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ABSTRACT

This article analyzes an emblematic climate litigation case involving the expansion of Heathrow airport. The action, proposed in August 2018 by the NGO Plan B Earth, alleges that in drafting its national aviation policy, the British government, in the person of the Secretary of Transport, did not take into account the 2015 Paris Agreement. The first decision of the Divisional Court found that the Secretary had fulfilled his obligations to consider existing domestic climate targets. Plan B and Friends of the Earth appealed and the Court of Appeals concluded that the government's airport expansion policy would be illegal. This decision was appealed, and in December 2020, the Supreme Court recognized the legality of the process. More than two years after the decision, the airport expansion process has not been resumed yet. This article examines the social, political and economic conjuncture of the United Kingdom; the British legal system; the legal arguments articulated by the parties and the courts; and the potential relationship of the case with the Brazilian reality, particularly with regard to issues such as active legitimacy, limits of questioning, procedural remedy, intervention of the judiciary, and the effects of international commitments in domestic policy.

Key words: airport expansion; Paris Agreement; climate litigation; discretion; emissions reduction targets.

RESUMO

Este artigo analisa um caso de litigância climática emblemático envolvendo a ampliação do aeroporto de Heathrow. A ação, proposta em agosto de 2018 pela ONG Plan B Earth, alega que, ao elaborar sua política nacional de aviação, o governo britânico, na pessoa do Secretário de Transportes, não levou em consideração o Acordo de Paris de 2015. A primeira decisão da Corte Divisional entendeu que o Secretário havia cumprido suas obrigações de considerar as metas climáticas domésticas existentes. Plan B e Friends of the Earth apelaram e o Tribunal de Apelações concluiu que a política de expansão de aeroportos do governo seria ilegal. Essa decisão foi objeto de recurso, e em dezembro de 2020, a Suprema Corte reconheceu a legalidade do processo. Passados mais de dois anos da decisão, o processo de expansão do aeroporto ainda não foi retomado. Este artigo examina a conjuntura social, política e econômica do Reino Unido; o sistema jurídico britânico; os argumentos jurídicos articulados pelas partes e pelas cortes; e a potencial relação do caso com a realidade brasileira, particularmente no que se refere a questões como legitimidade ativa, limites do questionamento, remédio processual, intervenção do Poder Judiciário, e os efeitos de compromissos internacionalmente assumidos na política doméstica.

Palavras-chave: expansão de aeroporto; Acordo de Paris; litigância climática; discricionariedade; metas de redução de emissões.

INTRODUCTION

Controversy has persisted in the United Kingdom over the expansion of Heathrow International Airport for many years. Located 23km from the center of London, Heathrow is one of the busiest airports in the world, and, at least until the COVID-19 pandemic, was operating at maximum capacity. The airport expansion was described by the British government as a measure 'necessary for the UK's long-term economic prosperity' (Adonis, 2009). The construction of a third runway would allow the airport's capacity to increase from 473,000 flights/year (in 2016) to 740,000 flights/year. However, the expansion involves the displacement of rivers, roads and homes, in addition to resulting in the emission of tons of greenhouse gases[1] (Department for Transport, 2017, 2018). If, on the one hand, the construction of an additional runway at the airport is part of a plan for economic growth and the materialization of citizens' right to come and go, its implications for the environment and, in particular, the worsening of the crisis climate change became the central point of a legal dispute.

This chapter analyzes an emblematic climate litigation case involving the expansion of Heathrow airport: the action R (on the application of Plan B Earth) v Secretary of State for Transport (the Court of Appeal Judgment), proposed in August 2018 by the organization British public interest charity Plan B Earth[2] (or "Plan B"). The action is based on the argument that, in drafting its national aviation policy, the British government (in the person of the Transport Secretary) did not take into account the 2015 Paris Agreement (or "Agreement"). The action is a judicial review, applicable in cases where the legality of the decision-making process (and not the result) of public authorities is questioned (Courts and Tribunals Judiciary, n.d.). The action is part of a broader movement that uses litigation to bring visibility to the climate issue, not only before the judiciary but also more broadly before society (Setzer, Cunha & Botter-Fabri, 2019).

[1] Globally, air transport accounts for only around 3% of carbon emissions; when considering all greenhouse gas emissions, the sector accounts for 4.9% of anthropogenic contributions (Lee et al., 2009). But when considering the emissions of individuals who travel by plane, air transport accounts for the majority of individual emissions. When comparing individuals who travel and do not travel by plane, the discrepancy becomes clear. For example, a flight from London to Edinburgh, which takes just over an hour, results in a carbon footprint greater than the carbon footprint of an individual for an entire year in Uganda (Guardian, 2019).

[2] The action was later joined to three other actions that also contested the decision: one proposed by Neil Spurrier (individual), another proposed by seven applicants (five local authorities, the non-governmental organization - NGO - Greenpeace and the Mayor of London); and another proposed by the NGO Friends of the Earth.

In the first decision, handed down in May 2019, the Divisional Court held that the Secretary did not need to consider the climate goals of the Paris Agreement in the decision to expand the airport. The court concluded that the Secretary had met his obligations to consider existing domestic climate goals and acted within his discretion. Plan B and Friends of the Earth appealed and, in February 2020, obtained a favorable ruling. The Court of Appeal ruling concluded that the government's airport expansion policy was illegal. Although the Department of Transport did not appeal the decision, the companies Heathrow Airport Limited and Arora Holdings Limited, which are interested parties in the process, appealed. In December 2020, the Supreme Court accepted part of the arguments presented, reversed the decision of the Court of Appeals and recognized the legality of the Secretary of Transport's decision-making process. In practice, the Supreme Court's decision allows the Heathrow Airport expansion process to move forward (Clark & Wackwitz, 2020).

This chapter aims to discuss the case Plan B Earth v Secretary of State for Transport, and how the precedent can be understood in the Brazilian context. To this end, after this brief introduction, we examine (1) the social, political and economic situation in the United Kingdom; (2) the British legal system; (3) the legal arguments articulated by the parties and the courts; and (4) the potential relationship of the case with the Brazilian reality.

