Adding Capacity at Heathrow consultation*:*
Comments on its Scope and Legality[1]

1. Executive Summary

1. The public Consultation *Adding Capacity at Heathrow* is subject to certain well-defined procedural limitations, which appear entirely illegitimate in light of the Government's own international and EC legal obligations.

2. The Government's invitation to the public to give opinions on the proposal for a third runway effectively permits only responses which accept that there is going to be a third runway. The consultative process does not therefore open up to public scrutiny the case for expansion itself, which is based on the 2003 Aviation White Paper and the 2006 Eddington Report. As such, it excludes the public from an important opportunity to effectively participate in the formation of policy.

3. It is true that the Aviation White Paper had, by supporting the proposal for a third runway, already pre-empted public debate in 2003. However, the Aarhus Convention, which became binding in 2005, imposes upon the Government a duty to include citizens effectively in policy making processes which affect the environment.

4. The question is, therefore, whether continuing to exclude the public from participating in the formation of policy on Heathrow capacity can be justified without contravening the terms of the Aarhus Convention and implementing EC legislation. The Government has to date offered no such justification.[2]

5. We argue therefore that the Consultation, in its current form, means the Government is in breach of its duties under the Aarhus Convention and implementing legislation. We further argue that an application for judicial review should be sought in order to declare unlawful the Secretary of State's decision to restrict the terms of the Consultation, and that concerns about the Government's failure to comply with the Convention should be formally lodged with the Convention's Compliance Committee.

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[2] See for example the following passage from the Consultation website FAQs at http://www.dft.gov.uk/consultations/open/heathrowconsultation/furtherinformation/faqs, in which the decision to restrict the terms of the Consultation is not justified, but rather simply reiterated:

> **Why are we not asking *whether* there should be a third runway?**
>
> The Air Transport White Paper stated the Government's support for the further development of Heathrow, including a third runway and additional terminal capacity subject to stringent local environmental limits being met. It also said that scope for making greater use of the two existing runways should be explored, subject to the same environmental limits. The consultation presents the outcome of our assessment of these options and invites views.

6. Our argument begins by outlining the historical background to the development of the Government's policy on Heathrow expansion. We then review in detail a selection of grounds for mounting a legal challenge to the Consultation as it now stands, drawing attention to the various ways in which it places the Government in breach of its duties to the public.

7. In addition to imposing a duty to consult the public effectively, the Aarhus Convention also implicitly recognises that, without proper consultation, a risk exists that factually incorrect or irrelevant matters may be taken into consideration and may therefore inform policy in ways prejudicial to the public interest and to individual rights. We therefore suggest a number of ways in which the main supports for the Government's Heathrow policy, the Aviation White Paper's Case for Need and the Eddington Report, can be judged wanting in these respects. We also outline a number of considerations which we believe are among those that must be addressed by a full and effective consultation, and which to date have not been publicly scrutinised.

8. The Appendix offers brief comments on judicial review for those unfamiliar with the procedure.

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10 March 2008

2. Policy Development Background

2.1. Since documents and reports in the area are numerous and lengthy, what follows is of necessity a condensed summary. In the Government's transport White Paper, *A New Deal for Transport: Better for Everyone* (CM 3950, DETR) in 1998, the case was made for an integrated air transport policy for the next thirty years.[3] Given the stated importance of 'good' air links to the UK economy, the forecasted increase in air travel demand whilst some major airports were reaching the limits of their capacity to handle rising demand was deemed to constitute the main problem. To resolve this problem, it was argued that decisions sensitive to issues implicated in civil aviation need to be made and require a "long-term framework that will maximise the beneficial aspects of aviation and minimise the negative effects".[4]

2.2. As the "first major step towards" this framework, in 2000 the Government offered a public consultation, entitled *The Future of Aviation: Consultation on Air Transport Policy* (the '2000 Consultation'). The purpose of the consultation was to contribute to a new White Paper which would "set out this… long term framework".[5] Three of the more important questions for consultation were:

> (a) Should the Government choose policies that responds to the demand of consumers and allow current growth patterns to continue, while mitigating the negative effects as far as possible [sic]. Or are the costs of this approach too high and should we therefore choose policies to limit these negative effects?
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> (b) How should the Government ensure that aviation meets the external environmental cost for which it is responsible? Should greater emphasis be placed on regulation (at global, national or local levels), economic instruments or voluntary agreements? If we should use a mixture of approaches, what are the principles that should underlie the choice of approach for each issue?
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> (c) If aviation covers [sic] its environmental costs, should capacity then be provided to meet demand?[6]

2.3. In 2002, the Government it offered further consultations on the development of capacity in the regions. In The *Future Development of Air Transport in the UK: South-East* (2002, 2nd ed.; the '2002 Consultation'), the Government asked, with specific reference to Heathrow and other airports, whether extra capacity for the next thirty years should be made available.[7]

2.4. In December 2003, the Government published *The Future of Air Transport* (the 'Aviation White Paper'). The Aviation White Paper made plain that the Government did

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[3] *The Future of Aviation: Consultation on Air Transport Policy* (the '2000 Consultation'), s.1, ch.1 ('Introduction and Purpose')
[4] 2000 Consultation, Forward and *The Future of Air Transport* (the 'Aviation White Paper'), s.1.6.
[5] 2000 Consultation, s.1, ch.1 ('Introduction and Purpose).
[6] 2000 Consultation, s.77(a)-(c) ('The Main Questions')
[7] *The Future Development of Air Transport in the UK: South-East* (2002, 2nd ed.), s.1.1

not "formally authorise (or preclude) any development".[8] Instead, its purpose was to define a "national strategic framework for the future development of airport capacity" over the next 30 years.[9]

2.5. Key to defining a framework in which, as mentioned, the aviation industry's beneficial aspects can be maximised and its negative effects minimised, was striking a balance between values of economic growth, employment and consumer choice and those of protecting the environment and the prudent use of natural resources.[10] Striking a balance ought to be made, according to the Government, in view of two issues: its claimed chief "role" as facilitator of markets and regulator of competition and its general duty to prevent harms to its citizen – conceived of as 'minimising' to acceptable levels, rather than preventing, impacts and costs entailed in this presumption.[11] Conceiving its role and duty in this way inclined it to a "general presumption in favour of liberalising aviation services" on grounds that "competition [is the] most effective way of securing benefits for consumers, and promoting economic efficiency and innovation"[12] and thus to reject the options of 'not providing additional airport capacity' as well as of 'encouraging growth without regard for the wider impacts'.[13] Instead, it concluded that a proper balance would be to cater for the forecasted growth in air travel demand whilst minimising the environmental impacts that facilitating growth may entail. Minimising such impacts is thought of in terms of incorporating the costs associated with them into aviation industry (e.g., by incorporating costs in the price of air travel).[14]

2.6. The Aviation White Paper stressed that such a framework implied making best use of existing facilities rather than new airport development.[15] However, where "capacity at terminals and runways is at, or near, saturation point", such as at "Heathrow – the busiest international airport in the world" where "the two runways are already full for virtually the whole day" and "at Gatwick, already the world's most intensively used single-runway airport",[16] it was claimed that additional capacity would be required in the 2015–2020 timeframe, conditional on meeting certain local "environmental limits".[17] To this end, it proposed public consultations on options to 'add capacity' to these airports and on a selection of identified environmental impacts that each option may present.

2.7. In November 2007, the Government offered a fourteen week public consultation on the options for adding capacity at Heathrow airport and on a selection of environmental

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[8] Aviation White Paper, s.1.3, ch.1 ('Purpose') and Summary) p.2
[9] Aviation White Paper, s.1.6 (p.17) and Summary (p.2).
[10] Aviation White Paper, s.2.17 (i.e., aspects of the Government's sustainable development policy, *A Better Quality of Life: A Strategy for Sustainable Development in the UK* Cm 4345, DETR, 1999).
[11] Aviation White Paper, s.1.9 and Summary
[12] 2000 Consultation, s.27; Aviation White Paper s.1.3
[13] Aviation White Paper, s.2.17.
[14] Aviation White Paper, s.2.18 (p.26) and Summary.
[15] Aviation White Paper, s.2.11.
[16] Aviation White Paper, s.2.12.
[17] Aviation White Paper (Summary), p. 7 ('The South East')

impacts, simply entitled *Adding Capacity at Heathrow* (the '2007-8 Consultation'). The Government, it was claimed, is

> now seeking your views on how Heathrow could be developed over the next 20 years or more. The White Paper made clear that, given the strong economic benefits, the Government supported the further development of Heathrow, by adding a third runway and exploring the scope for making greater use of the existing two runways. This support was conditional on: (i) a noise limit - no increase in the size of the area significantly affected by aircraft noise (as measured by the 57dBA L_{eq} noise contour in 2002); (ii) air quality limits - being confident of meeting European air quality limits around the airport, in particular for nitrogen dioxide ($NO_{2)}$ which is the most critical local pollutant around Heathrow; and (iii) improving public transport access to the airport.[18]

2.8. Having made clear the Government's wish to receive submissions from the public before a final policy decision is made,[19] the purpose of the consultation was to contribute to the formulation of final Governmental policy decision on the possible expansion of Heathrow. It should be noted that whilst it claimed that it would be for the airport proprietors themselves to submit planning applications for any such proposal in the usual manner,[20] since Government policy constitutes a 'material consideration' in local authority planning decisions (e.g., *Pye Ltd. v West Oxfordshire DC* [1982] JPL 577), a consultation outcome favouring expansion would aid any planning application by BAA, just as one opposing expansion would hamper any such application.[21]

2.9. Among concerns about the consultation, the Government's publicly stated strong support, as decision-maker, of its policy proposal to expand Heathrow capacity whilst excluding scope in the 2007-8 Consultation to question this support stands out. The stated reasons for the Government's strong support for the development of Heathrow capacity derives from a case for need and of the net economic benefits of capacity expansion outlined in the Aviation White Paper and updated in subsequent in documents. Beyond a small box at the end of the 2007-8 Consultation for 'final general comments' (Box E1), the Consultation restricts itself to four options (adding a third runway, making greater use of existing runways, altering the 'westerly preference' for departures and the Cranford agreement, and night-time rotation and early morning runway alternation). Assessment of each option's respective environmental and social

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[18] 2007-8 Consultation (Summary), p.3 ('Introduction') also at http://www.dft.gov.uk/consultations/open/heathrowconsultation/consultationdocument/summary?page=1#a1000 (accessed 14th January 2008).

[19] DfT website: 'Heathrow consultation - Frequently asked questions: Why is the Government consulting?' http://www.dft.gov.uk/consultations/open/heathrowconsultation/furtherinformation/faqs, (accessed 2 December 2007).

[20] Aviation White Paper, s.1.4.

[21] This point would become (more) problematic if, as anticipated, the Government's Planning Bill which, in lieu of the Barker Planning Review in 2007, aims to restrict public representation on certain planning applications and removes the likelihood of post-planning decision public inquiries for applications pre-judged by a Government-nominated committee to be in the 'national interest', becomes law before BAA submits its likely planning application to expand Heathrow capacity.

impacts is in turn restricted to local air quality (e.g., NOx), noise and public transport access issues.[22] There is no scope beyond those selected three impact-types to discuss further impacts such as that of increasing anthropogenic greenhouse gas (GHG) emissions on climate change. No explanation for this omission is offered beyond assurances that anticipated harms to the climate will be "tackled" by "fully … pricing carbon"[23] and by trading them in a proposed EU Emissions Trading Scheme.[24]

2.10. Similarly, there is no option, say, for foregoing expansion of Heathrow capacity altogether, nor is there scope to question the Government's stated case for expansion. An explanation for these omissions is offered by the Department for Transport (DfT) on its website which, in its entirety, states that

> The Air Transport White Paper stated the Government's support for the further development of Heathrow, including a third runway and additional terminal capacity subject to stringent local environmental limits being met. It also said that scope for making greater use of the two existing runways should be explored, subject to the same environmental limits. The consultation presents the outcome of our assessment of these options and invites views.[25]

To this, the DfT adds in the 2007-8 Consultation the claim that "delivering growth at Heathrow within the noise and air quality limits in the [Aviation] White Paper strikes the right balance between environmental, social and economic considerations".[26]

2.11. Since the reasons for the Government's support for capacity increase at Heathrow features strongly in the possible grounds for challenging the legality of the consultation (s. 3), it is helpful to summarise these (presented) reasons.

Case for Need. The chief argument for airport capacity expansion is the idea that expansion will contribute to, or is necessary for, future economic growth. The argument has four stages.

(i) It is argued that the civil aviation industry contributes to economic growth. The Aviation White Paper argued that air travel has significantly contributed to economic growth, largely by promoting access to new markets for business and bringing in investment to the UK.[27] Citing exports and imports by air, tourism and aviation employment, "in an increasingly competitive global marketplace, Britain's continuing success as a place in which to invest and do business depends crucially on the strengths of our international transport links".[28] The Transport Secretary, Ruth Kelly – the

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[22] See 2007-8 Consultation (Summary).
[23] 2007-8 Consultation, s.1.7, ch.1 (p.20).
[24] 2007-8 Consultation, s.1.7, ch.1 (p.20).
[25] DfT 'Heathrow consultation: frequently asked questions' http://www.dft.gov.uk/consultations/open/heathrowconsultation/furtherinformation/faqs (accessed 15th January 2007).
[26] 2007-8 Consultation (Summary), s. 1.49.
[27] 2000 Consultation ('Foreword'), p.3.
[28] Aviation White Paper, s.2.5.

Minister whose responsibility it is to assess and decide upon the 2007-8 consultation – reiterated the point by stating that "Heathrow supports 170,000 jobs, billions of pounds of British exports and is our main gateway to the global economy".[29]

(ii) It is claimed that air travel demand is forecasted to increase until the end of the forecasting range (2030). In the Aviation White Paper it is argued that the *past* thirty years have witnessed a five-fold increase in air travel in and out of the UK.[30] In relation to *future* demand, the Government asserts that "all the evidence suggests that the growth in popularity and importance of air travel is set to continue over the next 30 years"[31] and, more recently, has "forecast overall demand [to] grow from 228 million in 2005 to 490 million passengers passing through UK airports per year by 2030".[32] The claims about future demand derive from UK air traffic forecasts, compiled by the DETR in its *Air traffic forecasts for the UK 2000*[33] updated by the 2006 *Future of Air Transport Progress Report* and the *UK Air Passenger Demand and C0₂ Forecasts*.[34] These forecasts are premised on interactions between identified variables of economic growth, air fares, trade, exchange rates and the cost of carbon and are calculated within assumption of "unconstrained demand" giving forecasts of future demand from low to high until 2030.[35]

(iii) Some existing airport capacity is often cited to have reached its limits. "For too long", Ruth Kelly has argued, Heathrow "has operated at nearly full capacity, with relatively minor problems causing severe delays to passengers"[36] The suggestion is, given these limits, forecasted demand cannot be met without increasing capacity.

