Neutral Citation Number: [2017] EWHC 121 (Admin)

Case No: CO/6287/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2017

Before:

THE HON. MR. JUSTICE CRANSTON

- -

Between:

	(1) LONDON BOROUGH OF HILLINGDON **(2) LONDON BOROUGH OF WANDSWORTH** **(3) LONDON BOROUGH OF RICHMOND-UPON-THAMES** **(4) ROYAL BOROUGH OF WINDSOR AND MAIDENHEAD** **(5) GREENPEACE LIMITED** **(6) CHRISTINE TAYLOR**	**Claimants/ Respondents**
	- and -	
	THE SECRETARY OF STATE FOR TRANSPORT **- and -** **(1) THE DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS** **(2) HEATHROW AIRPORT HOLDINGS LIMITED** **(3) GATWICK AIRPORT LIMITED** **(4) TRANSPORT FOR LONDON** **(5) THE MAYOR OF LONDON**	**Defendant/ Applicant** **Interested Parties**

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Mr Martin Chamberlain QC and **Mr Richard Wald** (instructed by **Harrison Grant**) for the **Claimants/Respondents**
Mr James Maurici QC, **Mr David Blundell**, **Mr Andrew Byass** and **Ms Heather Sargent** (instructed by the **Government Legal Department**) for the **Defendant/Applicant**

Mr Stephen Tromans QC and **Ms Catherine Dobson** (instructed by **Transport for London In-House Solicitors**) for the **4th and 5th Interested Parties**

Mr Gerry Facenna QC in attendance at the hearing for the **2nd Interested Party**

Hearing date: 19 January 2017

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Approved Judgment

Mr Justice Cranston:

Introduction 1. The claimants seek by way of judicial review to challenge a decision of the Secretary of State for Transport ("the Secretary of State") of 25 October 2016. The decision selected for inclusion in a draft National Policy Statement ("NPS") a proposal for a third runway at Heathrow Airport. The decision was taken under the Planning Act 2008 ("the 2008 Act").

2. In the judicial review the claimants advance grounds that the proposal involves a flawed approach to air quality and that the decision is contrary to their legitimate expectations because the government made repeated promises over a number of years that there would be no third runway at Heathrow. The claimants are the local councils around Heathrow, where some one million people reside, the well-known NGO, Greenpeace, and a local resident, Mrs Christine Taylor. At the hearing they were supported by the fourth and fifth interested parties, Transport for London and the Mayor of London ("TfL/ the Mayor"), who agree with the claimants in their challenge regarding air quality.

3. The Secretary of State contends that there is an insuperable obstacle to the claim proceeding because under the 2008 Act the court has no jurisdiction at present to hear it. He therefore seeks an order under CPR r.3.4(2)(a) striking out the claimants' claim form and grounds. The Secretary of State is supported in its application by the second interested party, Heathrow Airport Holdings Ltd ("Heathrow Airport"). It attended the hearing through leading counsel but did not make separate submissions.

4. Resolution of the jurisdictional issue turns on the interpretation of section 13 of the 2008 Act and whether, under that section, proceedings may only be brought in a six week period beginning the day after an NPS is adopted or, if later, published. Neither event has yet occurred in this case. Publication of a draft NPS is imminent but adoption and publication of any final NPS is not expected until the end of the year at the earliest.

5. I have reached the clear conclusion that under section 13 of the 2008 Act the court has no jurisdiction to hear the claim. That follows from the language of the section, the legislative purpose and the overall statutory context and history. Once the Secretary of State adopts and publishes an NPS the court will have jurisdiction to entertain the challenges the claimants advance. For the present this claim must be struck out.

Background

6.In a statement in Parliament on 25 October 2016, the Secretary of State announced the government's decision under challenge in this case. He told the House of Commons that the government's preferred option for delivering additional runway capacity in south east England is the north-west runway scheme at Heathrow, promoted by Heathrow Airport. In the statement he said:

> "In December, my predecessor came to the House to announce the government accepted the [Airports] commission's assessment of the need for additional capacity, but made clear that further work was required before a decision could be made on the location of a new runway. That work is now complete.
>
> …
>
> In the new year, we will bring forward a draft national policy statement, which will include the details of the proposed scheme. As required under legislation, it will be subject to a full and extensive public consultation, followed by a period of parliamentary scrutiny. Only once Members have voted on the final national policy statement and it has been designated will the airport be able to make a detailed planning application.
>
> …
>
> Today, the Government have reached a view on their preferred scheme, and the national policy statement that we will publish in the new year will set out in more detail why we believe it is the right one for the UK. It will also set out in more detail the conditions we wish to place on the development, including the supporting measures I outlined. We want to make sure that we have considered all the evidence and heard the voices of all those who might be affected and, of course, of those who will benefit. The consultation will start in the new year, and I can announce today that I have appointed Sir Jeremy Sullivan, the former Senior President of Tribunals, to oversee the consultation process. This is an independent role, and Sir Jeremy will be responsible for holding the Government to account and for ensuring that best practice is upheld." *House of Commons*, Hansard, 25 October 2016, v.616, cc.162-166.

