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Case No: CO/11145/2009

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2011

Before :

LORD JUSTICE PILL

And

MR JUSTICE RODERICK EVANS

Between :

The Queen	
(on the application of Anne Marie Griffin)	<u>Claimant</u>
- and -	
London Borough of Newham	<u>Defendant</u>
- and -	
London City Airport Limited	<u>Interested Party</u>

Ms N Lieven QC and Ms S Blackmore (instructed by Friends of the Earth Rights & Justice Centre) for the Claimant

Mr S Pickles and Mr R Turney (instructed by London Borough of Newham) for the Defendants

Mr N King QC and Mr J Pereira (instructed by SJ Berwin LLP) for the Interested Party

Hearing dates: 18 & 19 November 2010

Judgment Approved by the court
for handing down
(subject to editorial corrections)

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Lord Justice Pill :

1. This is an application to quash the decision of Newham London Borough Council (“the Council”) on 9 July 2009 to grant consent to vary the conditions on the planning permission for operations at London City Airport. The Airport is situated in the London Borough of Newham and is within the East End of London. It mainly serves business flights. The conditions were varied so as to allow up to 120,000 flights a year as compared with the existing 70-80,000. On particular days, the increase could be as much as 100%. The total movements in 2006 were recorded at 79,616.
2. Mrs Anne-Marie Griffin (“the claimant”) chairs “Fight the Flights”, an unincorporated association established locally in 2007 to express concerns of local residents about the impact of London City Airport on residents, and its effect on the wider climate. London City Airport Limited (“the interested party”) have appeared before the court to support the Council’s submissions seeking to uphold the variation.
3. Two submissions are made by Miss Lieven QC on behalf of the claimant. First, the Council erred in law in granting the application to vary without considering a change in government policy and, secondly, it failed to consult the Councils of two London Boroughs, Waltham Forest and Redbridge, or the residents of those Boroughs.
4. The application for permission was made on 6 August 2007. It came before the Council’s Planning Committee on two occasions in 2008 on the second of which, on 8 October 2008, the Committee resolved that it was minded to grant planning permission subject to completion of an agreement under section 106 of the Town & Country Planning Act 1990 (“the 1990 Act”).
5. On 14 January 2009, consideration was again deferred as a result of representations made by Fight the Flights. Detailed reports were submitted by Officers for the meetings of July 2008, January 2009 and July 2009. In July 2009, the Officers recommended that the Development Control Committee confirm a resolution of 8 October 2008 to approve the application to vary the conditions, subject to a section 106 agreement, in accordance with terms set out in an appendix to the report and subject to conditions set out in the report. That recommendation was accepted by the Committee, the variation of conditions approved and permission granted.
6. The recommendation was expressed in these terms in the last paragraph of section 6.1 of the report:

“Due regard has been given to the ATWP [Air Transport White Paper] which advocates the growth of existing airports, but recognises that this must be balanced against adverse environmental consequences. Having assessed the information submitted with the application, and the additional information to complete the Environmental Statement Addenda, it is concluded that on balance the adverse impacts of the proposal are not such as would justify withholding consent in light of the benefits and the relevant policy considerations. This is considered to be a finely balanced decision which can only be made subject to securing more effective monitoring and mitigation of the airport’s impacts on the local environment

than are currently achieved. It is recognised that this consent allows the opportunity to secure improvements in this regard. Furthermore the restrictions on the airport's night time and weekend operation are maintained while that in respect of the potential impacts from early morning operation is improved. Approval is therefore considered appropriate subject to accompanying stringent conditions and a S106 agreement to mitigate the development's impact."

An identical statement as to the fine balance had been made in the July 2008 report.

7. The White Paper referred to was issued by the Secretary of State for Transport in December 2003 and entitled "The Future of Air Transport" ("ATWP"). The White Paper was based on a belief (paragraph 1.6) that:

"a national strategic framework for the future development of airport capacity, looking forward over a 30-year time horizon, is needed in order [amongst other things] to:

Provide a clear policy framework against which airport operators, airlines, regional bodies and local authorities can plan ahead.

The lack of such a framework has been a serious hindrance to the efficient development of airports in this country, resulting in over-lengthy planning enquiries and unnecessary delay."

It was noted at paragraph 2.5, that "Britain's economy is in turn increasingly dependent on air travel". The need for periodic reviews of the strategic framework set out in the White Paper was also recognised.

