

Nationally significant infrastructure projects - hot topics seminar

High Court challenges - current issues

James Maurici Q.C. and Kimberley Ziya

Landmark Chambers

INTRODUCTION

1. This talk is billed as “current issues” in respect of High Court challenges to Nationally Significant Infrastructure Projects (“NSIPS”). However, given the limited number of challenges that have in fact been brought under the Planning Act 2008 (“the 2008 Act”) regime, we have sought to draw out themes arising from those challenges which have been decided by the courts and the lessons to be learnt from those cases.
2. This talk assumes a basic understanding of the 2008 Act framework in relation to NSIPS, in particular, the mechanisms for challenging National Policy Statements (“NSPs”) under section 13 and the grant or refusal of Development Consent Orders (“DCOs”) under section 118.

OVERVIEW OF CHALLENGES UNDER THE ACT

(a) Predictions in 2009

3. In 2009, James wrote an article in the Journal of Planning Law in which he made various predictions as to what the world of High Court challenges would look like under the new 2008 Act.¹ He summarised his view as follows (at p449):

“It seems to the author likely that the Planning Act will result in future years in a large number of legal challenges to planning decision-making on major infrastructure projects. There are many reasons for this.”

4. The paper set out eight reasons for this prediction:

¹ J Maurici, “Judicial review under the Planning Act 2008” J.P.L. 2009, 4, 446-451.

- (1) Communities would feel disenfranchised by the process leading to the grant of DCOs (and the absence of a public inquiry) and therefore legal challenges to the decision to grant an Order (or other decisions taken along the way) would be more likely. A higher number of such challenges would be facilitated by the growing influence of the Aarhus Convention and increased availability of protective costs orders in environmental cases.
- (2) NPSs were so crucial to the 2008 Act regime that challenges to them would become a regular feature in the High Court given that NPSs.
- (3) The consultation requirements in respect of NPSs would lead to challenges to the process even before adoption.
- (4) The apparent need for NPSs to be subject to Strategic Environmental Assessment (“SEA”) and to comply with the Habitats Directive and Regulations would be a source of challenge.
- (5) The suggestion (e.g. by Friends of the Earth) that the 2008 Act is contrary to article 6 of the ECHR would lead to an *Alconbury* mark II challenge.
- (6) The Infrastructure Planning Commission (“IPC”)² would face difficult procedural decisions as to how to run the examination process which could be the subject of challenge.
- (7) At the time it was envisaged that the IPC would make the final decision in most DCO cases and therefore challenges may be brought by the Secretary of State if the refusal of consent went against the policy in the relevant NPS.
- (8) Finally, the fact that evidence and arguments would not be tested in cross-examination would lead to more errors on the examining authority which would be dealing with large volumes of information without the benefit of oral evidence or submissions.

² The IPC was abolished in 2012 and responsibility passed to the Planning Inspectorate.

(b) The outcome 10 years on

5. In fact, since the 2008 Act came into force there have been relatively few High Court challenges in respect of NPSs and DCOs. The PINS Infrastructure website states that there have been over 70 decided NSIP applications³ and 12 NPSs⁴ yet there have been only 16 (reported) decisions on challenges. Of those decisions:

- (1) Ten related to the grant or refusal of a DCO;⁵
- (2) Three related to the Airports NPS;⁶ and
- (3) Two related to ancillary procedural matters.⁷

Only one of the challenges was successful.⁸

6. So, where does this leave James' predictions? Well, in the words of the Danish Proverb "prediction is very difficult, especially about the future"⁹ and this appears to have been

³ <https://infrastructure.planninginspectorate.gov.uk/>.

⁴ <https://infrastructure.planninginspectorate.gov.uk/legislation-and-advice/national-policy-statements/>.

⁵ *R (Mynnyd y Gwynt Ltd) v SSBEIS* [2018] EWCA Civ 231; *R (Mars Jones) v SSBEIS* [2017] EWHC 1111; *R (Scarbrick) v SSCLG* [2017] EWCA Civ 787; *R (Williams) v SSECC* [2015] EWHC 1202; *R (Thames Blue Green Economy Ltd) v SSCLG* [2015] EWCA Civ 876; *R (Blue Green London Plan) v SSEFRA* [2015] EWHC 495; *R (FCC Environment (UK) Ltd) v SSECC* [2015] EWCA Civ 55; *R (Halite Energy Group Ltd) v SSECC* [2014] EWHC 17; *R (An Taisce (National Trust for NI)) v SSECC* [2013] EWHC 4161; *R (Gate) v SST* [2013] EWHC 2937. There have been a number of other challenges to DCOs that failed to get past the permission stage, for example, a judicial review of the Able Marine DCO.