(iv) If airport capacity expansion does not take place, then (a) "Heathrow's status", as Kelly continues, "as a world-class airport will be gradually eroded – jobs will be lost and the economy will [sic] suffer",[37] and (b) neighbouring Continental airports,

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[29] 'Heathrow expansion plans unveiled' BBCNews online 22 November 2007, http://news.bbc.co.uk/1/hi/uk_politics/7106524.stm .
[30] Aviation White Paper, s.2.4.
[31] Aviation White Paper, s. 2.8 and Summary (p.2)
[32] DfT, *Future of Air Transport Progress Report* 2006, s.4.10.
[33] DETR, June 2000.
[34] DfT, November 2007.
[35] Aviation White Paper, s. 2.8-2.9.
[36] 'Heathrow expansion plans unveiled' BBCNews online 22 November 2007, http://news.bbc.co.uk/1/hi/uk_politics/7106524.stm .
[37] 'Heathrow expansion plans unveiled' BBCNews online 22 November 2007, http://news.bbc.co.uk/1/hi/uk_politics/7106524.stm . Similarly, David Frost of the British Chambers of Commerce, adds that "Heathrow expansion is one of the fundamental infrastructure projects necessary to keep the country competitive" ('Heathrow expansion plans unveiled' BBCNews online 22 November 2007, http://news.bbc.co.uk/1/hi/uk_politics/7106524.stm).

chiefly, Frankfurt, Amsterdam and Paris,[38] will expand to pick up the forecasted increase in air travel and thus acquire the resultant growth forgone at Heathrow.[39]

To summarise, the then Chancellor, Gordon Brown, argued that

> Heathrow plays a unique role in the UK as a hub airport and demand for capacity already significantly exceeds supply, leading to less competition, greater congestion, reduced choice and higher prices for passengers. To avoid the economic consequences of constraining aviation growth further expansion of UK airport capacity is needed.[40]

Benefits and Costs. Having presented a case for need, the Government is of the view that capacity expansion would yield significant net economic benefits. The 2007-8 Consultation document, for example, claims that "in view of the significant potential economic benefits, the Government considers that there is a strong case for the introduction of further capacity at Heathrow".[41] The then Chancellor, Gordon Brown, argued that "a big expansion of Heathrow, including a new runway" appeared compelling on grounds that "the economic benefits vastly outweigh the environmental damage…".[42] The figure regularly cited is that expansion by "adding a third runway", for example, "would bring net economic benefits of around £5bn in net present value terms, even after taking account of climate change and noise costs"[43] with estimates ranging from £4.4 to £6.2bn.[44]

In reference to climate change,[45] the Government has routinely cited a recommendation in the Stern Review, *The Economics of Climate Change*, that "the best way to tackle the complex pattern of carbon emissions is to ensure that each activity which produces carbon is priced in a way that reflects its true cost to society, and to the environment".[46] This 'true cost to society and to the environment' approximates to £70 per tonne of

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[38] Airports in Amsterdam (Schipol) and Paris (Charles de Gaulle) now operate five and four runways respectively, and a fourth runway is planned for Frankfurt (Main).

[39] Aviation White Paper, s.2.13, ch.2 ('The Strategic Framework'). While in passenger terms, Heathrow continues to be Europe's dominant airport, its owners BAA argue that unless its infrastructure is upgraded, it will fall behind the airports of Amsterdam, Frankfurt and Paris ('Heathrow expansion plans unveiled' BBCNews online 22 November 2007, http://news.bbc.co.uk/1/hi/uk/7107652.stm)

[40] 'Go-ahead for Heathrow expansion: New runway, 5000 more daily flights; Economic case sways Government' *The Times*, 8 December 2006, http://www.timesonline.co.uk/tol/news/uk/article664286.ece

[41] 2007-8 Consultation (Summary), s.1.48.

[42] 'Go-ahead for Heathrow expansion: New runway, 5000 more daily flights; Economic case sways Government' *The Times*, 8 December 2006, http://www.timesonline.co.uk/tol/news/uk/article664286.ece

[43] 2007-8 Consultation (Summary), s.1.8; 'At a glance: Heathrow expansion' BBCNews online 22 November 2007, http://news.bbc.co.uk/1/hi/uk_politics/7107415.stm

[44] 2007-8 Consultation, s.2.2 Annex B (p.131).

[45] The Aviation White Paper recognised that the "growing contribution to climate change of greenhouse gas emissions from aircraft is a cause for concern" (Avation White Paper, s.2.15) and that aviation constitutes the fastest growing source of UK carbon dioxide and may, if unconstrained, amount to 16-18 million tones of carbon by 2030 (*op cit.*, s.3.35)

[46] 2007-8 Consultation (Summary), s.1.7.

carbon (rising by £1 per year in real terms),[47] with an apparent 'sensitivity range' of between £35 and £140 per tonne of carbon.[48]

Once the social cost of fossil-carbon pricing is established, the "Government believes that the best way of ensuring aviation contributes toward the goal of climate stabilisation would be [sic] through a well-designed emissions trading regime.[49] It maintains that

> a well-designed, open, international emissions trading regime for aviation is still the best way of ensuring that the aviation sector plays its part in tackling climate change… This means that when the trading scheme is established, any additional aviation emissions above that level would lead to no increase in total emissions, since airlines would have to pay for the equivalent emissions reductions in other sectors.[50]

Having thus priced carbon impact and sought to offset increased emissions by emissions trading with industries and countries paid by aviation to reduce their emissions proportionately, it is claimed in the 2007-8 Consultation "even once users pay the full environmental costs of their journeys, there will remain a strong economic case for additional runway capacity".[51] In this light, as the 2007-8 Consultation continues, to "artificially [sic] … constrain the natural [sic] growth of aviation, once carbon pricing is fully in place, would pose a significant cost to the UK economy, with

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[47] Aviation White Paper, s.3.9.

[48] Calculations of monetary estimate of external costs of climate change derives from the Department for Transport and HM Treasury report *Aviation and the Environment: Using Economic Instruments* (March 2003), which in turn derives from an endorsement in Government Economic Service (GES) working paper no.140, *Estimating the Social Costs of Carbon Emissions*, of Eyre *et al.*'s (1999) *Global Warming Damages: Final Report of the ExternE Global Warming Sub-Task* (Brussels: DGXII, European Commission). These are now found in Defra's Shadow Price of Carbon, accessed at 15th January 2007, http://www.defra.gov.uk/Environment/climatechange/research/carboncost/index.htm
If in 2000, for example, the amount of carbon emitted by passenger flights was 8.2 million tonnes (*Aviation and the Environment*, Appendix C.2) and by 2030 approximates to 19 million tonnes (*The Future Development of Air Transport in the United Kingdom: South East*, ANNEX E), then following calculation of the social cost of the contribution to climate change concerns:
• The UK contribution from international trips is obtained by taking half of the effect of the whole trip.
• Emissions are separated into cruise and LTO contributions (different for long-haul and short-haul flights).
• The proportion of carbon emitted at altitude is then multiplied by the radiative forcing index to account for the effect of other emissions at altitude and adjusted to account for the relative proportions of LTO and cruise emissions.
This total is then multiplied by an illustrative cost of carbon of £70 per tonne of carbon for 2000 and rising by £1 p.a. to £100 per tonne of carbon in 2030; giving a total cost of £1.4 billion in 2000 and £4.8 billion in 2030.

[49] Aviation White Paper, s.3.39 and Summary.

[50] 2007-8 Consultation (Summary), s.1.4.

[51] 2007-8 Consultation (Summary), s.1.7. Similarly, BA chief executive, Willie Walsh, argues that "We are committed to ensuring that growth is sustainable. By the time a third runway becomes operational, aviation emissions will have been capped by the EU for several years. If airlines want to fly more, they will have to pay for emissions reductions in other industries - so overall carbon dioxide in the atmosphere will [sic] not rise because of a third runway" ('Reaction: Heathrow expansion plan' BBCNews online 22 November 2007, http://news.bbc.co.uk/1/hi/uk_politics/7107549.stm)

no additional environmental benefit".[52] To put the matter a little more bluntly, Ruth Kelly reasons that failing to expand Heathrow would damage the economy and have no impact on global warming:

> If Heathrow is allowed to become uncompetitive, the flights and routes it operates will simply move elsewhere. All it will do is shift capacity over the Channel. It will make us feel pure, but with no benefit to the rest of the planet.[53]

[52] 2007-8 Consultation (Summary), s.1.7.

[53] 'Kelly launches fight for Heathrow expansion' *The Guardian*, 22 November 2007, http://politics.guardian.co.uk/green/story/0,,2214979,00.html

3. Possible Grounds for Challenge

3.1. The Government declared that the Aviation White Paper concerned a framework for future developments, rather than authorising or precluding any particular development. However, in relation to the 2007 Consultation, the Government has stated that the Aviation White Paper strongly supported the expansion of capacity of Heathrow. The 2007-8 Consultation invites comments from all interested parties, but offers no scope for comment on the reasons for the Government's support for Heathrow expansion. As we noted above, the Government's website which has been provided to support the Consultation states that

> The [Aviation] White Paper stated the Government's support for the further development of Heathrow, including a third runway and additional terminal capacity subject to stringent local [sic] environmental limits being met. It also said that scope for making greater use of the two existing runways should be explored, subject to the same environmental limits. The consultation presents the outcome of our assessment of these options and invites views.[54]

3.2. If the Aviation White Paper is interpreted in this sense, then its arguments and conclusions should be open to discussion and challenge as part of the 2007-8 Consultation. Whether there needs to be a third runway at Heathrow cannot therefore be excluded from the consultation. That this substantive issue has been so excluded is evident; however, the Government (as the quotation in s.3.1 above makes clear) has not provided any reason for this. Without any justification being given, there is nothing preventing the inference that no such justification in fact exists.

3.3. By excluding this substantive issue from the context of the Consultation, the 2007-8 Consultation falls short of allowing the same opportunities for public participation as the 2000 and 2002 Consultations. By permitting no meaningful scope to comment on the reasons for the Government's support, the 2007-8 Consultation does not permit the public to participate properly or effectively in the formation and finalisation of Government policy, and therefore undermines its own *raison d'etre*. Another consequence of the restriction of consultative scope is that the Government has arguably failed to fulfil its binding duties (including a duty imposed in 2005, subsequent to the Aviation White Paper) to include the public properly and effectively in decision making. The Government had every opportunity subsequent to the imposition in 2005 of the duty to include the public in the decision-making process by keeping open the scope of the Consultation to allow proper and effective public participation but has evidently decided against this. Three other points follow from this which also undermine the procedural validity of the 2007-8 Consultation.

3.3.1. The exclusion from the 2007-8 Consultation of that substantive issue (the entire basis of the Government's support for the proposal) appears so unfair as to be

[54] http://www.dft.gov.uk/consultations/open/heathrowconsultation/furtherinformation/faqs

procedurally improper, and thereby also frustrates the public's legitimate expectation to participate properly and effectively in the decision-making process.

3.3.2. The Government's public endorsement of one policy option which it has excluded from comment in the Consultation gives the appearance that submissions unsupportive of the Government's position will not receive a fair, impartial and independent hearing. Coupled with alleged collusion with the chief beneficiary of the Government's proposed policy (BAA) – in the company's co-authoring of the 2007-8 Consultation document and in the establishment of a joint body between the Government and the company to steer the proposal through the consultation process[55] – the Consultation is given the strong appearance of bias, and indeed that a decision may in effect have already been made. The suggestion of an unfair and partial hearing thereby defeats the purpose of the Consultation of contributing to final policy.

3.3.3. The failure to consult the public properly and effectively by clarifying the reasons for the Government's support for a third runway, and by inviting comment on these as part of the current Consultation introduces a risk that the Consultation may have taken into account incorrect or irrelevant matters which, had there been an opportunity to consult, could have been corrected. The suspicion that such matters may have been taken into account is underscored upon cursory (re)examination of *inter alia* the case for need and the calculation of net economic benefit.

3.4. We now consider in turn these various grounds for challenge: (i) failure to give reasons, (ii) failure to properly and effectively consult the public, (iii) standard of fairness implied in the duty to consult, and (iv) standard of impartiality implied in this duty, before turning to consider (v) the substantive issue which has been excluded from the Consultation, viz. whether the need for Heathrow expansion has been proven by the Aviation White Paper.

3.4.1. *Failure to give reasons*. The Government offers no reason for excluding from public comment the basis of its support for the proposal beyond two responses. In the 2007-8 Consultation, it is answered that "delivering growth at Heathrow within the noise and air quality limits in the [Aviation] White Paper strikes the right balance between environmental, social and economic considerations".[56] As noted in 3.1 above, the DfT's website answers the question "Why are we not asking *whether* there should be a third runway?" with the following:

> The Air Transport White Paper stated the Government's support for the further development of Heathrow, including a third runway and additional terminal capacity subject to stringent local environmental limits being met. It also said that scope for making greater use of the two existing runways should be explored, subject to the same environmental limits. The

[55] Greenpeace Freedom of Information Act request (mid-November 2007), http://www.greenpeace.org.uk/heathrow /baa-files accessed 1 December 2007.
[56] 2007-8 Consultation, s. 1.49.

> consultation presents the outcome of our assessment of these options and invites views

As is clear from the text quoted, no reason for excluding this question from the Consultation is in fact offered. The text offers merely a reiteration of the Government's position.

