UKELA PLANNING BILL WORKSHOP

THE PLANNING BILL

Major Infrastructure Projects

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Landmark CHAMBERS

THE PLANNING BILL: MAJOR INFRASTRUCTURE PROPOSALS

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Introduction

1. The Planning Bill was introduced in the House of Commons on 27 November 2007. It builds on the proposals contained in the White Paper (May 2007) *Planning for a Sustainable Future* ("**the White Paper**"), which followed Kate Barker's review and report *Review of Land Use Planning* (December 2006) ("**The Barker Report**") and focuses primarily on a number of initiatives intended to streamline the planning system.

2. The major part of the Bill introduces a new system for approving "nationally significant infrastructure projects", e.g. waste facilities and harbours. The Government's stated objective is to streamline these decisions and to avoid long public inquiries.

3. References to the Bill in this paper are to the provisions of the most up-to-date version available, namely the version currently being considered by the House of Lords as brought from the House of Commons on 26 June 2008.

4. In summary, the current form of the Bill provides that:

   (1) Decisions whether to permit "nationally significant infrastructure projects" will be based on new national policy statements produced by the Government which "*would establish the national case for infrastructure development and set the policy framework for infrastructure planning commission decisions*";

   (2) Decisions on nationally significant infrastructure projects[2] will be taken by a new Infrastructure Planning Commission ("IPC"). The White Paper stated that "*national policy statements would be the primary consideration for the infrastructure planning commission in determining applications for development consent for nationally significant infrastructure projects, though it would be possible for the commission to reject an application which was consistent with the national policy statement in certain circumstances*";

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[1] This comprises an updated version of parts of the paper given prior to Commons Third Reading at the UKELA Annual Conference 2008 at Canterbury. There have been a number of significant changes since then.

[2] See the definition in clause 14 and the detailed provisions covering the various categories in clauses 15-29.

(3) Such projects are subject to a new requirement for "development consent"[3], which can include a very wide variety of orders including those relating to compulsory purchase, highways

(4) The hearing and decision making process by the IPC will be timetabled and control of the process will be in the hands of the Commission. It will be the Commission (whether sitting as a Panel or as a single commissioner) which will have the primary role of examining oral evidence and its consent will be required for interested parties to ask questions[4];

(5) The Secretary of State will no longer have the final say on major infrastructure projects except in limited cases where the application falls outside a NPS[5] or where, for narrowly defined reasons, the Secretary of State is able to intervene[6];

(6) A Community Infrastructure Levy on developments would be introduced to raise money to pay for facilities such as schools and hospitals needed in consequence of new developments;

(7) Planning applications for minor developments, and similar lawful development certificate and listed building applications, to be determined by planning officers and appeals would be heard by a panel of local councillors rather than by the normal appeal process to the Secretary of State[7];

(8) Other "streamlining" proposals are put forward, e.g. amendments to the power to override rights under s. 237 TCPA and similar[8], and the determination of the mode of determining appeals[9] - while the provisions require the appellant/applicant and planning authority to be notified of the decision, they do not entitle them to be consulted as to the mode of determination. The Secretary of State's consultation as to this change was generally negative, but clearly that has proved no obstacle to DCLG proceeding and even though in many cases the Secretary of State/PINS are not best placed to make judgments as to the mode of determination at the stage at which such decisions usually have to be made. Criteria are to be published as to how this power

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[3] Clause 30. The TCPA definition of "development" is applicable – see clause 31.

[4] Clause 92(4) and (7). 92(7) contains the presumption in favour of examination by the Commission.

[5] Clauses 72(2), 81(2)(b) and 100. The cases are those which are not cases where (using the drafting jargon) "*a national policy statement has effect in relation to development of the description to which the application relates*".

[6] Clause 106.

[7] Clause 177-181.

[8] See clause 188 and Schedule 9.

[9] Clause 190.

should be exercised[10].

5. Undoubtedly, it is the proposals for the IPC and major infrastructure that has attracted the most attention since it marks a significant departure from the current planning system and its model of accountability. The current system places the primary responsibility for planning decisions at local authority level (subject to appeal), with the Secretary of State exercising residual and *ad hoc* jurisdiction over proposals considered significant enough to call-in, with the assistance of a report from a quasi-independent planning inspector. This democratically-accountable mode of decision-taking in planning (and compulsory purchase) received the endorsement of the House of Lords in terms of its compatibility with Article 6 of the European Convention on Human Rights ("ECHR") in ***R (Alconbury Developments Ltd. & others) v. Secretary of State*** [2003] 2 A.C. 295.

6. In the White Paper, the Government noted the difficulties which the planning system was creating in terms of delay and complexity (which had been highlighted in the Barker Report and elsewhere):

> "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; more than six years to get to a decision on the North Yorkshire Power Line upgrade; nearly four years to get to a decision on Dibden Bay container terminal; and two and a half years to reach a decision on Staythorpe C gas-fired power station. 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."

7. Whilst, on the one hand, the importance of a system responsive to economic needs is emphasised, these are not the only concerns. The development plan system, still in the throes of implementation following the Planning and Compulsory Purchase Act 2004, has created resource and other difficulties (though scarcely touched in para. 1.20) and local communities are adversely affected (ironically, one suspects, partly a result of the 2004 reforms):

> "1.21 Long, drawn out planning processes do not necessarily provide the best opportunities for people or communities to have their say or deliver the best outcomes in terms of social justice. Complex and lengthy consultation on local plans can lead to consultation fatigue while still failing to engage citizens effectively. The adversarial nature of the inquiry system for major infrastructure projects can be intimidating and

[10] Clause 190(6).

> make it difficult for local government, nongovernmental organisations (NGOs) and members of the public to participate effectively. The time and costs involved means it often favours the well-resourced and well-organised over less well-off communities and citizens."

8. In one sense, it is hard to quarrel with the opening paragraph in the White Paper. It, however, somewhat harder to understand how these multi-faceted objectives are all to be met and what priorities accorded to each:

> "1.1 Planning is of fundamental importance to the quality of people's lives. When planning is done well it enables us to build thriving, healthy, sustainable communities where people want to work, shop, live or visit. It supports the economic development which is vital to create jobs and ensure our continuing prosperity as a nation. It helps us to protect our natural and historic environment and ensure everyone has access to green space and unspoiled countryside. It enables the delivery of essential infrastructure which allows us to travel and enjoy access to clean, affordable energy, water and waste facilities. And it supports us as individual citizens in improving our homes and property while protecting us from over-intrusive development. Planning does all of this by helping us to ensure development meets economic, social and environmental objectives in an integrated and sustainable way."

