

HOW EFFECTIVE IS POLICY IN SETTING BOUNDARIES FOR DECISION-MAKERS?

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Introduction

1. Where a decision-maker has discretion in how to determine a matter, it is perfectly proper for policy guidance to be provided about how that discretion should be exercised. Indeed, this is usually desirable for reasons of certainty and consistency in decision-making. And it is right that policy for the guidance of decision-makers should normally be published, so that those interested in a decision can see how the matter is likely to be dealt with.
2. In the *Alconbury* case, Lord Clyde summarised the position as follows:²

“The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions. There are advantages both to the public and the administrators in having such policies. Of course there are limits to be observed in the way policies are applied. Blanket decisions which leave no room for particular circumstances may be unreasonable. What is crucial is that the policy must not fetter the exercise of the discretion. The particular circumstances always require to be considered. Provided that the policy is not regarded as binding and the authority still retains a free exercise of discretion the policy may serve the useful purpose of giving a reasonable guidance both to applicants and decision makers.”
3. Policy has played an important part in town and country planning since the inception of the statutory system. Over the years, a sophisticated system of policy has developed, encompassing circulars, planning policy guidance notes and statements, Ministerial statements and White Papers – the latter including policy from other Departments, such as on energy or air transport. Policy is embedded in the system as a tool for Government to guide decision-makers, both local planning authorities and inspectors. It is used to encourage certain steps in the decision-making process and to discourage other steps.
4. In order to be effective, planning policy must walk a fine line between being clear and firm in its requirements and not being so prescriptive as to be unlawful. Policy must be well-founded, rational and clearly drafted. This is not easy to achieve at the best of times, but when it is necessary for policy to give a firm steer to decision-makers, or to set boundaries for their consideration of matters, it is difficult to draft a policy which does what is required of it lawfully.

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² *R (Alconbury) v SSETR* [2003] 2 AC 295 at 345 (para 143).

5. National planning policy contains a number of provisions which appear aimed at limiting the scope of matters to be considered by planning decision-makers including, for example, health concerns about mobile phone masts (PPG8, para 30). This paper will consider how effective policy is in setting firm boundaries for decision-makers and what lessons are to be learnt from past cases. It attempts to summarise the relevant legal principles, and then consider the extent to which policy in PPG8 and PPS10/PPS23 has been effective in limiting the consideration of health effects and the extent to which policy in Circular 01/2006 on planning for gypsy caravan sites relating to temporary planning permissions has been effective in ensuring that a matter *is* considered.

The context of policy for the future

6. It appears likely that national planning policy statements will play an increasingly important part in planning decisions in the future. In particular, it is proposed in PPS4 to address the finding of the Barker report that “planning authorities do not always give sufficient weight to economic considerations when drawing up plans and determining planning applications”. And changes are proposed to PPS6 in order to provide “a strong focus on our town centre first policy, and which promotes competition and improves consumer choice”.
7. Beyond this, a relatively new type of planning policy document is proposed – a national policy statement. The 2007 White Paper, *Planning for a Sustainable Future*, included the following proposals:

“For key national infrastructure such as major airport and port projects, improvements to the Strategic Road Network, major new power generating facilities and facilities critical to energy security, and major reservoir and waste water plant works, we propose to:

* produce, following thorough and effective public consultation and Parliamentary scrutiny, national policy statements to ensure that there is a clear policy framework for nationally significant infrastructure which integrates environmental, economic and social objectives to deliver sustainable development; [...]”.

8. The Government’s starting point is that it considers that where, in the past, inquiries included discussions on strategic national and regulatory issues, it created an inefficient system.³ It therefore proposes effectively to remove those issues from the inquiry system. The approach to national policy proposed to be adopted is not a new idea. The 1999 consultation paper on streamlining the processing of major projects through the planning system proposed that policy statements be prepared to set the national policy framework for projects before they were considered for consent, to “reduce unnecessary debate at a subsequent public inquiry”. Such statements were to deal with the need for and benefits of certain infrastructure, the criteria for site selection and the relationship of the infrastructure to other policies. The use of such

³ *The Energy Challenge*, Annex A, p164.

statements was adopted by the Government in 2001.⁴ In its response to the Green Paper consultation, the Government said:

“We will issue clear statements of national policy about the need for specific investment as this will help reduce decision times.”