The decision not to give a reason, or at least not to give an adequate one, for the decision to restrict the 2007-8 Consultation is instructive. Although at common law there is no *general* duty to give reasons for decisions (*R* v *Trade Secretary, ex p. Lonrho plc* [1989] 2 All ER 609, 620),[57] quite in addition to it being, according to Lord Denning, "one of the fundamentals of good administration" (*Breen* v *AEU* [1971] 2 QB 175, 191), the courts often require decisions to be given. First, reasons must be given where there is a *specific* duty so to do, imposed by statute or at common law. Second, fairness may also require the giving of reasons, because of the impact of the decision on an individual's rights and interests, including those to do with health and privacy, freedom of expression, a fair hearing and property (*R* v *Home Secretary, ex p. Doody* [1994] 1 AC 531). In the leading case, Lord Mustill (at 564-5) said:

> The giving of reasons may be inconvenient, but I can see no grounds at all why it should be against the public interest: indeed, rather the reverse. That being so, I would ask simply: Is refusal to give reasons fair? I would answer without hesitation that it is not.

Although taken in a specific context, this approach is capable of applying to many decisions that affect the individual. Third, in addition to a specific duty or the public interest, reasons must be given if a decision in the absence of explanation may appear arbitrary, mistaken, unreasonable or harsh (*R* v *Civil Service Board, ex p. Cunningham* [1991] 1 All ER 310). Fourth, European Community law requires that reasons be given when this is necessary to secure effective protection of a Community right, including, for example, the right to life, to lawful possession of property and so forth (e.g., Case 222/86 *UNECTEF* v *Heylens* [1989] 1 CMLR 901).

Fifth, in addition, the practice of judicial review also supports the giving of reasons. If, for instance, an individual receives no reasons for a decision and obtains permission for full judicial review, the decision-maker will be expected to disclose relevant information so that the court can properly decide on the application for the review (e.g., *R* v *Lancashire CC, ex p. Huddleston* [1986] 2 All ER 941). Similarly, reasons must be stated for an exercise of discretion if a right of appeal is valueless without it (*Minister of National Revenue* v *Wright's Canadian Ropes* [1947] AC 109). On either account, aspects of fairness merge with principles of good administration: according to Bradley

[57] The courts, for example, have not yet held that reasons should be given for *all* decisions (*Stefan* v *General Medical Council* [1999] 1 WLR 1293).

and Ewing, a court will likely hold that operative reasons must have existed when the decision was made and will place little weight on reasons created subsequently.[58]

On the facts, a duty to give reasons may be implied from the duty to consult under the Aarhus Convention and Directive 2003/35/EC (see s.3.4.2 below), and/or by the voluntary assumption of responsibility in the Government's decision in the Aviation White Paper to consult. Alternatively, given the magnitude of the proposed policy, the public interest of the current case would seemingly imply a duty to give reasons (*Doody*). Further, where indeed there is a duty to give reasons, "proper and adequate reasons must be given" which are intelligible and deal with the substantial points in issue (*Re Poyser and Mills Arbitration* [1964] 2 QB467, 478). Given the likelihood in this case of there being a duty for the Government to give reasons for its decision, the actual statement offered by the Government clearly falls, at best, some way short of standards that can nominally expected of it. The statement available at time of writing on the DfT's website can only with extreme difficulty be regarded as 'proper and adequate' (*Re Poyser*). Indeed, as we noted above, it is difficult to interpret the statement as giving any reason at all. Rather, it constitutes only a reiteration of a position.

The position concerning an absence of reasons when there is a duty so to provide is found in *Lonrho* and *Padfield* v *MAFF* ([1968] AC 997). In *Lonrho*, Lord Keith explained that

> if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker who has given no reasons cannot complain if the court draws the inference that he had no rational reasons for his decision.

This position follows the broader ruling by the House of Lords in *Padfield*, where it was held that if no reasons are given for a decision, a court may, if the circumstances warrant it, infer that there was no rational basis for that decision. In the present case, this may well entail that there is no rational basis not to keep open in sufficient (i.e., effective) measure the 2007-8 Consultation to public comments on the stated reason for the Government's support.

By merely reiterating a position, rather than offering reasons, the DfT website statement gives some suspicion that the recommendations in the Aviation White Paper are in effect being treated as a rule which Government now claims to be merely following. To put it another way, although Government's presumption may derive from the White Paper and Eddington Report, it cannot uncritically derive therefrom without it risking being vulnerable to accusations of treating this guidance as a rule and thereby fettering its own discretion as policy and decision-maker (*R(on application of S and Others)* v *Brent LBC* [2002] EWCA Civ 693).[59] It is common knowledge that for a decision-maker to treat

[58] Bradley, A. and K. Ewing, *Constitutional and Administrative Law*, 13th ed. (Harlow: Pearson, 2003) at 722.

[59] On this reading, the Government's presumption must follow from its use of discretion and in so doing, must have adjudged the proposal *inter alia* to be necessary, to have taken into account the most advanced

recommendations as rules is to fetter his or her discretion, and that the exercise of discretion must not be prejudged or fettered by such a binding 'rule' (*R* v *Torquay Licensing Justices, ex p Brockman* [1951] 2 KB 784). In a Court of Appeal ruling on planning guidance, for example, Lord Schiemann held that "guidance is no more than that: it is not direction, and certainly not rules" and to regard it as rules would be for a decision-maker to break its statutory remit by failing to exercise independent judgement and by fettering its own discretion (*R(on application of S and Others)* v *Brent LBC* [2002] at 15-16).

In addition to the suspicion of unlawfully fettering its discretion, the consequence of the Government's response is that it either fails to discharge its duty to give proper and adequate reasons or fails to give reasons as such, and on either account, *offers possible grounds for judicial review for respectively breaching the duty owed to the public or for irrationality*.

3.4.2. *Duty to consult the public*. In *R (on application of Greenpeace Ltd)* v *Secretary of State for Trade and Industry* ([2007] EWHC 311), Sullivan J recognised (at 49) that

> Whatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive. The United Kingdom Government is a signatory to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention").

The Aarhus Convention on 'Environmental Democracy' was signed in 1998 and came into force on 30 Oct. 2001. The EC and UK have signed the Convention and became full parties in early 2005.

The Preamble, which is worth citing at length, records the parties to the Convention:

> *Recognizing* that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,
>
> *Recognizing* also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,
>
> *Considering* that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-

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thinking and experience on the matters, to be comprehensive enough (taking into account wider but perhaps less obvious material considerations), to be based on sound ideas adequate knowledge and clear (unconfused) thinking, to not conflict with wider Government policy (e.g., on climate change), and to not conflict with the Government's basic duties.

> making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,
>
> *Recognizing* that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,
>
> *Aiming* thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment, ...

At the heart of the Convention are, as Bell and McGillivray explain, three 'pillars' for the promotion of public participation.[60] The *first* pillar of the Convention promotes access to environmental information by the public. By 'access' here is meant both responses by public authorities within certain time limits to requests for information and active dissemination of environmental information as a positive obligation. The aim is to ensure information about the environment is freely available so as to enhance the public's capacity to participate in informed decision-making. *Secondly*, the Convention promotes increased public participation in environmental decision-making by requiring the establishment of a *transparent* and *fair* framework for decisions, within which the public will participate in the preparation of and deliberation on plans, programmes and proposals relating to the environment. In this respect, articles six and seven are of importance. Article 6 deals with "Public participation in decisions on specific activities" including those in Annex 1 (which includes 'Airports', art.6(1)(a)) and "proposed activities … which may have a significant effect on the environment" (art.6(1)(b)). This articles provides that Government's "shall provide for early public participation, when all options are open and effective public participation can take place" (art.6(4)) and "shall ensure that in the decision due account is taken of the outcome of [this] public participation" (art.6(8)).[61] Article 7 deals with 'Public Participation concerning Plans, Programmes and Policies relating to the Environment'. The final sentence says: "To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment."[62] The *third* pillar of the

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[60] Bell, S. and D. McGillivray, *Environmental Law*, 6th ed. (Oxford: OUP, 2006) at 317.

[61] This is reproduced in art.2(2)(a)-(d) Directive 2003/35EC (see below).

[62] The same principle to enable public participation in the decision-making process is contained in the UN Rio Declaration 1992, which the Government has ratified and upon which the Government derives its overarching policy of sustainable development in all public policy issues. Principle 10 of the Declaration provides that

> *Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have access to information concerning the environment that is held by public authorities… and the opportunity to participate in decision-making processes.*

Convention is the promotion of access to justice on environmental matters by giving the public the right to challenge decisions by means of an independent review by a court of law or other independent body.

In addition to the binding effect of the Aarhus Convention, the European Commission has part-implemented requirements of the Aarhus Convention (articles 6-9) by *inter alia* adopting Directive 2003/35/EC on public participation in certain environmental plans, programmes and policies. The Directive provides that Member States shall ensure that early and effective opportunities to participate in the preparation, modification and review of plans, programmes and policies (art.2(2) Directive 2003/35/EC) made under six existing EC directives dealing with nitrates, waste, hazardous waste, packaging, batteries and, significantly, air quality.[63]

Given the importance of the decision under challenge — whether substantial expansion of the world's busiest airport should now be supported — it is difficult to see how anything less than a public consultation *inter alia* on the reasons for the policy would have been consistent with the Government's obligations under the Aarhus Convention. It is similarly difficult to see how anything less than a public consultation whose coverage extends to policy reasons would be consistent with the Government's obligations under Directive 2003/35/EC to ensure 'early and *effective* opportunities' to participate in the preparation, modification and review of policies which impact on air quality. As it stands, there is no opportunity to express concerns on the justifications for and review of said policy proposal, beyond (a) a small box for 'final general comments' and (b) commenting on a selection of technical issues that do not touch on the desirability of the proposed policy itself. Needless to say, the provision of a small box for possible comments on the most important issue of the proposal is hardly to provide effective scope for public participation in decision-making on that issue.

In response, the Government may argue that in the 2000 Consultation on the policy framework and the 2002 Consultation on the development of capacity in the regions it has already effectively discharged its duties under the Convention and Directive. Such an argument would, however, be to misunderstand the nature of the obligation. The 2000 Consultation merely covered the framework for the development of policy and, whilst the 2002 Consultation considered whether development of Heathrow capacity was needed, the Convention and Directive are explicit in imposing a duty on public authorities to include the public *effectively* in the decision-making process, which should include the

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> *States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided.*

[63] The Directive has been transposed by the Environmental Information Regulations 2004 (SI 2004/3391), which replace the 1992 Regulations. It should be noted that Articles 6 and 7 of the Aarhus Convention on public participation on in environmental decision-making in the preparation of and deliberation on plans, programmes and proposals relating to the environment fall expressly to the EC to effect (http://www.defra.gov.uk/Environment/internat/aarhus/pdf/compliance-summary.pdf).

preparation, modification *and* review of plans, programmes and policies. Participation that ends at an early (preparatory) stage of policy development cannot be *effective* participation. By the same token, the idea that the 2007-8 Consultation might discharge said duties would also fail for want of addressing in the process a range of key issues. By excluding from discussion the reasons behind the Government's decision to support the Heathrow expansion proposal, the Consultation cannot meaningfully be described as one which facilitates 'effective' public participation in the decision-making process.

In response, it might be argued that the combined effect of the three consultations could amount to the provision of 'effective' participation within the meaning of the Directive and Aarhus Convention. On the question of what constitutes 'effective', although decided before the Convention and Directive, *Berkeley* v *Secretary of State for the Environment* ([2001] Env LR 16 ('*Berkeley No.1*')) remains the leading case concerning what proper opportunity to participate in any given consultation means, and is therefore instructive in the present case. In *Berkeley*, the House of Lords considered the role of public participation in, in that case, the environmental assessment process. It was held that public consultations are to ensure that the 'quality' of the participation is sufficient to actively engage the public and that the 'proper opportunity' is given to respond to any consultation exercise. The Lords emphasised that an important part of the environmental assessment procedure was to this end to provide the public with all of the relevant information in a rational and digestible form and to *facilitate public comment* on that information. Thus, according to Bell and McGillivray, it was the process of consultation which was important since this was designed to give the public sufficient opportunity to express its opinion.[64]

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[64] Bell and McGillivray, *op cit.*, 340. The increased emphasis upon participation in decision-making was taken up by the Royal Commission on Environmental Pollution in its 21st Report, *Setting Environmental Standards*, which called for a "more rigorous and wide-ranging exploration of people's values" at the "earliest stage" in what had been "hitherto relatively technocratic procedures (Cm 4053, 1998, §9). The RCEP called for more deliberative techniques in which the public played a significant role in setting strategies rather than being consulted on already drafted proposals (§7.22).

It may also be possible, albeit implausible, for the Government to try to argue that the Heathrow proposal does not relate to 'air quality' as defined by the Directive. In response, the Directive refers to Annex 1 (8) (a) of the Aarhus Convention: 'airports'. Moreover, if a proposal to increase greenhouse gas emissions by considerable amounts beyond that which would have otherwise been released is not a matter of air quality, then it is difficult to conceive what would be. An attempt to redefine air quality in this way would also defeat the purpose of the Directive which, as an implementing instrument of the Aarhus Convention is to "recognise that… essential to human well-being and the enjoyment of basic human rights" is "adequate protection of the environment", that "every person has the right to live in an environment adequate to his or her health and well-being" and a "duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations", requisite for both of which (duty and right) is on issues affecting these "access to information" and "entitle[ment] to participate in decision-making".

Although we are unaware of domestic or EC cases on the definition of 'air quality' in relation to anthropogenic (fossil) greenhouse gases, in view of the US Supreme Court's recent ruling, which may have 'persuasive precedent', on the US Environmental Protection Agency's unsuccessful attempt to exclude (fossil) carbon dioxide emissions from the US Clean Air Act apparently in order to avoid enforcing it and possible prosecution industries for contributing thereby to climate change (*Massachusetts* v *US*

Given (i) the 2000 Consultation concerned a framework and general principles for a framework for aviation policy not policies themselves, (ii) the 2002 Consultation concerned the *preparation* of a policy for possibly expanding the capacity at Heathrow (among other airports) and (iii) the 2007-8 Consultation concerned a pre-decided set of technical issues surrounding four options for the expansion of Heathrow capacity, the 2007-8 Consultation cannot be said to have facilitated public comment – quite the reverse. Taken together, it is clear that 'proper opportunity' has been offered to participate in only the preparation of Heathrow policy. By implication, there has been no scope to participate on the modification and the review of that proposal (as per Directive 2003/35/EC).