8. When considering, in section 11, the South East of England, the White Paper referred to the high demand for air journeys in the area, principally because of the nature and strength of the economy within the South East, and in London in particular. The main conclusion, at paragraph 11.6, was that "our first priority is to make the best possible use of the existing runways at the major South East airports". It was concluded that "there is scope for other existing South East airports, including London City, Norwich, Southampton and some smaller airports, to help meet local demand, and their further development is supported in principle, subject to relevant environmental considerations".
9. The White Paper acknowledged that "at the global level, the growing contribution to climate change and greenhouse gas emissions from aircraft is a cause for concern. It is a problem that can only be tackled effectively on an international basis". A section of the White Paper dealt with climate change and the growing contribution of air transport to climate change was noted (3.35). It was stated that the aviation sector needs to take its share of responsibility for tackling this problem. The Government was said to be committed to a comprehensive approach. Reference was made to fuel efficiency gains arising from fleet replacement and technology improvements. It was stated that "the best way of ensuring that aviation contributes towards the goal of climate stabilisation would be through a well-designed emissions trading regime". It

was added (3.42) that the Government recognises that such a regime “may not provide a total solution. In view of this, the Government will continue to explore and discuss options for the use of other economic instruments for tackling aviation’s greenhouse gas emissions”.

10. The White Paper was quoted at paragraph 10.5 of the July 2008 report:

“In policy terms, the national, regional and local planning policy framework support the principle of increasing the number of Total Aircraft Movements at LCA. The government Air Transport White Paper states that smaller airports in the South-East should be developed/enhanced to meet local demand subject to relevant environmental considerations. In particular, the White Paper, in relation to LCA, states ‘London City provides services within the UK as well as to a wide range of key European destinations such as Paris, Amsterdam and Zurich. Our forecasts show that the airport is likely to grow steadily and that this growth would not be significantly affected by the addition of runway capacity at the major London airports. It is particularly well placed to serve a niche business market. Several of the surrounding local authorities supported growth to 5mppa’”.

11. Paragraph 2.19 of the July 2009 report dealt with a submission, summarised at its paragraph 2.17 that, because of uncertainties raised by the Committee on Climate Change (“CCC”), “the planning assessment under climate change for these proposals should be reconsidered”.

12. It was stated:

“Climate change was considered in Section 10.12 of the original Committee report (Appendix 10) and officers are of the view that the Government has not made any material change in either climate change policy or to policy on aviation/airport capacity. Indeed recent statements and publications from the Government indicate that its approach to the future of aviation remains unchanged. In considering this issue, particular consideration has been given to Planning Policy Statement 1 Supplement on Climate Change, which sets out that in the determination of planning applications, planning authorities should consider the likely impact on the vulnerability to climate change. The points made by FOEJC [Friends of the Earth Rights & Justice Centre] are noted, but it is considered that the key consideration in terms of the decision before the Committee is that Government policy on climate change and aviation remain unchanged. The conclusions of previous reports to Committee on the issue of climate change and Government policy therefore remain valid and the matters raised by FOEJC do not alter the previous conclusion reached on that issue. By way of an update new Government regulations, which came into effect from the end of May 2009,

now adjust the government target for reducing greenhouse gas emissions from 26% to 34% by 2020. However, it is still concluded that this does not change the assessment or conclusions in respect of the consideration of these proposals.”

13. As a part of a proposed statement of reasons for approval, the July 2009 report summarised the relevant parts of the ATWP and considered its effect:

“The Air Transport White Paper (ATWP) and Progress Report sets out the national policy framework and national aviation policy. The ATWP recognises the importance of air travel to national and regional economic prosperity, and that not providing additional capacity where it is needed would significantly damage the economy and national prosperity. The ATWP also recognises that increasing airport capacity must be balanced by the need to have regard to the environmental consequences of air travel. Accordingly, the ATWP supports a balanced approach to aviation growth and adverse environmental impacts should be controlled, mitigated and, where relevant, made the subject of suitable compensation. The ATWP also encourages the best use of existing infrastructure. In relation to London City Airport (LCA), the ATWP states that it is well placed to serve a niche business market and that it continues to be an important factor in local regeneration, business development, transport and tourism infrastructure.”

