

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HONOURABLE MR JUSTICE LLOYD JONES

**IN THE MATTER OF AN APPLICATION
FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW**

BETWEEN:

**THE QUEEN
on the application of**

**TAKELEY PARISH COUNCIL
TREVOR ALLEN**

Appellants

and

**(1) STANSTED AIRPORT LIMITED
(2) BAA PLC
(3) SECRETARY OF STATE FOR TRANSPORT**

Respondents

**SKELETON ARGUMENT
ON BEHALF OF THE APPELLANTS**

I. INTRODUCTION

1. The Claimants, Takeley Parish Council and Trevor Allen, apply for permission to appeal against the decision of the honourable Mr Justice Lloyd Jones of 13 December 2005 to refuse the Claimants' renewed application for permission to apply for judicial review, and to refuse permission to amend the Claimants' Detailed Statement of Facts and Grounds. The Claimants also

appeal the Learned Judge's refusal, consequent on his refusal of permission, to grant the Claimants' application for a Protective Costs Order ("PCO").

2. A transcript of the judgment, together with the Appellant's notice, is in Appeal Bundle 1, to which reference hereafter is made in the form [**AB1/ + page number**]. References to paragraph numbers are to paragraphs of the judgment unless otherwise indicated. A further bundle, Appeal Bundle 2, containing materials from the High Court, is referred to in the form [**AB2/ + page number**].

II. FACTUAL BACKGROUND

a. The Parties

3. The First Defendant Stansted Airport Limited ("BAA Stansted") is a wholly owned subsidiary of the Second Defendant BAA plc ("BAA plc") (collectively "BAA"). In the context of the proposed construction of a new runway at Stansted airport, BAA Stansted proposed the introduction of three voluntary schemes: a Home Valuation Guarantee Scheme, a Special Cases Scheme and a Home Owner Support Scheme (HOSS"). This case is concerned with the latter scheme, the intended operation of which was detailed in a document dated September 2004 [**AB2/283-311**]. The purpose of the HOSS is to assist home owners whose property is suffering generalised blight as a result of proposals for a second runway at Stansted Airport.
4. The HOSS purports to implement the policy of the Third Defendant, the Secretary of State for Transport ("the Secretary of State"), as set out in his White Paper dated December 2003 entitled "The Future of Air Transport" [**AB2/222-237**] ("the White Paper") that a scheme be introduced to minimise the effects of generalised blight from the proposed second runway. However, by stipulating that only properties falling within a 66 dBA_{Leq}16 hour ("66 Leq") noise contour will qualify for their scheme, BAA Stansted accepted

from the outset that the HOSS would address only the most severely affected properties and many properties which suffer generalised blight would not qualify at all.

5. The First Claimant is a local Parish Council that lies to the south of the proposed runway and which is bisected by the boundary of the HOSS scheme. The Second Claimant is Chair of the Parish Council and a resident of the Parish whose property lies outside the HOSS scheme boundary and will therefore not qualify under the scheme however blighted it may be.

b. The White Paper

6. At paragraph 11.40 of the White Paper [AB2/236] the Government stated its support for the development of a second runway at Stansted airport. In the subsequent paragraph 11.41, it was emphasised that “[t]he airport operator will need to put in place a scheme to address the problem of generalised blight resulting from the runway proposal.”
7. “Generalised blight” was described at paragraph 12.16 [AB2/237] as follows: *“The prospect of airport development will in many cases have a wider impact on property values in the period before statutory protection is available. This is often referred to as ‘generalised blight’.* It was stated in that paragraph that *“where runways are supported by this White Paper”* arrangements are being made for non-statutory schemes to be brought forward locally by the airport operators to deal with the problem of generalised blight.
8. The non-statutory schemes envisaged by the White Paper were expected to *“minimise the impacts on local people . . .”* (paragraph 12.17).

c. The HOSS

9. BAA Stansted published a consultation document in respect of the HOSS in February 2004 [AB2/238-249].

10. In response to concerns expressed in a letter dated 7 April 2004 from a representative of Stop Stansted expansion, the Parliamentary Under-Secretary of State for Transport indicated in a letter of 30 April 2004 [AB2/258] that “*[i]n introducing this voluntary scheme, BAA are taking forward policies set out in Chapter 12 of the White Paper ... We will monitor progress by airports in bringing forward blight and noise mitigation schemes as described in Chapter 3 of the White Paper.*”
11. On 3 September 2004 an e-mail was sent to BAA’s Alastair McDermid from Jonathan Sharrock of the Airports Policy Division of the Department for Transport [AB2/280-281]. In that e-mail Mr Sharrock confirmed on the basis of the “... *the draft consultation document that you sent to us ...*” that “*your proposed scheme fits well with the White Paper references to ... schemes that address the problem of generalised blight*” .
12. In September 2004, BAA Stansted published a document detailing the intended operation of the HOSS [AB2/283-311]. In the Introduction to that document [AB2/285], BAA Stansted indicated that “*[w]hen the Government published the “Future of Air Transport White Paper in December 2003, it identified Stansted as the preferred location for the first new runway in the South East for over 50 years ...the Government has asked that we address the issue of “generalised blight” and that is what the Home Owner Support Scheme is about.*” The document also recorded (on two occasions) that “*[t]he Department for Transport has confirmed that this scheme is consistent with the government’s policy on voluntary blight schemes as set out in the Government’s White Paper “The Future of Air Transport” [AB2/285 and 292].*”
13. The key elements of the scheme are set out at paragraphs 10 to 12 of the Amended Statement of Facts and Grounds [AB2/409-412]. The scheme only