It is therefore difficult to construe the state of affairs as one of 'facilitating public comment' as required in *Berkeley*. The 2007-8 Consultation appears at best of 'sufficient quality' to engage only that sector of the public equipped with technical expertise to respond to technical issues concerning noise, local air quality and public transport issues. By implication it is of insufficient quality to engage the rest of the affected public, and will not therefore reflect the conclusions of the House of Lords Select Committee on Science and Technology, i.e. that policy makers "will find it hard to win public support, or even acquiescence, on any issue with a science component, unless the public's attitudes and values are recognised, respected and weighed in the balance along with the scientific and other factors".[65] Rather than 'facilitate public comment', the Consultation has in effect placed unacceptable limitation upon it. Consequently, the public can hardly be said to have been offered, as it must, a proper opportunity (*Berkeley*) let alone an effective one (Directive 2003/35/EC) to participate in decision-making on the development of proposed policy.

To sum up: the objection does not concern the absence in the 2007-8 Consultation of an openness on issues akin to that which characterised the 2000 and 2002 Consultations. Rather, the substance is that, in the course of the development of specific policy for Heathrow, the door opened in earlier consultations should, in accordance with provisions of the Aarhus Convention and the Directive 2003/35/EC, have been left ajar to enable effective and proper public participation in development and review of that developing policy. In the 2007-8 Consultation, the door is firmly shut on these possibilities, thus excluding the public from contributing any meaningful input to the decision-making process in which it has a clear right to be involved.

The magnitude of this failure is evident, once again, in the Government's published answer as to why it is not consulting on whether or not capacity at to Heathrow should be expanded. To reiterate:

Environmental Protection Agency 549 U.S. 1438 (2007)), the idea of excluding (excess) anthropogenic (fossil) greenhouse gases from the legal definition of 'air quality' is likely to be unsustainable.

[65] UK House of Lords, *Science and Society,* Report of the House of Lords Select (Committee on Science and Technology: London, 2000), s.2.65.

> The [Aviation] White Paper stated the Government's support for the further development of Heathrow, including a third runway and additional terminal capacity subject to stringent local environmental limits being met. It also said that scope for making greater use of the two existing runways should be explored, subject to the same environmental limits. The consultation presents the outcome of our assessment of these options and invites views.

Aside from the fact that it is difficult to construe this as an answer to the question it has set itself (see 3.4.1 above), the answer betrays no recognition of the duty to consult properly, that is, to facilitate and not to close off public participation (*Berkeley*) nor any of the duty imposed post-2003 Aviation White Paper to include the public *effectively* in decision-making on policies of this nature (Aarhus Convention and Directive 2003/35/EC).

As a consequence, the opportunity to engage the public properly and effectively in the development of policy on Heathrow capacity has been excluded from the 2007-8 Consultation, despite the Government having had ample opportunity, following the coming into force of the Aarhus Convention and Directive 2003/35/EC, to remedy this deficit. Accordingly, the 2007-8 Consultation constitutes a failure to discharge the Government's duties to consult the public properly and effectively on a substantive issue in decision-making in which, under the Aarhus Convention and Directive 2003/35/EC, it has a right to be involved, and therefore *offers possible grounds for judicial review for this breach of duty owed to the public by the Government*.

3.4.3. *Standard implied in duty to consult: fairness*. It should be recognised that a decision-maker will usually have broad discretion as to how a consultation exercise should be carried out and that a consultation exercise which is flawed in one, or even in a number of respects, is not necessarily so procedurally unfair as to be unlawful. The question is how flawed a consultation must be in these terms for it to be unlawful.

In *R* v *North & East Devon Health Authority, ex parte Coughlan* ([2001] QB 213), Lord Woolf MR giving the judgment of the Court of Appeal said (at 108):

> It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R* v *Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168.

Coughlan was considered by Maurice Kay J in the *R (Medway Council and others)* v *Secretary of State for Transport* ([2002] EWHC 2516) ('the Medway case'). He acknowledged that the four requirements set out in *Coughlan* did not expressly adopt the

language of fairness, but rejected the submission that fairness had ceased to be an aspect of a lawful consultation process:

> It is an aspect of what is 'proper'- the word used in *Coughlan* (at 108). ... it is axiomatic that consultation, whether it is a matter of obligation or undertaken voluntarily, requires fairness (at 28).

The overriding need for fairness in any consultation process was confirmed by the Court of Appeal in *R (Edwards and others)* v *Environment Agency and others* ([2006] EWCA Civ 877) (at 90-94 and 102-106) and expressly followed by Sullivan J in *Greenpeace* (at 59).[66]

The restrictive nature of the 2007-8 Consultation prevents effective participation by excluding sufficient scope to comment on the basis of the Government's support for the specific development of Heathrow's capacity. In s. 3.4.2 above, we argued that this restriction breaches the Government's duty to consult the public *properly* and *effectively* on the development and review of policy in which it has a right to be involved. The nature of the Consultation effectively prevents the public from giving "intelligent consideration and an intelligent response" to the proposed policy as required by *Coughlan*. Scope to make an "intelligent response" is restricted to a small box in which one may make only 'final general comments'. Since one cannot consider what is not consideration, the absence of reasons for the Government's policy proposal prevents the public from giving it "intelligent consideration". Consequently, an "intelligent response" cannot, for obvious reasons, "be conscientiously taken into account when the ultimate decision is taken" as indeed according to *Coughlan* "it must be". By thus excluding what it must provide, the 2007-8 Consultation can be regarded as improper in the sense of *Coughlan. Being thus improper may render it so procedurally unfair as to be unlawful, and thereby offer further grounds for judicial review.*

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[66] In *Edwards*, at paragraph 103, Auld LJ, with whom Rix and Maurice Kay LJJ agreed, stated that:

> *In general, in a statutory decision-making process, once public consultation has taken place, the rules of natural justice do not, for the reasons given by Lord Diplock in Bushell, require a decision-maker to disclose its own thought processes for criticism before reaching its decision. However, if, as in United States Tobacco (see per Taylor LJ, as he then was, at 370-371, and at 376, per Morland J), and in Interbrew (see per Moses J at pp 33-35 of the transcript), a decision-maker, in the course of decision-making, becomes [or ought reasonably to become] aware of some internal material or a factor of potential significance to the decision to be made, fairness may demand that the party or parties concerned should be given an opportunity to deal with it. See also the remarks of Schiemann J in R v Shropshire Health Authority, ex p. Duffus [1990] 1 Med LR 119, at 223 as to the changing scene that a consultation process may engender and the consideration by Silber J in R (Smith) v East Kent Hospital NHS Trust [2002] EWHC 2640, at 39-44, of the possible need, depending on the circumstances, for further consultation on matters and issues that the initial consultation may have thrown up.*

This seemingly procedurally unfair exclusion of the public from effective and proper participation on a substantive issue in which it has a clear right to be involved, also therefore frustrates the public's legitimate expectation to be so involved. The idea of legitimate expectation was used in *Schmidt* v *Home Secretary* ([1969] 2 CH 149) by Lord Denning MR who noted several main situations in which, in that case, claimants had 'a legitimate expectation of which it would not be fair to deprive [them] without hearing what [they have] to say'. The concept has since been endorsed in various rulings (e.g., *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 375; *R* v *Home Secretary, ex p Hargreaves* [1997] 1 All ER 397). In *Cloughlin*, one of the leading cases on legitimate expectation, it was held that a promise to (sectors of) the public may create a legitimate expectation of, in that instance, a "substantive benefit, the frustration of which" could "be so unfair as to amount to an abuse of power…" unless there is "an 'overriding public interest' to justify departure from the promise". In *Greenpeace*, this sense of legitimate expectation was expressly recognised in relation to a governmental duty to consult the public fully and effectively on a given issue.

In the present case, whilst there was a promise in the Aviation White Paper to consult on restricted issues, the entry into force of the Aarhus Convention and the (part) implementing EC Directive gave rise to a legitimate expectation that that promise will be fulfilled in accordance with existing law, that is, not in a restricted but an 'effective' manner – an expectation thwarted by the 2007-8 Consultation. No overriding public interest in preventing the public from effectively and properly participating in policy development has either been claimed or implied in this case. *Accordingly, this improper failure to discharge a duty may give further grounds for judicial review on the grounds of having thereby frustrated the public's legitimate expectation to be involved effectively in the decision-making process.*

3.4.4. *Standards implied in duty to consult: impartiality and independence*. The Government's strong support, as Consultation decision-maker, for one policy outcome of the 2007-8 Consultation for reasons it refuses to submit to public deliberation gives the appearance that submissions from the public either broadly or specifically unsupportive of the Government's policy are unlikely to receive a fair, impartial and independent hearing. In addition, allegations of collusion with the main beneficiary of the Government's endorsement, i.e. BAA, gives the consultation process itself a strong appearance of bias, and indeed invites the conclusion that a final decision have already been made. In sum, the suggestion of an unfair, partial hearing defeats the purpose of the consultation, namely, to contribute to a final policy on Heathrow.

Allegations of procedural impropriety typically concern failures to observe rules (i) in legislation and (ii) of natural justice or to have acted fairly (*Ridge* v *Baldwin* [1964] AC 40) for which some explanation may be beneficial. (i) Where a statute authorises a

certain power to be exercised after a stated procedure has been followed, failure to observe the procedure may result in the purported exercise of the power being declared a nullity (*Ridge* v *Baldwin*), an option that may be gainfully pursued, but cannot be done so here.[67]

(ii) The scope of natural justice is usefully understood in terms of the broad perception that it is the duty of the courts to ensure that *all* administrative powers have been exercised fairly, that is, in accordance with the principles of fair procedure (e.g., *Russell* v *Duke of Norfolk* [1949] 1 All ER 109, 118). Equally, there is a general rule of natural justice that public authorities must act fairly in making decisions (*Cooper* v *Wandsworth Board of Works* (1863) 14 CB (NS) 180, 194), which includes the further rule that no policy-maker shall be the judge of his or her own cause. More recently, the courts have come to explain natural justice purely in terms of fairness, stating that "the requirements of fairness demand [that] when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals" the courts may "readily imply… additional procedural safeguards as will ensure the attainment of fairness" (*Lloyd* v *McMahon* [1987] AC 623, 702-3; Lord Bridge). All of these requirements of 'natural justice' are essentially rules of the common law which are in large part now buttressed under the Human Rights Act 1998 (HRA) by article 6(1) European Convention on Human Rights (ECHR):

> In the determination of [one's] civil rights and obligations or of any criminal charge against [one], everyone shall be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The object and purpose of art.6(1) ECHR is to "enshrine the fundamental principle of the rule of law" (*Salabiaku* v *France* (1988) 13 EHRR 379, ECtHR at 28). In a democratic society, the right to the fair administration of justice holds such a prominent place that a restrictive interpretation of the article would contravene the purpose of the European Convention on Human Rights, which the HRA 1998 incorporates into English law. Accordingly, the article is to be given a broad and purposive interpretation (*Moreira de Azevedo* v *Portugal* (1990) 13 EHRR ECtHR at 66).[68]

Within the jurisdiction of the Human Rights Act 1998, the public's right to a hearing that is fair, public, independent and impartial is assumed, and implies *inter alia* an obligation

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[67] Whilst not every procedural error invalidates administrative action – the courts have often distinguished between procedural requirements which are mandatory (breaches invalidates) and those which are directory (breach does not invalidate) – this distinction does not take into account whether there has been a total failure to observe the procedure or substantial compliance with it; or of whether the procedural defect caused any real prejudice for the individual (cf. *Coney* v *Choyce* [1975] 1 All ER 979 with *Bradbury* v *London Borough of Enfield* [1967] 3 All ER 434).

[68] Strasbourg case-law has given particular regard to the 'object and purpose' of the ECHR (a teleological approach) rather than taking a literalistic approach. The object and purpose has been defined as 'the protection of individual human rights' (see Soering v UK (1989) ECHR 14038/88) and the 'promotion of a democratic society' (see Kjeldsen and others v Denmark (1976) I EHRR 711).

that those employing judicial and quasi-judicial powers be independent of the contestants to a dispute and exhibit no bias or prejudice. Not only must 'public bodies' refrain from hearings contrary to the public's right to fairness, impartiality and independence therein, they also have a *positive* duty to ensure that this takes place in all their decisions, actions and omissions (*Z* v *UK* (2001) 34 EHRR 97).

The rule against bias/impartiality. The essence of a fair (judicial and quasi-judicial) decision is that it has been made by an impartial decision-maker. The main rule against bias is that a decision-maker is disqualified from acting in a decision on one of two grounds. First, where s/he has a direct pecuniary interest, however, small, in the subject matter of the case. The automatic disqualification of a decision-maker also applies when there is no financial interest, but the decision-maker would be deciding on a case where the outcome would affect a cause in which he or she is closely involved with one of the parties (*R* v *Bow Street Magistrate, ex p Pinochet (No 2)* [2000] 1 AC 119). Second, apart from a pecuniary interest or identification with one of the parties, a decision-maker is disqualified from sitting when "the fair-minded and informed observer, having considered the facts [relating to an allegation of bias] would conclude that there was a real possibility that the tribunal was biased" (*Porter* v *Magill* [2002] 2 WLR 37 at 103; Lord Hope). Under this test, disqualification is not automatic but depends on whether an informed observer would conclude there was a 'real possibility of bias' once the facts had been ascertained.

The right to a fair hearing. It is equally fundamental to a just decision that each involved party must have the chance to present their version of the facts, to make submissions on the relevant rules of law, and to be able to comment on all material considered by the decision-maker.[69] This right includes the long-standing presumption of the principle of natural justice, *audi alteram partem*, that is, that 'both sides must have voice'. The requirement of fairness, in addition to *audi alteram partem*, implies 'equality of arms': the idea that everyone who is a party to a hearing be given a reasonable opportunity of presenting his case to the court (or assessor) under conditions which do not place him at a substantial disadvantage vis-á-vis his opponent. The principle of 'equality of arms' involves striking a 'fair balance' between the parties (e.g., *De Haes and Gijsels* v *Belgium* (1997) 25 EHRR 1, ECtHR at 53).[70]

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[69] Each party should also have the opportunity of knowing the case against him or her and of stating his or her case, and neither side must communicate with the judge behind the other's back.

[70] With regard the requirement of independence, according to Strasbourg case-law, "regard must be had, *inter alia*, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to question whether the body presents an appearance of independence (*Bryan* v *United Kingdom* (1995) 21 EHRR 342, ECtHR at §37). By 'guarantees against outside pressures', assessors and tribunal members should not be subject to instructions from the executive (e.g., *Beaumartin* v *France* (1994) 7 EHRR 165, ECtHR at 38 and *Sramek* v *Austria* (1984) 7 EHRR 351, ECtHR at 41-2). As to the requirement of an 'appearance of independence', this entails an objective test, bearing in mind the importance of justice not only being done but being seen to be done (*Campbell and Fell* v *United Kingdom* (1984) 7 EHRR 165, ECtHR at 81).

