Heathrow Judgment – key passages

93. We note that sections 87(3)(b), 94(8) and 106(1)(b) confer a power to disregard representations relating to the merits of policy in an NPS, and do not impose an absolute, exclusionary bar. However, we accept that the true construction of these restrictions may in any event have implications for the standard of review applied by the court in a challenge under section 13 to the ANPS, a matter which we consider below (see paragraphs 141 and following). It is therefore a matter which we need to consider.

…

Preliminary Point 6: Standard of Review

141. The issue of the proper approach for the court to take as to the standard of review in these claims (Issue 1) was debated before us at some length.

142. On behalf of the Claimants, led by Mr Pleming, it was submitted that there was no justification for the intensity of review to be reduced in relation to the various grounds of challenge they have advanced. Indeed, it was submitted that the nature of the issues involved (including climate change, air quality and other environmental issues of critical national and global importance) warranted a particularly high level of scrutiny.

143. To the contrary, Mr Maurici, supported by Mr Humphries, submitted that the threshold for judicial intervention in relation to an NPS is "very high indeed", particularly where irrationality is alleged. In this case:

i) The ANPS has been scrutinised and approved by Parliament, both by the Transport Committee and by the House of Commons. There has been consideration and debate on the merits of the policy by a democratically elected and accountable body.

ii) The policy involves political, social and economic considerations which depend essentially on political judgment, something which cannot be challenged on the basis of irrationality unless bad faith, improper motive or manifest absurdity is shown.

iii) A challenge to a planning judgment on the grounds of irrationality is a "particularly daunting task" and must not be used as a cloak for challenging the merits of a decision or policy (Newsmith Stainless Limited v Secretary of State for the Environment, Transport and the Regions [2001] EWHC 74 (Admin); [2017] PTSR 1126 at [6]-[8], the quotation being at [7] (see paragraphs 170-171 below)).

iv) The entire process, from consideration by the AC (including the collection and analysis of evidence, and advice and recommendations) through to the designation of the ANPS, was informed by a considerable amount of specialist, expert advice to which the Secretary of State was entitled to give, and did give, great weight.

v) Some of the grounds particularly involve matters of scientific, technical and predictive assessment: the courts afford an enhanced margin of appreciation to a decision-maker in relation to such matters (R (Mott) v Environment Agency

[2016] EWCA Civ 564; [2016] 1 WLR 4338: see paragraphs 176 and following below)

144. Mr Pleming suggested that issues on standard of review affected only three of the grounds advanced by the Hillingdon Claimants, namely those expressly pleaded as irrationality challenges: Ground 2 (adoption of a mode share target not realistically capable of delivery), Ground 5 (selection of the NWR Scheme despite a high risk that obligations under the Air Quality Directive would be breached between 2026 and 2030) and Ground 7 (failure to set out the legal test used for compliance with the Air Quality Directive). However, in our view, the question of the standard of review affects the issues they raise in respect of surface access and air quality generally. Moreover, for reasons given below under Grounds 8 and 9, the standard of review also affects the approach which should be taken by the court to alleged breaches of the Habitats Directive and the SEA Directive.

145. Mr Pleming explained that the effect of the errors of law advanced by the Hillingdon Claimants was that the Secretary of State wrongly preferred Heathrow (and, in particular, the NWR Scheme) to Gatwick as the location for the increase in airport capacity. Plainly, therefore, the context for those challenges is a policy decision at a high strategic level engaging a range of political, economic, social and planning considerations, and involving Parliament, together with a large number of consultees and members of the public located in different parts of the country and with potentially competing interests and points of view. Furthermore, some of the grounds of challenge involve highly technical subjects, such as traffic modelling and surface access issues.

146. We should add that the grounds pursued by FoE and Plan B Earth, and Mr Spurrier, also raise the issue of standard of review. The former each raised several grounds of challenge relating to climate change, in particular alleged legal errors arising out of the Paris Agreement. These arguments are not directed at a choice between Heathrow or Gatwick or indeed other locations, but instead the principle of whether a substantial increase in airport capacity should be promoted. As we explain below, the Paris Agreement raises a policy issue for the Government and for Parliament to address, namely the future carbon reduction target for the UK as its contribution to the revised Paris Agreement target expressed solely in global terms. This is plainly a policy matter at a high strategic level, which engages the widest possible range of economic and social considerations in the UK. Most of Mr Spurrier's submissions involve challenges to the merits of judgments reached by the Secretary of State, and were dependent on him establishing Wednesbury unreasonableness. Again, the issue of standard of review is relevant.

147. We take as a useful starting point the conclusion of Professor Paul Craig in "The Nature of Reasonableness" (2013) 66 CLP 131, endorsed by the Supreme Court in both Kennedy v Information Commissioner [2014] UKSC 20; [2015] AC 455 at [54] per Lord Mance JSC and Pham v Secretary of State for the Home Department [2015] UKSC 19; [2015] 1 WLR 1591 at [60] per Lord Carnwath JSC, that:

> "[B]oth reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context".

That properly emphasises that the scrutiny of review is dependent upon the circumstances of a particular case.

148. Similarly, the requirements of procedural fairness depend on context, including the statutory framework within which the decision sought to be impugned was taken (R v Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531 at page 560 E).

149. In considering the factors upon which such scrutiny may depend, the following passage from the judgment of Carnwath LJ (as he then was) in IBA Healthcare Ltd v Office of Fair Trading [2004] EWCA Civ 142; [2004] ICR 1364, approved by the Supreme Court in Kennedy at [53], is illuminating:

> "91. Thus, at one end of the spectrum, a 'low intensity' of review is applied to cases involving issues 'depending essentially on political judgment' (de Smith, para 13-056-7). Examples are R v Secretary of State, Ex p Nottinghamshire County Council [1986] AC 240 , and R v Secretary of State ex parte Hammersmith and Fulham London Borough Council [1991] 1 AC 521, where the decisions related to a matter of national economic policy, and the court would not intervene outside of 'the extremes of bad faith, improper motive or manifest absurdity' (per Lord Bridge of Harwich at pages 596-597). At the other end of the spectrum are decisions infringing fundamental rights where unreasonableness is not equated with 'absurdity' or 'perversity', and a 'lower' threshold of unreasonableness is used: 'Review is stricter and the courts ask the question posed by the majority in Brind [R v Secretary of State for the Home Department ex parte Brind [1991] 1 AC 696] namely, 'whether a reasonable Secretary of State, on the material before him, could conclude that the interference with freedom of expression was justifiable.'' (de Smith para 13-060, citing [Brind] at page 751 per Lord Ackner)."
>
> 92. A further factor relevant to the intensity of review is whether the issue before the tribunal is one properly within the province of the court. As has often been said, judges are not 'equipped by training or experience, or furnished with the requisite knowledge or advice' to decide issues depending on administrative or political judgment: see [Brind] at page 767 per Lord Lowry. On the other hand where the question is the fairness of a procedure adopted by a decision-maker, the court has been more willing to intervene. Such questions are to be answered not by reference to Wednesbury unreasonableness, but 'in accordance with the principles of fair procedure which have been developed over the years and of which the courts are the author and sole judge'. (R v Panel on Take-overs and Mergers ex parte Guinness plc [1990] 1 QB 146 at page 184 per Lloyd LJ)."

150. It is also helpful to recall this passage from the judgment of Sir Thomas Bingham MR in R v Ministry of Defence ex parte Smith [1996] QB 517 at page 556B:

> "The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue even greater

> caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations."

151. In our view, as well as the nature of the decision under challenge, the factors upon which the degree of scrutiny of review particularly depends include (i) the nature of any right or interest it seeks to protect, (ii) the process by which the decision under challenge was reached and (iii) the nature of the ground of challenge.

152. The interests which the Claimants seek to protect include the protection of the environment against harm caused by airport expansion in terms of, for example, noise, air quality and consequential health effects, affecting the daily lives of huge numbers of people and for a long time into the future. These are matters of great public importance; but they do not operate in isolation. There are other public interest issues which are said by its proponents to weigh greatly in favour of airport expansion, notably the contribution made to the national economy and the creation of employment. Inevitably, policy-making in this area involves the striking of a balance in which these and a great many other factors are assessed and weighed. As we have said, it is carried on at a high, strategic level and involves political judgment as to what is in the overall public interest.

153. Under our constitution policy-making at the national level is the responsibility of democratically-elected Governments and Ministers accountable to Parliament. As Lord Hoffmann said in R (Alconbury Developments Ltd) v Secretary of State for the Environment [2001] UKHL 23; [2003] 2 AC 295 at [69] and [74]:

> "It does not involve deciding between the rights or interests of particular persons. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires."

