Neutral Citation Number: [2020] EWCA Civ 213

Case No: C1/2019/1154

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
DIVISIONAL COURT
LORD JUSTICE HICKINBOTTOM, MR JUSTICE HOLGATE AND MR JUSTICE MARCUS SMITH
[2019] EWHC 1069 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 February 2020

Before:

Lord Justice Lindblom
Lord Justice Singh
and
Lord Justice Haddon-Cave

- -

Between:

The Queen (on the application of (1) Heathrow Hub Limited (2) Runway Innovations Limited)	**Appellants**
- and -	
The Secretary of State for Transport	**Respondent**
- and -	
(1) Heathrow Airport Limited (2) Arora holdings Limited	**Interested Parties**
- and -	
The Speaker of the House of Commons	**Intervener**

- -
- -

Martin Kingston QC, Robert O'Donoghue QC, Satnam Choongh and Emma Mockford (instructed by **DAC Beachcroft LLP**) for the **Appellants**
Robert Palmer QC, Alan Bates, Richard Moules and Andrew Byass (instructed by **the Government Legal Department**) for the **Respondent**
Michael Humphries QC, Gerry Facenna QC and Richard Turney (instructed by **Bryan Cave Leighton Paisner LLP**) for the **First Interested Party**
Charles Banner QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Second Interested Party**
Sarah Hannett (instructed by **the Office of the Speaker's Counsel in the House of Commons**) for the **Intervener**

Hearing dates: 24-25 October 2019

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Judgment Approved by the court for handing down

Lord Justice Lindblom, Lord Justice Singh and Lord Justice Haddon-Cave:

INTRODUCTION

1. This is the judgment of the court.

2. This is an appeal against an order handed down by the Divisional Court (Hickinbottom LJ, Holgate and Marcus Smith JJ) on 1 May 2019 in *R (on the application of Heathrow Hub Limited and Another) v Secretary of State for Transport* [2019] EWHC 1069 (Admin) ("the HUB Judgment") whereby the Divisional Court dismissed a claim for judicial review brought by the Appellants in respect of the Respondent's decision on 26 June 2018 to designate the "Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England" ("ANPS") as a national policy statement under section 5(1) of the Planning Act 2008.

3. On the same day, the Divisional Court (Hickinbottom LJ and Holgate J) also handed down a linked order in (*R (on the application of Neil Spurrier and Others) v Secretary of State for Transport* [2019] EWHC 1070 (Admin)), whereby the Divisional Court dismissed challenges by various parties to the designation of the ANPS on environmental grounds. The order of this court on the appeal and applications for permission to appeal in those proceedings is also handed down today.

4. The parties to this appeal against the HUB Judgment are as follows:

    (1) The Appellants (collectively known as "HUB"), are the promoters of a proposal to extend the existing northern runway at Heathrow Airport so as to operate as two runways, a proposal known as the Extended Northern Runway ("ENR") scheme.

    (2) The Respondent ("the Secretary of State") is the Minister responsible for United Kingdom ("UK") transport matters including aviation.

    (3) The First Interested Party, Heathrow Airport Limited ("HAL") is the owner and operator of Heathrow Airport and the promoter of a proposal to build a third runway at Heathrow Airport, a proposal known as the Heathrow Northwest Runway ("NWR") scheme.

    (4) The Second Interested Party, Arora Holdings Limited ("Arora") and its associated subsidiary companies own land within the indicative boundary of the NWR scheme, including several hotels.

    (5) The Intervener is the Speaker of the House of Commons.

5. The decision of the Secretary of State to designate the ANPS was the culmination of a six-year process, which began in September 2012 with the establishment of the Airports Commission ("the Commission"), to examine two questions: (a) whether there was a need for additional airport capacity in the South East of England; and (b) if so, how that capacity requirement should be met.

6. The ANPS concluded that (a) there was a need for further airport capacity and (b) this need should be met by the construction of a third runway at Heathrow Airport, namely the NWR scheme promoted by HAL.

7. The ANPS chose the NWR proposal over two other rival proposals: first, the ENR scheme proposed by HUB; second, a proposal promoted by the owner and operator of Gatwick Airport, Gatwick Airport Limited ("GAL"), for the construction of a second runway at Gatwick Airport, known as the Gatwick scheme.

8. By its claim for judicial review in these proceedings (CO/3071/2018) HUB sought to challenge the Secretary of State's decision to prefer the NWR scheme over the ENR scheme and to designate the ANPS accordingly. Unlike the other claimants in the linked Planning proceedings (CO/2760/2018, CO/3089/2018, CO/3147/2018 and CO/3149/2018), who oppose any expansion of Heathrow at all, HUB supports the expansion of Heathrow Airport but complains that legal errors were made in the process of selecting and preferring the NWR scheme over its ENR scheme.

FACTUAL BACKGROUND

9. The Divisional Court set out a full and clear account of the relevant facts (in paragraphs 21 to 86 of its judgment, under the heading "The Factual Background"). We gratefully adopt that account. For the hearing before us, the parties provided a detailed agreed narrative. We set out below the most salient events in that history.

10. On 7 September 2012, the Government established the Airports Commission, chaired by Sir Howard Davies, as an independent body of experts to examine the scale and timing of any requirement for additional capacity to maintain the UK's position as Europe's most important aviation hub. The Airports Commission's brief was to evaluate and report on how any need for additional capacity should be met in the short, medium and long term. The terms of reference of the Airports Commission required it to look, inter alia, at the environmental impact of meeting any capacity needs and required that the "Commission should base the recommendations in its final report on a detailed consideration of the case for each of the credible options. This should include the development or examination of detailed business cases and environmental assessments for each option, as well as consideration of their operational, commercial and technical viability". The terms of reference further expressly required the Airports Commission to provide material by way of its Final Report which would support the Government in preparing a national policy statement ("NPS").

11. Following its establishment, the Airports Commission issued an invitation for interested parties to submit proposals for long-term aviation capacity options. In connection with this invitation, in February 2013, the Airports Commission issued a guidance document, "Submitting evidence and proposals to the Airports Commission", which explained in general terms the approach it proposed to take with its role and how those who wished to submit proposals might best engage with the Airport Commission. In that guidance document, Sir Howard Davies described in his Foreword how the Airports Commission, as "a body without any vested interests or preconceived views", intended to provide a "fresh and independent view, at arm's length from politics". The guidance document also explained how the Airports Commission intended to make recommendations for Government by the summer of 2015, which it hoped "could form

the basis of a National Policy Statement". The Airports Commission explained: "In reaching our interim conclusions, part of the role of the Commission will be to ensure that appropriate consideration is given to all of the plausible options".

12. HUB put forward one of 52 proposals submitted to the Airports Commission in response to that invitation. These proposals were then published by the Airports Commission, together with six proposals of its own, with a further invitation for stakeholders to submit views and additional evidence.

13. HUB made its initial submission in respect of its proposed ENR scheme to the Airports Commission on 28 February 2013, followed by further submissions and engagement throughout the remainder of 2013.

14. On 17 December 2013, having considered the responses following the publication of the 58 proposals, the Airports Commission published an interim report (the "Airports Commission's Interim Report"), which assessed the evidence on the nature, scale and timing of steps needed to maintain the UK's status as an international hub for aviation. It also made recommendations for the better use of existing runway capacity consistent with long term options. The Airports Commission's Interim Report selected three options for further consideration in its final report: the NWR scheme, the ENR scheme and the Gatwick scheme. The Airports Commission explained that it considered each of the shortlisted options had "a credible prospect of being deliverable within the required timescales" although it noted that "there are still important issues to examine for each of the proposals, together with significant risks".

15. In January 2014, the Airports Commission consulted on a draft Appraisal Framework, and in February 2014, it adopted an Appraisal Framework. The "appraisal modules" adopted included noise, cost and commercial viability, operational efficiency, operational risk and delivery. The Airports Commission established an Expert Advisory Panel comprising 21 members to aid it in its assessment of the evidence.

16. On 1 July 2015, the Airports Commission published its Final Report which recommended, inter alia, that the NWR scheme was the most appropriate way to meet the identified need for additional runway capacity in the south east of England, combined with a significant package of measures to address environmental and community impacts.

17. The Airports Commission concluded that the ENR scheme performed better in two areas: (1) lower costs by approximately £3 billion, thereby lowering the financing risks and the potential for increase in aeronautical charges; and (2) it would require the loss of only 242 homes compared to the 783 homes for the NWR scheme. However, it concluded that these benefits were outweighed by five other matters where the NWR scheme outperformed the ENR scheme, namely (1) capacity, (2) respite, (3) noise, (4) air quality and (5) resilience.

18. The foreword to the Commission's Final Report stated:

> "Our choice at Heathrow is in favour of the Northwest Runway proposal by the airport operator. The so-called Heathrow Hub is an imaginative idea, which has usefully opened up thinking

> about the way the airport operates, but for the reasons we explain is less attractive from a noise perspective. The Northwest Runway scheme is technically feasible and does not involve massive, untested infrastructure. The costs are high, but financeable by the private sector, in our judgement and that of investors."

19. Under the heading "the best option for expansion at Heathrow", the Executive Summary of the Airports Commission's Final Report stated:

> "The proposal for extending Heathrow's northern runway (the scheme proposed by Heathrow Hub Ltd) offers two particular advantages:
>
> • Its estimated costs are roughly £3 billion lower than those of the Northwest Runway option, reducing the financing risk associated with the scheme and lowering the increase in aeronautical charges paid by airlines.
>
> • It would require the loss of only 242 homes compared to 783 for the Northwest Runway option, and its impacts on community facilities such as schools and health centres would also be much more limited.
>
> While these advantages are valuable, however, they must be offset against a larger number of important areas where the Extended Northern Runway scheme performs less strongly.
> First, the Extended Northern Runway scheme delivers a lower level of capacity than the Northwest Runway option: 700,000 air traffic movements a year compared to 740,000. This leads to reduced economic benefits and a smaller route network at the airport.
>
> Second, it would not be possible to maintain the principle of respite through runway alternation, which is highly valued by local communities, to the same degree with the Extended Northern Runway scheme as with a new Northwest Runway.
>
> Third, the Extended Northern Runway scheme would continue to concentrate take offs and landings along just two approach and departure paths, leading to higher number of people within the highest noise contours close to the airport.
>
> Fourth, the Extended Northern Runway scheme presents greater challenges in terms of compliance with the EU Air Quality Directive.
>
> Fifth, the Extended Northern Runway scheme creates a more congested airfield than the alternative option, leading to lower resilience and less space for ancillary development.

> On balance, the Commission's judgement is that the Extended Northern Runway presents a less effective proposition to meet the UK's aviation capacity and connectivity needs. It has therefore concluded that the Northwest Runway scheme offers the best option for expansion at Heathrow."

20. In terms of capacity, the Commission's conclusion (at [12.11]) was that:

> "Of the two Heathrow schemes, the Northwest Runway scheme offers the largest increase in capacity. This is due to lower anticipated congestion on taxiways and also simpler respite procedures associated with that scheme, which would keep all three runways in operation throughout the day, albeit with certain runways only used for arrivals or departures at certain times. The Extended Northern Runway scheme, by contrast, would be more susceptible to taxiway congestion and would not operate all three runways at certain times of the day to provide respite. While, in principle, the highest number of peak-hour movements is not significantly different between the schemes, it would be easier to schedule a larger number of movements over the course of the full operating day with the Northwest Runway scheme."

21. Following the publication of the Commission's Final Report, the Department for Transport ("the Department") undertook a review of the Airports Commission's work.

22. Shortly after the Airports Commission issued its Final Report, the Department indicated that it intended to consider all three schemes which had been shortlisted by the Airports Commission in its interim report. On 20 July 2015, the Department issued a "Rules of Engagement" document to the short-listed promoters. That document noted (at paragraph 1.2) that the "Government has as yet formed no view on the recommendations in the Airport Commission's final report, including whether or not there is a need for additional capacity and, if there is, how best to meet that need".

23. The Department held discussions with the three short-listed promoters**.** The Department held a series of initial meetings with HUB between July and September 2015 at which various process issues were discussed. At the first of those meetings, which took place on 9 July 2015, the Department indicated that it wished the output of the meetings to be a "document that sets out commitments and gives confidence that parties can work together towards a successful project". This document is what became known as the "Statement of Principles", a final version of which was signed in June 2016. The HUB Statement of Principles was expressed to be a legally non-binding document containing the principles on which the Government and HUB intended to proceed "if the Government concludes no later than 31 October 2016 … that [HUB]'s Scheme is the preferred scheme" (see paragraph 1.5). It made clear that "at the date of signing this Statement of Principles … the Government has not yet formed a view on the recommendations in [the Airports Commission's] Report as to how best to meet the need for more runway capacity in London and the south-east" (at paragraph 1.4). Similarly, the Statement of Principles stated that it "does not create any legitimate

expectation, whether substantive or procedural, in relation to the exercise of functions of Government" (at paragraph 2.1.1).

24. The Department also concluded a Statement of Principles with each of HAL and GAL, the texts of which were negotiated during the summer of 2016.

25. The Statement of Principles concluded with HUB setting out the understanding of HUB and the Department as to the responsibility of HUB for developing the relationship between HUB and HAL if the ENR scheme was selected by the Government. It reflected the responsibility of HUB for negotiation between HUB and HAL after, and in the event that, the ENR scheme was selected by the Government. Section 3 of the document, which is headed "fundamental principles" reads (in relevant part) as follows:

> "3.1 [HUB] is a private sector entity promoting a scheme to expand the airport by extending the northern runway within the economic regulatory system for airport operators established by the Civil Aviation Act 2012 … Consequently it is acknowledged by [HUB] that it would be for [HUB] to procure the development and implementation of its Scheme in the manner outlined in this Statement of Principles.
>
> 3.2. The Secretary of State and [HUB] both acknowledge that in the event that the Secretary of State concludes that [HUB]'s scheme is the Government's preferred scheme that the development and implementation of the scheme is conditional on [HUB] reaching agreement with the Operator [HAL] to take forward such development and implementation of the Scheme in accordance with this Statement of Principles (which may include, amongst other matters, the sale, licence or otherwise transfer of the intellectual property rights held by [HUB] in relation to the Scheme) ("Agreement").
>
> 3.3 [HUB] confirms that the Operator and [HUB] have undertaken initial commercial discussions regarding a possible Agreement including in respect of a purchase price for the sale, licence or otherwise transfer of the intellectual property rights held by [HUB] referred to in paragraph 3.2 above. [HUB] further confirms that these discussion were paused following the Airports Commission's Report where the Operator's own scheme (combined with a significant package of compensation and mitigation measures) was recommended by the Airports Commission. However, should the Government conclude that [HUB]'s Scheme is the preferred scheme, then [HUB] is confident that commercial discussions regarding the Agreement would be resumed and satisfactorily concluded with the Operator in relation to the sale, licence or otherwise transfer of appropriate rights and the development and implementation of the Scheme to ensure its successful delivery. …

> 3.4. Accordingly, [HUB] will use best endeavours to enter the Agreement with the Operator within thirty (30) days of, and in any event as soon as reasonably practicable, after receiving a notice from the Secretary of State … that its Scheme is the preferred scheme. [HUB] will confirm in writing that this has occurred and provide full details of such arrangements including certified copies of the Agreement signed by the Operator. …" (our emphasis)

26. On 9 December 2015, the Government's "Review of the Airport[s] Commission's Final Report" (published on 25 October 2016) concluded that the Department was satisfied that the Airports Commission's Final Report was a sound and robust piece of evidence on which the Government could base decisions as to whether further airport capacity was required and as to where that capacity would best be located.

27. On 14 December 2015, the Secretary of State announced that the Government accepted the case for airport expansion; agreed with, and would further consider, the Airports Commission's shortlist of options; and would use the mechanism of an NPS under the Planning Act to establish the policy framework within which to consider an application by the developer for planning consent. He went on to state that additional work would be required on air quality, noise, carbon emissions and the impacts on local communities. The decision to make the announcement had been agreed at a Cabinet Economic and Industrial Strategy (Airports) Sub-Committee meeting of 10 December 2015.

28. On 26 January 2016, the then Secretary of State (the Rt. Hon. Patrick McLoughlin MP) wrote to HUB to confirm that the Government's assessment was ongoing and that he was continuing to "consider all three of the shortlisted schemes". The Secretary of State proceeded to indicate "the key areas" on which he anticipated further engagement with HUB would be necessary.