THE TERRITORY UNDER ANALYSIS: SOCIAL, POLITICAL AND ECONOMIC SITUATION IN THE UNITED KINGDOM

One of the central points of the dispute under analysis is the reception of the Paris Agreement by the English legal system. If, on the one hand, Plan B argued that the Agreement should bind the decision-making of the Transport Secretary, on the other, the defendants argued that the Agreement would not be applicable in the United Kingdom and that internal policy would only be linked to compliance with the Transport Act. Climate Change Act of 2008 (Climate Change Act, or "CCA2008"). Regardless of the origin of the arguments, it is necessary to understand the British regulatory, political and social scenario, which preceded and influenced the situation in which the litigation progressed. It is not intended, however, to exhaust all the political measures adopted by the English government or the reaction of society, but to highlight those relevant to understanding the dispute under analysis.

CCA2008 was the world's first climate law and, as a result of its provisions, the British government was the first to legally establish emissions mitigation targets. The United Kingdom's pioneering spirit projected an image of leadership on climate issues and the approval of CCA2008 was acclaimed by environmentalists, unions and the business sector (Lockwood, 2013; Averchenkova et al., 2021).

Public attention to the issue was one of the factors that led to the approval of the law. Studies on the perception of climate change by the British in the 2000s indicate that the majority of the population showed concern about the issue, even though they considered it less relevant in comparison to other socioeconomic problems. Furthermore, at the time of approval, it was believed that public interest would be crucial to demand effective emissions reductions from future governments due to the way that emissions reduction targets are defined in the CCA2008 (Lockwood, 2013).

In fact, the main feature of CCA2008 is the establishment of emissions provisions (carbon budgets) every 5 years, with the ultimate goal of reducing UK emissions by 80% compared to 1990 levels by 2050. Until that moment, no there was a target limit for increasing the planet's warming temperature and the reference used to determine the reduction in UK emissions was 2ºC. The creation of the Climate Change Committee, or "CCC") was also notable, an independent body with the function of advising the government in establishing goals and reporting results to Parliament. The CCC determines the provisions corresponding to the amount of CO2 in tonnes to which the United Kingdom must limit its emissions every 5 years to ensure that the target is achieved in the long term, as well as advising the government on the measures that must be adopted to achieve this. Once accepted by the government, the provision is voted on by Parliament and becomes binding.

After the approval of CCA2008, however, public attention and support for climate policy suffered a relative decline. One of the main reasons was the conjunction of the effects of the 2008 global economic crisis and the population's growing concern about the costs that would result from the transition to a low-carbon economy, especially with regard to energy costs (Lockwood, 2013). Despite the challenges, the United Kingdom met the provision for the first 5-year period, reducing emissions by 25% between 2008 and 2012.

Naturally, the international context was also extremely relevant to the development of British climate policy. The year 2015 was highlighted by the Conference of the Parties (COP21) which resulted in the signing of the Paris Agreement, under which the signatories committed to limiting global warming to well below 2ºC and to make efforts to limit it to 1 .5ºC (compared to pre-industrial levels). The United Kingdom ratified the agreement in 2016.

Internally, the British socio-political scenario began to be marked by diverse and intense events surrounding the climate crisis (Barasi, 2019). In 2016, the organization Plan B was founded, author of the action against the expansion of Heathrow Airport under analysis. One of the central arguments defended by the organization is that by filing lawsuits it becomes possible to hold governments responsible for insufficient climate policies and commitments (Plan B, 2020a).

In 2018, Extinction Rebellion was founded, a non-partisan organization founded by activists and academics that demands transparency and action from governments on the climate crisis and biodiversity loss through non-violent actions. The movement led large demonstrations on the streets of London in 2019, attracting attention to the issue and gaining public support (Quinn, 2019). Part of the protests focused precisely on the expansion of Heathrow Airport and the respective implications regarding the increase in greenhouse gas emissions. In September 2019, a movement associated with the group threatened to force the closure of the airport indicating that they would fly drones in nearby areas. Three months later, members of Extinction Rebellion protested against the construction of the third runway by blocking a road near the airport, lying in front of a tractor.

Still in 2019, following a recommendation from the CCC, CCA2008 was amended so that the emissions reduction target by 2050 compared to 1990 was now 100% (net zero), making the United Kingdom one of the first major emitters to establish a goal of this nature. It should be noted that since April 2017, the organization Plan B had been demanding the British government about its inaction in amending the CCA2008 in order to reflect the more ambitious target set out in 2015 in the Paris Agreement, which the CCC recognized as being more ambitious than the initial target established in CCA2008 (CCC, 2016). Plan B even filed a lawsuit in this regard against the State Secretariat for Business, Energy and Industrial Strategy in 2018, but was unsuccessful (*Plan B & 11 Citizens v UK 2050 Carbon Target*)[3]. In this context, the CCC report recommending the adoption of the 100% reduction target indicates that the target is sufficient to fulfill the commitment made by the United Kingdom when signing the Paris Agreement. Furthermore, the chief executive of the CCC highlighted the importance of adopting an ambitious goal to ensure an international leadership position (CCC, 2016).

[3] https://planb.earth/plan-b-v-uk/, acesso em 10/3/2021.

The year 2020 brought great uncertainty. The main events for the United Kingdom were expected to center around its definitive exit from the European Union at the end of 2020. However, the year was also marked by the COVID-19 pandemic. As a result, there were delays in announcing new climate policies (Climate Home News, 2020) and the Conference of the Parties due to take place in Glasgow (COP26) was postponed until 2021. In May, the CCC produced a specific report with recommendations for the government on measures to be adopted in the recovery of the economy after the pandemic with a view to fostering a more resilient economy through the adoption of climate policies. In this context, in reference to the need to maintain the global ambition to reduce emissions, the British Prime Minister, Boris Johnson, stated that "climate action cannot be another victim of the Coronavirus" (Prime Minister's Office, 2020a) . In November, the Prime Minister announced a 10-point plan to underpin a "Green Industrial Revolution", create jobs and enable 100% emissions reductions by 2050 (Prime Minister's Office, 2020b).