7. The same day the Department for Transport published a statement on its website, which included the following:

> "The scheme will now be taken forward in the form of a draft 'National policy statement' (NPS) for consultation.
>
> The government's decision on its preferred location, which will be consulted on in the new year …

> Airport expansion will be delivered through a thorough, faster planning process, under the 2008 Planning Act and 2011 Localism Act. The government will set out the airport scheme it wants, along with supporting evidence, in its NPS. Public and Members of Parliament will be consulted and there will be a vote in the House of Commons. This will be followed by a planning application by the airport to the Planning Inspector who will take a view and advise government of his decision. Final sign off will be by the Secretary of State for Transport and then construction will start.
>
> …
>
> Expansion at Heathrow Airport Ltd will be accompanied by a comprehensive package of mitigation measures which will be subject to consultation with the public as part of the draft NPS consultation process. The measures will also be subject to regulatory approval by the [Civil Aviation Authority]."

8. The background to the decision of 25 October 2016 can be conveniently sketched beginning with the establishment of the Airports Commission in 2012. Its terms of reference were to examine the scale and timing of any requirement for additional airport capacity to maintain the UK's position as Europe's most important aviation hub. As part of its final report the terms of reference required the commission to provide materials "to support the government in preparing a National Policy Statement to accelerate the resolution of any future planning applications for major airports infrastructure."

9. A White Paper in March 2013, *Aviation Policy Framework*, stated that the final report of the Airports Commission was, amongst other things, to contain:

> "materials to support the Government in preparing a National Policy Statement to accelerate the resolution of any future planning application(s)."

10. The Airport Commission's interim report, published in mid-December 2013, selected three options for further consideration: the proposal by Heathrow Airport for a north-west runway at Heathrow, a proposal by Heathrow Hub Limited for an extended northern runway at Heathrow, and a proposal by the third interested party, Gatwick Airport Ltd, for a second runway at Gatwick Airport. The interim report also recommended the carrying out of further work into the feasibility of a proposal for an airport in the Inner Thames Estuary. In early September 2014 the commission decided not to recommend further consideration of that proposal.

11. On 1 July 2015, the Airports Commission published its final report. It recommended, *inter alia*, that the north-west runway scheme was the most appropriate way to meet the identified need for additional runway capacity in the south east of England. It stated that this could be taken forward either through an NPS or a Hybrid Bill in Parliament.

12. That same day the Secretary of State made a statement in the House of Commons in which he explained that the government had received the report the previous evening: *House of Commons*, Hansard, 1 July 2015, v.597, c.1461. The government would first, study the evidence base the commission had produced, secondly, decide on the best way of achieving planning consents quickly and fairly if expansion was to go ahead, and thirdly, return to Parliament in the autumn to provide a clear direction on the government's plans.

13. On 14 December 2015, the Secretary of State made a statement in the House of Commons that the government accepted the case for airport expansion; agreed with, and would further consider, the commission's shortlist of options; and would use the mechanism of an NPS under the 2008 Act to establish the policy framework within which to consider an application by the developer for planning consent: *House of Commons*, Hansard, 14 Dec 2015, v.603, c.1306. The Secretary of State explained that the government would begin work straightaway on preparing the building blocks for an NPS in line with the 2008 Act.

14. During 2016 the Department for Transport carried out work on areas the Airports Commission had considered, including preparatory work on the draft NPS, with three versions of content, one for each shortlisted scheme. There were accompanying Appraisals of Sustainability for each of the three schemes.

15. There was then the government's decision announced on 25 October 2016. Following that the government contacted local authorities, including the first four claimants, as to how best to conduct the consultation on the draft NPS when it was published. Work continued on the draft NPS and the accompanying Appraisal of Sustainability. These are expected to be laid before Parliament by the end of January 2017, and at the same time will be opened for consultation.

Legal and policy framework

Section 13 of the 2008 Act

16. Section 13(1) of the 2008 Act provides:

> "13 Legal challenges relating to national policy statements
>
> (1) A court may entertain proceedings for questioning a national policy statement or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if –
>
> (a) the proceedings are brought by a claim for judicial review, and
>
> (b) the claim form is filed [before the end of] the period of 6 weeks beginning with [the day after] —

(i) the day on which the statement is designated as a national policy statement for the purposes of this Act, or

(ii) (if later) the day on which the statement is published."

17. Section 13(1) as originally enacted in 2008 provided:

> "13 Legal challenges relating to national policy statements
>
> (1) A court may entertain proceedings for questioning a national policy statement or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if –
>
> (a) the proceedings are brought by a claim for judicial review, and
>
> (b) the claim form is filed during the period of 6 weeks beginning with —
>
> (i) the day on which the statement is designated as a national policy statement for the purposes of this Act, or
>
> (ii) (if later) the day on which the statement is published."

18. The explanatory notes to the 2008 Act state:

> "Section 13: Legal challenges relating to national policy statements
>
> 79. This section provides that legal challenges in connection with national policy statements can be brought only by judicial review and only during specified six-week periods."