applies to properties falling within a fixed 66 Leq noise contour. The Claimants' criticisms of the scheme are summarised at paragraphs 31 to 35 of the Amended Statement of Facts and Grounds [AB2/417-419]. In brief, the scheme only provides redress for those "worst affected" rather than minimising the impact on local people as envisaged by the White Paper, it fails to address instances of generalised blight which fall outside the boundary, and it is based on an irrational distinction between properties falling inside the boundary and those falling outside it.

III. PROCEDURAL BACKGROUND

14. The Claimants sought permission to apply for judicial review by a Judicial Review Claim Form dated 20 December 2004 accompanied by a Statement of Facts and Grounds [AB2/201-206]. Summary Grounds of Defence on behalf of the First and Second Defendants were served on 11 January 2004 [AB2/350-373].
15. Permission to apply for judicial review was refused on paper by Sullivan J on 4 March 2005 [AB2/381-382]. For the purposes of permission, the learned judge accepted that the claim was justiciable and that there was not material delay in bringing it. In relation to Grounds 2 and 4 of the claim, however, the learned judge adopted the reasoning of the Defendants.
16. A notice renewing the claim to an oral hearing was served by the Claimants on 11 March 2005 and the Claimants have served draft reformulated grounds in support [AB2/407-424]. If the Court of Appeal were to uphold the Claimants' appeal and grant permission to apply for judicial review, the Claimants also seek permission to amend their grounds.
17. Following a 2-day hearing on 13 and 14 December 2005, Lloyd Jones J refused the Claimants' renewed application for permission to apply for

judicial review. Lloyd Jones J considered that it was arguable that the First and Second Defendants were exercising a public function or acting as a public body when adopting the HOSS (paragraph 7), a view which was shared by Sullivan J when he considered permission on the papers [AB2/381-382]. However, he considered that no arguable case had been made out (paragraph 35).

IV. JUSTICIABILITY

18. The learned judge erred in dismissing the Claimants' case that a public body which, in the exercise of public functions, voluntarily purports to implement a particular policy, is capable of being the subject of judicial review.
19. The learned judge's conclusions were expressed as follows:
 - a. The learned judge was prepared to accept that there may be an obligation on the First and Second Defendants to have regard to the Secretary of State's policy, as set out in the White Paper, when considering what voluntary scheme to introduce. As he noted, such an obligation was also accepted by the First and Second Defendants (paragraph 13).
 - b. The learned judge was also prepared to accept that there are circumstances in which a public body, acting voluntarily, can be the subject of judicial review (paragraph 13).
 - c. However, the learned judge considered that there is no arguable ground for challenging the lawfulness of the HOSS adopted by the First and Second Defendants on the basis that it did not comply with the White Paper, because it was not required to do so (paragraph 14). Specifically, he considered that once it is accepted that there is no legal obligation to

implement a particular policy, “it is difficult to see how there can be a challenge to the legality of failing to do so” (paragraph 13).

20. The learned judge was quite correct to acknowledge that there must be circumstances in which a public body, acting voluntarily, can be the subject of judicial review. Indeed, it would be most surprising to contend otherwise. If, as the learned judge held to be arguable, the First and Second Defendants are exercising public functions, then judicial review must be available to ensure that those functions are exercised consistently with public law requirements of relevancy, rationality and fairness. If the position were otherwise one would have the somewhat unfortunate position of public law functions being immune from review. The exercise of public functions must be undertaken in accordance with the parameters laid down by public law. In short, if BAA is exercising public functions those functions must be subject to judicial review.
21. However, in those circumstances, the learned judge should have proceeded to conclude that the lawfulness of the HOSS can be the subject of judicial review on the grounds that it failed to implement the policy set out in the White Paper. The learned judge erroneously considered that the fact that there was no legal obligation to implement the policy as set out in the White Paper was determinative of the question of whether or not the HOSS can be challenged for failing to do so.
22. This approach is mistaken. It does not matter – for the purposes of amenability to review - whether the public body in question is actually *legally obliged* to give effect to, or act in accordance with an avowed policy, goal or objective. As a matter of general administrative law principle, where a public law body *purports* to base its decision or conduct on the premise that it is giving effect to, or acting in accordance with, a defined policy, goal or objective, the Court is entitled to assess whether or not the public body’s conduct is consistent

with its avowed intentions.¹ If, in fact, the decision taken is not consistent with the underlying policy, then the underlying premise and assumptions on which the public body in question has conducted itself are revealed to be flawed. Such a decision is fundamentally unsound and must necessarily be susceptible to judicial review.