It is worth noting that the United Kingdom fulfilled the provision established for the second 5-year period (2013-2017), having even exceeded the target of 31% and reduced emissions by 43% (Icarus Complex, 2019; Department for Business, Energy & Industrial Streategy, 2017). Furthermore, until the preparation of this article, the CCC understood that the country was in line with compliance with the third provision (2018-2022). However, the CCC understands that the United Kingdom is heading towards non-compliance with the following provisions (2023-2027, 2028-2032 and 2033-2037) (CCC, n.d) and that there is a gap between the policies in force and the target of reducing 100% (Darby, 2019).

Nevertheless, in December 2020, the British government announced a new Nationally Determined Contribution - NDC, under which it intends to reduce the country's emissions by 68% by the end of the decade. Then, in anticipation of the opening of the Climate Ambition Summit, which marked 5 years of the Paris Agreement, the British government announced that it will no longer fund projects involving the exploration of fossil fuels in other countries "as soon as possible" (Prime Minister's Office, 2020c)[4].

As the government itself has reinforced in recent announcements, as host of COP26 which took place in November 2021, the United Kingdom attracts attention and the expectation that it will demonstrate continued leadership in combating the climate crisis.

[4] On the same date, Plan B filed a lawsuit against the British government for insufficient measures to combat the climate crisis and financing projects with high levels of greenhouse gas emissions. See: https://planb.earth/plan-b-v-government-bailouts-for-polluters/.

THE LEGAL SYSTEM IN QUESTION

The English legal system is guided by common law while the Brazilian legal system has a civil law tradition. Although the two systems were influenced by Roman law, they developed differently. Common law seeks legal certainty mainly based on judicial precedents and civil law based on laws. Just as civil law uses precedents to form convictions and support decisions by the Judiciary, legislated acts are used to apply common law.

The term common law originates from 'common law', issued by the Westminster Courts, whose decisions were binding on the entire territory of England, opposing the customary law codified by each tribe with its particularities. Without going into the complex history of the formation of the United Kingdom and its current political system, it is necessary to point out that the United Kingdom has three distinct legal systems, one for England and Wales, one for Scotland and one for Northern Ireland, and This article focuses only on the first, although any aspects can be applied to the others as well (Thomson Reuters, n.d).

The United Kingdom does not have a written constitution that provides for individual rights, but is made up of norms arising from written sources (such as statutes) or unwritten sources (such as conventions). Furthermore, they are the sources of law in the legal system: legislation, which comprises Acts of Parliament and other norms, and jurisprudence, that is, judicial precedents that are applied in a binding manner (ICLR, n.d.). For the purpose of better understanding the case under analysis, it is also necessary to point out that the British system is dualistic, in the sense that international treaties bind the Government internationally, but do not have the power to change domestic law - to this end, they must be subjected to the legislative process to be incorporated into the British legal system (Lang, 2017)[5].

In the context of the British system, the bodies and individuals that make up the government are divided into three branches - executive power, legislative power and judicial power. The monarch is part of everyone, but her role is predominantly ceremonial. Parliament is the highest legislative authority and the doctrine of the supremacy of Parliament dictates that the legislation enacted by it prevails over common law, that is, legislation predominates over jurisprudence (Thomson Reuters, n.d). Parliament is made up of two Houses, the House of Commons, whose members are elected, and the House of Lords, which is not a representative body, as the members are not elected. but indicated. There is no formal separation of powers, but it can be verified in

[5] An example of this is the Human Rights Act, a domestic law enacted in 1998, which incorporated the European Convention on Human Rights into the domestic system, to which the United Kingdom had been a signatory since 1951 (Thomson Reuters, n.d).

practice, and in 2005 the Constitutional Reform Act (Constitutional Reform Act 2005) introduced changes to the system to ensure greater independence of powers.

As part of a system of checks and balances on the different powers, acts and omissions of public agents or bodies, their decisions, policies and practices may be subject to scrutiny by the judiciary. The principles of public law that govern the acts of public authorities and bodies determine that those who fulfill their legal functions do not abuse their powers and act in accordance with the human rights of those administered. Failure to comply with the law or such principles by public agents or bodies implies their illegality and there are administrative procedures for questioning potentially illegal acts with the public bodies themselves. However, when such procedures are unavailable, unreasonable or insufficient, and as long as they are proven to be so, it is possible to resort to the judiciary as a last resort (Public Law Project, 2018). This process is called judicial review. As already mentioned, this was the procedure used to question the decision of the Secretary of State who approved the national aviation policy, within the scope of which the expansion of Heathrow Airport is proposed. For practical purposes, we will refer to acts that may be subject to judicial review simply as 'decisions'.

There is no legal determination that limits those entitled to file a judicial review, it is enough that the author has some factual legitimacy, such as being directly affected or being part of a community affected by the decision, or being an entity or organization that has an interest in or defends interests related to the decision. However, there are factors that may be limiting for the filing of a judicial review. As already mentioned, judicial review is understood as a last resort and it is necessary to prove that other means have been exhausted or insufficient. In addition to other administrative means that must be prioritized, the review process itself encompasses a preliminary phase in which a letter must be sent to the authority issuing the decision explaining reasons for questioning its legality and indicating the intention to file a judicial review in the event of unsatisfactory response. In the latter case, an administrative court must be asked for permission to file a judicial review. Only upon approval of the request will it be possible to initiate the judicial review. Additionally, it is important to consider that the process involves high costs in general, such as legal fees (and, in the case of loss, succumbing fees), and procedural costs, in addition to possible expert costs[6]. Finally, in general, judicial review must be filed within a period of three months -

[6] In an estimate classified as 'general good', the Public Law Project initiative indicates that just legal fees and potential succumbing fees could represent around £30,000.00. There are ways to get around these costs, such as seeking crowdfunding or hiring a lawyer or institution willing to work pro bono. Furthermore, people who prove they have low income can request exemption from court costs (Public Law Project, 2018)

and, in some cases, within a shorter period - of the decision being challenged (Public Law Project, 2018), which requires promptness and , commonly, almost immediate availability of resources.