19. The amendments to section 13 by section 92(3)(a) and (b) of the Criminal Justice and Courts Act 2015 (the "2015 Act") took effect from 13 April 2015. The immediate impetus for the amendments was the decision in *R (Blue Green London Plan)* v. *Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 495 (Admin). In that judicial review development consent was granted under the 2008 Act by way of an order for the construction and operation of a waste water scheme in London, known as the Thames Tideway Tunnel. The order was made on 12 September 2014. Section 118 of the 2008 Act provides:

> "1) A court may entertain proceedings for questioning an order granting development consent only if (a) the proceedings are brought by a claim for judicial review and (b) the claim form is

filed during the period of six weeks beginning with:

> (i) the day on which the order is published…"

20. The claim for judicial review in the *Blue Green London Plan* case was filed on 24 October 2014. Ouseley J held that as a matter of ordinary statutory construction the six week period began on the day on which the order was made. "Beginning with" did not mean "after": at [39]. Therefore the six week period ended on 23 October 2014. There was no discretion to extend time and the claim was late. Sales LJ refused permission to appeal: [2015] EWCA Civ 876.

21. Section 92 of the 2015 Act amended section 118, but it also amended section 13, together with provisions governing legal challenges in sections 61N and 106C of the Town and Country Planning Act 1990 (neighbourhood development orders and development consent obligations respectively). The Explanatory Notes to the 2015 Act state that all the unamended provisions stipulated that a challenge must be made during a period of six weeks beginning with the day on which a particular event occurred in relation to the decision or action being challenged. It explains that section 92 amended these sections to provide:

> "that the six-week period within which a challenge must be brought does not start to run until the day after the decision or other action which is the subject of the challenge."

Scheme of 2008 Act

22. Part 2 of the 2008 Act is entitled "National Policy Statements". Section 5(1) provides that the Secretary of State may designate a statement as an NPS if it is issued by the Secretary of State and sets out national policy in respect of one or more specific descriptions of development. An NPS is defined as a statement designated under section 5(1) as an NPS for the purposes of the 2008 Act: s.5(2). Before designating a statement as an NPS the Secretary of State must carry out an appraisal of the sustainability of the policy set out in the statement: s.5(3).

23. The contents of an NPS are dealt with in section 5(5). It provides in part that:

> "(5) The policy set out in a national policy statement may in particular –
>
> > (a) set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area;
> >
> > (b) set out criteria to be applied in deciding whether a location is suitable (or potentially suitable) for a specified description of development;
> >
> > (c) set out the relative weight to be given to specified

criteria;

(d) identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development…"

The NPS must give reasons for the policy set out in the statement, and in particular must include an explanation of how that policy takes account of government policy relating to the mitigation of, and adaptation to, climate change: s.5(7)-(8).

24. A statement may be designated as an NPS for the purposes of the 2008 Act only if the consultation and publicity requirements set out in section 7, and the Parliamentary requirements in section 9, have been complied with: s.5(4). Consultation and publicity under section 7(2) is what the Secretary of State thinks appropriate in relation to the proposed NPS. However, the Secretary of State must consult those as may be prescribed: s.7(4).

25. If the policy set out in the proposal identifies one or more locations as suitable, or potentially suitable, for a specified description of development, the Secretary of State must ensure that the appropriate steps are taken to publicise the proposal: s.7(5). In doing this, section 8(1) requires the Secretary of State to consult relevant local authorities. The Secretary of State must have regard to the responses to the consultation and publicity in deciding whether to proceed with the proposal: s.7(6).

26. The Secretary of State must lay a draft NPS before Parliament. If either House of Parliament or a Parliamentary committee passes a resolution or makes recommendations about it respectively, the Secretary of State must respond. A draft NPS can be laid before Parliament again: s.8(8)-(9).

27. Part 4 of the 2008 Act sets out the requirement for development consent for nationally significant infrastructure projects. Under section 14(1)(i) these include airport-related development. Section 33(1) of the 2008 Act provides that, to the extent that development consent is required for development, planning permission is not required.

28. Part 5 of the 2008 Act covers applications for orders for development consent. Orders may be made only if an application has been made to the Secretary of State: s.37(1). There is a duty to consult placed on an applicant: s.42. Under section 45 the applicant must establish a timetable for consultation specifying a deadline. Section 45(2) provides that the deadline:

> "must not be earlier than the end of the period of 28 days that begins with the day after the day on which the person receives the consultation documents."

29. Part 6 is entitled "Deciding Applications for Orders Granting Development Consent". It provides that the Secretary of State has that function: s.103. Section 104 provides so far

as is relevant:

> "(2) In deciding the application the Secretary of State must have regard to –
>
> (a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),
>
> […]
>
> (3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies."

Sections 104(4)-(5) cover breaches of international objections and statute. Section 104(7) requires the Secretary of State to weigh adverse impacts and benefits of a development.

30. The timetable under section 98 for an examining authority to report on an application for development consent is "(3)… by the end of the period of 3 months beginning with" certain identified dates. As for the Secretary of State, he is under a duty to decide an application for an order granting development consent "by the end of the period of 3 months beginning with" certain specified events: s.107(1).