⁶ *R (Heathrow Hub Ltd) v SST* [2019] EWHC 1069; *R (Spurrier) v SST* [2019] EWHC 1070; and *R (Hillingdon LBC) v SST* [2017] EWHC 121. The two divisional court decisions in 2019 were in fact as a result of six separate challenges to the ANPS, one of which failed at permission stage. The Borough Claimants in *Spurrier* and Heathrow Hub were granted permission to appeal and the Friends of the Earth and Plan B applications for permission to appeal will be heard rolled-up with those appeals over six days starting on 17th October. A challenge to the Nuclear NPS brought by Greenpeace was refused permission by Ouseley J on the papers and not pursued. Greenpeace was ordered to pay the costs of the Defendant's acknowledgment of service and made a complaint to the Aarhus Compliance Committee in Geneva: <http://www.unece.org/env/pp/compliance/compliancecommittee/77tableuk.html>.

⁷ *R (Trago Mills Ltd) v SSCLG* [2016] EWHC 1792; and *R (Innovia Cellophane Ltd) v IPC* [2011] EWHC 2883.

⁸ *R (Halite Energy Group Ltd) v SSECC* [2014] EWHC 17.

⁹ Attributed to Neils Bohr, a Danish physicist who himself attributed it to Robert Storm Petersen. The original author appears to be unknown.

no exception. There evidently has not been the flood of challenges anticipated and the possible reasons for this are considered immediately below.

(c) Why these predictions (on the whole) did not prove to be correct?

7. First, the removal of the opportunity for proposed development to be opposed at a public inquiry was raised by the Hillingdon Claimants in *R (Spurrier and others) v Secretary of State for Transport* [2019] EWHC 1070¹⁰, at [29]. However, the Divisional Court noted that:

“On the other hand, the 2008 Act imposed for the first time a transparent procedure for the public and other consultees to be involved in the formulation of national infrastructure policy in advance of any consideration of an application for a DCO.”

8. The suggestion then is that while the 2008 Act removed the opportunity for a proposed development to be opposed at a public inquiry the increase in public scrutiny of national policy afforded by this new transparent procedure has balanced out the apparent reduction of scrutiny of decisions in relation to individual schemes. Further, there is some scope for oral representations and even cross-examination during the examination process,¹¹ which may have further (at least in some cases) reduced any feeling of exclusion from the decision-making process.
9. In respect of cost protection, the Aarhus Convention Compliance Committee confirmed in 2015 that a Local Authority proper is not a “member of the public” within the scope of the Convention¹²; this accompanied by a change in the Aarhus costs rules to limit costs protection only to members of the public meant that the London Borough Claimants in the *Spurrier* decision were not able to avail themselves of Aarhus costs protection. This change in the rules, and clarification from the Aarhus Compliance Committee, may have

¹⁰ This was a decision by Hickinbottom LJ and Holgate J sitting in the Divisional Court. They considered four claims challenging the designation of the Airports NPS. There were 22 grounds of challenge, set out at Appendix A to the judgment.

¹¹ Section 91 of the 2008 Act makes provision for issue specific hearings (“ISH”) where these are necessary “to ensure (a) adequate examination of the issue, or (b) that an interested party has a fair chance to put the party’s case.” At an ISH each interested party is entitled to make oral representations and the Examining Authority may allow for cross-examination: see s 94.

¹²http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2014-100/Correspondence_with_Party_concerned/ToPartiesC100_07.08.2015.pdf. The position is different for Parish Councils which are considered to be members of the public.

discouraged, and will no doubt continue to discourage claims brought by Local Authorities.¹³