Judicial review does not aim to determine whether the Executive Branch's decision was right or wrong, or whether the Judiciary Branch agrees with its content, but rather whether the decision was taken following due legal process by someone legally competent to do so. The reasons on which a legal review against a decision can be based are limited and, for the purposes of this analysis, two stand out. Firstly, the illegality of the decision that is intended to be reviewed can be asserted, which could result, for example, from a misinterpretation of the law or the exercise of a power improperly. Another possible basis is the assertion of irrationality/unreasonableness. With limited application to certain cases, this ground may arise from the claim that the decision was so unreasonable that no reasonable authority would make it (this 'unreasonableness' is called Wednesbury unreasonableness), or from the claim that the authority that issued the decision having considered irrelevant aspects or failure to consider relevant aspects. Regarding this last point, there is a reluctance on the part of the courts to enter into questions that could be understood as the merits of the decision, so there is a tendency to verify whether the decision would have been the same if other factors had been taken into account.

When deciding on a judicial review, the court has the discretion to grant or not grant legal remedies. The possible legal remedies are: (i) revocation of the decision; (ii) prohibitory order, which has the power to prevent a public authority from taking a decision or acting in an illegal manner preventively; (iii) determination of a specific obligation, such as taking a new decision within a given period; (iv) declaration, which aims to determine and clarify the correct understanding of the law; (v) determination of incompatibility, which generally refers to compliance with the Human Rights Act; and (vi) determination of compensation for damages, which applies only to specific cases that will not be dealt with in this article.

The favorable outcome of a judicial review, therefore, does not imply a reversal of the contested decision. Courts tend to order new decision-making within the parameters understood as legal - which may result in decision-making with the same content as the one questioned.

Having explained the main aspects of the British legal system and judiciary relevant to understanding the case under analysis, let us move on to the specific details of the dispute involving Heathrow airport.

THE LEGAL AND JUDICIAL PATHS MOBILIZED

Since 2003, the British government has sought to expand Heathrow Airport (Gorham, 2020). Therefore, to consider the legal and judicial paths used in the Plan B Earth v Secretary of State for Transport case, it is necessary to examine, albeit briefly, some of the changes in the British legal framework and political landscape over the last 20 years.

The questioning of the expansion of Heathrow Airport is primarily based on the 2008 Planning Act. This Law established the new procedure for the development of large infrastructure projects. The 2008 Planning Law requires that such projects - which include airport expansion - be justified by a national policy statement, or "NPS"). The Planning Law was approved on the same day that CCA2008 was approved, which gave the CCC the obligation to produce regular reports and assessments – including on greenhouse gas emissions from the aviation sector.

In 2012, the government established a Select Committee to make recommendations on how to increase the UK's airport capacity 'to maintain the UK's position as Europe's leading aviation hub'. The Commission selected three proposals: the construction of a new runway at Gatwick Airport, south of London; the construction of a new runway at Heathrow airport; and the extension of the northern runway at Heathrow Airport. In July 2015 the Commission concluded that the construction of a new runway at Heathrow Airport would be the most appropriate option.

In October 2016, the Secretary of State announced that the British government had decided to build the third runway at Heathrow. In the same month, the CCC published the document 'UK climate action under the Paris Agreement', which considered the implications of the Paris Agreement for the country's emission targets, concluding that there would be no need to set new targets .

On June 5, 2018, the Secretary of State for Transport published his Airports National Policy Statement, or "ANPS"). This ANPS was then submitted to the British Parliament, which on June 26, 2018 approved the document through an NPS. The decision was considered a defeat for several groups that had been opposing the expansion of the airport for years.

In response, several entities and organizations proposed judicial reviews against the government's decision. The organization Plan B joined with actions, as well as five districts, the mayor of London, the NGOs Greenpeace and Friends of the Earth and Neil Spurrier. Heathrow Airport Ltd, the Secretary of State for Environment, Food and Rural Affairs, Transport for London and Arora Holdings Ltd (owner of the land on which the new runway would be built) and the NGO WWF-UK joined as interested parties. The actions questioned different points of the ANPS.

London's five boroughs, the Mayor of London and Greenpeace claimed the findings on air quality and habitat conversion were illegal. They also alleged the illegality of the Strategic Environmental Assessment ("AAE") that informed the ANPS and that the consultation that informed the ANPS would be flawed. The NGO Friends of the Earth alleged that the Secretary of State had violated his obligations under the Planning Law by failing to explain how government policy related to mitigation and adaptation to climate change had been taken into account. It further alleged that the Secretary erred in failing to consider the commitments made by the United Kingdom under the 2015 Paris Agreement (or, alternatively, in failing to explain how he considered those commitments). The organization Plan B claimed that the UK's commitments under the Paris Agreement represented the government's policy on climate change mitigation and adaptation and that the Secretary of State was wrong to disregard these commitments. Spurrier claimed the decision was unlawful because of a lack of consultation, faulty air quality assessments and because ANPS policy would lead to a breach of the Kyoto Protocol, the Paris Agreement and the CCA2008.

In the first instance, none of these arguments succeeded, and the Court dismissed the action as unfounded. The Mayor of London, the Five Boroughs, Greenpeace, Friends of the Earth and Plan B have appealed this decision. Spurrier did not appeal. The arguments presented by the appellants concerned: the application of the Habitats Directive (1992/43/EEC); SEA requirements; and the climate commitments made by the United Kingdom (Gorham, 2020).

At the same time, during this period, the issue of climate change and – consequently, the expansion of the airport – began to occupy a prominent place in the country. In the second half of 2018, the social movements Fridays for Future and Extinction Rebellion organized a series of demonstrations in which they drew attention to the inconsistency between the government's speech about being one of the leading countries in the fight against climate change and its plans to maintain expansion from Heathrow airport. On May 1, 2019, the same day that the British government declared a state of climate emergency, the Court of Appeal handed down its judgment against the decision approving plans to expand Heathrow Airport. Tim Crosland, director of Plan B, welcomed the decision: "The Court's message was clear - governments cannot continue to say they will tackle the climate crisis while marching headlong into disaster" (Crossland, 2020).