Policy of 2008 Act

31. The policy behind the 2008 Act was spelt out in the White Paper, *Planning for a Sustainable Future*, May 2007. In the Foreword, the sponsoring Ministers explained that the White Paper proposed a wide-ranging package of reforms, *inter alia*, to streamline further the process in the town and country planning system. The new system would enable decisions to be taken on infrastructure in a way which was timely, efficient and predictable. The Executive Summary referred to the absence of clear policy frameworks for areas of nationally significant infrastructure, making the process of preparing applications for individual project proposals more onerous and uncertain. Many months had to be spent at inquiries into these proposals debating high level issues. The planning system, it said, was too bureaucratic, took too long and was unpredictable. The seven years for a decision on Heathrow Terminal 5 was one of the illustrations given, including the fact that the first claimant had to drop out of the inquiry into that proposal through lack of funds.

32. For key national infrastructure projects such as major airports, the White Paper proposed to replace the existing multiple consent regimes. A new system would mean that decisions could be undertaken on infrastructure in a way that was timely, efficient and predictable. One of five core principles underpinning the proposals in the White Paper was that the planning system should be streamlined, efficient and predictable.

33. With nationally significant infrastructure, the White Paper said, the proposals were

aimed at reducing the time taken from application to decision to under a year in the majority of cases. The time line for national policy development under this new regime, set out in the White Paper, was as follows:

- Government develops proposals for national policy.
- Public consultation on national policy, including local consultation where policy is location specific.
- National policy finalised and scrutinised by Parliament.
- Opportunity to make legal challenge to national policy.

The timeline in the White Paper proposed that policy development would be followed by project development and then a decision.

34. In the chapter on national policy statements the White Paper said, *inter alia*, that they:

> "would be subject to clear and defined opportunities for legal challenge."

Striking out a claim

35. CPR r.3.4(2)(a) provides (in so far as is relevant):

> "(2) The court may strike out a statement of case if it appears to the court-
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim…"

CPR r.2.3(1) defines "statement of case" for the purposes of the CPR as meaning:

> "…a claim form, particulars of claim where these are not included in a claim form…"

36. *The Administrative Court Judicial Review Guide 2016* (HM Courts & Tribunals Service, July 2016) makes clear that statements of case may be struck out in judicial review proceedings: see 12.10.1.1 (and see *R (Kumar)* v. *Secretary of State for Constitutional Affairs: Practice Note* [2006] EWCA Civ 990; [2007] 1 WLR 536, at [65]). Strike out applications on the basis that a claim has been brought contrary to a preclusive jurisdiction clause have occurred in the planning field: see *Hinde* v. *Rugby BC* [2012] JPL 816; *Nottingham CC* v. *Calverton PC* [2015] EWHC 503 (Admin); [2015] PTSR 1130 (both concerning section 113 of the Planning and Compulsory Purchase Act 2004).

37. There is no doubt that a strike out application can be made in this type of case. The issue is therefore whether, in the light of section 13 of the 2008 Act, there is no reasonable

legal basis for the claimants to bring their claim at this point.

The court's jurisdiction under section 13

38. The Secretary of State's application was to strike out the claimants' claim and grounds because under section 13 of the 2008 Act the court lacks jurisdiction at the present time to entertain it. The claimants' response to the Secretary of State's strike out application was that on a true construction of section 13 it does not apply to their application to judicially review the 25 October 2016 decision.

39. Before considering the parties' submissions on section 13 itself, it is appropriate to consider how a court should approach the interpretation of this section. While accepting that section 13 is not a true ouster clause, the claimants submitted that it should be construed in the same strict manner because it purported to exclude the court's jurisdiction. In other words, it should be interpreted to apply only to cases to which its terms most clearly applied. By contrast the Secretary of State submitted that a strict approach to interpreting section 13 was not required. Albeit that section 13 was a preclusive provision, its words were to be given their ordinary meaning.

Interpreting time-limited clauses

40. Text books on Administrative Law distinguish between true ouster clauses, which attempt to exclude legal challenge in the courts, and time-limited clauses, which confine challenges made within certain boundaries. They note that while true ouster clauses are deprecated following *Anisminic* v. *Foreign Compensation Commission* [1969] 2 AC 147, time-limited clauses are tolerated: e.g., Wade and Forsyth, *Administrative Law*, 11th ed., 2014, 622-623; Woolf, Jowell Le Sueur, Donnelly and Hare, *de Smith's Judicial Review*, 7th ed. 2013, 207.

41. Apart from true ouster clauses, as in *Anisminic*, the relevant case law falls into three broad categories. First are those instances when judicial review has been effectively excluded and other review substituted. An example is *R (G)* v. *Immigration Appeal Tribunal* [2004] EWCA Civ 1731, [2005] 1 WLR 1445, relied on by the claimants. There the Court of Appeal considered section 101 of the Nationality, Immigration and Asylum Act 2002. It provided for applications to review a tribunal's decision on the basis of error of law in considering an application to appeal an adjudicator's decision. Applications were to be determined by a single High Court judge by reference to written submissions only. The judge's decision would be final. Giving the judgment of the court, Lord Phillips MR stated:

> "13… The common law power of the judges to review the legality of administrative action is a cornerstone of the rule of law in this country and one that the judges guard jealously. If Parliament attempts by legislation to remove that power, the rule of law is threatened. The courts will not readily accept that legislation achieves that end: see *Anisminic Ltd* v. *Foreign*

Compensation Commission [1969] 2 AC 147."