29. On 17 August 2016, a meeting took place between HUB and the new Secretary of State (the Rt Hon. Chris Grayling MP) and the Minister for Aviation (the Rt. Hon. Lord Ahmad) at Heathrow Airport. The Secretary of State requested, at that meeting, that HUB obtain a written guarantee or assurance from HAL to the effect that if HUB's ENR scheme was selected by the Government, HAL would agree to implement it.

30. It should be noted that that request by the Secretary of State forms the major ground of complaint by HUB and is the foundation of each of the grounds of challenge by HUB in the judicial review proceedings (see further below).

31. On 19 August 2016, HUB wrote to the Secretary of State stating that HUB was "working to obtain comfort for you that, if our concept was chosen by the Government, HAL would be prepared to reach a prompt agreement with us to acquire or license our intellectual property and to implement an Extended Northern Runway. We will update you as soon as possible on progress".

32. On 7 October 2016, HUB wrote to the Secretary of State again stating that HAL had yet to respond definitively to the request for written confirmation that they would implement HUB's ENR. HUB stated that it would continue to use its best endeavours to reach agreement but if the Government wished for a definitive reply before the

Cabinet Committee reached its decision "it is now down to the Government to obtain one".

33. In addition to discussions on the approach of HAL to HUB's scheme, there were also discussions between July 2015 and October 2016 on the substance of HUB's proposal for expansion of the ENR. During this time HUB provided both solicited and unsolicited submissions and information in support of the ENR scheme. In particular, HUB produced technical reports seeking to challenge the findings of the Airports Commission insofar as they purported to show that the NWR scheme performed better than HUB's scheme.

34. On 25 October 2016, the Secretary of State announced that the Government's preferred option for the expansion of airport capacity was the NWR scheme at Heathrow. The decision to make the announcement had been, as previously, agreed at the Cabinet sub-Committee meeting of the same date. The decision was noted by the Cabinet. A number of documents were published at the same time as announcing the preferred option for expansion of airport capacity ("the Preference Decision"), including a Review of the Airports Commission's Final Report (dated 9 December 2015); a Further Review and Sensitivities Report Airport Capacity in the South East (dated October 2016) and a non-binding Statement of Principles agreed between the Secretary of State and HAL.

35. The Secretary of State also made a statement to Parliament, on the same day, in which he announced that the Government's preferred option was the NWR scheme.

36. Also on 25 October 2016, the Secretary of State appointed Sir Jeremy Sullivan, a former Lord Justice of Appeal, as Independent Consultation Adviser to oversee the consultation process on the draft ANPS and provide scrutiny and challenge to the Department.

37. On 2 February 2017, the Department laid before Parliament and published for consultation several documents, including a draft ANPS, an Appraisal of Sustainability (which assessed the three shortlisted schemes) and a number of technical supporting documents.

38. The draft ANPS included a section setting out why the NWR scheme was preferred for expansion at Heathrow instead of the ENR scheme. Three reasons were identified for preferring the NWR scheme, namely: (1) resilience and capacity; (2) respite from noise for local communities; and (3) deliverability. The draft ANPS explained the basis for these reasons, which are also the reasons that appear in materially identical terms in the final ANPS:

> "3.55 The Heathrow Northwest Runway scheme would provide respite by altering the pattern of arrivals and departures across the runways over the course of the day to give communities breaks from noise. However, respite would decrease from one half to one third of the day. The Heathrow Extended Northern Runway scheme has much less potential for respite. It would use both runways for arrivals and departures for most of the day, although it may be able to 'switch off' one runway for a

> short time during non-peak periods with a corresponding reduction in capacity.
>
> 3.56 The Heathrow Northwest Runway scheme should provide greater resilience than the Heathrow Extended Northern Runway scheme because of the way the three separate runways could operate more flexibly when needed to reduce delays, and the less congested airfield. It delivers greater capacity (estimated on a like for like basis by the Airports Commission at 740,000 flights departing and arriving per annum compared to the Extended Northern Runway scheme at 700,000), accordingly higher economic benefits, and a broader route network. It also provides greater space for commercial development, which could be used to enhance onsite freight capacity.
>
> 3.57 The Airports Commission and the Civil Aviation Authority both assessed the Extended Northern Runway scheme to be deliverable. However, the Extended Northern Runway scheme has no direct global precedent. As such, there is greater uncertainty as to what measures may be required to ensure that the airport can operate safely, and what the impact of those measures may be, including the restriction on runway capacity."

39. On 24 May 2017, HUB responded to the consultation on the draft ANPS with submissions addressing matters relating to capacity, safety, respite, noise, airspace, resilience, community property and infrastructure, capital cost, deliverability, and whether it was necessary for it to provide an assurance or guarantee from HAL. On this last matter, representations were made that there was no need for HUB to provide a guarantee or assurance because, inter alia, the Airports Commission considered all schemes to be deliverable.

40. HAL also made representations in May 2017 in response to the consultation, which supported the reasons set out in the draft ANPS as to the reasons for preferring the NWR scheme. These submissions were directed to matters relating to the ENR scheme's capacity, ability to offer resilience, stand capacity, the untested nature of the ENR scheme, and as to whether it had been properly costed.

41. A further consultation was commenced in October 2017 to allow updated evidence, including the Government's revised aviation demand forecasts and its final Air Quality Plan, to be taken into account and considered by the public. A revised draft ANPS and a number of other supporting documents were published at this time including an updated Appraisal of Sustainability. The revised draft ANPS repeated in materially identical terms the reasons why the NWR scheme was preferred over the ENR scheme.

42. On 18 December 2017, HUB made representations in response to this further consultation, supported by expert materials.

43. On 5 June 2018, the 'proposed ANPS' was laid before Parliament and the Government published a document entitled the "Government response to the consultations on the Airports National Policy Statement: Moving Britain Ahead" ("the Consultation Response"), which sought to address the key themes arising from these consultations. There had been 72,239 responses to the February 2017 consultation and 11,028 responses to the October 2017 consultation.

44. Sir Jeremy Sullivan, in his capacity as Independent Consultation Adviser, published reports covering the adequacy of both consultations and reached positive conclusions, including that the consultation had been carried out to "a high standard".

45. In March and November 2017, the House of Commons Transport Committee invited submissions to its inquiry into the ANPS. The Transport Committee was appointed to carry out the necessary Parliamentary scrutiny of the revised draft ANPS and received written evidence, including from HUB, whose written evidence was substantially the same as its representations of 18 December 2017 in response to the second consultation on the revised draft ANPS.

46. In December 2017, HUB made further submissions in response to the consultation on the draft ANPS, in which it once again submitted technical evidence and asserted that the conclusions on capacity and respite relied on by both the Airports Commission and the Secretary of State (in its support of the NWR proposal) were flawed.

47. On 25 May 2018 HUB sent a letter to the Secretary of State stating:

> "… [HUB] are of the opinion that the NPS should not be laid before Parliament without: …
>
> • the Extended Northern Runway scheme being included in the ANPS; and
>
> • a written guarantee from HAL to [HUB] that, if the Extended Runway Scheme is progressed, HAL will work on standard commercial terms with [HUB] to implement that scheme for the expansion of Heathrow airport"

48. On 4 June 2018, HUB wrote to the Prime Minister repeating arguments previously made by it.

49. On 5 June 2018, the Cabinet sub-Committee met and approved the laying before Parliament of the proposed ANPS. That decision was noted by the Cabinet. On the same day, the Secretary of State laid before Parliament the final proposed ANPS in accordance with section 9(8) of the Planning Act. The proposed ANPS continued to identify the same three reasons as were set out in the draft ANPS as to why the ENR scheme was not the Government's preferred scheme, namely for reasons relating to resilience and capacity, respite from noise and deliverability.

50. On 5 June 2018, the Government published the Consultation Response stating that it remained satisfied that the Airports Commission's reasons for recommending the NWR scheme continued to be sound:

> "3.63 As noted above, in forming its view on the most effective and appropriate scheme to meet the need for additional capacity the Government has considered the positive and negative effects from each of the three shortlisted schemes. The Government recognises that analysis suggests that the Heathrow Extended Northern Runway scheme would have mainly lower environmental and local impacts and would be cheaper to construct compared to the Heathrow Northwest Runway scheme. Further consideration of the environmental impacts of the Northwest Runway scheme is found in Chapters 6, 7 and 8.
>
> 3.64 As it would maintain Heathrow Airport's hub status, the scheme is expected to deliver substantial improvements in connectivity and bring about wider benefits in terms of trade, freight and productivity that are accompanied with a large increase in jobs. However, the relatively smaller increase in capacity offered by the scheme limits the overall size of these benefits, compared to the other two schemes.
>
> 3.65 The capacity of the schemes was considered by the Commission. It concluded that the Heathrow Northwest Runway scheme would provide capacity for around 40,000 additional ATMs compared with the Heathrow Extended Northern Runway scheme. This is on the basis of the Heathrow Northwest Runway scheme allowing for more flexibility, including all three runways being full length and capable of independent operation, allowing the airfield to be less constrained, easing airport taxiway congestion.
>
> 3.66 The Department has reviewed the Commission's findings, taking into consideration the representations from [HUB]/RIL, and agrees with the Commission's conclusions. The evidence provided by [HUB]/RIL uses an alternative, simplified methodology to model capacity, compared with the Commission's work. Under this alternative methodology, the Heathrow Northwest Runway scheme would still have greater capacity than the Heathrow Extended Northern Runway scheme."

51. A number of supporting technical documents were published at the same time, which included a redacted technical report from York Aviation ("the York Aviation Note"). The York Aviation Note stated that York Aviation had examined HUB's evidence that its scheme could deliver in excess of 700,000 annual ATMs, and said that "based on the evidence presented, there must be some doubt as to whether the 700,000 annual ATMs would be achieved in practice". As for HAL's NWR scheme, the York Aviation Note stated "although we have not seen a full capacity assessment for HAL's NWR scheme, we have seen no evidence that it is not capable of delivering the target 740,000 annual ATMs …".

52. On 18 June 2018, HUB wrote to the Secretary of State challenging the accuracy of the York Aviation Note.

53. On 21 June 2018, the Government provided a response to HUB's letter to the Prime Minister of 4 June 2018 addressing HUB's submissions on capacity, cost, airport charges, phasing, safety, housing loss and competition and stating that the decision to lay the proposed ANPS before Parliament was reached "after considering the points raised in response to the two consultations (including detailed representations made by [HUB]), the report and recommendations of the Transport Select Committee, and the points subsequently made in correspondence by [HUB's] representatives."

54. On the same day, a letter from the Department's legal advisers responded to HUB's letters of 25 May, 6 June and 18 June 2018. Under the heading "Guarantee" it said:

> "You have also requested that there should be a written guarantee from HAL that, if the ENR scheme were subsequently progressed, Heathrow Airport Limited (HAL) would work on standard commercial terms with your client ([HUB]) to implement that scheme.
> However as explained above, the Government does not agree that the ENR is the preferred way of meeting the need for additional airport capacity in the South East, and does not consider it appropriate to include it in the proposed ANPS. The NWR is the only scheme for which the proposed ANPS gives policy support. The request for a guarantee is therefore academic. In any event, such a matter is for HAL. …"

55. On 25 June 2018, there was a debate and vote on the proposed ANPS in the House of Commons. MPs voted in favour of the ANPS by 415 votes to 119, a majority of 296.

56. On 26 June 2018, the Secretary of State designated the ANPS which provided for the NWR scheme and explained the need for new airport capacity and that the preferred NWR scheme was the most appropriate means of meeting that need (paragraphs 1.40 and 1.41).

57. The ANPS explained the reasons for preferring the NWR to the ENR, which did not include the absence of the assurance or guarantee from HAL in relation to the ENR:

> "3.56 The Heathrow Extended Runway Scheme has two advantages over the Heathrow Northwest Runway scheme: lower capital costs (£14.4 billion for the Extended Northern Runway scheme compared to [£]17.6 billion for the Northwest Runway scheme), and significantly fewer houses being demolished (242 rather than 783), as well as avoiding impact on a number of commercial properties.
>
> 3.57 However, the Government made a preference for the Heathrow Northwest Runway based on a number of factors:

- Resilience;
- Respite from noise for the local communities; and
- Deliverability.

> 3.58 The Heathrow Northwest Runway scheme would provide respite by altering the pattern of arrivals and departures across the runways over the course of the day to give communities breaks from noise. However, respite would decrease from one half to one third of the day. The Heathrow Extended Northern Runway scheme has much less potential for respite. It would use both runways for arrivals and departures for most of the day, although it may be able to switch off one runway for a short time during nonpeak periods with a corresponding reduction in capacity.
>
> 3.59 The Heathrow Northwest Runway scheme should provide greater resilience than the Heathrow Extended Northern Runway scheme because of the way the three separate runways can operate more flexibly when needed to reduce delays, and the less congested airfield. It delivers greater capacity (estimated on a like-for-like basis by the Airports Commission at 740,000 flights departing and arriving per annum compared to the Extended Northern Runway scheme of 700,000), accordingly higher economic benefits and a broader route network. It also provides greater space for commercial development, which could be used to enhance onsite freight capacity.
>
> 3.60 The Airports Commission assessed the Heathrow Extended Northern Runway scheme to be deliverable. However, the Extended Northern Runway scheme has no direct global precedent. As such, there is great uncertainty as to what measures may be required to ensure that the airport can operate safely, and what the impact of those measures may be, including the restriction on runway capacity."

Key dates

58. The key dates and events in the factual background are, therefore, as follows:

(1) 1 July 2015: the Airports Commission published its Final Report recommending the NWR scheme over the ENR scheme.

(2) June 2016: the Statement of Principles was signed by HUB and the Secretary of State.

(3) 17 August 2016: the Secretary of State requested HUB obtain a written assurance from HAL to implement their ENR scheme if chosen ("the Assurance").

(4) 25 October 2016: following the agreement of the Cabinet Sub-Committee, the Secretary of State announced that the NWR scheme was the Preference Decision.

(5) 2 February 2017: the Department published the draft ANPS recommending the NWR scheme.

(6) 26 June 2018: the Secretary of State designated the ANPS choosing the NWR scheme ("the Designation Decision").

HUB'S GROUNDS OF CLAIM

59. HUB brought judicial review proceedings pursuant to section 13 of the Planning Act challenging the Designation Decision.

60. HUB argued that the Secretary of State's decision to designate the ANPS was legally flawed and should be quashed on five grounds, namely that in accepting the NWR scheme and rejecting the ENR scheme, the Secretary of State acted unlawfully in the following respects:

(1) Judicial Review Ground 1 - breach of EU competition law: The Secretary of State breached European Union ("EU") law by insisting that HAL provide a guarantee or assurance; and making its provision an effective pre-condition of ENR selection. This pre-condition was contrary to EU law insofar as it breached Articles 106(1) and 102 of the Treaty on the Functioning of the European Union ("TFEU").

(2) Judicial Review Ground 2 – legitimate expectation: The Secretary of State insisted on the provision of a guarantee or assurance when to do so was (i) procedurally unfair and (ii) in breach of HUB's legitimate expectation that the Secretary of State would select the ENR scheme if he found it to be "the most suitable scheme".

(3) Judicial Review Ground 3 – immaterial and material considerations: The Secretary of State had regard to an immaterial consideration (an incorrect factual assumption that the NWR provided greater capacity and respite) and failed to have regard to a material consideration (that the evidence demonstrated that the ENR provided at least the same capacity as the NWR, and the NWR could not in practice deliver the attributed levels of respite).

(4) Judicial Review Ground 4 – capacity: In the alternative to Ground 3, the Secretary of State failed to provide any (or any adequate and intelligible) reasons for rejecting HUB's submissions that the ENR provided the same capacity and respite as the NWR.

(5) Judicial Review Ground 5 - safety: The Secretary of State acted unlawfully by taking into account concerns relating to the safety of the ENR, and the implications of this for deliverability; and failing to provide any (or any intelligible) details or explanation of what the safety concerns were, or what those concerns were based on. He also acted contrary to a legitimate

expectation that he would, before relying on a particular matter for rejecting HUB's scheme, bring it to their attention and give them a reasonable opportunity to respond.