10. Second, while there may not have been many challenges to NPSs this may be changing following decisions (discussed in more detail below) illustrating how limiting the existence of a relevant NPS can be on the matters which can be considered at DCO stage.¹⁴ The decision in *Blue Green* in particular will be an important warning to Claimants to consider the effects of an NPS, especially one which has considered and rejected a range of alternative strategies to meet the identified need. The *Spurrier* and *Hub* cases involved – see below – six separate judicial reviews of the Airports NPS.
11. Third, the decision in *Hillingdon* [2017] EWHC 121 (discussed below) has closed the door to any pre-adoption challenges to NPSs. Any alleged deficiencies in the consultation process will need to be raised in a challenge to the adopted NPS.¹⁵ Arguably the position is the same in relation to DCOs as the relevant wording of section 118 is identical to that in section 13, which was at issue in *Hillingdon*. This though is untested in case-law.
12. Fourth, the application of SEA and Habitats requirements was one of the key issues in the *Spurrier* case. The appeals by the London Borough claimants (being heard in mid October) are also focussed on these issues. The outcome of that appeal, in particular in relation to the contested issue of the appropriate standard of review in environmental protection cases, could be said to affect the number of judicial reviews brought and their prospects of success (intensity of review is discussed in more detail below).
13. Fifth, there was despite the posturing by groups such as Friends of the Earth no *Alconbury* mark II. Such a challenge would have faced very grave difficulties given the post-*Alconbury* case-law including cases such as *R. (Friends Provident Life Office) v Secretary of State for the Environment, Transport and the Regions* [2002] 1 W.L.R. 1450

¹³ In 2013, the Ministry of Justice consulted on proposals to preclude local authorities from challenging DCOs at all: see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264091/8703.pdf at [53]-[62]. These proposals were ultimately not pursued.

¹⁴ See *Blue Green* [2015] EWCA Civ 876; and *Scarisbury* [2017] EWCA Civ 787. The point is also discussed in *Spurrier* [2019] EWHC 1070 at [91]-[112].

¹⁵ The consultation requirements for NPSs were considered in *Spurrier* at [125]-[137].

14. Sixth, there do not seem to have been any reported challenges to procedural decisions taken by the IPC, and later the inspectors appointed by the Secretary of State, in relation to the form of examination required for particular issues. The 2008 Act seems to push claimants to wait for adoption of an NPS or DCO prior to bringing a challenge, but this does not explain the lack of procedural complaint even at this stage.
15. The seventh prediction was overtaken by the abolition of the IPC in 2012.
16. Finally, it may be that the limited number of challenges to DCOs reflects a high quality of decision-making. On the other hand, it might be said by some that the scale of the issues involved in a DCO examination, the volume of documents and the strict six week time limit has simply makes bringing a challenge just too difficult and/or expensive for many people.

THEMES FROM THE CHALLENGES THAT HAVE OCCURRED

17. Despite the relatively small number of challenges two themes can be drawn out from the decisions which exist.
18. The first is that the court will adopt a strict approach to the scope of challenge available under the Act. This can be seen both in the cases concerning the court's jurisdiction to hear a challenge on a particular issue at a particular time and those regarding the powers to disregard representations relating to the merits of a policy at DCO stage which has already been established through an NPS. The important lesson for Claimants here is to ensure that the right challenge is brought against the right decision at the right time.
19. The second is the seemingly wide margin of appreciation afforded by the Court to decision-makers both in relation to the setting of national policy in an NPS and specific decisions on DCOs. The threshold for bringing a successful challenge appears to be set quite high.

THE SCOPE OF CHALLENGE

(a) Time Limits

20. As originally enacted section 118 of the 2008 Act read as follows (emphasis added):

“1) A court may entertain proceedings for questioning an order granting development consent only if (a) the proceedings are brought by a claim for judicial review and (b) the claim form is filed during the period of six weeks beginning with:

(i) the day on which the order is published ...”

21. Ouseley J held in *Blue Green* [2015] EWHC 495¹⁶ (upheld by the Court of Appeal in [2015] EWCA Civ 876) that it was “perfectly clear that, as a matter of ordinary statutory construction, a period of six weeks beginning with the day on which an event occurred includes the day on which the event occurred”: at [16]. Therefore, in the case of section 118, the six week time limit included the day on which publication occurred and the claims in this case were one day out of time.
22. Ouseley J went on to consider whether the court had any discretion to extend time but found that no such power could be derived from section 118 nor other provisions relied on by the Claimant: at [42]-[47].¹⁷ It also made no difference that one of the Claimants (Mr Stevens) appeared in person as this cannot convey to a court a discretion on whether to exercise jurisdiction that it does not have: at [53].
23. Mr Stevens argued that the Secretary of State had also interpreted the Act as excluding the date of publication from the six week time limit and had indicated such in an annex to his decision letter on the order challenged. The Judge recognised this but found that the error by the Secretary of State did not entitle the Claimant to have his challenge entertained when the court has no jurisdiction to do so, “nor can the error give the court jurisdiction it does not otherwise have”: at [48]-[51].
24. This decision was followed by Lindblom J in *Michael Williams* [2015] EWHC 1202.¹⁸ A key issue in that case was when the DCO was “published” within the meaning of section 118(1). Lindblom J adopted “a straightforward interpretation of the statutory formula”

¹⁶ The case concerned two challenges to the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 for the construction of a waste water scheme in London known as the Thames Tideway Tunnel. The Order was made on 12th September 2014 and the claims were filed on 24th October 2014.