Three central questions guided the Court's decision. The first concerned the application of the Habitats Directive. On appeal, the appellants argued that the Directive required consideration of 'alternative solutions', which would be distinct from consideration of 'reasonable alternatives' as set out in Article 5(1) of the SEA Directive (2001/42/EC Council) in evaluating the effects on the environment of certain plans and programs. The SEA Directive required the identification of a wide range of 'reasonable alternatives', whilst the Habitats Directive only required the consideration of

‘feasible alternatives’. The Court concluded that the Secretary of State did not act unlawfully by treating the Gatwick Proposal as a 'reasonable alternative' under the SEA Directive rather than an 'alternative solution' under the Habitats Directive.

The second question concerned the SEA requirements. At this point, the reasons raised by the appellants were also rejected by the Court. The decision concluded that the Secretary of State did not act illegally for the purposes of article 5(1) and Annex I, as consideration of carbon budgets would not result in a significant difference in the environmental assessment of the enterprise, and that the Noise pollution studies have adequately considered the number of people and buildings that would be potentially affected.

The third question concerned the topic of climate change. The appeal brought by the organization Plan B focused primarily on the interpretation of articles 5(7) and 5(8) of the Planning Act 2008, which state that the NPS must present the policy rationale in the statement. In this case, the motivation should have explained how the decision took into account the government's policy on mitigation and adaptation to climate change.

The Court accepted the climate-related grounds and ruled that the ANPS would have no legal effect unless the Secretary of State reviewed the policy. Under the decision, the commitments set out in article 2(1) of the Paris Agreement constitute government policy for the purposes of article 5(8) of the Planning Act 2008[7]. The government had ratified the Paris Agreement and the ministerial statements that followed had confirmed the government's adherence to those commitments. The commitments established in the Agreement, therefore, should be taken into account in the ANPS. In other words, the Secretary of State acted unlawfully by disregarding the UK's commitments in the environmental assessment that informed the ANPS, as well as by disregarding the effect of carbon dioxide emissions beyond 2050 or the effects of aviation on climate change.

It should be noted that in 2019, that is, after ANPS approval, the CCA2008 underwent a relevant change. Under the new text of article 1(1), the government must reduce greenhouse gas emissions to a level of at least 100% below the 1990 baseline by 2050 – the previous target was an 80% reduction . The sustainability assessment accompanying the ANPS concluded that the Proposal submitted by the entrepreneurs met the pre-amendment obligation. On the other hand, neither the ANPS nor the accompanying sustainability assessment referred to any of the commitments made by the UK under the Paris Agreement. The Secretary of State argued that he had not ignored this commitment, but that he had concluded that it was not relevant to the decision to designate the

[7] Article 5(8) determines that Secretaries of State must include in the NPS reasons for establishing the policy and how government policies related to mitigation and adaptation to climate change were taken into account.

ANPS. The Court of Appeal concluded, however, that articles 5(8) and 10 (3)(a)[8] of the Planning Act imposed a legal obligation on the Secretary of State to consider the commitments of the Paris Agreement, which meant the decision was illegal. The Court did not strike down the ANPS and did not order the Secretary of State to carry out a review of the ANPS. However, it stated that the ANPS would only have legal effect after considering how the policy was affected by the commitments established by the Paris Agreement.

On 7 May 2020, Heathrow Airport Ltd received permission to appeal to the Supreme Court (last instance). The government chose not to appeal. The petition filed by Heathrow Airport Ltd focused on the climate change aspects of the Court's decision. The appellant argued that the Paris Agreement would not constitute a 'government policy for mitigation and adaptation to climate change' for the purposes of article 5(8) of the Planning Act at the date of the ANPS designation. There would be no obligation to consider the Paris Agreement to comply with article 10(3) of the Planning Law.

Heathrow presented precedents that support the understanding that the United Kingdom is governed by principles specific to a dualist system, in which international obligations differ from national norms. In this sense, obliging the Secretary of State to consider the Paris Agreement, before its admission into the legal system, would result in the incorporation of an international treaty 'by the back door'.

On December 16, 2020, the Supreme Court reversed the Court's decision. Some points addressed as 'factual context' that made up the Supreme Court's understanding of the first two arguments deserve to be highlighted. Firstly, the Supreme Court pointed out that, despite the common objectives of the parties set out in the Paris Agreement[9], the instrument does not impose an obligation on signatory countries to adopt objectives to achieve them. The obligation of signatory states is to comply with the respective NDC - which, in the case of the United Kingdom, was linked to the European Union and was less ambitious than the provisions of the CCA2008. In October 2016, the CCC published a report called "UK Climate Action following the Paris Agreement", in which it stated that 'the Paris Agreement targets involved more ambition for emissions reductions than that on which existing UK targets were based' . However, it indicated that it would not be necessary to adjust the CCA2008 targets, as there would be 'a number of opportunities to revisit the

[8] The aforementioned provision determines that the Secretary of State must exercise his role with the objective of contributing to sustainable development and, to this end, must desirably take into account mitigation and adaptation to climate change.

[9] Specifically, limiting average global warming to well below 2ºC above pre-industrial levels, with efforts to limit it to 1.5ºC (article 2), and balancing anthropogenic emissions and the absorption of greenhouse gases by sinks.) until the middle of this century (article 4).

targets' and that 'the UK 2050 target would potentially be consistent with a wide range of temperature scenarios'. In October 2017, the British government published its "Clean Growth strategy", in which reference was made to the CCC's understanding of the need to update the CCA2008 targets. In December of the same year, in the context of the legal action filed by Plan B to question the lack of updating of domestic targets in view of the Paris Agreement, the CCC reinforced its previous position. In January 2018, however, the CCC published the report "An independent assessment of the UK's Clean Growth Strategy", in which it explains that to achieve net-zero emissions for up to half the planet, under the terms of the Paris Agreement, the United Kingdom should probably increase the ambition of your reduction targets. ANPS approval occurred months later, on June 25, 2018.

Turning to the assessment of the appeal, a central point in the Court's decision had been the understanding that the term 'government policies' would be a common term in the English language, not necessarily referring to specific norms, which resulted in the Court's conviction that that the Paris Agreement should be considered for the purposes of article 5(8) of the Planning Act. The Supreme Court disagreed with this understanding and stated that the text of the aforementioned article must be understood in a restricted way, in order to allow its application in a ready manner through the easy identification of the norms to be considered as 'government policies'. In this sense, the Supreme Court rejected arguments that public statements by politicians constitute 'government policies' and affirmed the need for legislative processes so that obligations set out in ratified international treaties become domestic law. Finally, he pointed out that the chronology of the facts makes it clear that, at the time of approval of the ANPS, the government had not defined how domestic policies would be adapted in view of the objectives adopted through the ratification of the Paris Agreement.

