

Neutral Citation Number: [2010] EWHC 626 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 26th March, 2010

Before :

LORD JUSTICE CARNWATH

Between :

| | | |
|--|---|------------------------------------|
| | THE QUEEN ON THE APPLICATION OF LONDON BOROUGH OF HILLINGDON & ORS | <u>Claimant</u> |
| | - and - | |
| | SECRETARY OF STATE FOR TRANSPORT | <u>Defendant</u> |
| | - and - | |
| | TRANSPORT FOR LONDON | <u>Interested Party</u> |

Nigel Pleming QC, Nathalie Lieven QC, David Forsdick & Richard Wald (instructed by
Harrison Grant) for the **Claimant**

Jonathan Swift, Karen Steyn, James Maurici (instructed by **Treasury Solicitor**) for the
Defendant

Martin Chamberlain (instructed by **Transport for London**) for the **Interested Party**

Hearing date : Tuesday 23rd - Thursday 25th February, 2010

Judgment Lord Justice Carnwath :

Introduction

1. Whether there should be a third runway at Heathrow airport is a question of national importance and acute political controversy. It is a matter on which the main parties are currently divided, and which may well become a significant debating-point at the forthcoming general election. The court is concerned only with issues of legality.
2. The matters before the court begin with the announcement in 2003 of the government's support in principle for a third runway. The immediate focus is the consultation process which began in November 2007, and culminated in decisions announced in January 2009 ("the 2009 Decisions"). The claimants, who are a group of local authorities and organisations opposed to the runway proposal, challenge the legality of the 2009 Decisions. They are joined by Transport for London, which has statutory responsibility for transport arrangements for Greater London. The decision is defended by the

Secretary of State for Transport.

3. The issues should be considered against the background of the development of government policy since the 2003 ATWP. Of particular relevance is the White Paper *Planning for Sustainable Communities* (Cm 7120), published in May 2007, which set the policy background for two major statutes in 2008, the Planning Act 2008 and the Climate Change Act 2008. The White Paper discussed two issues, which bear directly on the matters raised by the parties in this case: first, the increasing importance of climate change as a factor directing planning policies, and secondly, the need for a more efficient procedure for establishing and applying national planning policy in relation to major projects.

4. First, in relation to climate change, the Paper said:

“Meeting the challenge of climate change: The evidence is now compelling that greenhouse gas emissions from human activity are changing the world’s climate. The recent Stern Review makes it clear that ignoring climate change will eventually damage economic growth, people’s health and the natural environment. The Climate Change Bill published on 13 March will introduce a clear, credible, long-term framework for the UK to achieve its goals of reducing carbon dioxide emissions and ensure steps are taken towards adapting to the impacts of climate change. The planning system also has an important role to play in enabling the UK to meet those challenges....” (para 1.14)

The new framework was given legislative effect by the Climate Change Act 2008.

5. Secondly, the Paper spoke of the perceived weaknesses of the planning procedures for major projects, and the need for clearer policy guidance:

“1.17 Neither do we have clear policy frameworks for all areas of nationally significant infrastructure. The result is that fundamental issues such as whether there is a need for additional capacity or whether a technology is proven and safe are addressed from scratch in each individual application. This can make the process of preparing applications for individual project proposals more onerous and uncertain, and mean that many months have to be spent at the inquiries into these proposals debating high level issues such as need....”

6. The lengthy process leading to the approval of the fifth terminal at Heathrow was cited as an illustration of the problem:

“1.20 The process for dealing with major infrastructure projects, from submission of the proposal to decision in particular, is too slow and complicated. It took seven years to get to a decision on Heathrow Terminal 5;...

Prolonged procedures of this sort rarely result in better decision

making but they do impose high costs, not only on promoters but also on other participants in the process. Delays can also result in years of blight for individuals and communities during which people are unable to move house or receive compensation. And they can put at risk the country's economic and environmental well-being if, as a consequence, good development is delayed or investment and jobs go overseas rather than wait for modern infrastructure that is needed to support efficient business logistics. Individuals and communities find it difficult to be heard..."

7. The paper outlined the government's plans for dealing with this problem:

"1.46 We want to clarify and improve the way policy is set and decisions are made for nationally significant infrastructure projects. We propose that ministers should be clearly accountable – including through direct Parliamentary scrutiny – for setting overall strategy in national policy statements. We consider that decisions on individual applications should then be taken within the framework of the relevant national policy statement, by an independent, and expert, commission on an objective basis. This infrastructure planning commission would work within a clear legislative framework set by Parliament and a policy framework set by ministers, and would be accountable to them for its decisions and performance, as well as being subject to legal challenge. We consider that this framework provides for greater transparency and more effective accountability than current arrangements, by achieving a clear separation between setting policy and taking quasi-judicial decisions."

8. As foreshadowed in the White Paper, the Planning Act 2008 introduced a new planning procedure for major projects of this kind, including the establishment of a new "Infrastructure Planning Commission", and the preparation of "National Policy Statements" as the background to applications for a new form of "development consent". The relevant provisions were for the most part brought into operation after the commencement of these proceedings (some on 1st March 2010, shortly after the hearing before me). They now provide the statutory framework within which any formal proposal for a third runway will be assessed.

9. I note for completeness that the new procedures are themselves subject to some political controversy. The Conservative Party (Policy Green Paper No 14) has recently announced its own proposals for "Infrastructure of national importance". They also seek to address the perceived problems of "extremely lengthy, extremely expensive planning inquiries on key national infrastructure projects such as Heathrow Terminal 5". They propose to abolish the Infrastructure Planning Commission, but to retain "its expertise and fast-track process" in the form of a new "Major Infrastructure Unit", and to "integrate" the National Policy Statements into a revised system of "national planning guidance". This is of no direct relevance to the issues before me, since the court's task is to consider the issues in the legal context as it is, not to speculate about how it may change in the future. However, I observe that there seems to be some common ground

between the main political parties as to the need for improved procedures to establish the national policy framework for important planning decisions.

Factual history

10. The relevant history began in December 2003, when, following a period of consultation initiated in 2000, the Secretary of State published the White Paper *The Future of Air Transport* (“ATWP”). This was designed to set out a strategy for air transport in the UK over the next 30 years. The paper explained that it would be subject to continuing review:

“The strategic framework set out in this White Paper will need to be reviewed periodically given the uncertainties involved in looking ahead over the next thirty years – both in the aviation sector and more generally. Policies may also need to evolve over time to reflect changing market conditions and expectations. We will carry out such reviews as and when the circumstances require. And we will continue to consult on issues of significance which may affect the policies set out above.” (para 1.6)

11. The strategy included proposals for substantial growth at a number of regional airports, and in the South East. It envisaged overall growth in passenger numbers (expressed in millions of passengers per annum or “mppa”) from about 200mppa in 2003 to a “central case” of 470mppa by 2030. New runways were proposed at Edinburgh, Birmingham, Stansted and Heathrow.

12. In relation to expansion of Heathrow the ATWP stated:

“11.51 The Government believes there is a strong case for seeking to secure the large economic benefits achievable through the addition of a third runway at Heathrow. At the same time, however, we recognise that these strong economic arguments must be weighed against the serious environmental disadvantages of Heathrow. ...”

