

Airports NPS litigation: lessons learned

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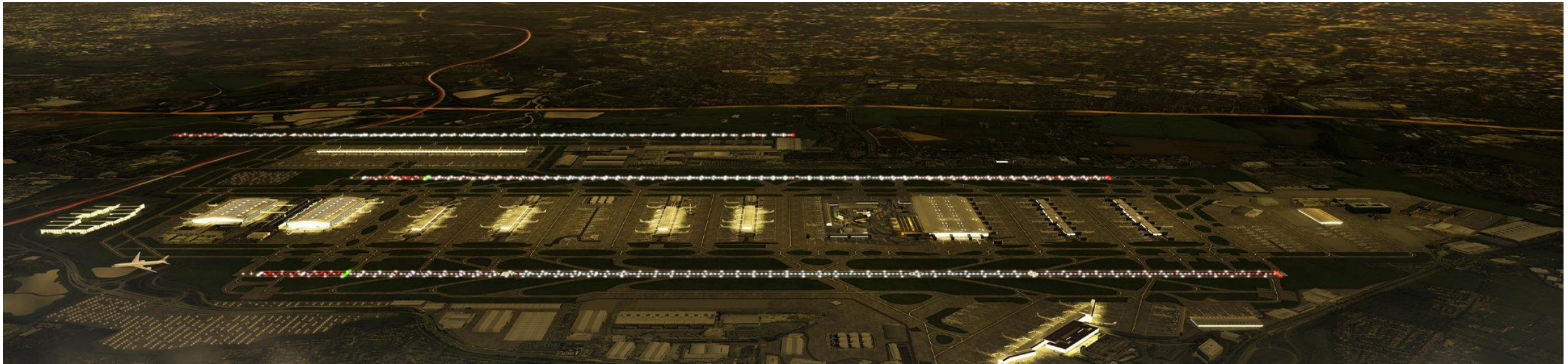
Overview

- Current position in litigation
- Background
- The nature of the litigation
- Key points from the judgments
- Wider lessons

Current position

- Airports National Policy Statement (“ANPS”) adopted in June 2018 and subject to 6 claims for judicial review
- 1 claim refused permission and marked “totally without merit”
- 5 claims listed for 10 day “rolled up” hearing
- Divisional Court heard claims in March 2019
- Two separate judgments handed down 1 May 2019 dismissing claims
- Court of Appeal will hear 4 appeals over 6 days from 17 October 2019

Background



Background (1)

- Long history of debate over Heathrow expansion
- Arguments played out at length in the Terminal 5 Public Inquiry – the stimulus for the PA 2008 regime
- Airports Commission launched in 2012 to “examine the scale and timing of any requirement for additional capacity to maintain the UK’s position as Europe’s most important aviation hub”
- AC Interim Report (March 2013) concluded that there was a need for new capacity by 2030 and that there was a “clear case for one net additional runway in London and the South East, to come into operation by 2030”

Background (2)

- AC shortlists three schemes in November 2014: Heathrow North West Runway (“NWR”); Heathrow Extended Northern Runway (“ENR”); Gatwick Second Runway (“G2R”)
- AC publishes final report in July 2015 concluding that NWR the “strongest option” but that it would require a significant mitigation package
- SST in December 2015 stated that it accepted case for expansion and would proceed to the designation of an NPS

Background (3)

- October 2016 Government announced its “preference decision”, accepting the principle of the NWR
- Challenge to preference decision dismissed by Cranston J on basis of s 13 PA 2008
- February 2017 – consultation on ANPS launched
- October 2017 – second round of ANPS consultation
- November 2017 – March 2018 – Transport Select Committee inquiry

Background (4)

- June 2018 – final ANPS laid before Parliament and debated
- ANPS designated 26 June 2018

The claimants

- The Boroughs: five London boroughs, the Mayor, and Greenpeace
- Mr Clarke: litigant in person from Birmingham
- Mr Spurrier: litigant in person from SW London
- Friends of the Earth
- Plan B Earth
- Heathrow Hub

The issues

- Surface access
- Air quality
- Habitats
- SEA
- Consultation
- Climate change
- Bias
- Human rights
- Legitimate expectation
- Competition law
- Reasons

Nature of the litigation

- Multiple parties (including several IPs) and overlapping claims
- Close case management
- Lengthy evidence and further disclosure from SST
- Lots of lawyers!

Key points from main judgment (1)

- Nature of NPSs varies, but in cases such as this there may be a powerful presumption in favour. For NWR, arguments about need are closed off (see especially 98-111)
- The duty to give reasons for the NPS: reasons/rationale for the policy only, not the totality of the reasons or reasons for rejecting consultation responses (119-123)
- Standard of review: degree of scrutiny will depend on the strand of policy under review. However, given Parliamentary scrutiny “the court would be properly cautious in intervening in favour of a challenge that the policy is irrational” (166-167)

Key points (2)

- Standard of review: degree of scrutiny will depend on the strand of policy under review. However, given Parliamentary scrutiny “the court would be properly cautious in intervening in favour of a challenge that the policy is irrational”; showing matters of planning judgment to be irrational is a “particularly daunting task (166-172);
- Little role for expert evidence (173-180)

Key points (3)

- Air quality: no need for policy to set out the legal tests on AQ (and may be misleading to do so) (275-278)
- Habitats: conclusions on “alternatives” in the IROPI test are subject to Wednesbury review (350-351). Those conclusions may have to be revisited at DCO stage, but the ANPS will be an important consideration at that stage (331). For an NPS, a proposed alternative is not a true alternative unless it meets the core policy objectives of the statement (341)
- SEA: the adequacy of the environmental report is judged by the Blewett standard, which itself is an application of Wednesbury. It is question of whether the issue has been considered, not the quality of the consideration (422-434).

Key points (4)

- Climate change: sufficient consideration of the implications to meet the relevant statutory duties; legitimate to conclude that could proceed within the CCA 2008 target; the ANPS expressly requires consideration of compliance with the relevant target at DCO stage (625-632);
- Sustainable development: broader duty in s 10 PA 2008 meant that international commitments were a discretionary consideration – SST was neither required to take them into account, nor to ignore them (646-9)

Heathrow Hub – key points

- In part, ultimately a rationality challenge to the rejection of ENR
- Part of case turned on request that Hub obtain an “assurance” from HAL that it will deliver the ENR if it is designated in the ANPS
- Case failed on the lack of a nexus between the “assurance” sought and the decision to designate the ANPS
- Note the (obiter) findings in respect of competition matters and their *potential* relevance to planning decisions

Wider lessons: policy making

- Use of consultation adviser (Sir Jeremy Sullivan) seems to have guided the consultation process and given it some robustness in the face of legal challenge
- Referring to later assessment of legal compliance at DCO stage (e.g. in respect of Air Quality) on face of the policy helps (although setting out the law does not)
- May need to give detailed evidence in respect of SEA, Habitats etc in defending a site specific NPS

Wider lessons: NPS litigation

- Complexity
- Potential for delay to projects which depend on NPS
- High stakes given terms of s 104 PA 2008

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