Résumé of Judicial Review of Airports National Policy Statement

With notes taken attached

By Neil Spurrier March 2019

This is a thumbnail sketch of the court proceedings. The case was very lengthy with a huge number of documents. There were 13 bundles of some 600 pages each, with a further 4 bundles for the Heathrow Hub claim. There were 10 legal authorities bundles totalling over 6,500 pages in all. Therefore, this is not an authoritative account of the judicial review claims – simply a thumbnail sketch or roadmap of what were each of the claims

There were 5 judicial review claims in all, and some claimants in each case had more than one person/organisation. Each Claimant sued the Secretary of State for Transport but there were a number of “Interested Parties”. An Interested Party is entitled to participate in the court proceedings but as he or she is not a party, they have no direct control of the proceedings and will not have an order made in their favour or against them. Apart from the Government departments, Heathrow and Arora were the main interested parties. Arora are a company that has hotels and land next to Heathrow and wish to participate in the development. They support the building of a third runway but want themselves to pull down the existing terminals at Heathrow Airport and construct a new “western hub” on the west side of the airport next to the M25. The western hub would include all terminals and passenger facilities, thus putting all terminals within one development.

**The Claimants in each case were:**

1. The London Boroughs of Hillingdon, Richmond, Wandsworth, Hammersmith and Fulham, Maidenhead and Windsor BC, Greenpeace, Mayor of London. There were three Interested Parties who were Heathrow, DEFRA and TfL. TfL took an active part in the proceedings and were very helpful. These claimants I call “the Boroughs”
2. Friends of the Earth “FoE”. Heathrow were an Interested Party
3. Plan B Earth “Plan B”. Heathrow and Arora were Interested Parties
4. Neil Spurrier “Neil”. Heathrow and Arora were Interested Parties. Papers were also served upon Gatwick, who did not respond, and Heathrow Hub/Runway Innovations, who started their own proceedings
5. Heathrow Hub/Runway Innovations “HHL”. Heathrow and Arora were Interested Parties

There was a sixth claimant, a Mr Clark, who was not granted permission to proceed. He did speak to me and told me that he lived away from Heathrow, somewhere in the Midlands. He started his JR claim on the ground that there was no financial merit in expanding Heathrow. The Judge would not allow his claim to continue. Permission for each of the remaining claimants to bring their judicial review claims was postponed to a “rolled up” hearing – in other words permission would be dealt with at the same time as the main trial. The trial has now finished, and the Judges have still not commented on permission. We presume that it will be dealt with within their written judgment.

Neil was the first to issue his court claim and so, in the list of claims, his name comes first – the claimants are listed in order of issue.

All the cases were heard together although not formally amalgamated. The first court hearing was in October 2018, when detailed directions were given including all claimants having to re-draft their claims to shorten them. All claimants were instructed not to duplicate claims so that the same thing was not said more than once. Neil was ordered to be led by the Boroughs, save on climate change where he would be led by FoE (in practice Neil worked far more closely with Plan B). The Judge ordered that each claimant could cross refer to the evidence of other claimants, should they wish to do so.

**One of the Government’s early defences was Parliamentary Privilege.** Parliament is supreme in English law and the courts cannot challenge Parliament. **Not only that, parties to a case cannot rely upon opinions expressed in Parliament.** The reasoning is that anyone seeking to rely upon anything said in Parliament might put his opponent at a disadvantage since the opponent might not be able to reply without criticising Parliament. Therefore, **opinions expressed in parliament cannot be submitted in evidence.** **All the assurances and representations of Grayling were therefore off limits as was the evidence given to the Transport Committee.** The proceedings were served upon the speaker’s counsel for speaker’s counsel to respond and some of the material was objected to. **One thing that the speaker did not object to was the Government’s responses to the Transport Committee recommendations, since these were published in a separate document outside Parliament**. As a result, all claimants including Neil came to an agreement with the Speaker and the cases proceeded with minor deletions to the statements of claim. The Government continued to object but the Court went ahead and heard the cases upon the amended documents agreed with the Speaker. Parliamentary Privilege dates back to the Bill of Rights 1688 being contained in Article IX.

**The Claims and the grounds of challenge:**

1. **The Boroughs**

Their grounds for challenging the Airports National Policy Statement “ANPS” were:

1. **Surface access;** the Boroughs claimed that the Secretary of State “SST” had grossly underestimated the demands upon the road access and that this would have serious and damaging consequences. In addition, the demands upon the public transport upgrades had been underestimated. TfL and the Mayor joined in this. **The Government disputed the claim saying (as it did with many of the other claims) that all the Government had to do was show that the scheme “could” be delivered on the estimates. Everything else could be dealt with at Development Consent Order “DCO” stage**. Various errors were set out by the Boroughs.
2. **Air Quality;** the Boroughs claimed that the air quality would continue to breach the EU limits as it does now. This was even more likely as the surface access demands had been underestimated by the SST. The SST relied upon the analysis of WSP, who carried out the Appraisal of Sustainability and who claimed that by 2026 the air quality could be compliant although they assessed the risk of non-compliance as “High”. There was a dispute as to the meaning of “High”. The Mayor’s counsel, Ben Jaffey QC, claimed that the text set it out as an 80% risk. The Government retorted that the 80% applied to risk factors and that WSP had set out a probability of compliance, not a risk factor. The probability of compliance was that air quality would be within 10% of the limit. The court did not make a finding of who was correct, and it is not clear what the difference might be. The SST’s proposed mitigation measures were challenged by the Boroughs
3. **The Habitats Ground**; the EU Habitats Directive provides for the protection of various species of animals, birds and plant life. There are various degrees of protection but in essence, the presence of a protected species restricts or prevents development. Major projects should have an assessment of habitats and consider alternative sites. An initial assessment predicted that there might be a rare species of orchid in the Mole Gap, which would prevent the development of the necessary accessway to Gatwick with a second runway. Gatwick would not be an “alternative site” therefore. Gatwick Airport did a survey, which concluded that it was extremely unlikely that such orchids did exist in the Mole Gap. Gatwick’s analysis was put to the SST’s advisors, WSP. WSP concluded that Gatwick were probably correct and that the orchids did not exist after all. That meant that from being excluded as an alternative to Heathrow on habitat grounds, Gatwick was back in the frame as an alternative. At the time that WSP responded that orchids probably did not exist, the SST altered the importance of the hub status requirement, so that from a hub being one of the desirable factors as set out by the Airports Commission, hub status now became critical to the SST’s plans. Being a critical requirement Gatwick ceased to be a viable alternative to Heathrow under the Habitats Regulations, since it did not have a vital requirement – namely hub status. This ground of the Boroughs is that the hub status was not a genuine requirement, but rather a ruse to get Gatwick excluded. **There were chuckles in the Courtroom** after the submissions of Ben Jaffey QC, on behalf of the Mayor, at the thought that the whole ANPS might be quashed because some non-existent orchids, that were thought might be in a place, were not in fact there!
4. **The Strategic Environmental Assessment** – “SEA” ground; it was claimed that an insufficient strategic environmental assessment was carried out. An **Environment Impact Assessment** is something less and does not go into the required detail set out in the SEA Directive. **Insufficient screening analysis was done, and the effects of noise were insufficiently studied,** it was claimed. Part of the SEA (as well as a principle in public law for large projects) is the **“Precautionary Principle”.** The “Precautionary Principle” implies that there is a social responsibility to protect the public from exposure to harm, when scientific investigation has found a plausible risk. **These protections can be relaxed only if further scientific findings emerge that provide sound evidence that no harm will result.** The Boroughs, Plan B and Neil have all referred to this in their Skeleton arguments and submissions.
5. **Consultation failings;** it was claimed that the SST had made up his mind prior to the consultation and that the consultation was therefore not in accordance with required procedures and objectives. That includes a set of principles called the **“Gunning Principles”** (a consultation must be carried out properly and with an open mind with due consideration to the responses)