Regarding the Secretary of State's duty to consider the Paris Agreement under section 10(3) of the Planning Act, the Supreme Court appreciated the Tribunal's finding that the Agreement is so obviously relevant to the ANPS decision that the Secretary of State was irrational in not considering it. Precedents on the discretion of public agents were explored to recognize that there are cases in which the clear materiality of an issue is sufficient to require its consideration in decision-making. Although the Supreme Court agreed that this thesis applies to the case under analysis, it was understood that the Secretary of State did consider the Paris Agreement in his decision. The Supreme Court's conclusion was based on an excerpt from the ANPS that expressly indicates that limitations on carbon emissions provided for in national and international government obligations will be considered both in the construction and operational phases of the airport expansion. Furthermore, the Supreme Court considered that the Secretariat of State followed the

understanding expressed by the CCC that the measures provided for in the CCA2008 would be 'potentially compatible with the objectives of the Paris Agreement'. After consolidating the understanding that the Paris Agreement was considered, the Supreme Court indicated that the more appropriate question would then be whether the Secretary of State should have given greater weight to the Agreement in his decision. In this regard, the defense's arguments were accepted that the Secretary of State used his discretion in understanding that the international obligations arising from the Paris Agreement were sufficiently covered by the consideration of the CCA2008, reinforcing that the Secretary acted on the advice of the CCC. Finally, it was understood that ANPS foresees the requirement for evaluation under updated CCA2008 objectives in the decision phase on granting permission to develop the project (the so-called Development Consent Order). Furthermore, he indicated that there is the possibility of changing the ANPS under the terms of the Planning Law if inconsistencies are found with the obligations arising from the Paris Agreement.

Turning to the third argument in Heathrow Airport Ltd's appeal, the Supreme Court considered the Secretary of State's discretion regarding the sufficiency of information submitted under the SEA Directive. The Court had accepted the argument of Friends of the Earth and Plan B that the omission of the environmental report on which the ANPS was based in citing the Paris Agreement would imply non-compliance with the aforementioned Directive, especially with regard to publicity and public consultation on the project. The Supreme Court understood that, during the public consultation phase, there was mention of international obligations to be observed by the project, which implied the possibility for the public to refer to the Paris Agreement at that stage. Furthermore, the Supreme Court reaffirmed that the Secretary of State's decision followed the CCC's understanding that the CCA2008 sufficiently covered the obligations set out in the Paris Agreement.

The fourth argument considered in the decision was the possible failure of the Secretary of State to assess the issues of emissions of gases other than CO2 and emissions after 2050, in breach of articles 10(2) and (3) of the Planning Law.

Regarding the first point, Friends of the Earth had argued that the known scientific uncertainties about the contribution to the greenhouse effect of emissions other than CO2 emissions (such as water vapor) are not enough to completely rule out the assessment of their impact. , basing the argument on the principles of precaution and common sense. However, the Supreme Court dismissed the argument stating that the precautionary principle ‘adds nothing’ to the discussion. The Supreme Court concluded by listing that (i) there was no irrationality on the part of the Secretary in not considering issues due to scientific uncertainty; (ii) the Secretary acted in accordance with advice provided by the CCC; (iii) the decision was taken in the context of the

British government's still incipient response to the implications of the Paris Agreement; (iv) the decision was made during the development of the Aviation Strategy, which would address the issue; (v) there are future phases of the approval process in which such emissions may be addressed; and (vi) both the Appraisal of Sustainability and the ANPS clearly indicate that when requesting a Development Consent Order it will be necessary to address environmental policies in force at the time of the application.

Regarding post-2020 emissions, the Supreme Court found it acceptable that the Secretary of State did not attempt to assess such emissions in the ANPS given that there are currently no policies for that period and that, in any case, the environmental report (Appraisal of Sustainability) that accompanying ANPS contains emissions modeling data up to the years 2085/2086. Furthermore, he reiterated the existence of future phases of approval of the Development Consent Order and the existence of ANPS adjustment mechanisms provided for in the Planning Law.

In general terms, the Supreme Court decided that, contrary to what the authors stated, the Secretary of State acted legally in approving the ANPS and that his decision covered the content of the Paris Agreement, since the CCC had indicated that the domestic law considered by the Secretary had the potential to meet the objectives of the Agreement.

The decision means that the ANPS will come into force, but the Secretary of State may decide to review it anyway. The future of the expansion has yet to be defined, but the British government has not shown support for the project to continue. In 2016, Boris Johnson indicated he would 'ly down in front of bulldozers' to stop expansion. Furthermore, following the Court's ruling against the interests of Heathrow Airport Ltd, the government decided not to appeal to the Supreme Court. In December 2020, when addressing the Supreme Court's decision, the Prime Minister's press secretary did not take a position on the project, but stated that 'any expansion must meet strict criteria relating to air quality, noise and climate change' (Clark et al. 2020).

Furthermore, it is not yet known what the implications of the COVID-19 pandemic will be in this case. In oral evidence given to Parliament's Transport Committee (House of Commons) on 6 May 2020, the chief executive of Heathrow Airport Ltd speculated that aviation demand could justify the construction of a third runway at Heathrow within '10 to 15 years'.

In addition to the implications for the construction of a third runway at Heathrow, the case gained repercussion, as the decision was expected to have implications for the designation of future NPSs and the review of other existing NPSs. Specifically, it was expected to clarify whether the Planning Act 2008 obliges the Secretary of State to consider international commitments to which the government has expressed a 'policy of adherence' when deciding to designate future NPSs.

In our view, the Supreme Court's decision still left room for discussion, given the existence of two provisions of the 2008 Planning Law that could give rise to the obligation, or not, to consider international treaties when designating NPSs. On the one hand, the Supreme Court ruled out treating international agreements not incorporated into the legal system as 'government policies' when examining article 5(8). On the other hand, when examining article 10(3), the Court left room for some international treaty to be considered so obviously relevant to a topic that its assessment becomes necessary.