23. Both the Secretary of State for Transport and BAA Stansted itself envisaged and intended that the HOSS would be implemented in order to give effect to the Government's policy on generalized blight as set out in the White Paper. This is clear *inter alia* from:

- a. The Under-Secretary of State for Transport's statement that "[i]n introducing this voluntary scheme, BAA are taking forward policies set out in Chapter 12 of the White Paper ... We will monitor progress by airports in bringing forward blight and noise mitigation schemes as described in Chapter 3 of the White Paper." (See paragraph 10 above);
- b. The Airports Policy Division of the Department of Transport's confirmation that on the basis of the "... the draft consultation document that you sent to us . . ." that "your proposed scheme fits well with the White Paper references to . . . schemes that address the problem of generalised blight". (See paragraph 11 above); and
- c. BAA Stansted's statements that "...the Government has asked that we address the issue of "generalised blight" and that is what the Home Owner Support Scheme is about" and "[t]he Department for Transport has confirmed that this scheme is consistent with the government's policy

¹ The Claimants refer, by way of example, to the cases of *R v. Criminal Injuries Compensation Board ex p. Cummins* (1992) 4 Admin LR 747, which demonstrates that, in cases where there is no obligation to give reasons, if a public body nevertheless chooses to give reasons, the adequacy of those reasons will be capable of being the subject of judicial review, and *R v Secretary of State for the Home Department ex p. Urmaza* (1996) COD 479, in which the Court was prepared to review a statement of policy which was not made out of legal compulsion.

on voluntary blight schemes as set out in the Government's White Paper "The Future of Air Transport." (See paragraph 12 above).

24. The Court is therefore entitled to enquire whether or not the HOSS, which was promulgated by BAA Stansted in order to give effect to the Government's policy on generalised blight as set out in the White Paper, in fact complies with the Government's policy as therein set out.
25. Equally, if the HOSS is in fact arbitrary, irrational, and an unlawful fetter on BAA's discretion, as is the Claimant's case, this too must be capable of being the subject of judicial review. It is irrelevant that BAA was not obliged to adopt the HOSS. Once it has done so, then its conduct must be subject to judicial review to ensure it is not vitiated by irrationality, arbitrariness, or the unlawful fetter of discretion.
26. However, the Claimants also advance their case on justiciability on a further basis, which arises out of the events of the hearing. At paragraph 15 of his judgment, the learned judge records a series of important concessions made by counsel for the First and Second Defendants. These were that:
 - a. A public body exercising public functions on a voluntary basis can be subject to judicial review;
 - b. The First and Second Defendants were, at the very least, obliged to have regard to the White Paper Policy; and
 - c. In order to do so, they must have properly understood it.
27. In the light of the above concessions, it is evident that the First and Second Defendants accept that their promulgation of the HOSS is justiciable, and that the Court is at the very least entitled to scrutinise whether or not the HOSS

reflects a proper understanding of the policy as set out in the White Paper. The Learned Judge did not reach an express conclusion on this line of argument advanced by the Claimants. It is submitted that he should have concluded that the lawfulness of the HOSS was properly the subject of judicial review on the basis that it failed to reflect the policy as set out in the White Paper.

V. THE HOSS DOES NOT REFLECT THE POLICY AS SET OUT IN THE WHITE PAPER

28. The judge erred in concluding at paragraph 16 that the HOSS promulgated by the First and Second Defendants reflects the policy as set out in the White Paper.

29. The judge's reasoning was as follows:

- a. The learned judge acknowledged that the White Paper refers to the need to minimise the impact of generalised blight on local people. However, he considered that the obligation to minimise generalised blight did not set a policy objective of eliminating the effect of blight. Rather, how to minimise blight and how to administer the scheme in practice were matters of judgment (Paragraph 19).
- b. The learned judge considered that it was not contrary to the objectives of the White Paper that generalised blight occurs outside the noise contour adopted by the HOSS, because the White Paper did not contemplate that all affected would be assisted (paragraph 20).
- c. The learned judge declined to accept that the scheme boundary was irrational, commenting that no doubt, whenever boundaries are adopted, there will be anomalous cases, but the use of a noise contour was not

irrational and the selection of which noise contour to employ was a matter of judgment on which there may be disagreement (paragraph 20).

d. As the White Paper did not envisage that all cases of generalised blight would be catered for, it was not unlawful that the HOSS failed to consider cases falling outside the scheme's boundary (paragraph 21).

30. The judge's reasoning is, with respect, in error. It assumes that simply because the White Paper does not envisage that all cases of generalised blight will be addressed, there can be no criticism of the severely circumscribed scheme promulgated by BAA. However, the latter does not necessarily follow from the former.