9. This point was re-stated in Circular 07/2005, and repeated in the Barker report, where it was noted that it had been argued that a clearer articulation of national policy could reduce delays.⁵ The 2007 Planning White Paper said that, given a national policy statement, there should be no need for inquiries to consider whether there is a case for development and what type of development is required to meet needs.⁶ For major infrastructure projects, the Planning Act 2008 enables representations to be ruled-out if they “relate to the merits of policy set out in a national policy statement”,⁷ and enables the authority and the Secretary of State to disregard such representations.⁸
10. To take new nuclear build as an example, the main proposal is to take consideration of safety, need and benefits issues out of the inquiry system, by creating a new framework to consider and decide these issues in a national context in advance of any particular applications.⁹ It has been proposed that cross-examination be ruled out on certain issues in inquiries. “It is envisaged that the kind of issues dealt with in such manner would be those on which the public has already had the opportunity for engagement, or other regulatory processes exist”.¹⁰ Examples are given of “matters such as national need/energy policy, health and safety and security”.¹¹
11. It is clear therefore that national planning policy will only become more important in the future.

The legal principles in outline

What is policy?

12. Planning policy is generally taken as encompassing circulars, planning policy guidance notes and statements, Ministerial statements and White Papers. Other less formal documents may constitute policy, such as Chief Planning Officer letters. Ministerial letters from other Departments have been held to constitute policy.¹² Even after dinner speeches given by Ministers might amount to Government policy in the right circumstances.¹³ But the weight to be given to a policy is likely to vary according to the formality of the means of expressing it.

⁴ Parliamentary answer by Stephen Byers on 20 July 2001.

⁵ Barker Review of Land Use Planning, Interim Report, para 1.14.

⁶ Paragraph 3.11.

⁷ Section 94(8).

⁸ Sections 87(3) and 106(1).

⁹ *The Energy Challenge* para 7.36.

¹⁰ Draft guidance for participants, Appendix 1, para 63.

¹¹ *Updating the Electricity Generating Stations and Overhead Lines Inquiry Procedure Rules in England and Wales: An Energy Review Consultation* (DTI, November 2006), p67.

¹² *NAVS v FSS* [2004] EWHC 2074 Admin.

¹³ *Dimsdale v SSE* [1986] JPL 276 at 277-278.

Relevance of policy

13. Although only advisory in nature, non-statutory policy relevant to planning matters will normally be a material consideration to which regard must be had by decision-makers. It is not essential for a decision-maker to cite a policy in order to establish that he has had regard to it. And the weight to be given to a policy in a particular case is a matter for the decision-maker alone.¹⁴
14. As is explained below, that is not the end of the matter. Although relevant, a policy does not have to be followed. “The only statutory obligation upon the local planning authority was ‘to have regard to them’. They were in no way bound by them”.¹⁵ Decision-makers can depart from policy:¹⁶

“there is an important distinction between having regard to guidance and being bound to follow it. A planning authority may legitimately be able to say that, having considered the guidance contained in a PPG, it must decline for countervailing and more important reasons to follow it.”

15. The general principles were summarised in the *Gransden* case:¹⁷
- a. a policy must envisage that there is a right to depart from it in exceptional circumstances;
 - b. policy cannot make a matter which is a material consideration an irrelevant consideration;
 - c. the proper role of a policy is to indicate the weight which should be given to relevant considerations;
 - d. though a body has to have regard to a policy, it does not have to follow it;
 - e. if there is to be a departure from policy, clear reasons must be given;
 - f. it is essential that the policy is properly understood by the decision-maker;
 - g. if proper regard is not had to a policy, the court will quash the decision.

