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BUSHELL AND ANOTHER

RESPONDENTS

AND

SECRETARY OF STATE FOR THE ENVIRONMENT

APPELLANT

[HOUSE OF LORDS]

[1981] AC 75

HEARING-DATES: 19, 20, 21, 22, 26, 27, 28, November 1979, 7
February 1980

7 February 1980

CATCHWORDS:

Highway - Motorway schemes - Public inquiry - Traffic forecasts - Publication on traffic forecasting by Department of Environment put in evidence - Cross-examination by objectors disallowed by inspector - Method of forecasting subsequently altered - Refusal of Secretary of State to reopen inquiry - Whether breaches of natural justice - Government policy - Whether suitable for investigation at local inquiry - Highways Act 1959 (7 & 8 Eliz. 2, c. 25), s. 11, Sch. 1, para. 9

HEADNOTE:

The Secretary of State for the Environment in 1972 published two draft schemes under section 11 of the Highways Act 1959 for the construction of motorways and connecting roads. Following objections to the schemes, a public local inquiry was held. The Highways (Inquiries Procedure) Rules 1976 were not in force at the time of the inquiry, though the Secretary of State had announced his willingness to comply with rules in substantially the same terms. At the inquiry, counsel for the Department of the Environment stated that a publication by the department known as "the Red Book" had been used by them as the standard basis for assessing future traffic growth and thus the need for the motorways. Objectors including the applicants, who challenged that need, sought to cross-examine the witnesses who gave evidence on the department's behalf to test the accuracy of the traffic predictions contained in the Red Book, but the inspector ruled that he would not permit the witnesses to be cross-examined as to the need for the motorways or as to the reliability of the Red Book, although he permitted the objectors to call their own evidence as to the need for the motorways. In his report, he recommended that the schemes be made. After the close of the inquiry and before his report was made, the department issued new design flow standards that showed that the existing roads in the area could take considerably more traffic than had previously been estimated and a revised method of predicting traffic growth that resulted in predictions of slower growth than the Red Book method, but the Secretary of State declined a request

by the objectors for the inquiry to be reopened for those matters to be investigated, saying that such representations as they wished to make as to the need for the motorways in the light of the new estimates could always be considered by him as part of the continuous consideration of any of the department's proposals. He told the objectors that if the new information led him to disagree with the inspector's recommendations they would be

given an opportunity to comment on it. In his decision letter, he said that the general changes relating to design flow standards and traffic forecasts that had taken place since the inquiry had been fully taken into account by him and that he was satisfied that they did not materially affect the evidence on which the inspector had made his recommendations. He made the schemes. The applicants applied under Schedule 2 to the Act of 1959 for them to be quashed, on the grounds, inter alia, that the inspector had been wrong in law to disallow cross-examination of the department's witnesses on the Red Book and that the Secretary of State had since the inquiry taken into account undisclosed information and evidence going to the fundamental issues thereat, including in particular, the need for the motorways, those being matters that might reasonably have caused the inspector to reach other conclusions. Sir Douglas Frank Q.C., sitting as a deputy judge of the Queen's Bench Division, dismissed the application but the Court of Appeal by a majority (Lord Denning M.R. and Shaw L.J., Templeman L.J. dissenting) allowed an appeal by them and quashed the schemes.

On appeal by the Secretary of State: -

Held, allowing the appeal (Lord Edmund-Davies dissenting), (1) that in the absence of statutory rules as to the conduct of a local inquiry under the Act of 1959, the procedure to be followed was a matter of discretion for the Secretary of State and the inspector, the only requirement of the Act being that the procedure had to be fair to all concerned, including the general public and supporters of the scheme in question; that what was fair, including whether cross-examination of a witness should be allowed, would depend on the subject matter of the particular inquiry and was to be judged in the light of the practical realities as to the way in which administrative decisions involving judgments based on technical considerations were reached; that the use by the department of the concept of traffic needs in the design year of the motorway assessed by a particular method as the yardstick for determining the order in which particular stretches of the national motorway network should be constructed was a matter of government policy in the sense that it was a topic unsuitable for investigation by individual inspectors at individual local inquiries; and that, accordingly, the inspector's refusal to permit cross-examination of the department's witnesses as to the reliability and statistical validity of the methods of traffic prediction disclosed in the Red Book had not been a breach of the rules of natural justice (post, pp. 93F-G, 94H - 95E, 96D-F, 97D-F, 98G-H, 100B-C, G - 101A, 102B, 108G - 109B, 119A, 121A, G - 122E).

Dictum of Lord Greene M.R. in *B. Johnson & Co. (Builders) Ltd. v. Minister of Health* [1947] 2 All E.R. 395, 399-400, C.A. applied.