14. The July 2009 report provided that it was to be read as an update to previous reports. The July 2008 report had considered the ATWP in more detail under the heading “Climate Change”. It was acknowledged, at 10.13, and Miss Lieven relies on the acknowledgement, that: “a critical consideration of this proposal is the impact it may have on climate change”. Paragraph 10.14 provided:

“It is generally accepted by all parties that increased levels of aviation will increase greenhouse gas emissions and that this can lead to adverse global climate change. It is considered that the current position on climate change and how to manage these impacts is largely determined by the government’s position and policies. The climate change impacts from aviation and the government’s position on managing these impacts are discussed in the Air Transport White Paper (ATWP) and the Government’s strategy on climate change ‘Towards a Suitable Transport System’ (“TSTS”). The TSTS confirms that the Government considers that economic growth and controlled growth of aviation are consistent with its long-term objective of reducing carbon dioxide emissions by 60% from current levels by 2050. The Government accepts that the best way to ensure the aviation sector contributes to managing these effects is through the use of fiscal incentives, for instance Air Passenger Duty, and extension of the European Union Emissions Trading Scheme.”

15. The Officers' conclusion was stated at 10.17:

“Given this, it is considered that the proposal does not raise any issues directly impacting on climate change that runs contrary to the stated aims and policies of the National Government. It is also considered that the direct impacts of the proposal on climate change, energy efficiency and sustainability can be suitably mitigated through the use of conditions and s106 clauses.”

The impact of the proposal on the local environment, including its noise impact, was considered in the report.

Submissions on Ground 1 and documents relied on

16. The central submission made on behalf of the claimant is that, in January 2009, between the dates of the 2008 and 2009 reports by officers, there was a fundamental change in government policy towards aviation and climate change. On 15 January 2009, Mr Geoff Hoon MP, Secretary of State for Transport, made a Parliamentary statement. No account was taken of the change, it was submitted, in the report to Committee in July 2009, on which the Committee relied. Miss Lieven relied in particular on two statements in Mr Hoon's statement to support the submission:

“I can announce that we will establish a new target to get aviation emissions in 2050 below 2005 levels and I have asked the Committee on Climate Change to advise on the best basis for its development.”

“So, Mr Speaker, we are effectively taking three steps to limit any increase in carbon dioxide emissions . . . Third, we will establish a new target to limit aviation emissions in the UK to below 2005 levels by 2050.”

In the same statement, the Secretary of State announced the Government's support in principle for the expansion of London Heathrow Airport with a third runway and sixth terminal. Support for the third runway has since, of course, been withdrawn.

17. In the House of Commons on 23 April 2009, the Secretary of State for Energy and Climate Change, Mr Edward Milliband confirmed the 2050 target:

“Tackling the impact of climate change on aviation is a key priority. That is why we led the way in ensuring that EU emissions trading scheme would cover aviation emissions for the first time from 2012. It is also why we are the first Government in the world to make a commitment to returning aviation emissions to their current levels by 2050. We are also striving to ensure that international aviation is part of global climate change agreements.”

18. Miss Lieven submitted that the announcement demonstrated a fundamental change of approach. Before the announcement, the policy had been that aviation emissions

could be controlled and reduced solely through the Emissions Trading Scheme (“ETS”). What was now introduced was an absolute cap on aviation emissions to be achieved by 2050.

19. In subsequent Government statements, the new target has been repeated. The new policy should have been drawn to the attention of the Committee, it was submitted, and the absence of a reference led to a failure to take into account a highly material consideration. Miss Lieven accepted that the ATWP and subsequent Progress Report of 2006 set out and continue to set out Government policy but submitted that from January 2009 there was another critical strand to that policy which should have been taken into consideration.
20. The CCC responded to the request made by Mr Hoon in his January 2009 statement and published a report in December 2009 entitled “Meeting the UK Aviation Target – Options for Reducing Emissions by 2050”. That report of course post-dated the Council’s decision. It did assume, amongst other things, “increases in capacity resulting from more efficient use of existing runways, or changes in planning permission” at, amongst other airports, London City Airport. A “maximum increase in ATMs [air traffic movements] of about 55% between now and 2050” was contemplated. However, Miss Lieven referred to the Executive Summary of the report, where it was stated that there would need to be some restriction (3.4 million ATMs as against a possible capacity of 4 million ATMs by 2050) on full utilisation of planned capacity at existing airports. The report had assumed that there would be an increase in capacity at Heathrow from 480,000 ATMs to 702,000 ATMs.
21. In support of her submission that, until January 2009, Government policy was to control aviation emissions solely through the ETS, Miss Lieven referred to the statement in the Executive Summary of the ATWP that “the White Paper sets out proposals to bring aviation within the European Union Emissions Trading Scheme, to help limit greenhouse gas emissions”. No absolute limit was expressed in that document.
22. Miss Lieven sought to rely on the decision of Carnwath LJ, sitting in the Administrative Court on 26 March 2010, in *R (London Borough of Hillingdon & Ors) v Secretary of State for Transport & Anr* [2010] EWHC 626 (Admin). That was a challenge to the then existing Government policy support for the expansion of Heathrow and in particular the support in principle for a third runway already mentioned. It was not a challenge to a planning decision but the judge was invited to consider the relevance of a change in Government policy to possible future decisions also at Heathrow. Carnwath LJ referred to Government documents, including the new target that aviation emissions be capped in 2050 below the 2005 levels. Carnwath LJ stated, at paragraph 73, that “the most significant seems to me to be the 2050 cap”. At paragraph 75, he stated that he understood the evidence for the Secretary of State to accept that the target may require some constraint on overall growth in aviation demand.
23. At paragraph 77, Carnwath LJ stated that the claimants’ submissions added up, in his view, “to a powerful demonstration of the potential significance of developments in climate change policy since the 2003 White Paper. They are clearly matters which will need to be taken into account under the new Airports NPS” [National Policy Statement]. However, Carnwath LJ added, at paragraph 78:

“Finally, I am not able, at least on the material before me, to hold that any of these points amounts to a ‘show-stopper’, in the sense that the only rational response would be to abandon the whole project at this stage.”

24. The Council should have grappled with the consequences of the January 2009 announcement, it was submitted. Members could have said that the application to vary was inconsistent with it or they could have refused permission on the basis that the policy was unclear. They could have appraised policy and, as a matter of law, were not debarred from granting planning permission but were not entitled to ignore the statements. An important tool in limiting aviation emissions is to restrict the capacity of airports and the Council was required to take the 2050 target into account when making a decision. When considering an application involving an increased capacity, the declared 2050 target must be taken into consideration, it was submitted. If the target is to be achieved, an early start to limiting capacity is inevitably required.

25. Mr Pickles, for the Council, and Mr King QC, for the interested party, referred to Mr Hoon’s statement, and to a series of other documents and statements, to support the submission that the announcement of the target had not involved a change in planning policy which the Council was required to take into account in making its decision on this application. A different policy did not emerge at the time of the announcement or up to July 2009 when the decision was made. Nowhere in Mr Hoon’s statement, submitted Mr Pickles, is there an expression of intention to depart from the ATWP. When announcing the target for 2050, Mr Hoon also stated:

“Work published by the aviation industry already illustrates how it could reduce United Kingdom emissions below 2005 levels by 2050. This could include the use of new technologies like blended wings and through the sustainable introduction of renewable fuels.”

26. Moreover, the target was stated in the context of contemplated future capacity increase at Heathrow which was said by Mr Hoon clearly to need “new capacity as soon as possible so as to reduce delays and improve resilience”. In a press release which accompanied the statement, it was stated that, in the light of the decision to set a UK target to reduce aviation carbon emissions in 2050 below the level of 2005, the CCC had been invited to assess, amongst other things, “the scope for reductions, including from improvements in technology and the effect of appropriate policy levers; and the implications of further aviation expansion beyond 2020”. While a target had been announced, the policies required to achieve it were yet to be stated, it was submitted. Neither in the Ministerial statement nor in the press release was it suggested that, in making development control decisions, a new or different policy was to be applied.

27. The announcement of a target was also put into context, it was submitted, in a statement of Lord Adonis, newly appointed Transport Secretary, on 24 June 2009:

“And in respect to aviation which is the hot and controversial topic we’ve said that where there are increases in aviation capacity this must go with tight controls on the environmental impacts of airports, but also of a commitment on the part of the

aviation industry to a big reduction over time in carbon per plane and we have also set a new target, we're the first Government in the world to set a target like this that by 2050 the carbon emissions from aviation should be lower than they were in 2005."

28. Thus, it was submitted, the policy by which the target was to be achieved had not been announced by July 2009. Moreover, the perceived need, expressed in Mr Hoon's statement, for advice from the CCC was inconsistent with there having been prior changes of policy. The policies in the ATWP still operated, it was submitted, and this was recognised in the claim form itself which, having referred to the target, stated, at paragraph 26:

"It is true to say that the Government has not yet set out how this new target affects the policies in the ATWP, but the issue here is that there plainly had been a change of policy in respect of the key consideration of Government policy on climate change, even though that policy may (and probably will) require further clarification."