Allegations of procedural impropriety of the kind made at the beginning of this subsection are usefully addressed separately. With regard to the first concern above, it is asked whether support by a policy-maker for her own policy on which she is deciding *and* foreclosure of the scope to question that support puts her in breach of her positive duty to observe and to ensure the public's right to a fair, impartial and independent hearing under art.6(1) ECHR.

Were the Government to support a proposed policy but not decide upon the proposal, there would be no question of a breach of art.6(1) (unless, say, it exercised undue pressure upon the decision-maker; e.g., *Beaumartin* v *France* (1994) 7 EHRR 165). Were it to support a proposal upon which it is also deciding, it may be unlawful under the general rule that no person can be judge of his or her own cause, subject to recent qualifying conditions (see *Alconbury* below). More certain is the question of a decision-maker supporting his or her own policy for reasons it refuses to have challenged: this would *prima facie* prevent *audi alteram partem* and an equality of arms under art.6(1) ECHR (*De Haes and Gijsels*). The latter two scenarios apply in the present case, and may, with different degrees of certainty, put the Government in breach of its duty to observe and to ensure a fair, impartial and independent hearing.

Against these challenges, there appear (at least) two 'defences' available to the Government. (i) Whilst presuming support for Heathrow expansion, the Government could have disclosed in advance of the 2007-8 Consultation those conditions or reasons which could lead to its presumption being altered. To disclose those conditions or grounds which would lead the Government to change its presumption in favour of the proposal would be to clarify what difference the public's contributions to the consultation could actually make. The value of disclosing possible reasons, at least, upon which a decision-maker might decide differently than is expected was endorsed by Lord Reid in *Padfield*. Whether disclosure in the present case would have sufficed to satisfy the requirement of fairness would turn on the fact at hand.

It is plain, however, that the Government has offered no such counter-presumption, or, surprisingly, anything approximating to a possible reason. Instead it declined to offer such upon a request for such, and explained that

> There could be many reasons why the Government might alter its position on airport's policies. In respect of Heathrow, the Government wants people to register their views and will take policy decisions after considering all responses.[71]

Whilst there may indeed be many reasons why the Government might alter its position, the response is disingenuous. It is precisely the denial of any scope for "people to register their views" beyond purely technical matters concerning the four capacity

[71] Email sent by DfT personnel identifying himself as 'Jonathan' from Heathrowconsultation@dft.gsi.gov.uk on 3 December 2007 (16:00 hrs).

expansion options that excludes the possibility of raising "the many [undisclosed] reasons why the Government might alter its position". Indeed, s an exercise in avoiding giving the required clarification, the reply could not be improved upon. Without disclosing reasons, it is unclear what difference the public's submission will actually make. Of course, even had the possible grounds for changing the presumption been disclosed, they would be irrelevant unless the scope of the Consultation was widened sufficiently to invite public views upon them.

(ii) A further 'defence' available could be for the Government to rely on judicially imposed limits governing challenges on grounds of natural justice to administrative authorities, which centre upon the otherwise general rule that no decision-maker should be judge in their own cause. This rule was in question in the seminal *R* v *Secretary of State for the Environment, Transport and the Regions, ex p. Holdings and Barnes plc and others* ([2001] UKHL 23 (the 'Alconbury' case)). Specifically, it was asked whether decisions about government (planning) policy by ministers whose departments were responsible for making such policy was compatible with the public's right to a fair, impartial and independent hearing (art.6(1) ECHR). In answer, the House of Lords accepted that a policy-maker who is the judge of his own cause cannot be impartial or independent (at 43). However, the House upheld the distinction between the legality of (planning) judgements and the merits of the decision, and thought it misconceived to regard a minister's role as that of a judge, for so to do would disturb the whole scheme of planning legislation. It is for the court to determine only the lawfulness and fairness of the decision-making *procedure.* As Lord Slynn argued (at 48), it is

> for elected Members of Parliament and ministers to decide what are the objectives of planning policy, objectives which may be of national, environmental, social or political significance and for these objectives to be set out in legislation, primary and secondary, in ministerial directions and in planning policy guidelines.

The importance of the notion of 'Parliamentary sovereignty' within a democratic society to the ruling to render compatible a policy-maker the judge of his own cause with the public's right to a fair, impartial and independent hearing is evident throughout their Lordships rulings. Lord Nolan argued (at 60) that

> Parliament has entrusted the requisite degree of control [over the use and development of town and country] to the Secretary of State, and it is to Parliament which he must account for his exercise of it. To substitute for the Secretary of State an independent and impartial body with no central electoral accountability [i.e., the court] would not only be a recipe for chaos: it would be profoundly undemocratic.

Similarly, Lord Hutton (following Lord Greene in *B Johnson & Co (Builders) Ltd v Minister of Health* [1947] 2 All ER 395) put it (at 198) that,

> in the democratic system of government in England a minister could properly perform both functions because he was answerable to Parliament as regards the policy aspects of his decision and answerable to the High Court as regards the lawfulness and fairness of his decision making process. In my opinion the jurisprudence of Strasbourg also recognises that in a democracy, where the courts have jurisdiction to conduct a judicial review of the lawfulness and fairness of a decision, a Government minister can be both a policy maker and a decision taker without there being a violation of article 6(1).

Concurring with these views, Lord Hoffman determined (at 74) that

> The administrator may have a duty, in accordance with the rule of law, to behave fairly ('quasi-judicially') in the decision-making procedure. But the decision itself is not a judicial or quasi-judicial act… [because] it does not involve deciding between the rights and interests of particular persons [sic]. It is the exercise of a power delegated by the people to decide what the public interest requires.

The House did not rule, however, that being a judge of one's own case will, within this 'democratic safeguard', on every occasion, satisfy the requirements of fairness. For, in addition to having to comply with fairness and legality of procedure, each case will turn on its own facts, including the question, as Lord Slynn pointed out (at 46), as to whether there has been meaningful scope for the aggrieved party to express its views. This qualification, it is argued, aligns with the requirements of *audi alteram partem.* Nonetheless, the presumption remains that Parliamentary sovereignty, as a 'power delegated ultimately by the people' to Parliament enables a policy-maker, despite a lack of impartiality and independence, to be in principle the judge of his or her own cause because s/he is deemed answerable to Parliament – provided the decision procedure is fair.

It may well be for Government to argue that *Alconbury* applies in the present case. Were the Government (specifically, the Minister in question, Ruth Kelly), as policy-maker, to be permitted to may be the judge of its preferred policy, the initial charge of procedural impropriety would be reduced to the legality of restricting public representation by an otherwise sufficiently impartial and independent decision-maker. It is submitted, however, that *Alconbury* can be distinguished from the present case for three reasons.

First, the facts of *Alconbury* concerned planning permission, a public inquiry and subsequent decision by a Secretary of State to 'call in' a planning appeal to in effect be the judge of his own cause, that is, with regard *existing* policy. In contrast, the present case concerns a public consultation on the development of *possible* policy, that is, policy that is yet to be determined. Whereas the policy context in *Alconbury* had already been decided by Parliament and ministers in full and open deliberation, the very purpose of the Consultation is to contribute to the finalisation of policy. It is not therefore a question of deciding in light of democratically-endorsed policy; it is a question of the Government deciding on its own proposed, yet-to-be-determined, policy. Consequently, the

'democratic safeguard' is not present in the manner it was in *Alconbury*, and this fact distinguishes *Alconbury* from the present case of the Minister being the judge of her own cause.

Secondly, important in considering whether policy-maker who judges his or her own cause breaches art.6(1) HRA 1998 is whether there is meaningful scope for the public to express its views (Lord Slynn at 46). It is precisely the restriction of any meaningful possibility ('proper' and 'effective') for the public to express its views on the Government's cause in the present case that distinguishes it from *Alconbury.*

It goes without saying that the ability of the public to express its views is mandatory to the democratic safeguard appealed to in *Alconbury.* This is because on any meaningful account, democracy (as self-government, be it direct or representative) rests in the final analysis on the consent of the governed. In order for consent to be meaningfully expressed, there must be sufficient scope of freedom of expression and ability to 'give voice' (*audi alterem partem*) so as to *inter alia* question and hold accountable the Government to the remit of that consent. This point is recognised by Lord Steyn who in *R* v *Secretary of State for the Home Department, ex p. Simms* ([2000] 2 AC 115) argued (at 408) that open discussion and meaningful scope to express views operates as both "safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them," and "brake on the abuse of power by public officials". Such scope Ewing calls the "lifeblood of democracy."[72] To restrict public comment on decisions of public interest is to restrict the scope within which consent can meaningfully be given, and to restrict this scope is in turn to displace the 'democratic safeguard' according to which a policy-maker may be the judge of her own cause. Accordingly, by thus displacing this safeguard suggests that *Alconbury* can be distinguished from the present case.

This point serves in addition to reframe the preceding objection thus: whereas in *Alconbury* the policy context was determined by Parliament and Government in full and open deliberation of objectives of policy of 'national, environmental, social or political significance', in contrast in the present case, the Government is alone in deciding on final policy having favoured one policy outcome for reasons it refuses to submit to any, let alone, full and open, public deliberation.

Thirdly, whilst a policy-maker may be the judge of his or her own cause in respect of fixed policy if safeguards as outlined in *Alconbury* are present, in *consultations* on possible policy, it is submitted that to be the judge of one's own cause *if* that cause cannot be questioned would clearly defeat the requirement of fairness in *Cloughlin*. It cannot have been the intention of the Lords in *Alconbury* to have uncritically dispensed with a large body of authority on fairness concerning consultations. Indeed, the question of consultations formed no part of the *Alconbury* judgement. Since the 2007-8 Consultation

[72] Ewing, K. 2000 'The Politics of the British Constitution', *Public Law*, at 432.

involves the Government being the judge of its own cause in a case where it refuses to submit its cause to public comment in the decision-making process, this fact clearly distinguishes *Alconbury.*

If any one of these three reasons for distinguishing Alconbury from the present case hold, then the Government's (specifically, the minister responsible, Ruth Kelly's) role judge of its own most publicly stated cause which it is has excluded from public comment is incompatible with art.6(1) HRA, *and may therefore offer yet further grounds for judicial review.*

With regard to the second concern at the beginning of this section, it is asked whether the Government's alleged collusion renders the Consultation procedurally improper by introducing active bias. The question is whether the fair-minded and informed observer, having considered the facts relating to such an allegation would conclude that there was a real possibility that the hearing was biased (*Porter* v *Magill*). On the facts, in addition to the Government's public support for one policy proposal on the basis of reasons it is not willing to have questioned (for reasons it is not willing to provide) the Government has requested that the main beneficiary of its support, BAA, supply data on noise and air quality, which it has not permitted to have challenged; it has had BAA co-author its consultation document; and it has with BAA established a joint group apparently in order to steer the proposal through the consultation process.[73] In response, the Government has stated that "it had to cooperate with BAA officials to obtain data on noise and air pollution from the airport".[74]

In determining the issue of bias, it is noted that where bias is alleged, the reviewing court does not have to decide whether the judge or decision-maker is in fact biased, since "bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect" (*R* v *Gough* [1993] AC 646, 672; Lord Woolf). The appearance of bias is sufficient: "where the impartiality of a judge is in question the appearance of the manner is just as important as the reality" (*ex p Pinochet*, at 139; Lord Nolan). Lord Hewart's dictum that it is "of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done" applies here (*R* v *Sussex Justices, ex p McCarthy* [1928] 1 KB 256).

Whether a fair-minded and informed observer would conclude a real possibility, or appearance, of bias in the case at hand may in the first instance turn on whether the co-operation between the Government and BAA was *necessary* for the consultation to take place or whether it was merely *useful*. If it was not strictly necessary, it is likely such an observer will conclude a possibility of real bias. But even it was necessary to obtain technical data from this source, such an observer is hardly likely to conclude that the

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[73] Greenpeace Freedom of Information Act request (mid-November 2007), http://www.greenpeace.org.uk/heathrow/baa-files accessed 1 December 2007

[74] 'Kelly launches fight for Heathrow expansion' *The Guardian*, 22 November 2007, http://politics.guardian.co.uk/green/story/0,,2214979,00.html

refusal to open this data to public scrutiny and, moreover, the establishment of a joint steering group is necessary to a degree sufficient to remove the real possibility of bias. *These conclusions may offer further grounds for judicial review*.

3.4.5. *Excluded substantive issues: the case of need and calculation of net economic benefit*. This failure to consult the public effectively may, to paraphrase Sullivan J in *Greenpeace* (at 57), be of such a kind as to present the risk that the 2007-8 Consultation "may turn out to have taken into account incorrect or irrelevant matters which, had there been an opportunity to comment, could have been corrected".

In this subsection, we address several substantial problems with the Government's conclusions in support of Heathrow expansion previous to the current Consultation which fall into these categories. These are chiefly elements of the case of need for capacity expansion at Heathrow, including calculations of net economic benefit. Since it remains unclear whether such matters would only be used to indicate the serious consequences of excluding the avowed basis of the Government's support from public comment, or would be included more fully in an application for judicial review, only a few possible concerns are discussed in this section. If used, these, being given in outline only, would require development.

In relation to possible concerns excluded from comment in the 2007-8 Consultation, it should first be noted that the formulation of policy by a public body is in every case on the authority of Parliament and, whilst to an extent often a discretionary matter, is subject to those powers granted to it. Acts done in excess of the power vested by Parliament in a public body are invalid for being *ultra vires*, or an abuse of power (e.g., *ex p Leech* [1994]). Second, the idea of discretion involves the possibility of choosing between several decisions or course of action, each of which may be lawful (*R* v *Foreign Secretary, ex p. World Development Movement* [1995] 1 All ER 611), and can perhaps be thought of as the 'expected exercise of sound judgement after considering all relevant factors whilst keeping an open mind sufficiently free from external influence'.[75] Third, the grounds upon which a court may review the exercise of discretion are various, overlap, and a poorly reasoned decision may be defeated on several grounds (e.g., abuse of discretionary power, failure to perform a statutory duty, being in 'excess of jurisdiction', mistake of fact and acting incompatibly with Convention rights). These grounds cannot, however, be discussed without presentation of substantial arguments which, as mentioned, are offered in this section in outline only.

