

# 39 FROM 39: TRANSPORT INFRASTRUCTURE CHALLENGES CONSIDERED (PART II)

*R (Ross & Sanders on behalf of Stop  
Stansted Expansion) v Secretary of State for  
Transport [2020] EWHC 226 (Admin)*

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# The background

- Planning application submitted to Uttlesford DC in 2018 by Stansted airport
- Stansted seeking planning permission for:
  - operational development to construct new taxiway links and aircraft stands to increase the number of aircraft movements using the existing runway
  - to raise the cap on passenger throughput imposed by planning condition in 2008 by 8 million passengers per annum (“mppa”) from 35mppa to 43mppa
- The Claimants asked the Secretary of State to treat the proposed development as a Nationally Significant Infrastructure Project (“NSIP”) under s23 and/ or s35 of the Planning Act 2008.
- The Secretary of State declined the request

# The legislative framework

- Under section 23(4)-(6) of the 2008 Act, alteration works to an airport runway must be treated as an NSIP if they are expected 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”.
- Under section 35, the Secretary of State may give a direction that development not qualifying as an NSIP is to be treated as development for which development consent is required where “he thinks 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 challenge

- SSE sought judicial review on two main grounds:
  - (1) Alleged misinterpretation of s23 Planning Act 2008/ errors in calculating the increase in the no of passengers as a result of the works.
  - (2) Unlawful exercise of the SoS' discretion under section 35, including by failing to treat the scheme as part of a larger project to increase passenger numbers by more than 10mppa; and by relying upon allegedly erroneous carbon emissions modelling underpinning the Government's June 2018 policy on airports in the south-east of England making best use of their existing runway capacity (“the MBU policy”), which the SoS found the scheme to be in line with.

# The judgment

- Dove J dismissed the challenge on both grounds:
  - In relation to section 23, the question for the SoS was what increase in capacity could realistically be achieved as a result of the works, not what might arithmetically or technically be possible. This involved making a technical and predictive judgment, with which the Court would not readily interfere.
  - In relation to section 35 there was no evidence that the works formed part of a wider NSIP; and the SoS was entitled to rely upon the carbon emissions modelling underpinning the MBU policy, which had not been challenged and was satisfactorily explained by the SoS in evidence.

# Comments

- Clarification of the correct approach to the judgment required under section 23 of the 2008 Act (whether airport development qualifies as an NSIP).
- Another case where the Courts have emphasised the wide margin of appreciation afforded to a decision-maker in respect of judgments involving technical, scientific or predictive assessment.
- The Court was not prepared to entertain a “disguised” challenge to the legality of published government policy or the modelling and assumptions underpinning it. Challenges to the lawfulness of policy statements should be brought directly (see, for example, *Plan B*).