Particular attention was drawn to the need for stringent limits on aircraft noise (11.53), and for compliance with the mandatory air quality limit values for NO₂ (applicable from 2010 under an EU Directive) (11.54). Reference was also made to the need for improvements to the surface transport infrastructure:

“11.58 Further expansion of Heathrow will place pressure on already congested road and rail networks. The Government has no plans for further motorway widening in this area beyond that which we announced in July 2003. The solution will need to be based on improvements to public transport, which is likely to require the airport operator spending several hundred million pounds on new rail infrastructure. The prospects for the introduction of some form of road user charging, either by means of charges to enter the airport or pricing across a wider area,

should also be considered. ...”

The Paper indicated that the government supported the proposal subject to being satisfied that “the key condition” relating to compliance with air quality limits could be met. Their support would also be –

“... conditional on measures to prevent deterioration of the noise climate and improve public transport access as set out above.” (para 11.62)

In 2004 the Department established the “Project for the Sustainable Development of Heathrow” (PSDH) to consider how the conditions could be met.

13. It is noteworthy that, although the ATWP contained some discussion of climate change (para 3.35ff), it was not seen as a limiting factor at that stage. Government policy (as set out in the Energy White Paper 2003) was that there should be a 60% reduction in CO₂ from 1990 levels by 2050, but international aviation was not included in these figures. In the ATWP the view was taken that the best way for aviation to contribute to the “goal of climate stabilisation” would be through “a well-designed emissions trading regime” (para 3.39).

14. In October 2006 the Stern Review on “the Economics of Climate Challenge” was published. In the words of the claimants’ expert (Mr Lockley), the Review “reflected a fundamental shift in attitudes to climate change in the UK”, and in particular made clear that an emissions trading scheme was not enough in itself to address the problem. He draws attention to the Review’s warning against “overinvestment in long-lived, high-carbon infrastructure – which will make emissions cuts later on much more expensive and difficult” (p xix).

15. The increased significance of climate change was reflected in the ATWP “Progress Report”, issued by the Department of Transport in December 2006. It contained a detailed discussion of the Stern findings, under the heading the “Global challenge of climate change”, describing it as “the biggest single issue that we face” (para 2.1). The government was –

“...clear that major decisions on increases in airport capacity need to take account of not only their local environmental effects, but also the wider context of aviation’s climate impacts”. (para 2.33)

A new “emissions cost assessment” was to be introduced, following further consultation, to inform decisions on major increases in aviation capacity. In spite of the increased emphasis on this issue, Mr Lockley criticises the report as a “selective” treatment of the Stern Review, and he notes in particular the absence of any reconsideration of the principle of airport expansion.

16. On 22 November 2007 the Secretary of State began a new consultation process, with the publication of *Adding Capacity at Heathrow Airport, Consultation Document*. As already noted, this followed the publication in May 2007 of the White Paper *Planning*

for Sustainable Communities. The purpose of the consultation was said to be to seek views on a range of matters that had formed part of the PSDH work, including such issues as whether a third runway, if built, should be supported by associated passenger terminal facilities, and (significantly for present purposes) whether the three conditions identified in the ATWP remained valid and could be met.

17. The Consultation Document restated the Government's view that there was a strong economic case for a third runway. It gave an estimate of "net economic benefits of around £5bn in net present value terms". However, it did not seek responses relating to the principle of development. The Background referred to the Government's support for a third runway which was said to have been –

“conditional on:

– a noise limit...

- air quality limits...

- improving public transport access to the airport.”

The PSDH had been set up to consider “whether, and how, these conditions might be met” (p 8).

18. In a chapter headed “The Policy Context”, it was explained that the consultation was concerned with “the local environmental impacts” of the proposal, and that although the context included “our response to the global challenge of climate change”, these topics were “outside the scope of this consultation” (p 18). The questions were accordingly relatively limited in scope, relating to such issues as whether a third runway should be supported by associated passenger terminal facilities. Views were also sought on whether the three conditions identified in the ATWP (noise, air quality and public transport access) remained valid.

19. During the course of the consultation, the Climate Change Act 2008 was passed. Section 1 imposed a statutory duty on the Secretary of State to ensure that the “net UK carbon account” for the year 2050 is at least 80% lower than the 1990 baseline (“the 2050 target”). Emissions from international aviation were not included initially, but provision was made for their inclusion in accordance with regulations to be made by the Secretary of State, with a deadline of the end of 2012 for the making of such regulations, or an explanation to Parliament of the reasons for not making them (s 30). The Act also established a new independent, expert Committee on Climate Change (“CCC”) (chaired by Lord Adair Turner) to advise the government (inter alia) on possible amendments to the 2050 targets, on the consequences of including international aviation, and on progress towards the target (ss 32-7).

20. On 15th January 2009 the Secretary of State made a statement to the House of Commons announcing his conclusions following the consultation (“the 2009 Statement”). The government remained convinced that additional capacity at Heathrow was “critical to this country's long-term economic prosperity”. Having considered all the evidence, the Secretary of State had decided that “all three of the conditions for supporting a third runway can be met”. He had decided that any additional capacity would be subject to a

new “green slots” principle –

“to incentivise the use at Heathrow of the most modern aircraft, with further benefits for air quality and noise – and indeed carbon emissions.”

21. At the same time the Department issued a document entitled “*Adding capacity at Heathrow: Decisions following Consultation*” (“the Decisions Paper”). The paper referred to the “policy decisions” announced to Parliament, and stated that its purpose was “to summarise those decisions and to identify the core evidence which the Secretary of State took into account”. The Decisions Paper confirmed support for a third runway at Heathrow with additional passenger facilities, but “subject to an aggregate limit of 605,000 annual movements which would be subject to review in 2020” (para 2). The paper summarised the results of the consultation, noting that–

“The consultation did not ask whether or not respondents supported expansion – the Government’s position in principle having already been set out in the ATWP”. (para 19)”

22. The paper indicated that the Secretary of State was satisfied that the conditions set out in the ATWP could be met and “therefore confirms the Government’s policy support for a third runway” (para 60).

23. In his statement to Parliament the Secretary of State also announced a target to bring aviation emissions in 2050 below 2005 levels. He had asked the Committee on Climate Change “to advise on the best basis for its development”. Emissions from aviation would be monitored with the help of the CCC:

“Any future capacity increases at Heathrow beyond the decision that I have announced today will be approved by the Government only after a review by the Committee on Climate Change in 2020 of whether we are on track to achieve the 2050 target that I have announced.”

He anticipated that the airport operator would bring forward a planning application for a new runway to be operational early in the period between 2015 and 2020.

24. The present proceedings were begun on 7th April 2009, seeking the quashing of “the decision to confirm policy support for a third runway and terminal 6 at Heathrow”.

Permission was not granted by Dobbs J on 31st July 2009 but a rolled up hearing to include the application for permission to apply for judicial review and the substantive claim was ordered. I now grant permission to apply for judicial review.

25. On 9th December 2009 the CCC issued a paper entitled “Meeting the UK aviation target – options for reducing emissions to 2050”. This contained a detailed assessment of the steps likely to be needed to ensure that CO2 emissions in 2050 would not exceed 2005 levels. The overall conclusion was that total ATMs in the UK should not increase by more than 55% between 2005 and 2050 (p 26), but it was said that there were “no

implications... for specific airports (e.g. Heathrow)’.

