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# **JUDICIAL REVIEW: WHAT COUNTS AND MAKES A DIFFERENCE IN A SUCCESSFUL JUDICIAL REVIEW OF PLANNING DECISIONS?**

Mark Westmoreland Smith



## Drax

- *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy*  
[2021] EWCA Civ 43





## Drax – the grounds

- (1) On need: whether the Secretary of State misinterpreted EN-1 on the approach to assessing an energy NSIP's contribution to satisfying the need for the type of infrastructure proposed
- (2) On GHG emissions: whether the Secretary of State misinterpreted EN-1 on the approach to greenhouse gas emissions
- (3) Whether the Secretary of State misapplied section 104(7) of the Planning Act. This requires the secretary of state to undertake a balancing exercise of the benefits of a proposed development versus its adverse effects





## Drax – need (1)

- Key: paragraph 3.2.3 of EN-1: *“This Part of the NPS explains why the Government considers that, without significant amounts of new large-scale energy infrastructure, the objectives of its energy and climate change policy cannot be fulfilled. However, ... it will not be possible to develop the necessary amounts of such infrastructure without some significant residual adverse impacts. This Part also shows why the Government considers that the need for such infrastructure will often be urgent. The IPC should therefore give substantial weight to considerations of need. The weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project’s actual contribution to satisfying the need for a particular type of infrastructure.”*
- Issue: does this require a quantitative assessment of need? The CoA said no



## Drax – need (2)

- *“59. Both in Part 2 and in Part 3 the absence of any quantitative definition of relevant need is striking. No attempt is made to describe in quantitative terms either the general need for the types of generating capacity within the scope of EN-1 or a specific need for any particular type. No targets or limits are set. This is deliberate and explicit. It is stressed that the Government has “other mechanisms”, including the Electricity Market Reform project, to influence delivery (paragraph 3.3.24).”*
- *“68. Properly understood, paragraph 3.2.3 is not in tension with the other policies. It supports them. Based, as it is, on the fundamental policy that “substantial weight” is to be given to the contribution made by projects towards satisfying the established need for energy infrastructure development of the types covered by EN-1, including CCR fossil fuel generation infrastructure, it ensures that the decision-maker takes a realistic, and not an exaggerated, view of the weight to be given to “considerations of need” in the particular case before him, which should be “proportionate to” the “actual contribution” the project is likely to make to “satisfying the need” for infrastructure of that type. That is its function.”*



## Drax – GHG emissions

- Paragraph 5.2.2 of EN-1: *“Government has determined that CO2 emissions are not reasons to prohibit the consenting of projects which use these technologies”*
- CE argued that the SoS had erred in concluding that GHG emissions were irrelevant or had no weight
- Both the HC and CoA held that in fact the SoS had applied significant weight to GHGs and so the ground failed. The HC said that paragraph 5.2.2 of EN-1 prevented GHG emissions amounting to a standalone reason for refusal
- The CoA disagreed. CO2 emissions are not, of themselves, an automatic and insuperable obstacle to consent being given for energy infrastructure identified in EN-1. They should be given weight in the planning balance: *“How much weight is for the decision-maker to resolve. It follows that, in a particular case, such weight could be significant, or even decisive, whether with or without another 'adverse impact’”* (at [87])



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# Manston

- *R (Dawes) v Secretary of State for Transport*





## Manston – need

- The ExA concluded: *“Given all the above evidence, the ExA concludes that the levels of freight that the Proposed Development could expect to handle are modest and could be catered for at existing airports (Heathrow, Stansted, EMA, and others if the demand existed). The ExA considers that Manston appears to offer no obvious advantages to outweigh the strong competition that such airports offer. The ExA therefore concludes that the Applicant has failed to demonstrate sufficient need for the Proposed Development, additional to (or different from) the need which is met by the provision of existing airports”* [ExAR, § 5.7.28]





## Manston - DL, § 20 and 21 (1)

20. Whilst noting the ExA's consideration of need [ER 5] and conclusion that the Applicant's failure to demonstrate sufficient need weighs substantially against the case for development consent being given [ER 8.2.25 - 8.2.26], the Secretary of State disagrees and concludes that there is a clear case of need for the Development which existing airports (Heathrow, Stansted, EMA and others able to handle freight) would not bring about to the same extent or at all. The Secretary of State concludes that significant economic and socio-economic benefits would flow from the Development to Thanet and East Kent as well as more widely including employment creation, education and training, leisure and tourism, benefits to general aviation<sup>2</sup> and regeneration benefits. In addition, as a result of the Development, the potential exists for Manston Airport to develop and grow into a transport asset for the UK which would provide a number of significant benefits locally, regionally and nationally, complementary and in addition to those able to be provided by existing airports. These include increased capacity available in North Kent for import and export of freight by air to, from and within the UK including support for high value and time-critical transport of goods, increased connectivity to the North Kent area, benefits which flow from its location in terms of its accessibility, enhanced access to markets and to end users, the facilitating of



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## Manston - DL, § 20 and 21 (2)

inward investment, support for the advanced manufacturing sector in which the UK is looking to build competitive strength, and the provision of a passenger and executive airport in North Kent. The Secretary of State gives substantial weight to the above public benefits both individually and cumulatively.

21. In addition, it is to be concluded that the Development would support the government's policy objective to make the UK one of the best-connected countries in the world and for the aviation sector to make a significant contribution to economic growth of the UK<sup>3</sup>. It is the Government's aviation policy that airports should make the best use of their existing capacity and runways, subject to environmental issues being addressed<sup>4</sup>. Substantial weight is given by the Secretary of State to the conclusion that the Development would be in accordance with such policies and that granting development consent for the Development would serve to implement such policy. Although the Secretary of State considers the Development would also be consistent with the aims of emerging aviation policy<sup>5</sup>, he considers that as such, it should be afforded limited weight.



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## Drawing these cases together

- (1) Understand judicial trends
- (2) Understand the wider context in which the claim is made
- (3) Claimant's should consider the Defendant's position and seek to offer a way out





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## Golden Rules

- (1) Focus the claim on the good points
- (2) Be concise
- (3) Don't overburden the judge with unnecessary reading
- (4) Know your judge
- (5) Listen to and be guided by the judge
- (6) Judicial questions are key: focus on them





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## Golden Rules – *Inplayer v Thorogood* [2014] EWCA CIV 1511

*“54. In essence an appellant's skeleton should provide a concise, user friendly introduction for the benefit of the three judges who will probably have had no previous involvement in the case. The skeleton should then set out the points to be argued clearly and concisely, with cross-references to relevant documents and authorities, in the manner prescribed by practice direction 52a paragraph 5. The skeleton should not normally exceed 25 pages. Usually it will be much shorter...”*

*55...The task is not rocket science. It just requires a few minutes clear thought and planning before you start. A good skeleton argument (of which we receive many) is a real help to judges when they are pre-reading the (usually voluminous) bundles. A bad skeleton argument simply adds to the paper jungle through which judges must hack their way in an effort to identify the issues and the competing arguments. A good skeleton argument is a real aid to the court during and after the hearing. A bad skeleton argument may be so unhelpful that the court simply proceeds on the basis of the grounds of appeal and whatever counsel says on the day.”*





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