29. On 30 June 2009, Mr Paul Clarke MP, Parliamentary Under-Secretary of State for Transport, made a statement that the Government "remain committed to our strategy for aviation set out in the Air Transport White Paper. The biggest challenge of all is to make sure that we have the necessary airport capacity to support UK economic competitiveness, while also ensuring the environmental impacts of aviation are minimised". Mr Clarke referred to the 2050 target and stated:

"This is a challenging target, but it can be achieved over time and in a number of ways. Aircraft are becoming more efficient and almost all of our airlines are now making major efforts to find cleaner ways of operating."

Mr Pickles submitted that it follows that the ATWP's policy requirement that best use should be made of existing airport capacity, subject to detailed environmental appraisal, was maintained. The statement of a target did not require or suggest that a different approach to the application for planning permission at London City Airport should be adopted. The means by which the target was to be achieved were to be expressed, with advice from the CCC. It was not the Council's task to anticipate changes of policy. The position was accurately set out, it was submitted, in paragraph 2.19 of the July 2009 report, already cited.

30. The Department of Transport's Annual Report and Resource Accounts 2008-09, printed by order of the House of Commons on 16 July 2009, noted that aviation will join the European Emissions Trading System in 2012 and that the system would lead to a large reduction of carbon dioxide by 2020. However, the section of the report on protecting the environment (chapter 6) referred to the Government working on "an ambitious package of measures to address international aviation emissions". At paragraph 6.16, it was stated:

"In January 2009 the Secretary of State announced the establishment of a new target to reduce CO₂ emissions from UK

aviation in 2050 to below 2005 levels. The Committee on Climate Change (CCC) has been asked to advise on this target by December 2009, considering the scope for emissions reductions, including those from technological improvements, and on the best basis for measuring progress. We expect the target to drive innovation and the uptake of new technology within the UK fleet and to ensure that the industry plays its full role.”

31. A duty to advise the Secretary of State on the consequences of treating emissions of targeted greenhouse gases from international aviation and international shipping as emissions from sources in the United Kingdom is now imposed on the CCC by section 35 of the Climate Change Act 2008. The Act states a target in relation to the net UK carbon account in section 1 and in section 13 a duty is imposed on the Secretary of State to prepare such proposals and policies as the Secretary of State considers will enable the carbon targets which have been set under the Act to be met. The approach in the statute does not, it was submitted, support the suggestion that the announcement of a target itself requires attention in development control decisions. As with the target announced by Mr Hoon, policies to achieve it will be devised by the Secretary of State.
32. For the interested party, Mr King QC commented that none of the three grounds of appeal were raised when the planning application was being considered and it appears that no one thought them material at the time, though representations were made by Friends of the Earth, who had opposed the application. None of the many objectors referred to an alleged change in Government policy. What would become policy are the statements of the means by which the target for 2050 is to be achieved. This will be expressed in a national policy statement, informed by the CCC. How the target is to be achieved is not for a local planning authority to decide on an ad hoc basis and in the absence of national policy guidance.
33. The continued operation of the ATWP was confirmed, Mr King submitted, in the Department of Transport publication “Delivering a Sustainable Transport System”: main report of November 2008. Mr King submitted that without further policy explaining how, if at all, the new target was to influence development control decisions, the mere adoption of a target cannot of itself be capable of affecting the outcome of the planning application. The question of how a strategic target is to be met is a matter for Government policy based on technical, economic and political considerations. It was not for the defendant to engage in speculation about how the emissions target might translate into development control policy.
34. In Mr Hoon’s statement itself, the announcement of the target follows and flows from his statement that the means by which emissions could be reduced “could include the use of new technologies like blended wings and through the sustainable introduction of renewable fuels”. No embargo on expansion was revealed. A range of measures had also been proposed in the ATWP, in Mr Miliband’s statement of 23 April 2009 in relation to the need for expansion of aviation, in Lord Adonis’s statement of 24 June 2009 and in Mr Clarke’s statement of 30 June 2009. As well as ETS, more efficient aircraft were contemplated, cleaner ways of operating, new measures for air traffic control and international co-operation. Mr Clarke had also noted that the “underlying long-term demand for air travel remains strong”.