(See also Lord Clyde at [139]-[141].) The nature of the interests which the Claimants seek to protect is therefore intimately bound up with the nature of the decision which they seek to challenge.

154. Here the "decision" was to designate policy in the form of the ANPS. The scope of "policy" was considered in Bushell v Secretary of State [1981] AC 75, which concerned a legal challenge to the line orders for the proposal to construct sections of the M40 and M42 comprising about 30 miles of motorway. Mr Maurici cited Lord Diplock's seminal passage (at page 98) in which he explained how the concepts of "policy" and policy decisions may cover a wide spectrum:

> "'Policy' as descriptive of departmental decisions to pursue a particular course of conduct is a protean word and much confusion in the instant case has, in my view, been caused by a failure to define the sense in which it can properly be used to describe a topic which is unsuitable to be the subject of an investigation as to its merits at an inquiry at which only persons with local interests affected by the scheme are entitled to be represented. A decision to construct a nationwide network of motorways is clearly one of government policy in the widest sense of the term. Any proposal to alter it is appropriate to be the subject of debate in Parliament, not of separate investigations in each of scores of local inquiries before individual inspectors up and down the country upon whatever material happens to be presented to them at the particular

> inquiry over which they preside. So much the respondents readily concede.
>
> At the other extreme the selection of the exact line to be followed through a particular locality by a motorway designed to carry traffic between the destinations that it is intended to serve would not be described as involving government policy in the ordinary sense of that term. It affects particular local interests only and normally does not affect the interests of any wider section of the public, unless a suggested variation of the line would involve exorbitant expenditure of money raised by taxation. It is an appropriate subject for full investigation at a local inquiry and is one on which the inspector by whom the investigation is to be conducted can form a judgment on which to base a recommendation which deserves to carry weight with the minister in reaching a final decision as to the line the motorway should follow.
>
> Between the black and white of these two extremes, however, there is what my noble and learned friend, Lord Lane, in the course of the hearing described as a 'grey area'. Because of the time that must elapse between the preparation of any scheme and the completion of the stretch of motorway that it authorises, the department, in deciding in what order new stretches of the national network ought to be constructed, has adopted a uniform practice throughout the country of making a major factor in its decision the likelihood that there will be a traffic need for that particular stretch of motorway in 15 years from the date when the scheme was prepared. This is known as the 'design year' of the scheme. Priorities as between one stretch of motorway and another have got to be determined somehow. Semasiologists may argue whether the adoption by the department of a uniform practice for doing this is most appropriately described as government policy or as something else. But the propriety of adopting it is clearly a matter fit to be debated in a wider forum and with the assistance of a wider range of relevant material than any investigation at an individual local inquiry is likely to provide; and in that sense at least, which is the relevant sense for present purposes, its adoption forms part of government policy."

155. Lord Diplock was not dealing directly with the appropriate standard of review, but rather addressing the issue of whether certain matters were appropriate for discussion and cross-examination at public inquiries relating to the authorisation of individual projects and on whether a change in "policy", namely departmental assessment methods, required an inquiry to be reopened. However, his observations on the scope of "policy" are instructive: some strands of a policy document will involve a greater degree of political judgment than others.

156. That theme was taken up in R (London Borough Wandsworth) v Secretary of State for Transport [2005] EWHC 20 (Admin) at [58]-[60]. Having quoted the passage from Bushell which we have set out above, Sullivan J accepted that policy in a White Paper may contain a spectrum of decisions ranging from matters of primary fact to questions

of political and economic judgment. At the latter end of the spectrum, he said, "there will be a heavy evidential onus upon a claimant for judicial review to establish that such a decision is irrational, absent bad faith or 'manifest absurdity'" (see [58]). That introduces a reference to the nature of the ground of challenge, to which we return below (see, especially, paragraphs 167 and following).

157. However, in addition to the range of political judgment involved, there is a spectrum of *finality* in policy decisions, as illustrated by R (Hillingdon London Borough Council) v Secretary of State for Transport [2010] EWHC 626 (Admin) ("Hillingdon (2010)"), another claim involving proposed expansion at Heathrow, in which ministerial policy decisions in 2009 were challenged on the basis that they would preclude opposition to the principle of a third runway at Heathrow. Applying Lord Diplock's observations in Bushell, Carnwath LJ (as he then was) considered the extent to which the 2009 decisions and an earlier White Paper might have the effect of restricting the issues which could be canvassed at a public inquiry into a proposal held *before* the designation of any NPS. He rejected the claim. An important theme in his reasoning was that the 2009 decisions of the Secretary of State were simply policy statements without direct, substantive effects: they were only preliminary steps in a continuing process which still had a long way to go before arriving at any "substantive event" in the sense of a formal statutory authorisation for the construction of a third runway. He considered that that limited the scope for judicial review (see [48]). This view formed a counterpart to the claimants' concern in 2010 about the extent to which the 2009 decisions would have the effect of restricting the legal scope for making objections to a subsequent planning application.

158. At [69], Carnwath LJ returned to his thinking on the limited scope for judicial review of a policy statement of that nature. He did refer to the "high-level" character of some of the policy judgments made in the decisions under challenge; but, more importantly, he emphasised the *preliminary* nature of the decisions taken and said that any grounds of challenge needed to be seen in the context of a continuing process towards statutory authorisation. He said:

> "A flaw in the consultation process should not be fatal if it can be put right at a later stage. There must be something not just 'clearly and radically wrong', but also such as to require the intervention of the court at this stage. Similarly, failure to take Account of material considerations is unlikely to justify intervention by the court if it can be remedied at a later stage. It would be different if the failure related to what I described in argument as a 'show-stopper': that is a policy or factual consideration which makes the proposal so obviously unacceptable that the only rational course would be to abort it altogether without further ado."

159. Relying on that passage, Mr Maurici and Mr Humphries submitted that for a ground of challenge to the ANPS to succeed it would need to relate to a policy or factual consideration that makes the proposal so obviously unacceptable that the only rational course would be to abort it altogether without further ado. This was referred to as the "show-stopper" test. However, we unhesitatingly reject that submission, which takes the observations of Carnwath LJ out of context namely, in that case, that the policy statement in that case was only of a preliminary nature. The observations have no application to a judicial review under section 13 of the PA 2008 of an NPS which, in relevant respects, is of a final nature. Whereas in Hillingdon (2010) the Secretary of State had undertaken not to rely on section 12 of the PA 2008, which would have resulted in earlier policy statements having the status of an NPS, the ANPS has now been designated; and sections 87(3), 94(8) and 106(1) may operate so as to preclude

challenges to the merits of policy contained in that document, as we have described above (see paragraphs 92-99).

160. In respect of the process by which the challenged decision – the designation of the ANPS – was reached, Mr Maurici and Mr Humphries relied heavily upon the role of Parliament. Relying upon various authorities, they submitted that the court should adopt a very restrained approach to judicial review on the grounds that Parliament has considered and approved the ANPS.

161. As we have described, section 5(4) and 9 of the PA 2008 requires an NPS to be scrutinised by parliament before designation (see paragraphs 30 and 32 above). In one of the authorities to which Mr Maurici and Mr Humphries referred us, R (SG) v Secretary of State for Work and Pensions [2015] UKSC 16; [2015] 1 WLR 1449 at [94], Lord Reed JSC reiterated the observation of Lord Sumption JSC in Bank Mellat v HM Treasury (No 2) [2013] UKSC 39; [2014] AC 700 at [44] that, where Parliament has reviewed a statutory instrument, respect for Parliament's constitutional functional calls for "considerable caution" before the courts will hold it to be unlawful on a ground falling within the ambit of Parliament's review. In a challenge to the introduction of a cap on welfare benefits for claimants in non-working households raising discrimination arguments as between men and women, Lord Reed said that proportionality issues involving controversial issues of social and economic policy, with major implications for public expenditure were pre-eminently the function of the democratically elected institutions. The need for the court to give due weight to the considered assessment made by those institutions meant that it had to respect their view unless "manifestly without reasonable foundation". Consistently with that principle, the Supreme Court also decided that the court could properly have regard to any consideration by Parliament of the issues raised in the proceedings for judicial review (see [93]-[95]).

162. In relation to the submission of Mr Maurici and Mr Humphries, we would first stress that an NPS is not itself a statutory instrument (although a DCO under an NPS is); and that, although as a matter of fact in this case Parliament did approve the ANPS which the Secretary of State proposed to designate, the PA 2008 does not make Parliamentary approval (as opposed to scrutiny) a pre-condition for designation (section 5(4)(a)).