**2. FoE**

a) Their **first ground** was that the ANPS did not explain as required how it took account of climate change

b) Their **second ground** was that the ANPS breached the duty to contribute to sustainable development and in particular the duty “to have regard to the desirability of mitigating and adapting to climate change” cannot be limited to simply an analysis of how the ANPS policy relates to existing policy and legal obligations. The details in their claim included a complaint that **the SST had failed to take into account the Paris Agreement (Paris does not provide for a target greenhouse gas reduction in the way that Kyoto does as also does our own Climate Change Act 2008. Rather, Paris provides for a target warming reduction to 2° above pre-industrial levels with a preference for 1.5° level. That 1.5° level was subsequently uprated to a necessity by the IPCC (The Intergovernmental Panel on Climate Change)).**

c) Unlike Plan B, FoE conceded to the Government that the Climate Change Act 2008 does not require us to operate to reduce to 1.5°, but that Paris needed to be considered in order to comply with the Planning Act 2008 requirements

**3. Plan B**

**Plan B also considered climate change but went further than FoE arguing that it was now government policy that warming should be restricted to 1.5°.** They referred to various statements of Government in support of this. With this in mind they argued that:

1. The ANPS was ultra vires (beyond the powers of the SST) since **it failed to explain how the development would be carried out within the Government’s anti-climate change policy**.
2. As a result of the above they claimed that the ANPS was irrational **(irrationality is a public law ground for challenging an executive decision)**
3. The third ground was that the resulting damage to the earth and suffering to people was **a breach of human rights.**

The reasoning of the Paris Agreement was explained in detail together with the legal basis and the Dutch case of The Urgenda Foundation v. Kingdom of the Netherlands, District Court of the Hague [2015] was considered

**4. Neil**

There were a number of grounds:

1. **Failure in consultation** and in particular failure to consult the public and **failure to take account of the recommendations of Parliament through the Transport Committee.**
2. **The ANPS was biased** since it followed the Airports Commission, which was itself biased as its chair person, Sir Howard Davies, was right up to his appointment an employee of one of Heathrow’s biggest shareholders. Neil also argued that **the decision to choose Heathrow was illogical since it did not give the most value when calculated using the Government’s webTag analysis**
3. The extra **noise** and pollution would be a breach of human rights
4. The **extra pollution would breach the EU Air Quality regulations**
5. Expansion would **breach our climate change obligations** and the SST had not explained how the policy would take account of climate change and the SST had not had due regard to climate change. Part of the ground was that there was **no allocation of possible greenhouse gas emissions between the south east and all the regions**

 In order to fall into line with others, Neil restricted his arguments to:

* Air Quality rules being breached **by emissions from aircraft themselves** and this not being considered at all following Caroline Low’s admission **that the Government did not take account of Ultra Fine Particles.** This was developed to include the DEFRA report on Ultra Fine Particles “UFPs” and the three studies mentioned in the DEFRA report (Hudda, Keuken, and Riley). No one else considered emissions from aircraft. Neil referred to the Precautionary Principle and the **failure of Caroline Low to find out about UFPs, while at the same time ignoring them from the modelling of emissions that she carried out** – effectively finding on behalf of the Government that UFPs from aircraft do not exist.
* **Bias due to Sir Howard Davies’ prior position** with the Heathrow shareholder
* **Noise at night and the WHO guidelines** versus the Government’s recommendations and SoNA, and also the difference of the night-time LOAEL of 40dB (WHO) and 51dB (DfT/SoNA). That represents a 360% in noise events
* The absence of any comparison table for allocating greenhouse gas emissions budgeted throughout the whole country
1. **HHL**

HHL’s claim was on competition grounds. They claim that the SST acted irrationally in choosing the north west runway scheme “NWR” rather than the extended runway scheme “ENR”. ENR, they claim is much cheaper and easier to deliver than NWR. They also claim that for the ENR scheme to be considered, the SST required Heathrow to give a guarantee that Heathrow would procure the ENR, if the Government chose ENR instead of NWR. Heathrow refused to give such a guarantee and consequently the ENR scheme got no further. HHL claim breach of competition law

**Defences**

**Secretary of State “SST”**

Needless to say, the defences were extremely lengthy and detailed. **Essentially though, the SST’s defence centred around the concept that the NWR scheme is “potentially” deliverable. The details could be dealt with at DCO stage. The claimants were of the view that, in practice, once into DCO stage, the likelihood of a successful challenge might be remote**. Nigel Pleming made the point that residents were getting increasingly frustrated with this. Firstly, when they brought their previous claim, they were told by the Court to wait until the ANPS to bring judicial review proceedings. Now the SST is submitting that they should wait again until the DCO stage. All the while residents in the compulsory purchase area do not know whether they can challenge or not. Briefly the SST’s counsel responded as follows:

**Surface Access:** reliance was placed upon the Appraisal of Sustainability [AoS] and the associated documents which were positive

**Air Quality**: again, reliance upon the air quality analysis and the potential for deliverability, which is all that was required

**SEA grounds:** similar

**Habitats:** unsurprisingly the QC for the SST argued that the hub status requirement was a policy decision of the Government which it was perfectly entitled to take. It was nothing more than a coincidence that the timing was similar to the time that the Mole Gap was assessed not to be the habitat of rare orchids. The Judges appeared sympathetic to this, but Ben Jaffey QC, with a masterstroke, reminded the judges that **the later updates for the air quality analysis and Appraisal of Sustainability still had both Gatwick and the ENR as alternatives for assessment, so surely they had not been excluded?!**

**Consultation**: denied that the SST had a closed mind. Claimed that he was entitled to have an opinion. Evidence of very extensive consultation, QC submitted.

**Climate Change:** James Maurici QC submitted that **the Paris Agreement was an informal international agreement and had not been adopted into national law**. It was not part of the Climate Change Act nor the Planning Act and therefore the SST was not obliged to have regard to it. **Whether right or wrong in law, that is the most astonishing submission from any Government that has any concern over climate change. Where it leaves us is a little uncertain. Plan B argued that as it is part of Government Policy then it is covered by the Planning Act**

Neil, other claims: The SST declined to acknowledge any of them as having any merit. Indeed, James Maurici QC declined to respond to Neil saying after Neil’s oral submissions saying “If I need to, I will come back to that on Monday morning, but beyond that, I won't be dealing separately with the submissions of Mr Spurrier. In my submission, his claim is unarguable and should be refused permission because it is **simply challenging expert judgments**.” The Judge did invite James Maurici QC to comment saying “Just one question from me, or really a matter that we just want to make sure whether you wanted to comment on this or not. There is a submission made by Mr Spurrier at the end of his submissions, and it was really in relation to where is there evidence that the Secretary of State took into account other carbon producers. He specifically referred to regional airports, but it would include anyone who had a carbon output, in coming to the conclusion that Heathrow could be expanded in accordance with the scheme to achieve the Paris targets.” He did respond to that the following day, albeit in a fashion that Neil submitted to the Judges did not deal with the complaint satisfactorily

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**Format of the Court Proceedings**

* Claims issued within 6 weeks of the designation of the ANPS with statements of claim setting out the grounds of complaint
* First hearing in October 2018. Detailed directions given
* Pre-Trial review in January 2019. Review of position and further directions
* Skeleton Arguments filed shortly before trial. A “Skeleton Argument” is a summary of the submissions. It should not refer to any ground or matter that was not in the original claim
* Court Hearing with submissions made. There are no witnesses called or cross examination

**Order of Oral Submissions**

The Boroughs

FoE

Plan B

Neil

SST in response

Heathrow in response

Arora in response

HHL

SST in response

**Legal representation**

The Boroughs, the Mayor: solicitors Harrison Grant. TfL: in-house legal department. Counsel Nigel Pleming QC (39 Essex Chambers) for the Boroughs. Counsel Ben Jaffey (Blackstone chambers) for the Mayor and TfL

FoE: solicitors Leigh Day. Counsel David Wolfe

Plan B: Tim Crosland is the director of Plan B and did the litigation.

Neil: Litigant in person

SST: solicitors were the Government Legal Department. Counsel: James Maurici QC.

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**Some notes taken by Frances Spurrier from the back of the Court during the trial**

**Day 3**

Notes from the back of the Court.

Spurrier & others v. Sec of State

In the High Court of Justice

 Queen’s Bench Division

Divisional Court

Before Holgate J and Hickinbottom LJ

Day 3 Wednesday, 13th March

Submissions of Counsel for Friends of the Earth

Post Paris considerations. Non CO2 emissions. Volume 13, Tab11 p119

Climate Change Committee 2009 report.

It is in the Statement of Common Ground (Volume 6) that non-CO2 emissions have significant impact. SST response is to say that they are uncertain. We say this is not a basis to exclude them.

Climate Change Committee January 2018 Appraisal of Sustainability 16 year appraisal period.

Ground 3 Strategic Environmental Assessment Directive

SEA Directive League Materials Tab 19

 Article 174 of the Treaty Precautionary approach. Discussion over meaning. Report shall include such information as may reasonably be required.

Annexe 2

There is a Requirement to assess alternatives. Shadwell Estates Para 97

SS has said Evaluation in Bundle 1, TAB 17 p520 Para 75-76

Consultation Response.

Inclusion of Paris Agreement in Appraisal of Sustainability. SST does in skeleton argument. AoS scoping report.

Doesn’t say anything about Paris or why it wasn’t included. No mention of Paris or evaluation of why it wasn’t included.

Appendix A to Scoping Report mentions climate change & Kyoto. Appendix to Scoping Report p2-8List of range of documents

CCCs advice re Caroline Lowe’s witness statement. Can’t explain evaluation of scoping inconsistent on time basis.

Is there here an evaluation which stands any scrutiny whatsoever?

On the ‘don’t need to do it now’ (re Climate Change Committee) point. Longer term/wider reach. Whether through prism of s10 or SEA they needed to go beyond obligations.

AoS High degree of uncertainty re emissions. The Climate Change Committee has said that the Climate Change Act could be compatible with Paris.

Submissions of Tim Crossland, Plan B Earth

S12 Climate Change Act Actions and investment needed to meet Paris agreements. Paris is key aspect of UK policy relating to climate. Paris agreement was to keep global temperature rise 1.5C degree within pre-industrial levels – not 2.0C. This has been the lynch pin of Government policy since 2015. SST was bound to take this into account. Rationality.

2 degree target has been rejected by 195 Governments since 2015. The Secretary of State presents us with a defence but does not defend second proposition (presume 2 degree)

Carbon trading 50% gigatons of carbon for 1.5 degree. Graphic showing carbon rise in proportion to economic growth across various countries. Carbon budgets produced by IPCC. Traffic lights. Represents what the world has to do collectively. A particular country has to be consistent with global trajectory. UK’s fair share of global target. Complexity about how you divide up the global budget.