¹⁷ The Claimant sought to rely on section 31(1) of the Senior Courts Act 1981 and CPR 54.5.3 and 3.1.

¹⁸ This was a challenge to the Clocaenog Forest Wind Farm Order 2014 which gave development consent for a major windfarm in North Wales. The claim alleged failure to comply with the Habitats Directive and Regulations. After the hearing of the claim (but prior to judgment) the solicitors for the Interested Party (RWE Innogy UK Limited) wrote to the court submitting that, in light of the judgment in *Blue Green*, the court had no jurisdiction to hear and determine the claim because proceedings were not issues in time.

holding that it meant “the day on which the order, or the statement of the Secretary of State’s reasons for making it, is put into the public domain”: at [44]. On the facts:

“...the placing of the order on the Planning Inspectorate’s infrastructure planning website on 12 September 2014, together with the Secretary of State’s decision letter and the Examining Authority’s report, and, on the same day, the notification of interested parties, both by e-mail and by post, that this had been done, was enough to constitute publication of the order, and the reasons why it was made, within the meaning of section 118. It enabled any interested party, including Mr Williams, to consider, with the benefit of legal advice, whether there were grounds for a claim for judicial review, and, if there were, to launch a challenge within the statutory period of six weeks. The fact that the Secretary of State chose to publish the order in that way but then went on to publish it in other ways as well does not mean that he failed to publish it, and his reasons for making it, on 12 September 2014. Putting both the order and the reasons on the Government’s legislation.gov.uk website, producing it and sending it out in printed form, and placing notices in the London Gazette and in the local press to announce the decision were all separate and additional acts of publication. But the order and reasons had been published on 12 September 2014.”

25. The claim, having been issued on 24th October 2014, was therefore one day out of time.
26. Lindblom J went on to consider submissions by the Claimant on whether the judgment of the European Court in *Uniplex (UK) Ltd v NHS Business Services Authority*¹⁹ should lead him to reach a different conclusion.²⁰ He concluded that it did not (at [59]) noting that:
 - (1) The provisions in section 118 clearly respect the principle that the period laid down for bring a challenge must start to run only from the date on which a claimant knew or ought to have known of the alleged error of law: at [61].
 - (2) There was no support for a submission that time begins to run only once the publicity requirements in the Infrastructure Planning (EIA) Regulations 2009 have been met: at [62].

¹⁹ Case C-406/08; [2010] P.T.S.R. 1377.

²⁰ That case concerned the need for certainty of rules limiting the time period within which proceedings may be brought to vindicate right deriving from European Law. The Court considered whether EU Law required the time period for bringing proceedings seeking to establish an infringement of the rules for public procurement to run from the day of the infringement or the day on which the claimant knew, or ought to have known of it. It also considered whether a requirement that proceedings be brought “promptly” was compatible with EU Law and the effect of EU Law on a national court’s discretion to extend time limits.

- (3) EU law does not specify an “appropriate time limit” for challenging decisions in the field of environmental law, nor specify that the time limit set for such a challenge should be subject to a court’s discretion to extend: at [63].
- (4) A statutory time limit of six weeks does not jeopardise a claimant’s right to a fair trial under article 6 of the ECHR: at [64].
- (5) Ouseley J’s reasons for rejecting various other arguments based in EU law in the *Blue Green* case were compelling: at [66].

27. In summary “the conclusion that the court does not have jurisdiction to determine [the Claimant’s] claim for judicial review is not in any way inconsistent with the decision of the court in *Uniplex*, or with any other European Jurisprudence”: at [67].

28. The wording of section 118 has since been amended to reverse the effect of the decision in *Blue Green*.²¹ It is clear that the six week time limit now runs from the day after the decision (or reasons for it if later) is published. However, the strictness of the court’s approach to time limits in these two cases and the guidance in *Williams* on the meaning of “published” remain applicable.

(b) Prematurity

29. *Hillingdon* [2017] EWHC 12 is an important decision of Cranston J on the proper construction of section 13 of the 2008 Act. For ease of reference, section 13 provides as follows:

“(1) A court may entertain 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 only if –

(a) the proceedings are brought by a claim for judicial review, and

(b) the claim form is filed [before the end of] the period of 6 weeks beginning with [the day after] –

(i) the day on which the statement is designated as a national policy statement for the purposes of this Act, or

(ii) (if later) the day on which the statement is published.”