35. The Department of Transport publication “UK air passenger demand and CO₂ forecast”, of January 2009 referred to “a comprehensive approach to reduce aviation’s climate change impacts. This includes supporting and encouraging research and development in new technology, improvements in air traffic management, the development and adoption of better operating practices and the use of economic instruments. It was recognised that no single measure provides a complete solution to aviation’s climate change impact”. (Paragraph 114 page 178)).
36. Reference has been made to the CCC’s conclusion that future aviation policy should be designed “to be compatible with a maximum increase in ATMs of about 55% between now and 2050”. At the launch of the CCC’s report on 8 December 2009, Lord Adonis referred to the announcement of the 2050 target and added that “the Government welcomes the Committee’s advice. I accept the Committee’s view that a 60% increase in passenger numbers and 54% increase in flight numbers is compatible with the 2050 target”. Lord Adonis also stated:
- “In that spirit let me say without qualification that I welcome the CCC’s analysis and advice. The Government will now engage in further work, in particular costing and assessing the policy options available to us, to enable us to give effect to the committee’s advice, and this further work will be reflected in the National Policy Statement on Airports which is to be published in 2011.”
37. On 15 December 2009, Mr Clarke was asked in the House of Commons about the grant of the planning permission now challenged. It would not of course go to save an unlawful permission but Mr Clarke, having said that the decision to grant the planning consent was entirely a matter for the London Borough of Newham, added that “expansion of the airport is consistent with the Government’s view that there is considerable potential for airports like London City to grow, and the airport is well placed to serve a niche business market”.

Conclusions on Ground 1

38. I do not accept that there was a relevant policy change which ought to have been brought to the notice of the Committee on 9 July 2009. I substantially accept the submissions of Mr Pickles and Mr King. The ATWP remained the appropriate policy statement. Read as a whole, the statements made and documents issued between December 2008 and July 2009 do not demonstrate a change of planning policy relevant to the decision to be made by the Council in July 2009. Mr Hoon’s statement of 15 January 2009 announcing a target for aviation emissions in 2050, neither expressly nor by implication, created a limit on increased capacity at existing smaller airports in the South East such as London City.
39. In the ATWP, the first priority was stated to be to make the best possible use of the existing runways at the existing airports in the South East, including London City. On any application, environmental considerations were to be taken into account, as they were by the Council in this case. Shortly before the Council’s decision, Mr Clarke, Parliamentary Under-Secretary of State for Transport, stated that the Government remained committed to the strategy for aviation set out in the ATWP.

40. I do not accept Miss Lieven's submission that policy before Mr Hoon's announcement was that aviation emissions could be controlled and reduced solely through the ETS and that the announcement of a target for 2050 indicated a fundamental change of approach. The need for a comprehensive approach was expressed in the ATWP. Reference was made to fuel efficiency gains arising from fleet replacement and technological improvements. While a thorough and well designed ETS was given priority, other options would be explored and discussed, it was stated.
41. The announcement of the target by Mr Hoon was closely linked with his statement that the use of new technologies such as blended wings and the sustainable introduction of renewable fuels could contribute. In June 2009, the newly appointed Transport Secretary, Lord Adonis, also referred to the need for the aviation industry to produce a big reduction over time in carbon per plane. In June 2009, Mr Clarke referred to ways in which the target may be achieved; improvements in aircraft efficiency and cleaner methods of operating. Neither statement signalled a change from the policy of providing increased airport capacity in the South East. The Department of Transport publication of January 2009, cited at paragraph 35 above, also referred to a range of measures which could reduce aviation's climate change impact.
42. Integral to Mr Hoon's statement of 15 January 2009, when announcing the target, was that he had asked the CCC to advise on the best basis for its development. That is a clear indication that the means of achieving the target had not been decided upon and that reliance would be placed on the requested report of the CCC. Their report post-dated the decision challenged but is significant in confirming the policy of increases in capacity at, amongst other airports, London City Airport. Some restriction on development to full utilisation of planned capacity at existing airports in the UK was contemplated but in a scenario in which a large increase in capacity at Heathrow was then expected and in which an increase in ATMs of about 55% by 2050 was considered acceptable. That must require a substantial increase in runway capacity.
43. Lord Adonis accepted in December 2009 that such an increase in flight numbers is compatible with the 2050 target. In his parliamentary statement of 15 December 2009, Mr Clarke confirmed the Government's view that there is considerable potential for airports like London City to grow. These statements post-date the decision but go to confirm that Mr Hoon was not stating a change of policy relevant to the present application when he announced a target for 2050 in January 2009.
44. I do not consider that the *Hillingdon* decision assists the claimant. Carnwath LJ referred to matters, particularly the 2050 target, which will need to be taken into account under a new National Policy Statement but Carnwath LJ was not required to focus, and did not focus, on a decision such as the present to be made in the meantime.
45. When making his announcement on 15 January 2009, the Secretary of State expressly requested CCC's advice as to policy. It was not for the Council to work out a new policy in the meantime. The Council would, in my judgment, have been wrong to do so. The important questions which arise call for national guidance and not speculation by a local planning authority as to the effect of a target announced for 2050.