The challenge for individual countries is to relate to global target. It is critical to know what temperature we are aiming towards, 1.5º or 2º There isn’t a third way. 2º degree or Paris.

Paris is an international commitment. Lord Justice Hickinbottom observed that Parliament has set domestic law obligations in the terms that it has. Domestic mitigation. Adaptation.

 Plan B responded you should review domestic legislation to bring it into line with international commitments.

There is a review by Climate Change Committee currently under way. The CCC is due to report in May.

Mr. Justice Holgate asked re meaning of ‘adaptation’. What level of heat do our roads and runways have to deal with?

Plan B There is a danger of setting precedent which says 1.5º or 2ºis irrelevant. 2º is an historic, discredited target. Assuming a 2.0 temperature rise it will not be unusual to have temperatures of 50 degree days by mid-century.

SST tells us on the one hand it is vital to limit global warming to 2º. On other hand 63% - 99% chance of exceeding according to Climate Change Committee.

Government Report of 2018 – Without significant reductions in emissions we may reach 5ºC by the end of the century. Beyond the point of extreme danger. Beyond 2º climate change becomes irreversible and catastrophic.

Risks of CC disaster – food price spikes, large scale migration, state failure. CC grave threat to international security.

Even in 2016 there was evidence from CCC that whole world going to have to reduce carbon to zero.

Paris is likely to require greater ambition we must retain flexibility. Gov 25 year plan to improve the environment in 2018. Paris substantially increased ambition for global emissions reduction.

Foreign & Commonwealth office said climate change is an existential threat also an opportunity to drive global revolution.

Government said to CCC: How will we get to net zero carbon economy by 2050?

LJH said mechanism within CC Act for changing aims under act. Requires consultation.

Plan B consultation on ANPS

Gov response page 530 is wrong. Commitment is below 1.5º. Efforts is below 2º Makes it appear Paris not considered relevant. People had no chance to make submissions.

UK legally binding commitment under the CC Act and Paris. CCC have made it clear that in their view Paris is relevant and publicly expressed their surprise at SST failure to mention.

On this SST said: ‘Can’t be expected to cover every detail.’ Telling in respect of GOV attitude to climate change.

SST said in email ‘Paris irrelevant’ Holgate J said the Defendant would need to clarify what was meant by that.

Plan B – after this protracted process the first time we discover is in SST witness statements that a conscious decision has been taken not to include Paris temperature limits (1.5º) against ANPS. SST says Paris agreement not legally binding. SST didn’t ask whether ANPS consistent with greater ambition for 1.5º i.e. that global net zero carbon emissions by 2050 that’s the implication of the Paris Agreement.

Mayor ambition for London zero net carbon by 2050 so it’s very unclear why the SST is in such a different position. Does SST have even half an ear as to what is going on around him. 35,500 million tonnes of carbon. How is that consistent with net zero carbon by 2050. This is a question SST needed to ask but didn’t.

SST defines Gov policy as meaning only obligations which ae legally binding on the Gov. SST says Paris not legally binding. Doesn’t impose specified temperature on UK.

Plan B – Policy and legal intention are two different things. ‘Policy’ dictionary definition: A course or principle of action adopted or proposed.

Hillingdon 2010: Planning assumptions not legal obligations. But Judgement in Hillingdon said significant developments in policy. Clearly matters will need to be taken into account in Government ANPS.

The 2º target is not in any legislation yet SST refers.

Paris agreement is fundamental principle not detail. If it is irrelevant to ANPS it is also irrelevant to DCO stage.

Foreign Office has described Climate Change as existential threat. How can that not include

Human rights? Once we acknowledge threat of CC is threat to human rights, it takes away discretion to act inconsistently with Paris.

Rationality

Clean Growth Strategy – Landmark agreement. Foreign Office said other countries to implement.

Major National project has implications for emissions for many decades to come.

Parliamentary role – statutory provision. Where there is tension between policy and climate change policy must bring it to the attention of Parliament.

Parliament must have proper context for its decision

Appropriate relief. Plan B submission that no properly constituted ANPS so should be quashed.

**Day 4**

Notes from the back of the Court.

Spurrier & others v. Sec of State

In the High Court of Justice

 Queen’s Bench Division

Divisional Court

Before Holgate J and Hinkinbottom LJ

**Thursday, 14th March**

NRS Would like to address points in skeleton argument then air quality.

Much discussion on whether this should be DCO or ANPS. The Hillingdon claimants have made substantial submissions on this. I would like to record my position that the ANPS must give consideration to what is or is not sustainable. This is particularly so for air quality, noise and climate change.

S10(2) of the Planning Acts development must be sustainable.

If ANPS not contribute toward sustainable development, then it should fail. The DCO process has already started. If you look at the national planning inspectorate website There are 13 pre DCO documents already.

Air Quality

Grounds 4 and 5 of claim. The Hillingdon claimants have dealt at length with law on surface access. I would like to deal with emissions from aircraft themselves. It is as I understand it the SST case is that they have little effect and indeed. Heathrow has stated in meetings with us that they have little effect.

I refer to Jacobs report confirmed by Ursula Stevens & Caroline Low (Expert Witnesses for Sec of State) that estimates of populations affected by air quality are within 2 kilometre radius round the boundary of the intended airport.

SST appears to make light of my claim. He says ‘much ink has been spilt on this’. My lords, bad air quality, below legal standards, spills a lot more than just ink.

If I am correct that there are substantial emissions from planes - and I will come to three studies which I say show that there are – then many other analyses become infected with this error. Webtag costings, Appraisal of Sustainability, Health Impact Analysis etc.

Breaches of the law not merit. DEFRA has referred to. Emissions clarified as nitrogen dioxide and particulates. Particulates divide into PM 10s PM 2.5 and ultrafine particles. PM2.5 is particulate matter which passes through a size3 selective inlet. My submission that ultrafine particles pass through so are included in PM2.5

Caroline Low’s statement Para 14, 311 refers ‘almost no impact’ and negligible impact

Ursula S says that the 2km study area was appropriate in context of human health. But Volume 13 Tab 7 Page 75 p 86 in bundle Definition of UFPs UFP are believed to contribute to toxicity but their contribution is unclear.