9. As usual, the devil is in the detailed provisions and there remain stark questions to be asked about the extent to which environmental protection and the quality of decision-making must give way to economic objectives and speed of process in the further tinkering with the current development control system, which some regard as resulting in less community participation rather than more.

10. The case made on behalf of Government is that the Bill, as a whole, will make the planning system quicker, more transparent and will give communities a "far greater say". The Secretary of State argues that the current planning system for major infrastructure projects is struggling to deal with the challenges of the 21st century –climate change, protecting the environment and the need for new homes. Planning decisions on major infrastructure projects are, she said, too slow. For example, Heathrow T5 took seven years to gain approval. The Government estimates that some £300 million will be saved each year under the proposed new arrangements. The Minister's claims have not, however, gone unchallenged and opposition to the Bill has been mounting steadily. Sixty three Labour MPs signed a Commons motion opposing the plans to set up the IPC and the Government delayed a Commons debate on the Bill amid fears of a backbench rebellion. The first day of the Report Stage of the bill took place on 2 June and the second day was delayed until 25 June. This gave the Government time before the Third Reading to strike a deal with backbenchers that leaves the central objectives of the Bill intact, but makes some limited concessions. Importantly, an amendment seeking to allow ministers to have the final say

on major infrastructure projects was rejected by 303 votes to 260 and an amendment seeking to permit oral representations to be made when such applications are determined was rejected by 306 votes to 262. The First and Second Readings have taken place in the House of Lords and the Committee stage is due to commence on 6 September. As I shall explain, these two central issues of democratic accountability and fair procedures are likely to dominate debate in the Lords this Autumn.

The main proposals

11. Currently, nationally important infrastructure projects are given development consent under a varied of statutory provisions. Development decisions relating to airports are taken according to the town and country planning legislation, but special statutory regimes exist for other types of infrastructure such as power stations, electricity line, pipe-line, ports (except where development extends beyond the shoreline), road and railways. Local planning authorities take development decisions pertaining to airports and the relevant Minister adjudicates upon applications for the necessary permissions in all other cases. The procedural arrangements under each of these mechanisms vary, but generally a local inquiry is conducted by a planning inspector in order to examine the proposed development in detail and to evaluate objections. The evidence is tested by means of cross-examination at inquiry, the inspector then writes a report making recommendations and the Minister decides whether or not to grant consent.

12. Parts 1 to 8 of the Bill will create a new system of development consent for nationally significant infrastructure projects. These are defined in Part 3 of the Bill by reference to categories of project and thresholds for each type of project. National significant infrastructure projects are defined in clause 14 of the Bill as follows[11]:

> "(1) In this Act "nationally significant infrastructure project" means a project which consists of any of the following—
>
> (a) the construction or extension of a generating station;
>
> (b) the installation of an electric line above ground;
>
> (c) development relating to underground gas storage facilities;
>
> (d) the construction or alteration of an LNG facility;
>
> (e) the construction or alteration of a gas reception facility;
>
> (f) the construction of a pipe-line;
>
> (g) highway-related development;
>
> (h) the construction or alteration of an airport;

[11] There have been modifications to this definition at the Report Stage. See Hansard HoC

(i) the construction or alteration of harbour facilities;
(j) the construction of a railway;
(k) the construction or alteration of a rail freight interchange;
(l) the construction or alteration of a dam or reservoir;
(m) development relating to the transfer of water resources;
(n) the construction or alteration of a waste water treatment plant;
(o) the construction or alteration of a hazardous waste facility."

13. The Secretary of State may also (under subsection (3)) make an order which amends the categories of nationally important infrastructure project, subject to subsection 5 which provides that new types of project may only be added if they are in the fields of energy, transport, water, waste water or waste.

14. Clause 30 requires that "development consent"[12] be obtained for any development[13] to the extent that it is or forms part of a nationally significant infrastructure project. Development consent is to be obtained via the procedure outlined in the Bill. The requirement for development consent under the new provisions obviates the need to obtain planning permission, listed building consent and a range of other consents listed in clause 32.

15. The IPC, created under clause 1 of the Bill, will be given responsibility for *examining* all applications for development consent for nationally significant infrastructure projects. If there is a relevant national policy statement in force at the time of the application, then the IPC will have responsibility for *determining* the application except in the narrow category of cases where the Secretary of State may intervene under clauses 106-109.

16. The IPC will give its development consent in the form of an order which may also confer other rights on developers such as the compulsory acquisition of land where this there is a compelling public interest, the creation, suspension and extinguishment of rights over land, allowing the abrogation or modification of agreements relating to land, the stopping up or diversion of highways, protecting property or interests of any person, the charging of tolls, for the payment of contributions and compensation and the submission of claims to arbitration.

17. See the very wide definition in s. 116 of what may be included in an order granting development consent, including "matters ancillary to the development for which consent is granted"[14] and "associated development"[15].

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[12] Defined by clause 116.

[13] Clause 31 – applies the TCPA meaning.

[14] Clause 116.

18. Some of the key concessions made by the government in order to avoid a back bench rebellion at the Third Reading relate to scrutiny of the IPC by a Select Committee. The Secretary of State has announced that:[16]

> "…the Government have already proposed that the chair of the IPC should be subject to pre-appointment scrutiny by a Select Committee. The Government have now agreed to extend that pre-appointment scrutiny to the deputy chairs of the IPC. Thirdly, there will be a requirement for the IPC to provide the Select Committee with reports on particular subjects that concern the Committee. Fourthly, the Government have agreed that the relevant Select Committees should be able to call the chair of the IPC before them to explain, not just the overall performance of the organisation, but particular aspects of decisions. I hope that it will be acknowledged that that is a significant shift in terms of accountability."

Most importantly, the IPC will be reviewed two years after its creation. The Secretary of State's announcement was, however, rather scant on detail as to who would review the IPC, against which criteria and what the consequences of such a review might be: [17]

> …I can give a commitment that the Government will carry out a review of how the IPC is working two years after its establishment. The Government have also agreed to table amendments in the other place so that if that review reveals problems, they can in future extend the grounds on which Ministers can intervene to remove decisions from the IPC and take the decisions themselves. This new amendment will ensure that if this system is not working, Ministers have a safety valve to widen the basis on which they can take decisions in future. That is a significant addition to the Bill and this is a very strong package of measures that, taken together, will strengthen democratic accountability. Labour Members have pressed hard for better democratic accountability in the new system and I am grateful for their constructive engagement.

