

Locus Standi

2. The first objection was that Axis had no standing to bring a complaint by way of judicial review.
3. In keeping with the requirements of GCR Order 53 R(3)(6) I found that Axis, as the owner of the adjacent property Whitehall House, had a sufficient interest to be regarded as having standing to bring this application for judicial review.
4. My reasons, briefly stated for present purposes, are two fold.
5. First, as Axis is its owner and as Whitehall House is conceded by CIHL to be existing within “the surroundings” of the Heliport, the Air Navigation (Overseas Territories) Order (“ANOTO”) itself would have Axis within its contemplation as someone having an interest in ensuring that the Heliport is safe and properly certified as being safe. To say, as the Defendants do, that Axis may not complain about the safety of the Heliport because Whitehall House “*does not lie within the certified flight paths for the Helicopter*”, begs the very question whether or not the Heliport should have been certified as being safe for its location. Article 105(2) of the ANOTO is definitive in this regard where it provides that before certification may be granted the CAACI must be satisfied (among other things) that:

“(a) The aerodrome is safe for use by aircraft having regard in particular to the physical characteristics of the aerodrome and of its surroundings....”
6. Second, it is conceded by the Defendants that Axis would have standing although they say that this is limited to a challenge on the ground of nuisance. But that narrow basis of concession would, in my view, be an unduly restrictive way of according to

someone who is not a mere busybody or meddler¹, the right to have the Court's assessment of whether a public authority has complied with the requirements of the ANOTO. As was said in ex parte Bateman [1992] WLR 711, there is "*the desirability of the courts recognising in appropriate cases the right of responsible citizens to enter the lists for the benefit of the public, or of a section of the public of which they themselves are members*".

7. The modern case law has indeed come to favour a more liberal approach to the recognition of standing in cases in which there is a wide public interest. In R v I.R.C. ex parte Nat. Fed. of Self-employed and Small Businesses Ltd. Lord Diplock described the removal of "*technical restrictions on locus standi*" as representing "*progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial life time*" (above at 641 C-D).
8. In R v Sect. of State for Foreign and Commonwealth Affairs, ex parte World Dev. Movement Ltd. [1995] 1 W.L.R. 386 at 395 F; Rose LJ described the "*increasingly liberal approach to standing on the part of the courts during the last 12 years*". And, most recently as research reveals, in R (Feakins) v. Sect. of State for the Environment, Food and Rural Affairs [2003] EWCA Civ. 1546, [2004] 1WLR 1761 at [212] Dyson LJ said: "*In recent years, there has unquestionably been a considerable liberalization of what is required to found a sufficiently of interest for the purposes of standing*".

¹ As Lord Fraser explained: "...a mere busybody does not have a sufficient interest. The difficulty is...to distinguish between the desire of the busybody to interfere in other people's affairs and the interest of the person affected by or having a reasonable concern with the matter to which the application relates: R v IRC ex.p. National Fed. of Self-Employed and Small Businesses Limited [1982] A.C. 617, 646 B-C.

9. In my view, one need not take too liberal a view to recognize that Axis, as the owner of Whitehall House which lies within the immediate surroundings of the Heliport, has a sufficient interest to be accorded standing to challenge the certification.
10. I regard this as being an appropriate case for the recognition of standing in Axis as an interested member of the public also because of the public safety issues that arise.

Delay

11. The second ground of preliminary objection is that Axis has not brought its application “promptly” within the meaning of the GCR Order 53 rule 4, although it did so within the 3 month deadline imposed by that rule. In effect, the rule requires judicial review claims to be commenced promptly and in any event within three months.
12. The policy of the rule is the need for what *Fordham*² describes as “speedy certainty”. The policy there is explained by citations from the case law:

- In *A. v Essex County Council* [2010] UKSC 33 [2011] 1 AC 280 at [116], Baroness Hale, endorsing the proposition that “*there is a significant public interest in public law claims against public bodies being brought expeditiously*” as “*true in judicial review, when remedies are sought to quash administrative decisions which may affect large numbers of people or upon which other decisions have depended and action been taken*” and which is “*normally a prospective remedy, arising not only to quash the past but also to put right the future*”.

² Fordham: *Judicial Review Handbook*, 6th Ed., Hart Publishing 2012, p.26.1.2.

- In *Trim v North Dorset District Council* [2010] EWCA Civ. 1446; [2011] 1 WLR 1901 at [23], Carnwath LJ explained the policy thus:

“...it is in the public interest that the legality of the formal acts of a public authority should be established without delay.”
- And earlier in *O’Reilly v Markman* [1983] 2 AC 237, per Lord Diplock:

“The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by decision.”

13. The promptness rule is a strict rule but one that requires an examination of the circumstances of the case to see whether an applicant who filed within the three-month deadline imposed by GCR O.53 rule 4, did so nonetheless with all reasonable promptitude.