Abatement policies – there are no standards for particulate matter. Policies and actions to control ambient PM2/5 and PM 10 will not always control UFPs

Report from DEFRA on UFPs

 Poorly understood UFP emissions sources are affecting UFP exposure

LJH enquired after the date of the document

2018

Shortly after the ANPS but it is a Government document so I would say the contents must have been known, certainly ought to have been known

Health concerns UFP penetrate deep into the respiratory system with potential translocation to the bloodstream. There is a report from Queen Mary’s Hospital that confirms this does happen.

Queen Mary’s Report

First evidence that inhaled pollution particles move to the placenta meaning UFPs pass to the next generation. Caroline Low witness statement said UFPs not the subject of legislation therefore not considered.

Research studies show particulates at 20km and even 40km. Research at Los Angeles shows at least a two-fold increase at 60kms.

At this point Lord Justice Hinkinbottom states that re UFP reaching placenta there is no evidence that UFP’s reach the foetus. Discussion takes place regarding absence of legislation for UFP. Study at LAX includes primary particulates also NOx emissions.

 NRS refers their Lordships to three research papers Hudda et al, Keuken et al and Riley.

Spread of emissions 40 kms away from Schiphol.

NRS refer to Royal college of Physicians Reports of 2016 pp41-64 which shows PM2.5 attributable to mortality rates of 29,000

Noise

Mr. Pleming has spoken on noise levels 51 db and 54 decibels LOAEL and what happens between those two levels.

Even 51 is hugely greater than World Health Organisation recommendations.

It has been made plain that WHO statistics are guidelines only These are guidelines only.

Even by Gov own analysis 2.2 million people newly affected by noise from an expanded Heathrow. Households experiencing increased daytime noise in the forecast year is 972,957. That’s households so if you allow an average household of 2.3 people that gets you to love 2.2 million. The Government’s argument is that for the forecast year households will experience reduced daytime noise of 673,784 so it is not 2.2. million. However, the small print is forecast year which is 2060! The Government has not explained how putting an airport the size of Gatwick as a bolt on to Heathrow you actually reduce noise.

Hoped for technology is unlikely. Current design of turbo fan engine coming to the limits of its ability to reduce emissions. New technology doesn’t exist. I am not a scientist my Lord by the open rotor system allows fuel to burn at a higher temperature and so reduce emissions, but it will be noisier. Reduced noise is up in the air and we are crystal ball gazing.

Minimise Total

Map at Vol 11 p345 shows what minimise total is.

 Flights are shown to fly over the minimum number of people. Flights are directed over Richmond Park and turn left over Hounslow. From North Westminster they are shown going over Brentford and Osterley Park. They don’t do that!! They fly straight. This is not a fair comparison.

Mr. Lotinga (Gov expert witness) says in his first witness statement that WHO guidelines are informative for developing policies. I say they may well be but if they are not achieved what are they there for? Refers to SoNA controlled study of aviation noise impacts. SoNA project is of poor quality involving no research institute input, no medical assessment it had just 2000 respondents and was solely a questionnaire drawn up with Ipsos MORI. The majority of respondents were around Heathrow and suffered noise of 54 LAeq with 100 per cent above 51. That is well above the WHO recommended level.

Night Noise WHO Night Noise Guidelines

Considering the scientific evidence on the thresholds of night noise exposure, indicated by L night outside, as defined in the Environmental Noise Directive an L night outside of 40 decibels should be the target of the night noise guideline to protect the public, including the most vulnerable groups such as children, the chronically ill and the elderly. L night outside value of 55 is recommended as an interim target for countries where the night noise guideline cannot be achieved in the short term.

Volume 13 p7

10 hour quiet periods at night protects 80% of the population.

We are being offered 6.5 hours curfew.

There is plenty of evidence that sleep is a biological necessity and disturbed sleep is associated with a number of health problems.

It is part of the Gov defence that HIA has been carried out. I would point out that HIA (Health Impact Analysis) This is not the same as Health Impact Assessment.

Climate Change

Due regard to climate change is required by sections 5(8) and 10(2) of the Planning Act, the Secretary of State should have regard to the total emissions, greenhouse gas emissions, that any airport expansion of this nature is going to have. Total UK carbon budget. The regions will be left with nothing. But yet we know the regions are expanding. They are expanding now. It is a free for all. Where is the assessment or consideration of where this leaves regional airports?

**Day 5**

Friday 15th March

Notes from the back of the Court

High Court of Justice Queens Bench Division

Divisional Court

Spurrier & others v. Sec of State before Holgate J and Hinkinbottom LJ

Continuing ‘evidence’ of Counsel Mr. Maurici

LJH queried meaning of ‘high risk’

Counsel Mr. Jaffey said that high risk means 80%

I say it means what it means. Head room point.

Limits what Heathrow could do for Central London (emissions) because it makes very small contribution !!!!

Mr. Maurici – public transport mode share

Scheme capable of being delivered to within air quality directive

Response to Mr. Jaffey

Issue 4 – submissions on surface access re update for 2017 revised passenger updates scaled up rather than modelled

Insufficient precautionary approach

Irrational

Shouldn’t have chosen it (NWR scheme) because high risk of non-compliance in air quality terms

But air quality reanalysis – mitigating factors

Unjustified assumptions re mitigation

At the DCO stage s104 applies Habitat Directives. What the law is relevant at DCO stage. Have to comply with the law but policy doesn’t have to set out what the law is. Sec of State will have to decide what he thinks the law is (!!!what happened to Parliament and the Courts) and whether it is complied with.

If dissatisfied, complainants can then ask for JR (oh, goody!)

**Day 7**

Day 7

Tuesday 19th March

Claimants’ Final Replies

Notes from the back of the Court

Counsel for SST hands in replies to NRS points on climate change 10 minutes before Court sits.

LJH asked re: Carbon cap scenario re question raised by Mr. Spurrier

Holgate J said Duty to give reasons.

 NPS must give reasons. SST said we have satisfied this by what was put in the ANPS (hah!) Consultation Response Document. Also, response to the Transport Committee. Also, Appraisal of Sustainability and Habitats Regulation Assessment. These documents were published alongside the ANPS.

Holgate J: Referred to consultation regulations in relation to the duty to give reasons. Please check.