National policy statements

19. The national policy statements, defined in clause 5, will be created by the Secretary of State, following public consultation. Clause 10 provides that where the Secretary of State is either designating or reviewing a national policy statement, she must do so with the objective of contributing to sustainable development. The Secretary of State will have a wide discretion in determining how prescriptive the policy statement should be. Clause 5(5) provides:

> "(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

[15] Clause 111(2) to (5).

[16] *Hansard* 25 June, 2008, Col 349.

[17] *Hansard* 25 June, 2008, Col 349.

> 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;
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> (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."

20. It is clear from this that the NPS may be very general, or criteria-based, in its approach but it also remains open for it to be very specific and to specify the size, nature and location of a development which is considered to be appropriate. This would allow most of the in-principle decisions regarding the essentials of a major project to have been determined before there are even pre-application consultations.

21. An important concession made by the Secretary of State at the Third Reading of the Bill concerns the content of NPSs dealing with nuclear power and airports. She confirmed that these NPS will be site-specific –in other words it will be for the executive (subject to the provision for Parliamentary sucrutiny discussed in the next paragraph), rather than the IPC to decide the location of these two types of development. The Secretary of State said:[18]

> "First, I make a commitment that the national policy statements that cover nuclear power stations and airport development—the two most contentious forms of development covered by the Bill—will be location-specific. The national policy statements will not only cover the national need, but they will also say that development is likely to take place in certain areas, and it is unlikely to take place in other areas where, simply, it would not be suitable. As far as we can, we will make those location-specific. That is important, as it further constrains the ability of the IPC to take these decisions without reference to a politically determined framework that has been the subject of debate and scrutiny by the Select Committee and of public involvement".

She was, however, rather vague about the nature of the consultation that would take place before the making of these site-specific NPSs: [19]

> "My hon. Friend will know that the phrase in the Bill is quite open regarding the consultation that should take place. I am happy to confirm that it will include consultation with the public. That will vary with each NPS, as some will be on big issues that are locationally specific, so different people are likely to be interested,

[18] *Hansard* 25 June, 2008, Col 348.

[19] *Hansard* 25 June, 2008, Col 348.

> while others will be more general and will not raise people's concerns. The question is whether the consultation is appropriate and proportionate, and gives people who are concerned the right to have a say. There is the absolute intention on the Government's part to ensure that the country has a debate about these big national issues".

22. At the Report Stage, on 2 June 2008, the Government introduced a new provision for Parliamentary scrutiny of the proposal for NPS as a new clause 8 which was amended without a division[20]. This provision is now contained in clause 9 of the Bill::

> "'(1) This section sets out the parliamentary requirements referred to in sections 5(4) and 6(4).[21]
>
> (2) The Secretary of State must lay the proposal before Parliament.
>
> (3) In this section "the proposal" means—
>
> (a) the statement that the Secretary of State proposes to designate as a national policy statement for the purposes of this Act, or
>
> (b) (as the case may be) the proposed amendment.
>
> (4) Subsection (5) applies if, during the relevant period—
>
> (a) either House of Parliament makes a resolution with regard to the proposal, or
>
> (b) a committee of the House of Commons makes recommendations with regard to the proposal.
>
> (5) The Secretary of State must lay before Parliament a statement setting out the Secretary of State's response to the resolution or recommendations.
>
> (6) The relevant period is the period specified by the Secretary of State in relation to the proposal.
>
> (7) The Secretary of State must specify the relevant period in relation to the proposal on or before the day on which the proposal is laid before Parliament under subsection (2)."

23. Where a relevant national policy statement applies, the IPC must determine all applications for major infrastructure projects in accordance with the national policy. If there is no relevant national policy statement in place, the IPC will make a recommendation to the Secretary of State who will then determine the application herself.

24. A national policy statement identifying a suitable location for a nationally significant infrastructure project might create blight, reducing land values and making it difficult to sell land. The Bill therefore makes provision, not only for public consultation and the right to challenge the adoption of a statement in the High Court, but also for the payment of compensation where the publication of a national policy statement causes blight.

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[20] See HoC Hansard 2 Jun 2008 : Column 603.

[21] These are amended accordingly.

25. The use of NPS is the source of much concern with regard to the extent to which:

(1) It curtails the ability to question the merits of decisions taken at the NPS stage, which may be quite specific in terms of the nature, quantum and location of the project considered to be nationally significant

(2) The ability of the IPC to reject applications in accordance with NPS is circumscribed since clause 101 requires it to have regard to a relevant NPS, any matters prescribed in relation to it and any other matters thought to be "both important and relevant" to its decision. The more specific the NPS, the more difficult it will be for development consent to be refused if it accords with the NPS, notwithstanding such environmental or human impacts as may be likely to arise.

(3) There is a corresponding power on decision maker in clauses 92(8) and 103 to prevent parties raising issues going to the merits of NPS. This would allow it to prevent any issues being raised which would question the merits of the NPS, such as the environmental impacts. Although at inquiries currently, it is not the role of the inquiry to question current national policy: see e.g. ***Bushell v. Secretary of State*** [1981] AC 75. However, current planning policy rarely descends to the detail or prescription possible in NPS and there is generally scope in major projects (e.g. the Dibden Bay inquiry) to test issues of need and alternatives.

26. Community participation at the NPS stage, even where the NPS specifically designates potential sites, or areas, for major infrastructure, may be of limited effect given that the publicity requirements lead to a Parliamentary process and not to the debate of e.g. appropriateness of locations and alternatives within a planning inquiry framework. The extent to which consideration of alternatives to a development proposal is a material consideration is limited in the planning context, though it is most likely to be relevant in precisely the type of case likely to fall within the new provisions. See ***Trusthouse Forte Hotels Ltd v Secretary of State*** (1986) 53 P. & C.R. 293 and ***R (Scott Jones) v North Warwickshire Borough Council*** [2001] EWCA Civ 315. In ***Trusthouse Forte***, approved by the Court of Appeal in ***Scott Jones***, Simon Brown J. held:

> "These authorities in my judgment establish the following principles:
>
> 1. Land (irrespective of whether it is owned by the applicant for planning permission) may be developed in any way which is acceptable for planning purposes. The fact that other land exists (whether or not in the applicant's ownership) upon which the development would be yet more acceptable for planning purposes would not justify the refusal of planning permission upon the application site.
>
> 2. Where, however, there are clear planning objections to development upon a particular site then it may well be relevant and indeed necessary to consider whether there is a more

appropriate alternative site elsewhere. This is particularly so when the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it.