26. On 14th January 2010 a letter to the Secretary of State on behalf of some of the claimants drew attention to the discrepancy between the CCC’s advice as to acceptable growth, and the increases implied by the 2003 ATWP. They called on the government to revise its aviation policy, and in the meantime put all airport expansion plans on hold. In his reply dated 2nd February, the Secretary of State said that the CCC report did not provide grounds for such a move. The government was committed to publishing a National Policy Statement on Airports in 2011 which would take account of all the developments relevant to the airport sector.

27. While the policy debate continues, there is considerable evidence before me of the hardship caused to the local community by uncertainty and resulting planning blight. This is of particular significance in the village of Sipson, which would in effect have to be destroyed if the proposal proceeds. The representatives of the local authorities also speak of the difficulties of preparing local plans in this context. By way of illustration I was referred to a planning application for a hotel in the Sipson area, which had been subject to a direction issued by the Government Office for London on 1st December 2009, restricting the grant of permission because it was in the proposed area for Heathrow expansion. Such factors are of course unfortunate by-products of many major planning proposals. It is not suggested that in themselves they amount to legal reasons for intervention, but they highlight the practical importance of the issues before me, and the desirability of speedy resolution.

The claimants’ case

28. As often occurs in such cases, the claimants’ case has evolved. The 50 page “skeleton” differs in substance and emphasis from the original grounds. A five page Summary was produced at my request, and I permitted it to be treated as containing the amended grounds for judicial review. The case is framed in conventional judicial review terms, under three heads:

- i) Breach of natural justice/legitimate expectation in failing to undertake a fair consultation;
- ii) Failure to take into account material considerations; and
- iii) Failure to provide adequate reasons.

29. *Consultation* The main complaint is that the January 2009 decision was “fundamentally different from the subject matter of the consultation”, making the process “conspicuously unfair” (see *R(Elphinstone) v Westminster CC* [2008] EWHC 1287 paras 61-2, [2008] EWCA Civ 1069 para 63; *R(Edwards) v Environment Agency* Civ 877 paras 92-4). The claimants focus on three elements in the final decision which were not present in the Consultation document:

- i) an entirely new target for aviation emissions to be capped in 2050 below 2005 levels;
- ii) support only for expansion up to 605,000 ATMs, with a review in 2020;
- iii) the introduction of a new “green slots” policy applying to any additional capacity at Heathrow.

These are said to have been “entirely new factors” which produced “a fundamentally different” decision from that consulted upon.

30. *Material considerations* It is said that the Secretary of State failed to take account of, or had an inaccurate appreciation of a number of considerations which he himself had identified as material:

- i) changes which rendered the business case materially inaccurate;
- ii) a mistaken assumption as to the potential of “Green Slots” to contribute to CO2 reductions;
- iii) the impact of the proposal on the Piccadilly Line and on road transport, as explained in TfL’s consultation response;
- iv) the need for Strategic Environmental Assessment.

31. *Reasons* The decision failed to provide adequate reasons in respect of the following:

- i) *Green Slots* There was a conflict between the Secretary of State’s statement to Parliament (15th January 2009) that the “green slots” policy was one of the identified steps to limit any increase in carbon dioxide emissions, and the response to the letter before action which asserted that “the green slots” policy did not relate to such emissions;
- ii) *Piccadilly Line* The conclusion that there is adequate capacity on the Piccadilly Line contradicts the views of the Mayor and TfL, the expert statutory body responsible for this line;
- iii) *Surface Access* The conclusion that there should be “more than enough public transport capacity to meet peak hour demand for Heathrow” was not explained.

32. Although this division of issues conformed to conventional heads of judicial review, it resulted in a fragmented form of presentation which seemed to me to detract from the force of the main points. I find it simpler and clearer to look at the matter more broadly,

by reference to the three “headline issues”:

- i) Climate change
 - ii) Economic justification
 - iii) Surface access.
33. In any event, by the time of Mr Fleming’s final submissions for the claimants, the headline issues had been overtaken by a more fundamental question, that is the precise status and effect of the 2009 Decisions. As he implicitly recognised, his grounds of challenge depended to a large extent on the expectation that the Decisions would be treated by the Secretary of State as in effect closing the door to further principled opposition to the runway project. If that is not the correct interpretation of the Decisions, the case for the court’s intervention at this stage is materially weakened.
34. In my view, it is impossible to answer that question without considering the statutory procedures which, following the 2009 Decision, the third runway proposal will need to undergo to be capable of implementation on the ground.

The Planning Act 2008

The statutory provisions

35. The preparation of an Airports National Policy Statement (NPS) would be under section 5 of the Planning Act 2008. That section provides:

“5 National policy statements

(1)The Secretary of State may designate a statement as a national policy statement for the purposes of this Act if the statement—

- (a) is issued by the Secretary of State, and
- (b) sets out national policy in relation to one or more specified descriptions of development.

(2) In this Act “national policy statement” means a statement designated under subsection (1) as a national policy statement for the purposes of this Act.

(3) Before designating a statement as a national policy statement for the purposes of this Act the Secretary of State must carry out an appraisal of the sustainability of the policy set out in the statement.

(4) A statement may be designated as a national policy statement for the purposes of this Act only if the consultation and publicity requirements set out in section 7, and the parliamentary

requirements set out in section 9, have been complied with in relation to it.

(5) The policy set out in a national policy statement may in particular—

(a) set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area;

(b) set out criteria to be applied in deciding whether a location is suitable (or potentially suitable) for a specified description of development;

(c) set out the relative weight to be given to specified criteria;

(d) identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development;

(e) identify one or more statutory undertakers as appropriate persons to carry out a specified description of development;

(f) set out circumstances in which it is appropriate for a specified type of action to be taken to mitigate the impact of a specified description of development.

(6) If a national policy statement sets out policy in relation to a particular description of development, the statement must set out criteria to be taken into account in the design of that description of development.

(7) A national policy statement must give reasons for the policy set out in the statement.

(8) The reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change.

(9) The Secretary of State must—

(a) arrange for the publication of a national policy statement, and

(b) lay a national policy statement before Parliament.

(10) In this section “statutory undertakers” means persons who are, or are deemed to be, statutory undertakers for the purposes of any provision of Part 11 of TCPA 1990.

36. As appears from subsection (4), adoption of the NPS is dependent on compliance with “the consultation and publicity requirements set out in section 7, and the parliamentary

requirements set out in section 9”. Section 9 (taken with section 106) is particularly significant, because it provides the mechanism for giving parliamentary scrutiny to the contents of the NPS, and thereafter limiting the scope of the debate in the decision-making process. By section 9(2), the Secretary of State must lay the proposal before Parliament. If, during the relevant period -

“(a) either House of Parliament makes a resolution with regard to the proposal, or

(b) a committee of either House of Parliament makes recommendations with regard to the proposal

... the Secretary of State must lay before Parliament a statement setting out the Secretary of State's response to the resolution or recommendations.”

37. The Act also takes account of the fact that consultations may have been carried out, and policy decisions made, before the new procedure comes into force. Section 12 provides the means by which they can be brought into account:

“12 Pre-commencement statements of policy, consultation etc.

(1) The Secretary of State may exercise the power conferred by section 5(1) to designate a statement as a national policy statement for the purposes of this Act even if—

(a) the statement is a pre-commencement statement or

(b) the statement sets out national policy by reference to one or more pre-commencement statements.