Mr. Maurici (?) – Habitats Directive. Exclusion of Gatwick as not true alternative. Proper approach is to look at what SST did as well as what he concluded.

Mr. Jaffey said this case is an example of defining project narrowly so that alternatives need not be considered.

Risk to Mole Gap conservation? No commission opinion was sought as Gatwick had been excluded. But extent of harm to species has not been identified. There may be no harm at all.

Advocate General’s opinion Para 61. Difference between Environmental Impact Assessment and habitats Directive. Latter is more far reaching. HD is intended for strict level of protection. Holgate public interest considerations whether the alternative qualifies.

In my submission none of that is Wednesdbury. The standard of review is not W’bury.

LJH Where a possible objective does not satisfy it is not an alternative.

Lumsden. Lord Reeve Proportionality analysis in my submission not W’bury.

Friends of the Earth – My Lord’s decision. Wording SEA directive is different ‘reasonable objectives’.

FOE. Hub status – After Gatwick had been excluded on Hub status grounds it continued to be included in the AoS. AoS 2018 Gatwick still be appraised as an alternative. HRA screening explains how alternatives were developed.

Process of sifting. Each sift is included as a criteria. We end up with a shortlist of Gatwick and Heathrow. Gatwick was a credible option right up to that stage.

Detailed economic analysis. Many pages. P132 – reasons for selection. First bulleted arrow, TAB 14 same bundle PT25 reasons for choosing ANPS. Again, Gatwick is considered.

Post Adoption Statement

Says Gov chosen H’row in the light of other reasonable alternatives. Should look at what they are doing rather than what they are saying because Gatwick is considered as an alternative throughout. Reason H’row is preferred does not mean Gatwick is not a credible alternative.

Justice Holgate: These documents are describing a process. AC excluded a large number of options on grounds of sustainability or practicality.

Mole Gap very briefly. Vol 9 Tab 12 p645

Natural England Vol 12 Tab 14 It would be necessary to look at Gatwick later on as may be no harm

Surface access – revised passenger demand forecasts. The only surface access modelling comes from TfL which shows serious problems. H’row says may introduce phasing. This point ran before the AC Vol 11 TAB6 p63 AC adopt modelling TfL not phasing. Much of surface access can’t be phased. No consistency in what SST has put forward as reasons. Once you decide to phase you have undermined one of the arguments for adopting H’row in the first place in my submission.

SST said H’row benefits could be achieved more quickly.

Air Quality

Doesn’t mean can’t develop anything in London! A particular development may cause a breach of Article 13 – not all developments..

Major planning decision by SST EU will issue dissuasive fines.

Types of breach - compliance area tipped over

Make bad area worse

Prolong excess period longer than alternative

WSP report. Maurici says high risk doesn’t mean high probability.

Issue of probability – compliance.

WSP assessment is the SST’s document. SST has approved it is his document.

Vol 8 TAB 5 p241 WSP report. Bottom page 241 para 3.3.13

Identifies plus minus 30% uncertainty range.

95 confidence limit.

Practical examples. Less than 20% of the limit Value

Within 10% of the limit value

Equates to 25% possibility of an exceedance.

H’row analysis p255Mr. Maurici A40 Westway zero % headwind. 50:50 risk.

Caveat Conclusions 56 p265 Risk of an impact decreases over time consistent with real world fall in emissions. We don’t know when decreases will start. All figs assume rail access and do not consider freight. Many vehicles arrive at night. High risk breach of proposed limit value.

DCO flightpaths not yet decided. People will not know until too late whether they are going to be affected. Therefore no true consultation.

Misdescription (ie Maurici/SST) reordering of claimant submissions

Claimants’ position is that in the absence of actual flightpaths should have been CAA together with Dft (not HAL). Don’t want to leave this case without making point Heatrow doesn’t want to see (us to see?) certain documents

Supplemental Bundle 12 TAB 12 p496 Who we will consult LOAEL

Reference to inner ring. It is perfectly possible to draw a circle to show areas of significant effects.

Holgate J. Indicative flight paths?

SST knew where the 3rd runway

Defendant knew that these were not likely to be the flightpaths. (?)

54 contours rather than 51 (noise) contours. Local plans. No detailed documents which to respond to. Failure to consider how homes and jobs will be accommodated in the area.

Closed minds

Essential points of law. Believe SST had a closed mind. Preference does not exclude SST from a fair consultation.

**Mr. Woolf FOE**

A lawfully made ANPS might have been different. For our case nothing turns on Gatwick or H’row. Applicable legal contexts. Paris - Consideration of carbon was not lawfully sufficient.

Some future aviation strategy may come to explain magical compliance. We are dealing with the legality of this ANPS at the time it was made. We say it failed.

Entitled to a lawfully made ANPS. If we were right on our point of law then we would win.

Low CB 4 TAB 1 p286

SST no wider considerations.

Narrow considerations.

Overarching obligation of precautionary basis.

Parliament passed Acts at the same time. Inference Parliament knew interrelationship (ie ANPS and CCA?) CCA targets both in terms of gases.

DCO Stage. Case of Pepper v Hart

This is not backdoor incorporation of the Paris Agreement to enshrine it in law. We are saying enhanced desirability of mitigating climate change.

Non CO2 emissions. 2009 CCC report.

**Plan B Final responses**

Paris sustainable development duty 10.2 of the planning Act SST argues (in response to FoE) no legal foundation for the point that SST must consider impact on future generations.

We note the interrelationship between s10 and the Equality Act.(?) Disproportionate Burden of climate change on the most vulnerable. Poor relationship between young and old who are blamed. We ask the Court to take judicial notice of the School strikes last Friday. Also Antonia Guetteres ‘We no longer have the luxury of time’. Yet SST says no obligation re Paris temperature. Plan B has no position on Aviation other than it should be consistent with climate change.

Costs of adaptation. Flood risk makes homes uninsurable. Costs of adaptation were not considered by SST therefore economic benefits must be treated with caution.

Bundle 13 p252

Vital for future UK security we implement the Paris goals. FCO has said similar. Yet SST says no need to consider. We have made it clear that our claim does not relate to legal enforceability of the Paris Agreement. Nor do we engage in asking the Court to rule on international law. It is a question of fact. Is the temperature limit 1.5 Paris or the historic, discredited 2.0 degrees.