[75] See, for example, *Rooke's* case (1598) 5 Co Rep 99b: "'Discretion' means… that something is to be done according to the rules of reason and justice, and not according to private opinion'.

3.4.5(a). *Case for need.* To reiterate, the Government has argued that the civil aviation industry contributes to economic growth, that air travel demand is forecasted to increase by 2030, that Heathrow – as the principal UK airport, is close to its capacity limits, and that if expansion of its capacity does not take place, then the economy will suffer because neighbouring Continental airports will expand to pick up the forecasted increase in air travel and thus acquire the resultant growth forgone at Heathrow.

The argument that airport expansion will be conducive to economic growth is rooted in four main assumptions: (i) that promotion of economic growth *tout court* is in the public/national interest, (ii) that the demand forecasts are sufficiently reliable, (iii) that the opportunity cost argument (regarding growth foregone being exported to the Continent) is plausible, and (iv) that the calculation of net benefit cost-benefit analysis should be accepted as the best way of weighing the negative outcomes of the policy against positive ones.

(i) *Promotion of economic growth*. To assume that to increase GDP is necessarily to promote the public interest ultimately cuts against much of the advice the Government is being given by its own advisors. For example, the Sustainable Development Commission has attempted to make sustainable production and consumption the measure of the public good by publishing a series of framework indicators that are intended to serve a means of quantifying sustainability.[76] In understanding how these indicators are related to one another, the Commission stresses that it can no longer be taken as read that higher GDP can be unproblematically equated with social progress.[77] The concept of 'wellbeing' has been introduced by the SDC as a way of thinking critically about the goals of Government policy, and particularly about the traditional policy tools which are used to provide quantitative measures of progress. By introducing a set of questions concerning the meaning of prosperity (particularly through its work with DEFRA), into the heart of Government, the SDC is reflecting international efforts to redefine prosperity in ways which do not simply transform environmental and social harms into externalised costs. These have included measures such as the Index of Sustainable Economic Welfare and Genuine Progress Indicator.[78] Against this background, to assume that economic growth is necessarily a measure of net benefit is highly questionable. Such assumptions can no longer simply be left unexplored in policy consultations of national and international importance.

(ii) *Reliability of forecasts.* The argument that airport expansion will be conducive to economic growth is rooted in forecasts of future air travel demand, and therefore the *case for expansion can be no stronger* than the evidence upon which those forecasts are based

[76] See http://www.sustainable-development.gov.uk/progress/national/framework.htm (accessed 3 February 2008.
[77] See http://www.sd-commission.org.uk/pages/redefining_prosperity.html
[78] See for example Daly, H. & Cobb, J. (1989), *For the Common Good*. Beacon Press, Boston, and Daly, H. (1996) *Beyond Growth: The Economics of Sustainable Development*. Beacon Press, Boston.

and upon the methods and methodological assumptions through which they are constructed.

Central to the endorsement in the Aviation White Paper of Heathrow capacity expansion were forecasts of air travel demand at UK airports in *Air Traffic Forecasts for the United Kingdom* 2000.[79] Further supporting analysis of demand and carbon emissions forecasts from UK aviation are set out in *Passenger Forecasts: Additional Analysis* 2003, *Aviation and Global Warming* in 2004, the 2006 *Future of Air Transport Progress Report* and the 2007 *UK Air Passenger Demand and Carbon Dioxide Forecasts* which updated passenger demand forecasts (none of these documents revisit any of the policy conclusions of the Aviation White Paper).[80]

Forecasts in *Air Traffic Forecasts for the United Kingdom* 2000 (AFC 2000; as amended) "are an input to the assessment of the need for runway and terminal capacity and the impact of capacity constraints on passengers, airlines and airport operators".[81] Forecasts

> are based on econometric equations, which specify a relationship between passenger traffic and a number of explanatory variables, which determine it… The key variables determining air traffic were found to be domestic and foreign economic growth (principally GDP); air fares; trade and exchange rates.[82]

An additional variable subsequent to the AFC 2000 is the cost of carbon.[83]

> The relationships derived from past years data are applied to projections of future year values of the explanatory variables to calculate forecasts of air traffic.[84]

For the purpose of the UK air traffic forecasts,

> it is assumed that additional airport and airspace capacity is made available as necessary to accommodate growth in passenger numbers. In this sense they are unconstrained forecasts of the underlying demand for air passengers, independent of any supply side limitations. Unconstrained forecasts are necessary to identify where and when the need for additional airport capacity will arise and to inform decisions about the provision of such capacity.[85]

The "Government does not claim that air traffic forecasts are an accurate prediction of what will happen" but "indicate what demand might be if there were no constraints on

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[79] See Aviation White Paper, Appendix A(1).
[80] Freedom of Information request, May 2007. http://www.dft.gov.uk/foi/responses/2007/may2007/airtransportwhitepaper/airtransportwhitepaper
[81] AFC 2000, s.1.3.
[82] AFC 2000, s.2.1.
[83] 2006 *Future of Air Transport Progress Report*, s.4.8. See also s.1.5 ('Passenger demand') *UK Air Passenger Demand and Carbon Dioxide Forecasts*, DfT, November 2007
[84] AFC 2000, s.2.2.
[85] AFC 2000, s.2.7.

capacity".[86] "Given the uncertainty in producing forecasts",[87] it is made clear in the Aviation White Paper and elsewhere make clear that all selected forecasts, that is, of low, medium and high "demand scenarios" up until 2030 rest on the presumption of "unconstrained demand".[88] The presumption of unconstrained demand, it is claimed, is a "useful tool in policy-making".[89] Assessment of the relationship between the variables – economic growth, air fares, trade, exchange rates and the price of carbon within the context of demand unconstrained by capacity contributes to forecasts of "overall demand" growing "from 228 million in 2005 to 490 million passengers passing through UK airports by 2030".[90] The latest forecast summary, in Appendix C of the 2007-8 Consultation document, is supplemented by forecasts of passenger demand from BAA itself. In some instances, BAA's forecasts are regarded as the "preferred source of the required inputs".[91]

Among concerns with the forecasts, three present themselves in (a) the uncertainty of the predictions, (b) uncritical treatment of some variables and the assumption of unconstrained demand and (c) the misrepresentation of relevant variables.

(a) Of immediate concern is the divergence between the Government's categorical public assertions in and around the 2007-8 Consultation concerning future air travel demand and the more circumspect rhetoric of the forecast themselves. Whereas public representations claim that "all the evidence suggests that the growth in popularity and importance of air travel is set to continue over the next 30 years",[92] confiding that "continued growth in passenger … demand[93] … from 228 million in 2005 to 490 million passengers passing through UK airports per year by 2030",[94] forecasts documents state that forecasts "may not always be accurate".[95] There are several reasons for this uncertainty. Indeed, these documents freely admit that:

> Producing robust long term annual forecasts of factors such as GDP is difficult
>
> Judgements are… required when considering the future path of air fares in the face of liberalisation, slower technical advances and environmental measures.

[86] 2000 Consultation, s.52.
[87] 2000 Consultation, s.48.
[88] Aviation White Paper, ss.2.8-2.9.
[89] 2000 Consultation, s.52.
[90] 2006 *Future of Air Transport Progress Report*, s.4.10
[91] 2007-8 Consultation, Annex C.4.
[92] Aviation White Paper, s. 2.8.
[93] 2007-8 Consultation, s.17, Annex C (p.209).
[94] E.g., 2006 *Future of Air Transport Progress Report*, s.4.10.
[95] AFC 2000, s. 2.8

> Inevitably, some assumptions had to be based on judgement; these have been made on the basis of the best available statistical data.[96]
>
> The specification of the statistical models on which the forecasts depend is also in many respects a matter of judgement.
>
> Market maturity refers to the slowdown in growth often apparent in older, more mature, product markets [but]… change [therein] may not be captured in past data and requires a judgement about how it might develop in the future.[97]
>
> *A further problem with any forecasting model is that relationships based on past behaviour may not always be accurate for predicting behaviour in the future*. There may be changes in national and international policies or attitudes, which will affect demand. By their nature, it is difficult, if not impossible, to predict when these might occur and what their impact might be.[98]

There is also the assumption that air traffic forecasts can reflect these uncertainties as "a high scenario and a low scenario" of demand *growth*.[99] Finally, it is admitted that "The forecasts have been prepared on the basis of no major changes in Government policy",[100] including the shifts in direction which are registered within the Climate Change Bill. In other words, the forecast scenarios rest on the assumption that there is a linear relationship between the key variables, and that this assumption holds only insofar as growth remains unconstrained by external factors which, as is noted in s.2.8(c) of AFC 2000, lie outside the space of possibilities shaped by these assumptions. It is of course necessary, for the purposes of forecasting, to submit the phenomena being studied to a degree of mathematical simplification in order to obtain mechanistic models. However, in the context of the relationship between carbon emissions and sustainability, there is much policy uncertainty concerning the extent of the measures that may need to be taken over the next fifty, or even thirty, years in order to address the problem of global warming. Further, the other variables used in modelling demand (such as the price of oil) are themselves subject to uncertainties attendant on political developments, as detailed in (b) below. The forecasts for aviation traffic growth by their very nature factor out such political uncertainties, by treating the political sphere as not impinging on the phenomena under analysis. By assuming that the social world can, for forecasting purposes, be unproblematically reduced in complexity to level of a natural phenomenon isolated for study in a controlled laboratory environment, econometric forecasts demand to be treated with the utmost circumspection and scepticism recommended by the Government analysts in AFC 2000. However, as we have indicated, such qualities are lacking in the 2007-08 Consultation and in public representations surrounding the Consultation. By not

[96] AFC 2000, s.2.8(a)
[97] AFC 2000, s.2.8 (b)
[98] AFC 2000, s.2.8(c) (emphasis added)
[99] AFC 2000, s.2.9.
[100] AFC 2000, s.2.10.

consistently drawing attention to the uncertainties surrounding economic forecasting, the Government may therefore be judged to have undermined the public's opportunity to give an 'intelligent response' (*Cloughlin*). Further, such concerns may suggest that the case for need depends on elements which could be construed as misleading.

(b) The appearance of misleading information seems only to be reinforced by the forecasts' treatment of key variables, and is not alleviated by the way that the assumption of unconstrained demand is left in the background of the Government's analysis. With regard to *air fares*, the "key factors considered in choosing the air fare assumptions for the 2000 forecasts are aviation fuel prices, aircraft technology, competition and deregulation."[101] With regard to *aviation fuel prices*, "the price of oil is assumed to stabilise around its current value of $25 a barrel, although in the longer term it may decline."[102] The contention is made specific in the latest update: "oil prices (in real terms) are assumed to fall … to $53 per barrel in 2030".[103] The AFC 2000 continues that "as fuel is approximately 10% of costs even a 50% change in the price of oil has a modest effect on air fares but nevertheless a significant one compared to other drivers."[104]

This assumption has been left unrevised in the Aviation White Paper,[105] in the 2006 *Future of Air Transport Progress Report* and in the 2007 *UK Air Passenger Demand and Carbon Dioxide Forecasts*. Whilst the price of standard crude oil on NYMEX was under $25/barrel in September 2003, and with inflation adjustments had remained below this mark since the mid 1980s, in contrast with this assumption, a series of events led the price to reach over $60 by 11 August, 2005, surpass $75 in the summer of 2006, fall to between $50 and $60/barrel in the early part of 2007, then rise steeply, reaching $92/barrel by October 2007 and $99.29/barrel for December futures in New York on 21 November, 2007.[106] On 3 January, 2008, oil prices had an all-time peak at $100.05 per barrel.[107]

The difference between $25 a barrel and $90 is over 250%. This may increase the assumed contribution of fuel costs at 10% of overall operational cost to potentially over 25%, producing a "significant … effect… compared to other drivers".[108] If the AFC 2000 is right to conclude that little of any increases in fuel cost will be absorbed by the industry,[109] they will instead lead to higher airline prices, and therefore influence forecasts of future demand.

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[101] AFC 2000, Appendix 2.11.
[102] AFC 2000, Appendix 2.12.
[103] *UK Air Passenger Demand and Carbon Dioxide Forecasts*, 2007, e.g., ss.3 ('Comment on the forecasts') and 2.28 ('air fares'),
[104] AFC 2000, Appendix 2.12.
[105] "Aviation fuel prices were assumed to stabilise at $25 per barrel in real terms in the year 2000 prices" , Aviation White Paper, Appendix A(7).
[106] "Oil reaches new record above $99", BBC, 21 November 21, 2007 (accessed 29 November 2007).
[107] 'Single trader behind oil record', http://news.bbc.co.uk/1/hi/business/7169543.stm
[108] AFC 2000, Appendix 2.12.
[109] AFC 2000, s.7.8.

With regard to the assumption of *ceteris paribus* unconstrained economic growth, it is widely said that air travel demand is largely determined by growth.[110] Economic growth is a key variable in air travel demand in large part because, as is explained in the 2000 Consultation, air travel in and out of the UK over the past twenty years has trebled due to general economic growth itself "heavily influenced by expansion of scheduled low cost carriers".[111] At the same time, the government has made clear that it considers its main role in formulating relevant policy is to facilitate economic growth by providing a congenial environment for markets. It can therefore be assumed that the goal of promoting economic growth will provide an environment congenial to forecasts of growth in consumption. The rub, however, is that the case of need to expand Heathrow's capacity critically derives from forecasted demand relative to assessments of current capacity. If typical scenarios of demand reflect the assumption that economic growth is to be promoted as a measure of social progress, rather than alternative assumptions, then the variables present in these demand forecasts are not independent from the forecaster's value commitment to economic growth, which as we have noted above, is itself an issue that should be addressed in the Consultation. To nevertheless treat economic growth as if it were an independent variable would be to make a mistake of fact (see below, p. 39, n. 122).