163. Moreover, some of the cases to which we were referred raised issues of a different nature and in a different context to the present case, and so we have gained little help from them. For example, the high threshold for intervention by the court suggested in M v Home Office [1994] 1 AC 377 at page 413D-G related to an attempt in an earlier case to injunct a Minister from laying a statutory instrument before Parliament for approval. In O'Connor v Chief Adjudication Officer [1999] 1 FLR 1200, the court found the notion of "extreme irrationality" to be unhelpful as a way of defining a standard of review; but in any event, at page 1215, the court went on to accept that it was a matter for the Minister, subject to the scrutiny of Parliament, to decide who should qualify for income support and who should not, and, in particular, whether students in full time higher education should do so. These were essentially political judgments.

164. Similarly, we have gained little help from two authorities relied upon by Mr Maurici and Mr Humphries in respect of challenges to decisions involving national economic policy and political judgment. Nottinghamshire County Council v Secretary of State for the Environment [1986] AC 240 was concerned with a challenge to the setting of expenditure targets for local authorities throughout the country for the purposes of determining the amount of rate support grant payable. R v Secretary of State for the Environment ex parte Hammersmith and Fulham London Borough Council [2001] 1

AC 521 related to decisions to cap excessive expenditure by local authorities. In summary, the House of Lords held in each case that decisions of this kind, involving the exercise of political judgment on matters of national economic policy, could not be challenged for irrationality, short of bad faith, improper motive or manifest absurdity.

165. The impugned decision in the present case was made within a very different statutory framework. For example:

i) In section 13, the PA 2008 envisages, and includes express provision for, challenges to an NPS by way of judicial review.

ii) It is true that the policy-making here involved issues of political, social and economic judgment and was subject to prior Parliamentary scrutiny (and, in the event, approval); but the power to designate an NPS is subject to (amongst other things) the consultation requirements imposed by the PA 2008 itself, which are aimed at public participation in the decision-making process.

iii) Further, the procedural balance struck by the legislation envisages that the merits of policy formalised in this way cannot be challenged in the subsequent examination of an application for development consent.

iv) In addition, the policy-making process was subject to compliance with some relatively precise legal requirements, notably those arising from the SEA Directive and the Habitats Directive, which also involved obligations to consult widely. Some of the challenges made either relate to those other regimes or raise other planning issues of a technical nature.

v) Looking at the PA 2008 more broadly, the NPS regime need not relate to public sector development (as the ANPS illustrates) and it may relate to infrastructure of a relatively modest scale and cost as compared with the new runway and development at Heathrow.

For all these reasons we find it difficult to treat the local government finance cases and the approach justified there as analogous or helpful in the present context.

166. For reasons which by now will be apparent, we consider that the degree of scrutiny required by any challenge before us will be dependent upon, amongst other things, the strand of policy which is under review. However, although Parliament scrutinised and approved the content of the ANPS as later designated, generally we do not consider that the main grounds of challenge in these proceedings raise issues in respect of which Parliamentary approval is an especially weighty matter in relation to the appropriate degree of scrutiny, particularly when the nature of the grounds of challenge are considered.

167. We accept that, where a fully informed Parliament has considered and by vote approved a policy, the court would be properly cautious in intervening in favour of a challenge that the policy is irrational. Some of the claims here are framed in terms of irrationality. However:

i) As we have already explained, despite the statutory role for Parliament in the PA 2008, section 13 expressly allows challenges to the designation of the ANPS etc by way of judicial review.

ii) Some aspects of the ANPS relied heavily upon massive amounts of scientific and other information and analysis. It is not possible to say that Parliament could have been fully informed on all matters.

iii) Further, and in our view most importantly, although we accept that some grounds which are not in substance irrationality are dressed up as such, some of the grounds before us do not substantively involve an allegation of irrationality but other legal error on the Secretary of State's part. For example, there is an issue (reflected in Issue 11) as to whether the Secretary of State failed to carry out the statutory consultation exercise with an open mind, thereby breaching the first of the Gunning principles. As we will explain below (see paragraphs 508 and following), a challenge of that nature must be considered in the context of the statutory framework in which the Secretary of State was operating, and the responsibilities placed upon him. But if, after taking those factors into account, this ground of challenge were to be upheld, it would be difficult to see how (e.g.) Parliament's approval of the ANPS could overcome or avoid the consequences of a legal flaw of that nature.

168. However, we stress that the degree of scrutiny will necessarily be dependent upon the circumstances of the particular challenge. Some of the issues raised in respect of some of the grounds of challenge (e.g. noise impact issues) have been specifically addressed in the Parliamentary process, notably in the report of the Transport Committee ("Airports National Policy Statement" HC 548 - 23 March 2018) and the Secretary of State's published response to that report (Cm 9624 - June 2018). Moreover, they have formed part of an overall judgment which has involved balancing those considerations against the national economic interest. We see the force in the proposition that the court should apply "considerable caution" when reviewing such matters (see paragraph 161 above).

169. As we have said, in Wandsworth, Sullivan J accepted that policy in a White Paper may contain a spectrum of decisions ranging from matters of primary fact to questions of political and economic judgment; and he said (at [58]) that, at the latter end of the spectrum "there will be a heavy evidential onus upon a claimant for judicial review to establish that such a decision is irrational, absent bad faith or 'manifest absurdity'". That approach, he said, did not confine judicial review to issues of bad faith or manifest absurdity, but did emphasise the heavy onus placed upon a claimant to show that a judgment was irrational in any other respect.

170. That reference to a "heavy onus" mirrors the principles in relation to planning decisions set out by Sullivan J in the well-known passage in Newsmith (cited at paragraph 143(iii) above) at [5]-[8]. There he emphasised that, although a challenge to a planning decision may be made on the grounds of irrationality, the court must be astute to see that this is not used as a cloak for what is, in truth, an assault on the decision-maker's assessment of the merits. A claimant alleging that a planning inspector has reached a Wednesbury unreasonable judgment faces a "particularly daunting task."

171. Mr Pleming submitted that the approach in Newsmith is confined to statutory reviews of decisions by planning inspectors where (e.g.) a site visit takes place and where the issues relate to matters such as whether a building is in keeping with its surroundings and impact on the landscape or to accessibility by public transport. However, in our view, those were only examples given by Sullivan J to illustrate the approach he was laying down, which is now applied generally to challenges involving planning judgments by planning authorities, including those made by local authorities (see, e.g., R (Nicholson) v Allerdale Borough Council [2015] EWHC 2510 (Admin) at [10-13]), judgments made in the context of formulating planning policies as well as decision-making (see, e.g., Tesco Stores Limited v Secretary of State for the

Environment [1995] 1 WLR 759 per Lord Hoffmann at pages 780-2; and Woodfield v J J Gallagher Limited [2016] EWCA Civ 1007; [2016] 1 WLR 5126 per Lindblom LJ at [27]-[29]), and the application of planning policy by inspectors to the circumstances of a case (Suffolk Coastal District Council v Hopkins Homes Limited [2017] UKSC 37; [2017] 1 WLR 1865 at [25]-[26]). It reflects the margin of appreciation which the courts allow to planning authorities both in decision-making and in the adoption of policies or plans. The approach laid down in Newsmith and these later cases also reflects the inability of the court to determine issues of planning judgment for itself, especially in proceedings for judicial review where there is a factual conflict or a conflict of expert opinion.

172. We also consider that, generally, as matters involving planning judgment, the approach indicated in Newsmith should be applied to the irrationality challenges, or to challenges to what are essentially matters of judgment, pursued in these proceedings.

173. Both the Claimants and the Secretary of State have filed a vast quantity of evidence, some of it from experts. As they rightly acknowledged during the preliminary hearings as well as during the substantive hearing, it is not the role of a court in judicial review proceedings to resolve conflicts of this evidence, particularly not in favour of a claimant on whom the burden of proof lies. In addition to it being generally outside its role, proceedings for judicial review are not well-suited to resolve conflicts of evidence.

174. R (Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649 is a recent illustration of the difficulties posed by reliance upon material of this nature. The claim concerned a challenge to a decision by the Lord Chancellor to reduce the amount of money made available as legal aid for defending people accused of crimes. The Divisional Court (Leggatt LJ and Carr J) held that, although expert evidence might be admissible in an irrationality challenge to show that a decision was reached by a process of reasoning which included a serious technical error, if that error is not incontrovertible but is a matter on which there is room for reasonable experts to disagree, that ground cannot be established. This situation arises where, for example, the evidence of an expert relied upon by a claimant is contradicted by a rational opinion in a statement from an expert filed by the defendant (see [36] to [41]).