31. The Claimants advance two primary contentions as to why the HOSS promulgated by BAA fails to reflect the policy set out in the White Paper:

a. First, even if it is assumed in BAA's favour that BAA has correctly interpreted the policy in the White Paper in terms of its syntax (see b. below), BAA has nevertheless failed to understand it in so far as the HOSS promulgated by BAA is arbitrary and irrational and amounts to an unlawful fettering of BAA's discretion.

b. However, in fact, BAA has also positively misunderstood the policy as set out in the White Paper.

a. The HOSS is arbitrary, irrational and amounts to an unlawful fettering of BAA's discretion

32. The White Paper envisaged a scheme which addressed generalised blight, and yet the HOSS fails to do so in any rational, non-arbitrary fashion. The adoption of an arbitrary noise contour is an insufficient proxy for the

incidence of generalised blight, in that even some of those worst affected may fall outside it, while those less impacted may fall within it. By way of illustration, one qualifying criterion for the Special Cases Scheme also promulgated by BAA is that the home owner should have been unable to sell their property at a price within 15% of market price, although the SCS operates outside the HOSS scheme boundary. This recognises that generalised blight may seriously impact properties which do not qualify under the HOSS.

33. An appropriate scheme would be to use a noise contour as a starting point, but to permit the scheme to have flexibility to consider individual cases on their merits. Indeed, this is precisely the approach adopted by the compensation scheme set up in respect of the Channel Tunnel Rail Link (“CTRL”), which is expressly mentioned in the White Paper at paragraph 12.17 [AB2/237] as a recent precedent for the type of non-statutory compensation scheme envisaged by the White Paper. The CTRL scheme is set out in a document entitled “Guidelines for Discretionary Purchase of Property by Union Railways Ltd (URL)” [include in bundle AB2] which provides in relevant part as follows:

“This brief sets out the agreed guidelines for the scheme, including details of how to apply and the general manner in which cases are dealt with. *All applications are considered on their individual merits.*

...

Assessment of Serious Effect

URL must be of the opinion that your enjoyment of your property will be seriously affected by either the construction or the use of the CTRL. Serious effect may be caused by a number of factors including:-

(a) Noise: If the predicted noise levels at your property from construction work are well in excess of 70 dB(A) (12 hour Laeq) over at least three months, or are predicted to increase by 1 dB(A) to a level of at least 68 dB Laeq (0600 - midnight) or 63 dB Laeq (midnight - 0600), due to the use of the CTRL, we will normally consider that your enjoyment of your property will be seriously affected by noise. In assessing the predicted noise level URL will take into account the benefits of any proposed environmental mitigation measures such as noise fencing or bunding. A Glossary of terms related to Noise Measurement may be found in Appendix 1.

(b) Diminution in Value: If, at the time of assessment, your property is or is likely to be, in the opinion of URL, significantly diminished in value as a result of the CTRL proposal, we will normally consider it seriously affected. Diminution in value is the amount that the value of your property has been reduced due to the CTRL proposal and is normally expressed as a percentage of the assessed unaffected market value. The diminution will be assessed by our Valuers but you may submit any valuation advice you may have obtained. As a guide, a diminution in value of less than 15% would not normally be considered to have seriously affected your enjoyment of your property.

(c) Medical Conditions: If in the opinion of URL you, or a dependent living with you in the property suffer from a medical condition (such as respiratory condition or tinnitus, but not stress or anxiety) which will be severely aggravated by physical effects, such as dust, noise or pollution, from either the construction of the railway or its use, we are likely to consider that your enjoyment of your property will be seriously affected. The factors listed in these guidelines are not exhaustive. Other factors or combinations of factors may cause serious effect and URL will take these into account when considering your application." [emphasis added]

34. Paragraph 6 then provides:

"Except when the accepted reason for moving is based upon medical grounds as set out in paragraph 5(d) above, we will not *normally* offer to buy your property unless we are of the opinion that it will be seriously affected by BOTH diminution in value AND noise during the construction period, or the first year following the opening of the CTRL (see paragraph 2 above for an explanation of serious effect)." [emphasis added]

35. The combination of the word "normally" in paragraph 6 and the assurance that "all applications are considered on their individual merits" indicates that while the starting point for compensation under the CTRL scheme is the satisfaction of criteria (a) and (b), namely the criteria of noise and diminution in value, this is not a rigid and inflexible requirement. Indeed, a document disclosed by the Department of Transport in response to a request under the Freedom of Information Act 2000 entitled "CTRL, Central Railways and Highways Agency Schemes" [**include in bundle AB2**] summarises the operation of the CTRL scheme as follows:

“C4. The CTRL scheme *has no defined boundary*. Part of the justification was that the impact depended not only on distance to the line but also on size, aspect and value of the house in question: *All claims are judged on a discretionary basis*.