Clean Growth Strategy is published Government policy that has Paris stamped all over it. Straw man point.

Plan B we accept CCAct important component. CC committee said needed to look at both CC Act and Paris. Both in conjunction. DfT has published a document re Paris temperature goal of 1.5. If it is not relevant why commission research on it?

SST can’t hide behind date. It was obvious that Paris agreement had implications for heathrow. It was his choice when to commission it. Target net zero by 2050.

**Neil final response:**

My Lords, thank you very much. I would like to address you on three matters which I dealt with before. In connection with climate change, I would like to refer you to Mr Maurici's note. I say that this gets the Secretary of State absolutely nowhere, and that he is still in default in this obligation. If I may, I'll come to that.

The issues are not whether the technical judgement exercised by the SST is correct. The issues are firstly whether or not the SST has adopted a rational approach and secondly whether he has considered matters which he ought to have considered. In my submission, it is not rational to disregard likely impacts that could have very long and harmful consequences, simply because they have not been assessed

**My previous submissions on Air Quality**

I have produced to the Court 3 well respected research projects that are referred to by the DEFRA Air Quality Expert Group. Their report was uploaded onto their website on the 27th July 2018 – one month and two days after the ANPS was designated. The contents must have been well known before the designation of the ANPS and the specific reports go back to 2014. Just to remind you, the section in the DEFRA report says:

“For example, a location such as Heathrow Airport, where aircraft tend to approach the airport from the east (flying over the London conurbation), there is potential for considerable exposure to UFP from aircraft.”

If I may I will clarify one point about the UFPs raised in my last submission. In the website statement of the Queen Mary’s Hospital report of particulates in the placentas of expectant mothers (at Volume 13 tab 8 page 99), it is said that as yet there is no specific evidence of the transfer of particulates from the placenta to the foetus. However, I would draw your lordships’ attention to the statement that there is actual harm done to the foetus directly from the particulates in the placenta. Transfer from one to the other is not necessary for there to be harm. The release said at page 100 in Volume 13 tab 8 states this:

 “ “We do not know whether the particles we found could also move across into the foetus, but our evidence suggests that this is indeed possible. We also know that the particles do not need to get into the baby’s body to have an adverse effect, because if they have an effect on the placenta, this will have a direct impact on the foetus.”

Professor Mina Gaga, President of the European Respiratory Society who was not involved in the study, said: “This new research suggests a possible mechanism of how babies are affected by pollution while being theoretically protected in the womb. This should raise awareness amongst clinicians and the public regarding the harmful effects of air pollution in pregnant women.

“We need stricter policies for cleaner air to reduce the impact of pollution on health worldwide because we are already seeing a new population of young adults with health issues.”

The “Precautionary Principle” is to apply. We know that there is respected medical opinion that particulates in the body do pass to the next generation. That respected opinion says that there will (not might) be harm to the foetus. We also have DEFRA saying that particulates emitted from planes in the air are likely to be blown downwind away from the point of emission over the population of London. There are three research studies specifically referred to by DEFRA to back this up. Increasing the harmful particulates to the population and to subsequent generations through development would be contrary to the principle of “sustainability” contained in the Government’s own planning policy as set out in the National Planning Framework taken from Resolution 42/187 of the United Nations General Assembly of 1987. That principle is:

“sustainable development can be summarised as meeting the needs of the present without compromising the ability of future generations to meet their own needs”

The SST is not having any regard to the precautionary principle – indeed I would submit that he is operating more of a gung ho principle. He has not acknowledged my claim in respect of particulates and NO2 being transmitted downwind from planes in the air. I pleaded it in para 38 of my ASFG. The SST did not address that part of the claim. I raised it in my Skeleton Argument and again it was not addressed. I have addressed you on it and again the SST has not responded to it save saying that my claim is unarguable. There may be very little he can say.

The SST through his counsel says that I cannot raise this because it is simply challenging expert judgments. I would like to make three submissions on that:

1. The case of *Mott 2016* (Volume 2 Tab 41) that the SST has often referred to, including his defence to my claim. The case states the principle that it is not the function of the Court to form its own view as between the views of different experts in a technical area (para 70 page 4359). However, at para 56 Beaston LJ (page 4355) states that

“The proper time for a public body which is a defendant in judicial review proceedings to explain the reasons and justification for a decision is before the hearing of the application for judicial review. It is the duty of such a body to assist the Court with full and accurate explanations of all the facts relevant to the issue the court must decide”

I am not asking the Court to decide between two technical issues. I am saying that a vital piece of information is missing, that the SST should have assisted, and it is illogical to not to take account of the information. Do particulates and / or NOx from aircraft spread downwind flowing into the lungs of people up to 20 – 40 kilometres downwind or not? If not, why not in the light of the research projects referred to by DEFRA? The SST has breached *Mott* by offering no assistance or comment on this.

1. In the case of *Claire Stephenson v Secretary of State for Housing and Communities and Local Government 2019* Volume 2 tab 42B (fracking case) Dove J referred, in paragraph 34 of his judgment to a previous judgement of my lord Lord Justice Hickinbottom in *R (Jayes) v Flintshire County Council and Hamilton 2018*  concerning the duty of the decision maker to take all reasonable steps to acquaint himself with relevant information, reciting from the earlier judgment that

“Although any administrative decision-maker is under a duty to take all reasonable steps to acquaint himself with information relevant to the decision he is making in order to be able to make a properly informed decision (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council 1997 AC 1014)* the scope and content of that duty is context specific.”

Whether we are going to be infected with UFPs and NOx blown downwind is very relevant in this context, I would submit. I remind your lordships of paragraph 36 of Caroline Lowe’s second witness statement at page 321 of Volume 4 in which she says:

“Unlike NOX and particulate matter (PM), UFP are not currently the basis of air quality legislation and not the subject of the air quality modelling”

Not precautionary – and indeed wrong in law since they are PM2.5s under the 2008 EU Regulations. Effectively Caroline Lowe says: “I don’t know, I will not enquire, and the answer is nil”.