(2) But subsection (1) does not apply in relation to a pre-commencement statement if the Secretary of State thinks that—

(a) since the time when the statement was first issued or (if later) the statement or any part of it was last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,

(b) the change was not anticipated at that time, and

(c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different.

(3) For the avoidance of doubt, section 5(3) to (9) continue to apply where the Secretary of State proposes to designate a statement as a national policy statement for the purposes of this Act in circumstances within subsection (1)(a) or (b).

(4) The Secretary of State may take account of appraisal carried out before the commencement day for the purpose of complying

with section 5(3).

(5) The Secretary of State may take account of consultation carried out, and publicity arranged, before the commencement day for the purpose of complying with the requirements of section 7.

(6) In this section—

‘the commencement day’ means the day on which section 5 comes fully into force;

‘pre-commencement statement’ means a statement issued by the Secretary of State before the commencement day.”

38. For a “nationally significant infrastructure project”, such as this would be (s 23), the Act lays down a new unified procedure, administered by the Infrastructure Planning Commission, which replaces the conventional procedures for obtaining planning permission and other necessary authorisations and consents, by a single procedure for “development consent” (s 31) .
39. Section 106 is important since it establishes the special status of the NPS in the subsequent process, thereby avoiding the risk, discussed in the 2007 White Paper, that fundamental policy issues such as need for additional capacity “are addressed from scratch in each individual application”:

Matters that may be disregarded when deciding application

“106 (1) In deciding an application for an order granting development consent, the decision-maker may disregard representations if the decision-maker considers that the representations—

(a)...,

(b) relate to the merits of policy set out in a national policy statement, or

(c) ...

(2) In this section “representation” includes evidence.”

40. The 2008 Act contains special provisions allowing for legal challenge in the courts. By section 13, proceedings for questioning “a national policy statement or anything done or omitted to be done by the Secretary of State in the course of preparing such a statement” may be entertained only if they are begun within six weeks of the statement being designated as a national policy statement, or if later the date of publication. Similarly, by section 118 proceedings for challenging the grant of development consent must be brought within six weeks of the publication of the order or of the reasons for granting consent.

Comment on the 2008 Act

41. This new statutory framework on its face offers a comprehensive framework laid down by Parliament, within which all the wider policy aspects of a major proposal such as the third runway are to be publicised and debated, and confirmed by Parliament, as the background to consideration of the more site-specific issues at the detailed planning stage. As applied to the present proposal, it would mean that, subject to section 12, even those issues which have been subject to policy decisions in 2003 or 2009, are still open to debate, inside and outside Parliament, before a final decision can be taken. Within that context, it might have been thought that legal arguments at this stage about deficiencies in the process leading to the 2009 Decision are premature, since they may be made good as part of the statutory process, and, if not, that will be the time to seek the aid of the court.

42. Even if section 12 is relied on, it does not preclude further debate on the issues contained in the previous policy. Before a “pre-commencement policy statement” can be imported into the NPS procedure, the Secretary of State must first consider whether there has been a significant and unanticipated change of circumstances which would have materially affected the policies. Even if that hurdle is surmounted, the policy is still subject to the other requirements of section 5(3) to (9), including those relating to consultation and parliamentary approval, and the giving of reasons explaining the relationship of the proposal to the government’s policies on climate change. Thus even if section 12 is relied on, it does not rule out further debate within and outside Parliament as to whether the previous policy commitment should be reconsidered. Further, unless and until a NPS has been concluded, the power to exclude representations directed to the merits of government policy (section 106) does not come into play.

Expected procedure in this case

43. In response to my questions, Mr Swift produced a note outlining the procedures which the third runway proposal would be expected to undergo following the 2009 Decision, and gave some further oral explanation. The following are the main stages as I understood his submissions. (Although I requested an agreed note of his oral explanation, this was not achieved, and I have relied on my own note and recollection.)

- i) Further consultation, as promised in the 2009 Decision, on air quality and noise compliance mechanisms, and on green slots.
- ii) Preparation of Airports NPS. BAA have indicated that they will not seek consent until the NPS is in place. It is not the Secretary of State’s present intention to rely on section 12(1) to import the AWTP or the 2009 Decisions into the NPS.
- iii) There is a difference of view as to whether a Strategic Environmental Assessment (SEA) would be required under the relevant EU Directive. (This appears to turn on whether the NPS would be regarded as a “plan or programme” under the Directive, an issue which it does not seem to me necessary to resolve for the purpose of these proceedings.) In any event, it is said, the recent consultation on the Ports NPS was accompanied by a “Sustainability Appraisal”,

which complied with all the requirements for a SEA; “a similar process is likely to be followed with regard to the Airports NPS.”

- iv) The adoption of the NPS can be subject to judicial review: s 13.
- v) Following the adoption of the NPS, BAA would apply for development consent for a “nationally significant infrastructure project” (s 23, 31). Before doing so they would be obliged to publicise the project and consult the local community (ss 42-47).
- vi) The application would be subject to the requirement of an Environmental Impact Assessment, and possibly an assessment under the Habitats Regulations 2004.
- vii) The application would be examined by the IPC on written representations with hearings on particular issues.
- viii) Following the decision there is a further opportunity for legal challenge by judicial review.
- ix) The proposal would also be subject to consents under the Civil Aviation Act.

The status and effect of the 2009 Decision

44. Against that background I return to the question raised in Mr Fleming’s final submissions. I do so under four headings:

- i) What power was being exercised?
- ii) The Secretary of State’s position
- iii) The claimants’ position
- iv) The court’s view

What power?

45. Judicial review is the court’s response to allegations of abuse of power adversely affecting the rights or interests of those bringing the claim. The starting point must therefore be to identify the legal source of the power in question and the practical consequences of its exercise.

46. The formulation of government aviation policy, through the 2003 ATWP leading to the 2007 consultation and the 2009 Decision, was not made under any specific statutory

procedure. Mr Swift referred to the Civil Aviation Act 1982, section 1 of which charges the Secretary of State for Transport with the “general duty of organising, carrying out and encouraging measures for... the development of civil aviation”. That no doubt provides the legal basis of his actions, but it is expressed in general terms, and says nothing about the mechanisms to be used or the practical consequences.

47. In this case, the mechanism used was that of non-statutory consultation, followed by a policy announcement by the responsible Minister to Parliament. As I read it, the relevant decision was that announced to Parliament. The accompanying Decisions Paper was simply designed to “summarise and explain” that decision. The statement made clear that the practical implementation of the policy would be through a planning application made by the airport operator. That was before the relevant provisions of the 2008 Act had been brought into operation. Assurances have since been given of the government’s intention to prepare an Airports NPS under the 2008 Act.

48. Thus the 2009 Decisions are no more than policy statements without any direct substantive effects at this stage. I refer to my discussion of similar issues, in the context of proposals for local government reorganisation, in *Shrewsbury and Atcham BC v Secretary of State* [2008] EWCA Civ 148 paras 32-4. I there distinguished between the scope for judicial review as respects, on the one hand, the process of “initiation, consultation, and review”, and, on the other, the “substantive event” at the end of that process, that is a formal act having

“... substantive legal consequences: for example, by conferring new legal rights or powers, or by restricting existing legal rights or interests”.