175. Much of the expert evidence submitted to us was therefore superfluous.

176. In any event, the question of the correct approach to a challenge to an administrative or executive decision in the context of expert evidence was recently considered in Mott (cited at paragraph 143(v) above). The claimant alleged that the imposition of conditions on a licence by the Environment Agency to reduce the number of salmon caught in order to protect fisheries in the River Wye was irrational, albeit that the decision was supported by scientific evidence. The court considered the approach to be taken in a judicial review of a decision that is predictive, in the sense that it is based upon an evaluation of assessments as to what might happen in the future and that evaluation is wholly or partly made by reference to scientific or technical material (see [7]). It was common ground between the parties that an enhanced margin of appreciation should be accorded to decisions involving "scientific, technical and predictive assessments", but the claimant unsuccessfully argued that that principle did not apply to the error which he purported to identify (see [69]).

177. Giving the judgment of the court, Beatson LJ referred to R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department [2008] EWCA Civ 417; R v Director General of Telecommunications ex parte Cellcom

Limited [1999] ECC 314; and R (Downs) v Secretary of State for the Environment, Food and Rural Affairs [2009] EWCA Civ 664; [2010] Env LR 7; and notably to the rejection in Downs of a challenge to a regulatory regime for the control of pesticides for non-compliance with an EC Directive on the basis that the claimant had been unable to surmount the "formidable" hurdle of "manifest error" in such a highly technical field. At [75], he said this:

> "The contexts of these cases and the evidence before the bodies whose decisions were challenged are different from the position in the present case. In [Downs] there were differences between different experts, and in the Abolition of Vivisection case… the view of the decision-maker was supported by other experts. As well as those factors, the scope of judicial review is acutely sensitive to the regulatory context and, in particular, decisions involving what Professor Lon Fuller called 'polycentric' questions pose particular challenges to a judicial review court. Notwithstanding the differences and recognising the importance of sensitivity to context and flexibility, I consider that these cases provide general assistance in considering the approach to the decisions of the agency."

At [78], he continued:

> "In the present case the decisions were based on three principal factors. First, the agency's assessment on the basis of the shortfall in egg deposition that the salmon fishery in the Wye is at risk of becoming unsustainable, which was not challenged. Secondly, the views of the researchers and the agency, reflecting a broad scientific consensus, that salmon return to their rivers of origin to spawn. Thirdly, the genetic data gathered from the 55 fish taken from the estuary and the ONCOR, GeneClass2 and cBayes models used in the Exeter report to estimate their rivers of origin. The decisions were thus made against an unchallenged assessment as to the risk to the Wye and a background assumption on which there is scientific consensus that salmon return to their river of origin to spawn. The decisions were then the result of an amalgam of assessments which are in part factual and in part predictive in nature. They also involved consideration of other factors, such as how to balance the interests of those primarily affected with the wider public interest, and how factors such as the 'heritage installation' aspect should be factored into the decision and are in this sense 'polycentric'. I respectfully agree with the statement of Lightman J in [Cellcom] at [26] that 'if . . . the court should be very slow to impugn decisions of fact made by an expert and experienced decision-maker, it must surely be even slower to impugn his educated prophecies and predictions for the future'".

At [77], Beatson LJ pointed out that the adequacy of a model used to estimate the percentages of fish from a given river was a matter of scientific judgment rather than legal analysis.

178. Despite several requests from the court, the various Claimants before us – notably, the Hillingdon Claimants – made no submissions on Mott to suggest that it is not good law or how it relates to the arguments in these claims.

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.

181. Finally, we return to the passage previously quoted from Lord Diplock's speech in Bushell (at paragraph 154 above) and the proposition that the nature of the policy decisions brought together in a document such as the ANPS covers a wide spectrum. At one end there are broad judgments about the importance of aviation (including a "hub" capacity capable of competing internationally) to the national economy and the balance between such considerations and environmental issues (including noise, air quality and climate change). At the other end of the spectrum, a proposal to locate airport expansion in a particular locality has very direct implications for the planning of that area and the environment of those living and working there. Whereas the designation of the ANPS has settled the issues of need and the selection of the NWR to meet that need, the assessment of a specific proposal and the application of criteria laid down by the ANPS, legislation and other policies will be very much in contention through the DCO process.

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).

….

207. We now turn to the sub-grounds upon which the Hillingdon Claimants rely.

i) Updated passenger demand forecasts: The DfT17 updated demand forecasts were dealt with by the Secretary of State in the Updated Appraisal Report (see paragraph 72 above). This identified the change since the Jacobs/AC analysis, namely that, due to pent up demand for Heathrow, even under the NWR Scheme, assuming no phasing of capacity and no barriers to airlines making use of this capacity as soon as it becomes available, Heathrow is now assumed to be capacity-full by 2028 rather than 2035 in the AC assessment – although by and from 2035 the met demand is estimated to be broadly similar to that relied on in the AC assessment (paragraphs 2.19-2.20). In other words, there is now a higher rate of growth in demand than the AC had forecast: it is expected that a three-runway Heathrow will "fill up" more quickly than was assumed in the AC assessment. However, as Mr Jones points out (Jones 2, paragraph 12), that does not fundamentally change the nature of the surface access challenge at Heathrow, which is concerned with ensuring the surface access objectives are met when the expanded Heathrow is at full capacity. Mr Maurici accepted that the Secretary of State did not update the surface access analysis to reflect the updated passenger demand forecast: but submitted that that did not change the growth in passenger numbers, but only the period over which full capacity would be reached. If unconstrained demand grows at a different rate from that assumed, then that can be managed by requiring mitigation measures to be taken sooner and/or phasing additional capacity by (e.g.) constraining ATMs. That was Mr Jones' view (Jones 1, paragraph 38).

In our view, the Secretary of State did not err in dealing with the change in passenger demand forecasts as he did.

ii) Updated population and employment forecasts: As we understand it, Mr Williams accepted (Williams 2, paragraph 27) – and, by the hearing, the Claimants accepted – that subsequent changes in population forecasts are immaterial to the AC's surface access analysis and conclusions. In any event,

we do not see how such changes could make any material difference, the points raised in (i) above applying to these changes in forecasts too.

iii) Freight impact assessment: The AC's freight impact analysis considered only the daily period 7am-7pm; but, in our view, although of course freight transport operates 24 hours a day, there can be no criticism of the Secretary of State for not considering the impact at night. In terms of surface access impacts, he was entitled to focus upon the potentially busiest times and ignore the times at night when there is no congestion or road capacity issue. Mr Maurici submitted that he was not required to do more. We agree.

(iv) Catalytic demand impact: The AC took the view that catalytic or induced demand would be widely dispersed, one third being outside London and the South East altogether. It concluded that such dispersal would mean that it would be impossible to assess its impact on the transport system at a granular level, but that the impact would be small at any given point (see Graham 1, paragraph 218). SDG made assumptions as to jobs created from HAL's submission to the AC; then used HAL's forecast of employment-related trips to identify additional jobs created by expansion; and then converted new "non-expansion" jobs into additional trips throughout London (and not just in Hillingdon and the adjacent boroughs) (see paragraph 3.14 of the SDG Report).

We do not consider that, even in the face of TfL's further modelling, the Secretary of State acted irrationally, or otherwise unlawfully, in making the judgment (in agreement with the AC) that the effects of catalytic demand were too uncertain to draw a conclusion that there would be any adverse effect at a particular point.

(v) Infrastructure assumption: In respect of the complaint that the AC assessment was based on the assumption that unplanned and/or unfunded projects such as the WRL, the SRA and Crossrail 2 would be delivered by 2030, the AC received responses to its consultation on this point and it responded in paragraphs 2.6.3-2.6.5 of its Consideration of Consultation Responses to the effect that these schemes (or equivalent other schemes) would be required in any event to respond to the background growth with or without expansion, the traffic attributable to any airport expansion being generally a marginal addition to background demand (Graham 1, paragraphs 197 and 201).

208. The material before the court shows that the Secretary of State's team did adequately have regard to the various points advanced by TfL. The assessments and judgments reached cannot be criticised as irrational, applying the appropriate standard of review and bearing in mind Mott. Applying the principles in West Berkshire and Buckinghamshire (see paragraphs 131 and following above), the "Government Response to the Consultations on the ANPS" cannot be criticised for failing to go into more detail on these matters. Nor can it be said that the Secretary of State failed to comply with the fourth Gunning principle.

209. We thus reject this ground.

…

Ground 2

210. As a second ground, it is submitted that the Secretary of State erred in adopting mode share targets in the ANPS that TfL had shown were not realistically capable of being delivered; and, even if delivered, would fail to mitigate the impact of the scheme

which would result in 40,000 additional vehicle trips every day. The thrust of Mr Jaffey's oral argument was in respect of the second limb of that submission.

…

215. In our view, the mode share requirements in the ANPS are not arguably irrational, or otherwise unlawful. Mr Jaffey was wise not actively to press that submission before us.

216. The submission he did actively pursue was that it was irrational for the Secretary of State to impose mode share targets which would not in fact mitigate the surface access harm of a third runway: a 50% public transport mode share in 2030, or a 55% mode share in 2040, without any commitment to additional public transport infrastructure, would still mean severe adverse consequences for the road and rail network.