61. Ground 3 was not pursued. The remaining four grounds were heard by the Divisional Court on 20-22 March 2019 on a rolled-up hearing basis.

THE DECISION BELOW

62. In its judgment ([2019] EWHC 1069 (Admin)), the Divisional Court granted permission to apply for judicial review on Judicial Review Grounds 1 and 2 advanced by HUB below but refused both substantive claims. The Divisional Court refused permission for judicial review in respect of Judicial Review Grounds 4 and 5. Accordingly, HUB's claim was dismissed ([211]).

63. HUB sought permission to appeal the Divisional Court's decision on Judicial Review Grounds 1 and 2 and permission to appeal was granted by Lindblom LJ on 22 July 2019. HUB did not pursue any appeal in respect of the Divisional Court's findings on Judicial Review Grounds 4 and 5. Therefore, we are concerned in this appeal with the Divisional Court's judgment in respect of Judicial Review Grounds 1 and 2 below only.

GROUNDS OF APPEAL

64. HUB's Grounds of Appeal relate to the same issue, namely the request made by the Secretary of State on 17 August 2016 for what is referred to in the Background Facts as "a guarantee or assurance" that HAL would implement the ENR, if the scheme was selected by the Government as its preferred means for airport expansion. The Divisional Court found that the term "guarantee" was never used by the Secretary of State in the period leading up to the Preference Decision but that he did request HUB obtain a requisite written "letter of support", "comfort" or "commitment" from HAL ([121]). For ease of reference we refer to this as the request for an "Assurance".

65. HUB contends that the Divisional Court's decision on Judicial Review Grounds 1 and 2 below was wrong in law. HUB advances four grounds by way of appeal which are, as summarised in HUB's skeleton, as follows:

    (1) Appeal Ground 1: the Divisional Court erred in law insofar as it failed to find that a distortion of competition had arisen as a result of the State measure before the October 2016 Preference Decision was taken, and, accordingly, that the question of whether or not the issue of the Assurance was subsequently a material consideration for the Secretary of State is legally irrelevant.

    (2) Appeal Ground 2: the Divisional Court erred in law insofar as it found that no distortion of competition or potential abuse was capable of arising because of the fact that a subsequent Development Consent Order ("DCO") application might be made. Grounds 1 and 2 are therefore related.

    (3) Appeal Ground 3: the Divisional Court's analysis of whether the issue of the

Assurance was a material consideration for the Secretary of State is vitiated by numerous and compounding errors of law including that: (i) the Court committed errors of law in its approach to Article 9 of the Bill of Rights 1689 by failing to take at face value the Secretary of State's repeated statements to Parliament that the lack of the Assurance was an (if not the most) important consideration in him deciding to prefer the NWR to the ENR; (ii) it amounts to the rejection of a series of facts previously conceded by the Secretary of State in relation to his decision-making process; and (iii) it represents an impermissible after-the-event rationalisation of the Secretary of State's decision-making process. Grounds 2 and 3 are also related in the sense that if HUB succeeds on both Grounds then its competition law complaint will have been made good.

(4) Appeal Ground 4: the Divisional Court erred in finding that HUB had no legitimate expectation and that the Secretary of State could resile from any such expectation. Grounds 3 and 4 are therefore related as well.

66. It is convenient to consider HUB's Grounds of Appeal in the following order:

(1) Appeal Ground 4: LEGITIMATE EXPECTATION

(2) Appeal Ground 3: MATERIALITY

(3) Appeal Grounds 1 and 2: COMPETITION LAW ISSUES

67. We also consider the effect of section 31(2A) of the Senior Courts Act 1981 below.

Appeal Ground 4: LEGITIMATE EXPECTATION

Legal principles

68. In the agreed List of Issues for this Court and relevant propositions of law, at paragraph 12, the parties agreed that the propositions of law relating to the doctrine of legitimate expectation were accurately set out by the Divisional Court in its judgment (at [123]-[124]) in the following way:

> "123. … [T]here are several ways in which a legitimate expectation may arise. However, the underlying rationale is that, where a public authority has given a promise or adopted a practice which represents how it is going to act in a given matter or area, in certain circumstances, the law may impose an obligation on the authority to honour that promise or practice unless there is good reason not to do so. An individual may then challenge a decision that breaches that promise, or fails to comply with that practice, even when he has no enforceable statutory, contractual or other legal right to call upon.
>
> 124. The promise or practice may relate to the way in which the authority deals with the individual. In *R v Devon County Council, ex parte Baker* [1995] 1 All ER 73 at pages 88e-89f,

> Simon Brown LJ identified a number of distinct categories of legitimate expectation, including (i) an expectation that the authority will act fairly towards him (his category (3)) and (ii) an expectation that a particular procedure, not otherwise required by the law in the protection of an interest, must be followed consequent upon some specific promise or practice (his category (4)). Whilst such categories cannot be seen as hermetically sealed or mutually exclusive, as we understand Mr Kingston's submission, the alleged legitimate expectation here falls into category (4). Given that, but for his assurance or promise that he would not do so, the Secretary of State could quite properly have taken into account the unique deliverability risks in respect of the ENR scheme, the legitimate expectation arose as the result of particular assurances that he would deal with the selection of the preferred scheme in a particular way, i.e. by ignoring any deliverability risk that arises from the fact that HUB do not own/operate Heathrow and will not in any event implement the ENR scheme themselves. The promise relied upon must be clear, unambiguous and devoid of any relevant qualification, but it is well-established that it need not be express. <u>It can be derived from the circumstances of a particular matter.</u>" (our emphasis)

69. Although we would not disagree with that summary, it is important, in our view, to be clear about the last sentence. That sentence must not be read out of context. In the context of the above passage read fairly and as a whole, what is required is that there must be a practice (even though there is no express promise) which is impliedly tantamount to such a promise. That practice must still give rise to a representation which is clear, unambiguous and devoid of any relevant qualification.

70. It is important to recall that the origin of the modern doctrine of legitimate expectation lies in the decision of the House of Lords in *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 374 ("*CCSU*"). That was a case concerning a procedural expectation (a suggested duty to consult), but the fundamental ingredients of a legitimate expectation will be the same where there is asserted to be a substantive expectation (in effect a promise that a public authority will behave in a certain way on matters of substance and not merely procedure).

71. In the *CCSU* case, there was no express promise of consultation with the trade unions at GCHQ. Nevertheless, there had been a long-standing *practice* of consultation with the unions when fundamental terms of employment were to be altered. It was for that reason that the House of Lords held that, in the absence of national security considerations, there would have been a duty to consult the unions before the decision was made to ban union membership at GCHQ. That duty was subordinate to the interests of national security, which is why ultimately the application for judicial review failed.

72. In the *CCSU* case, at 401, Lord Fraser of Tullybelton said that a "legitimate … expectation may arise either from an express promise given on behalf of a public authority or from the existence of a <u>regular practice</u> which the claimant can

reasonably expect to continue" (our emphasis).

73. Furthermore, as subsequent decisions of the courts have made clear, a legitimate expectation will only be created if there has been some representation which is clear, unambiguous and devoid of relevant qualification: see the seminal decision of the Divisional Court in *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Limited* [1990] 1 WLR 1545, at 1569 (Bingham LJ).

74. The position has been recently explained in the Supreme Court decision of *R (Gallaher Group Ltd and others) v Competition and Markets Authority* [2019] AC 96, in which the main judgment was given by Lord Carnwath JSC. Lord Carnwath considered earlier decisions, including the decision of the Court of Appeal in *R v Inland Revenue Commissioners, ex parte Unilever Plc* [1996] STC 681. At paragraph 37 of his judgment Lord Carnwath referred to the "principles of legitimate expectation derived from an express or implied promise …", thus recognising that what is required is a promise although it need not be an express one as it may be implied. At [40], Lord Carnwath said:

> "… The decision in *Unilever* was unremarkable on its unusual facts, but the reasoning reflects the caselaw as it then stood. Surprisingly, it does not seem to have been strongly argued (as it surely would be today) that a sufficient representation could be <u>implied</u> from the Revenue's <u>consistent practice</u> for over 20 years …" (our emphasis)

75. It is clear therefore, in our view, that, although an express promise is not required to found a legitimate expectation, there must be a consistent practice which is sufficient to generate an implied representation to the same effect.

The Divisional Court's conclusions

76. The Divisional Court considered the claim for legitimate expectation (Judicial Review Ground 2 before it) under three headings:

    (1) Was there a legitimate expectation?

    (2) If there was a legitimate expectation, could the Secretary of State resile from it?

    (3) If there was a legitimate expectation from which the Secretary of State could not resile, did he act unlawfully by breaching or frustrating that expectation?

77. The Divisional Court answered these questions respectively, (1) 'No', (2) 'Yes' and (3) 'No', in the Secretary of State's favour. We turn to consider each of these questions in turn below.

(1) Was there a legitimate expectation?

The Divisional Court's conclusions

78. The Divisional Court drew a useful working distinction between "scheme-specific" risks (i.e. risks inherent in the nature of the proposed scheme itself) and "promoter-specific" risks (i.e. risks consequent upon the nature of the promoter) ([17]). These were also described as "objective" and "subjective" deliverability risks respectively. In the case of the ENR scheme, promoter-specific risks or subjective deliverability risks arose because HUB did not own or operate Heathrow Airport and depended upon HAL to deliver its ENR scheme.

79. HUB contended that the Secretary of State's request for an Assurance amounted to a breach of a legitimate expectation that the Secretary of State would not take into account any promoter-specific or subjective deliverability risks. Mr Kingston QC argued before the Divisional Court that a legitimate expectation could be derived from "assurances" given (i) by the Airports Commission, (ii) by the Secretary of State and (iii) in the Statement of Principles.

80. The Divisional Court held that there was no evidential basis for the legitimate expectation alleged by HUB for five reasons ([130]-[131]):

    (1) First, there was no express promise.

    (2) Second, the Airports Commission was only concerned with scheme-specific risks and, in any event, it was independent of the Department and its representations could not be attributed to the Secretary of State.

    (3) Third, it was impossible to see how the bare request by the Secretary of State on 17 August 2016 for an Assurance in relation to HUB's inability itself to deliver the ENR scheme could itself found any legitimate expectation. Moreover, it is telling that HUB did not question the legitimacy or lawfulness of the Secretary of State's request at the time but rather sought to comply with his request, without complaint.

    (4) Fourth, the Statement of Principles expressly stated that it did not create any legal obligation (paragraph 2.1.3) nor "any legitimate expectation, whether substantive or procedural, in relation to the exercise of functions of Government" (paragraph 2.1.1).

    (5) Fifth, given the express exclusion of rights based on a legitimate expectation contained in the Statement of Principles, which was a formal and carefully negotiated document, HUB could not reasonably have considered that any of the less formal messages emanating from the Secretary of State could be relied on as creating or supporting a legally enforceable legitimate expectation.

HUB's submissions on appeal

81. Mr Kingston submitted that the Divisional Court's conclusion on this issue was

wrong. It should have found on all the evidence that a legitimate expectation existed: that the Secretary of State would not regard it as a material matter for his Preference Decision whether or not a non-airport owner or operator had reached agreement with the owner or operator of the airport to implement their scheme.

82. Mr Kingston made three principal points.

83. First, he eschewed any reliance upon the Airports Commission and accepted that he could not attribute statements of the Airports Commission to the Secretary of State. He nevertheless relied upon the fact that Secretary of State (i) set the terms of reference for the Airports Commission, (ii) did not limit the Airports Commission to considering bids only from existing airport owners, (iii) did not specify that non airport-owning bidders would have to obtain assurances from the relevant airport owner that their scheme would be implemented and (iv) undertook a careful review of the Airports Commission's Final Report.

84. Second, he relied upon the discussions prior to finalising the Statement of Principles during which the Department told HUB that it wished to adopt a fair procedure as between all promoters and that "each promoter was being treated equally in the review process".

85. Third, he relied upon the findings of the Divisional Court that the "penny had dropped" by the time the Statement of Principles had been finalised in June or July 2016 that HAL could not be expected to engage with HUB on subjective deliverability risks until after the Preference Decision had been made and that the Secretary of State would not take sponsor-specific risks into account in making the Preference Decision (see [38]). He submitted that these findings were inconsistent with the Divisional Court's conclusion that HUB were not entitled to rely upon a legitimate expectation to that effect.

86. In summary, Mr Kingston argued that there was a "common understanding" reached that it would not be a consideration in the Preference Decision that HUB was not the owner or operator of Heathrow; and at no stage did the Secretary of State make it clear, as he should have done, that promoter-specific risks would be regarded as material in the Preference Decision.

Analysis

87. In our view, none of Mr Kingston's points undermine the Divisional Court's analysis.

88. As to Mr Kingston's first point, the fact that the Secretary of State had a supervisory role in relation to the Airports Commission, setting its terms of reference and requiring the production of the Airports Commission Report, does not – and could not – begin to amount to an express or implied representation by the Secretary of State that only scheme-specific risks would be taken into account in the future when making the Preference Decision. As Mr Palmer QC pointed out, the Airports Commission Report was not part of any procurement process. The Airports Commission's function was to look at possible technical solutions for the aviation capacity problem in the South of England. There was nothing in the Airports Commission's terms of reference to suggest that the Secretary of State required the Airports Commission to consider promoter-

specific issues. This does not mean that promoter-specific issues would not become relevant; plainly, at some stage they were bound to come into focus.

89. As to Mr Kingston's second point, the fact that HUB were told that they would be treated "fairly" and "equally" does not amount to an express or implied representation that promoter-specific risk would not be a consideration.

90. As to Mr Kingston's third point, there was nothing inconsistent between the Divisional Court's findings at [38] and [138] and its conclusion that HUB were not entitled to rely upon a legitimate expectation. The growing realisation of the difficulties of getting HAL to co-operate with HUB when they were competitors for the same prize did not amount to an unequivocal representation that HUB would not be required to get some sort of letter of comfort in advance of the Preference Decision. In any event, the process leading up to the Preference Decision was governed by the Statement of Principles. Further, as Mr Palmer submitted, it is impossible to see how the discussions which led to the Statement of Principles could have created any legitimate expectation in circumstances where the finalised Statement of Principles expressly ruled out "any legitimate expectation".

91. We agree with the Divisional Court that it is impossible to spell out from the matters referred to by Mr Kingston (whether taken individually or collectively) an express or implied promise or any regular pattern of behaviour amounting to a representation that promoter-specific risks would never be a consideration in the Preference Decision process, still less a clear and unambiguous representation devoid of any relevant qualification such as to justify a finding in law of legitimate expectation.

92. In our view, the analysis of the Divisional Court on this issue (at [130]-[131]) is clearly correct and cannot be faulted. HUB's Appeal Ground 4 must be rejected on this basis alone.

(2) If there was a legitimate expectation, could the Secretary of State resile from it?

93. The Divisional Court went on to pose a second question - which was in the circumstances hypothetical - namely, if it was wrong on the first question, could the Secretary of State nevertheless resile from any legitimate expectation? The Divisional Court answered this question in the affirmative and held that the Secretary of State was entitled to resile from any legitimate expectation in the public interest (see [132]-[136]). However, it was not necessary for the Divisional Court to consider this alternative hypothesis given its clear finding on the absence of a legitimate expectation in the first place. Moreover, it is surprising that the Divisional Court chose to do so given that, as Mr Palmer made clear, he never argued the point.

94. In these circumstances, and given the clear view we have ourselves reached on the first question, we do not think it necessary or appropriate to consider the Divisional Court's findings on this second question.

(3) If there was a legitimate expectation from which the Secretary of State could not resile, did he act unlawfully by breaching or frustrating that expectation?

95. The Divisional Court then went on to posit a further hypothetical question, namely, that even if a legitimate expectation was established and remained in place so that the Secretary of State could not properly resile from, it, did the Secretary of State in fact breach it? The Divisional Court answered this third question in the negative on the basis that promoter-specific risks were immaterial to the Secretary of State's Preference Decision (see [137] and further below).

96. The issue of 'materiality' was a pivotal feature of the Divisional Court's judgment in two ways. First, as we have explained above, the Divisional Court held that the Secretary of State's request for a written Assurance (and HAL's refusal to provide one) was not material to the Preference Decision or the Designation Decision and this provided a further answer to HUB's claim based on legitimate expectation (i.e. Judicial Review Ground 2). Secondly, as we explain below, the Divisional Court held that the lack of materiality of the Assurance also provided the complete answer to HUB's claim under EU competition law (i.e. Judicial Review Ground 1). It is convenient to consider the materiality issue under the next heading below relating to Appeal Ground 3.