3. Instances of this type of case are developments, whether of national or regional importance, such as airports ... coalmining, petro-chemical plants, nuclear power stations and gypsy encampments... Oliver J's judgment in *Greater London Council v Secretary of State for the Environment and London Docklands Development Corporation and Cablecross Projects Ltd* [1986] JPL 193 suggests a helpful, although expressly not exhaustive, approach to the problem of determining whether consideration of alternative sites is material:

> "Comparability was appropriate generally to cases having the following characteristics: First of all, the presence of a clear public convenience, or advantage, in the proposal under consideration; secondly, the existence of inevitable adverse effects or disadvantages to the public or to some section of the public in the proposal; thirdly, the existence of an alternative site for the same project which would not have those effects, or would not have them to the same extent; and fourthly, a situation in which there could only be one permission granted for such development, or at least only a very limited number of permissions."

4. In contrast to the situations envisaged above are cases where development permission is being sought for dwelling houses, offices (see the GLC case itself) and superstores (at least in the circumstances of *R v Carlisle City Council and the Secretary of State for the Environment, ex parte Cumbrian Co-operative Society Ltd*).

5. There may be cases where, even although they contain the characteristics referred to above, nevertheless it could properly be regarded as unnecessary to go into questions of comparability. This would be so particularly if the environmental impact was relatively slight and the planning objections were not especially strong..."[22]

27. While it is true that issues such as national need, and similar, are not always appropriate issues for debate at inquiry and are the subject of Secretary of State decisions with only the reasons given in a decision letter, there are issues which can usefully be debated at inquiry which may be subsumed into the NPS process and taken away from the examination of the issues in public forum. There are cases where the extent of the need requires to be balanced against the extent of the harm to be caused and the likely efficacy of mitigation. This places a considerable burden on the SA and SEA process in formulating NPS to assess and identify environmental harm.

28. If the NPS establishes need for a specific type of project in a specific location or range of locations, the extent to which the balancing exercise of harm against need can be debated is likely to be much reduced if not eliminated, given the power of the IPC to exclude consideration of any representations challenging the merits of NPS.

29. There remains the opportunity to seek to persuade the Secretary of State to review the

[22] Principle 6 related to CPO cases and is not reproduced.

NPS[23] or to lobby her to intervene on the narrow basis in s. 102(2) that:

> "(a) since the time when the national policy statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any policy set out in the statement ("the relevant policy") was decided,
>
> (b) the change was not anticipated at that time,
>
> (c) if the change had been anticipated at that time, the relevant policy would have been materially different,
>
> (d) if the relevant policy was materially different, it would be likely to have a material effect on the decision on the application, and
>
> (e) there is an urgent need in the national interest for the application to be decided before the national policy statement is reviewed."

30. It nonetheless needs to be recognised:

(1) Decisions on need issues and the policy reasons for the decision may be more clearly stated and more subject to debate, at least via consultation and Parliament, than a Secretary of State's reasons in a planning decision letter;

(2) The position is arguably more transparent and open to public debate than the authorisation of public infrastructure projects via hybrid bill procedure (e.g. the Channel Tunnel Rail Link and Crossrail) where the principle of the Bill is determined on Second Reading and petitioners against the Bill provisions are not able to controvert the principle of the Bill before bill select committees.

31. At least, in the case of NPS, there is a requirement for publicity and consultation under clauses 5(4), 7 and 8, without which the NPS may not be designated as such. The Secretary of State must also "*have regard to the responses to the consultation and publicity in deciding whether to proceed with the proposal*"[24]. There is also the new clause 9 which provides for Parliamentary scrutiny of the NPS (which will be especially important where the NPS deals with nuclear power or airports given that they will be site specific).

32. However, the details of consultation are not determined by the legislation which only provides that consultation and publicity should be as follows:

(1) As may be decided by the Secretary of State as "*appropriate in relation to the proposal*"[25];

(2) "Appropriate steps" must be taken to publicise the proposal, if the proposed policy

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[23] See clause 6.

[24] Clause 7(6).

[25] Clause 7(2).

identifies one or more locations as suitable/potentially suitable for a specified description of development (presumably steps which are effective to publicise within the areas concerned)[26];

(3) Following consultation with the local authorities for the areas of any of the locations concerned[27];

(4) As may be prescribed[28].

33. It remains to be seen, and depending on any further amendments, to what extent wide consultation rights are conferred[29] and the extent to which these are able to influence

(1) The Secretary of State's formulation of the NPS; and/or

(2) The Parliamentary scrutiny process.

34. Finally, given the importance which is to be attached to NPS, it is important that they be kept up to date. If they are not, then the streamlined procedure proposed before the IPC will be less effective. Major statements of national policy, especially when the descend to detail, may be out of date within a relatively short period of time. For example, the capacity and growth assumptions in the Airports White paper do not seem to have taken very long to become out of date given, first, the time taken to assemble the data and formulate the policy and, secondly, the changes which can occur fairly rapidly in any event. It is more likely that the more detailed the NPS, the greater the risk that it will be out of date more quickly. This has implications for the decision-making process.

European environmental legislation

35. It has not yet been articulated in legislation or guidance, but the question of development consent and applications under the Bill would have to comply with applicable EU provisions relating, for example, to SEA[30], EIA[31], Habitats[32] and Waste[33]. However, it is

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[26] Clause 7(5).

[27] Clause 8.

[28] Clause 7(4).

[29] Given the wide consultations that take place e.g. for draft PPSs.

[30] See Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. See also ***Seaport Investments Limited's Application*** [2007] NIQB 62,

[31] See Directive 85/337/EEC (as amended).

[32] See Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora, Directive 79/409/EEC on the Conservation of Wild Birds, the Conservation (Natural Habitats &C.) Regulations 1994 S.I. 1994 No. 2716 and ***Landelijke Vereniging tot Behoud van de Waddenzee & Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw Case C-127/02*** [2005] Env. L.R. 243.