In the present case, following the 2003 White Paper and the 2009 Decision, we are still a long way from any “substantive event” in the sense of a formal statutory authorisation for the construction of the third runway, following the procedure as now set out in the 2008 Act. Any grounds of challenge need to be seen in the context of a continuing process towards that eventual goal.

The Secretary of State’s position

49. The Secretary of State’s initial position was that the decision in principle to support the runway proposal had been made in 2003, and that the 2007 Consultation and the 2009 Decisions had the relatively limited purpose of completing business left over from then. This position was clearly stated in Mr Swift’s written submissions (para 12):

“The Consultation Document made clear that the Government was not consulting again on whether or not Heathrow should be expanded. The Government had already determined its position on that question in the ATWP... The economic case as set out in the November 2007 and final Impact Assessments was designed to inform the policy decisions that were under consideration i.e. how capacity at Heathrow should be added... The Secretary of State did not set out to consult on the economic case during the 2007-2008 consultation because the Government had already concluded in the ATWP, following

extensive consultation, that there was a strong economic case for the addition of a third runway at Heathrow.”

50. This view was also reflected in the evidence of the Department’s policy witnesses. Thus, in the words of Mr Gray (the “Lead Policy Adviser on Heathrow Delivery”), the 2009 Decision was designed in effect to “complete unfinished business” from the 2003 ATWP; the decision to confirm policy support for a third runway and passenger terminal facilities was –

“a policy decision; it does not authorise development but provides the policy context for it”. (Gray 1 para 21)

Similarly, while there would be further consideration of matters such as surface access arrangements, he did not see this as affecting the decision of principle:

“Whilst it is true that a planning inspector, or... the Infrastructure Planning Commission *would not be expected to ‘go behind’ the policy decision in favour of airport expansion*, the Government has always been explicit that it sees the detailed surface access arrangements – including possible enhancements to existing rail services etc – as a matter for the planning regime, following the preparation of a detailed surface access strategy.” (Gray 2 para 17, emphasis added).

51. By the end of the hearing, Mr Swift had modified this position to some extent, and accepted that at least some aspects of the policy, including the economic case as supported by the Impact Assessment, could be revisited at a later stage. Mr Fleming recorded his submission on the final day as follows:

“Impact assessment is a continuous process. It does not stop at the consultation document or the interim stage. No doubt it will be reconsidered and updated through the process...”

That note accorded with my recollection. In any event the earlier position was, in my view, untenable in law and common sense. Consistency of policy is of course a legitimate objective. Having adopted a favourable approach to the third runway proposal in 2003, the government was entitled to maintain that general approach unless and until circumstances demanded a change of view. However, it could not be regarded as immutable. It is a trite proposition in administrative law that no policy can be set in stone. It must be open to reconsideration in the light of changing circumstances. This position had been acknowledged in the 2003 ATWP itself, which had recognised the need for periodical review and consultation to take account of changing circumstances.

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. Even if the immediate purpose of the 2007 consultation was limited to the three specific conditions identified in 2003, that did not remove the need for a general reappraisal of the policy in the light of other material changes since that time.

53. The matter has been put beyond doubt following the coming into force of the relevant provisions of the 2008 Act. The proposition that policy was predetermined in 2003 is negated by the government's affirmed intention to prepare an Airports NPS as a preliminary to the planning procedures, and its disavowal of any present intention to rely on section 12(1) to import pre-commencement policy. The 2008 Act provides a comprehensive framework for consideration of all the relevant issues, including those on which the present claimants now rely. Until the NPS is concluded, there is nothing in law entitling the Secretary of State to limit that debate.

The claimants' position

54. As I have said, Mr Fleming implicitly acknowledged that if, contrary to the Secretary of State's initial position, the issues of principle were still open for consideration, it would take away much of the force of the claimants' concerns. However, he stressed that Mr Swift had not altogether abandoned reliance on the 2009 decision as the starting point for future consideration of the proposal. In particular he had given no unequivocal assurance that there would be an NPS before a planning decision, or that section 12 would not be relied on to import previous policy.
55. Furthermore, he argues, there is nothing in law to stop BAA (whatever its present stated intentions) from applying for planning permission before the NPS is published or settled. Hence the need to bring the challenge at this stage. Otherwise, it is said, the ATWP and the 2009 Decision will be treated as "statements of government policy in the traditional planning sense", and for that reason become immune from questioning at any subsequent planning inquiry.
56. I am very doubtful of the value of speculation as to what might happen if the government or BAA change their minds as to how to proceed. The time for examining the legality of any consequent actions will be if and when they occur.
57. In any event, I do not accept the premise of the argument. It presupposes that there is a clear "no-go area" at any planning inquiry, defined by what is termed "policy in the traditional planning sense". The authority relied on is *Bushell v Secretary of State for the Environment* [1981] AC 75. There the House of Lords upheld the refusal of an inquiry inspector to allow cross-examination on aspects of the Department's forecasting methodology because (in the words of the headnote) -

“(it)was a matter of government policy in the sense that it was a topic unsuitable for investigation by individual inspectors at individual local inquiries...”

58. It is to be noted that this decision came at the end of a very torrid period in the history of major road inquiries (see e.g. John Tyme *Motorways versus Democracy* 1978), which led to the regularisation of procedure under the Highway (Inquiries Procedure) Rules 1976. Those rules contained a specific provision enabling the inspector to disallow questions directed to the merits of government policy. The inquiry in *Bushell* had taken place before the rules came into effect. In the absence of a specific provision, the House accepted that it was a matter for the inspector's discretion whether to allow questioning

on that subject.

59. This authority was recently applied in a context much closer to the present in *Barbone v Secretary of State for Transport* [2009] EWHC 463 (Admin). The challenge was to the Secretary of State's decision to vary a planning condition so as to allow increased traffic movements at Stansted airport, in line with the ATWP proposals. The judge (Sir Thayne Forbes) accepted the Secretary of State's argument that by seeking to challenge the government's assessment of the economic benefits, the objectors

“... were in reality calling into question the Government's judgment of national economic policy, which had already taken that phenomenon into account. As Lord Diplock said in *Bushell* (supra), a planning inquiry into a particular transport proposal promoted in the context of settled national policy is not the appropriate forum for such a debate...” (para 50)

By the same token, the present claimants submit that the Secretary of State or BAA would be likely to argue at any future planning inquiry that the ATWP and the 2009 Decision should be treated as “settled national policy” and therefore not an appropriate matter for debate at the planning stage.

60. That argument may have gained some support from the Department's initial position in this case, but, as I have explained, I regard that position as untenable in law, and in any event inconsistent with the framework now established by the 2008 Act. While I have no reason to question the decision in *Barbone*, I do not see it as laying down any general principle, beyond the particular aspect of the ATWP with which it was directly concerned. Furthermore, the decision was made without reference to the new legal framework introduced by the 2008 Act. In that context, any attempt by the Secretary of State to argue that the 2003 and 2009 policy decisions were immune from further debate would be directly contrary to the clear intention of the legislature.

61. More generally, I do not accept that *Bushell* can be read as laying down any general rule that government “policy” is automatically outside the scope of debate at a local planning inquiry. Lord Diplock referred to the “protean” character of the word “policy”, and to the wide range of types of decision to which it may be applied:

“A decision to construct a nationwide network of motorways is clearly one of government policy in the widest sense of the term. Any proposal to alter it is appropriate to be the subject of debate in Parliament, not of separate investigations in each of scores of local inquiries before individual inspectors up and down the country upon whatever material happens to be presented to them at the particular inquiry over which they preside. So much the respondents readily concede.