Grounds 2 and 3

46. It is the noise impact of the variation that gives rise to these grounds which are based on a failure to consult the London Boroughs of Waltham Forest and Redbridge, and their residents. These Boroughs adjoin the territory of the London Borough of Newham on the north side. Other adjoining Boroughs, Tower Hamlets, Greenwich, Barking & Dagenham and Havering were consulted.
47. The airport is in the extreme south of the London Borough of Newham and the runway runs from east to west. At the nearest point, both Waltham Forest and Redbridge are over 4 km to the north of the runway.
48. Under regulation 10(1)(a) of the Town & Country Planning (General Development Procedure) Order 1995 (SI 1995/419) the Council were under a duty to consult other local planning authorities where development was “likely to affect land” in their area. The decision as to which Boroughs to consult was taken by Mr Sunil Sahadevan, Team Leader of the Royal Docks Area Team in the Council’s Development Control Division. The noise impact of the proposed variation was considered in the Environmental Statement which had been prepared. It included a plan depicting the predicted noise contours that would result from implementation of the proposals and Mr Sahadevan based his judgment about which local authorities should be consulted under regulation 10(1)(a) on those contours, though not inflexibly so. In his opinion, the most significant noise contour for present purposes is the 57dB LAeq, 16h (“dB”) contour. In an exercise of discretion, the Borough of Barking and Dagenham was consulted as having land close to the 57 dB contour.
49. Miss Lieven accepted that a judgment had to be made. The judgment should have been made on a consideration of whether the development “affects” the Borough concerned, and the word “affect” is not qualified by, for example, the word “significant”, or stated to be “an effect amounting to annoyance”. The Council could not rationally conclude that only areas within the 57dB contour were likely to be “affected”, it was submitted. Had Waltham Forest and Redbridge been consulted under regulation 10, there is reason to believe that they would have objected to the proposal and views of other London Boroughs are necessarily important in the assessment process.
50. In his statement, Mr Sahadevan said that, in October 2007, he did consider whether Waltham Forest and Redbridge should be included in the consultation process. He decided against doing so having regard to the distance north of the 57 dB contour of the nearest boundary of the Borough, 4.5 km in the case of Waltham Forest and 3.9 km in the case Redbridge.
51. Unsurprisingly, the contours have an elongated, sausage shape running from east to west. That is because the runway is oriented from east to west and aeroplanes must take off and land in one of those directions. Any banking to the north must to some extent be deferred and when reaching or leaving Waltham Forest and Redbridge, about 4 km away, planes will be at a considerable height. The July 2009 report referred to the “slight implications” of proposed changes in flight paths for the exact position of the 57 dB contour. The change was not considered significant and, in my judgment, and having regard to the geography, rightly so for present purposes.

52. Planning Policy Guidance 24: Planning and Noise, Annex 2 (1994) (“PPG 24”) is headed “Noise Exposure Categories: Explanation of Noise Levels”. In relation to daytime, it is stated:

“In respect of air traffic noise a considerable amount of research has been carried out. 57dB . . . relates to the onset of annoyance as established by noise measurements and social surveys.”

There are to be no night-time flights at London City Airport but it is noted in the document, without comment, that for air traffic, the level proposed to trigger the recent grant scheme at Stansted Airport has been adopted. This level is the 57 dB contour value.

53. A plan has been prepared showing the 54 dB contour. It has not brought that level of noise significantly closer to Waltham Forest and Redbridge. PPG 24 provides that “a change of 10 dB(A) corresponds roughly to halving or doubling the loudness of a sound”. In Annex 3, it is stated, at paragraph 8 that, with respect to exposure to aircraft noise, 60 dB should be regarded as a “desirable upper limit for major new noise sensitive development”.

54. In the Environmental Statement Addendum of December 2007, reference was made to a study of the Attitudes to Noise from Aviation Sources in England (“ANASE”). That suggested that “instead of adopting a noise level of 57 dB as the onset of significant community annoyance, a level in the order of 50 dB (or even lower) would be the appropriate level”. At paragraph 2.2.62, of the Addendum, it was stated:

“At London City Airport, this finding is surprising and in contrast to the community response which the Airport has received over the years regarding environmental noise. The current record of noise complaints received by the Airport annually is low and has remained reasonably consistent, as is apparent from the table below.”

In the following paragraph, it was commented that aircraft activity at night is one of the matters raised in the ANASE study as giving rise to adverse community response, over and above that recorded during the day. Night flights are not contemplated at London City Airport.