[33] See e.g. the Waste Framework Directive 2006/12/EC consolidating Directive 75/442/EC and its amendments.

largely a matter for the introduction of new secondary legislation once the primary legislation is in its final form.

36. EIA will be required wherever the applications for consent fall within the EIA Directive requirements, though amendments may be required to ensure that the national planning regulations apply properly to the new consent regime, which mirrors the language of EIA in using the term "development consent". Given the division between NPS and the consent process, and the possible decisions in principle at the NPS stage, it is possible that multi-stage issues, such as arose in ***R (Barker) v. Secretary of State*** [2006] Q.B. 764 (ECJ) and [2007] 1 AC 470 (HL), could arise between the two stages in that the NPS has been based on inadequate environmental information, or a material change occurs before the grant of consent etc. Even if the IPC declines to consider the merits of the NPS and a decision in principle to proceed, the effect of the EIA Directive and ***Barker*** appears to be that full EIA is still required for the whole project (including any associated development).

37. It also appears that the NPS will need to be subject to the requirements of SEA, presumably incorporated in the sustainability appraisal as is the case in the current development plan procedure. There is little doubt that much if not all NPS will fall within the threshold requirements of SEA. Indeed, it appears that the NPS process will fall directly within the Environmental Assessment of Plans and Programmes Regulations 2004 S.I. 2004 No. 1633[34]. It appears that NPS sets the framework for EIA development and is[35]

    (1) subject to preparation and/or adoption by an authority at national, regional or local level *or* which is prepared by an authority for adoption, through a legislative procedure by Parliament or Government; *and*

    (2) *required* by legislative, regulatory or administrative provisions.

38. It is possible that in the case of very specific NPS, the requirements of EIA and SEA will overlap considerably. However, SEA would be required first prior to the designation of a NPS under the Bill and EIA would only be required prior to the grant of development consent.

39. However, both SEA and EIA are processes for the gathering of information and assessments (themselves subject to consultation requirements) to inform the decision-making process and do not dictate the outcome of the process.

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[34]The Regulations simply adopts the wide approach of the SEA Directive and e.g. follows the broad definition of "plans and programmes" given in article 2(a) of the SEA Directive, the same issues arise with respect to these key concepts under the Regulations as they do in respect of the Directive.

[35] Art. 2(a) of the SEA Directive and reg. 2(1) of the Regulations.

40. Habitats requirements, on the other hand, do carry the possibility of requiring an application to be rejected notwithstanding any NPS since the provisions of the Habitats Directive and Regulations (which may also need to be amended to deal appropriately with the new consent procedures) do dictate the outcome. Indeed, as the decision on the Dibden Bay proposals amply demonstrate, a failure to meet the requirements of that Directive may lead to the rejection of a major project even where need is established. This is effectively covered by clause 101(4) & (5) of the Bill which requires the IPS to take account of the effect of EU legislation and to depart from the NPS where required by such legal provisions (which it would have to do in any event).

Process

41. The IPC will have the power to appoint panels of 3 or more Commissioners, or a single Commissioner, to examine applications. The decisions will be made by the Commission "*where a national policy statement has effect in relation to development of the description to which the application relates*"[36].

42. The Bill envisages, in Part 6, that much greater use will be made of written representations and much less reliance will be place upon oral representations. Restrictions will also be placed on the use of cross examination by interested parties at a hearing. The Bill provides for examination of the application to be through written representations, with an open floor stage *where this it necessary to hold an oral hearing.* Clause 89 requires a hearing when the IPC decides that it is necessary for its examination of an issue to receive oral representations, either to ensure the adequate examination of the issue, or so that an interested party has a fair chance to put their case. Additionally, clause 91 provides that the IPC must arrange an open-floor hearing if at least one "interested party"[37] informs it of a wish to be heard within the specified deadline. Each interested party is entitled to make oral representations at such an open-floor hearing.

43. Clauses 88-91 of the Bill provide that:

> "**88 Written representations**
>
> (1) The Examining authority's examination of the application is to take the form of consideration of written representations about the application.
>
> (2) Subsection (1) has effect subject to—
>
> (a) any requirement under section 86 or 87 to cause a hearing to be held, and
>
> (b) any decision by the Examining authority that any part of the examination is to

[36] Clause 69(1).

[37] Defined by clause 95(1).

take a form that is neither—

(i) consideration of written representations, nor

(ii) consideration of oral representations made at a hearing.

(3) Rules under section 91 may (in particular) specify written representations about the application which are to be, or which may be or may not be, considered under subsection (1).

89 Hearings about specific issues

(1) Subsections (2) and (3) apply where the Examining authority decides that it is necessary for the Examining authority's examination of the application to include the consideration of oral representations about a particular issue made at a hearing in order to ensure—

(a) adequate examination of the issue, or

(b) that an interested party has a fair chance to put the party's case.

(2) The Examining authority must cause a hearing to be held for the purpose of receiving oral representations about the issue.

(3) At the hearing, each interested party is entitled (subject to the Examining authority's powers of control over the conduct of the hearing) to make oral representations about the issue.

(4) Where the Examining authority is a Panel acting under Chapter 2, any two or more hearings under subsection (2) may be held concurrently.

90 Compulsory acquisition hearings

(1) This section applies where the application includes a request for an order granting development consent to authorise compulsory acquisition of land or of an interest in or right over land (a "compulsory acquisition request").

(2) The Examining authority must fix, and cause each affected person to be informed of, the deadline by which an affected person must notify the Commission that the person wishes a compulsory acquisition hearing to be held.

(3) If the Commission receives notification from at least one affected person before the deadline, the Examining authority must cause a compulsory acquisition hearing to be held.

(4) At a compulsory acquisition hearing, the following are entitled (subject to the Examining authority's powers of control over the conduct of the hearing) to make oral representations about the compulsory acquisition request—

(a) the applicant;

(b) each affected person.

(5) A person is an "affected person" for the purposes of this section if the person's name has been given to the Commission in a notice under section 57.

91 Open-floor hearings

(1) The Examining authority must fix, and cause the interested parties to be informed of,

> the deadline by which an interested party must notify the Commission of the party's wish to be heard at an open-floor hearing.
>
> (2) If the Commission receives notification from at least one interested party before the deadline, the Examining authority must cause an open-floor hearing to be held.
>
> (3) At an open-floor hearing, each interested party is entitled (subject to the Examining authority's powers of control over the conduct of the hearing) to make oral representations about the application."