Appeal Ground 3: MATERIALITY

The Divisional Court's conclusions

97. The Divisional Court summarised its decision on the question of 'materiality' as follows (at [137]):

> "137. In relation to that question, we have concluded that promoter-specific risk was in fact immaterial to the Secretary of State's decision to prefer the NWR scheme over the other schemes; and that therefore, even if there had been a continuing legitimate expectation as contended for by the Claimants, that expectation was not breached or frustrated."

98. In coming to this conclusion, the Divisional Court explained that it took the following six matters into account (at [138](i)-(vi)). First, its previous analysis of the evidence. Second, the fact that the approach laid down in the Statement of Principles had not changed. Third, the fact that there were various possible reasons why the Secretary of State made this request: he was seeking to explore the nature and depth of HAL's objections to the ENR. Fourth, the fact that he was seeking to ensure HUB had given careful thought to promoter-specific risks *before* the Preference Decision. Fifth, the fact that the Airports Commission had determined that the NWR was in any event preferable, and the Secretary of State could not have sensibly "bucked" the recommendation of the Airports Commission unless he had good reason to do so; and "[t]here was no such reason". Sixth, the fact that this was consistent with, inter alia, the Secretary of State's "after-the-event statement" on 5 September 2018, which recorded him as saying:

> "When I took over, we asked questions again: Has the Airports Commission got it right? Has anything changed? The drawbacks

> of the Gatwick and [HUB] Schemes were amply set out in the [Airports Commission] recommendations. The question was: was there anything new? Was there anything to change that view?"

99. The Divisional Court held that nothing had changed as regards the ENR scheme to cause it to be promoted above the NWR scheme, and concluded (at [138(vii)]):

> "(vii) Thus, we do not consider that the ENR scheme was in any way prejudiced, in terms of how it was assessed, by the absence of any response from HAL to the request posed by the Secretary of State regarding its commitment to the ENR scheme." (our emphasis)

100. The Divisional Court further explained (at [138] (viii)):

> "(viii) Even if HAL had responded positively to the request, this would have made no difference to the outcome, because it could not have improved the objective merits of the ENR scheme."

HUB's submissions on 'materiality' on appeal

101. HUB challenged the Secretary of State's Designation Decision inter alia on the basis that the Secretary of State took into account an - immaterial and therefore - unlawful reason, namely the promoter-specific risk of the failure of HUB to obtain an Assurance from HAL to implement the ENR scheme if chosen.

102. As explained above, the Divisional Court found in relation to the Legitimate Expectation challenge that the ENR scheme was not "in any way prejudiced" by the absence of an Assurance from HAL (see [138(vii)] cited above, our emphasis).

103. As we shall explain below, the Divisional Court also found in relation to the question of the competition law challenge that the Secretary of State's request for an Assurance from HAL and the absence of any response from HAL "had no effect on the preference decision" (see [190], emphasis in the original).

104. HUB challenged these findings on the basis that they were arrived at following what Mr Kingston referred to as "a series of significant and compounding legal errors in the course of its analysis", specifically:

    (1) The Divisional Court committed errors of law in its approach to Article 9 of the Bill of Rights by failing to take at face value the Secretary of State's repeated statements to Parliament that the lack of the Assurance was an (if not the most) important consideration in his deciding to prefer the NWR to the ENR.

    (2) The Divisional Court erred in law by ignoring and/or rejecting a series of concessions made by the Secretary of State in both his written and oral submissions to the effect that the issue of the Assurance was a factor to

which he had regard. Thus, the fact of the Commitment request and reliance on it was common ground between the parties.

(3) The Divisional Court erred in law by substituting *ex post facto* its own rationale for the Secretary of State's decision to prefer the NWR over the ENR for the rationale actually given by the Secretary of State himself.

The Secretary of State's submissions

105. Mr Palmer's central submission was that HUB had failed to grapple with the three key points at the heart of the case. First, that the Secretary of State accepted the recommendation of the Airports Commission that the NWR was to be preferred to the ENR. Second, there were sound objective reasons for the conclusion that the NWR would deliver the greatest overall benefits, economic and otherwise, and there was no good reason to depart from the Airports Commission's recommendation despite the extensive review which subsequently took place. Third, against that background, it was immaterial whether or not any Assurance was obtained by HUB from HAL in respect of delivering the ENR scheme. The obtaining of an Assurance would only have been a material factor if good reason had been found for preferring the ENR over the NWR in the first place. Manifestly this was not the case. Furthermore, it is important to distinguish between the situation before and after the Preference Decision was made. The Secretary of State formally accepted the Airports Commission recommendation that the NWR was objectively the better scheme following the meeting of the Cabinet on 25 October 2016; thereafter, the question of the absence of an Assurance became irrelevant.

Analysis

106. We begin by setting out the main points which it seems to us emerged clearly from the evidence before the Divisional Court:

(1) The Airports Commission made a clear recommendation, on objective scheme-specific grounds, that the NWR scheme was to be preferred to the other two short-listed schemes, the ENR scheme and Gatwick schemes.

(2) The decision which the Secretary of State then had to make was simply whether or not to accept the Airports Commission's expert recommendation.

(3) Nothing subsequently emerged which suggested that the Airports Commission's analysis and conclusion was wrong.

(4) The Preference Decision was agreed by the relevant Cabinet Sub-Committee prior to being formally announced by the Secretary of State on 25 October 2016.

(5) The ANPS reflected the findings of the Airports Commission's Final Report, namely that the NWR scheme was the best option on objective scheme-specific grounds.

(6) The absence of an Assurance from HAL played no material part in the

> essential decision to accept the recommendation of the Airports Commission – it was, at most, an additional confirmatory reason for not departing from the Airports Commission's recommendation that the NWR scheme was to be preferred to the ENR scheme.

107. We expand on these points below.

The Airports Commission's Final Report

108. The Airports Commission was an independent body, established to examine the need for additional capacity to maintain the UK's 'hub' status and how any need should be met. The Airports Commission's Guidance Document made it clear that its assessment was to be evidence-based and objective. As the Divisional Court held, the Airports Commission process was very much a "competition of ideas" and it was clear that it was focused on "*objective* delivery, that is to say factors affecting a scheme's deliverability irrespective of *who* was delivering it" and "excluded promoter-specific risks" (see [24] and [25], emphasis in original).

109. The Airports Commission considered 58 different proposals of schemes for delivering additional airport capacity in London and the South East by 2030, including six proposals it had raised itself. In its Final Report dated 1 July 2015, the Airports Commission considered three short-listed options in detail: the NWR scheme, the ENR scheme and the Gatwick scheme.

110. The Airports Commission conducted a detailed analysis of the objective merits of the various proposed schemes and unanimously concluded and recommended in its Final Report in clear terms that the NWR scheme was the best option and was to be preferred to the ENR scheme for objective scheme-specific reasons.

111. In its final chapter (Chapter 13) headed "Recommended Option for Expansion", the Airports Commission's Final Report described each of the three options as "a credible option for expansion, capable of delivering valuable enhancements to the UK's aviation capacity and connectivity" (paragraph 13.2). However, it concluded as follows:

> "13.3 Nonetheless, the Commission has unanimously concluded the proposal for a new [NWR] at Heathrow Airport, in combination with the significant package of measures to address the environmental and community impacts described below, present the strongest case. It delivers more substantive economic and strategic benefits than any other shortlisted option, strengthening connectivity for passengers and freight users and boosting the productivity of the UK economy and strikes a fair balance between national and local priorities. The Commission's terms of reference required it to make recommendations designed to maintain the UK's position as a global hub for aviation. Heathrow expansion is the most likely route to achieving that."

112. The concluding chapter went on to explain that the ENR had some advantages, *e.g.* lower costs (£3 billion) and required the loss of fewer homes (242 compared to 783), but highlighted five areas where the ENR performed less strongly (at paragraphs 13.77-13.87):

(1) Capacity: the ENR delivered a lower level of capacity than the NWR (700,000 ATMs a year compared to 740,000 ATMs) which would lead to "reduced economic benefits and a smaller route network at the airport".

(2) Respite: it would not be possible to maintain the principle of respite to the same degree with the ENR as with the NWR; and the Commission noted that respite through runway alternation was "highly valued by local communities".

(3) Noise concentration: the ENR would continue to concentrate take offs and landings along just two approach and departure paths, leading to a higher number of people within the highest noise contours close to the airport.

(4) Air quality: the ENR presented greater challenges in terms of compliance with the EU Air Quality Directive.

(5) Resilience: the ENR created a more congested airfield than the NWR, leading to lower resilience and less space for ancillary development.

113. In terms of objective delivery risks (i.e. those related to building the schemes), the Airports Commission concluded that there was no substantial difference between the two Heathrow schemes.

114. In terms of safety, the Airports Commission's conclusion was that all three schemes raised issues which required detailed investigation and resolution but none should be considered 'show stoppers'. However, the Airports Commission's Final Report observed:

> "12.24 The CAA did note the lack of precedent for the Heathrow [ENR] concept and indicated that it would need more detailed development."

115. The Airports Commission's Final Report went on to summarise its conclusion:

> "13.87 On balance, taking account of its economic, environmental and social impacts, and operational and commercial factors, the Commission's judgment is that the [ENR] presents a less effective proposition to meet the UK's aviation capacity and connectivity needs. It has therefore concluded that the [NWR] scheme offers the best option for expansion at Heathrow."

The Department's approval of the Airports Commission's Final Report

116. Following a number of criticisms by HUB of the independence of the Airports Commission, the Department conducted a review of the methodology of the Airports Commission's Final Report and satisfied itself that it was reliable. On 9 December 2015, in its "Review of the Airports Commission's Final Report", the Department stated:

> "The Department is therefore satisfied that the Airports Commission's Final Report is a sound and robust piece of evidence on which the Government can base decisions as to whether further airport capacity is required and as to where that capacity would best be located."

117. A few days later, on 14 December 2016, the Government announced that it accepted the case for airport expansion and would consider the Airports Commission's three shortlisted options using the policy framework provided for by the Planning Act.

118. It is important to note, therefore, that following the work of the Airports Commission, the decision which the Secretary of State then had to make was, in essence, a binary and simple one: namely, whether or not to accept the recommendation of the Airports Commission's Final Report that the NWR scheme was "the best option".

The objective merits of the ENR scheme remained the same

119. Both HUB and the operator of Gatwick Airport sought to persuade the Department that the Airports Commission's findings regarding the relative merits of their schemes vis-à-vis the NWR scheme were incorrect. Both submitted evidence and arguments to the Department to this effect. The Department commissioned a technical report from York Aviation in order to provide reassurance as to the Airports Commission's conclusions on the relative merits of certain aspects of the NWR scheme and the ENR scheme. The Divisional Court held that, although the operator of Gatwick Airport had improved the objective merits of its Gatwick Scheme, "the merits of the ENR scheme had remained exactly the same" ([138(vi)]). Mr Kingston challenged this finding. He relied upon an acknowledgment in the evidence of Ms Low that HUB were able to point to an aspect of the Commission's findings on air quality which HUB successfully challenged. Ms Low said as follows:

> "566. A good example of how we acted on unsolicited information from [HUB] is provided by our consideration of the revision of [HUB]'s proposals in relation to air quality. The [Commission] had concluded that the ENR scheme had performed less well in relation to air quality than the NWR, concluding that 'the Extended Northern Runway scheme presents greater challenges in terms of compliance with the EU Air Quality Directive'. Following the publication of [the Commissions]'s final report, [HUB] submitted to us a number of revisions to their surface access plans. [HUB] argued that these revised plans addressed the issues raised by the [Commission]. My team continued to assess the plans, albeit noting that these plans did not contain the level of detail considered by the [Commission].
>
> 567. Following technical analysis by the Department's environmental consultants (WSP) of the high level surface access iterations from [HUB], we concluded that that proposal

> could address the concerns raised by the [Commission] in regards to air quality:
> *'The Heathrow ENR Surface Access arrangements which were considered by the [Commission] have undergone further consideration by the promoter to improve air quality. Variations put forward to The Department include 'Iteration 3' and Iteration 4' which are considered by the promoter to be deliverable, and could provide reductions in adverse air quality effects relative to the surface access proposals assessed by the AC'.*
>
> 568. However, as set out below, we did not consider that the other concerns raised by the [Commission] in relation to the ENR scheme had been satisfactorily met."

120. Accordingly, as Ms Low makes clear (in paragraphs 569 ff.), apart from this one point - which was not seen as being of decisive significance - HUB were unable to undermine any of the other findings of the Commission's Final Report. Thus, it would appear to be more accurate to say that, unlike the Gatwick scheme, the merits of the ENR scheme remained *substantially* the same (rather than 'exactly' the same). This point does not, therefore, materially advance Mr Kingston's argument.

The Preference Decision

121. On 25 October 2016, the matter came before the relevant Cabinet Sub-Committee. A detailed briefing paper was circulated beforehand, which carefully set out and compared the merits of the two short-listed Heathrow schemes. There was an instruction that the paper was not to be summarised so that it would be read by Cabinet Sub-Committee members in full. The Divisional Court extensively cited the paper (at [62]) and observed (at [63]):

> "63. The paper therefore engaged with the merits of the two proposals, including the risks inherent in the novelty of the ENR scheme; and downplayed the significance of the failure of the Claimants to obtain any assurance from HAL. Indeed, as can be seen, the conclusion was that any commercial negotiations between the two would not delay the 2030 target date for delivery of full capacity."

122. Mr Kingston's reliance upon oral comments by the Secretary of State during the meeting must be seen in the context of the meeting as a whole and the detailed briefing paper which had been prepared. The decision was taken by the Cabinet Sub-Committee to accept the Airports Commission's recommendation and prefer the NWR scheme. This was then announced formally by the Secretary of State.

The ANPS

123. The reasons given in the ANPS for preferring the NWR scheme over the ENR scheme closely reflected the conclusions and recommendations of the Airports Commission (see paragraphs 3.56 to 3.60 of the ANPS). In summary:

(1) The NWR scheme would provide better respite, by altering patterns of arrival and departures, thereby giving communities breaks from noise.

(2) The NWR scheme would provide greater resilience, because of the way that the three separate runways could operate more flexibly when needed to reduce delays, and because of the less congested airfield. This in turn enables the NWR scheme to provide greater capacity, namely, 740,000 flights departing and arriving *per annum* compared to the 700,000 flights of the ENR scheme.

(3) There was greater uncertainty as to what measures might be required to ensure that the ENR scheme, which had no direct global precedent, could operate safely, or what the impact of those measures might be, including on runway capacity (i.e. the capacity of the ENR scheme could be reduced yet further below the 700,000 flights estimated).

124. The ANPS concluded as follows:

> "3.73 Building on this assessment, the Government has identified a number of attributes in the manner of strategic effects, which it believes only the preferred scheme is likely to deliver to meet the overall needs case for increased capacity in the South East of England and to maintain the UK's hub status. The Government has afforded particular weight to these.
>
> 3.74 The needs case has shown the importance of developing more capacity more quickly, and in a form which passengers and businesses want to use. The Heathrow Northwest Runway scheme is best placed to deliver this capacity, delivering the greatest benefits soonest as well as providing the biggest boost to the UK's international connectivity, doing so in the 2020s at a point when without the scheme 4 out of 5 London airports would be full, with all the problems to passengers this could entail. Taken together, benefits to passengers and the wider economy are substantial, even having regard to the proportionally greater environmental disbenefits estimated for the Heathrow Northwest Runway. Even though the preferred scheme's environmental disbenefits are larger than those of the Gatwick Second Runway scheme, when all benefits and disbenefits are considered together, overall the Heathrow Northwest Runway scheme is considered to deliver the greatest net benefits to the UK."

125. The ANPS was, therefore, based on purely objective or scheme-specific reasons for preferring the NWR scheme to the ENR scheme - in effect, adopting the recommendations and rationale of the Airports Commission - and makes no mention of any subjective or promoter-specific matters.

