in section 10(3) to 'have regard to the desirability of mitigating and adapting to climate change';
- iii. Failure to compile an adequate environmental report for the purposes of public consultation, in breach of the SEA Directive¹⁴;
- iv. A legally inadequate approach to considering the non-carbon and post-2050 carbon impacts of expansion.

5 *R (Friends of the Earth) & another v Heathrow Airport Ltd* [2020] UKSC 52 ('FOE').

6 Brought via Planning Act 2008, s13.

7 Planning Act 2008, s5.

8 *Spurrier & others v Secretary of State for Transport* [2019] EWHC 1069 (Admin). See also *R (Heathrow Hub Ltd) v Secretary of State for Transport* [2019] EWHC 1069 (Admin).

9 *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [7].

10 *Spurrier* (n 8), app B offers a concise summary. Note a 22nd issue raised a remedial matter.

11 *R (Heathrow Hub Ltd) v Secretary of State for Transport* [2020] EWCA Civ 213.

12 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206, 7–50; *Plan B Earth* (n 9) [66]–[124].

13 SEA Directive (n 3) 30–31; *Plan B Earth* (n 9) [125]–[183].

14 SEA Directive, art 5 (n 3).

The UKSC in *FOE*, on appeal by the developer, dealt only with these four matters, ultimately overturning the Court of Appeal on all counts. While the issues before the UKSC were therefore strikingly narrower than those before the lower courts, a high degree of legal interdisciplinarity was still manifest. Resolving the challenge required the UKSC to construe important provisions in a major, and relatively new, planning law enactment.¹⁵ The UKSC also sought to work out how best to apply established general principles of administrative law,¹⁶ in the context of a highly unusual set of legislative provisions imposing duties to consider climate change¹⁷ and against the backdrop of the precautionary principle¹⁸ and the international climate regime. *FOE* is, in other words, at one and the same time a case about planning law, administrative law, climate law and environmental law. Like any legal challenge to the lawfulness of a governmental decision on a matter of ‘high policy,’ the case also raises constitutional questions about the proper relationship between court, executive and Parliament.

In consequence, there is a huge amount to make sense of in the *FOE* judgment. In this edition, we bring together four commentators, who have expertise in different areas of law to offer their reflections on the case. Our hope in doing so is to provide detailed coverage of the *FOE* judgment, and its lessons for the various areas of law on which the challenge touches on. We also seek to highlight the way in which environmental problems often arise at the intersection of different fields of law, and the resultant importance of bringing different legal lenses to bear in understanding them.

A final observation worth making is that, as several of the commentators in this edition stress, *FOE* is very far from the final chapter of the legal saga relating to Heathrow-expansion. An NPS is not development consent. It is, as its name makes clear, a national *policy* statement, which sets out the parameters in which a decision on an application for a development consent order will be made in the future. Those parameters are legally important¹⁹ but they are by no means determinative.²⁰ Rather, as the UKSC emphasised, before the bulldozers are brought in, a further decision-making process will need to be gone through.²¹ An important part of that process will be assessment of expansion against up-to-date legislative targets, including the

15 For discussion of the background to the Planning Act 2008, see Lord Carnwath, ‘A Starring Role for the Planning Act 2008?’ (lecture given at the National Infrastructure Planning Association Inaugural Dinner, 17 October 2012), and Joanna Bell and Elizabeth Fisher, ‘The ‘Heathrow’ Case: Polycentricity, Legislation, and the Standard of Review’ (2020) 83 MLR 1072.

16 Specifically, the doctrines of relevancy and rationality.

17 See Elizabeth Fisher, Eloise Scotford and Emily Barritt ‘The Legally Disruptive Nature of Climate Change’ (2017) 80 MLR 173; Chris Hilson, ‘Framing Time in Climate Change Litigation’ (2018) 9(3) *Oñati Socio-Legal Series* 361; Eloise Scotford and Stephen Minas, ‘Probing the Hidden Depths of Climate Law: Analysing National Climate Change Legislation’ (2019) 28(1) *RECIEL* 67.

18 *FOE* (n 5) [164]–[166].

19 Planning Act 2008, s104(3): ‘the Secretary of State must decide the application [for development consent] in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.’

20 For instance, one of the grounds on which development consent can be refused, even in accordance with a NPS, is ‘if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits’ (Planning Act 2008, s104(7)).

21 Planning Act 2008, pt 6.

net-zero-by-2050 carbon target introduced through legislative amendment in 2019.²² The concrete future of Heathrow is, in other words, still yet to be finally determined. This does not, however, strip the UKSC's *FOE* judgment of its importance. On the contrary, *FOE* is a harbinger of what may be to come: any challenge to development consent will undoubtedly be characterised by a similar degree of legal interdisciplinarity. Furthermore, as several commentators in this edition point out, the legal issues raised in the case have relevance far beyond the debate about Heathrow.

22 The Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019/1056).