(2) That the Secretary of State had not been bound to communicate the departmental advice that he had received after the close of the inquiry to the objectors to give them an opportunity of commenting on it, nor had it been a

breach of the rules of natural justice for him to refuse to reopen the inquiry in order to give them an opportunity of criticising the department's revised methods of estimating comparative traffic needs; and that accordingly, the schemes had been validly made (post, pp. 103D-E, 110D-E, 119A, 123H - 124A).

Decision of the Court of Appeal (1979) 78 L.G.R. 10 reversed.

INTRODUCTION:

APPEAL from the Court of Appeal.

This was an appeal by the Secretary of State for the Environment by leave of the Court of Appeal (Lord Denning M.R., Shaw and Templeman L.JJ.) from their decision on July 30, 1979, by which by a majority (Templeman L.J. dissenting) they allowed an appeal by the applicants, John Bushell and Terence James Brunt, from a decision of Sir Douglas Frank Q.C., sitting as a deputy judge of the Queen's Bench Division, on December 9, 1977 (1977) 76 L.G.R. 460. By that decision, Sir Douglas Frank dismissed an application by the applicants, the owners respectively of Lea End Farm, Alvechurch, Birmingham 48, and lease-hold property 27, Alvechurch Highway, Bromsgrove, Worcestershire, for an order quashing the M42 Birmingham-Nottingham Motorway (Catshill and Lydiate Ash to Monkspath Section) and Connecting Roads Scheme 1976 and the M40 London-Oxford-Birmingham Motorway (Umberslade to Warwick Section) and Connecting Roads Scheme 1976. The grounds of their notice of motion, dated September 29, 1976, were that the schemes were not within the powers of the Highways Acts 1959 to 1971

and/or that the requirements of the Acts had not been complied with in that there had been a substantial breach of natural justice in the course of the public inquiry into the proposed schemes or orders and in the manner in which the Secretary of State for the Environment had reached his decisions, in that: (a) in the course of the inquiry the inspector had refused to hear evidence, or any sufficient evidence, of traffic need and the method adopted by the Department of the Environment for projecting traffic need; he had declined to order or require that the department produce evidence of such matters and refused to permit the representatives of the applicants to cross-examine or otherwise challenge witnesses called by the department in those regards;... (c) the Secretary of State had, since the inquiry, taken into account undisclosed information and evidence going to the fundamental issues at the inquiries, viz. matters of road capacities and changed criteria for calculating the same, changes in economic circumstances affecting demand and need and changes in actual traffic on relevant existing roads in the Oxford-Birmingham corridor and around the Birmingham conurbation, being matters that might reasonably have caused the inspector to reach other conclusions; alternatively, that the Acts impliedly required that the objections of the applicants should be fairly and properly considered by the Secretary of State and that the Secretary of State should give fair and proper effect to the result of such consideration in deciding whether the schemes should be made and that those implied requirements had not been complied with.

The facts are set out in their Lordships' opinions.

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Geoffrey Rippon Q.C., Konrad Schiemann and David Holgate for the Secretary of State. Traffic forecasts are of their nature uncertain. How often must the Secretary of State reopen the inquiry? [Reference was made to the Highways Act 1959, ss. 7 (2), 11 (4) (5) (6), 279; Sch. 1, Pt. II, paras. 9, 10, Sch. 2, paras. 2, 3.]

This is not a case of failure to comply with the requirements of the Act, but simply of "did they have a fair crack of the whip?" The rules of natural justice apply at the inquiry and to the Secretary of State. They apply all the way through. (There is no power in the Act to quash the Secretary of State's decision on the ground of failure of the inspector to allow cross-examination.) There were at the relevant time no statutory rules applicable to inquiries.

The Secretary of State goes further than paragraph 8 (v) of his printed case: "The [Secretary of State] submits that the duty to act fairly and the rules of natural justice do not go beyond the provisions of the Lord Chancellor's Rules [Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1967 (S.I. 1967 No. 720); Highways (Inquiries Procedure) Rules 1976 (S.I. 1976 No. 721)] in respect of the complaints made by the [applicants]." The applicants have had a fair crack of the whip. Natural justice must apply at least up to the point of the decision letter. Rules 15 (2) of the Highways (Inquiries Procedure) Rules 1976 gives a guideline to the application of the rules of natural justice. [Reference was made made to rule 11 (2).] It is difficult to conceive of a case where one could say: "this was manifestly not policy." If the

inspector was wildly wrong, then one might be able to say that the applicants did not have a fair crack of the whip and that natural justice could apply. It is conceded that the Secretary of State's decision could be interfered with on the ground of natural justice if the applicants were prejudiced, but the Secretary of State urges the consideration that the inspector may not be a lawyer. If in good faith he says that a witness should not be cross-examined, he has done the best he can under the rules. He must have some discretion as to the conduct of these inquiries. If he exercise it totally unreasonably, that could be bad faith. Rule 6 (2) of the Rules of 1976 appears to give him some discretion; see also rule 9 (3). The rules of 1976 were not applicable to this inquiry. The House has to consider not whether this was a matter of policy but whether the inspector's decision was unfair and whether the applicants were prejudiced.