The situation is not dissimilar with respect to unconstrained demand. Irrespective of the apparent utility of this assumption, it is plain that if what is good for growth is increasing air travel demand, then one means of facilitating growth must also be to increase capacity to facilitate demand. That the increase in unconstrained demand is represented as a necessary development resulting from current trends in air travel overlooks the role that the proposal to expand Heathrow capacity would have in a demand trend that the Government must, by its commitment to economic growth, be seeking to create. It also overlooks the role of the Government in facilitating unconstrained demand by its "presumption in favour of liberalisation"[112] to facilitate markets. The conclusion is inescapable: given the government's affirmation of its role (currently as facilitator of growth) certain forecasts follow to the likely exclusion of others, but this choice and its influence is not represented within the forecasting methodology itself. As noted in (a) above, the forecasting methodology contains an irreducibly *political* element, which is reflected in the choice to emphasise some uncertainties surrounding forecast variables and ignore others. Without bringing this political element into the foreground of the Consultation itself, the Government could once again be judged to have failed to promote the public's opportunity to give an 'intelligent response' (*Cloughlin*).[113]

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[110] E.g., AFC 2000, s.2.6.
[111] 2000 Consultation, ss. 42 and 50
[112] E.g., 2000 Consultation, ss.26-7 and Aviation White Paper, s.1.3, ch.1;
[113] Instructive here is a recent assessment of the implications of aviation growth in the UK by the Environmental Change Institute at Oxford University, *Predict and decide: aviation, climate change and UK policy*, the available evidence about the scale, nature and impacts of the projected rise in air travel was

(c) *Misrepresented variables*. Likely policies to limit harms generated by the other variables have not themselves been included as variables beyond an environmental tax of 10% on civil aviation fuel (rising by 10 % per annum for nine years until the tax amounts to 100% of fuel costs in 2015)[114] and (from the Aviation White Paper onwards) the social cost of carbon. Pricing carbon is said to

> ensure the cost of aviation fully reflects its environmental cost… Air passenger demand forecasts assume that after 2010, passengers will face an additional cost linked to their climate change emissions… based on the Defra central value for the cost of carbon is phased in from 2010 to 2020.[115]

Incorporating the true cost of externalised harms into the industry represents, in the view of some, a step towards 'minimising impacts' of a kind which the 2003 White Paper takes as one of its two primary goals. This approach assumes that the negative impacts of the policy can unproblematically be assigned a monetary cost, and in this way, be successfully mitigated through measures that ensure the cost is paid for, either through tax, compensation or some other means. We take issue with this assumption below in 3.4.5(b) with respect to the Government's argument for the net benefits of Heathrow expansion.

Assuming both unconstrained demand and presuming expansion of UK airport capacity to meet that demand, the Government argues that adequately pricing and incorporating harms that civil aviation imposes is sufficient to allay concerns about these harms. Such (future) harm, it argues, approximates to £70 per tonne of carbon (rising by £1 per year in real terms),[116] or more recently, to £19/tCO_2,[117] with a sensitivity range of between £35 and £140 per tonne. This social cost of fossil-carbon derives from the Department for Transport and HM Treasury report *Aviation and the Environment: Using Economic Instruments* (March 2003), which in turn derives from an endorsement in Government Economic Service (GES,) *Estimating the Social Costs of Carbon Emissions* (working paper no.140), of Eyre *et al.*'s (1999) *Global Warming Damages: Final Report of the ExternE Global Warming Sub-Task* (Brussels: DGXII, European Commission).

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used to weigh up the arguments for and against restraining aviation, particularly passenger air travel. In the light of this evidence and the UK's environmental goals, the report concludes that the Government's assumption of unconstrained demand will require modification, and that it will instead need to explore a policy of managing demand for air travel. This is likely to include a change in strategic policy to give a presumption against the expansion of UK airport capacity. See http://www.eci.ox.ac.uk/research/energy/predictanddecide.php

[114] AFC 2000, s.7.8

[115] 2006 *Future of Air Transport Progress Report*, ss.4.5-4.6. Footnote 21 of the 2006 Progress Report states that: "The Defra central value for the cost of carbon is assumed to rise from £70/tC in 2000 by £1 per annum in real terms. The extra cost is assumed to be phased in gradually from 2011 to 2021". Footnote 22 explains that "The DEFRA range of values for the cost of carbon in 2000 is £35/tC to £140/tC".

[116] Aviation White Paper, s.3.9.

[117] There is a conversion factor of 3.67 between carbon dioxide emissions and the carbon value of emissions. *UK Air Passenger Demand and Carbon Dioxide Forecasts*, 2007, s.2.36 and Box 2.4 (shadow price of carbon dioxide emissions).

Central questions here include whether this cost is sufficient to 'offset' the damage to the climate resulting from the Government's two presumptions mentioned. In response, there appear an array of well-document problems with pricing of carbon such as this; only a few can be mentioned here.

First, the *Aviation and the Environment* report makes clear that the figure of £70/tC (or £19/tCO_2) takes no account, for example, of widely reported positive feedbacks, 'so-called climate catastrophes' (e.g., Gulfstream suppression, melting of Greenland icecap or the West Antarctic icesheet), 'socially contingent' impacts of climate change (e.g., mass migration, disease migration, famine) or the estimated costs of impacts post-2100 (Appendix A.4, *Aviation and the Environment: Using Economic Instruments*, March 2003).

Second, the Intergovernmental Panel on Climate Change (IPCC) estimates that the global warming potential of emissions from aviation is 2-4 times that of the carbon emissions alone because of the effects of water vapour and NOx at high altitudes. If this is multiplied by between 2.4 and 2.7 (the radiative force adjustment), it gives effective charge of c.£50 per tonne of CO_2, not £19/tCO_2. If this is the case, then the calculation of £19/tCO_2 (or £70/tC) is difficult to square with the Government's stated primary aviation policy objective of 'maximising the social and economic benefits, whilst minimising the environmental impacts', since by this calculation climate impacts are not minimised because they have not been adequately priced. It is also difficult to square this calculation with the duties imposed on the Government, by virtue of the UK being a contracting Member State of the EC, to "ensur[e]" the "fulfilment" of "obligations arising out of [the] Treaty" where "Member States shall take all appropriate measures… and *abstain* from *any* measure which *could* jeopardise the attainment of the objectives of [the] Treaty" (art.10EC),[118] including Community objectives of "promoting a high level of protection and improvement of the quality of the environment" (art.2EC) "based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay" (art.174(2)EC). It is difficult to identify a serious commitment to a 'high level of protection', let alone to an 'improvement of the environment', when there is such reluctance to apply the 'polluter should pay' principle to the aviation industry.

(iii) *Opportunity cost*. The idea that obstructing airport expansion will result in potential, subsequent economic growth being exported elsewhere in Europe appears credible only up to a certain threshold. The UK's and all other EC Member States' binding emissions reductions commitments under the Kyoto Protocol are co-ordinated by and at the level of the EC. Whilst aviation has been excluded from the Protocol, much recent focus has

[118] Italics added. See also, e.g., Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431. On the somewhat ambiguous status of the principles of the EC Treaty vis-à-vis Member States, see Scott, J. and E. Vos, 'The Juridification of Uncertainty' in Joerges, C. and R. Dehouse (eds) *Good Governance in Europe's Integrated Market* (Oxford: OUP, 2002).

been on including the industry's emissions therein. Indeed, the Government has repeatedly affirmed its commitment to meeting the challenge of climate change by *inter alia* "pressing in the International Civil Aviation Organisation for an agreed basis for allocating aviation emissions to individual countries".[119] The point is that if such incorporation takes place, as it likely will, before the 7-13 year construction of Heathrow's capacity,[120] then it is unclear how continental European airports such as Frankfurt, Paris and Amsterdam, will be recipients of unconstrained airport expansion if their respective government's will be constrained by emissions reductions targets.[121] It is plausible to think that some growth may be exported, but it is implausible to believe that unconstrained growth will be exported. Consequently, if it is implausible to believe that aviation-based growth *tout court* will be foregone if Heathrow does not expand, then a central element in the case of need for such has yet to be made.[122]

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[119] 2007-8 Consultation, s.1.4, ch.1, (p.19) and 2006 *The Future of Air Transport Report.*

[120] Depending on which of the four options, or combination of them, is chosen by BAA (see 2007-8 Consultation, Annex C, Table C1: BAA Heathrow Passenger and ATM Forecasts and Table C2: DfT Heathrow Passenger and ATM Forecasts on pp. 205 and 209 respectively).

[121] Not to mention, mounting resistance among respective publics to any prospect of expansion See, for example, those at Schipol, Amsterdam, at http://www.aef.org.uk/?p=83

[122] Various legal issues present themselves in the construction of the case of need (e.g., mistakes of fact some of them possible 'irrational', misleading accounts of basic variables, the questionable conflation of public interest with economic growth *tout court*, the exclusion of the opportunity in several important respects of being able to give an "intelligent response" (*Cloughlin*) which together lend weight to the contention that the case for need has yet to be made. Some legal issues may include of these may include:
- Failure to exercise discretion properly by not exercising discretion sufficiently free from outside influences.
- Mistake of Fact. Attempts to seek judicial review of a decision based on a claim that the decision-maker made an error of fact will be met by the reply that judicial review des not provide a right of appeal since the claimant is, in effect, asking the court to substitute itself for the decision-maker in deciding an issue of fact *unless* there has been an evident mistake in a finding of fact that is directly material to the decision, for example, a decision based on a statement that is incorrect. Here, a claim for review may succeed on other grounds – such as taking into account an irrelevant consideration – falsely describing what is dependent as independent. In addition, there is developing authority for the view that a decision may be subject to review where there has been an error as to a material fact. In *R* v *Criminal Injuries Compensation Board, ex p A* ([1999] 2 AC 330), four members of the House of Lords accepted that a decision could be quashed for a material error of fact. Similarly, where (as it was in *R(Alconbury Developments Ltd)* v *Environment Secretary* [2001] 2 All ER 929, at 53 and 61) a decision affecting civil rights under art.6(1) ECHR is made by the Secretary of State, a reviewing court must be able to control essential findings of fact (although it is not required to provide a rehearing on every evidential issue). (The view is supported by *Wade & Forsyth Administrative Law,* 7th ed (1994), pp 316-318: "Mere factual mistake has become a ground of judicial review, described as "misunderstanding or ignorance of an established and relevant fact", *[Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1030], or acting "upon an incorrect basis of fact" . . . This ground of review has long been familiar in French law and it has been adopted by statute in Australia. It is no less needed in this country, since decisions based upon wrong facts are a cause of injustice which the courts should be able to remedy. If a 'wrong factual basis' doctrine should become established, it would apparently be a new branch of the ultra vires doctrine, analogous to finding facts based upon no evidence or acting upon a misapprehension of law."
It is also supported by de Smith, Woolf and Jowell*, Judicial Review of Administrative Action,* 5th ed. (1995), p 288: "The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision on any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention."

3.4.5(b). *Case for net benefits.* The *Adding Capacity at Heathrow* consultation document confidently claims that "adding a third runway", for example, "would bring net economic benefits of around £5bn in net present value terms, even after taking account of climate change and noise costs"[123] and that "in view of the significant potential economic benefits, the Government considers that there is a strong case for the introduction of further capacity at Heathrow".[124]

The claim of significant potential economic benefit follows from application of comprehensive cost-benefit analysis under the New Approach to Appraisal (1998) decision-making rules.[125] This currently favoured tool of policy formulation, which expressly underpins the general framework on air transport policy to "maximise beneficial aspects… and minimise the negative effects",[126] enables the decision-maker to arrive at public policy by identifying the more cost-effective and/or benefit-maximising option among several competing options. To do so, benefits and costs of each option need to be identified and (monetarily) quantified.[127] Estimated costs are subtracted from anticipated benefits so as to calculate expected net benefits. Measures to reduce costs to certain levels may then be included into calculations to yield a final range of net benefits that a given option is likely to offer. Each option's level of net benefits (if any) is then compared with that of the others, and the option which offers the most net benefits is deemed, all other things being equal, the best choice in the circumstances.[128] The favoured figure of £5bn will have been arrived at by subtracting monetarily quantified negative impacts and other costs from monetarily quantified anticipated benefits, and by incorporating into the calculation measures to mitigate costs.

This approach forms the methodological backbone of the Eddington Report on the future of UK transport, which illustrates well both its strengths and its critical failures. If the social good, and with it, the national interest, can be treated as a monetised measure such as the rate of increase of GDP, then all that needs to be done in order to achieve progress, and with it, maximum net benefit, is to arrange economic incentives so that the benefits of social activities outweigh their costs. This means that it is necessary to take into account incentives that cause the costs of different policies to be externalised onto those

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- Unreasonableness (irrationality). Whilst a judge may not on judicial review set aside an official decision merely because he or she considers that the matter could have been decided differently, a decision may be set aside for unreasonableness. The *Wednesbury* test is that a court may set aside a decision for unreasonableness only when an authority has come to the conclusion 'so unreasonable that no reasonable authority could ever have come to it' (*Associated Provincial Picture Houses Ltd.* v *Wednesbury Corporation* [1948] 1 KB 223). More recently, rulings have expanded this test: unreasonableness denotes 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt' (Lord Diplock, *Secretary of State for Education* v *Tameside MBC* [1977] AC 1014 at 1064).

[123] 2007-8 Consultation, s.1.8.

[124] 2007-8 Consultation, s. 1.48,.

[125] See http://www.webtag.org.uk/.

[126] 2000 Consultation, Foreword.

[127] See, e.g., Pearce, D. *et al.* (1989) *Blueprint for a Green Economy*, London: Earthscan and, for a useful critique, O'Neill, J. (1993), *Ecology, Policy and Politics*, London: Routledge, ch.4-5.

[128] See 2007-8 Consultation, Annex B.

who have no power to refuse to pay them, such as unconsulted communities living under the flight paths of new airports. Eddington writes that to avoid market failures of this kind, and therefore to maximise the democratic legitimacy of the government's actions in its role as facilitator of markets, all costing must take into the "full social, environmental and economic costs and benefits of policy options".[129] Only then will a true picture of the net economic yield of a given option be possible.

The main strength of this approach is held to lie in the way it 'gives a voice to the voiceless', by translating *prima facie* non-economic impacts (which may otherwise be entirely discounted) into the language of a monetized measure that allows them to be weighed against expected benefits. In this way, the negative outcomes of policy are treated as objective costs which must be included in any calculation of net benefit. But to employ cost-benefit analysis (CBA) in this way without further comment also betrays assumptions which should arguably themselves be the subject of consultation. This is because, once they are brought to the surface for further examination, the Government's confident estimates of net gain as a result of Heathrow expansion become questionable. The problem is not so much that the estimates of net gain are mistaken, but that they represent a response to the wrong question.