THE CASE IN LIGHT OF BRAZILIAN REALITY

The expansion of the country's air network is a recurring issue that has been mobilizing the airport sector in Brazil. Documents from the National Civil Aviation Agency - ANAC, International Civil Aviation Organization - OACI and International Air Transport Association - IATA demonstrate an increase in aviation energy efficiency and technological innovation, contributing to the reduction in the growth rate of total Brazilian emissions (ANAC, 2019). This situation can be attributed mainly to fleet renewal, increased fuel efficiency, technological and operational improvements, in addition to better air traffic management (Mendes & Souza, 2018). On the other hand, Brazil, precisely because it is a country that, due to economic and social circumstances, still allows expansion of flights per capita, as projected in the scenario that preceded the pandemic, the potential expansion of airports in the country should not be ruled out.

The judicialization of the expansion of Heathrow airport leads us to several comparisons with the Brazilian system, such as legitimacy for filing the action, limits of questioning, procedural remedy, intervention of the Judiciary in aspects of legality, respecting technical discretion and criteria convenience and opportunity of Public Administration, as well as consideration of the effects of internationally assumed commitments on domestic policy.

In this sense, the first aspect to consider is that the approval of the expansion of a project with potential impact on the environment, such as the expansion of Heathrow airport, could be questioned through the filing of a public civil action or through popular action. Municipalities, as well as associations, as long as the requirements set out in Law 7347/1985, which governs the Public Civil Action Law, are met, among other entities, are entitled to file a public civil action, with a precautionary request, aiming to obstruct the process of approval and construction of projects that may cause damage to the environment.

In addition, the approval of a project by the Public Administration may be questioned through an action to annul an administrative act, if the Administrator has committed illegality, by failing to observe material legal provisions or by violating the dictates that govern the activities of the Public Administration, such as reasonableness, efficiency, motivation, purpose and morality[10].

Unlike judicial review, access to the Judiciary is not conditioned on exhaustion of the administrative sphere. The Judiciary may be asked to express its views even during the course of the administrative process and may order the Public Administration to give a ruling on the object of the controversy, carrying out adequate administrative provision, reserving the powers of the Executive Branch to establish public policies.[11] However, the Superior Court of Justice on several occasions has already stated that judicial assessment must be limited to adherence to the applicable legal parameters, with no interference in the discretionary content of such a procedure.[12]

On the other hand, the Public Administration cannot omit itself and fail to observe legal obligations to which it is subject to implement established public policies. Similar to the English system, the development of infrastructure projects in Brazil is based on multisectoral strategic policies that must be subject to analysis and criticism from various stakeholders, observing due

[10] Lei Federal 9784/1999.

[11] "Constitutional right. Environmental Law. Article 225 of the Constitution. Duty of Environmental Protection. Need for compatibility with other constitutional vectors of equal hierarchy. Articles 1, IV; 3rd, II and III; 5th, Caput and XXII; 170, Caput and Sections II, V, VII and VIII, of the CRFB. Sustainable development. Intergenerational Justice. Allocation of resources to meet the needs of the current generation. Political choice. Judicial control of public policies. Impossibility of violating the democratic principle. Narrow rationality exam. Respect for the decision-making analysis criteria used by the public policy maker. Infeasibility of alleging prohibition against retrogression. New Forest Code. Direct Actions of Unconstitutionality and Declaratory Action of Constitutionality judged partially valid. (...) 18. Institutional capacity, absent in a scenario of uncertainty, imposes self-restraint on the part of the Judiciary, which cannot replace the choices of other State bodies with its own choices (...)" ADC 42, Relator(a): LUIZ FUX, Tribunal Pleno, julgado em 28/02/2018, PROCESSO ELETRÔNICO DJe-175 DIVULG 12-08-2019 PUBLIC 13-08-2019.

[12] "Special Appeal - administrative act - Merit - The tripartition of Powers allows each person to decide, within the scope of discretion, the opportunity and convenience. The merit of the act is defined, in this case, by the Executive. The Judiciary is prohibited from replacing the administrator. The examination of legality, in addition to the formal aspect, also includes the analysis of the facts taken into account by the Executive. It is inappropriate, however, to simply change the option of that Power." STJ, 2ª Turma, Rel. Min. Luiz Vicente Cernicchiaro, REsp nº 4.526/SP, DJU de 01.10.1990.

"Special Appeal - Writ of Mandamus - Administrative Act - Merits. The merit of the administrative act is subject to judicial criticism. The respective grounds must be taken into account, that is, whether the assessment of opportunity and convenience is based on a legitimate fact." STJ, 2ª Turma, Rel. Min. Luiz Vicente Cernicchiaro, REsp nº 4.790/RJ, DJU de 05.11.1990.

"The Public Power is in charge of policing environmental issues; The Public Prosecutor's Office is procedurally legitimized to take legal action, but it is not the administrative master of environmental licensing. All doctrine and jurisprudence are making this division in a very dignified way. The role of the Public Prosecutor's Office is deeply commendable, but it must be aware that its role is as a legitimized agent to, through judicial means, promote the defense of the environment, and not as a legitimized agent to, through judicial means, replace the Public Administration, especially when it, through procedures adopted within the law, grants any authorization without any objection." STJ; REsp 763.377/RJ; rel. Min. Francisco Falcão, primeira sessão; j. 27.8.2007.

legal process. The Federal Constitution itself establishes the harmonization of economic, social and environmental interests, as provided for in articles 170 and 225 of the Federal Constitution, and the transversality of environmental law must permeate the planning of socioeconomic policies and sectoral plans. The National Environmental Policy Law (PNMA, Law 6938/81), approved by article 225 of the Federal Constitution, establishes, in its article 9, the instruments for the planning and execution of environmental policies, with environmental licensing being the most frequently used, without prejudice to environmental zoning, among others. In the case of a project with a significant environmental impact, such as the construction and expansion of airports and other terminals - such as maritime and railway terminals - the project must be submitted to an Environmental Impact Study and respective Environmental Impact Report - EIA/RIMA, within the scope from which locational alternatives are evaluated, considering impacts and compensations of a socio-environmental nature.