At the other extreme the selection of the exact line to be followed through a particular locality by a motorway designed to carry traffic between the destinations that it is intended to serve would not be described as involving government policy in the ordinary sense of that term. It affects particular local interests only and

normally does not affect the interests of any wider section of the public, unless a suggested variation of the line would involve exorbitant expenditure of money raised by taxation. It is an appropriate subject for full investigation at a local inquiry and is one on which the inspector by whom the investigation is to be conducted can form a judgment on which to base a recommendation which deserves to carry weight with the minister in reaching a final decision as to the line the motorway should follow.

Between the black and white of these two extremes, however, there is... a 'grey area'". (p 98)

62. A policy decision to construct a third runway at Heathrow combines elements from both ends of the "spectrum" (to use a term adopted by Sullivan J in *R(Wandsworth LBC) v Secretary of State* [2005] EWHC 20 (Admin) para 60). At one end it involves broad judgments about the importance of aviation to the national economy, and the balance between such considerations and environmental issues, including climate change. At the other, the decision to meet some of the demand by construction of a new runway and passenger facilities at Heathrow has very direct implications for the planning of that locality and the environment of those living in it.

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 an 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. There is nothing in *Bushell* which would require such arguments to be disallowed as a matter of law.

The court's view

64. For the above reasons I find myself unable wholly to support the position taken by either party. As statements of present government policy on particular issues at particular points in time, the 2003 ATWP and the 2009 Decisions carry weight, but they are not immutable, nor can they limit the scope of the permissible debate in relation to a future Airports NPS.

65. That conclusion has implications for the scope of judicial review at this stage. Although the 2009 Decision took the form of a statement made to Parliament, it has not been argued that it is for that reason immune from challenge. I accept also that it is established, at least in this court, that such "high-level" Ministerial statements of airports policy are susceptible in principle to judicial review, even if they have no direct substantive effects (see *R (Medway Council) v Secretary of State for Transport* [2002] EWHC 2516 per Maurice Kay J; *R (Wandsworth LBC) v Secretary of State for Transport* [2005] EWHC 20, per Sullivan J).

66. In considering the scope of review, I have found most assistance in another judgment of Sullivan J in *R(Greenpeace Ltd) v Secretary of State* [2007] EWHC 311 (Admin); [2007] Env LR 29, which also concerned consultation pursuant to a White Paper,

although in a rather different context, relating to future nuclear power stations. A Government White Paper had promised “the fullest public consultation” before a decision was taken to support the building of new nuclear power stations. Citing his earlier airports decision, the judge accepted that, in the absence of any statutory procedure, it might be very difficult to establish procedural impropriety; and that given the judgmental nature of “high-level, strategic” decisions it will be “well-nigh impossible to mount a ‘*Wednesbury* irrationality’ challenge absent bad faith or manifest absurdity” (para 54).

67. He accepted that the promise of full consultation founded a “legitimate expectation” enforceable in public law. But in considering its scope, it was inappropriate simply to “read across” from criteria applied to consultation in cases in different context. While there was an overriding requirement that any consultation must be “fair” -

“... what is fair, and in particular whether fairness demands that new material which has not been available during the consultation period should be made available to consultees so that they have an opportunity to deal with it before a decision is taken, must depend upon the particular circumstances of the case.” (para 61)

68. He emphasised that a consultation exercise which is “flawed in one, or even in a number of respects” is not necessarily “so procedurally unfair as to be unlawful”. Further it was necessary to recognise the decision-maker’s “broad discretion” as to how a consultation exercise should be carried out. He concluded:

“In reality, a conclusion that a consultation exercise was unlawful on the ground of unfairness will be based upon a finding by the court, not merely that something went wrong, but that something went ‘clearly and radically’ wrong.” (para 63)

69. I gratefully adopt that analysis, and the conclusion, as directly relevant to the present case, subject to one qualification. It is not simply the “high-level” character of some of the policy judgments which limits the scope for review. I would also emphasise the preliminary nature of the decision. As I have said, any grounds of challenge at this stage need to be seen in the context, not of an individual decision or act, but of a continuing process towards the eventual goal of statutory authorisation. A flaw in the consultation process should not be fatal if it can be put right at a later stage. There must be something not just “clearly and radically wrong”, but also such as to require the intervention of the court at this stage. Similarly, failure to take account of material considerations is unlikely to justify intervention by the court if it can be remedied at a later stage. It would be different if the failure related to what I described in argument as a “show-stopper”: that is a policy or factual consideration which makes the proposal so obviously unacceptable that the only rational course would be to abort it altogether without further ado.

70. Against that background, I turn to consider, by reference to the three “headline issues”, whether there is anything which meets those criteria for intervention.

Grounds for review

71. As I have said, the grounds can be most conveniently grouped under three heads:

- i) Climate change
- ii) Economic justification
- iii) Surface access

In the light of my discussion of the applicable principles of judicial review, I hope I will be forgiven for dealing with these issues relatively shortly, without detailed consideration of the substantial evidence, much of it technical, which has been put before me.

Climate change

72. The claimants' grounds under this head are based principally on failure to reopen the consultation to deal with three new aspects of the Departmental thinking: the new target for aviation emissions to be capped in 2050 below 2005 levels; the initial support for expansion only up to 605,000 ATMs; and the new "green slots" policy. They also point to a (since acknowledged) inaccuracy in the statement to Parliament, which suggested wrongly that the green slots policy was relevant to CO2 emissions.

73. Of these, the most significant seems to me to be the 2050 cap, particularly in the light of the December 2009 CCC report. Although the December report cannot be directly relevant to the legality of a decision taken some eleven months earlier, neither side has objected to reference to it. Indeed, both rely on it for different purposes.

74. The claimants say that this report shows that the objectives of the 2003 ATWP for the expansion of aviation are fundamentally inconsistent with the policy on climate change as it has now developed. I can best explain this by drawing on the summary in their skeleton argument:

- i) Under the 2003 ATWP, overall growth in passengers to 470mppa by 2030 was predicted, substantially more than a 100% increase. No assessment of the further growth from 2030 to 2050 was provided.
- ii) In the 2009 forecasts, the "central" forecast was 455mppa by 2030 under the "capacity scenarios supported by the ATWP". The figure for 2050 on the same basis (as corrected in later correspondence) was 572mppa. That equated to an increase above the 2003 level of well over 150%.
- iii) The Air Traffic Movements (ATMs) represented by these figures led to the 2009 Forecasts showing overall CO2 emissions increasing by 60% by 2050 (from

2005 levels).

- iv) The “stark contrast” between the 2009 Forecasts (60% increase over 2005 levels) and the 2050 Target (reduction *below* 2005 levels) was an issue raised in the original grounds for judicial review.
- v) The CCC Report (December 2009) was a response to the government’s own request, made at the time of the 2009 Decision, as to how the 2050 target could be met.
- vi) That report, taking into account likely CO2 savings from biofuels, and likely developments in aircraft technology, and operational efficiencies, concluded that demand growth would need to be constrained to 60% between 2005 and 2050, if the 2050 Target was to be achieved. That equated to about 370mppa in 2050.
- vii) By contrast, using existing rates of Air Passenger Duty, but a much higher carbon price than used in the 2009 Forecasts, the CCC forecast that under the capacity scenarios supported by the ATWP, demand growth would rise by about 115% over the same period, to around 490mppa in 2050.
- viii) The skeleton concluded:

“Thus even with technological improvements, biofuels and a much higher price of carbon, there remained a stark disparity between the predicted mppa (following from the policies in the ATWP) and that which could be accommodated within the 2050 Target.