55. These issues were analysed in the report of January 2009. It was stated:

“8.3.5 The ES states that it follows current Government guidance in adopting the noise contour band of 57dB LAeq, 16h as the threshold for the onset of significant community annoyance. In the context of the dwellings, it is understood that the current scheme of noise insulation to those premises within the 57dB(A) contour would continue, thus providing the opportunity for mitigation to those newly affected.

...

8.3.11 The ES states that at the request of LB Newham, the results of the recent Attitudes to Noise from Aircraft Source in England (ANASE) study and the relevance of this study to the Airport has been considered. The ANASE study suggests that the onset of significant community annoyance occurs at a lower level than previously thought i.e. at just over 50 dB LAeq, 16h rather than 57 dB LAeq, 16h. However, concerns have been expressed about the robustness of the study so care has to be taken of relying in detail on these results. Nonetheless, it is generally felt that people are more annoyed by aircraft noise than used to be the case.”

56. While extrapolation of contours may not be straightforward, it has not been suggested other than that the level at the Waltham Forest and Redbridge boundaries would be significantly lower than 54 dB. There was consultation with Havering, which is substantially farther away from the airport than Waltham Forest or Redbridge but that is said to have been over-consultation. Nothing turns on it.
57. In her reply, Miss Lieven’s emphasis changed. Reliance was placed not on noise levels scientifically calculated but on evidence that the people of Waltham Forest are disturbed by the aircraft. Reliance was placed on a letter from a resident dated 19 August 2009 in which it was stated that “these planes are very noisy especially when they turn”. A letter printed in a newspaper on 27 August 2009 from a resident stated that “suddenly, this summer, I have become aware of the noise caused by passenger aircraft frequently flying over Leytonstone and other parts of Waltham Forest”. Reference was made to the number of aeroplanes in the sky. The writer urged “politicians of all parties to fight this”. Miss Lieven submitted that residents can be seriously disturbed outside the 57 dB contour and that the two Boroughs could not reasonably be excluded from the consultation process.
58. In my judgment, the claimant falls far short of establishing that the decision not to consult Waltham Forest or Redbridge was irrational. It was not irrational to base a decision on the effect of noise on scientifically prepared noise contours and it was not irrational to choose 57 dB as an appropriate level for decision. The evidence demonstrates a level lower than 54 dB at the boundaries to the Boroughs, and probably much lower.
59. Moreover, if the need to exercise discretion should arise upon a breach of regulation, which in my judgment it does not, the absence of any timely objection from the two Boroughs is significant. As Mr King has submitted, given the nature of the development proposed, and the very considerable work that went into it, it is not conceivable that the officers of the two Boroughs, and at least some of their members, were unaware of the proposals. They were not objectors to the proposal and are not parties to the present proceedings.
60. There is evidence that senior officers of the two Boroughs had been kept informed of developments at the Airport. Neither Borough responded to the consultation on the draft Master Plan and neither accepted the invitation to attend a presentation in May 2006. Concerns were not expressed at that time, though there was, of course, no planning application then in existence. It should be added that complaint about the failure to have consulted was made by Waltham Forest in October 2009 and by

Redbridge in November 2009, that is some time after the decision had been made. Correspondence with Redbridge followed.

61. On ground 3, which clearly has considerable overlap with ground 2, Miss Lieven relied on article 6.4 of Council Directive 85/337/ECC which provided that:

“The public concerned shall be given early and effective opportunity to participate in the environmental decision-making procedures.”

involving proposed developments. Advertisements could have been placed in local newspapers and notices in public libraries. Where appropriate, individual notice to persons likely to be affected was required (Regulation 13 of the Town and Country Planning (Environmental Impact Assessment) Regulations 1999, as amended (SI 1999/293).

62. To counter the submission that the level of complaint about London City Airport was extremely low, Miss Lieven relied on the perceived absence of value in complaining and lack of knowledge as to where complaints should be registered and as to how to complain. Waltham Forest recorded that there was a total of only 7 complaints reported to them in the 3 years up to 2011. In the case of Redbridge, the figure was 7 complaints in 6 years.
63. I do not consider that the breach of duty alleged in ground 3 is made out. The evidence in support of it does not enhance the submission under ground 2. In my judgment, no breach of duty has been established on grounds 2 and 3. Even if there was a breach, it was not of such significance on the evidence as to merit the quashing of the planning permission.
64. I would refuse this application.

Mr Justice Roderick Evans :

65. I agree.