42. Expeditious processing of asylum claims was a legitimate objective, Lord Phillips said, but that could not justify refraining from the use of judicial review if the alternative of statutory review under section 101 did not provide a satisfactory safeguard for those seeking asylum. While it did not afford a right to an oral hearing, the court held, section 101 nonetheless provided adequate and proportionate protection of the asylum seeker's rights, so that it was a proper exercise of the High Court's discretion to decline to entertain an application for judicial review of issues which could be the subject of the scheme of statutory review: [20]-[21].

43. Secondly, there are those cases where judicial review has been confined in its ambit, what in *R* v. *Cornwall CC, ex parte Huntington* [1994] 1 All ER 694 was called a jurisdiction bar. In that case there was what the text book writers call a time-limited clause. The case involved judicial review challenges to the making by local authorities under the Wildlife and Countryside Act 1981 of a right of way order and a by-way order. Schedule 15 of that Act set out the procedure for making these orders. If objections were raised, the order had to be submitted to the Secretary of State and either an inquiry or a hearing held. The Secretary of State could not confirm an order until the objections and the report of the inquiry were considered. Under paragraph 12, a person aggrieved by an order could challenge its validity once it had taken effect by application to the High Court within 42 days of its publication. Paragraph 12(3) provided that otherwise "the validity of an order shall not be questioned in any legal proceedings whatsoever".

44. The Court of Appeal held that neither order had been confirmed so there could be no legal challenge. In his judgment, with which Sir Stephen Brown P and Peter Gibson LJ agreed, Simon Brown LJ agreed with the first instance judge, McCullough J, that it was Parliament's intention that the High Court should only become involved when all the administrative steps had been completed. Simon Brown LJ continued (at 700g – 701b):

> "True as McCullough J recognised in the Devon appeal, it is arguably
>
> > 'less than ideal that the opportunity to challenge the order on the basis of the county council's default should only arise after the order has been confirmed, thus risking the possibility that the time and money devoted to the intervening local inquiry will have been wasted'
>
> But, as he pointed out, the answer to the argument is that this is what Parliament has ordained, and in any event, there are obvious countervailing benefits. First amongst these is that the very fact that an application for judicial review cannot be made at this preliminary stage means that the inquiry will not be delayed thereby. I agree and would furthermore point out that the Secretary of State may in any event refuse to confirm the order, thus making unnecessary any legal challenge whatever.
>
> I would approve also what Brooke J said to substantially the same

effect in the Cornwall application ([1992] 3 All ER 566 at 576):

> 'It is quite clear, in my judgment, that Parliament intended to prescribe a comprehensive programme of the events which should happen from the time when the relevant authority sets in motion the consultation process mentioned in para 1 of Sch 15, and that once the order is made the prescribed procedure then follows, without any interruption for legal proceedings in which the validity of the order is questioned, until the stage is reached, if at all, when notice of a decision is given pursuant to the procedure prescribed in para.11. It is then, and then only, that Parliament intends that the person aggrieved by an order which has taken effect shall have the opportunity of questioning its validity in the High Court provided that he takes the opportunity provided for him by para. 12(1) of Sch 15…'"

45. Thirdly, there are what have been called the "allocation of jurisdiction" cases. *Farley* v. *Secretary of State for Work and Pensions (No 2)* [2006] UKSC 31; [2006] 1 WLR 1817 is one of these. Lord Nicholls (with whom other members of the judicial committee agreed) said that the relevant section, section 33(4) of the Child Support Act 1991, admitted, on its face, only one interpretation: on an application for a liability order the magistrates' court must proceed on the basis that the relevant maintenance assessment in question was lawfully and properly made: [16]. Lord Nicholls said:

> "18. I pause to note that in the absence of such an enabling provision [enabling a challenge to a maintenance assessment to be made at an earlier stage] elsewhere in the 1991 Act section 33(4) would fall to be interpreted differently. In the absence of such a provision section 33(4) would be interpreted with the strictness appropriate to a provision which purports to exclude the jurisdiction of the court to determine whether an order made by a government minister is a nullity. The need for a strict approach to the interpretation of an ouster provision of this nature was famously confirmed in the leading case of *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 AC 147: see, for example, Lord Reid, at pp169-170. This strict approach, however, is not appropriate if an effective means of challenging the validity of a maintenance assessment is provided elsewhere. Then section 33(4) is not an ouster provision. Rather, it is part of a statutory scheme which allocates jurisdiction to determine the validity of an assessment and decide whether the defendant is a "liable person" to a court other than the magistrates' court."