In Ground 1 in *Stephenson*, the contention was that the Defendant Secretary of State had unlawfully failed to take into account material considerations, in that case certain scientific and technical evidence. That ground was considered to have been made out as, on the evidence of the Secretary of State, relevant material had not been considered

1. In the *Secretary of State for Education and Science v Tameside Metropolitan Borough Council 1997 AC 1014* Volume 2 tab 42A Lord Diplock said, concerning the Secretary of State for Education’s requirement to introduce comprehensive education, at pages 1064 and 1065 sections H and A and B that

“It is not for any court of law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act, he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider………..Or, put it compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly”

In my submission, it is neither rational nor in accord with the dictum of Lord Diplock to disregard these likely very serious health impacts, simply because they have not been assessed. There is an unassessed very substantial risk of harm and the risk of passing that harm onto the next generation. We are at least entitled to be told the truth, I submit. The SST has produced no contradiction of any sort to the evidence of transmission of UFPs and NO2 downwind and the consequential harm. At present the only presumption can be that the evidence referred to by DEFRA is correct and the ANPS is therefore unlawful for the reasons that have been discussed.

Both the duty of candour and the duty to assist the Court *(Mott)*, should have ensured that the evidence of DEFRA was disclosed, addressed and, if rejected, reasons given.

Counsel for the SST said on Friday (page 138 of the Transcript) quoting from para 6.4.11 from the 2017 PLAN UPDATE TO AIR QUALITY RE-ANALYSIS (Volume 8 tab 5 pages 225 – 286) that

“implementation of RDE (Real Driving Emissions legislation) should minimise the risks that the Heathrow option would impact on the compliance of the Greater London zone in any potential opening year”.

That may or may not be the case. But Heathrow may well be responsible for some of the emissions in central London or the towns and villages to the west for the reasons set out.

**Noise**

As no response has been given by the SST, I ask the Court to find that the WHO Night time limits and sleep requirements are appropriate and that the ANPS is quashed for not providing enough sleep time in accordance with the WHO Guidelines and an unreasonably high minimum noise level of either 54dB or 51dB LOAEL or even the 45dB night-time LOAEL referred to in the Air Navigation Guidance 2017, but which will not be implemented because a night-time ban is not proposed for 8 hours or the 10 hours recommended by WHO for enough sleep for 80% of the population. I remind your lordships of the 11 decibel difference between the WHO LOAEL of 40 dB at night with the 51dB of the DfT and SoNA study research providing 360% more flights at night than the WHO Guidance.

I also remind your lordships of the WHO finding that the risk of heart attack from night time noise rises at 50dB – below the level at which the SoNA investigation stopped even recording. I also refer your lordships to the WHO Guidelines and the “Process of Developing the Guidelines” at page 8 of Volume 13 of the Bundle. Your lordships will see the extensive range of consultees including “stakeholders from industry, government and non-government organisations”. Compare this to the small range of consultees by the CAA with the SoNA survey. Again, Mr Lotinga on behalf of the SST has offered scant assistance to the Court on this huge difference. Again, my lords – the Precautionary Principle and rationality on this vast difference between WHO and DfT/SoNA. It is not rational to have such a discrepancy or to run the risks of extra heart disease on such a wide area of the population. I refer your lordships to the WHO Guidelines on pages 12 to 15 Volume 13)

**Climate Change**

My Lords, you will recall that I mentioned in my submission that there was no apportionment or apportionment table provided in the ANPS to show how the budget, carbon budget or greenhouse gas budget was going to be shared out amongst the regions and London. The Secretary of State has emphasised in his response to both Friends of the Earth and Plan B that this is a national policy statement. It therefore needs to have the climate change consequences related to the national allocation of aviation carbon or other greenhouse gases, assuming that other greenhouse gases are accepted to be included.

My Lords, I have been handed a note, and I feel I have been slightly ambushed by this because I originally raised this point in my statement of claim and it was perfectly open to the Secretary of State to respond to it but he didn't, but the Secretary of State, in essence, in his note here is saying that he did deal with it. I haven't got time, my Lords, to go through everything that he has said here. But, for example, if we go over the page to 5.4 the consultation response also deals with possible impacts on regional airports, and then he gives a whole load of paragraph numbers. I will just take one out of the hat, which I have taken, which is 8.52. 8.52, my Lord, which I think is at page 535 of core bundle 8, says:

"The Airports NPS sets out the carbon scenarios used by the commission in their work to address uncertainties over the future policy treatment of international aviation emissions. It also confirms the government's conclusion that expansion via the northwest runway at Heathrow can be delivered within the UK carbon obligations. The government considers that growth in the sector, including at Gatwick and regional airports, is compatible with the UK's climate change obligations even a Carbon Cap scenario. The commission showed that passenger numbers would continue to grow at Gatwick and regional airports. In such a scenario the government would take a national view of the best way to meet a cap."

My Lords, I would say to that, well, yes, that's all very nice but how is it going to be shared out and is the government seriously going to say that £17.6 billion is going to be spent expanding Heathrow only to have Heathrow then having to restrict its use or not use the expansion because regional airports need to expand? It just doesn't add up.

And if I may, my Lords, if I could refer you to volume 13 and it is page 133. There the Committee on Climate Change in 2009 did a report. You may recall, my Lords, at that time the then Labour Government was considering Heathrow expansion, it wasn't quite the same scheme but there was some -- the expansion was intended to be some 702 hundred thousands air traffic movements and there is a table there, ES2B.

Then the Committee on Climate Change suggested that various airports would have to restrict their growth or their capacity utilisation, as it is called there, should expansion go ahead. At the top of the chart you will see Heathrow, maximum runway capacity, 702 hundred thousand. Capacity utilisation, 100 per cent. Gatwick has a lower capacity. That was also 100 per cent. Stansted was 66 per cent. London City, 100 per cent. Bristol, 56 per cent. Manchester, 90 per cent. Edinburgh, 50 per cent, and other UK airports, 31 per cent. That was an example then, my Lords, but that sort of division and application of the carbon budget is what I would expect to be shown on an ANPS which is a national policy statement and something that the Secretary of State has stated in his submission that it is national. And it is national. I mean, it is intended to be a hub airport, whether one thinks that's right or wrong. Without that, my Lords, and without that apportionment I submit that neither section 10 nor section 5(8) have been complied with. We simply don't know how this is going to work in line with other airports.

I think, my Lords, I have probably come to the end of my allotted time. I thank you very much indeed for listening to me and if there are any questions, my Lords, I would be pleased to answer them.