¹⁴ *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447 at 1458H-9C; *Seddon Properties v Secretary of State for the Environment* (1981) 42 P&CR 26 at 28; *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759 at 764G-H and 780 F-H.

¹⁵ *Carpets of Worth v Wyre Forest DC* [1992] JPL 66 at 67.

¹⁶ *R v Wakefield MDC, ex p Pearl Assurance* [1997] JPL B131 (para 10).

¹⁷ *EC Gransden v SSE* (1987) 54 P&CR 86.

Interpretation of policy

16. When policy comes to be interpreted, its ordinary meaning should be adopted. As it was put by Sedley LJ recently: “what a policy means is what it says”.¹⁸ Policy should not be subject to the fine analysis that would be given to a statute.¹⁹
17. Generally, the position appears now to be that the meaning of a policy which is clear is a matter for the courts to determine.²⁰ If a decision-maker fails properly to understand the meaning of the policy, that will amount to an error of law.
18. Where, however, policy is unclear or ambiguous – where there may therefore be more than one acceptable interpretation of it – the decision-maker’s interpretation of policy will be respected by the courts, unless he has attached a meaning to the policy which it is not reasonably capable of bearing.
19. This approach ought to ensure that clear policy is applied by decision-makers in the way that it was intended to be applied. This would avoid, as it was put by one judge, “an approach whereby decision makers can live in the planning world of Humpty Dumpty, making a particular planning policy mean whatever the decision maker decides that it should mean”.²¹

Departing from policy

20. Where a policy is a material consideration, it does not necessarily mean that it must be followed in every case where it is relevant. It has been said of PPGs, for example, that “they are guidance and not tramlines”.²²
21. If a decision-maker departs from policy he must give clear reasons for doing so, so that the recipient will know why the decision has been made as an exception to policy and the grounds on which the decision has been taken.²³ The reasons should amount to “cogent reasoned justification”.²⁴

Rigid adherence to policy

22. Where a decision-maker formulates a policy to assist in the decision-making process, a rigid application of the policy rather than consideration of each case on its merits is a failure properly to exercise discretion – for example, a policy by a council not to allow any permits for the sale of pamphlets in public parks.²⁵ The policy in such cases

¹⁸ *FSS v Sainsbury’s Supermarkets* [2005] EWCA Civ 520 at para 16.

¹⁹ *R v SSHD, ex p Urmaza* [1996] COD 479.

²⁰ *Sainsbury* at para 16; *R (Springhall) v Richmond upon Thames LBC* [2006] EWCA Civ 19 at para 7. Although the position is far from clear – see for example *R (Heath & Hampstead Society) v Camden LBC & Vlachos* [2008] EWCA Civ 193, where the Court of Appeal applies the approach in *R v Derbyshire CC, ex p Woods* [1997] JPL 958 and *Northavon DC v SSE* [1993] JPL 761.

²¹ *Cranage PC v FSS* [2004] EWHC 2949 Admin (para 50)

²² *R v Wakefield MDC, ex p Pearl Assurance* [1997] JPL B131 (para 9).

²³ *EC Gransden v SSE* (1987) 54 P&CR 86; *Carpets of Worth* at 67.

²⁴ *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148 at 189 (para 21).

²⁵ *R v London County Council, ex parte Corrie* [1918] 1 KB 68.

moves beyond being guidance and becomes a general rule. This would have the effect of distorting the statutory scheme by elevating the importance of one factor above others.