46. *R (A)* v. *Director of Establishments of the Security Service* [2009] EWCA Civ 24; [2010] 2 AC 1 is another example. There section 65 of the Regulation of Investigatory Powers Act 2000 provided that proceedings against any of the intelligence agencies should be heard by the Investigatory Powers Tribunal. In the Court of Appeal, Laws LJ had said that the tribunal was a judicial body of like standing and authority to that of the High

Court. The Supreme Court held that section 65 conferred exclusive jurisdiction on the tribunal so that the High Court could not consider a judicial review claim by a former member of one of the agencies. Lord Brown, with whom the other justices agreed, said:

> "23. Nor does *Anisminic* assist A. The ouster clause there under consideration purported to remove any judicial supervision of a determination by an inferior tribunal as to its own jurisdiction. Section 65(2)(a) does no such thing. Parliament has not ousted judicial scrutiny of the acts of the intelligence services; it has simply allocated that scrutiny (as to section 7(1)(a) HRA proceedings) to the IPT. Furthermore, as Laws LJ observed, ante, p13, para 22:
>
> > "statutory measures which confide the jurisdiction to a judicial body of like standing and authority to that of the High Court, but which operates subject to special procedures apt for the subject matter in hand, may well be constitutionally inoffensive. The IPT… offers… no cause for concern on this score."

The position, Lord Brown added, was analogous to that in *Farley*.

47. The claimants invoked *R (G)* v. *Immigration Appeal Tribunal*. They contended that if section 13 precluded an application for judicial review for what may be many years, it is closely analogous to provisions in which judicial review is ousted. In particular, by the time judicial review is permissible, it may not be possible to wind the clock back and individuals may have suffered uncompensatable loss. This was not like the allocation of jurisdiction clauses in *Farley* and *A* on which the Secretary of State relied. In *Farley*, the provision in question merely had the effect that, if the opportunity to challenge the relevant assessment was not taken up at the time it was made, it could not be challenged at a later stage. In *A*, the provision in question regulated not the time at which the proceedings could be brought but the forum, which in any event was equivalent to the High Court.

48. In my view section 13 should not be regarded as akin to an ouster clause. Its effect is to suspend, rather than to exclude, the right of access to the court and the power of the court to perform its judicial review function. There is no basis to give the section a narrow construction. The Court of Appeal decision in the *Huntingdon* case is almost on all fours with the present case. The judgment of Simon Brown LJ in that case gives no support to the claimants' argument about a strict construction. Nor do the judgments of the House of Lords in *Farley* and *A*, which consider preclusive provisions analogous to those in this case.

49. Thus section 13 falls to be given its ordinary and natural meaning: *Pinner* v. *Everett* [1969] 1 WLR 1266, 1273 C-D. That meaning turns on the language used, considered in its statutory context and in light of the legislative purpose.

50. Supported by TfL/the Mayor, the claimants advanced two arguments regarding the ordinary meaning of section 13. First, they contended, it creates an end date for filing challenges, the six week period following the designation or publication of an NPS. Secondly, they submitted, the decisions to which the preclusion applies are limited to preparatory acts related to the performance of the Secretary of State's statutory powers, not to antecedent policy-making.

(a) Time limits for claims

51. Section 13 requires that claims to which it applies must to be filed "before the end of" the six week period beginning with the date the NPS is designated or, if later, published. The Secretary of State's case is that this means that claims are confined to that six week period. In outline, the claimants' case, supported by TfL/the Mayor, is that all the section requires is that claims must be filed before the end of the specified period. If something must be done "before the end of" a period, they submitted, it can also be done before the beginning of that period. Consequently, section 13 does not bite in this case.

52. The claimants' case is that this is the natural and ordinary meaning of the words of section 13 and should be given effect. To say that something has to be done "before the end of" a period is not the same as saying that it must be done "during" the period. That is so even if the period is defined as "beginning with" a certain date. An example the claimants gave was that if something must be done "before the end of the Christmas period", it can also be done before the start of the Christmas period (e.g., 24 December), and the position is no different if the Christmas period is defined as "the period of twelve days beginning on 25 December".

53. In the claimants' submission what the Secretary of State was attempting to do was to substitute the word "during" for the phrase "before the end of". If the intention had been to stifle judicial review before that date, section 13 would have used the language of section 45(2) ("not be earlier than") or in sections 98(3) or 107(1) ("by the end of a period beginning with"). The fact that the language of "during" was used in the original version of section 13 counted against the Secretary of State's construction, in the claimants' submission, and the court should simply take section 13 as now in force.

54. As background to these submissions, the claimants added two general points. First, that on the Secretary of State's interpretation claimants could be shut out from challenging an NPS development for years until the point when the NPS is designated or published. Precluding a challenge until later in the process could mean that the consultation on the draft NPS, and Parliamentary consideration of it, would be undertaken on a flawed basis. In the claimants' submission, their air quality and legitimate expectation grounds in this case are, to use the language of Carnwath LJ in *R (on the application of Hillingdon and others)* v. *Secretary of State for Transport* [2010] EWHC 626, showstoppers, in other words fundamental flaws that are incapable of remedy later in the process.