The Secretary of State's rationale

126. At a meeting on 5 September 2018, the Secretary of State was asked about his thinking at the time when he designated the ANPS. The Divisional Court set out the note of the meeting in full (at [85]). We summarise the essence of the note as follows. The Secretary of State was asked specifically whether the absence of an Assurance from HAL was "a factor" in his decision to designate the ANPS. He explained that the matter needed to be looked at "the other way round". He said that the decision to designate the ANPS was based on the Government's acceptance of the Airports Commission's recommendations. When he took over as Secretary of State, the only question was whether there was "anything new" to change the view that the Airports Commission had "got it right". Nothing had changed as regards the objective merits of the ENR scheme. There had to be a good reason for departing from the recommendations of the Airports Commission. The absence of an Assurance from HAL was simply an additional reason for not overturning the Airports Commission's conclusions. The following passage encapsulates the Secretary of State's explanation:

> "[Secretary of State]: Nothing had changed. It was different with Gatwick – there [the updated forecasts for Gatwick strengthened its case which meant] that Government now had a harder decision to make. That's why I said Gatwick was a very difficult decision. <u>But with the [HUB] scheme, nothing emerged post the Commission to change the view that the NWR scheme was preferred over the ENR based on a number of factors: respite, resilience and deliverability</u>. And <u>furthermore</u> , the lack of a guarantee made it even harder for them." (emphasis in original)

127. In our view, the Divisional Court were right to reject Mr Kingston's submission that this was merely an *ex post facto* rationalisation by the Secretary of State. The Divisional Court summarised the position neatly (at [138(v)-(viii)]):

(1) "The Secretary of State could not sensibly have bucked the recommendation of the Airports Commission unless he had good reason to do so. There was no such reason.".

(2) "Nothing had changed in the case of the ENR scheme to cause it to be promoted above the NWR scheme".

(3) "[W]e do not consider that the ENR scheme was no in any way prejudiced, in terms of how it was assessed, by the absence of any response from HAL…".

(4) "Even if HAL had responded positively to the request, this would have made no difference to the outcome, because it could not have improved the objective merits of the ENR scheme".

128. The overall assessment of Ms Low in her first witness statement (at paragraph 707) was justified:

> "Ultimately, the issue of guarantee is an 'academic' one. There were several good reasons to prefer the NWR scheme over the ENR scheme, and neither the presence nor absence of a guarantee could have changed that outcome. Even in the counterfactual scenario, where [HUB] had secured a guarantee during the Airports Commission process, it could not have changed the assessment that the ENR scheme underperformed against the NWR scheme on a number of areas, or that the greatest strategic benefits lay with the NWR scheme."

129. In summary, matters proceeded sequentially: there being no objective or scheme-specific reasons to depart from the recommendation of the Airports Commission, the Secretary of State accepted the Airports Commission's recommendation and preferred the NWR scheme to the ENR scheme when making both the Preference Decision and the Designation Decision; and, at most, the absence of an Assurance was an additional or confirmatory factor which played no material part in the essential decision. In our view, this is borne out by the evidence.

HUB's challenge to the conclusions in the ANPS

130. HUB mounted a full-frontal challenge to the conclusions of the ANPS. They went as far as contending that the reasons set out in paragraph 3.60 of the ANPS on the deliverability of the ENR scheme were "bogus", and asserting that the real reason for rejecting the ENR scheme was the absence of an Assurance from HAL that they would implement the ENR scheme if selected by the Government as its preferred scheme. HUB also raised specific challenges as to the ANPS's findings on capacity and safety.

131. In our view, the Divisional Court was right (at [82]) to characterise HUB's contention as plainly "unsustainable" and to reject HUB's challenges to the specific findings of the Airports Commission on capacity and safety (at [87]-[102] and [103]-[112] respectively).

132. Accordingly, the ANPS's reasons for concluding that the NWR scheme was the objectively better scheme are lawful and rational.

133. For these reasons alone, in our view, Appeal Ground 3 is unsustainable.

HUB's particular grounds

134. We turn to consider the three main points Mr Kingston made under this ground of appeal. It is convenient to do so in reverse order.

'The Divisional Court substituted its own rationale'

135. Mr Kingston argued that the Divisional Court "substituted its own rationale" for that actually given by the Secretary of State for designating the ANPS by drawing an artificial distinction between "scheme-specific" factors and "promoter-specific" factors affecting deliverability.

136. This point is without substance. As mentioned above, the distinction drawn by the Divisional Court (at [16]-[18]) between "scheme-specific" factors and "promoter-specific" factors affecting deliverability was simply a useful shorthand way to describe the distinction between "objective" and "subjective" risks, which is a key theme running through the case. It did not give rise to a substantive point.

137. The shorthand was used accurately by the Divisional Court in its judgment to describe the distinction where it arose from time-to-time in the evidence, for instance: (i) the meetings between HUB and the Department for Transport in September 2015 which considered what the Court labelled as the "promoter-specific" factors ([31]-[32]); (ii) HAL's objections to the ENR scheme related to what the Court described as "scheme-specific" factors ([35]-[37]); and (iii) the ANPS's use of "deliverability" to encompass what the Court described as "scheme-specific" factors ([80]-[81]).

138. As the Court held (at [82]-[86] and [113]-[138]), throughout the decision-making process, the Secretary of State treated as separate the issues of (a) deliverability arising from the ENR scheme itself (i.e. scheme-specific or objective risks) and (b) the issue of the need for HAL to build the ENR scheme if selected (i.e. promoter-specific or subjective risks). The Airports Commission and the ANPS found the NWR scheme to be objectively better than the ENR scheme.

139. The evidence demonstrates the distinction that the Divisional Court described by the shorthand terms. This is no *ex post facto* substitution of the Secretary of State's reasons for designating the ANPS, which are clearly set out in the ANPS itself and do not rely on any promoter-specific factors.

'The Divisional Court ignored the Secretary of State's admissions'

140. Mr Kingston argued that the Divisional Court ignored admissions or concessions made by the Secretary of State in his evidence, pleadings and submissions to the effect that the failure of HUB to obtain a written Assurance from HAL was a relevant factor in the designation of the ANPS. He submitted that the Divisional Court erred by finding that the Assurance issue was not a material consideration for the Secretary of State at all, notwithstanding that he personally asked for an Assurance on 17 August 2016, and notwithstanding that he thereafter repeatedly referred to the lack of guarantee as, *e.g.*, the 'biggest' reason for rejecting the ENR scheme.

141. There is no merit in this point. HUB's submission elides two separate questions, namely *legal* materiality and *factual* materiality, and ignores the latter question. The legal question is whether the "promoter-specific" factor of the absence of an Assurance could potentially be taken into account as a matter of law. The factual question is whether or not the "promoter-specific" factor was *in fact* material to the decision to designate the ANPS and taken into account (i.e. whether it in fact made any difference at all). As we explain, the answer to the legal question is 'yes' – the absence of an Assurance was potentially a relevant factor which could have been taken into account. However, the answer to the factual question is 'no' – in fact, the absence of an Assurance turned out not to be material to the final decision to prefer the NWR scheme and designate the ANPS.

142. De Smith summarises the legal position in *Judicial Review* (Eighth edition) as follows:

> "DECISIONS BASED UPON IRRELEVANT CONSIDERATIONS OR FAILURE TO TAKE ACCOUNT OF RELEVANT CONSIDERATIONS
> 5-130 When exercising a discretionary power a decision-maker may take into account a range of lawful considerations. Some of these are specified in the statute as matters to which regard may be had. Others are specified as matters to which regard may not be had. There are other considerations which are not specified but which the decision-maker may or may not lawfully take into account. If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised.
> 5-131 It may be immaterial that an authority has considered irrelevant matters in arriving at its decision [..] if it has not allowed itself to be influenced by those matters and it may be right to overlook a minor error of this kind even if it has affected an aspect of the decision. However, if the influence of irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence. As a general rule it is enough to prove that their influence was material or substantial. For this reason there may be a practical advantage in founding a challenge to the validity of a discretionary act on the basis of irrelevant considerations rather than extraneous purpose, though the line of demarcation between the two grounds of invalidity is often imperceptible."

143. As recorded by the Divisional Court, it was common ground between the parties that the absence of an Assurance was material in the legal sense and that the Secretary of State was entitled as a matter of law to consider it. The Divisional Court referred (at [119]-120]) to Simon Brown LJ's judgment in *R v Somerset County Council, ex parte Fewings* [1995] 1 WLR 1037 at 1049 in which he described three categories of consideration for decision-makers, and recorded the agreement of the parties that the Assurance issue fell within the third category, namely it was a consideration to which the Secretary of State "may have regard if in his judgment and discretion he thinks it right to do so" ([119]).

144. The Divisional Court correctly went on to conclude that "[e]verything else being equal, whether and when the Secretary of State took [the Assurance issue] into account against the ENR scheme – and, if so, the weight he gave to it – were matters for him to determine, challengeable on only traditional public law grounds (see, *e.g., R (Khatun) v London Borough of Newham* [2004] EWCA Civ 55 at [35] *per* Laws LJ)." ([120]).

145. The Secretary of State accepted that the Assurance issue was *potentially* a material consideration in the legal sense, but did not accept that it was *in fact* material to the designation of the ANPS. The Divisional Court held that the promoter-specific issue ceased to be of any weight or significance once the Government accepted the Airports

Commission's recommendation that the NWR scheme was an objectively better scheme than the ENR scheme ([75]-[82] and [138]). As the Divisional Court explained (at [138(vi)]):

> "138(vi) [T]he Secretary of State was considering whether there existed an objective reason for departing from the recommendation of the Commission that the [NWR] Scheme should be preferred. Such an objective reason might have been a change in the objective merits of the three schemes. The fact is that the Commission's recommendation was not departed from *because* there was no good reason to do so." (emphasis in original)

146. The Divisional Court accepted the Secretary of State's evidence and case that, even if HAL had responded positively to HUB's request for an Assurance, this would have made no difference to the outcome because "it could not have improved the objective merits of the ENR scheme" ([138(viii)]. This is a complete answer to this sub-ground, and indeed to appeal ground 3 entirely. It demonstrates that the Divisional Court directed itself correctly in law and that the Assurance issue was a matter which had been determined to be a potentially relevant consideration by the Secretary of State, but concluded on the evidence that ultimately it attracted no weight. The weight to be given to this issue was entirely a matter for the Secretary of State, reviewable only on traditional public law grounds: see *Khatun,* above.

147. The fact that a consideration may be potentially relevant to a decision does not mean that it, in fact, played a material part in that decision. This is the essential reason why the Divisional Court rejected HUB's complaint. We agree with the Divisional Court's reasoning.

'Article 9 of the Bill of Rights'

148. Mr Kingston argued that the Divisional Court erred in its approach to Article 9 of the Bill of Rights by failing to take at face value the statements made by the Secretary of State to the House of Commons and to the House of Commons' Transport Committee (see further below and [71] and [74]).

149. The Divisional Court explained (at paragraph 145 of its judgment) that the disputed material was essentially to the same effect as the admissible evidence: i.e. the statements made by the Secretary of State in Parliament were consistent with those made outside Parliament. It followed that the Court did not need to resolve the Article 9 issues raised, since they made no difference to the outcome.

150. On 25 October 2016, when the Secretary of State made an announcement to Parliament that the Government's preferred option was the NWR scheme, in answer to a question from Sir Gerald Howarth MP, he said:

> "I pay tribute to the promoters of the Heathrow Hub Scheme, having already paid tribute to the other promoters generally. The Scheme was very innovative and very different, but for two prime reasons we felt

> unable to endorse it. First, it did not allow a respite for the surrounding communities, because the same two corridors would be used for taking off and landing all the time. Secondly, the Scheme's promoters could not ultimately provide the certainty that it would be built and adapted by [HAL], if we opted for it rather than for the main route. Those, to my mind, are two strong reasons. However, I pay tribute again to the promoters. It was a very innovative concept, and we gave it very serious thought. After visiting and listening to the promoters, I considered very carefully whether it was the best option. In the end, however, my judgment was that the north-west runway was the better one for Britain."

151. On 7 February 2018 the Secretary of State gave evidence before the House of Commons' Transport Committee. In answer to questions from Mr Steve Double MP the Secretary of State said:

> "I have to say that the extended runway proposal is a very innovative one. At the end of the day, as I have said before, I think the biggest issue for us was that the promoters of that scheme could not secure from Heathrow a written guarantee that if we picked it they would do it. That seemed to be a fairly fundamental problem for us. There were a number of other issues related to it; that was not the only one, but there was no guarantee that that would be something the owners of Heathrow would be willing to pursue. No guarantee could be secured on that front.
> I explained why we had taken the view on the [ENR scheme]. It did not deliver as much capacity, and it also had the simple complication that we did not have certainty that we could do it because [HAL] would not sign up to it."

152. In the Divisional Court the Speaker of the House of Commons intervened to object to those two statements being relied on by the Appellant, on the ground that they were inadmissible by virtue of Article 9 of the Bill of Rights 1689. We have received submissions to similar effect on behalf of the Speaker, made in writing by Ms Sarah Hannett, dated 6 September 2019.

153. Article 9 of the Bill of Rights provides (using modern spelling):

> "… The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

154. At paragraph 145 of its judgment the Divisional Court concluded that, in view of the findings which it had reached under what was Ground 1 before it - in particular, that the real focus of the decision made on 25 October 2016, and of decision-making throughout the entire process leading up to the designation of the ANPS, was on the objective or scheme-specific merits and demerits of the ENR and that promoter-specific matters were immaterial - it was unnecessary for the Court to determine these issues under Article 9. The Divisional Court continued:

> "… Without straying into possibly forbidden territory, we consider that on any fair reading, the Secretary of State's remarks in Parliament were expressed in the context of the innovative nature of the ENR scheme and the implications of that for the assessment of relative scheme merits. Those statements were not only consistent with, but essentially to the same effect as, statements he made outside Parliament which are admissible and which as such formed the basis for our findings. Therefore, we do not need to resolve the dispute between the parties about whether the statements made in Parliament can be used in this case to indicate the relative weight attached to the matters to which they refer in the decision-making process."

155. The Divisional Court was also of the view that it should not decide these important issues because it had not been possible for it to give as much time as would be needed to hear full submissions on the issues. It confined itself to some limited observations at paragraphs [147]-[152]. It said, at paragraph [152] of its judgment, that the answers to the difficult questions raised were "far from clear" but that it had some real reservations about the correctness of some of the submissions advanced by Ms Hannett on behalf of the Speaker, at least in their extreme form. That said, it concluded that the resolution of such issues should await full argument in a case where it was necessary for them to be decided.

156. We respectfully agree with that approach. We have come to the conclusion that the Divisional Court was entitled to reach the finding which it did, that it was unnecessary for it to resolve the Article 9 issues, having regard to the conclusions reached elsewhere in its judgment that this issue was simply not material.

157. Before this Court the Speaker does not take issue with the Divisional Court's conclusions. The Speaker has intervened only in the event we should reach a different conclusion and consider it necessary and desirable to determine the admissibility of the disputed statements.

158. The Speaker accepts that there are circumstances in which reference can properly be made to proceedings in Parliament and where therefore this will not constitute impermissible "questioning" of statements made in Parliament:

    (1) The Courts may admit evidence of proceedings in Parliament to prove what was said or done in Parliament as a matter of historical fact where this is uncontentious: see *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, at 337

    (2) Parliamentary material may be considered in determining whether legislation is compatible with the European Convention on Human Rights: see *Wilson v First County Trust Ltd (No. 2)* [2004] 1 AC 816, at paragraph 65 (Lord Nicholls of Birkenhead).

(3) The Courts may have regard to a clear ministerial statement as an aid to the construction of ambiguous legislation: see *Pepper v Hart* [1993] AC 593, at 638.

(4) The Courts may have regard to Parliamentary proceedings to ensure that the requirements of a statutory process have been complied with. For example, in this case, the Courts may admit such material in order to be satisfied that the steps specified in section 9 of the Planning Act have been complied with.

(5) The Courts may have regard to Parliamentary proceedings in the context of the scope and effect of Parliamentary privilege, on which it is important for Parliament and the Courts to agree if possible: see the decision of Stanley Burnton J (as he then was) in *Office of Government Commerce v Information Commissioner* [2010] QB 98, at paragraph 61.