Expansions of transport hubs, by their very nature, present the peculiarity of greater locational rigidity in cases of expansion, despite the study of alternatives considering the pros and cons of building a new airport in another location. Not to mention that airport concessions often provide for airport expansion, especially considering that Brazilian airports are often undersized considering current flows and future projections - impacted by the pandemic. In the case of Heathrow airport, there were questions about the criteria for alternative studies, whether viable or reasonable alternatives should be considered, a topic that is frequently brought up, mainly by the Public Prosecutor's Office, in actions involving the approval of projects and environmental licensing in Brazil.

In Brazil, there are some examples of judicialization of the airline sector and related infrastructures, such as lawsuits discussing flight times at Santos Dumont airports (RJ)[13] and Congonhas (SP)[14], due to noise pollution and nuisance to the population. Within the scope of these processes, it was concluded that the aerial activities were legal, carried out as provided for in the applicable regulations and guidelines from the competent authorities. It must be considered that the eventual relocation of flights to other airports further away from urban centers may have reflex effects, as can the ground traffic of passengers to their destinations.

[13] TRF-2 - APELREEX: 00466017520124025101 RJ 0046601-75.2012.4.02.5101, Relator Guilherme Calmon Nogueira da Gama, Data de Julgamento: 17/10/2017, 6ª Turma Especializada.
[14] TJ-SP - APL: 9161900582008826 SP 9161900-58.2008.8.26.0000, Relator Antonio Rigolin, Data de Julgamento: 29/11/2011, 31ª Câmara de Direito Privado, Data de Publicação: 30/11/2011.

Focusing specifically, although not exclusively, on the climate issue, the Public Ministry of the State of São Paulo filed legal actions against airlines with operations at Guarulhos airport in order for them to compensate for greenhouse gas emissions considering departures and plane arrivals in Guarulhos (Setzer, Borges & Leal, in press). Even though not all actions were definitively resolved, the Judiciary ruled in many of them as unfounded, given the lack of legal obligation imposing GHG emission limits to be observed by airlines. Consequently, the absence of procedural interest that would justify the filing of the action imposing compensation for the emission of gases emitted by lawful, authorized activities of national interest was recognized. As in the case involving the Plan B organization, the legal actions were based directly on climate issues, but brought up other environmental issues, such as emissions of polluting gases that are not considered greenhouse gases.

When it comes specifically to the climate issue, Brazil is a signatory to the Paris Agreement. In December 2020, it submitted its updated National Determined Contribution ("NDC"), through which it reaffirmed its commitment to reducing GHG emissions by 37% by 2025, compared to 2005, and by 43% by 2030. It is up to the Government, through the elaboration and application of public policies, define how the commitments assumed will be implemented in order to honor the declared goals. From a broader perspective, one could consider a demand to order the Government to issue standards and apply them effectively, to make the Paris Agreement effective, in addition to guaranteeing the protection of society's fundamental rights in the face of climate change.

Such a measure may have its procedural interest challenged under the argument that legal action would not be a necessary measure because climate change has been considered in public policies, without the deadline for reducing greenhouse gas emissions approaching in 2025. greenhouse at 37% of 2005 levels by 2025. Another challenge is that the rules on environmental licensing, at least at the federal level, as is the case with Resolution 1/1986, of the National Environmental Council - CONAMA, do not expressly require that climate issues are considered in licensing. In practice, some environmental bodies have requested information on GHG emissions within the scope of the environmental licensing of projects, which are usually restricted to reporting obligations on emissions, but without a prescriptive approach.

In any judicial strategy adopted, whether to question the expansion of an infrastructure project or to question the measures adopted by the Government to achieve the NDC, it must be discussed whether the Judiciary is responsible for deciding only on aspects of legality and to what extent it could decide on the elaboration and execution of public policies. In this context, it may be questioned whether the Sectoral and Multiannual Transport and Energy Plans considered the climate variable, with an analysis of the separation of powers, as well as a possible omission by the State in guaranteeing fundamental rights in the face of materiality, being essential for this debate. of the theme.

It should be noted that, although climate change has rarely been addressed directly and in depth by the Brazilian Judiciary, it is increasingly common for the topic to appear in legal demands as an additional argument for questioning undertakings with significant environmental impact and to accelerate the transition to a low-carbon economy. The topic has gained greater relevance recently, which justified the call for a public hearing to better understand climate change by the Ministers of the national Supreme Court, within the scope of the Claim of Non-Compliance with a Fundamental Precept - ADPF 708 (Borges, 2020). The exhibitions made on the occasion offer an important overview of the recent evolution of the topic and the treatment of the world's Courts, which could shed some light and even influence national decisions (Setzer, 2020).

CONCLUSION

The legal implications of the 2015 Paris Agreement and the UK's commitment to decarbonisation and climate change mitigation are gradually being worked out. Following the Supreme Court ruling, Heathrow Airport can still apply for licensing for the third runway. However, the project still needs to be approved, and this decision must take into account the commitments made by the government since the approval of the ANPS in 2018, which now include the goal of achieving carbon neutrality by 2050 (defined in June 2019), as well as its recent pledge (December 2020) to reduce emissions by 68% by 2030 (Department for Business, Energy & Industrial Strategy et al., 2020).

Heathrow Airport may also face more legal challenges. Shortly after the sentence was handed down, the NGO Plan B announced that it intends to take the case to the European Court of Human Rights (Plan B, 2020b). On 12 December 2020, Plan B sent a letter to the UK

government, claiming that its failure to develop a plan to tackle climate change would constitute a breach of human rights and national and international law (Plan B, 2020c). .

In Brazil, climate litigation cases are not yet significant in number, but the topic has become increasingly recurrent and should gain greater relevance in the coming years (Setzer, Borges & Leal, in press). With the year 2025 approaching, for which Brazil has set a target in its NDC, and given the judicialization of projects subject to environmental licensing, it will be important to monitor how the Judiciary will position itself in the face of a discussion that will probably bring on one side the guarantee of the principle of separation of Powers, the principle of legality and discretion over administrative merit by the Executive Branch, and, on the other, possible omission or insufficiency of the State in addressing the climate issue.

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