Limiting consideration of issues

23. In principle, policy cannot render a matter which is a relevant consideration irrelevant or rule out consideration of what would otherwise be a material issue. Similarly, policy cannot make relevant a matter which is properly under the relevant statute to be regarded as irrelevant. In planning law, however, where the ambit of what can be a material consideration is wide, this second point is much less important.
24. A policy may go too far and amount to a fetter on the exercise of discretion by decision-makers. Whether it does so will in large part depend on the drafting of the policy. It will also depend on the willingness of decision-makers to consider the merits of the particular case and to consider departing from what appears to be rigid policy guidance.
25. Generally, policies which state that they apply “normally”, or which allow for departures in “exceptional circumstances”, will be lawful. This is not a hard and fast rule, as much will depend on the circumstances of the case, and in particular how the policy is applied in practice. Some policies which expressly permit departures in only the most exceptional circumstances have been held to be unlawful.²⁶ Others have been held to be lawful.²⁷
26. In some cases it may be necessary to justify a policy by explaining what circumstances might enable a decision-maker to depart from policy, to show that it is not a blanket policy.²⁸

Examples of policy in action

PPG8

27. Paragraph 30 of PPG8 states that:

“it is the Government’s firm view that the planning system is not the place for determining health safeguards. It remains central Governments responsibility to decide what measures are necessary to protect public health. In the Government’s view, if a proposed mobile phone base station meets the ICNIRP guidelines for public exposure it should not be necessary for a local planning authority, in processing an application for planning permission or prior approval, to consider further the health aspects and concerns about them.”

²⁶ *R v Warwickshire CC, ex p Collymore* [1995] ELR 217; *R v SSHD, ex p Simms* [2000] 2 AC 115.

²⁷ *R v Warwickshire CC, ex p Williams* [1995] ELR 326.

²⁸ See eg *R (Rogers) v Swindon NHS PCT* [2006] 1 WLR 2649.

28. In the first case to consider this provision, *Phillips v FSS* [2003] EWHC 2415 Admin, the Judge observed in passing that:

“although the guidance states that it should not be necessary to consider the health aspects of a development that complies with specified standards for public exposure, it recognises that public concerns about the health implications of a development can still be a material consideration” (para 41).

29. This appeared to draw a distinction between health impacts and concerns about health impacts, with the latter being a material consideration notwithstanding the policy.

30. In *T-Mobile v FSS* [2004] EWCA Civ 1763, the claimant’s appeal against a refusal of planning permission for a mobile phone mast was refused on grounds relating to health risks despite it being common ground that the mast would comply with the ICNIRP guidelines. The inspector had concluded that the proposals provided “insufficient reassurance that there would be no material harm to the living conditions (in terms of health concerns) specifically of the group identified by the Stewart Report as potentially vulnerable: that is, of young children” (DL para 14). In its challenge, the claimant argued that if the guidelines were met, that should be the end of the matter (para 10) and that the inspector was not entitled to reject the appeal on “grounds to do with the perception of health” (para 11).

31. The judge at first instance accepted the claimant’s contention. The Secretary of State supported the inspector’s approach, arguing that “it should not be necessary” did not mean “it will not be necessary”, and that the guidance was merely “an expression of view or approach, not itself a distinct policy properly so called” (para 15). The Court of Appeal rejected this distinction and concluded that the provision was “as much policy as anything else in the document” (para 19). The Court of Appeal went on:

“Certainly the text leaves open the possibility (and this is no more than a conventional aspect of administrative law) that there might be a case in which the planning authority would be justified in looking further and, to that extent, departing from the policy. But that would be an exceptional course which would have to be specifically justified”.

32. The Court concluded that whereas the inspector thought his conclusion was consistent with policy it was in fact a departure from policy, which had to be justified by the existence of exceptional circumstances (para 21).

33. This was an unusual case, inasmuch as it might seem that the Secretary of State was arguing that what appeared to be policy was not policy, and that the words used did not mean what they appeared to mean.

34. The judgment in *T-Mobile* was applied in the case of *Harris v FSS* [2007] EWHC 1847 Admin. There, the inspector had concluded that the mast complied with the ICNIRP guidelines, and said: “accordingly I consider that the residents’ concerns about what they perceive to be the health risks associated with the appeal proposals do not justify withholding planning permission” (DL para 13). The Judge said that the inspector’s approach was simply to apply the statement in PPG8 effectively to rule out

consideration of health concerns (para 20). He summarised the effect of the *T-Mobile* case as meaning:

“that, where the policy guidance applies, public concerns about the health implications of the creation of a radio base station can be a material consideration only if there exist exceptional circumstances which justify departure from the policy” (para 24).