²¹ It now provides that the claim form must be filed “before the end of the period or 6 weeks beginning with the day after (i) the day on which the order is published...” (emphases added).

30. The Hillingdon Claimants (a collection of London Boroughs, Greenpeace and local resident Ms Christine Taylor) challenged the decision of the Secretary of State to “prefer” for inclusion in a draft NPS a proposal for an additional north-west runway at Heathrow, this is often referred to as the October 2016 preference decision.
31. Cranston J began by considering the correct approach to construing a clause such as section 13, noting the traditional distinction drawn between “true ouster clauses” and “time-limited clauses”: at [40]. He concluded that section 13 was not akin to an ouster clause as its effect is “to suspend, rather than to exclude, the right of access to the court and the power of the court to perform its judicial review function”. There was therefore no reason to give the section a narrow construction and it ought to be given “its ordinary and natural meaning”: *Pinner v Everett* [1969] 1 WLR 1266, 1273 C-D”: at [48]-[49].
32. He then turned to consider what is the ordinary and natural meaning of section 13. There were two key issues between the parties on this question. First, does the section simply provide an “end date” for filing challenges or also a start date? Second, what is meant by “acts done in the course of preparing an NPS”?
33. Cranston J held that the words in section 13 meant that proceedings can only be brought in the six week period following publication of the NPS: at [57]. This conclusion was supported by the words of the section itself (as amended post *Blue Green*) and the statutory purpose, namely, to speed up the planning processes for major development: at [59]-[60]. This statutory purpose point was reiterated by the Divisional Court in *Spurrier* at [140]:

“Section 13(1) reinforces the point that Part 2 of the PA 2008 has created a process with a number of steps leading up to the designation of an NPS. It is an iterative process, which in the case of the ANPS has engaged other procedures as well, notably under the SEA Directive and the Habitats Directive. Section 13(1) protects that process against legal challenges until it culminates in the designation of an NPS. It is implicit in the iterative nature of this procedure that, even if a legal error occurs at an early stage, it may be capable of being cured (and, in the event, in fact be cured) by corrective steps taken later on; or the defect may be rendered immaterial by the manner in which the policy-making subsequently proceeds (for example, by being based on different considerations which are not open to legal challenge) or by the way in which one of the participants brings an important aspect to the attention of the Secretary of State.”

34. Cranston J in *Hillingdon* also emphasised that there was no exception for so called “showstopper arguments”²² in construing the application of section 13: at [65].

35. He went on to consider the acts to which section 13 applies, namely, “anything done or omitted to be done in the course of preparing” an NPS. He rejected the Claimants’ argument that these were limited to the preparatory steps specified under the 2008 Act (at [71]):

“There is no basis, in my view, to confine acts or omissions in the course of preparing an NPS to the exercise by the Secretary of State of his statutory functions under the 2008 Act, or to separate out what were characterised as preceding policy-making functions not subject to the preclusive effect of section 13. The words “anything done, or omitted to be done, by the Secretary of State in the course of preparing” an NPS are clear, albeit that there might need to be a fact-sensitive inquiry as to whether a particular act or omission was in the course of preparing an NPS. If Parliament had intended that those acts or omissions be limited to what is laid down in the 2008 Act, or to a draft NPS, it could easily have said so.”

36. The decision at issue in this case was without doubt an act in the course of preparing the draft ANPS and therefore a challenge to that decision was caught by section 13 and could only be brought after publication of the NPS.

37. The judge also rejected an argument that Article 9 of the Aarhus Convention which requires that remedies in environmental cases should be adequate, effective and timely mandates a different outcome (at [75]):

“To my mind there is nothing in Article 9 which prevents a signatory state from having in place provisions regulating the time at which a claimant may bring a challenge in the domestic courts. Nor is there anything in the one decision of the Aarhus Convention Compliance Committee referred to in argument which suggests incompatibility with Article 9: see the *Port of Tyne* case, ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3. The Aarhus point goes nowhere.”