217. However, we do not consider there is any more force in this limb of the submission. Paragraph 5.17 of the ANPS requires a DCO applicant to show how he will increase the relevant proportion of journeys to achieve "a public transport mode share of *at least* 50% by 2030, and *at least* 55% by 2040 for passengers" (emphasis added). It is open to the Secretary of State to require a higher percentage mode share at the DCO stage, e.g. if he considers it necessary to satisfy the general requirements of paragraphs 5.15-5.16 and 5.21-5.22. 50% and 55% are minimum, not maximum, figures. The mode share requirements in paragraph 5.17, when read in context, are not arguably irrational or otherwise unlawful. Once again, the approach to such assessments advocated in Mott is relevant.

…

255. The Hillingdon Claimants challenge the ANPS's approach and conclusion in respect of air quality on five grounds, as follows:

…

iii) Ground 5: It was irrational to adopt and designate the ANPS in circumstances in which it was known that, if constructed and used to full capacity from 2026, there would be a high risk that the air quality obligations will be breached in the period 2026-30.

…

v) Ground 7: It was irrational and/or contrary to the Secretary of State's obligation to act transparently to adopt and designate a policy based on the premise that the NWR Scheme was capable of being delivered without breaching air quality obligations – and to require a DCO applicant to satisfy him that the NWR Scheme would not breach those obligations – without identifying the correct legal test.

256. We will deal with those grounds in turn.

…

Ground 5

266. Perhaps appreciating that to be the case, before us Mr Jaffey focused on his third ground under this head, namely that it was irrational for the Secretary of State to adopt and designate a policy which is probably undeliverable.

267. The risk as to deliverability of course derives, not from the NWR Scheme itself, but from the modelling uncertainties in the AQP 2017. As we have explained, the AQP 2017 is not aspirational: it is required to deliver outcomes, in the form of reductions in pollutants to Air Quality Directive limit levels by a particular date. If it transpires over time that the AQP 2017 is not up to that task, then there is an obligation to vary it – in accordance with the procedure set out in the Directive – to ensure that it does. Both the Commission and the domestic courts have made clear that the UK's commitment to achieve the limit level will be enforced.

268. But in any event, in our view, a policy which may not be deliverable is not, by virtue of that alone, irrational. There is no evidential basis for the submission that the policy is certainly not deliverable. Deliverability will be tested at the DCO stage. In respect of the ANPS, given that the Gatwick 2R Scheme has been assessed as not fulfilling the hub policy objectives of the Government – and capacity objectives alone are insufficient to warrant the building of a second runway at Gatwick which would leave the requirement for hub capacity unfulfilled and possibly deepened – a policy to expand Heathrow, on terms which may be extremely challenging for applicants, is clearly not unlawful on grounds of irrationality. HAL and any other DCO applicants will well appreciate the air quality challenge, and the need to satisfy the air quality requirements of the policy in any application.

…

Ground 7

275. Mr Jaffey submitted that it was irrational for the ANPS not to identify the legal test for the air quality requirements, given that (i) the policy is based on the proposition that the NWR Scheme is capable of being delivered within those requirements and (ii) it obliges any applicant for a DCO to satisfy the Secretary of State that those requirements would be met.

276. However, the air quality legal requirements are set out in the Air Quality Directive and Regulations. Insofar as the scope of any of the requirements is controversial, the construction of the relevant provisions is a matter for the court not the Secretary of State. If the Secretary of State were required to set out the meaning of the requirements, his paraphrase could not in any event be authoritative. If there is any controversy over the scope of the requirements, that will be elicited (and, if necessary, determined by this court on judicial review) at the examination stage of the DCO, whether or not the Secretary of State has set out his interpretation of the provisions in the policy. For him to set out that interpretation at this stage would therefore be otiose.

277. But it would also be insufficient and misleading. To satisfy the precautionary principle, it is essential that any DCO applicant satisfies the Secretary of State that the NWR Scheme will not breach any air quality requirements as properly construed, not as construed by the Secretary of State.

278. In respect of air quality requirements, the ANPS is focused on outcome not input. However, as we have explained, it deals with many other aspects of the scheme in the same way. As Mr Maurici pointed out, if this ground were good, then the ANPS would have to set out the Secretary of State's views on the requirements of all of the relevant EU and legislative schemes, such as that relating to climate control, SEAs and habitats. That would be an extraordinary result. However, for the reasons we have given, that is not a legal requirement.

…

Standard of Review

344. In terms of the standard of review, relying on R (Lumsdon) v Legal Services Board [2015] UKSC 41; [2016] AC 697, Mr Jaffey submitted that article 6(3) and (4) were to be construed as inherently incorporating proportionality.

345. However, the circumstances which gave rise to the claim in Lumsdon were very different from those before us, the issue in that case being whether a quality assurance scheme for advocates was proportionate as a derogation from the fundamental EU law freedom of establishment for providers of services. The relevant provision of the relevant Directive (article 9(1)(b) and (c) of Parliament and Council Directive 2006/123/EC as implemented by regulation 14(2)(b) and (c) of the Provision of Legal Services Regulations 2009 (SI 2009 No 2999), set out at [85] of Lumsdon) explicitly required the application of the same tests (including proportionality) as had been previously summarised at [52] as representing the general approach in EU law to derogations from fundamental freedoms. The Directive explicitly used a "less restrictive measures" test.

346. Mr Jaffey relied on passages in the judgment of Lord Reed and Lord Toulson JJSC referring to a "less restrictive alternative" test (see [63] and [67]). However, those passages appear in the part of the judgment which dealt with (i) national measures derogating from "fundamental freedoms", such as the freedom of movement of goods, workers, establishment, and capital and to provide services, and (ii) national measures derogating from "rights" protected by EU Treaties, such as the right to equal treatment or fundamental rights such as the right to family life (see [50]; the same contextual point was also made earlier in the judgment, at [23]).

347. In our view, Lumsdon and the jurisprudence it cites is of no assistance in determining whether article 6(3) and (4) of the Habitats Directive are to be construed as incorporating a proportionality approach of this kind. Those provisions do not involve any derogation from fundamental freedoms or rights of the kind with which the principles set out at [50] et seq of Lumsdon are concerned.

348. In any event, as Mr Maurici pointed out, Lumsdon does not help the Hillingdon Claimants to challenge the legality of the Secretary of State's decision to rely upon the "hub objective" when considering whether the Gatwick 2R Scheme was an "alternative solution". In particular, it does not deal with the *basis* upon which objectives may be selected. The analysis in Lumsdo n of the EU approach to proportionality is of no assistance in ascertaining the nature or extent of any legal constraints under the Habitats Directive upon an authority identifying the objectives or aims of the policies set out in the preparation of a plan or the yardstick by which they should be reviewed by the court.

349. In short, we do not consider that Lumsdon is of any assistance in determining the issues before us.

350. In any event, in Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174; [2015] PTSR 1417, it was held that, although a strict precautionary approach is required for article 6(3) of the Habitats Directive, the appropriate standard of review is the Wednesbury rationality standard: the court should not adopt a more intensive standard or effectively remake the decision itself. In coming to that conclusion, Sales LJ (as he then was) said:

> "78. A further issue arising from Mr Jones's submissions concerns the standard of review by a national court supervising the compliance by a relevant competent authority with the legal requirements in article 6(3) of the Habitats Directive. Although

the legal test under each limb of article 6(3) is a demanding one, requiring a strict precautionary approach to be followed, it also clearly requires evaluative judgments to be made, having regard to many varied factors and considerations. As Advocate General Kokott explained in paragraph 107 of her Opinion in Waddenzee [i.e. Landelijke Vereniging to Behoud van de Waddenzee v Staatsecretaris van Landbouw, Natuurbeheer en Visserij (2005) Case C-127/02; [2005] 2 CMLR 31] the conclusion to be reached under an 'appropriate assessment' under the second limb of article 6(3) cannot realistically require the attainment of absolute certainty that there will be no adverse effects; the assessment required 'is, of necessity, subjective in nature'. The same is equally true of the assessment at the screening stage under the first limb of article 6(3). Under the scheme of the Habitats Directive, the assessment under each limb is primarily one for the relevant competent authority to carry out.

79. Mr Jones submitted that Patterson J erred in treating the assessment by the Inspector of compliance of the proposed development with the requirements of article 6(3) as being a matter for judicial review according to the Wednesbury rationality standard. He said that in applying EU law under the Habitats Directive the national court is required to apply a more intensive standard of review which means, in effect, that they should make their own assessment afresh, as a primary decision-maker.