35. It was argued by the claimant that there were particular and unusual circumstances in the case to which the inspector should have had regard (para 16). The Judge concluded that the inspector had regarded the case not as “an exceptional case that justified a departure from policy” (para 27). He went on, however, to consider whether the inspector was entitled to conclude that “there were present in this case no exceptional circumstances requiring him to depart from the policy”, and found that he was (paras 28-29).
36. This line of cases on PPG8 started out with *Phillips* suggesting that health concerns would be material considerations notwithstanding the text of paragraph 30, but *T-Mobile* and *Harris* have brought us to a position where the courts have adopted a very robust approach – more robust perhaps than the Secretary of State might have wished given the arguments raised in *T-Mobile*.

PPS10/PPS23

37. Advice in PPS10 is that “waste planning authorities should concern themselves with implementing the planning strategy in the development plan and not with the control of processes which are a matter for the pollution control authorities” (para 26), and that “it should not be necessary to use planning conditions to control the pollution aspects of a waste management facility where the facility requires a permit from the pollution control authority” (para 32). This advice is reinforced by PPS23 (paras 2 and 10).
38. In *Cox Skips v FSS* [2006] EWHC 2626 Admin, the claimant had argued in a planning appeal that the conditions on a planning permission for a waste transfer and recycling centre should not limit the categories of waste accepted at the site. It was submitted, in reliance on national planning policy (PPG10 and PPS23), that this was an issue for the pollution control authorities. The waste management licence was subject to a condition which restricted the waste to be handled to a specified list (para 7). There were no objections to the application from the local authority environmental health officer or from the Environment Agency and there was no evidence on the harmful effects there might be from the site (para 20).
39. The inspector concluded that he did “not accept that the waste management licence alone offers a rigorous or wide enough regime to safeguard the amenities of local residents or the environmental impacts associated with the site operations over a wider area” (DL para 13). The operator challenged the inspector’s decision, on the basis that the type of waste streams handled should be controlled by the Environment Agency under the waste management licence, according to government policy (by then including PPS10) (para 17).

40. The Judge considered that the waste management licensing regime was directed towards “on-site considerations and processes” (para 28) whereas amenity and wider environmental impacts were matters for land use planning (paras 24-25). He therefore concluded that the inspector’s decision was in accordance with government policy.
41. This is a case which is perhaps on the borderline. But if the intention behind the policy was to ensure that the planning system does not focus on the control of emissions (as is stated in PPS23 at paragraph 10), the policy was not effective in practice. By presenting the issue as one of the amenity of the local area, the inspector – and the courts – were not constrained by the words of the policy.

Circular 1/06

42. ODPM Circular 1/2006 (Planning for gypsy and traveller caravan sites) provides:

“Where there is unmet need but no available alternative gypsy and traveller site provision in an area but there is a reasonable expectation that new sites are likely to become available at the end of that period [of the temporary planning permission] in the area which will meet that need, local planning authorities should give consideration to granting a temporary permission” (para 45).

43. This provision is directing authorities to consider granting temporary planning permission in certain circumstances. Whether to grant temporary rather than full planning permission is likely to be a material consideration in many cases in any event (for example under Circular 11/95). This provision appears to be ensuring that it is a matter to which consideration must be given in certain circumstances.
44. The phrasing of this element of the policy in Circular 1/2006 has been described as being in “more vigorous tones” than previous policy on gypsy sites.²⁹ It has also been held that the policy was a development of the policy on temporary planning permissions in Circular 11/95 and that despite a degree of apparent conflict between the two, when the two circulars were read together there was no conflict between policy on temporary planning permissions in the Circular and in Circular 11/95.³⁰
45. In *Doncaster MBC v FSS* [2007] ECHC 1034 Admin the Deputy Judge said took a straightforward approach to the interpretation of the policy, and held that:
- “The new Circular enjoined her [the inspector] to give consideration to granting a temporary permission where there was a reasonable expectation that new sites were likely to become available at the end of the period. It did not require that there should be a time-limited permission if there was no such reasonable expectation” (para 25).
46. He concluded that the inspector had properly understood and applied the policy, and that it was clear that the inspector had found that there was no reasonable expectation of new sites becoming available within the period being considered (para 27).

