

Case Name: *Ross & Anor (Acting On Behalf of Stop Stansted Expansion) v Secretary of State for Transport* [2020] EWHC 226 (Admin) (07 February 2020)

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Commentary: The High Court dismissed the challenge brought on behalf of Stop Stansted Expansion to the Secretary of State for Transport decision not to treat the application for planning permission for development at Stansted Airport as a Nationally Significant Infrastructure Project (NSIP). The application involved new taxiway links and aircraft stands and an increase in the planning cap of 35 million passengers per annum (mppa) to be increased to 43 mppa.

Under section 23 of the Planning Act 2008, airport-related development is to be treated as an NSIP in the case of any "alteration" to an airport the effect of which is "to increase by at least 10 million per year the number of passengers for whom the airport is capable of providing air passenger transport services". The Claimant argued that the airport's proposals would lead to an increase of greater than 10 mppa because the Secretary of State should have considered the total passenger capacity which it was theoretically possible might be created by the works. The judge held that the Secretary of State was required to form a judgment by asking what increase in capacity could be realistically achieved, not what might technically or arithmetically be possible. In addition, the Secretary of State had not left material considerations out of account so the Secretary of State's interpretation of the statutory test was sound and a reliable basis for taking the decision as to whether or not the proposal was an NSIP.

The judge did agree that the works did amount to an alteration to a runway within the meaning of section 23(6) because the statute uses the word "includes" so even though the works did not directly affect the runway the Secretary of State was entitled to conclude that works could constitute an alteration for the purposes of section 23(6).

The Secretary of State also has a discretionary power under section 35 of the Planning Act 2008 to treat a project as an NSIP if the Secretary of State considers that the project is of national significance either by itself or when considered with one or more other projects (or proposed projects) in the same field. The Claimant's second ground was that the Secretary of State should have exercised his discretion to treat the proposal as an NSIP. The Claimant made several contentions as to why the decision was flawed. These included that the Secretary of State should have taken account of the fact that the proposal was part of a larger project to expand above the NSIP threshold in future but the judge considered the material before the Secretary of State and was not satisfied that it could have led to him properly concluding that the application he was considering was part of a wider or larger project.

The Claimant also criticised the Secretary of State's conclusion that the carbon emissions caused by the proposed development could be properly regarded as within the scope of the Government's policy on making best use of existing runways (MBU Policy). The claimant's submissions was that the MBU carbon emissions modelling was flawed and had "underestimated the effects of growth in aircraft traffic at Stansted airport". The judge accepted the Secretary of State's submission that in "reality this aspect of the Defendant's decision was essentially based on reliance on the MBU policy, and that the substance of the

Claimants' case is in fact a challenge to the legality of that policy in disguise. Certainly, the legality of that policy is now beyond argument. As such I accept that the Defendant was, lawfully, entitled to reach the conclusion which he did, based squarely on the MBU policy that "an increase in the planning cap at [Stansted]...could be adequately mitigated to meet the CCC's 2050 planning assumption". That was a conclusion which applied the provisions of the MBU policy which had considered that proposals of this scale would not imperil the achievement of climate change targets in the light of the modelling work which had informed the policy."

For further discussion see *Simoncity*

Case summary prepared by Susannah Herbert