(6) An exception has also been identified for the use of ministerial statements in judicial review proceedings. The Speaker accepts that such an exception exists but contends that the scope and nature of this exception has not yet been the subject of detailed judicial analysis. It calls for careful consideration of the constitutional issues involved. We respectfully agree

159. HUB cites the decision of the Privy Council in *Toussaint v Attorney General of St Vincent and the Grenadines* [2007] 1 WLR 2825 to support its submission that a ministerial statement in Parliament, relied on to explain ministerial conduct outside Parliament, is admissible in an application for judicial review. In *Toussaint* a decision to expropriate the claimant's property was announced in the Government Gazette: the reason given was that it was necessary to use the land for a learning resource centre. On the same day the Prime Minister made a statement to Parliament in which he stated that the true reason for the expropriation was the claimant's relationship with the previous Government. The claimant sought to rely on that statement to show that this was the real reason for the decision. The Privy Council held that the claimant could rely on the Prime Ministerial statement made in Parliament.

160. In *Toussaint* the judgment of the Privy Council was given by Lord Mance. At paragraph 19 he said that there was no allegation of impropriety as to what the Prime Minister had said in Parliament:

> "It is *not* alleged that the Prime Minister misled the House or acted improperly within the House. The Prime Minister's statement in the House is relied on for what it says, rather than questioned or challenged. …"

161. Later, at paragraph 23 Lord Mance said:

> "… The meaning of the Prime Minister's statements to the House is an objective matter. Mr Clayton accepts that Mr Toussaint can only rely on the statements for their actual

> meaning, whatever the Judge may rule that to be. While no suggestion may be made that the Prime Minister misled the House by his statement, Mr Toussaint also remains free to deploy any evidence available to him on the issue whether the public purpose recited in the declaration was a sham … The Prime Minister's statement to the House is potentially relevant to Mr Toussaint's claim as an admission or explanation of the Executive's motivations. If the Prime Minister were to suggest that he expressed himself incorrectly, and did not intend to say what he said, then it would not be Mr Toussaint who was questioning or challenging what was said to the House."

162. We accept the submissions made by Mr Palmer and Ms Hannett that that passage is *obiter* since on the facts of that case it had already been noted that there was no allegation that the Prime Minister had in fact misled Parliament.

163. In the present case the Speaker contends that the decision in *Toussaint* can be distinguished on its facts for two reasons:

(1) It was an essential part of the Privy Council's reasoning that the Prime Ministerial statement was not being questioned: there was no dispute as to its meaning or to the inferences that could be drawn from it.

(2) The statement sought to be relied on by the claimant was a statement made by the Prime Minister explaining the reason for a particular decision and was not a statement made in the course of giving evidence or made *ex tempore* in answering questions from Members of Parliament.

164. The Speaker submits further that the decision in *Toussaint* gives rise to problems of principle. First, the Privy Council postulated *obiter* what would happen if the Prime Minister were to suggest that he expressed himself incorrectly in Parliament. It said that it would not be the claimant who was then questioning or challenging what was said in the House, but it did not acknowledge the risk of a breach of Parliamentary privilege by the Prime Minister should he wish to make such a submission and neither did it acknowledge the unfairness that would necessarily arise if the Prime Minister could not make such a submission before a Court.

165. Before this Court Mr Palmer felt constrained in the same way. He did not wish to submit that what the Secretary of State said was inaccurate. However, he felt that he would in fairness have to make such a submission if these statements were admissible.

166. Secondly, the Speaker submits that the Privy Council in *Toussaint* suggested that the meaning of the statements in Parliament was "an objective matter" for the Court to determine: see paragraph 23. But the Speaker submits that the determination by a Court of the meaning of statements made in Parliament, at least where there is a dispute as to that meaning, risks the Court being drawn into forbidden territory. It is submitted that this is at odds with the approach taken in England and Wales at least at first instance in *Office of Government Commerce* and in *Kimathi & Ors v Foreign and Commonwealth Office* [2018] 4 WLR 48.

167. *Office of Government Commerce* was subsequently considered by the Court of Appeal in *R (Reilly and Another) v Secretary of State for Work and Pensions (No. 2)* [2017] QB 657, at paragraph 109. In that passage the Court approved what had been said by Stanley Burnton J at paragraphs [46]-[48] in the *Office of Government Commerce* case. At paragraph [47] Stanley Burnton J said:

> "… [T]he courts cannot consider allegations of impropriety or inadequacy or lack of accuracy in the proceedings of Parliament. Such allegations are for Parliament to address, if it thinks fit, and if an allegation is well founded any sanction is for Parliament to determine. The proceedings of Parliament include Parliamentary questions and answers. These are not matters for the courts to consider."

168. *Kimathi* concerned an attempt to use Parliamentary material to prove facts (the number of detainees held in camps in Kenya in the 1950s) which were neither confirmed nor denied by the other party to the case and in respect of which there was no other evidence. At paragraph [20] Stewart J said:

> "… The claimants' application is an unusual one because it is sought by them to rely on what was said in Parliament to prove (a) that facts which occurred extraneous to Parliament but were mentioned in Parliament were true and (b) that the person who related those facts in Parliament believed them to be true … [H]ere the defendant does not admit those underlying facts, in which case the claimants cannot rely upon Hansard for the truth of what was said. If they were able to rely on it for that purpose, the Court would then be in a position of having to decide the accuracy of the content of the proceedings in Parliament, so as to determine if those facts had been proven. This is expressly forbidden."

169. Although we do not have to decide this point, we see force in the submissions made on behalf of the Speaker. The fundamental difficulty, in our view, is that, if the statements were held to be admissible and if there is a dispute as to their meaning, the Court would be drawn into having to resolve whether what was said on behalf of the Secretary of State was accurate or not. That would bring the Court into the territory which is forbidden by Article 9 of the Bill of Rights.

170. Mr Kingston submitted that it was the Divisional Court itself which impermissibly questioned what was said in Parliament in the sense that it construed the Secretary of State's statements made there to mean the same as what the Secretary of State had said outside Parliament. We do not accept that submission. There is nothing impermissible in a Court interpreting a statement made in Parliament. As the decision of the House of Lords in *Pepper v Hart* makes clear, there will be circumstances in which the Court must interpret what a Minister has said in Parliament because that may be relevant to the interpretation of an ambiguous Act of Parliament. One of the criteria for admissibility of a ministerial statement made in Parliament which were set out in *Pepper v Hart* is that the statement is clear: that necessarily requires the court to form a view on what it means.

171. In our view, Mr Palmer was right to contend that there will be circumstances in which the proper assertion of Parliamentary privilege has the consequence that a piece of evidence must be excluded from court proceedings and the result - serious though that may be - is that the case must be decided in the absence of that evidence: see *Hamilton v Al Fayed* [2001] 1 AC 395, at 403-404 (Lord Browne-Wilkinson).

172. For those reasons, we reject the submissions which have been made on behalf of the Appellant in relation to Parliamentary privilege and Article 9 of the Bill of Rights.

Conclusion on Appeal Ground 3

173. For all the above reasons, Appeal Ground 3 of the appeal must be rejected.

SECTION 31 OF SENIOR COURTS ACT 1981

174. In a claim for judicial review, the court has a discretion whether to grant any remedy even if a ground of challenge succeeds on its substance (*Simplex GE (Holdings) Ltd. v Secretary of State for the Environment* [1988] 3 PLR 25 (at [42]). We explain at paragraphs 269 to 280 of our judgment in relation to the planning appeals how the *Simplex* test has been modified by the amendments made to section 31 of the Senior Courts Act 1981 ("SCA 1981") by section 84 of the Criminal Justice and Courts Act 2015, such that the court has a duty to refuse to grant relief where it appears to the court to be "highly likely" that the outcome of the application would not have been substantially different if the conduct complained of had not occurred.

175. As we have pointed out, the Divisional Court held in this case that even if HAL had responded positively to the request for an Assurance, "…this would have made no difference to the outcome, because it could not have improved the objective merits of the ENR scheme" (at [138(viii)]).

176. The Divisional Court was justified in coming to this conclusion on the evidence before it. It is clear that, if no request for an Assurance had been made by the Secretary of State or HAL had assented to such an Assurance, this would have made no difference to the ultimate decision because at all material times the objective merits of the ENR scheme remained the same.

177. For these reasons, we are satisfied that it is "highly likely" that the outcome for HUB would been the same whether or not an Assurance was forthcoming from HAL, and that the test in section 31 of the SCA 1981 is satisfied. Accordingly, the Divisional Court was bound to refuse HUB's application for judicial review in any event.

Appeal Grounds 1 and 2: COMPETITION LAW

178. We turn, finally, to the competition law issues which are raised by HUB under Appeal Grounds 1 and 2 (which are directed in turn towards the Divisional Court's findings under Judicial Review Ground 1). HUB contends that the Divisional Court erred in (1) failing to recognize that a distortion of competition had arisen as a result of the State measure *before* the October 2016 Preference Decision was taken, and, accordingly, that the question of whether or not the issue of the Assurance was *subsequently* a material

consideration for the Secretary of State is legally irrelevant; and (2) finding that no distortion of competition or potential abuse was capable of arising because of the fact that a subsequent DCO application might be made.

The Divisional Court's judgment

179. The Divisional Court dealt with HUB's competition law claim concerning alleged breaches of Articles 106(1) and 102 of the TFEU (Judicial Review Ground 1) in the last section of its judgment ([156]-[209]). It granted permission for judicial review ([156]), but refused HUB's substantive claim ([209]). The Divisional Court arrived at its decision on the competition law issues on a number of alternative bases. In order to understand this part of its judgment fully, it is necessary to set out the Divisional Court's reasoning in some detail.

The hypothetical 'self-standing competition claim'

180. The Divisional Court, having set out Articles 102 and 106(1) of TFEU in full, stated that *actual* infringement of Article 102 TFEU was not necessary, and that proof of risk of or potential for an abuse was sufficient ([159(iv)]).

181. It listed (at [160]) four issues which fell to be determined in order to ascertain whether there had been an infringement of the TFEU:

> "(i) Does the undertaking in question have a dominant position in a market and, if so, in which market or markets?
>
> (ii) Is the undertaking in question a 'public undertaking' or an undertaking to which a Member State has granted 'special or exclusive rights'?
>
> (iii) What is the nature of the measure, enacted or maintained in force by the Member State, that is said to enable the undertaking to infringe Article 102 TFEU? We shall refer to such a measure as the 'State Measure'.
>
> (iv) Has the undertaking in fact infringed Article 102 as a result of the State Measure?"

Materiality

182. However, before turning to the competition law issues, the Divisional Court stressed what it referred to as a "fundamental point" regarding Judicial Review Ground 1 stating (at [162] and [163]):

> "162. Before we consider these points of competition law, however, we should stress one fundamental point regarding Ground 1. This is a claim for judicial review and [HUB] are seeking (and seeking only) the quashing of the Secretary of State's decision to designate the ANPS. This is a public law ground and the remedy sought is a public law remedy. [HUB]

> have chosen to bring a competition law claim not as a self-standing claim, but within the framework of a claim for judicial review. We have found – in relation to Ground 2 – that the promoter-specific issues regarding the ENR scheme played no material part in the decision to prefer the NWR scheme over the ENR scheme. For this reason alone, we consider that Ground 1 must also fail.
>
> 163. Had [HUB] framed their case as a competition law challenge to the preference decision and sought to challenge that decision in late 2016, that point might not arise. However, for the reasons we now give, even if it had been so framed, that claim would not have succeeded."

183. Accordingly, the Divisional Court held that Judicial Review Ground 1 was bound to fail for the same 'materiality' reasons as Judicial Review Ground 2, namely, that promoter-specific issues played "no material part" in the decision to prefer the NWR over the ENR and therefore HUB's public law challenge to the Secretary of State's decision to designate the ANPS by way of judicial review could not succeed.

184. Nevertheless, the Divisional Court went on to consider and rule upon HUB's competition law arguments on the hypothesis that HUB's competition law claim had *not* been brought in a public law context within the framework of a claim for judicial review but was a "self-standing" competition law claim. As we explain below, it was not necessary for the Divisional Court to have gone on to decide the competition law issues. In our view, it could properly have declined to do so since, in view of its finding on 'materiality', the competition law issues were academic (see further below).

185. The Divisional Court decided the competition law issues under the four heads listed above.

(1) Dominant Position

186. The Divisional Court noted the dispute between the parties as to which is the relevant market for the purpose of assessing dominance and rehearsed the various arguments. The Divisional Court recorded that Mr Palmer for the Secretary of State contended that the relevant market was for "the supply of runway scheme designs" and although this argument was not pressed it was not abandoned and would be decided. Mr Facenna QC for HAL contended that HUB had simply adduced no evidence as to the market or HAL's "dominance" and for this reason Appeal Ground 1 must fail. Mr O'Donoghue QC for HUB argued that HAL was in a position of dominance in the market for "the provision of airport operation services (and related services) at Heathrow" or, in the alternative, "for the development of new airport capacity in the South East of England" ([165]-[167]).

187. The Divisional Court found the relevant market to be "the provision of services (and related services) *in the South East of England*" and rejected the other arguments. It held (at [168]):

> "168. We consider that the relevant market to be wider than simply the provision of airport operation services (and related services) *at Heathrow*. Although this was the conclusion of the CAA in paragraphs 4.28 and 4.30 of its Notice of Determination, the CAA was considering HAL's market power in relation to the market for the provision of services at Heathrow Airport for the purpose of imposing a price control. The question before us is a different and wider one, namely the provision of airport operation services (and related services) *in the South East of England* . That, we find, is the relevant market in the present case. We consider further below why the separate market, contended for by the Secretary of State, for the provision of runway scheme designs is, in our judgment, entirely irrelevant to a consideration of Ground 1 (see paragraph 197)." (emphasis in original)

188. The Divisional Court found there was no distinction between the development of *new* airport capacity, and the *existing* market for airport capacity in the South East of England because a present market includes future potentiality and the two questions were inseparable. It said this (at [169]):

> "169. We do not consider that the development of *new* airport capacity in the South East of England can sensibly be differentiated from the existing market for airport capacity in the South East of England. The fact is that all markets can be the subject of change and development. In this case, the point of the ANPS was to commence the process of expanding this market. But the existence of the market as it stands at the moment and the manner in which that market might be developed in the future are questions that are actually inseparable: a present market includes future potentiality and we do not consider it appropriate to separate the two." (emphasis in original)

189. The Divisional Court dismissed the suggestion by Mr Palmer for the Secretary of State, that HUB and HAL were not competing with each other in any economic market, as an irrelevant question, because Article 102 "protects *competition* not *competitors*" (at [170]-[171], emphasis in original).

190. The Divisional Court then analysed the Notice of Determination of the Civil Aviation Authority ("CAA") in some detail ([172]-[175]). It noted the CAA's conclusion that "HAL was dominant in the market for the provision of airport operation services (and related services) *at Heathrow"* and continued (at [172]-[173]):

> "172. … However, a necessary part of that conclusion was that Heathrow Airport itself was a dominant provider of airport operation services in the South East of England. If – hypothetically speaking – there were another airport of the scale of Heathrow in the South East of England (or, possibly, in the UK) then this might constitute a substitute service capable

> of competing with Heathrow and so reduce the possibility of HAL's dominance *at* Heathrow.
> 173. Self-evidently, HAL's market power *at* Heathrow derives from two factors: (i) HAL's operative control of Heathrow, and (ii) the fact that Heathrow itself has no substitute. If the latter did not pertain, then users of Heathrow would simply be able to go elsewhere for their airport operation services."

191. The Divisional Court then set out in full sections 4.35 and 4.36 of the CAA's Notice of Determination's analysis of the demand and supply side of the geographic market.

192. The Divisional Court rejected the suggestion by Mr Palmer and Mr Facenna that the CAA's Notice of Determination should be regarded as immaterial because it was drawn up for a different purpose, in the context of controlling airport prices under the Civil Aviation Act 2012. It held as follows (at [177]-[178]):

> "177. Clearly, a court must be careful when considering an analysis or determination, made for a specific purpose, being deployed in a different context, not contemplated by the author of the analysis or determination. The appropriate course is to consider whether the material is probative for the purposes it is being used. In this case, the Notice of Determination clearly *is* probative: the Notice of Determination has been produced by the relevant sector regulator and deals with the question that is before us today, namely the definition of the market in which HAL is active and HAL's dominance in that market. We consider that it was appropriate for the Claimants to rely upon the Notice of Determination, and we note that – apart from contending that the Notice had been produced for a distinct and separate purpose – neither the Secretary of State nor HAL sought to criticise the CAA's reasoning in support of its Notice of Determination and its findings.
>
> 178. We conclude that HAL, as the owner and operator of Heathrow, is dominant in the market for the provision of airport operation services (and related services) in the South East of England."