C5. There is a particular concern about defining any sharp boundary upon a map for the risk of increasing the blight problem. Where there is uncertainty as to the magnitude of the impact of a future proposal, offering generous compensation with a sharp cut-off will tend to increase the anxiety of people just outside of the cut-off (especially when the full impact is unknown – people assume the worst). A possible advantage of a discretionary scheme is that those with real anxieties will claim – without the need for a well-defined line.” [emphasis added]

36. Hence the CTRL scheme, which is identified by the White Paper as an example of a suitable scheme for the compensation of generalised blight, does not simply adopt a rigid noise contour like the HOSS. Rather, it uses a noise contour as a starting point for compensation, but considers applications from those outside the noise contour on their merits. Hence, it offers much more flexibility than the HOSS.
37. The Learned Judge dealt with this point in two stages. First, he expressed the conclusion that the CTRL scheme and the HOSS are comparable, subject to what he described as “the question of flexibility” (paragraph 22). This is of course true – the key distinction between the CTRL scheme and the HOSS is precisely that the CTRL scheme includes an element of flexibility which avoids the arbitrary and irrational effect of the noise contour in the HOSS.
38. Second, addressing the question of flexibility at paragraphs 31 to 33, he commented that those putting forward the HOSS concluded that it was desirable to have a definite boundary and set out their reasons for taking that approach and that they were entitled to adopt them. However, in adopting this rigid approach, BAA fully recognised, in a passage cited by the Learned Judge at paragraph 32 of his judgment [AB2/293-294] that:

“... in defining a boundary, we draw a line between those who qualify and those who do not, some of whom live close to each other, and that there will be places where that line appears arbitrary. The boundary therefore (as with other schemes) can be no more than a proxy for where generalised blight might exist.”

39. Despite the above, BAA nevertheless elected to apply a rigid noise contour on the basis *inter alia* that “This is comparable to the boundary of other voluntary schemes such as CTRL’s ...” [AB2/293-294] Yet the CTRL scheme is *not* comparable, as contrary to the approach adopted by BAA, it does not apply a rigid boundary. Hence, BAA’s approach is falsely premised on comparability with the CTRL.
40. Moreover, BAA went so far as emphasise the intention not to deviate from the rigid boundary of the scheme [AB/294], notwithstanding the express acknowledgment, set out above, that such a boundary may result in arbitrary distinctions. The application of a rigid, inflexible boundary in such circumstances amounts to an unlawful fettering of BAA’s discretion.²

b. The White Paper policy is not capable of bearing the meaning given to it by BAA

41. It is clear from the Introduction to the HOSS [AB2/285] that the HOSS was intended to compensate only those properties that were “worst affected” by blight, and further, that BAA considered that a scheme so defined was consistent with the policy set out in the White Paper. Yet a scheme compensating only those “worst affected” simply cannot be reconciled with the clear and unambiguous wording of the White Paper, which states:

“We look to operators to *minimise* the impacts on local people.” [emphasis added]

² See *Lavender v Minister of Housing* [1970] 1 WLR 1231

42. A scheme which compensates only those worst affected contemplates only a very small category of the total number of persons impacted by generalised blight. The reference to minimising impacts on local people in the White Paper, although not envisaging compensating everyone affected, still entails a wholly different order of inclusiveness than a scheme targeting only those worst affected.
43. The marked contrast between a scheme to “minimise” the impact of generalised blight and a scheme addressed to those “worst affected” by generalised blight is even more apparent when the White Paper has elsewhere at paragraph 3.19 [AB2/**] drawn a clear distinction between those worst affected, identified as “the more severe cases” and those less affected. No such distinction is made in Chapter 12 dealing with voluntary measures, and it can only therefore be concluded that no such distinction was intended to be made.

c. No compulsory remedy sought

44. Finally, the judge erred in concluding (paragraph 23) that the combined effect of declarations (1) and (2) sought by the Claimants would be “tantamount to a compulsory remedy” and would compel the First and Second Defendants to adopt a different, more generous HOSS scheme. The first declaration sought simply clarifies that *if* BAA Stansted seeks to implement a scheme which purports to give effect to the policy set out in the White Paper, it must do so lawfully. As BAA has repeatedly emphasised in the course of these proceedings, it is under no legal compulsion to do so, so a declaration of this nature cannot amount to a compulsory remedy. The second declaration then sets out what is meant by lawful implementation in the event that BAA were voluntarily to seek to implement such a scheme. It should also be emphasised that the declarations sought against BAA are a necessary preliminary step to the Claimants’ case against the Secretary of State.

45. For these reasons, it is submitted the learned Judge was wrong to conclude (paragraph 23) that Ground 2 of the Claimants' claim does not disclose an arguable case for judicial review.