²⁹ *South Staffs DC v SSCLG & Dunne* [2008] EWHC 3362 Admin at para 39.

³⁰ *Bromley LBC v SSCLG & Friend* [2008] EWHC 3145 Admin.

Accordingly, the inspector had been right to reject the grant of a temporary permission in favour of a permanent one.

47. That case was followed by *Clee v FSS* [2008] EWHC 117 Admin, where it was argued that an inspector was obliged to consider the issue of temporary permission in accordance with paragraphs 45 and 46 of the Circular. The Judge accepted that a decision-maker must have proper regard to national policy guidance (para 10) and that the Circular should not be misunderstood or misapplied (para 14). He concluded that whilst there was no express reference in the decision to these paragraphs in the Circular (para 13), the operative requirement of the policy was only to give consideration to granting a temporary planning permission – and that policy did not require a grant of permission in circumstances where the criteria in the Circular were met (para 15). As the inspector had considered whether to grant temporary permission, that was enough. A similar conclusion was reached in *Rafferty v SSCLG* [2008] EWHC 2937 Admin, where the inspector considered the question posed by paragraph 45 of the Circular, although he made no specific reference to it.
48. Other cases have made it clear that an inspector is only obliged to give consideration to granting a temporary planning permission if the three questions inherent in paragraph 45 are answered in the affirmative. There must be (i) an unmet need, (ii) no available sites in the area, and (iii) a reasonable expectation that new sites are likely to become available at the end of the period. Where one of these cannot be answered positively, the “obligation to consider granting a temporary permission to the claimant has not been triggered”.³¹ It has even been observed that the policy in paragraph 45 appears to *discourage* the grant of temporary planning permission unless the conditions – including a reasonable expectation of new sites – are met.³²
49. These cases demonstrate that policy will normally be taken to mean what it says. Paragraph 45 of the Circular only requires that consideration be given to granting a temporary permission. If that is done, there is no error. There is no obligation to grant planning permission, but merely to consider granting it.³³ Whilst this might not be enough to meet the objectives of the Circular, as set out in paragraph 12, it is enough to meet the terms of the policy.

Challenges to policy

50. If policy is to be effective in setting boundaries for decision-makers, the policy has to withstand challenge from those opposed to it.
51. An illustration of how the tensions between policy and decision-making in individual cases may lead to collateral litigation is the claim recently heard which was brought by the Stop Stansted Expansion group against the decision of the Secretaries of State for Transport and Communities and Local Government to permit an application for modifications to conditions on the planning permission for Stansted Airport to increase throughput.

³¹ *Lushey Stanley v SSCLG* [2009] EWHC 404 Admin, at paras 18 and 22.

³² *Langton & McGill v SSCLG* [2008] EWHC 3256 Admin at para 31.

³³ *Lushey Stanley* at para 23.