55. The claimants contended that prejudice and damage were likely to be caused if section

13 was read to delay any challenge until the publication of a final NPS. Mrs Taylor, a local resident, referred in her evidence to planning blight. Consultation and Parliamentary consideration of the draft NPS would also result in a massive waste of public money and resources if the challenge had to be brought much later in the process. Once the flaws the claimants had exposed were established, it would be necessary to start again, lengthening the period of uncertainty and exacerbating the planning blight.

56. Secondly, the claimants submitted that on their interpretation section 13 still had a function to perform. Although it would not preclude challenges before the six week period beginning with the designation of the NPS or its publication, it would act as a long stop after which claims were impossible. While ordinary judicial review claims must be filed promptly, and in any event not later than three months after the grounds for making the claim first arose (CPR 54.1), that period might be extendable in important cases, well beyond the three months: see e.g. *R* v. *Secretary of State for the Home Department ex p. Ruddock* [1987] 1 WLR 1482, 1485, per Taylor J; *R (Law Society of England & Wales)* v. *Legal Services Commission* [2010] EWHC 2550 (Admin), at [127], per Moses LJ. In requiring claims to be launched no later than the six weeks after designation or publication of the NPS, section 13 shut out that possibility.

57. In my view the meaning of the words of section 13, when understood in their context, is that proceedings can only be brought in the six week period once the NPS is designated or published. Judicial review challenges both before and after that six week period are prohibited. Since in this case any designation or publication of an NPS is not expected to occur until late 2017 at the earliest, any claim before that is precluded.

58. As explained earlier in the judgment, the scheme of the 2008 Act is that where it is proposed that an NPS is location specific, a necessary step in the process of preparing a draft NPS for consultation is deciding on the location to include in the draft. Once a draft NPS and accompanying Appraisal of Sustainability are published and laid before Parliament, there is public consultation and an opportunity for MPs to debate it. A highly respected former judge, Sir Jeremy Sullivan, has been appointed to oversee the fairness of the consultation process for this development. Following that process the Secretary of State "must have regard to the responses in deciding whether to proceed with the proposal." If an NPS is finally designated and published, the period for legal challenge by way of judicial review will be for six weeks.

59. In interpreting section 13, there are first, the words of section 13 itself. The claimants and TfL/the Mayor focused on the phrase "before the end of", namely the end date. However, the section also contains a very clear start date, "6 weeks beginning with the day after" the day on which the statement is designated or, if later, published. In other words, section 13 contains both a start date and an end date. Read as a whole the words of section 13 convey an intention to preclude a challenge at any time before that start date.

60. This conclusion is bolstered by the statutory context and history. The purpose of the 2008 Act, both in its provisions as a whole and its policy background, was to speed up the planning processes for major developments. The time taken over approval of Terminal 5 at Heathrow was an example of what the government was attempting to

address. One aspect of the new approach was to limit the time for legal challenges and the delay they can cause, especially if there were a number of such challenges. That is most clearly evident in the time line in the White Paper: legal challenges come at the end of policy formulation. Section 13 in its original form could not have been clearer: claims had to be filed during the period of 6 weeks beginning with the designation or publication of the NPS.

61. It was common ground that the immediate trigger for the amendments to the wording of section 13 and other provisions in the 2008 Act and the Town and Country Planning Act 1990 was the decision in the *Blue Green London Plan* case [2015] EWHC 495 (Admin); [2016] EWCA Civ 876. The purpose of these amendments was the narrow one of reversing the effect of that judgment so that the six week period within which a challenge must be brought does not start to run until the day after the decision, which is the subject of the challenge. That was the only stated purpose in the Explanatory Notes to the 2015 Act.

62. It is well-established that Explanatory Notes can be used as an aid to construction: *Wilson* v. *First County Trust (No.2)* [2003] UKHL 40; [2004] 1 AC 816, [64], per Lord Nicholls. The claimants and TfL/the Mayor invoked *obiter* comments of Lord Steyn in *R (Westminster City Council)* v. *National Asylum Support Service* [2002] 1 WLR 2956, [6], that it is impermissible to treat the aims of the government about the scope of statutory language as expressed in them as reflecting the will of Parliament.

63. In my view this ignores the political reality, that when Parliament votes in favour of a clause in a Bill it can be taken as having endorsed the explanation the government has given for its introduction. The language of the clause as enacted is always determinative, but the Explanatory Notes may be of assistance in understanding it. Here the Explanatory Notes to the 2015 Act refer to the six week period "within which" a challenge must be brought. As the Secretary of State submitted, that is consistent only with the permissible period of challenge having both a beginning and an end.

64. Somehow, the claimants and TfL/the Mayor suggested, as well as addressing the immediate problem of *Blue Green London Plan* case, the 2015 Act was designed to reverse the underlying legislative purpose of the whole of the 2008 Act. That suggestion is both unrealistic and untenable. The effect of section 13 remains as before the 2015 Act, namely that challenges are confined to a particular six week period defined by reference to the designation or publication of an NPS.