VI. CLAIM AGAINST THE SECRETARY OF STATE FOR TRANSPORT

46. It is incompatible with the Secretary of State's duty to act in accordance with Convention rights for the Secretary of State to accord ongoing policy support in his White Paper to the construction of a new runway at Stansted but then either positively to endorse or validate a scheme which fails to provide adequate protection to those impacted by generalised blight as a consequence of that runway and/or to fail to implement or procure the implementation of appropriate measures for the compensation of those affected by generalised blight. The learned judge erred in his conclusions that there was no arguable case that the Secretary of State has acted, and continues to act, contrary to his obligations under Article 8, Article 1 of Protocol 1 and Article 14 of the European Convention on Human Rights ("ECHR") in this regard.
47. The Judge's reasoning was as follows:
- a. As to Article 8 ECHR, the Judge acknowledged that in *Hatton v UK* the European Court stated that where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8. However, the Judge considered that diminution in the value of property as a result of plans for the expansion of an airport in the future did not engage Article 8. Further, Article 8 requires a balance to be struck between the competing interests of individuals and the public, provision has been made for individuals most affected, and this is an area in which the role of the domestic policy maker is to be accorded special weight (paragraphs 27 and 28).

- b. As to Article 1 Protocol 1, the Judge records that it is common ground between the parties that Article 1 of the First Protocol is engaged (paragraph 29). However, he considered that the HOSS satisfied the requirement of a reasonable relationship of proportionality between the means employed and the aim sought to be realised (paragraph 30). He did not think that the use of an inflexible noise contour was a disproportionate response (paragraphs 31 to 33).
- c. The Judge did not accept that the Government has struck a balance between the competing interests of property owners and the public at large in its policy as set out in the White Paper. He reiterated his conclusions that the White Paper is not capable of bearing the meaning for which the Claimants contend (paragraph 26).
- d. The Learned Judge doubted that Article 14 is engaged because the scheme did not distinguish between individuals and groups on the basis of personal characteristics. He further considered that any disagreement would be justified (paragraph 34).

a. Is Article 8 engaged?

- 48. At paragraph 27 the Learned Judge considered the present case to be “very different” from *Hatton v UK* because it concerned the possible diminution in value of property as a result of plans for the expansion of an airport in the future. This is not a satisfactory basis for concluding at the permission stage that it is not even arguable that Article 8 is engaged.
- 49. First, it is not understood why an impact on property values does not fall within the definition of “seriously affected by noise or other pollution” within the meaning of the test laid down by the Grand Chamber in *Hatton*. Indeed, the submissions on behalf of the UK government summarised at paragraph

106 of the judgment in *Hatton* make the point that “...the property market in the affected areas was thriving and that the applicants had not claimed they were unable to sell their homes and move”, indicating that property values were considered by the Government to be of relevance for the purpose of assessing impact under Article 8.

50. Second, although the HOSS aims to compensate loss in property value, it does so by reference to noise contour. Indeed, it was argued by BAA and the Secretary of State and accepted by the Judge, the adoption of a noise contour is a suitable proxy for the incidence of generalised blight. In those circumstances, there can be no basis for any logical distinction between compensation for noise pollution and compensation for loss in value of property by reference to noise pollution.
51. Third, if, which is not clear, emphasis is to be placed on the reference to matters taking place in the future, such emphasis would be misplaced. While the anticipated expansion is to take place in the future, the impact of generalised blight is felt now, and it is precisely this anomalous impact on residents of a future development which may or may not take place which the White Paper policy was intended to alleviate.

b. Striking a “reasonable balance”

52. The learned judge was wrong to conclude, in relation to both Article 8 and Article 1 Protocol 1, that there is no arguable case that the Government had failed to strike a reasonable balance between the competing interests of the individual and the public.
53. The Claimants’ case is put on two alternative grounds. First, the Government has already struck a balance between the competing interests of property owners and the public at large as required by Article 8 and Article 1 Protocol 1 in its policy as set out in the White Paper. Specifically, it has determined

that compensation should be available to “minimise” the impact of generalised blight. To the extent that the HOSS fails to implement the balance determined by the Government to be appropriate, the Secretary of State’s endorsement of the HOSS, and/or his failure to ensure that appropriate provision has been made to compensate for generalised blight, amounts to a breach of his Convention obligations.

54. Second, even if the White Paper policy is to have the meaning contended for by the Secretary of State and BAA, it still demonstrates that the Secretary of State considers that a fair balance entails the grant of compensation, even if only for those most seriously affected. In those circumstances, it is still for the Secretary of State to show that the fair balance identified was in fact achieved. For the reasons identified above, it is submitted that even the compensation of those most severely affected was not achieved.
55. The Judge has failed to grapple with this point. He simply reiterated his conclusions that the White Paper is not capable of bearing the meaning for which the Claimants contend (paragraph 26). For the reasons set out above, the Learned Judge erred in his conclusions in this respect.
56. In any event, given the requirements of proportionality and the Court’s functions in relation to that, the legality of the balance struck by the Secretary of State is a matter which requires full evidence and should properly be determined at the substantive hearing. The learned Judge erred to dismiss the Claimant’s case on the basis of proportionality at the permission stage.

c. Article 14

57. The Learned Judge erred in doubting that Article 14 is engaged because the scheme did not distinguish between individuals and groups on the basis of personal characteristics. Discrimination on the basis of property is one of the heads of discrimination expressly mentioned in Article 14. The scheme

operates in a discriminatory manner because it compensates home owners whose properties are located within the scheme boundary but not those located outside it, even if the extent of blight suffered by both is materially the same.