38. The Judge declined to rule on whether the Government’s earlier announcement in relation to the Airport Commission’s final report in December 2015 was also covered by section 13: [73]. The Secretary of State had made a statement in the House of Commons that the Government accepted the case for airport expansion; agreed with, and would further consider, the commission's shortlist of options; and would use the mechanism of an NPS

²² These were identified by Carnwath LJ (as he then was) in an earlier challenge brought by the same claimants also relating to the proposed expansion of Heathrow: *R (Hillingdon) v SST* [2010] JPL 976. The decisions in that case pre-dated the coming into force of the 2008 Act and therefore it has no bearing on the construction of s.13.

under the 2008 Act to establish the policy framework within which to consider an application by the developer for planning consent. The Secretary of State explained that the Government would begin work straightaway on preparing the building blocks for an NPS in line with the 2008 Act. In *Spurrier* the Divisional Court ruled that a challenge to the findings of the Airports Commission itself (which finally reported in July 2015) was outside the scope of section 13 of the 2008 Act: [556].

(c) Disregarding representations relating to merits set out in NPS

39. Sections 87(3)(b), 94(8) and 106(1)(b) of the 2008 Act entitle the Examining Authority and Secretary of State, when considering a DCO, to disregard representations relating to the merits of a policy set out in an NPS. The effect of these provisions and the consequent relationship between NPSs and DCOs are discussed in some detail in *Spurrier* at [91]-[112]. This was the main issue in the *Blue Green* [2015] EWHC 727; [2015] EWCA Civ 876 and *Scarisbrick* [2016] EWHC 715; [2017] EWCA 787²³ decisions.
40. The Divisional Court in *Spurrier* noted that “the nature and content of NPSs may differ substantially” and this will affect whether representations relate to the merits of a policy set out in the NPS or not. The court set out the “modest and obvious proposition” that “where an NPS does not lay down policy on a particular matter, the policy to disregard objections does not apply to that matter”: at [100].
41. For example, in *Scarisbrick*, paragraph 3.1 of the DCO in question provided a summary of the national need for additional hazardous waste facilities. It did not identify the scale of that need nor consider appropriate sites for development to meet that need. The Court of Appeal held that national need was a question that could not be re-opened at DCO stage²⁴ but that the availability of alternative locations to that proposed in the DCO application could be a relevant consideration: see [68]-[69].
42. Contrast this with the facts in *Blue Green* where alternative strategies for meeting the identified national need had been expressly considered and rejected during the NPS

²³ This was a challenge by a local resident to the White Moss Landfill Order 2015 which granted development consent for a hazardous waste landfill.

²⁴ The Court of Appeal rejected the Claimant’s argument that the “accepted” or “demonstrated” need in the NPS was purely at a “strategic level” and therefore an assessment of need was still required in relation to a specific DCO application: see [21]-[24].

process. Sales LJ in endorsed the comments of Sullivan LJ in refusing permission on the papers (at [11]):

“The two stage process was introduced by the 2008 Act in order to avoid precisely the outcome which this appeal seeks to achieve: the reopening at the second (examination by the panel) stage of the process, of alternatives to the option (in this case the tunnel) which has been adopted by the Government in the first (NPS) stage of the process. The provisions of the 2008 Act must be interpreted with the underlying objective of having a two-stage process for NSIPs in mind. Although the Claimant focuses upon the terminology of the final sentence of paragraph 16.25 of the panel's report (paragraphs 24 and 25 of the judgment), there was, in reality, no other way in which the panel could reasonably have exercised its discretion under section 87(3) given the statutory objective - to settle strategic alternatives at the first stage - and the flagrant conflict between the ‘no alternatives to the tunnel’ policy set out in the NPS (paragraphs 8 and 9 of the judgment) and the ‘alternatives to the tunnel’ put forward by the Claimant.”

43. The attempt to reopen and examine the strategic merits of having the Thames Tideway Tunnel at all therefore failed.
44. The Divisional Court in *Spurrier* emphasised that the decision in *Blue Green* does not mean that alternative schemes to that proposed in the NPS can never be considered. The decision is limited to situations where an alternative has expressly been considered and rejected at NPS stage: at [106].
45. Further, a change of circumstances since the designation of an NPS does not alter the position in respect of the representations which can be disregarded: see *Spurrier* at [107]-[108]. This does not mean that a change of circumstances cannot be taken into consideration when assessing the adverse impacts of a particular DCO proposal (see *Spurrier* at [109]) but it cannot be used to challenge the merits of the NPS itself. Where there is a concern regarding the merits of an NPS due to a change in circumstances then the only option is to seek to bring this to the Secretary of State's attention and invite them to review the NPS: see *Blue Green* (CA) at [14].