80. I do not accept these submissions. In the similar context of review of screening assessments for the purposes of the Environmental Impact Assessment (EIA) Directive and Regulations [see paragraph 378 below], this Court has held that the relevant standard of review is the Wednesbury standard, which is substantially the same as the relevant standard of review of 'manifest error of assessment' applied by the CJEU in equivalent contexts: see R (Evans) v Secretary of State for Communities and Local Government [2013] EWCA Civ 114; [2013] JPL 1027 at [32]-[43], in which particular reference is made to Case C-508/03, Commission of the European Communities v United Kingdom [2006] QB 764, at [88]-[92] of the judgment, as well as to the Waddenzee case. Although the requirements of article 6(3) are different from those in the EIA Directive, the multi-factorial and technical nature of the assessment called for is very similar. There is no material difference in the planning context in which both instruments fall to be applied. There is no sound reason to think that there should be any difference as regards the relevant standard of review to be applied by a national court in reviewing the lawfulness of what the relevant competent authority has done in both contexts. Like this Court in the Evans case (see para. [43]), I consider that the position is clear and I can see no proper basis for making a reference to the CJEU on this issue."

The approach in Smyth was followed in R (Mynydd y Gwynt) v Secretary of State for Business, Energy and Industrial Strategy [2018] EWCA Civ 231; [2018] PTSR 1274 at [8].

351. We respectfully agree with that analysis and conclusion on this issue. We do not see any arguable justification for a different standard of review to be adopted for issues to do with compliance with article 6(4) – in respect of the identification of policies giving rise to a proposed scheme, and the assessment of whether an option meets the core objectives of those policies – as opposed to article 6(3). Indeed, if anything, the assessment of whether a policy meets the core objectives of a policy-maker, assigned by Parliament with the task, is in our view even more essentially a matter for that policy-maker, and not the court which is peculiarly ill-equipped to make such assessments. However, for the reasons we give below (see paragraphs 353-356), the nature and standard of review is not determinative in this case.

352. Having dealt with the factual and legal context in some detail, we can deal with the two limbs of the ground of challenge quite briefly.

Ground 8.1: Discussion and Conclusion

353. Whether the standard of review is irrationality or proportionality, we conclude that there is no legal basis for challenging the Secretary of State's decision to adopt the so-called "hub objective" and/or his assessment that the Gatwick 2R Scheme failed to meet it.

354. As set out in the factual background section of this judgment (paragraphs 42 and following), at least as far back as September 2012 when the AC was established, increasing airport capacity so as to maintain the UK's position as Europe's most important aviation hub was identified as a core objective. This involves the provision of capacity for more long-haul flights (paragraphs 1.2 and 1.3 of the ANPS). The AC Final Report confirmed the economic importance of the "hub objective", and the need to increase capacity in order to reverse the decline in the UK's hub status. Reference was made to the current inability of London to develop long-haul links to new destinations, including those in emerging markets. Demand for such routes was being met by increased services at hub facilities in Europe and the Middle East. Capacity constraints affect not only passenger services but also the economically important freight sector. These points were included in Chapter 2 of the February 2017 draft ANPS, as well as in the finally designated version. The inclusion of the "hub objective" as properly one of the fundamental aims of the ANPS is simply not open to challenge.

355. Mr Jaffey's more specific attack was on the Secretary of State's conclusion in September 2017, repeated in the final version of the ANPS (paragraph 1.32), that the expansion of Gatwick through the addition of a second runway would not deliver the "hub objective", i.e. to maintain the UK's hub status. However, as Mr Maurici pointed out, there are no legal challenges to the assessments and conclusions reached in paragraphs 3.18-3.19 (or, we would add, paragraphs 3.20-3.24) of the ANPS. One of those conclusions was that the Gatwick 2R Scheme would not maintain but rather would *threaten* the UK's global aviation hub status (paragraph 3.19). This was entirely consistent with the AC's Final Report (see paragraph 55 above). Therefore, on the conclusions reached by the Secretary of State, this is not an issue about the

extent to which the Gatwick 2R Scheme would meet the "hub objective", which would be a matter of degree or relative attainment of that aim. Rather, the Secretary of State has concluded that the scheme would not meet that policy objective at all. That conclusion is not open to challenge by way of judicial review. The Secretary of State was entitled to decide that a proposal that would threaten the "hub objective" is not an "alternative solution" for the purposes of the Habitats Directive. That conclusion too is not open to legal challenge.

356. In our view, the Hillingdon Claimants' argument would not have any better prospects of success if the proportionality approach were to be appropriate for this area of judicial review. The selection of the "hub objective" as a consideration of central importance to the ANPS and the Gatwick 2R Scheme as failing to deliver that objective, were both key points for Parliament to consider when the final version of the NPS was laid before it and for the Secretary of State when he designated the NWR Scheme. Even if proportionality were involved, for the reasons we have given the Secretary of State would have a significant margin of appreciation; and the evidence was firmly against the Gatwick 2R Scheme being able to maintain the UK's hub status function.

357. Finally, Mr Jaffey contends that the decision to reject the Gatwick 2R Scheme as an "alternative solution" for the purposes of the HRA is inconsistent with its retention as a "reasonable alternative" in the AoS for the purposes of the SEA Directive. We have already dealt with the language of these two regimes and their differing legal purposes (see paragraphs 320-322 above). The Gatwick 2R Scheme was not ruled out as an alternative at the beginning of the SEA process. An opportunity was given for the case for it to be advanced. The "sifts" of alternatives referred to by Mr Jaffey were carried out either by the AC or before the consultation stage under the SEA Directive.

358. Mr Jaffey then relied upon the description of the Gatwick 2R Scheme as an alternative in the final version of the AoS (June 2018) and the Post Adoption Statement (26 June 2018). But these documents are not to be construed as if they were legal instruments. Moreover, they plainly state that they are to be read together with the ANPS, and so the passages relied upon should be read compatibly with the policy statement unless that is made impossible by the language used. That is not the case here. The documents referred to by Mr Jaffey state that, even with a second runway, Gatwick would largely remain a point-to-point airport. In other words, as paragraph 3.10 of the ANPS states, Gatwick would attract "very few transfer passengers". That is an assessment by the Secretary of State that is justified on the evidence. On the basis of that assessment, Gatwick would be the antithesis of a hub.

359. Furthermore, Annex C of the submission by officials to the Secretary of State on 25 September 2017 explained why Gatwick was retained in the consideration of alternatives in the AoS, having regard to the different purposes of the SEA regime, in accordance with the analysis set out above (paragraph 322), and to record and explain how the evidence underpinning the decision to select the NWR had been tested comprehensively. We see no merit in Mr Jaffey's criticisms, which we consider overly forensic.

360. For these reasons, we reject the Hillingdon Claimants' challenge under Ground 8.1.

…

416. However, before turning to those matters, it is convenient to address Mr Pleming's submissions on differences between the SEA and EIA regimes which he suggests justify a stricter approach being taken to the adequacy of an environmental report prepared for SEA than is suggested by Blewett. In summary, he submitted that:

i) The SEA Directive imposes mandatory requirements as to the information to be provided in a report, whereas the EIA Directive allows Member States a degree of choice as to the projects requiring EIA and the content of an environmental statement.

ii) An environmental statement is prepared for EIA in support of an application for development consent and can be supplemented or corrected by additional information. An environmental report is prepared for SEA by the authority promoting the plan or programme and the addition of further information at a later stage could undermine compliance with the requirement of article 6(2) for early and effective consultation.

iii) An environmental report for SEA is prepared by or on behalf of the authority promoting the plan or programme which may also determine whether it is to be adopted finally, whereas an environmental statement is submitted for assessment by an independent decision-maker who may require further information to be provided.