(2) Public or Privileged Undertaking

193. The Divisional Court concluded that HAL was a "privileged undertaking" for the following reasons (noting it was not suggested that HAL was a "public undertaking"). First, the operation of airports in the United Kingdom is highly regulated (European Aviation Safety Rules) ([182(i)]). Second, Heathrow is susceptible to *ex ante* price controls by the CAA because of the substantial market power it holds ([182(ii)]). Third, although the provisions of the CAA 2012 acted as constraints on HAL's ability to charge fees rather than the grant of special or exclusive rights, the history of Heathrow demonstrated that HAL had not accumulated its substantial market power in a competitive market ([182(iii-iv)]. The Divisional Court rehearsed the history of the previous public ownership of Heathrow and other main airports and their

privatisation in 1986 by the Airports Act 1986 and held (at [182(iv)(c)]):

> "c) We do not consider that the history of Heathrow and the fact that it was a part of a public undertaking can be disregarded for the purposes of article 106(1) TFEU . It was by virtue of being a part of this public undertaking that Heathrow attained its status as a dominant airport. The sale into private hands of such a public undertaking constituted the granting of special or exclusive rights first to BAA and then to HAL. The continued existence of special or exclusive rights is evidenced by the fact that controls such as those contained in the CAA 2012 continue to exist."

194. The Divisional Court rejected other reasons suggested by Mr O'Donoghue for HAL being a "privileged undertaking" ([183]).

(3) and (4) The State Measure and Infringement

195. The Divisional Court then turned to the third and fourth questions of State Measure and infringement. It considered that "State Measure" had a wide meaning and could include a "request" ([184]). It framed the issue under these two heads compendiously - as to whether HAL abused its dominant position and whether the State Measure enabled that abuse ([186]).

196. The Divisional Court nevertheless held (again) that Judicial Review Ground 1 must fail because of its earlier finding of materiality on Judicial Review Ground 2, namely that the Secretary of State's request that HUB obtain an assurance from HAL had no material effect on the decision to prefer the NWR to the ENR. It explained (at [190], and [192]-[193]):

> "190. Given those conclusions, it is impossible to see how any abuse of a dominant position could arise on the part of HAL, or how the State Measure – the request of the Secretary of State – could in any way have enabled the abuse. This is an inevitable consequence of our finding that the request and the response to it had *no effect* on the preference decision. That is the case whatever HAL's state of mind when not providing the commitment requested by the Secretary of State and sought by the Claimants. …
>
> …
>
> 192. The short point is that there is not even a potential anti-competitive consequence liable to result from the State Measure in this case.
>
> 193. For this reason also, we conclude that Ground 1 must fail."

The alternative hypothesis

197. The Divisional Court nevertheless said that, "out of respect" to the arguments put to it on the basis that the absence of a guarantee or assurance from HAL was material to the Preference Decision, it would proceed to consider the question of infringement ([194]). Its analysis is set out in the next six paragraphs of the judgment ([195]-[200]). It relied upon the decision of the CJEU in Case C-475/99 *Ambulanz Glöckner Landkreis Südwestpfalz* [2002] 4 CMLR 21. We return to this below. For present purposes, it is sufficient to cite the Divisional Court's conclusion on the basis of this hypothesis (at [200]):

> "200. Accordingly, if we are wrong in our conclusion that the Secretary of State did not regard the provision of a guarantee or assurance by HAL as material to the preference decision, our conclusion would be that the *preference decision* was materially affected by the Secretary of State's request and the response to it; that the Secretary of State's request was a State Measure; and that the State Measure gave HAL the opportunity materially to influence *the preference decision*."

198. The Divisional Court then went on to state that its hypothetical conclusion did not necessarily mean that there was an abuse of a dominant position by HAL, or that Ground 1 would be made out because influencing the *Preference* Decision and the ANPS *Designation* Decision itself were "two very different matters" ([201]). The Preference Decision "was part of an extended process" involving the Airports Commission, the Department, the Government and Parliamentary scrutiny and would be followed by a DCO application ([203]-[204]). The Divisional Court continued (at [205]):

> "205. In these circumstances, we consider that it cannot sensibly be said that the failure on the part of HAL to provide a commitment or assurance to the Secretary of State regarding the ENR scheme can have influenced the structure of or competition in the market for the provision of airport operation services (and related services) in the South East of England, even if the Secretary of State's preference decision was affected by HAL's failure to provide the commitment or assurance requested. That is all the more so, given that the market in which HAL operates is a *regulated* market, where the sector regulator has a range of tools to ensure that substantial market power is not abused.

199. The Divisional Court held that there was a "disconnect" between any breach of competition law and the relevant decision to designate the ANPS (at [206]):

> "206. The fact is that Ground 1 seeks to question something done by the Secretary of State in the course of preparing the ANPS, namely the preference decision, where that decision did not, even potentially, affect competition or market structure, whilst seeking to quash the designation of the ANPS. However,

> the designation of the ANPS was not affected by the promoter-specific risk. In short, there is a disconnect between the breach of competition law alleged by the Claimants and the decision which section 13(1) of [the Planning Act] allows them to challenge (see also paragraph 162 above)."

200. The Divisional Court concluded as follows (at [207]):

> "207. Therefore, even assuming (contrary to our finding) that the preference decision was materially affected by the Secretary of State's consideration of the promoter-specific risk, no breach of article 102 TFEU occurred, and (inevitably) none was caused by a State Measure under article 106(1) TFEU.
>
> i) The preference decision was just one step towards the designation of the ANPS. By itself, it had no anti-competitive effect. The question of which scheme should be preferred had no competitive effects at all.
>
> ii) In the period after the preference decision, the ANPS was drafted, consulted upon (twice), considered by the Transport Committee and the Cabinet Sub-Committee, laid before Parliament, debated and voted upon. Throughout this period, the Government was pressed to justify its choice, and it is quite clear that the relative merits of all three schemes continued to be debated. Indeed, as has been described, HAL was continuing to highlight the relative merits of and demerits of the ENR and NWR schemes in May 2017 (see paragraph 37 above).
>
> iii) When, after all this had taken place, the Secretary of State came to decide to designate the ANPS, he was designating an NPS that reflected the outcome of consultation and the input of Parliament.
>
> iv) The reasons for preferring the NWR scheme to the ENR scheme, as they are stated in the ANPS, are set out in paragraph 80 above. Three reasons for preferring the NWR scheme were given – resilience, respite and deliverability. Two of these reasons were challenged by way of the Ground 4 and Ground 5 challenges that we have already described and dealt with. The third reason was the subject of Ground 3, which is no longer pursued.
>
> v) We note that the Claimants have suggested that the reasons articulated in the ANPS for the preference of the NWR scheme over the ENR scheme are "manifestly bogus" (see paragraph 8 above). In light of our conclusions in relation to Grounds 2, 4 and 5, and given

> the withdrawal of Ground 3, that point is self-evidently bad. To be fair to Mr O'Donoghue QC, he did not press this argument hard; but it does seem to us important to note that the reasons contained in the ANPS for preferring the NWR scheme over the ENR scheme are sound and clearly not susceptible of challenge by way of judicial review.
>
> In short, even if the preference decision was affected by HAL's failure to respond to the request for a "commitment", that is not sufficient to cause the designation of the ANPS to be undermined."

Summary

201. In summary, the Divisional Court answered the four questions which it posed under Article 106(1) as follows:

    (1) Does the undertaking in question have a dominant position in a market and, if so, in which market or markets? Yes. HAL was in a dominant position in the market for the provision of airport services (and related services) in the South East of England.

    (2) Is the undertaking in question a "public undertaking" or an undertaking to which a Member State has granted "special or exclusive rights"? Yes. HAL had special and exclusive rights and therefore was a "privileged undertaking".

    (3) What is the nature of the measure, enacted or maintained in force by the Member State, that is said to enable the undertaking to infringe Article 102 TFEU? [Is it a State Measure?]. Yes. The request from the Secretary of State for HUB to obtain a written Assurance from HAL was capable of amounting to a State Measure.

    (4) Has the undertaking in fact infringed Article 102 as a result of the State Measure? No. The State Measure (i.e. the request for a written Assurance) did not materially affect the designation of the ANPS and, accordingly, there was no infringement - in other words the State Measure could not be said to have induced any actual or potential abuse of the dominant position.

202. The Divisional Court held, therefore, that Judicial Review Ground 1 failed on two separate bases:

    (1) First, because of the 'materiality' point, namely, as held under Judicial Review Ground 2, promoter-specific issues played no material part in the decision to prefer the NWR to the ENR ([162]) and the request for an Assurance was immaterial to the Preference Decision. Accordingly, it was impossible to see how any abuse of a dominant position or how the State Measure could have enabled any abuse ([189]-190]).

(2) Second, because even if the absence of a guarantee or assurance was material to the Preference Decision, it could not be said to have materially affected the Designation Decision ([194]-[207]).

Submissions on appeal

HUB's submissions

203. Mr O'Donoghue made two main submissions on behalf of HUB in support of its appeal on the competition law issues. First, the Divisional Court's finding on materiality was wrong for the same reasons as deployed under Appeal Grounds 3 and 4 (see above). Second, the Divisional Court erred because it should have looked at the potential for anti-competitive effects and a distortion of competition at the time that the State Measure was adopted – i.e., August 2016 – rather than at the time of the Preference Decision in October 2016 (or beyond). In particular, the Divisional Court erred in law because, for the purposes of Article 106(1) read in conjunction with Article 102, it is sufficient if the State Measure is such as to introduce a structural feature in the market which gives rise to a conflict of interest or inequality of opportunity in the relevant market. No more is needed because that conflict of interest or inequality of opportunity is *itself* sufficient, in law, to mean that there is a potential for abuse by the dominant and "privileged undertaking".

HAL and Secretary of State's submissions

204. HAL and the Secretary of State challenge the first and second findings by the Divisional Court in relation to the competition law issue, namely HAL is in a "dominant position" and HAL is a "privileged undertaking". Neither the Secretary of State nor HAL challenge the Divisional Court's third finding that the request for a written Assurance constituted a State Measure. HAL and the Secretary of State seek to uphold the Divisional Court's fourth finding that the State Measure could not be said to have induced any actual or potential abuse of the dominant position and, therefore, there was no infringement.

205. HAL also raise a further point, namely, that the Divisional Court wrongly failed to consider whether any abuse which did take place was capable of being "objectively justified".

206. Mr Facenna argued on behalf of HAL that it was inappropriate for the Divisional Court to make the hypothetical findings on competition law that it did. The 'materiality' issue identified in the Divisional Court's judgment at [163] was the complete answer to HUB's entire competition law claim and it was unnecessary for the Divisional Court to go further. Whilst the subsequent findings of the Divisional Court are properly treated as *obiter*, the findings are adverse to HAL and, left unchallenged, risk influencing later decisions in other contexts. He pointed, in particular, to current litigation by Arora against HAL in the Chancery Division and to the fact that any litigant against HAL could rely on such *obiter dicta* to contend that HAL were in a dominant position. Mr Facenna submitted that the Court of Appeal should either overrule paragraphs [162] to [207] of the judgment as being inappropriate or, preferably, find that the Divisional Court's conclusions on the various issues identified were wrong in law.

Arora's submissions

207. Arora seeks to uphold the Divisional Court's main findings in relation to the competition law issues. It submits (in agreement with HUB) that the Divisional Court was right to hold that HAL is in a "dominant position" in the relevant market and HAL is a "privileged undertaking". But it also submits (in agreement with HAL and the Secretary of State) that the Divisional Court was right also to hold that that there could nonetheless have been no breach of Article 106 TFEU taken together with Article 102 for the reasons given at in paragraphs [199]-[204] of the Judgment – namely, the State Measure could not be said to have induced any actual or potential abuse of the dominant position and there was, therefore, no infringement.

Analysis

Academic or hypothetical issues

208. It is well-established that Courts should not opine on academic or hypothetical issues in public law cases other than in exceptional circumstances where there is good reason in the public interest for doing so. As Lord Slynn of Hadley said in his classic statement in *R v Secretary of State for the Home Department ex parte Salem* [1999] 1 AC 450 (at 456):

> "… I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to questions of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House, there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se … The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is good reason in the public interest for doing so as for example (but only by way of example) where a discrete point of statutory construction which does not involve detailed consideration of the facts, and where large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future." (our emphasis)

209. Many similar statements are to be found in the relevant case law (see *e.g.* per Lord Goff in *R v Secretary of State for the Home Department, ex parte Wynne* [1993] 1 WLR 115 at 120A–B*; per* Lord Hutton in *R (on the application of Rusbridger) v Attorney General* [2004] 1 AC 357 at [35]); per Munby J in *Smeaton v Secretary of State* [2002] 2 FLR 146 , 244 at [420]; per Davis J in *BBC v Sugar* [2007] 1 WLR 2583 at [70]). A helpful review of the authorities is to be found in the judgment of Silber J in *R (Zoolife) v Secretary of State for the Environment, Food and Rural Affairs* [2007] EWHC 2995 (Admin), at [32]-[36].

210. The dangers inherent in courts and tribunals expressing views on matters which do not arise for decision was emphasised in the competition law context by the Court of Appeal in *Office of Communications v Floe Telecom Limited* [2009] EWCA Civ 47 (see especially the judgment of Mummery LJ at [22] to [24] and Lawrence Collins LJ at [122]).

Present case

211. In the present case, the 'materiality' point rendered the remaining issues academic.

212. The Divisional Court's fundamental – and in our view correct - finding on 'materiality' (at [137]) in the context of legitimate expectation under Judicial Review Ground 2 (namely, that the promoter-specific risk relating to the Assurance was "immaterial" to the Secretary of State's decision to prefer the NWR scheme to the other schemes) meant that it was not necessary to determine the competition law issues raised under Judicial Review Ground 1.

213. As the Divisional Court itself correctly pointed out (at [162]), HUB were seeking to bring a competition law claim "within the framework of a claim for Judicial Review", and such a claim could not succeed because promoter-specific issues regarding the ENR scheme played no material part in the Preference Decision. This was the complete answer to HUB's competition law claim.

214. The Divisional Court held (at [189]-[190]) that, since the Secretary of State's request for a written Assurance and the response to it was immaterial to the Preference Decision, "it [was] impossible to see how any abuse of a dominant position could arise on the part of HAL or how the State Measure… could in any way have enabled the abuse". This was the inevitable consequence of its finding that the Assurance request and response "had *no effect* on the preference decision" (emphasis in original). The Divisional Court further held (at [206]) that the Preference Decision "did not, even potentially, affect competition or market structure" and the Designation Decision was not affected by the promoter-specific risk.

215. Further, the Divisional Court's finding at [138(viii)] on the counterfactual basis - that, even if HAL had responded positively to the request for an Assurance, it would have made no difference to the outcome - meant that there was a further complete answer to HUB's claim, namely under section 31(2A) of the SCA 1981.

216. However, having reflected on the matter, we have decided exceptionally that we should consider the findings of the Divisional Court's judgment on competition law - notwithstanding that they are *obiter dicta* - because of their potentially wider implications.

The relevant "market"

217. There was a dispute between the parties as to which is the relevant "market" for the purposes of assessing "dominance" under Article 102 TFEU. The Divisional Court recorded that Mr Palmer for the Secretary of State initially contended that the relevant market was the market "for the supply of runway scheme designs" and, although the argument was not pressed by him (or Mr Facenna on behalf of HAL), it was not abandoned and, accordingly, the Court would decide the point ([165]-[166]). The Divisional Court ruled that the relevant market was the market "for the provision of airport operation services (and related services) *in the South East of England*" (168]).

218. Although the point was also not pressed before us, we should make it clear that we are

not persuaded that the Divisional Court's wide definition of the relevant market is correct. The Airports Commission ran what the Divisional Court described as a "competition of ideas" (at [24]). It was, in essence, soliciting designs for runways and airport solutions. It received 52 proposals and considered a further six designs of its own (see paragraph 12 above). We are not persuaded that HUB or others proposers who neither owned nor operated airports could be properly said to be competing in a market for the provision of "airport operation services" and services related thereto.