INTENSITY OF REVIEW

(1) NPSs

46. The proper approach for the court to take in relation to the standard of review in challenges to an NPS was a key issue before the Divisional Court in *Spurrier*. Some preliminary principles are set out at [141]-[184] of the judgment. There the Judges explain

that the standard of review will be dependent on circumstances of the case (at [147]). The factors to be taken into account include (at [151]):

- (1) The nature of the decision under challenge e.g. the level of political judgment involved, whether it is based on technical expert assessments etc.
- (2) The nature of any right or interest the decision seeks to protect.
- (3) The process by which the decision was reached.
- (4) The nature of the ground of challenge e.g. whether it has been addressed in Parliamentary process.

47. The Court also noted that the nature of NPSs means that they are likely to contain a wide “spectrum” of policy decisions. This in turn bears on the intensity of review in three ways (at [181]-[184]):

“182. Does this "spectrum" analysis have any additional bearing on the intensity of review? We consider that it may do so in three ways. First, it may require the court to apply "considerable caution" to challenges on matters of judgment (see, e.g., *SG* cited at paragraph 161 above). Second, depending on the nature of the ground of challenge, it may affect whether that ground is made out. Third, if a ground of challenge is made out, it may affect the court's approach to the grant of relief.

183. On the second point, some grounds may be of a hard-edged nature, the legal merits of which are not affected by the fact that the ANPS deals with policy-making on a wide spectrum. Examples of errors of this kind could include a misinterpretation of a provision in the PA 2008 governing the exercise of ministerial powers, a complete failure to satisfy a procedural requirement in the statute, or a complete failure to address a legally mandated matter. But other grounds of challenge may relate to subjects which formed part of a mix of considerations in the development of policy in the ANPS. Here, it may be helpful to consider where the target of the challenge lies on the policy "spectrum": the "polycentric" question referred to in *Mott*. This may go to the question of, not only whether an error has been made, but whether a material error of law occurred.

184. On the third point, where a ground of challenge is made out and the question of relief is being considered, it may assist the court to consider where the legal error sits in relation to that policy spectrum, the ANPS and public interest considerations viewed as a whole. This could arise, for example, where the complaint relates to a failure by the Secretary of State to address a subject covered in a consultation response or irrationality in the treatment of a particular subject (see also *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51 at [138] and [156], and *R (Champion) v North Norfolk District Council* [2015] UKSC 52; [2015] 1 WLR 3710).”

48. The Divisional Court considered the impact on the standard of review of the fact that there had been Parliamentary scrutiny and approval of the Airports NPS: [168]. The Divisional Court also said:

“179. For our part, we consider *Mott* is a helpful reminder of well-established good law: the court should accord an enhanced margin of appreciation to decisions involving or based upon "scientific, technical and predictive assessments" by those with appropriate expertise. The degree of that margin will of course depend on the circumstances: but, where a decision is highly dependent upon the assessment of a wide variety of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament), the margin of appreciation will be substantial. That will be a potentially important consideration when we examine some of the grounds of challenge, which do relate to matters of technical judgment and expertise, modelling and predictive assessments, some of which were made by independent expert bodies or by the Secretary of State assigned to make such assessments on the basis of expert evidence.

180. We also accept Mr Maurici's submission that, by analogy with *R (Prideaux) v Buckinghamshire County Council* [2013] EWHC 1054 (Admin); [2013] Env LR 32 at [116], the Secretary of State was entitled to attach great weight to the reports of the AC, particularly the AC Final Report. That is consistent with *Mott*. The AC was an independent and expert body, which had been specifically instructed to examine the extent to which there was a need for additional airport capacity, and if so how that need should be met. It comprised a panel of independent experts, which in turn commissioned and relied upon a great body of independent expert surveys and analysis.”

49. In addition to these preliminary comments the Divisional Court considered in detail the proper standard of review in relation to the SEA and Habitats grounds in the case: see [344]-[352] (SEA) and [401]-[435] (Habitats). The Court agreed with the approach taken by Jackson LJ in *R (Mynydd y Gwynt) v SSBEIS* [2018] EWCA 231²⁵ at [8], itself following the decision in *Smyth v SSCLG* [2015] EWCA Civ 174, at [78]-[81], namely that the standard of review by the court is *Wednesbury* rationality and not a more intensive standard of review.²⁶ This finding is being

²⁵ This was a challenge to the refusal by the Secretary of State to grant a DCO in respect of a windfarm close to the Elenydd Mallean SPA. The key issue in the case was the likely effect of the proposed development on the red kite population in the SPA due to risk of collision with the turbines.