65. For the sake of completeness I should add that the claimants gain no support from the category of so called showstopper arguments Carnwath LJ identified in *R (Hillingdon)* v. *Secretary of State for Transport* [2010] JPL 976. The decisions under challenge in that case pre-dated the coming into force of the 2008 Act so were not made under it. The Secretary of State placed no reliance on section 13 in the case. Thus the judge's reasons cannot be read as creating an exception in section 13 for such arguments. In any event there is no basis in the language of section 13 for such a reading.

(b) Preparatory acts

66. If challenges can only be brought in the six week period beginning the day after the designation and publication of an NPS, the issue arises as to how far back in the course of preparation challenges are possible. Section 13 enables challenges to "anything done or omitted to be done in the course of preparing" an NPS. Where is the line to be drawn between acts and omissions in the course of preparing an NPS and those which are antecedent to its preparation? The preclusive provisions of section 13 bite on the former but do not bar legal challenges to the latter.

67. Unsurprisingly the claimants and TfL/the Mayor took a narrow view of the decisions and omissions that can be said to have arisen in the course of preparing the NPS and in respect of which the right of access to the courts is suspended. The claimants' case was that section 13 applies only to decisions or omissions in the course of the preparatory steps specified in the 2008 Act. That meant things done in compliance or purported compliance with the consultation and publicity requirements in the 2008 Act (ss.5(4), 7, 8), the Parliamentary requirements (ss.5(4), 9), on review of the NPS (s.6(1), potentially s.11), or when carrying out an appraisal of the sustainability of the policy (ss.5(3), 10).

68. TfL/the Mayor drew a distinction between the NPS and the statements of policy which preceded it: embodying those policy statements in the NPS is a distinct legal process under the 2008 Act.

69. Both the claimants and TfL/the Mayor submitted that it would be permissible, under the rule in *Pepper* v. *Hart* [1993] AC 593, to take into account statements made by Mr John Healey MP, the Minister for Local Government, during the passage of the Bill in committee, which they took to be supportive of their interpretation. I observe immediately that statements in committee, made in response to points raised in debate and often without careful thought, can have no role in a *Pepper* v. *Hart* exercise.

70. In this case the claimants contended that their challenges in this judicial review to the decision of 25 October 2016 are not caught by the preclusive effect of section 13. That decision was not something done in the course of preparing the NPS. The decision was a precursor to the NPS process, not part of the process itself. The Secretary of State told the House of Commons that the scheme would now be taken forward in the form of a draft NPS for consultation. Preparation of the draft NPS, it was said, was a step understood as separate from, and subsequent to, the 25 October 2016 decision.

71. There is no basis, in my view, to confine acts or omissions in the course of preparing an NPS to the exercise by the Secretary of State of his statutory functions under the 2008 Act, or to separate out what were characterised as preceding policy-making functions not subject to the preclusive effect of section 13. The words "anything done, or omitted to be done, by the Secretary of State in the course of preparing" an NPS are clear, albeit that there might need to be a fact-sensitive inquiry as to whether a particular act or omission was in the course of preparing an NPS. If Parliament had intended that those acts or omissions be limited to what is laid down in the 2008 Act, or to a draft NPS, it

could easily have said so.

72. Nor is there any warrant for distinguishing between policy statements which (to use TfL/ the Mayor's terminology) have the imprimatur of the NPS and other policy statements. That is not what the Act says. The formulation of a policy might be part of the preparation of an NPS and to draw such a distinction is artificial. The statutory net is cast wide – it applies to "anything" done in preparing an NPS as well as to omissions.

73. There is no need for me to engage with whether what occurred before the October 2016 decision is caught by the preclusion as constituting preparatory acts. It is the October 2016 decision which is the subject matter of this challenge. In my view it was part of the process leading to the adoption of an NPS. It confirmed the government's preferred site to deliver the new runway, a matter which the Secretary of State is permitted to include in an NPS by section 5(5)(d). The government's decision on the 25 October 2016, and the announcement of that to the House of Commons and on the Department of Transport website, were without doubt acts in the course of preparing the draft NPS and ultimately any NPS.

The Aarhus Convention

74. The claimants and TfL/the Mayor pointed to Article 9 of *the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, done at Aarhus, Denmark, on 25 June 1998. Article 9 of the Convention provides that remedies in environmental cases (to put it broadly) should be adequate and effective and, *inter alia*, timely. To read section 13 in the manner I have determined has the effect, they submit, of precluding timely access to the courts to challenge a decision which, it is contended, contravenes provisions of national law relating to air quality. This runs counter to the United Kingdom's obligations under Article 9, which should inform the interpretation of section 13: *Morgan and Baker* v. *Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, [22], per Carnwath LJ.

75. To my mind there is nothing in Article 9 which prevents a signatory state from having in place provisions regulating the time at which a claimant may bring a challenge in the domestic courts. Nor is there anything in the one decision of the Aarhus Convention Compliance Committee referred to in argument which suggests incompatibility with Article 9: see the *Port of Tyne* case, ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3. The Aarhus point goes nowhere.

Conclusion

76. For the reasons set out above, the court has no jurisdiction to hear the present claim. In those circumstances, the claim form discloses no reasonable grounds for bringing it and should be struck out.