52. The SSE challenge alleged that in witness statements in the 2005 Air Transport White Paper litigation, and in Parliamentary debates on the Planning and Compulsory Purchase Bill, undertakings were given by the Government to the effect that notwithstanding the national policy position it would be possible for an inquiry to consider the need for a development and legitimate for objectors to argue that permission should be refused even if that would frustrate an objective of national policy.
53. SSE alleged that the approach adopted in the Stansted decision was contrary to these undertakings because it was said that the decision concluded that policy was not susceptible to challenge at the inquiry, that the need for the development was settled by national policy, and that the level of environmental harm was not sufficient to outweigh the need and therefore to justify a refusal of permission as that would amount to a challenge to Government policy. This was said to be a misapplication of policy, in frustration of a legitimate expectation and a failure to have regard to relevant considerations.
54. The SSE challenge also included an argument as to what parts of the White Paper were policy and what parts were the inputs or assumptions to policy, or expressions of belief rather than policy. The submission was then made by SSE that the decision-makers should have considered whether – in the light of the evidence at the inquiry – the beliefs, inputs and assumptions set out in the White Paper were valid.
55. The Secretaries of State submitted that SSE’s challenge was in fact an attack on national transport planning policy and that a planning inquiry into a particular proposal promoted in the context of settled national policy is not the appropriate forum for such a debate. It was submitted that the case was an attempt to use proceedings for a particular scheme to mount a challenge to the merits and efficacy of national policy on addressing climate change and global warming. The argument was based on the decision in *Bushell v Secretary of State for the Environment* [1981] AC 75 at 98 that:
- ““Policy” as descriptive of departmental decisions to pursue a particular course of conduct is a protean word and much confusion in the instant case has, in my view, been caused by a failure to define the sense in which it can properly be used to describe a topic which is unsuitable to be the subject of an investigation as to its merits at an inquiry at which only persons with local interests affected by the scheme are entitled to be represented. A decision to construct a nationwide network of motorways is clearly one of government policy in the widest sense of the term. Any proposal to alter it is appropriate to be the subject of debate in Parliament, not of separate investigations in each of scores of local inquiries before individual inspectors up and down the country upon whatever material happens to be presented to them at the particular inquiry over which they preside.”
56. In the judgment in the SSE challenge – *Barbone v Secretary of State for Transport* [2009] EWHC 463 Admin – the Judge accepted that the Air Transport White Paper was based on the Government’s judgment as to the balance of socio-economic and environmental factors, and that, by seeking to adopt a different approach to issues such as tourism, economics and climate change in the context of a particular air transport scheme, SSE were in reality calling into question the Government’s judgement of

national policy, as those factors had already been taken into account in formulating the policy in the White Paper.³⁴ SSE's arguments were rejected because they were inconsistent with the approach in *Bushell*.

57. SSE's case on climate change in particular was characterised as being principally a challenge to the efficacy of Government policy in seeking to reconcile the objectives of expanding aviation and meeting climate change,³⁵ on the basis that the policy was misjudged and unlikely to succeed in realising its objectives, so that the appeal should be determined on a basis other than that set out in the national policy.³⁶ This was rejected as an attack on national transport policy which fell squarely within the principles of *Bushell* and was therefore impermissible.³⁷
58. The judgment in *Barbone* found against SSE and in favour of upholding the policy as formulated. Although the case provides a current illustration of how attempts to use policy to set boundaries for decision-makers may well lead to collateral problems and satellite litigation, it is also a stark example of how that policy – if properly formulated and applied – should be safe from attack in particular decisions.

Conclusion

59. The conclusion to be drawn from this analysis is perhaps that policy can be very effective in setting boundaries for decision-makers. The policy in PPG8 is a good illustration of that. But it must also be concluded that preparing a policy which will set robust boundaries is fraught with difficulty. It appears that in many cases – such as with PPS10/PPS23 and with Circular 1/2006 – policy will not be as effective as may have been hoped. This may be because a way round the policy can be found by decision-makers, or because the policy is not drafted in a way which really achieves its objective.
60. There are limitations to what a policy can achieve. It cannot make a matter which is a relevant consideration an irrelevant consideration in all circumstances. A policy which is too rigid will amount to a fettering of discretion.
61. And there are many ways in which a policy can fail to meet its objectives when it comes to be applied in practice. An unclear policy can be construed in a way different from that which was intended. Notwithstanding policy, each case must be considered on its merits. The applicability of a policy in a particular case can be challenged. A policy can be departed from, provided rational reasons are given. A policy can be given little weight in the overall balance.
62. The answer to the question posed by this paper seems to be: it can be very effective, but it often won't be.

³⁴ Paragraphs 47-50.

³⁵ Paragraph 70.

³⁶ Paragraph 84.

³⁷ Paragraph 85.

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