417. Whilst there are some differences between the two regimes, we do not consider that they are as stark as Mr Pleming suggested, and they certainly do not justify a difference in the intensity of review for which he contends.

i) In the case of the EIA Directive, an Annex I project must be subjected to an assessment, whereas an assessment is required for an Annex II project if it is judged likely to have significant environmental effects (see also Annex III). Similarly, the SEA Directive requires an assessment to be made for certain categories of plans or programmes (article 3(2)) and in other cases where the plan or programme is judged likely to have significant environmental effects (article 3(4)).

ii) Where SEA has to be undertaken, the requirement to include in the environmental report the information described in article 5 and Annex I is not absolute. Instead, a judgment is involved as to "the information that may reasonably be required", taking into account current knowledge, assessment methods, the contents and level of detail in the plan, its stage in the decision- making process and whether matters are more appropriately assessed in other procedures (article 5(2) and see also regulation 12(3) of the SEA Regulations). Article 5(4) also requires those designated environmental authorities which are consultees on the environmental report under article 6(3) to be consulted on the scope and level of detail of that report. Similarly, the EIA Directive allows the competent authority to exercise judgment

appropriate to the EIA process on the scope and level of detail to be included in an environmental statement.

iii) Indeed, we consider the fact that the SEA Directive allows the promoter of a plan to judge the nature and amount of information which should reasonably be provided in the environmental report, *a fortiori* in the formulation of policy, is a strong indication that the standard of review in SEA cases is not materially different from that in the EIA cases.

iv) Cogent Land (as approved in No Adastral) establishes that it is permissible to cure a defect in the adequacy of an environmental report by the subsequent publication of and consultation upon supplementary material. That procedure is compatible with the requirement in article 6(2) of the SEA Directive for "an early and effective opportunity within appropriate timescales" for those consulted to express their opinions on the draft plan and the accompanying environmental report "before the adoption of the plan or programme". In these respects, there is some similarity to the EIA regime.

v) Where a local planning authority wishes to obtain planning permission to carry out development which is "EIA development", it may nonetheless determine that application itself, unless it is called in by the Secretary of State for Housing, Communities and Local Government. The EIA Regulations do not provide otherwise. There is no material difference for present purposes between that situation and the ability of an authority to formulate draft policy, consult thereon and adopt a final policy, so as to justify a more intensive form of review on the adequacy of an assessment of environmental effects in SEA.

vi) Furthermore, it should be noted that many statutory regimes for the adoption of plans or programmes do provide for independent scrutiny going beyond the legal requirements of a formal consultation process. For example, statutory development plans are the subject of an "examination" procedure before an independent examiner (sections 20 and 38A of the Planning and Compulsory Purchase Act 2004). A marine plan under the Marine and Coastal Access Act 2009 dealing with marine development must be subjected to a similar process of independent "investigation" (section 51 and schedule 6). An NPS under the PA 2008 must be subjected to Parliamentary scrutiny, which may include scrutiny by a select committee.

418. Accordingly, we do not consider that Mr Pleming's submissions comparing the SEA and EIA regimes lend any substantial support for the stricter standard of review for which he contends.

419. We turn to the EIA authorities. In Blewett, the complaint was that the environmental statement for a proposed extension to a landfill site contained no assessment of the effect of the scheme on groundwater protection. Instead, the minerals planning authority decided that that matter could be left to be assessed following the grant of planning permission, by assuming that complex mitigation measures would be successful. Sullivan J held that the starting point was that it was for the local planning authority to decide whether the information supplied by the applicant was sufficient to meet the definition of an environmental statement in the

EIA Regulations, subject to review on normal Wednesbury principles (see [32]-[33]). Information capable of meeting the requirements in schedule 4 to the EIA Regulations should be provided (see [34]), but a failure to describe a likely significant effect on the environment does not result in the document submitted failing to qualify as an environmental statement or in the local planning authority lacking jurisdiction to determine the planning application. Instead, deficiencies in the environmental information provided may lead to the authority deciding to refuse permission, in the exercise of its judgment (see [40]). Thus, the statement in [41], that the deficiencies must be such that the document could not *reasonably* be described as an environmental statement in accordance with the EIA Regulations, was in line with the judge's earlier observations in [32]-[33]. It simply identified conventional Wednesbury grounds as the basis upon which the court may intervene.

420. In Shadwell Estates Ltd v Breckland District Council [2013] EWHC 12 (Admin) at [73], Beatson J referred to a number of authorities which had taken the same approach in EIA cases to judicial review of the adequacy of environmental statements or the environmental information available: R v Rochdale MBC ex parte Milne [2000] EWHC 650 (Admin); [2001] Env LR 22 at [106], R (Bedford and Clare) v Islington London Borough Council [2002] EWHC 2044 (Admin); [2003] Env LR 22 at [199] and [203], and Bowen-West v Secretary of State for Communities and Local Government [2012] EWCA Civ 321; [2012] Env LR 22 at [39]. In Bedford and Clare, Ouseley J held that the environmental statement for the development of a new stadium for Arsenal was not legally inadequate because it had failed to assess transportation impacts using the local authority's preferred modal split, the loss of an existing waste handling capacity to make way for the development, noise effects at night and on bank holidays, contaminated land issues, and the effects of dust during construction. He considered that the significance or otherwise of those matters had been a matter for the local authority to determine. The claimant's criticisms did not show that topics such as modal split or noise effects had not been assessed at all. Instead, they related to the level of detail into which the assessment had gone and hence its quality. That was pre-eminently a matter of planning judgment for the decision-maker and not the court.

421. In R (Edwards) v Environment Agency [2008] UKHL 22; [2009] 1 All ER 57, the claimants sought judicial review of the Environment Agency's grant of a Pollution Prevention and Control Permit for the operation of a cement works, which was to include the burning of shredded tyres as a fuel. The relevant regulations required the company's application to identify the nature and sources of foreseeable emissions from the installation and to describe significant environmental effects that were foreseeable. The complaint was that PM_{10} emissions from low level point sources (as opposed to emissions from a stack) had not been included in the air quality modelling. The House of Lords held that whether this aspect should have been addressed had been a matter of judgment for the Environment Agency to determine. They applied the observations of Sullivan J in Blewett at [41]. Once again, the complaint related to the adequacy of the quality of the assessment that had been undertaken. The applicant had carried out modelling of one source of PM_{10} emissions; the omission of the low- level sources did not amount to a public law ground of challenge.

422. Turning to the SEA Directive, an analysis of the decisions on whether there has been compliance with the SEA Directive shows that challenges have been successful where the author of a plan has failed to give *any* consideration to a subject which article 5 and Annex I expressly required to be addressed. Challenges which have simply criticised the quality of the treatment given to a subject, such as the level of detail provided or a failure to cover a particular aspect of that subject have been unsuccessful.

423. We consider first cases in which the court has intervened.

424. As we have explained, Forest Heath was a case in which the local authority wholly failed to address the subject of "reasonable alternatives" to the proposed extensions to Newmarket, particularly the reasons why they should be rejected.

425. The court had previously reached a similar conclusion in City and District Council of St Albans v Secretary of State for Communities and Local Government [2009] EWHC 1280 (Admin); [2010] JPL 70, in which a challenge to a revision of the East of England Plan, a regional spatial strategy, was upheld. The plan proposed substantial growth in the London Arc, a belt of land to the North and East of London, lying between Rickmansworth and Brentwood. The court, referring to article 5(2) and regulation 12(3) of the SEA Regulations, accepted that the SEA Directive allows a process of decision-making in which options can be progressively narrowed and clarified (see [14]). Such decisions may not need to be revisited when alternatives to more detailed proposals are subsequently under consideration. On that basis, a complaint that the environmental report for the regional strategy had not addressed alternatives to expansion at Harlow was rejected, and so a further environmental report dealing with that subject was not required (see [15] and [19]-[20]). However, Mitting J concluded that there had not been *any* evaluation of alternatives to policies proposing the expansion of other towns which would require the erosion of the Green Belt. Consequently, there had been a failure to comply with article 5(1) in relation to those particular policies so as to justify a quashing order (see [21]-[22]).

426. Heard v Broadland District Council [2012] EWHC 344 (Admin); [2012] Env LR 23 was concerned with a proposal in a Joint Core Strategy for a "growth triangle" to the North East of Norwich. It appears that this was to involve the development of more than 20,000 homes on several large sites. Ouseley J upheld a complaint that there had been a failure to comply with article 5(1) on the grounds that, although an alternative option had been identified which would have involved no additional development in the triangle, no assessment had been made of that option and no reasons had been given for rejecting it. The sustainability appraisal carried out for the Strategy related solely to the authorities' preferred option. The reasons for rejecting other alternatives at earlier stages were not set out and so it was not possible to discern the reasons why the preferred option had been selected (see [58]-[70]).

427. In Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government [2015] EWCA Civ 681; [2016] PTSR 78 a policy in a Core Strategy required mitigation measures for housing development located within 7km of Ashdown Forest (an SAC and SPA) including

the provision of "Suitable Alternative Natural Green Spaces". The Court of Appeal upheld a challenge to that specific policy on the grounds that, in breach of the SEA Directive, the authorities had failed to consider reasonable alternatives to the imposition of mitigation measures for development within the 7km zone. Richards LJ, giving the judgment of the court, accepted that the identification of reasonable alternatives was a matter of evaluative assessment for the local planning authority, subject to review on normal public law principles, including Wednesbury unreasonableness. But in order to make a lawful assessment, the authority had at least to apply its mind to the question of alternatives. In this case, there was no evidence of any consideration being given to reasonable alternatives to the policy regarding development within the 7kmzone. It had not assessed that there were no such alternatives or that it was inappropriate to "drill down" further into the detailed requirements of the policy for that purpose (see [42]).