219. Competition law is not concerned with regulating a contest between rival schemes to be chosen under a national planning policy.

"Special or exclusive rights"

220. The Secretary of State and HAL submitted that the Divisional Court was wrong to find on the material before it that HAL had been granted "special and exclusive rights" which made it a "privileged undertaking" within Article 106(1) ([182(iii)]). HUB objected to the Secretary of State and HAL arguing this point since it did not specifically feature in the directions orders for this appeal, but they were not able to point to any particular prejudice.

221. We are unable to conclude that the material before the Divisional Court sustained a finding that HAL had been granted "special and exclusive rights" which made it a "privileged undertaking" within Article 106(1) ([182]).

222. The Divisional Court cited the well-known definition of "special and exclusive rights" by Advocate General Jacobs in his Opinion in the Case C-475/99 *Ambulanz Glöckner Landkreis Südwestpfalz*, Opinion (EU:C:2001:284) at [89]:

> "Special or exclusive rights within the meaning of Article [106(1) TFEU] are … rights granted by the authorities of a Member State to one undertaking or to a limited number of undertakings <u>which substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions.</u>" (our emphasis)

223. The Divisional Court gave four reasons for concluding that HAL was a "privileged undertaking" ([182(i)-(iv)]). We are not persuaded that these reasons necessarily justify such a finding.

224. First, the Divisional Court referred to the fact that the operation of airports is "highly regulated". However, the EU and domestic UK regulatory requirements protecting public interests in the aviation sector (*e.g.* in relation to air safety) do not amount to the grant of "special and exclusive" rights to persons carrying on those activities. Indeed, HAL's licence under the Civil Aviation Act 2012 ("CAA 2012") acts as a constraint mechanism in relation to airport charges rather than being the grant of "special and exclusive" rights (see below).

225. Second, the Divisional Court referred to the fact that Heathrow is a "dominant airport" within the CAA 2012 with "substantial market power". However, this simply means

that Heathrow is prohibited from charging for airport services except under a licence which may include price caps or other price regulation. HAL's CAA licence does not grant it any special rights or geographical or other exclusivity. The licence acts as a constraint. Further, other companies with relevant airport facilities in the Heathrow area can also apply for a licence. HAL's licence gives it no power to restrict other persons carrying on airport operation activities at Heathrow. The fact that HAL is the owner and operator of airport facilities in the Heathrow area is not the consequence of any licence but simply the result of historical circumstance to which the licensing regime applies.

226. Third, the Divisional Court heavily relied upon the fact that Heathrow Airport was once a public undertaking. It said (at [182(vi)]):

> "c) We do not consider that the history of Heathrow and the fact that it was a part of a public undertaking can be disregarded for the purposes of article 106(1) TFEU . It was by virtue of being a part of this public undertaking that Heathrow attained its status as a dominant airport. The sale into private hands of such a public undertaking constituted the granting of special or exclusive rights first to BAA and then to HAL. The continued existence of special or exclusive rights is evidenced by the fact that controls such as those contained in the CAA 2012 continue to exist." (our emphasis)

227. The fact that an undertaking purchases an asset which was historically part of a publicly owned undertaking or former State monopoly does not in itself mean that it is the beneficiary of a "special or exclusive right" under Article 106(1) TFEU, or that it thereby "substantially affects" the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions". The fact that Heathrow was, over 30 years ago, owned by a state-owned undertaking prior to privatisation by the Airports Act 1986 does not necessarily mean that the purchaser in an open sale, HAL, was *thereby* granted "special and exclusive" rights which "substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions".

228. The authorities do not seem to support a finding that a history of state ownership *ipso facto* amounts to any ongoing *"*special or exclusive rights*"*. In Case C-302/94 *R v SSTI ex p British Telecommunications* [1997] 1 CMLR 424, it was acknowledged that BT had been created through privatisation of a former state monopoly, but there was no suggestion that that it continued to be a monopoly or had *"*special or exclusive rights*"*. The Court of Justice held that *"*special or exclusive rights*"* did not arise from the existence of a licensing regime for operators of telecommunications networks in circumstances where licences were granted on an objective basis ([38]-[39]). It further held that *"*special or exclusive rights*"* do not arise by virtue of the fact that licence holders were empowered to acquire land compulsorily and exercise other statutory powers ([40]-[42]).

229. Further, as the Divisional Court itself noted (at [182(iv)(b)]), over the years BAA divested itself of its airports (Gatwick, Prestwick and Stansted) separately "to a variety

of different owners, so as to induce competition". Insofar as HAL has "market power", it arises from its physical scale and number of slots, and not from its earlier history as a State-owned enterprise.

The evidence as regards "dominant position"

230. The Divisional Court held that HAL was in a "dominant position" in the relevant market which was the market "for the provision of airport services (and associated services) in the South East England" (see [178]). We are not convinced that there was sufficient evidence to justify that finding.

231. The term "dominant position" has been defined as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers" (see Case 85/76 *Hoffmann-La Roche & Co AG v Commission*, EU:C:1979:36, at [38]).

232. The question whether an entity enjoys a "dominant position" in a relevant economic market in which it is competing generally invariably requires a court or competition authority to be provided with detailed expert economic evidence to enable it to do two things: first, define the relevant "economic market" (i.e. identifying the product and geographic parameters of the relevant economic market); and second, determine the particular enterprise is "dominant" in that market, an assessment of the degree to which the entity's conduct in the market is constrained by competition (see the European Commission's Guidance: *Commission Notice on the definition of relevant market for the purposes of Community competition law*, Official Journal 1997 C372/5; and *Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, Official Journal 2009 C45/7, §§9-18).

233. The burden of proving both the relevant market and HAL's dominance in that market was on HUB (see *Streetmap.Eu Limited v Google Inc.* [2016] EWHC 253 (Ch) at [40]).

234. HUB did not provide the Divisional Court with any such expert economic evidence. It merely invited the Court to rely entirely upon a "Notice of Determination" prepared by the CAA pursuant to its powers and duties under the CAA 2012 which identified Heathrow Airport as a "dominant airport" for the purposes of that Act.

235. We find it hard to accept that that was an adequate basis on which to reach a concluded view on this question. The CAA's Notice of Determination's identification of Heathrow as a "dominant airport" was the consequence of the application of a specific statutory test under section 6 of the CAA 2012, namely the "market power" test which requires the CAA to identify airport facilities which may be subject to the application of economic regulation under that Act. The "market power" test is significantly different from an assessment of "dominance" for the purposes of Article 102 TFEU, in particular sections 5 to 7 of the CAA 2012 require the CAA to make determinations about whether *particular airport areas* have market power. Article 102, in contrast, applies to an *economic undertaking* that has been found to have a dominant position in a particular economic market. The CAA's identification of Heathrow as a "dominant airport" did not entail or comprise any finding with respect to the dominance or otherwise of the entity

HAL itself (or any economic undertaking) in any economic market for the purposes of competition law.

HUB's specific arguments on appeal

236. HUB argue by their Appeal Ground 1 that a distortion of competition had already arisen before the Preference Decision. This does not assist them. As the Divisional Court correctly found, the absence of a written Assurance from HAL was "immaterial" to the Preference Decision and did not give rise to even "a *potential* anti-competitive consequence" (at [189]-[190] and [192]). The Divisional Court also went on to hold there was a "disconnect" between the alleged breach of competition law and the challenged decision, namely the Designation Decision two years later (at [206]). Accordingly, the Divisional Court's findings on 'materiality' are the end of the matter, however it is approached.

237. Mr O'Donoghue submitted that the principle that the mere creation of a conflict of interest (or some analogous failure to guarantee equality of opportunity) is sufficient to infringe Articles 106(1) and Article 102 was "extremely well established" in the case law (to which reference in the Judgment was conspicuously lacking). He referred to seven cases which he said established this principle: Case C-18/88 *RTT v GB-Inno-BM;* Case C-163/96 *Raso v Others*; Case C-340/99 *TNT Traco*; Case C-462/99 *Connect Austria*; Case C-475/99 *Ambulanz Glöckner Landkreis Südwestpfalz* [2002] 4 CMLR 21; Case C-49/07 *MOTOE*; and Case C-533/12P *DEI*. He submitted that a State Measure which changes the structure of the market in favour of the privileged undertaking will itself give rise to a "risk of an abuse of a dominant position" as per the CJEU in *MOTOE* (*supra*). Put another way, he submitted that Article 106(1) TFEU requires the State to guarantee equality of opportunity at all stages, and asking one competitor to guarantee or assure he would implement a competing product or service manifestly fails to do so.

238. Mr O'Donoghue's reliance on these CJEU cases is misplaced. The cases do not support a free-standing principle that the mere existence of a conflict of interest is sufficient to found a breach of Article 102 and Article 106(1). Further, *RTT, Ambulanz Glockner* and *MOTOE*, were cases where organisations had been granted actual monopolies, or decision-making powers equivalent to *de facto* monopolies, because they enable the organisation to have decisive or very substantial influence over regulatory or other matters concerning its competitors, access to the relevant market, and/or the conditions under which competition in the market could take place. On the facts of those cases, the placing of the privileged undertaking in that position was inherently liable to facilitate an abuse of dominance by it, or otherwise to give rise to the distortion of competition or anti-competitive consequences. As the Grand Chamber explained in *MOTOE* at [51]:

> "51. To entrust a legal person such as ELPA, which itself organises and commercially exploits motorcycling events, the task of giving the competent administration its consent to applications for authorisation to organise such events, is tantamount *de facto* to conferring upon it the power to designate the person authorised to organise those events and to set the conditions in which those events are organised, thereby placing that entity at an obvious advantage over its competitors…"

239. Contrary to Mr O'Donohogue's assertion, none of those cases show that a measure giving rise to a "conflict of interest" constitutes a breach of Articles 102 and 106(1) without it being necessary to show that the "conflict" is liable to distort or otherwise harm competition in an economic market.

240. As the General Court explained in Case T-68/08 *FIFA v Commission* [2011] ECR II-349:

> "175 Under Article 86(1) EC, the competition rule applicable to the State measures (Case C-22/98 *Becu and Others* [1999] ECR 1-5665, paragraph 31), Member States must not, by laws, regulations or administrative measures, put public undertakings and undertakings to which they grant special or exclusive rights in a position which the said undertakings would not themselves attain by their own conduct without infringing Articles 12 EC and 81 EC to 89 EC (see, to that effect, Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 20).
>
> 176 In that regard, although it is true that special or exclusive rights within the meaning of that provision are granted when protection is conferred by the State on a limited number of undertakings which may substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions (Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 24), the fact remains that the United Kingdom legislation does not confer such protection on the broadcasters [BBC and ITV] in question.
>
> 177 Thus, such rights are at issue when the public authorities have granted a monopoly (Case C-163/96 *Raso and Others* [1998] ECR I-533, paragraph 23), when they can prevent the entry of a competitor into the market sphere of the rights-holder on grounds relating to potential adverse effects on the operation and profitability of the rights-holder's activities (*Ambulanz Glöckner*, paragraph 176 above, paragraphs 7, 23 and 25) or labour market requirements (*Becu and Others*, paragraph 175 above, paragraph 23), or where the rights-holder is entitled, under the relevant legislation, to influence the terms under which the activity in question may be pursued by his competitors according to his interests or according to the consequences of their activity on that market or even on a neighbouring market (see, to that effect, Case C-202/88 *France v Commission* [1991] ECR I-1223, paragraph 51; *ERT*, paragraph 142 above, paragraph 37; *GB-Inno-BM*, paragraph 175 above, paragraph 25; and Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 43)."

241. Mr O'Donoghue submitted that the request for an Assurance in effect granted HAL a *de facto* veto over the ENR scheme. This is not correct. HAL was not able to exercise a veto of any sort over HUB's scheme. The decision as to what weight, if any, was to be given to any scheme-specific factors or the absence of an Assurance from HAL (or HAL's views as to the demerits of the ENR scheme) when taking the Preference Decision was solely for the Secretary of State. There was no basis for assuming that any "conflict of interest" arising from the request for an Assurance was liable to lead to any restriction of, or other harm to, competition in any economic market. HUB were not competing with HAL in any relevant market. Rather, HUB wanted to sell HAL a licence of the intellectual property needed for carrying out the ENR scheme.

242. A State Measure cannot found a breach of Articles 102/106(1) simply because it gives rise to *some form of* "conflict of interest" on the part of a "dominant undertaking" having "special and exclusive rights". Article 106(1) is not a freestanding prohibition against State Measures giving rise to any "conflict of interest". Rather, Article 106(1) is simply a general prohibition designed to ensure that State Measures do not undermine achievement of the objectives of the other competition law provisions of the TFEU, including Article 102. The purpose and function of Article 102 is to prevent harm to competition in economic markets in which a "dominant undertaking" is present. Further, Article 102 prohibits conduct by "dominant undertakings" which involves "resort to methods other than normal competition" (or "competition on the merits") and which is liable to further weaken competition in the market and thereby further embed the dominant undertaking's dominance.

243. The position is summarised in the well-known definition of "abuse of dominance" by the ECJ in Case 85/76 *Hoffmann-La Roche v Commission*, EU:C:1979:36, at [91]:

> "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition." (our emphasis)

244. In the context of airport expansion, the operation of the process laid down in legislation for selecting a runway scheme as a matter of national planning policy is an aspect of the *normal* operation of markets for airport services. It is also a normal aspect of the operation of that policy that airport operators like HAL should be permitted to express their positions and views to the Secretary of State with regard to the runway schemes under consideration.

245. Thus, in summary, a State Measure giving rise to a "conflict of interest" will only constitute a breach of Articles 102 and 106(1) if it is liable to give rise to a distortion of competition, i.e. anti-competitive effects on competition in economic markets for goods or services. In order for the State Measure to constitute a breach, the "conflict" it creates

would need to be liable to obstruct the achievement of the intended outcomes of Article 102 by producing, in a relevant economic market, anti-competitive consequences similar to those which Article 102 exists to prevent.

246. Mr O'Donoghue submitted that the request for a written Assurance amounted to the introduction of "a structural feature in the relevant market" which was liable to place HAL in a position of 'conflict of interest' which itself was a violation of Article 106(1)". We disagree. Even on the premise that this competition took place within the relevant South East Market for airport services in the South East, there is no basis for suggesting the request introduced a structural feature in the South East Market. The request itself made no alteration to the structure of the South East Market or to the conditions under which competition was taking place in that market. In any event, the Divisional Court's factual findings do not show that the request was liable to distort even the "competition" between runway schemes to be selected as the preferred scheme, let alone that any supposed "conflict of interest" on the part of HAL was liable to distort or otherwise harm competition in the South East Market.

247. HUB finally argue by their Appeal Ground 2 that the Divisional Court was wrong to find that there was no distortion of competition because of the fact that a subsequent DCO application might be made. Both HAL's and HUB's schemes involved the building of a new runway and associated airport facilities at Heathrow. The Preference Decision was concerned with the selection of a suitable runway scheme for national planning policy purposes. The question of who - whether HAL or someone else - would build those facilities was a separate matter to be decided in due course. Whilst it is likely to be HAL, the Divisional Court's reference to and reliance upon the DCO was nevertheless a relevant consideration. Even if and insofar as HAL had, as a result of the request for an Assurance, been placed in a position where it could have influenced the Preference Decision against the ENR scheme, this would not have sufficed to show that the request by the Secretary of State for an Assurance was liable to distort competition in the South-East Market identified by the Divisional Court.

Summary on Competition Law issues

248. For the reasons we have given, therefore, we find ourselves unable to endorse the Divisional Court's conclusions on the academic issues of competition law with which it dealt in paragraphs [157] to [207] of its judgment. We should also make it clear, however, that our own observations on these matters do not bear on our reasoning on the decisive issues in the appeal before us. Nor should they be taken as resolving questions that may in the future have to be decided by another court, in different circumstances and on different evidence and argument. It follows, therefore, that the competition law issues themselves remain moot.

CONCLUSION

249. For the reasons set out in this judgment, HUB's appeal must be dismissed.

250. We express our gratitude to all counsel and their legal teams for their able assistance in this case.