44. General guidance as to the conduct of *specific issue hearings* and *open-floor hearings* (DCLG is clearly anxious to move away from the terminology of inquiries) is provided in Clause 92 which provides that these hearings should be in public and presided over by at least one member of the Panel or the single Commissioner. It is for the IPC to determine how the hearing is conducted, in particular the IPC can decide whether a person making an oral representation can be questioned by an interested party. It can also decide the duration of an oral representation or any questioning that is permitted.

45. Clause 92(8) allows the IPC to refuse to hear a representation it considers it:

(1) is irrelevant or frivolous;

(2) relates to the merits of policy set out in a national policy statement;

(3) repeats other representations already made;

(4) relates to the compensation payable on the compulsory acquisition of land.

46. The Bill is extremely detailed in prescribing the procedural arrangements and powers, much more so than in the TCPA, which is perhaps reflective of the fact that the Commissioners may have little experience of the current appeals/call-in system and there is considered to be a need to prescribe in primary legislation in some detail. It should be noted that even at open-floor hearings There is no right to cross-examine, or even to call witnesses as such, merely to make oral representations: see above. As John Healey stated at the Report Stage of the Bill on 2 June[38]:

> "Everyone will have a right to submit evidence to the commission; they can do that in writing. Everyone will have the right to be heard in an open session if they require that. We seek to put in place specific open sessions for those whose properties are affected by compulsory purchase orders. The questioning will be led by the commission itself, not by lawyers. It will not involve the kind of adversarial, sometimes off-putting, hugely expensive and often lengthy lawyer-driven process in which local voices are normally the first to get lost. We can ensure that the inquiry can be conducted fairly and faster than is sometimes the case in the big inquiries, some of which get bogged down for years."

47. The Government does not seem to have accepted that that questioning could be properly

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[38] HoC Hansard 2 Jun 2008 : Column 600.

controlled by the tribunal and the Bill still confer wider rights of representation and presentation of evidence. There is undoubtedly a sense of grievance felt by parties who are restrained from preventing the case at least in the manner in which they consider will best assist their case, even if it is appropriately controlled in a proportionate manner. This is particularly likely to be the case where CPOs are proposed or projects are likely to have a serious impact on their interests. Since the Bill proceeds on the basis that the IPC will control the evidence (and is able to do so) it is difficult to understand why it is regarded as undesirable *in principle* at least to recognise rights in connection with the presentation of evidence and questions. Depending on the experience and expertise of the IPC members, the combination of circumstances of curtailment of rights to debate merits issues and rights to present and question evidence could be unfortunate.

48. Moreover, the provisions of cl. 101 although they give primacy in decision-making to the NPS recognizes the need to have regard to other matters and do not wholly eliminate the prospect of weighing the need identified in the NPS with the impacts:

> "**101 Decisions of Panel and Council**
>
> (1) This section applies in relation to an application for an order granting development consent if the decision-maker is a Panel or the Council[39].
>
> (2) In deciding the application the Panel or Council must have regard to—
>
> (a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),
>
> (b) any local impact report (within the meaning given by section 58(3)) submitted to the Commission before the deadline specified in a notice under section 58(2),
>
> (c) any matters prescribed in relation to development of the description to which the application relates, and
>
> (d) any other matters which the Panel or Council thinks are both important and relevant to its decision.
>
> **(3) The Panel or Council must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of the following subsections applies.**
>
> (4) This subsection applies if the Panel or Council is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.
>
> (5) This subsection applies if the Panel or Council is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Panel or Council, or the Commission, being in breach of any duty imposed on it by or under any enactment.
>
> (6) This subsection applies if the Panel or Council is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of

[39] i.e. the IPC's Council – see cl. 220(1).

any enactment.

(7) This subsection applies if the Panel or Council is satisfied that the adverse impact of the proposed development would outweigh its benefits.

(8) This subsection applies if the Panel or Council is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met."

49. Cl. 101(7) is interesting since it inevitably permits objectors to advance cases which do question the weight to be given to need as set out in NPS since otherwise it would not be possible to consider whether the impact *outweighs* the benefits. Presumably, one factor which will go into this exercise and under 101(2)(d) is the extent to which the NPS may be out of date (subject to suspension during review under cl. 105 and the Secretary of State's power to intervene in such cases under ss. 106-109).

50. The Bill creates a timetable for the IPC to follow when determining applications. It will have six months in which to carry out the examination procedure and a further three months in which to take a decision 9or make recommendations, as the case may be).

51. In Part 9 of the Bill, changes are made to the existing Town and Country Planning regime. In relation to development plans, a duty will be placed on local planning authorities to include policies in relation to development and use of land which take action on mitigating, and adapting to, climate change. Clause 173 provides:

"151 Development plan documents: climate change policies

In section 19 of PCPA 2004 (preparation of local development documents) after subsection (1) insert—

"(1A) Development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contributes to the mitigation of, and adaptation to, climate change." "

52. The Bill also requires local authorities to arrange for decisions on minor planning applications[40], lawful development certificates[41] and listed building applications[42] to be taken by planning officers, with a right of review by the authority, as opposed to an appeal to the Secretary of State. Rights to challenge the reviews may be brought in the High Court by the extension of the existing challenge provisions in Part XII TCPA and equivalent[43].

53. The Bill removes the right to insist on an oral hearing at a planning appeal and instead

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[40] Clause 177

[41] Clause 178

[42] Clause 180

[43] Clauses 179 and 180(5).

empowers the Secretary of State to determine the appropriate procedure for planning appeals without any right of the appellant or local authority to be consulted[44].

54. One significant change introduced at the Third Reading is the requirement in clause 58 for the IPC to have regard to a local impact report prepared by local authorities affected by applications for development consents. This amendment was introduced by Clive Betts MP, one of the leading Labour Planning Bill rebels. In supporting this amendment, the Secretary of State said that:[45]

> "It would require the IPC to invite affected local authorities to produce reports on the views of their residents, the impact of a proposal on a community and its interaction with the local development plan. The legal formulation says that the commission "must have regard" to the local impact report, and that is a pretty strong way of making sure that elected local authorities have a bigger say on behalf of their communities. I entirely accept that this is a question of democracy. I want to make sure that we build in as many checks and balances as possible, but at the same time ensure that decisions are made speedily and efficiently. Local authorities will also be statutory parties to the examination. The arguments about the need for a formal role for local government have been very strong indeed, and I very much welcome new clause 42, and the supporting amendments Nos. 349 and 355."