²⁶ However, these comments were obiter, as the Divisional Court held that, even applying the more intense standard of review argued for by the Borough Claimants the SEA and Habitats grounds would still fail: see [353].

challenged on appeal ²⁷ and there is also a complaint before the Aarhus Compliance Committee alleging that *Wednesbury* review does not satisfy Article 9 of the Aarhus Convention.²⁸

(2) DCOs

50. There appears to have been less controversy in relation to the standard of review appropriate in examining DCO decisions. The principles were agreed by the parties in *R (Mars Jones) v SSBEIS* [2017] EWHC 1111²⁹ and summarised by Lewis J at [47] of his judgment:

“In essence, the courts must read the decision letter, and the report which it adopts, in good faith and as whole: see *South Somerset DC v Secretary of State for the Environment* [1990] 1 P.L.R. 80 at page 83E-F. The issue is whether the decision maker in his decision “leaves room for genuine as opposed to forensic doubt as to what he decided and why” (per Sir Thomas Bingham M.R. in *Clarke Homes Limited v Secretary of State for the Environment and East Staffordshire District Council* (1993) 66 P. & C.R. 263 at pages 271 to 272). It is not the court’s task to read into decisions something more coherent or less legally vulnerable than, on a fair reading, is contained there but equally it is not for the courts to strike down a decision which

²⁷ One issue the Court of appeal will be considering in *Spurrier* is the CJEU decision in *Craeynest and others* (C-723/17). The Opinion of Advocate General Kokott in that decision seemed to question whether the EU standard of review of “manifest error of assessment” (which is broadly equivalent to *Wednesbury* review, as explained in *Smyth*) is good enough in cases where what is in issue is compliance with a directive aimed at protection of the environment. The Advocate-General provided little if any assistance though on what the standard of review should be if not manifest error of assessment. Thankfully the CJEU did not endorse the Advocate-General’s analysis at all: see [46]-[54] of its judgment. The meaning of this judgment will be argued over in the *Spurrier* appeal but it seems clear that the CJEU is saying that the standard of review is a matter for domestic courts, even if the case concerns an environmental protection Directive. This means that domestic procedures for safeguarding EU environmental rights will be subject to the usual tests that they do not render decisions on environmental issues excessively difficult to challenge (principle of effectiveness) and are not less favourable than those governing similar domestic situations (principle of equivalence). Beyond that this is a matter for domestic law.

²⁸ This follows on from a comment made in <http://www.unece.org/env/pp/compliance/compliancecommittee/33tableuk.html> that *Wednesbury* might be insufficient. The case is being heard soon but there is unlikely to be a decision for some time. Frankly the views of the Aarhus Compliance Committee on this matter are bizarre and reflect a poor understanding of how *Wednesbury* review actually works. It would be open to our domestic courts to reject the views of this Committee; and in our view they should if it is concluded that *Wednesbury* review is in some way incompatible with Article 9 of the Aarhus Convention.

²⁹ This was a challenge to the North Wales Wind Farms Connection Order 2016 which granted development consent for 17.4km of above ground electricity line. The line was to pass close to Berain farm which encompassed a number of Grade II listed buildings and was brought on three grounds: (i) failure to have regard to determine the application in accordance with the NPS; (ii) failing to consider whether it was necessary and proportionate to grant powers to extinguish private rights in perpetuity in relation to compulsory acquisition powers; (iii) failure to give adequate reasons.

could have been better expressed if it is intelligible and free from error (see *First Secretary of State v Sainsbury's Supermarkets Ltd.* [2005] EWCA Civ 520 at paragraph 24). The courts will, in general, be concerned with considering the report and the decision letter and it is not appropriate to subject those documents to the kind of scrutiny appropriate to the process of interpreting a statute or a contract and, as the letter is addressed to parties who will be well aware of the issues, it is not necessary to address every argument relating to each matter (see *Seddon Properties Ltd. and Another v Secretary of State for the Environment* (1978) P. & C.R. 26)."

51. In *Scarisbrick Cranston J* noted the requirement in section 104 of the 2008 Act that the Secretary of State "have regard to" any relevant NPS and that he must determine the application in accordance with any such NPS unless one of the relevant exceptions apply. He confirmed that the weight to be given to the need identified in the relevant NPS is a matter of planning judgment for the decision-maker subject to challenge only on the basis of *Wednesbury* irrationality: see [62].

30th September 2019

The above views are those of the authors alone.