58. The Learned Judge also wrongly concluded at paragraph 34 that any discrimination would be justified, referring to reasons already given. As set out above, such reasons were in error.

VII. PROTECTIVE COSTS ORDER

59. The Learned Judge did not deal with the Claimants' application for a PCO, concluding that in the light of his refusal of permission, the further question of a PCO did not arise (paragraph 35). The Claimants now invite the Court of Appeal to deal with the application.

60. At paragraph 93 of their Summary Grounds of Defence [AB2/373] BAA sought an order that the Claimants pay their costs in the extraordinary sum of £23,585. This sum is ridiculously high and was described by Sullivan J as "*disproportionate*" [AB2/381-382], by Collins J as "*grossly excessive*" [AB2/469], and by Lloyd Jones J as "*extraordinarily high*" (paragraph 91). BAA further requested costs in the sum of £6,519.18 incurred in resisting the Claimants' application for a PCO [AB2/452]. In addition to BAA's costs, the Claimants also face the risk of potential adverse costs exposure to the Secretary of State.

61. The First Claimant is a parish council with very limited financial resources. It anticipates financing the instant litigation by means of levying an increased precept on the local district council, giving it a maximum of £70,000 budgeted over a 3-year period (Witness Statement of David Fossett at paragraph 8

[AB2/402]).³ It would inevitably be obliged to discontinue the application for judicial review if exposed to an indeterminable prospective liability for costs, particularly if such liability were to even approach the order of magnitude suggested by BAA (see the First Witness Statement of Richard Buxton at paragraphs 11 and 27 to 29 [AB2/390-391, 396-397]; and the Witness Statement of David Fossett at paragraphs 4 to 9 [AB2/401-403]).

62. The Second Claimant's position is set out in his Witness Statement [AB2/405-406]. Although he is currently indemnified by the First Claimant for his costs and costs exposure, he has no individual means of financing his claim. If his indemnity were to cease due to the First Claimant discontinuing its claim, Trevor Allen would also be obliged to withdraw rather than incur the financial risk of costs exposure.
63. The Claimants' primary concern is their potential exposure to the unquantifiable adverse costs of two sets of defendants. As to the costs order made by Lloyd Jones J at paragraph 108, namely that there be no order for costs against the Second Claimant and that the First Claimant will pay the First and Second Defendants' costs of the acknowledgment of service, to be assessed, the First and Second Defendants' costs of resisting the PCO, limited to the sum of £1,000, and the Secretary of State's costs of lodging written submissions, limited to the sum of £1,000, it is within the First Claimant's capability to accommodate these costs. However, it should be emphasised that the Claimants' primary concern is the exposure to *future* unquantifiable costs risks.
64. In the circumstances, the Claimants' application is for a PCO in relation to *prospective* rather than *antecedent* awards of costs in terms that there be no order for costs in any event, alternatively that the Claimants' liability to costs

³ Note the clarification in the Second Witness Statement of Richard Buxton at paragraph 15 [AB2/464-465] that the £70,000 is only available on a £20,000 per annum basis.

be strictly capped. The rationale for such an order, as explained in the Witness Statement of David Fossett at paragraphs 7 and 8 [AB2/402] is that it would enable the Parish Council to budget in advance for a fixed exposure to costs.

a. CPR Rule 44.3 and the Overriding Objective

65. The Court will be familiar with the rules governing the award of costs set out in CPR Rule 44.3. For completeness, these are set out below in so far as is relevant:

“44.3 (1) The court has discretion as to-

1. whether costs are payable by one party to another;
2. the amount of those costs; and
3. when they are to be paid.

(2) If the court decides to make an order about costs-

- (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
- (b) the court may make a different order.

...

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances...”

66. Additionally, CPR Rule 3.1(2)m gives the Court the power to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective. The overriding objective as set out in CPR Rules 1.1 and 1.2 includes dealing with cases justly, ensuring that the parties are on an equal footing and ensuring that a case is dealt with fairly. The Court must seek to give effect to the overriding objective when it exercises any power under the CPR or interprets any rule.

b. The Aarhus Convention

67. An important part of the Claimants’ application⁴ is as follows. In environmental cases, the starting point for the exercise of the above discretion

⁴ See the First Witness Statement of Richard Buxton at paragraph 23 [AB2/394-395] and the Second Witness Statement of Richard Buxton at paragraph 4 [AB2/461]

should not be the criteria laid down by the Court of Appeal in cases such as *Child Poverty Action Group*⁵ or *R (Corner House Research) v. Secretary of State for Trade and Industry*⁶ on which the Defendants place considerable reliance,⁷ but, rather, the obligations of the UK under the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“the Aarhus Convention” or “the Convention”), a copy of which is attached.

