Case Name: *Dawes, R (On the Application Of) v Secretary of State for Transport & Anor* [2024] EWCA Civ 560 (21 May 2024)

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Commentary:
The Court of Appeal (Lewis, Jackson and Warby LJs) dismissed an appeal by Jennifer Dawes ("the Appellant") against the decision of Mr Justice Dove (in the High Court) to dismiss a judicial review of the decision of the first respondent, the Secretary of State for Transport, to grant a development consent order ("DCO") for the development and reopening of Manston Airport in Kent for a dedicated freight facility.

Background
In 2018, Riveroak Strategic Partners Limited applied for and were granted a DCO by the Secretary of State. This decision was successfully challenged by way of judicial review in February 2021.

In 2022, the Secretary of State redetermined the application and granted a DCO. The Appellant challenged this decision by way of judicial review and Dove J dismissed the appeal on two grounds. In dismissing the appeal, the key conclusions Dove J reached were in relation to Ground 1, with these conclusions the subject of this appeal. The Town Library summarised this decision in September 2023 – see here.

Grounds & Judgment
The Appellant was granted permission to apply to the Court of Appeal on five grounds.

Ground 1 – Procedural fairness had been breached as the Secretary of State withheld underlying evidence from the Azimuth report.

The Court held the requirement of procedural fairness depends upon several factors including the facts, the nature of the decision-making process and the statutory framework.

Nothing in the development consent regime (through the Planning Act 2008 or the Infrastructure Planning (Examination Procedure) 2010 Rules ("2010 Rules")) required the disclosure of confidential or commercially sensitive information relied upon for the report i.e. the interview transcripts that informed the Azimuth report (a report which went to issues of demand and need).

The Azimuth report was available to the Appellant and the report identified the methodology used, the names of interviewees and summarised the responses. The Appellant was not entitled at common law (or through statutory provisions) to be provided with the transcripts and this ground was dismissed.

Grounds 2 & 3 – 2) Rule 19 of the 2010 Rules did apply to the proceedings after the initial decision had been quashed and 3) the judge erred in concluding that rule 19(3) would only apply if new evidence was the reason, rather than a reason, for being disposed to disagree with the recommendation of the Examining Authority and in treating the new evidence (the IBA Report) as not making a difference to the Secretary of State's conclusion.

Rule 19 poses procedural requirements after the completion of the Examining Authority's examination. The Court held the rule applies following the quashing of an earlier decision, as the applicability of rule 19 depends upon whether the circumstances set out in rule 19 apply rather than the stage that the process of determining the application has reached.

Rule 19(3)(b) contemplates if there has been some new evidence or new facts (i.e. something not addressed at the examination) which causes the Secretary of State to disagree with the recommendation of the Examining Authority. On whether the obligation in rule 19(3)(b) arose in this case (ground 3), the Court held the new evidence or new facts must be the causative of the disagreement and it must be for that reason that the Secertary of State disagrees with the recommendation. It was common ground that the new evidence did not have to be the sole reason for the disagreement.

On the facts, the Court found the reason for the Secretary of State reaching a different conclusion to the Examining Authority was principally based on his assessment of the need for the development, and the different weight he attached to the forecasts in the Azimuth report. The IBA report (being the new evidence) was not a reason for the disagreement with the recommendation. The IBA report, whilst referred to at different points of the decision letter, did not on analysis have a causative effect resulting in a disagreement with the recommendation. This meant there was no requirement on the Secretary of State to notify interested parties or ask for submissions pursuant to rule 19(3)(b).

Therefore, whilst rule 19 applied to the process where a decision has been quashed (ground 2), that would not lead to the appeal being allowed as the obligation did not arise in this case (so ground 3 failed).

Ground 4 – There was a breach of procedural fairness as the Appellant did not have an opportunity to make submissions on the IBA Report.

It was not necessary to consider ground 4 given the findings on ground 2 and 3, however, if both grounds 2 and 3 were satisfied, this ground would have succeeded.

Ground 5 – The advice the Secretary of State received that the future capacity of other airports was not material to the decision rendered the decision unlawful.

The Court found the Secretary of State was not advised that it was legally impermissible to take future airport capacity into account, but rather, on a proper reading of the advice and decision letter, the Secretary of State was advised not to take future airport capacity into account because of the lack of certainty that the airport capacity will materialise.

On that basis, ground 5 was dismissed.

Conclusion

This decision clarifies the application of rule 19 of the 2010 Rules and confirms that it can apply to redeterminations following the quashing of an earlier decision on a development consent order application.

Case summary prepared by Jack Curnow