The question to which the Government's estimates of net benefit are an answer is whether expanding Heathrow capacity would promote economic growth. But as we have noted previously (see s.3.4.5(a)(i) above), the Government's own advisors see the identification of growth with progress as such as by no means unproblematic. One advantage, however, of assuming that they can be identified in this way is that it allows judgements about whether a policy is socially progressive to be made on a quantitative basis. Other conceptions of the ends of progress (sustainability, equity, and so on) would not necessarily facilitate such an approach. However, this should not rule out considering whether such ends should be considered in the place of growth. Indeed, the work of the SDC with DEFRA on the role of sustainability indicators in defining progress represents an attempt within the Government itself at a critical study of the inadequacy of growth as a measure of progress. As with the decision to opt for a particular growth forecasting methodology (see s.3.4.5(a)(ii) above), the decision to affirm economic growth itself as the measure of progress is an irreducibly political choice, and as such deserves to be made the subject of public consultation. To choose growth as *the* measure of what is socially desirable policy is, by extension, to choose CBA as an assessment tool; but this choice itself is therefore not one that can be justified by a cost-benefit analysis. The validity of such analyses in judging what is progressive and what is not is in fact precisely the issue that the public deserves to be consulted on.

Given that the choice of growth as value and CBA as its measuring instrument is political, and should be open to debate, several other questions arise which would also

[129] Eddington, R. (2006), *The Case for Action: The Eddington Transport Study*, London: HMSO, p. 52.

need to be opened up in an adequate consultation. These too have to do with the assumptions which guide the Government's framing of the question of progress in terms of 'net economic benefit'.

First, the use of CBA in the way recommended by Eddington depends on the assumption that all negative and positive impacts of a policy can in fact be assigned a monetary value. With respect specifically to negative impacts which are typically externalised, this value is presumed to indicate, e.g., the amount of financial compensation which would need to be paid to make good the impact, and/or the monetary value an individual might put on a given good (e.g. health, freedom from noise, leisure, amenity value of landscape etc.) indicating how much they would be willing to pay in a free auction to ensure its provision, if given full information on the likely consequences of a given policy for the good in question.[130] In this way, commonly overlooked social and environmental costs can be assigned a value and made internal to the calculation of overall cost. It is thought that, by doing this, impacts which are, in traditional accounting approaches, simply shifted either onto individuals or groups who do not benefit from a policy, or onto the environment can be fully costed. If this is done, then a principle of equity is thought to be satisfied, whereby the accounting framework in principle allows all parties to be given a voice in determining the progressiveness of the policy in question.

However, the assumption that all impacts can in principle be assigned a monetary value is arguably illegitimate because the kinds of things people value are not necessarily *commensurable* with one another. To assume that monetary value *can* be universally assigned is to presume that a common measure can serve as a universal point of comparison – in other words, that there is at least one feature (monetary value) in respect of which all the different things people find valuable are comparable. But this assumption represents a questionable value judgement about the nature of the things people care about. In the case of some values, it is arguably part of what people find valuable about them that they *cannot* in principle be compared with one another in the way that the comprehensive CBA approach advocated by Eddington suggests. It is in fact part of the meaning of certain goods that they are incommensurable, and cannot be exchanged for other goods, either in a one-to-one transaction, or as part of a sacrificial transaction geared to achieving a further end. For example, to place a monetary value on friendship could only be thought of as a tool for assessing the relative importance to us of different friends if we were prepared to misunderstand what is actually *meant* by friendship.[131] The reason why it is wrong to treat friends as instrumental means to an end and therefore as readily exchangeable units is contained in the social practices by which friendship is enacted. The problem, when values that are incommensurable with each other in this sense are threatened (e.g., when values such as 'biodiversity', landscape,

[130] Attfield, R. and Dell, K (eds) (1996) *Values, Conflict and the Environment* (2nd edn), Aldershot: Ashgate, p. 54.
[131] Raz, J. (1986), *The Morality of Freedom*, Oxford: Clarendon: pp. 350-1.

community cohesion and silence are affected), is how to rank them ordinally in terms of importance. How this done has to be a matter of public and transparent deliberation, a process which cannot be submitted to a pre-decided algorithmic decision procedure such as that offered by CBA.[132] Indeed, to assume that such a process of deliberation could be substituted for by CBA is to already have made a judgement concerning the ordinal ranking of values in general, in favour of the alleged greater social value of the measure that is offered by monetization. As noted above with respect to the choice of economic growth as a metric for measuring progress, whether this is a justifiable decision or not should be a matter of public deliberation.

What values can be considered incommensurable in the above sense is itself a matter of public debate, but the class might include e.g. biodiversity, landscape, community cohesion and silence. Such values are held to be constitutive of, or ingredient in, the well-being of an individual or group and as such are therefore more or less non-substitutable. Sociological research into the experiences of groups who, as a result of infrastructural development, have heightened levels of nuisance imposed upon them has suggested that they tend to respond negatively to definitions of nuisance as a compensatable cost.[133] In fact, they tend to interpret this definition as being itself an additional negative impact, one which demonstrates the indifference of public authorities to their specific situation.

Secondly, in order to support its utility as a tool for planning in the present, CBA operates with the assumption that the further into the future the costs and benefits of a policy may be located, the less monetary value they have in relation to the present. Just as reliance on CBA masks the *political* problem of how to rank values, its assumption that the future can be discounted relative to the present masks the political problem of how the present generation is to manage its responsibilities to future ones. The Government's avowed goal in its published sustainability strategy *Securing the Future* (2005) is precisely to decide how best to do this.[134] However, CBA as a policy tool is at odds with this stated goal, as it undermines the goal of equity by defining the value of future goods *for* the future, and the severity of future costs, using a metric which is biased towards the interests of the present.[135]

Thirdly, there is the problem of assumed consent, which applies to both present and (*a forteriori*) future generations. In order for the comprehensive approach to CBA recommended by Eddington to be used, it must be assumed that the population has already consented to bearing the negative impacts of a policy which a cost-benefit analysis may deem acceptable costs. Once again, this should arguably on equity and legal

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[132] O'Neill, J. (1993), *Ecology, Policy and Politics*, London; New York: Routledge, pp. 119-121.
[133] Burningham, K. (1998), "A noisy road or noisy resident?", *Sociological Review*, 46(3), pp. 536-563.
[134] DEFRA (2005), *Securing the Future: Delivering UK Sustainable Development Strategy*, http://www.sustainable-development.gov.uk/publications/pdf/strategy/SecFut_complete.pdf.
[135] Parfit, D. (1983), "Energy Policy and the Further Future: The Social Discount Rate," in *Energy and the Future*, MacLean, D. and Brown, P. G. (eds), Totowa, NJ: Rowman and Littlefield, pp. 31-37.

grounds not be assumed, but should rather be explored in an adequate consultation process.[136]

Fourth, by reducing all factors in the decision-making procedure to questions of utility (costs and benefits), CBA procedure has long been recognised as being inimical to the recognition of rights.[137] The problem stems from the fact that where rights and wrongs are 'translated' into the language of costs and benefits, basic rights (e.g., to life, privacy, freedom of expression, a fair hearing) are reduced to commodities bought and sold in actual or shadow markets and therefore 'discounted' or, where translation is not possible, are disregarded from the cost-benefit equation altogether.[138] The divergence between the values of utility and of rights is problematised by *inter alia* s.6(1) HRA 1998 which provides that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right" where an 'act' for this purpose includes a failure to act.[139] It is therefore difficult to see how the Government can comply with Convention rights and endorse a decision-making procedure which discounts them.[140]

[136] Authorities on consent to harms in the criminal law (e.g., *R* v *Brown* [1994] 1 AC 212 (HL); *R* v *Wilson* [1997] QB 47 (CA); e.g., Roberts, P. (1997) 'Consent to Injury: How Far Can You Go?' *Law Quarterly Review*, 113:27) represent an avenue worth considering in relation to *assumed* consent by public bodies, particularly where such bodies may be guilty of mis-, mal- or non-feasance

[137] See, for example, MacIntyre, A. 'Utilitarianism and Cost-Benefit Analysis: An Essay on the Relevance of Moral Philosophy to Bureaucratic Theory' in Scherer, D. and T. Attig (eds) (1983) *Ethics and the Environment*, Englewood cliffs, New Jersey: Prentice-Hall.

[138] See, for example, Gewirth, A. 'Human Rights and the Prevention of Cancer', in Scherer, D. and T. Attig (eds) (1983) *Ethics and the Environment*, Englewood cliffs, New Jersey: Prentice-Hall, p. 176

[139] Failure to act does not include a failure to introduce in Parliament a proposal for legislation or a failure to make any primary legislation (s.6(6) HRA 1998).

[140] If a claimant relies on Convention rights in its dealings with a public authority – in this case, with regard that authorities use of CBA – the authority must in the exercise of its functions decide whether these rights are relevant and, if so, what their effect may be. If the authority ignores the Convention issues, then it is at risk of failing to take relevant considerations into account, of committing an error of law and/or of making a disproportionate decision.

Appendix

Brief Note on Procedure of Seeking Judicial Review

Judicial review is one way of making public bodies accountable and ensuring that they act only within the powers granted to them by Parliament. This concerns a "review [of] the lawfulness of an enactment or decision, action or failure to act in relation to the exercise of a public function" (s 54.1(2)(a) Civil Procedure Rules 2000).[141] This means that judicial review concerns not the merits but the legality and procedural propriety of any decision, act, enactment or omission by any 'public body' (Diplock LJ in *Council of Civil Service Unions* v *Minister for Civil Service (the ' GCHQ' case)* [1985] AC 374). By 'public body' includes not only the Executive but also private concerns under the control of the state with public functions and with powers over and above those assigned to private individuals (*Foster* v *British Gas plc* [1991] 2 AC 306) such as BAA.[142] Since all 'public bodies' must also comply with the European Convention on Human Rights (ECHR) (s.6 Human Rights Act 1998), human rights considerations form a more recent and critical part of the two broad grounds of legality and procedural impropriety upon which the actions, decisions and omissions of such bodies may be reviewed to ensure they conform to the powers Parliament has granted them.

Failure to act in accordance with the powers granted to a public body by Parliament can lead to a decision being quashed by the courts (*Certioriari* or quashing order wherein parties returned to original position). Other remedies are *Mandamus* or mandatory order (forces public body act in a certain way, e.g. to take account of certain things), *Prohibtia* or prohibition order (prohibits decision-maker from acting *ultra vires*), *Injunction* (forbids action or orders action; including against Ministers, *M* v *Home Office* [1994] 1 AC 377), *Declaration* (declares rights and obligations of parties; *Ridge* v *Baldwin* [1964] AC 40; [1963] UKHL 2) and *Damages* (only awarded if the applicant has private law rights involved; *Cooper* v *Wandsworth Board of Works* (1863) 14 CB (NS) 180).

To obtain judicial review requires one to have leave to apply and grounds. Leave to apply requirements cannot be discussed here beyond noting that that issue in question must be a public law issue,[143] that one requires sufficient 'standing' (i.e., loosely, those affected by the decision,

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[141] Similar rights exist under s.288 Town and Country Planning Act (as amended) 1990 as amended which concerns reviewing the lawfulness of decisions by a Secretary of State on post-Public Inquiry planning disputes.

[142] It should be noted that English courts have decided not to question the validity of primary legislation (*Picken* v *British Railway Board* [1974] A.C. 765) but instead only whether Acts are compatible with EC law (which may disapplied, *du Pêcheur SA v Federal Republic of Germany; R v Secretary of State for Transport, ex p. Factortame Ltd and Others (No 4)* (*The Times* March 7, 1996; [1996] QB 404)) or compatible with Human Rights Act 1998 (which may be declared incompatible, s 4 HRA 1998) unless 'extreme circumstances' apply (e.g, Hoffman LJ in *R* v *Home Secretary, ex p. Simms* [2000] 2 AC 115, at 131).

[143] This will be the case if the decision, act or omission is made by a 'public body' (private bodies outwith the *Foster* test may also be reviewable if their powers involve a 'sufficient public element' and/or are governmental in nature (*R* v *Jockey Club, ex p Aga Khan* [1993] 2 All ER 853) and carry out some 'public function' (*R* v *East Berkshire HA, ex p Walsh* [1985] QB 152 603])).

act, enactment or omission),[144] that one must apply within three months of the decision, act, enactment or omission (unless there are good reasons for not being able so to do)[145] and that there must be no other avenues available to challenge the decision.

Grounds to obtain judicial can be divided into two (overlapping) categories: challenges on substantive (illegality and irrationality) and on procedural grounds (including legitimate expectation).

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[144] To have standing, individuals must be directly affected by an action or decision (*ex p Smedly*) but need not be too 'directly' affected (*R* v *Selby DC ex p Samuel Smith Old Brewery* [2001] PLCR 6). In absence of direct, personal interest, cases of public interest may have standing (*R* v *Secretary of State for Foreign and Commonwealth Affairs, ex p. Rees-Mogg* [1994] 1 All ER 457): taken into consideration here is the seriousness of the alleged wrong and, if the individual is a 'pressure group', its number of supporters, whether they are directly affected, whether the group has better expertise and authority to bring a case than an ordinary individual (*R* v *Her Majesty's Inspectorate of Pollution, ex p Greenpeace* [1994] 1 WLR 570) and whether it can claim some representation or works in areas of public interest, even if that interest lies beyond the boundary of the nation state, such as 'Third World issues' (*R* v *Secretary of State for Foreign and Commonwealth,* ex *p. WDM* [1995] 1 WLR 386).
Rule 54.17 of the CPR 2000 provides that courts may receive applications from interested parties such as pressure groups and interested bodies). Anticipating such a provision, in *R* v *Somerset CC ex p Dixon* [1997] COD 323, in criticising *ex p. Rose Theatre*, Smedly J explained that judicial review concerns 'wrongs not rights and some people not affected may be in a good position to bring to court's attention wrongs'.
In addition, Art. 9(2) of the Aarhus Convention, which entered into force in 30 October 2001 (to which to which the Government and EC became a full parties in early 2005), concerns access to justice in environmental matters and provides that anyone who has a 'sufficient interest' shall be able to challenge the substantive or procedural legality of any decision, act or omission.
[145] Factors outwith the claimant's control which delay review (e.g. getting legal help) may be reason to extend time limit (*R* v *Stratford DC ex p Jackson* [1985]) particularly when the general public interest is involved (*ex p Ruddock*).