In short, the best current evidence is that steps will have to be taken to constrain demand to well below that which would be provided for by the capacity increases in the ATWP 2003; and

The level of growth in mppa consistent with the 2050 Target (60% from 2005) is ‘dramatically lower’ than the growth envisaged at any earlier stage.”

75. The evidence for the Secretary of State, as I understand it, does not provide direct answers to these points. It is accepted that the 2050 target may require “some constraint on overall growth” in aviation demand, but reliance is placed on the CCC’s own observation that their conclusions are directed at the overall position and have “no implications for specific airports”. The difference between the “central forecast” and the target does not show that the target cannot be achieved. Rather (in Mr Swift’s words):

“... it demonstrates the extent to which the Government needs to formulate policies to divert the future path of CO2 emissions from the central forecast to the target. The Government will formulate such policies having regard to the advice of the Committee on Climate Change.”

Furthermore, even an increase in capacity at Heathrow to 702,000 ATMs would account for no more than a 10% increase on the present level ATMs overall, and would be well within the 55% cap on additional ATMs suggested by the Committee.

76. To the latter point the claimants make the rejoinder that it relates the increases at Heathrow alone to a cap designed to apply nationally. The argument thus assumes a policy decision, contrary to the ATWP, that Heathrow is to be favoured at the expense of other London and regional airports. The 55% cap itself implies a very significant reduction to the general expansion envisaged in 2003. For example, at Stansted, the growth supported by the 2003 ATWP involved an increase in ATMs from 166,000 in 2005 to 371,000 in 2030, amounting to growth of 205,000. By contrast, the 55% cap proposed by the CCC would allow for growth only to 257,000 in 2050, equivalent to growth of only 91,000, even assuming no bias in favour of Heathrow.
77. Judicial review proceedings are not a suitable forum to resolve this technical debate. However, the claimants' submissions add up, in my view, to a powerful demonstration of the potential significance of developments in climate change policy since the 2003 White Paper. They are clearly matters which will need to be taken into account under the new Airports NPS. As has been seen, the Act specifically requires an explanation as to how the NPS takes account of the government's climate change policy. Whether or not these matters should have been treated as "fundamentally" affecting the scope of the 2007 consultation (under the authorities referred to at para 29 above) seems to me of little moment, given that they will be subject to further statutory consultation and consideration under the NPS procedure. The "green slots" point adds nothing to the argument. I do not see this as a "fundamental" point, and I see nothing objectionable in it being put forward as an idea for further consideration. The confusion over its relevance to CO2 emissions was regrettable but no more.
78. Finally, I am not able, at least on the material before me, to hold that any of these points amounts to a "show-stopper", in the sense that the only rational response would be to abandon the whole project at this stage. Indeed I do not understand the claimants to go that far. Irrationality is not part of the amended grounds of challenge.

Economic justification

79. My response to this aspect of the case is similar.
80. The claimants point to a number of factors, which in their view undermine the economic justification, whether as put forward in 2003 or January 2009. The most significant point is the decision to limit growth initially to 605,000 ATMs in 2020, with further growth being permitted only in the light of a CCC review at that stage. They point to the Department's own alternative "sensitivity" tests, which indicated that such a limit if maintained would reduce the estimate of "net present value" substantially (from £5bn to £0.9bn on one scenario). Although the Department's witnesses express varying degrees of confidence that the limit will be raised, these are contrasted with Ministerial statements that, until the review –

"it is not possible to anticipate whether the cap might be lifted or

the timing of any decision to lift the cap.”

81. Further uncertainty in the economic case is said to follow from the CCC report. Mr Lockley, in a very recent witness statement, points out that the 2050 carbon price assumed in the CCC projections (see para 74(vii) above) is more than three times that used in the January 2009 impact assessment (£200/t compared to £62/t). This he says has important implications for the economic assessment, since it would “dramatically reduce the NPV and, on a broad brush analysis of the central case result in a substantially negative NPV”. In the absence of a detailed response from the Department, I am not in a position to evaluate this assessment, although it would seem surprising if an increase of this magnitude did not have a significant effect on the economic picture.
82. The claimants also point to other elements which they say have not been adequately costed, notably the cost of surface access and public transport improvements, which (on the advice of Transport for London) they say could substantially exceed the £1.3bn allowed for in the Department’s Impact Assessment (based on a study by its own consultants Scott Wilson). One aspect, which they say has been left out of account, is the potential cost of a tunnel connection under the new runway to link the new terminal facilities to the rail transport network, which they say could cost up to £750m, and have a consequential effect on journey times.
83. The Department’s general response is that, even on more limited growth assumptions, the proposal shows a positive NPV return, and that in any event that is only part of the economic case, which depends also on the government’s judgment of “non-monetised economic benefits” such as reductions in delay, greater “resilience” of the airport in times of disruption, and wider employment and productivity benefits. So far as transport costs are concerned, the Department was entitled to rely at this stage on an “indicative estimate” based on the expert advice of its consultants.
84. Again, the claimants’ points are a powerful demonstration of why it makes no sense to treat the economic case as settled in 2003. As potential grounds for judicial review at this stage, however, they have been overtaken by the concession (to my mind inevitable) that the economic case is subject to review in the light of changing circumstances. Even if that concession had not been made, I would regard those points as obviously relevant for consideration and consultation as part of the preparation of the NPS. They do not require the intervention of the court at this stage.

Surface access

85. On the third headline issue, surface access, the arguments are somewhat different, because this has always been seen as a matter to be resolved finally in the context of the planning process. Indeed, I have some difficulty in understanding what precisely was intended to be the content of the third “condition”, or of the consultation in respect of it. I return to the sequence of pronouncements on this issue.
86. The 2003 ATWP referred to the need for improvements to the surface transport infrastructure:

“11.58 Further expansion of Heathrow will place pressure on already congested road and rail networks. The Government has no plans for further motorway widening in this area beyond that which we announced in July 2003. The solution will need to be based on improvements to public transport, which is likely to require the airport operator spending several hundred million pounds on new rail infrastructure. The prospects for the introduction of some form of road user charging, either by means of charges to enter the airport or pricing across a wider area, should also be considered. ...”

The Paper indicated that the government’s support would be –

“... conditional on measures to... improve public transport access as set out above.” (para 11.62)

87. The 2007 Consultation Paper restated the need for improvements to public transport, in accordance with a surface access strategy to be developed by the operator as part of its planning application, but indicated that on the basis of “an initial high level assessment” it was considered that –

“the level of public transport provision in a third runway scenario looks (at this early stage) to be sufficient to manage the levels of forecast demanded.” (para 3.177-180)

No specific consultation question was directed to this assessment. It seems that the third condition was intended to be covered by the general question about environmental conditions:

“Do you agree or disagree with the Government’s view of the continuing validity of the environmental conditions? What are your reasons? Are there any significant considerations you believe need to be taken into account?” (p 114)

It is not clear to me what comments were expected on the “validity” of the condition, since it could hardly have been suggested that surface access was not a valid consideration. However, it is notable that consultees were not asked in terms for views as to whether this condition could be met.