68. The UK ratified the Aarhus Convention on 24 February 2005. It provides in relevant part as follows:

“Article 1

OBJECTIVE

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

Article 2

DEFINITIONS

For the purposes of this Convention,

1. “Party” means, unless the text otherwise indicates, a Contracting Party to this Convention;

...

4. “The public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

5. “The public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

Article 6

PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES

⁵ (1999) 1 WLR 347 [AB41-64]

⁶ [2005] EWCA Civ 192 [AB64A-104]

⁷ Although, for the reasons set out in the statements of Mr Buxton, the Claimants say the conditions set out by the Court of Appeal in *Corner House* for the award of a PCO are in any event satisfied.

- a. Each party:
- (a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;
 - (b) Shall, in accordance with national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment ...

Article 9
ACCESS TO JUSTICE

...

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

- (a) Having a sufficient interest or, alternatively,
- (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be

given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

...

Annex I

...

8. (a) Construction of lines for long distance railway traffic and of airports with a basic runway length of 2,100m or more ...”

69. As will be evident from the above, the UK, as a Contracting Party to the Aarhus Convention, has undertaken to *guarantee* rights of access to justice in environmental matters in accordance with the provisions of the Convention. Article 9 of the Convention provides that a signatory must ensure that members of the public have access to administrative or judicial procedures to challenge both the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6, which includes decisions as to the construction of airports, and acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment, which include, it is submitted, human rights act protections. In particular, such procedures should be fair, equitable and *not prohibitively expensive*. There is an obligation to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to justice.

70. It is well established that in exercising a discretion, it is appropriate to take into account principles and obligations which arise from international treaties and conventions. Thus in *R v Secretary of State for the Home Department ex parte Venables*⁸, Lord Browne-Wilkinson considered the fact that the UK was a party to the United Nations Convention on the Rights of the Child to be a

⁸ [1998] AC 407

factor relevant to the exercise of a discretion as to the length of sentence for children convicted of murder. He said at 499E:

“The Convention has not been incorporated into English law. But it is legitimate in considering the nature of detention during Her Majesty’s pleasure (as to which your Lordships are not in agreement) to assume that Parliament has not maintained on the statute book a power capable of being exercised in a manner inconsistent with the treaty obligations of this country. ...The Secretary of State contends that he is entitled to fix a tariff which will endure throughout the childhood of the offender and that neither in fixing that tariff nor in considering any revision of it will he have any regard to the welfare of the child. Such a policy would infringe the treaty obligations of this country.”⁹

71. As a consequence of the above, it is submitted that, in environmental cases, the Court’s discretion to make a PCO must be exercised in a manner which is consistent with the obligations and principles of the Aarhus Convention. The Court of Appeal in *Corner House* clearly did not have within its contemplation environmental claims to which the Convention applies, and for this reason, the *Corner House* guidelines cannot be treated as comprehensive. Most particularly, criteria such as the requirement that the applicant has no private interest in the outcome of the case (which Collins J acknowledged might be too restrictive in any event [AB182]) should not be construed so as to bar the present Claimants from eligibility to obtain a PCO in otherwise meritorious circumstances.

c. PCO would be fair, just and in the public interest

72. It is submitted that the instant litigation is a classic example of a case in which a departure from the normal rule that costs follow the event should be permitted to enable litigation in the public interest to be brought without the risk of exposure to deterrent financial risks. The issues raised are of considerable general public importance. The Court has not yet had the opportunity to consider the extent and scope of the obligation under both

⁹ Similarly, see Munby J in *R (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin) at para. 52

general public and human rights law to alleviate the effects of generalised blight in the case of developments such as airports, road and rail links. This is a question of increasing environmental significance which the public interest requires to be resolved.

73. The litigation is brought by a public body of limited financial resources against *inter alia* a well-resourced public company and a government department. As detailed above, the Claimants simply do not have the financial resources to be able to risk proceeding with their claim in the face of an indeterminate prospective liability for costs. The costs claimed by BAA at this early stage in proceedings illustrate exactly why the pursuit of this claim might prove to be “*prohibitively expensive*” for the Claimants contrary to the dictates of the Aarhus Convention.

74. The Claimants’ claim, as reformulated, has clearly has considerable merit. For these reasons, it is submitted that the award of a PCO would be fair, just, and in the public interest. Considering the breadth of the discretion available to the Court, and the fact that the Court of Appeal in *Corner House* did not turn its mind to the particular circumstances of a case like the present, in particular the impact of the Aarhus Convention, it is respectfully submitted that the Court should have no reluctance in concluding that it would be appropriate to award a PCO in the terms sought by the Claimants.

VIII. CONCLUSION

75. For all the reasons set out above, the Court of Appeal is requested to:
 - a. Overturn the decision of Lloyd Jones J refusing the Claimant’s application for Judicial Review;

 - b. Grant permission to the Claimants to apply for judicial review;

- c. Grant permission to amend the Claimants' grounds as set out in the Amended Statement of Facts and Grounds; and
- d. Make an appropriate protective order in relation to costs.

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