428. In Re Seaport Investments Limited [2008] Env LR 23, the High Court of Northern Ireland granted an application for judicial review in relation to two Area Plans because the environmental report in each case had failed to comply with the requirement to provide information addressing items (b), (c), (d), (f) and (h) in Annex I to the SEA Directive. Thus, in addition to there being no explanation dealing with the selection of alternatives, there was a failure to identify areas likely to be "significantly affected"; SPAs, Ramsar sites (i.e. a wetland site designated of international importance under the UNESCA Convention on Wetlands) and candidate SACs were ignored; and certain acknowledged environmental impacts were not the subject of any assessment. In an important part of his judgment, Weatherup J held that the "responsible authority must be accorded a substantia l discretionary area of judgment in relation to compliance with the required information for environmental reports" (see [26]). He added that the court will not examine the fine detail of the contents of the environmental report, but will consider whether there has been "substantial compliance" with the information requirements of the SEA Directive. Thus, the court will consider whether the matters specified in the Directive have been addressed, rather than "the quality of that address".

429. The distinction drawn by Weatherup J is illustrated by two cases in which allegations of non-compliance with the SEA Directive were rejected.

430. First, in Shadwell Estates Ltd v Breckland District Council [2013] EWHC 12 (Admin) the challenge was to the adoption of the Thetford Action Area Plan, and in particular to a policy for an extension to the town to provide 5,000 homes. In essence, the complaint was that, in breach of paragraphs (c) and (f) of Annex I, the AoS failed to assess the environmental characteristics of a substantial area of the extension, in that it had assumed that development there would have no effect on stone curlews (a European protected species) simply because it lay beyond a 1500m buffer zone designed to protect the SPA supporting that species (see [5] and [79]), and consequently had failed to take into account and assess evidence of stone curlews within that area and elsewhere (see [66] and [70]). Beatson J reviewed the case law which we have already summarised (see [73]-[78]). Having described the claimant's criticisms of the appraisal as "highly detailed", the judge concluded that the authority had not been required to provide a

comprehensive assessment of all of the evidence of stone curlew activity in the area, and that, in substance, it had provided an environmental report in substantial compliance with the SEA Directive and Regulations (see [80]-[81]). The challenge assumed too intrusive a standard of review for the legal adequacy of an environmental report (see [82]). Although Beatson J endorsed the "Blewett approach" (see [76]-[77]), he did so simply as a practical expression of conventional Wednesbury principles (see [73]-[75]).

431. In R (Gladman Developments Ltd) v Aylesbury Vale District Council [2014] EWHC 4323 (Admin); [2015] JPL 656, Lewis J rejected a challenge to the legal adequacy of the contents of a neighbourhood plan which sought to meet a requirement for additional housing. The SEA had identified alternatives to the settlement boundary and options for extending the town in different directions. It had given reasons for rejecting alternatives. The examiner had concluded that the SEA addressed environmental impacts at a level of detail appropriate to the contents of the plan. Nevertheless, the claimant argued that the requirements of the SEA Directive had not been met because the assessment of alternatives had been vague and lacking in precision. In particular, it was said that there was a lack of reasons to explain the drawing of the settlement boundary in certain locations and the non-allocation for housing of certain sites outside that boundary. Lewis J held that it sufficed that the report had explained why expansion had been based on the existing form of the town and why expansion in other directions would result in greater environmental impacts (see [89]-[92]). Accordingly, he concluded that a greater level of detail was not required. The report had indeed addressed the subject which the SEA Directive required to be tackled, and criticisms made about the manner in which that exercise had been carried out or the level of detail in the report did not amount to a public law ground of challenge.

432. Therefore, in conclusion, looking at the authorities as a whole, it is plain that the "Blewett approach" is not a freestanding standard or principle: it is no more and no less than a practical application of conventional Wednesbury principles of judicial review.

433. The information in article 5(1) and Annex I which is to be included in an environmental report is that which "may reasonably be required" (article 5(2)). That connotes a judgment on the part of the authority responsible for preparing the plan or programme. Such a judgment is a matter for the evaluative assessment of the authority subject only to review on normal public law principles, including Wednesbury unreasonableness.

434. Where an authority fails to give any consideration at all to a matter which it is explicitly required by the SEA Directive to address, such as whether there are reasonable alternatives to the proposed policy, the court may conclude that there has been non-compliance with the Directive. Otherwise, decisions on the inclusion or non-inclusion in the environmental report of information on a particular subject, or the nature or level of detail of that information, or the nature or extent of the analysis carried out, are matters of judgment for the plan-making authority. Where a legal challenge relates to issues of this kind, there is an analogy with judicial review of compliance with a decision-maker's obligation to take reasonable steps to obtain information relevant to his decision, or of his omission to take into account a consideration which is legally relevant but one

which he is not required (e.g. by legislation) to take into account (Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 at page 1065B; CREEDNZ Inc v Governor-General [1981] NZLR 172; In re Findlay [1985] AC 318 at page 334; R (Hurst) v HM Coroner for Northern District London [2007] UKHL 13; [2007] AC 189 at [57]). The established principle is that the decision-maker's judgment in such circumstances can only be challenged on the grounds of irrationality (see also R (Khatun) v Newham London Borough Council [2004] EWCA Civ 55; [2005] QB 37 at [35]; R (France) v Royal London Borough of Kensington and Chelsea [2017] EWCA Civ 429; [2017] 1 WLR 3206 at [103]; and Flintshire County Council v Jeyes [2018] EWCA Civ 1089; [2018] ELR 416 at [14]). The "Blewett approach" is simply an application of this public law principle.

435. As we have described (in paragraphs 147 and following above), where a legal challenge of the kind described in the preceding paragraph is brought, the question whether the decision-maker has acted irrationally, be they a local planning authority or a Minister, demands the intensity of review appropriate for those particular circumstances.

…

The Grounds: Introduction

436. We set out the grounds above (see paragraph 376).

437. The Hillingdon Claimants sought to advance their case on these issues in considerable detail. Large parts of the extensive witness statements filed on their behalf contain detailed criticism of the AoS. The Secretary of State responded in kind, in about 250 pages of witness statements. There then followed further exchanges of witness statements in reply. By that stage, the process had already become reminiscent of a planning inquiry. More was to follow at the hearing, including five pages of tables on behalf of the Secretary of State giving dozens of references to the evidence, a response of similar magnitude on behalf of the Hillingdon Claimants, and even detailed written notes in reply.

438. It may be that the Hillingdon Claimants' decision to produce evidence on this scale from the outset was linked to their submission that, where the adequacy of an environmental report is challenged, it is the role of the court, not simply to consider lawfulness on conventional Wednesbury principles, but to decide for itself whether the report was of "sufficient quality". We have firmly rejected that submission (see paragraphs 401-435 above): the court applies conventional Wednesbury principles, tempered by the margin of appreciation accorded to the Secretary of State because the issues involve judgment, evaluation and expert technical analysis. Furthermore, it is well-established that proceedings for judicial review generally do not enable disputes of fact and expert opinion to be resolved in claims such as this. It is not the court's job to perform a quality assurance role on the adequacy of the environmental report or to examine the detailed material upon which it relies.

439. It follows that it is not usually necessary, and is generally inappropriate, for a claimant to produce detailed evidence of the kind we have received in the

Hillingdon Claimants' claims. In most cases it is sufficient to produce the environmental report (or, preferably, the relevant sections of that report), along with any supporting material which is directly relevant to the legal challenge; and to make submissions on that material as to why the report fails to comply with article 5 and Annex I of the SEA Directive. Exceptionally, it might be appropriate for a witness statement from an independent expert to be produced in order to explain a technical matter which the court might not otherwise be able to understand from the source documents, even with the assistance of Counsel and even though the court will be comprised of specialist judges from the Planning Court. That should only happen where such evidence is necessary for such a purpose; and even then, its content should be non-tendentious and comply with CPR Part 35 and with the duties owed by an expert to the court (see HK (Bulgaria) v Secretary of State for the Home Department [2016] EWHC 857 (Admin)).

440. It follows from our conclusions in regard to the appropriate approach to such challenges that we have resisted being drawn into a detailed examination of the various evidential references we have been given. Our perusal of the material before the court indicates that that would be unnecessary as well as inappropriate.

…

491. Ms Low and Mr Lotinga have explained why, for the purposes of taking strategic level decisions in the ANPS, it was judged appropriate to adopt the 54dB level rather than 51dB. Mr Stanbury has explained why he disagrees and considers that the lower figure should have been used. We agree with Mr Maurici that it is inappropriate to ask this court to adjudicate upon technical differences of this nature in an application for judicial review. Mott again underscores that point. There was nothing that could be described as irrational in the Secretary of State's approach to the selection of noise parameters. This issue did not involve any failure to comply with the SEA Directive.

…