[VISCOUNT DILHORNE. Do you accept that the question of the need for the motorway was one of the most important issues at the inquiry?] One might accept that as a subjective view. Thitherto, the most important matter had been thought to be the line that the motorway was to take. The question of need was not one of the most important issues in the mind of the Secretary of State. His first consideration was his duty under section 7 (2) of the Act of 1959.

The question whether the Red Book was out of date was not a proper one for the departmental witness. It was for Parliament to complain to the Secretary of State that it was out of date. With hindsight, perhaps the witness could have been asked: "are you competent to answer questions on this?" and he would have said "no." It was not a matter on which he had authority to answer questions. He would not have been entitled to do so. He might have been able to give evidence, as a traffic engineer, about the forecasts in relation to the present case; it does not follow that he could have answered questions about the Red Book, which

is concerned with forecasts on a national basis. One could not have got him to get up and say that he did not agree with it: he would have had to say: "it is my starting-point."

If one looks at the whole of the inspector's report and of the Secretary of State's decision letter, it cannot be said that the whole inquiry should fall to the ground because of this one error, if it was an error, just to show what is accepted on this relatively minor matter; that the Red Book forecasts are not reliable. It is still a question whether the Secretary of State would have come to a different broad conclusion, having regard to all the other matters involved.

It was right that need should be considered, but that was a matter for the discretion of the Secretary of State of the time. One may have views different from another. It may be a reasonable thing to allow local objectors to question need: the application of national policy so far as it concerns them; but not to question the national policy for a major trunk road. Sir Douglas Frank was right (1977) 76 L.G.R. 460, 472-473. The witness could have been asked if he agreed with the Red Book. Its authors were the only people who could really speak as to the basis on which they had prepared it. The witness could perhaps have been asked to explain it, but he could not have been asked to disagree

with it, in the sense that its methodology was the methodology that it was government policy to use as a starting-point.

On the subject of cross-examination, as Shaw L.J. said (1979) 78 L.G.R. 10, 19, the inspector must deal with matters according to the circumstances: quite apart from what the rules say, he must be given a fairly wide discretion. If the House thinks that the inspector here made a mistake, it should adopt the view that that failure, in the context of the whole inquiry and of the Secretary of State's decision, did not in any way substantially prejudice the objectors.

As to reopening the inquiry, it is no good doing it in order to reexamine the Red Book. One may get a test of reasonable or fair opportunity from the judgment of Diplock L.J. in *Wednesbury Corporation v. Ministry of Housing and Local Government* (No. 2) [1966] 2 Q.B. 275, 300, 302.

There has here been compliance with the requirements of the Acts. There has been no infringement of the rules of natural justice. The applicants were entitled to a fair crack of the whip, and that is what they got.

As to the reopening of the inquiry, the whole question is a matter for the Secretary of State's discretion. Lord Denning M.R. has two tests: 78 L.G.R. 10, 15, 18. The Secretary of State might have some difficulty in exercising his discretion in the way that Lord Denning suggests. The reopening of the inquiry would be to examine a methodology in the Red Book that has been abandoned. Lord Denning M.R.'s judgment in *Lovelock v. Secretary of State for Transport* [1979] R.T.R. 250 is much more to the point than his judgment in the present case.

Schiemann following. Suppose that the inspector or the Secretary of State acted wrongly, what would be the consequences? So far as cross-examination is concerned, the Secretary of State would speculate that the inspector took the view (which he himself is urging) that the government in its motorway programme generally has to make various assumptions regarding traffic many years ahead and

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that it is its policy to have a uniform set of assumptions as to general traffic growth in the country at large. These will include how traffic will grow; road, rail, etc. Its policy is one of not allowing the policy of proceeding on those assumptions to be challenged.

It is very difficult in a 100-day inquiry to allow cross-examination. Objectors may not be there all the time: can they come and say that they want to cross-examine on some matter already dealt with? Transcripts are not always available. It is very difficult to devise a method that will be expeditious but foolproof and yet not wildly expensive.