88. The Mayor for London submitted a detailed response to the Consultation Paper, supported by a number of “technical notes”, one of which (prepared by officers of Transport for London) related to surface transport issues. Transport for London has statutory responsibility for implementing the Mayor’s transport strategy for transport in London, in particular for the underground and overground railway systems (Greater London Act 1999 s 154). This criticised the “narrow focus” of the assessment of public transport demand and capacity, which was directed to the immediate area of Heathrow and contained no assessment of the wider impacts. It also commented on the Department’s use of the population and employment projections taken from its TEMPRO dataset, rather than the higher projections accepted for the purpose of the London Plan for 2026.

89. The 2009 Decisions Paper referred to the “strict environmental conditions” identified in 2003, the third being “public transport improvements to the airport”. However, it did not address the Mayor’s comments in any detail. It stated the Department’s “clear” view that “a detailed surface access strategy” was not a prerequisite for a policy decision and would be “a matter for the airport operator as part of a planning application in due course”. It continued:

“The Department’s analysis focused at a higher level on the capacity of the rail system to carry the extra airport users. Improvements are already in prospect with enhanced Piccadilly Line services from 2014 and Crossrail from 2017. The Secretary of State is satisfied with the Department’s analysis that by 2020 there should be more than enough public transport capacity to meet peak hour demand for Heathrow. He welcomes the collaborative approach being followed by BAA in developing the Air Track project and encourages all interested parties to participate in the consultation and the Transport and Works Act process with a view to seeing that scheme implemented ahead of a third runway...

More generally, it will be for the airport operator to develop a surface access strategy for an expanded airport as part of a comprehensive transport assessment ahead of any planning application....” (para 56, 58)

Taking account of these points and the evidence, the Secretary of State was satisfied that the condition could be met (para 60).

90. The Secretary of State’s statement to Parliament was in similar terms. He referred to the third condition as “the provision of adequate public transport”. He mentioned –

“major improvements in rail access... already announced including increases in capacity on the Piccadilly Line and the introduction of Crossrail services from 2017. This will provide a maximum capacity of 6,000 passengers per hour, which will be able to accommodate the estimated demand for rail access to a three-runway airport...”

He referred to steps being taken by BAA to develop other rail links. “Having considered all the evidence” he had decided that the condition could be met.

91. In summary the sequence is:

i) 2003 ATWP Policy support is conditional on “measures to improve public transport access as set out above”, that is –

“... improvements to public transport... likely to require the airport operator spending several hundred million pounds on new rail infrastructure”.

- ii) *2007 Consultation* Improvements to public transport will be in accordance with “a surface access strategy to be developed by the operator as part of its planning application”; but on “an initial high level assessment” -

“...the level of public transport provision in a third runway scenario looks (at this early stage) to be sufficient to manage the levels of forecast demanded.”

Consultees are asked for views on “the validity” of the condition, but not as to the substance.

- iii) *2007 Decisions* The Department is clear that “a detailed surface access strategy” is “a matter for the airport operator as part of a planning application”; but the Secretary of State is satisfied on “all the evidence” that the third condition, that is “the provision of adequate public transport” can be met.

92. In my view the claimants’ criticisms of the reasoning of this part of the 2009 Decisions are justified. I find it impossible to determine precisely what the Secretary of State ultimately understood to be the scope of the third condition, or what if anything he has decided about it. It is equally impossible to ascertain what if anything he has made of the points raised by Transport for London. It is difficult to see how a concluded view of any significance could be arrived at without addressing directly their concerns, as the responsible statutory authority. The most likely interpretation, as it seems to me, is that he has decided nothing of significance. He has implicitly recognised that this is an issue which can only be resolved at a later stage, in the context of a detailed strategy prepared by the operator as part of a planning proposal, including a commitment to expenditure (“several hundred million pounds on new rail infrastructure”) as described in the ATWP.
93. This conclusion is reinforced by some of the points made by Mr Chamberlain on behalf of TfL. I need only mention one. He says that the Secretary of State’s reliance on the improvements already planned for the Piccadilly Line is based on a misconception that increased capacity is already committed. Planned improvements to that line are indeed expected to increase capacity by some 25%, but growth in demand apart from the third runway proposal is estimated significantly to exceed that. So the pressure on the Piccadilly Line will be worse in 2020 than it is now, even without the third runway. Although I pressed Mr Swift on this point, he was unable to provide a convincing answer.

Conclusion

94. In these proceedings the claimants sought the quashing of the Secretary of State’s Decisions in January 2009 to “confirm policy support” for the proposal for a third runway and new passenger facilities at Heathrow. The critical issue, as it has emerged, has been the precise status and effect of those 2009 Decisions. The Department’s initial position in these proceedings was that the policy of support for the third runway proposal had been finally determined in 2003, subject only to fulfilment of the three environmental conditions identified at that time. That was in my view untenable.

95. Even before the changes introduced by the Planning Act 2008, it was not open to the Secretary of State simply to stand on the principle of the policy decision made in 2003, without regard to the important developments since then, particularly in relation to climate change policy. Indeed, that was implicitly acknowledged in the announcement, made at the same time as the 2009 Decisions, of the intention to seek advice from the CCC on the 2050 cap. Although the Secretary of State's support for the runway project was not made expressly conditional on the outcome of that study, I do not see how he could reasonably have excluded the possible need to review it in the light of the CCC's advice.
96. In the event the effect of the 2009 Decisions at the time they were made has been overtaken, as an issue, by two important developments since the proceedings began:
- i) The bringing into operation of the relevant provisions of the 2008 Act, taken with the Secretary of State's commitment to the preparation of an Airports National Policy Statement under the Act, and his disavowal of any present intention to rely on section 12(1) to import pre-commencement policy;
 - ii) The CCC's December report on the 2050 cap, which on its face raises serious issues about the overall aviation growth assumptions on which the 2003 ATWP was based.
97. The first point provides the effective answer to the second. The preparation of the Airports NPS will necessarily involve a review of all the relevant policy issues, including the impact of climate change policy (specifically identified as an issue in the 2008 Act s 5(8)). It also provides the answer to the defects which I have identified in the Secretary of State's reasoning on the third condition relating to surface access.
98. It was agreed that submissions in respect of remedies should await this judgment. As at present advised, it seems to me that it would be appropriate to invite the Secretary of State to convert his "present intentions" in respect of section 12(1) into an undertaking, so as to put that matter beyond doubt. The relief sought in the original judicial review application was drafted without reference to the 2008 Act, the relevant provisions of which were not then in force. I am doubtful whether a quashing order is appropriate in relation to a statement of policy which had no substantive legal effect at the time, and which, assuming an undertaking in the form I have proposed, will have none under the 2008 Act. On the basis of the intentions of the Secretary of State and BAA, as presently understood, the 2008 Act provides a complete legal framework for consideration of all the issues on which the claimants rely.
99. I will however allow an opportunity for further consideration of relief and consequential orders in the light of this judgment. For that purpose I will adjourn the hearing of those matters, unless previously agreed, until the first available date in the new term (estimate one hour). Written submissions, with proposed drafts of the order, should be filed and exchanged not later than close of business on the first day of term (13th April 2010).