Clause 58 provides:

> "**58 Local impact reports**
> (1) Subsection (2) applies where the Commission—
> (a) has accepted an application for an order granting development consent, and
> (b) has received—
> (i) a certificate under section 56(2) in relation to the application, and
> (ii) where section 57 applies, a notice under that section in relation to the application.
> (2) The Commission must give notice in writing to each of the following, inviting them to submit a local impact report to it—
> (a) each authority which, in relation to the application, is a relevant local authority within the meaning given by section 99(5), and
> (b) the Greater London Authority if the land to which the application relates, or any part of it, is in Greater London.
> (3) A "local impact report" is a report in writing giving details of the likely impact of the proposed development on the authority's area (or any part of that area).
> (4) "The proposed development" is the development for which the application seeks development consent.
> (5) A notice under subsection (2) must specify the deadline for receipt by the Commission of the local impact report.
> (6) The deadline is the deadline for completion of the examination of the

[44] Clause 190.

[45] *Hansard*, 25 June, 2008, Col 352.

application by a Panel or a single Commissioner (see section 96)."

Are the reforms needed to speed up the process?

55. Why is a completely new procedure required? The answer DCLG gives is a concern with "long, drawn out planning processes" and Heathrow Terminal 5 in particular. Inquiries such as T5, we are told, are far too long and costly and a recipe for prevarication and for lawyers to complicate the process. However, what is constantly ignored is that T5 was an exceptional inquiry and this was recognised by the Inspector in his report.

> "Inquiries such as this, however, will always be exceptional and must inevitably take time if all those concerned are to be given a fair hearing."

56. The Competition Commission in its recent report on the Groceries Inquiry found that the planning system due to its cost and complexity was a barrier to entry to retailers seeking to enter the market. If that complexity is a barrier to commercial organisations it does not say much for making the system more complex.

57. There appear to be less drastic and more inclusive responses to the problem of lengthy and complex planning process. Firstly, reduce the bulk of policy and simplify procedure, as DCLG claims it is committed to doing. Planning policy is so complex and unwieldy that it provides itself a barrier to understanding by not only local communities but local authority members who are heavily reliant on their officers to steer them through the morass of policy. Simplification of policy would free up the time of planners in local government rather than having to spend a disproportionate amount of time on policy issues. Procedure is to be simplified in part (e.g. with heritage consents) but the example of the simplification of environmental permitting which began with The Environmental Permitting Regulations 2007 is not being followed. On the contrary, the planning system is to be made more complex.

58. Secondly, greater control over inquiry procedure should be given to inspectors, with specialist training if necessary. Reasonable control over procedure is the key. The right to present evidence and question witnesses at inquiries does not mean that they should be unfocussed or lengthy, but should be directed to the key issues. The new commissioners will, in any event, be required to exercise strict control over procedures and evidence: why not keep the experienced planning Inspectorate and inquiries, and give them more power to control the process?

59. Procedures can be kept within reasonable limits as shown by the recent Parliamentary Select Committee hearings into the Crossrail Bill (a far larger project than T5) where

evidence was kept short and focussed on the essential issues. The Lords began hearings in February 2008, reported in May and the Crossrail Act 2008 became law on 22 July. In Commons and Lords there were just over 100 sitting days in total for the largest rail project since the 19th century. T5 had 525 sitting days. Michael Barnes QC the inspector at the Hinkley "C" nuclear inquiry in the late 1980s, managed to complete his inquiry in good time by setting reasonable limits to evidence and succeeded without depriving interested parties of the right to call evidence and ask questions. Why this experience has not been built upon by government is unclear.

60. Under the planning system, interested parties have the right to attend inquiries, present evidence and ask questions if there a proposals for new housing, superstores, or anything which goes to inquiry. It is difficult to reconcile those rights with the Bill's curtailment of participation in *major* projects which will have a far greater impact on the environment and local communities.

Article 6 and fairness

61. There is a suggestion that the new proposals might breach Article 6 ECHR.

62. Article 6 provides that:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all of part of the trial in the interests of morals, public order or national security…"

63. The Secretary of State has issued a statement under s. 19 Human Rights Act 1998 confirming that in her view the Bill complies with the ECHR. While this it is probably the case that the Bill itself it compatible with the ECHR, it is important to be aware that the discretion given to the IPC in relation to matters of procedure must be exercised in individual cases in a manner that is ECHR compliant. The wide discretion that the IPC will enjoy regarding the procedure preliminary to and at hearings will mean that consideration of the procedural guarantees in Art 6 will be relevant in most applications it hears.

Fair Hearings

64. The key question raised by the Bill is when the IPC must allow oral submissions and cross-examination in order for its procedures to be fair. The point is an important one due to the central place accorded to oral argument in the common law adversarial tradition. In ***Sengupta v Holmes*** [2002] EWCA Civ 1104 [38], Laws L.J explained that:

> "…oral argument is perhaps the most powerful force there is, in our legal process to promote a change of mind by the judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it."

65. Nevertheless, a fair "hearing" does not automatically entail an opportunity to be *heard orally*. In civil cases, it has been held that, in order to determine whether an oral hearing is required in order for a *fair* hearing, the nature of the application must be examined. For example, in ***BLCT (13096) Limited v J Sainsbury plc*** [2003] EWCA Civ 884; [2004] P & CR 32, the Court of Appeal held that Art.6 did not require an oral hearing of an application for leave to appeal. The question was one of law, and there was no question of any decision either on the facts or as to any party's credibility.

66. The cases establish that one is entitled to an oral hearing where fairness requires is, but this will not be so in every case: ***R(Ewing) v Department of Constitutional Affairs*** [2006] 2 All ER 99, [27]; ***R (on the application of West) v Parole Board*** [2005] 1 WLR 350. In the latter case, the House of Lords held that where a Parole Board determines a challenge to the revocation of a prisoner's licence, whether an oral hearing is required depends upon the facts of each case. A hearing is likely, their Lordships said, where facts are in issue that could affect the outcome or where it might contribute to achieving a just decision. Similarly in ***R(Vetterlein) v Hampshire CC*** [2002] Env. L.R. 198 Sullivan J said this:

> "68. The special meeting was held in public. The agenda was available to members and to the public beforehand. In deciding whether there has been a breach of Article 6(1) the procedures have to be looked at in their entirety, including the earlier opportunities to make representations during the consultation process and the subsequent right to seek relief by way of judicial review if the Council errs in law. A 'fair' hearing does not necessarily require an oral hearing, much less does it require that there should be an opportunity to cross-examine. Whether a particular procedure is 'fair' will depend upon all the circumstances, including the nature of the claimant's interest, the seriousness of the matter for him and the nature of any matters in dispute."