14. When one looks objectively at the chronology of the events of this case and which begins with the certification of the Heliport on 11th November 2011³, I do not

³ As the principles are summarised at Fordham (op.cit; 26.2.4), time runs from the decision, not from knowledge of the decision: *R v Dept. of Transport, ex.p. Presvac Engineering Ltd.* (1992) L Admin L.R. 121 at 133D-H – the relevant date is when the grounds for challenge arose, not the date of the claimant’s knowledge. But *cf R (Anufrijeva) v Sect. of State for the Home Dept.* [2003] UKHL 36; [2004] 1 AC 604 at [26]: “Notice of a decision is required before it can have the character of a determination with legal effect;” [28] “the constitutional principle requiring the rule of law to be observed...requires that a constitutional state must accord to individuals the right to know a decision before their rights can be adversely affected.”

It would appear that that conflict in the case dicta may be explained only on the basis that some administrative decisions will more directly affect the rights of individuals than others which will carry wider and more general consequences of public interest. It would follow that time should run to block a challenge in the former category only after the individual affected would have had knowledge of the decision.

Certification of a heliport carrying as it does consequences of wide public interest may otherwise therefore ordinarily be regarded as a matter of public knowledge once the certificate is granted allowing for the commencement of operations.

consider that Axis can be shut out for having failed to act promptly in the bringing of its application for leave. True it is that Axis could conceivably have acted more quickly than it did at different stages of events but that is not the test for deciding whether there had been delay of the kind to justify blocking the application. The test is whether Axis acted promptly after it had notice of the grant of certification having regard to all the circumstances that attended its efforts to bring its application for leave to apply for judicial review.

15. When all the circumstances are viewed objectively, it would not be fair to ignore the CAACI's own failure to give disclosure of relevant material, in particular the Heliport Manual; disclosure which it intentionally did not give until the 20th December 2011. Even if not specifically earlier requested by Axis from the CAACI but from CIHL, when disclosure of the Manual was required of the CAACI it refused. Instead, Axis was therefore required to file a request under the Freedom of Information Law and the evidence shows that the CAACI's compliance with directions given under that Law was itself, less than prompt and complete.
16. The fact of the matter is that disclosure of the Manual is shown by Axis' Notice of Motion to have been essential to its pleaded case and Axis' request for its disclosure was reasonable, even if somehow it would have been possible for Axis otherwise to have pleaded a case without the Manual.
17. Part of the complaint about delay relates to the time that elapsed after disclosure of the Manual on the 20th December 2012 until the 9th February 2012 when Axis' Notice of Motion was filed. I do not regard that passage of time as being in and of itself indicative of a lack of promptness by Axis, given the complexities of the issues which

arose and which needed to be addressed, especially by way of legal and technical expert advice, advice which Axis had to seek from expert advisers from overseas before settling and filing its Notice of Motion.

18. In the circumstances of this case, it would, in my view, be unfair to block Axis' application on the basis that it failed to comply with the duty to act promptly within the meaning of GCR O.53. r.4.

Admission of Expert Evidence

19. The CAACI and CIHL also object to the admission of evidence provided by Axis' expert witness Mr. Geoffrey Connolly. My reasons for allowing the evidence are more fully explained in the judgment in the case⁴. But for present purposes, while I fully accept the admonition in the case law against the too liberal or general admission of expert evidence in judicial review proceedings, I also observe that the case law itself recognises that exceptionally, in the most compelling of circumstances, expert evidence can be allowed.
20. It cannot be allowed for the purpose of inviting the Court simply to prefer the views of another expert over those of the expert decision-maker (here CAACI); nor for the purpose of inviting the Court to substitute its own views for those of administrative decision makers, however well-informed the court might become by reliance on expert evidence.
21. The decision, exceptional though it may be, to allow expert evidence, must be taken in the particular context of the case and where, as here, the challenge is to the rationality of the decision; the scope for admission is very narrow indeed. But that

⁴ Subsequently delivered on 24th May 2013.

even in such a context as this it can be appropriate and necessary to allow expert evidence, I think can readily be demonstrated by the following propositions:

22. Where the challenge is to the effect that the decision-maker had failed completely to take into account an essential factor such as the nature of the aircraft to be operated from the Heliport when granting certification, should the court be obliged to take into account only the views of the decision-maker itself on the issue? Surely it would be appropriate in such circumstances to allow expert evidence to explain to the court why such a failure on the part of the decision-maker would be fundamental to the reasonableness or lack thereof of the decision to grant certification.
23. That is in the nature of the enquiry raised by the challenge here – one going to the fundamental concern of safety involved in the certification of the Heliport – and which arises from the nature of the activity to take place at and around the Heliport.
24. I am obliged to allow the expert evidence relied upon by Axis to test the reasonableness of the decision itself but having regard of course to the limitations which the case law imposes upon a court in looking at that question not to simply substitute its view; (however well informed) for those of the expert decision-maker.
25. It follows that the expert evidence to be relied upon by the CAACI and CIHL must also be admitted.