67. The European Court of Human Rights has held that the absence of an oral hearing may violate Art. 6(1) in proceedings related to the exercise of a profession: ***Bakker v Austria*** App 43454/98. But not in a case involving only technical issues: ***Göç v Turkey*** (2002) 35 EHRR 134, [51]-][52]. The decision in ***Jacobsson v Sweden (No.2)*** (2001) 32 EHRR 463, makes clear that each case must be determined on its own facts:

> "49. ... the Court does not find on the evidence before it that the applicant's submissions to the Supreme Administrative Court were capable of raising any issues of fact or of law pertaining to his building rights which were of such a nature as to require an oral hearing for their disposition ... on the contrary, given the limited nature of the issues to be determined by it, the Supreme Administrative Court, although it acted as the first and only judicial instance in the case, was dispensed from its normal obligation under Article 6(1) to hold an oral hearing."

68. If effective opposition to large infrastructure projects on, amongst other things, environmental grounds is to be made, it will be crucial to present oral submissions and test evidence by cross examination in many cases. Documentary evidence will often need to be tested orally. In ***R v Secretary of State for Wales, ex p Emery*** [1996] 4 All ER 1, it was held that conflicts of documentary evidence as to the existence of footpaths should have been examined orally at inquiry. In the context of planning inquiries, Lord Edmund Davies recognised in ***Bushell v Secretary of State for the Environment*** [1981] AC 75, 116, that:

> "there is a massive body of accepted decisions establishing that procedural fairness requires that a party be given an opportunity of challenging by cross-examination witnesses called by other parties on relevant issues."

69. In ***R(Adlard) v Secretary of State for the Environment*** [2002] 1 WLR 2515, however, it was held not to be unfair to deny an oral hearing to the objectors to a planning application for the expansion of a football stadium. The Court of Appeal held that there was no warrant either in domestic or Strasbourg jurisprudence for concluding that where the administrative decisions taken at first instance were generally likely to turn on questions of judgment and discretion rather than on oral findings of fact, the statutory scheme had to provide for an oral hearing at that initial stage. Simon Brown L.J. concluded that:

> "31. For my part, I can find no warrant, whether in domestic or in Strasbourg jurisprudence, for concluding that where, as in *Runa Begum* and as again here, the administrative decisions taken at first instance are generally likely to turn on questions of judgment and discretion rather than on findings of fact, the statutory scheme must provide for an oral hearing at that initial stage. On the contrary, I have reached the clearest conclusion that the statutory scheme as a whole is plainly compliant with article 6 and that there is no need to resort to the Secretary of State's call-in power to make it so.
>
> 32. With regard to issue (i) I add just this. The remedy of judicial review in my judgment amply enables the court to correct any injustice it perceives in an individual case. If, in short, the court were satisfied that exceptionally, on the facts of a particular case, the local planning authority had acted unfairly or unreasonably in denying an objector any or any sufficient oral hearing, the court would quash the decision and require such a hearing to be given. This presents no difficulties: Mr McCracken disputes neither the authority's power to conduct such a hearing nor the court's power to order it. I should make it plain, however, that I am by no means persuaded that any oral hearing was required on the facts of the present case. Quintessentially the decision whether or not the permit this development (and the departure from the development plan which it represents) involves questions of discretion and planning judgment rather than the resolution of primary fact. When invited to identify the most acute factual issues in the case Mr McCracken could find nothing more telling than: (a) whether the development would result in 3,744 more parked cars (the appellants' estimate) or a maximum of 2,500 parked cars (the respondent's rival case); and (b) whether only 1,080 cars could be accommodated within the suggested area (as the appellants contend) or as many as 1,800-2,300 (the respondents' estimate)."

70. Even in compulsory acquisition cases, Strasbourg has not considered a hearing to be

necessary. In ***Zumtobel v. Austria*** (1993) 17 E.H.R.R. 116, the process involved a hearing at the office of the Provincial Government which was neither in public nor before a 'tribunal': see paras. 8 & 9. Nevertheless, the Court held that the composite administrative and judicial process as a whole complied with Article 6(1).

71. The IPC will face many difficult decisions and will have to decide whether the nature of the issues at stake requires an oral hearing and cross examination. It will be interesting to see how the courts consider a challenge should be brought to the IPC's procedural decisions. Must the aggrieved party seek judicial review promptly and within 3 months of the refusal to allow an oral hearing, or within 3 months of the substantive decision? It would seem unjust to require a challenge to be brought within three months of the procedural decision at a time when the substantive decision may not be known and may, in any event, have been one with which the party was content. The thrust of the House of Lords' decision in ***R(Burkett) v Hammersmith & Fulham LBC*** [2002] 1 WLR 1593, is that claimants should not be forced to challenge decisions which do not have concrete impacts on their legal rights or interests. However, it would be undesirable to have challenges brought after the IPC examination so that the whole issue must be reconsidered.

72. A similar problem has arisen the context of *ad hoc* public inquiries such as the Saville Inquiry. This was disrupted by three separate judicial review decisions of procedural decisions by the Inquiry panel at great cost and delay. The response in the Inquiries Act 2005 is contained in s. 38 which provides that judicial review challenges to decisions of Ministers or Inquiry panel members "must be brought within 14 days after the day on which the applicant became aware of the decision, unless that time limit is extended by the court." Given the huge scope for Art. 6 challenges to the IPC's decisions on procedure, guidance as to how to challenge such decisions would be desirable.

73. In conclusion, it seems unlikely that the procedure as a whole given the consultation and scrutiny requirements of NPS, the procedure before the IPC and the right to judicially review both the NPS and the decision on the development consent application will not be Art. 6 compliant in principle. However, it leaves open the issue of compliance with fairness requirements in individual cases given the powers of the IPC to control evidence and process.

16 September 2008