Cross-examination

26. The requirement for cross-examination of the decision-maker (in the person here of the CAACI's aerodrome inspector Mr. Dick) and the requirement for condour on the part of the decision-maker are two important but different issues, the one not to be confused with the other.

27. In my view, there is no acceptable reason why the duty of candour owed by it as the respondent public authority, should not be fulfilled by the CAACI in this case giving full and honest answers in writing to questions of fact which arise from Mr. Dick's affidavit evidence and as identified by Axis' counsel; and to do so without the need for cross-examination. This is not a case in which justice cannot be done without cross-examination. Although it is well established that cross-examination may be permissible in judicial review proceedings, it should be ordered only sparingly. See *R v I.R.C. ex.p. Rossminster [1980] AC 952 at 1027 A-B* and *Fordham* (op. cit.) *F1 para. 17.49 p.182* and the cases there cited⁵.

28. The direction I give is that those questions of fact are to be answered in a further affidavit filed and served by Mr. Dick no later than 9am tomorrow morning.

They are the following:

- (a) What measurements were taken by Mr. Dick or anyone else at any time as regards the site – including such as one would take on the ground but also as regards magnetic bearings of approach/departure surfaces, their inclines,

⁵ The following further statement of the principle provided in the Beloff's written submissions are adopted:

Judicial Review and appeal are distinct (see further under General Judicial Review Principles below) Case law recognises "**recourse to such powers [as] very much the exception. The vast, indeed overwhelming, bulk of judicial review cases will continue, as hitherto, to be determined without oral evidence.**" In this regard, the general rule is that facts in dispute will be resolved in favour of the respondent/defendant without recourse to oral evidence.

Cross-examination may unusually be allowed in circumstances where, for example:

- (a) the motives of the decision-maker are in doubt (*R v. Waltham Forest LBC ex parte Baxter [1998] QB 419*);
- (b) written records do not support later evidence given in statements (*R (H) Commissioners of Inland Revenue [2002] EWHC 2164*); or
- (c) the good faith of a decision-maker is under challenge (*Colman v. GMC [2010] EWHC 1608*).

The courts are more disposed to allow cross-examination in cases involving human rights - see for example, *R (on the application of Al-Sweady) v Secretary of State for Defence [2009] EWHC 2387*.

obstructions through the inclines and the separation angle between such surfaces?

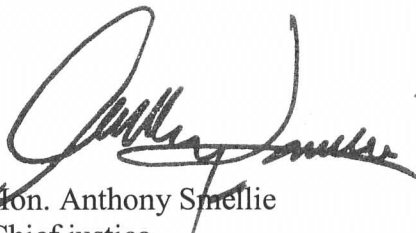
- (b) What was actually approved by the CAACI as regards to the alignment of the northerly approach departure surfaces?
- (c) What, if any, examples did there exist in Canada of heliports with a separation angle of or less than ninety degrees and, in November 2011, what did Mr. Dick know of any such heliports?
- (d) What was Mr. Dick aware of at the time of its receipt, as regards the authorship of the Aeronautical Study?
- (e) What, if anything, took place at the so-called preliminary site inspection and at the final inspection?
- (f) To what regard, if any, did Mr. Dick have to performance characteristics of the Helicopter?
- (g) Did Mr. Dick, in November 2011, consider the notion of a continuous surface to the safety area adjoining the FATO at all?

29. I stress my concern that these issues are addressed with complete candour by Mr. Dick and advise that I reserve the discretion that I undoubtedly have to seek clarification if needs be by putting questions to him myself. Otherwise, I am not persuaded that cross-examination of the experts generally on their affidavits is either necessary or appropriate and I decline to make such an order, which should be made as Mr. Beloff submits by further reference to the case law, only in the most compelling and exceptional circumstances: *R v I.R.C. ex.p. Rossminster* (above); and

R (G) v London Borough of Ealing [2002] EWHC 250; RC (Bancoult) v Foreign Secretary [2012] EWHC 2115.

Re-amended Notice of Motion

30. Leave to re-amend the Notice of Motion in the terms propounded is granted. No element of surprise or prejudice arises from the proposed re-amendments. Leave is to be given unless the proposed amendments would cause injustice to the other parties or would constitute a “useless claim” because no evidence is to be available to support it: See *Jacques Scott and Company Limited v Immigration Board and Island Companies Ltd. 1997 CILR 219.*
31. The element of “surprise” in this context would include proposed amendments which may not be reasonably anticipated and which are aimed at “shifting the goal posts” of the litigation even after it is well underway such as to give rise to concerns of “litigation creep”, as it was described by Justice Mumby in *CF v Secretary of State for Home Depot [2004] EWHC 111 (Fam.) (at page 128).*
32. For further reasons explained more fully in context in the judgment, I did not consider that that concern arose in this case.


Hon. Anthony Smellie
Chief justice



Date: 17th June , 2013