A failure to permit cross-examination would not necessarily lead to the conclusion that the action of the Secretary of State was not within the powers of the Act. The question whether there has been a refusal of natural justice to such a degree that nullity results or ought to result has to be looked at as at the time of the Secretary of State's decision, not as at the time of the inquiry. There was no prejudice here by any wrongful refusal of cross-examination on the Red Book, because the Red Book has not been relied on by the Secretary of State. What the objectors sought to achieve they did achieve without cross-examination. [Reference was

made to *Fairmount Investments Ltd. v. Secretary of State for the Environment* [1976] 1 W.L.R. 1255.] Whether particular circumstances amount to substantial prejudice will vary from case to case, but see the principles set out by Kerr J. in *Miller v. Weymouth and Melcombe Regis Corporation* (1974) 27 P. & C.R. 468. That indicates an analysis of the situation; the Secretary of State does not say that the case is parallel to the present. Kerr J.'s ruling with regard to discretion has been followed in other cases at first instance. There is a generally received dictum at p. 476 that if there is a possibility that the applicant has been prejudiced the court will in general quash the decision, but there is a distinction between the position facing the court and the position facing the Secretary of State, both as regards cross-examination and as regards new evidence. The court cannot know whether the decision would have gone the other way if the evidence had been given, or the cross-examination had been permitted, etc. The Secretary of State knows what weight he would have given to evidence in cross-examination of a traffic engineer, or to the view of the inspector founded on such an answer.

The position as regards natural justice is obscure if one phrases the question in such a general way as "does the Secretary of State accept that natural justice requires cross-examination to be allowed?" In the last analysis, one has to ask oneself, in relation to a particular proceeding, whether Parliament envisaged that there must invariably be cross-examination of a minister's representative. There is no absolute requirement to allow cross-examination, still less a requirement to allow it on every topic. The Secretary of State accepts the Inquiries Procedure Rules, which are not strictly relevant, as embodying the principles that ought to have guided his decision.

As to the happenings since the inquiry, if one asks whether these vitiate the making of the schemes, there are two separate classes of matter arising since the inquiry that are alleged to be relevant: (1) the adoption by the Secretary of State of two different types of national standard: (a) the revised national volume of traffic forecasts (Department of the Environment, Directorate - General Highways, Technical Memorandum H 3/75, "Standard Forecasts of Vehicles

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and Traffic," February 1975); (b) the change in views as to the amount of traffic that a given design of road can be expected to carry (Technical Memorandum H 6/74, "Design Plans for Motorways and Rural All-Purpose Roads," August 12, 1974). (2) relates to the actual traffic counts for 1974/1975. On (1), the Leitch report (Report of the Advisory Committee on Trunk Road Assessment, 1977), which came after the Secretary of State's decision letter, it may possibly inform the court as to the exercise of discretion ("may quash"), but that is the highest that it can be put. [Reference was made to the evidence and analysis prepared by the applicants after August 1976 and presented to the Court of Appeal: see per Templeman L.J., 78 L.G.R. 10, 25.] It was recognised at the inquiry that one could go above the design flow standards; it was not said that they were something that could not be exceeded. The effect of the adoption of the revised standards on the decision is shown in the decision letter, paras. 11, 14, 112. It strengthened the objectors' case.

What weakened it was that the design year has been put further into the future, a sensible thing to do.

On (2), the decision letter does not mention the 1974/1975 traffic counts. The Secretary of State did not take them into account. He cannot rely on a matter that is not in his decision letter, nor can the objectors if the complaint is the other way. The Secretary of State did not regard the results of the 1974/1975 censuses as a matter that should influence his decision. He accepts that he had those figures in his department. He cannot normally go beyond the decision letter indicating who took a matter into account, at what stage and with what effect. He can rest with saying that the figures were not significant in his mind. He has to rest on the decision letter. It is not right for him to speculate as to whether he thought that they were irrelevant as being of no weight or whether he took them into account but gave them no, or little, weight. There is a whole variety of possible processes that may have gone on in his mind. It is now for this House to say, from the documents, what he did take into account.

Lord Gifford and Andrew Arden for the applicants. The test that should be applied to both parts of this case in determining whether there has been a breach of the requirements of natural justice and the considerations to be taken into account have been considered in two recent cases: Lake District Special Planning Board v. Secretary of State for the Environment [1975] J.P.L. 220; see transcript, pp. 14-16; Nicholson v. Secretary of State for Energy (1977) 76 L.G.R. 693 (on which the applicants rely). With regard to the Lake District case, substantial prejudice is not a matter that the court has to be satisfied on, but the applicants do not suggest that a mere technical error would necessitate the Secretary of State's decision being quashed.

The applicants rely on the general test that both Kerr J. and Sir Douglas Frank suggested should apply to such a consideration: whether, viewing the matter as a reasonable man, there could be a risk of unfairness. That test is fully satisfied in the present case. The formulation of principle that the applicants would suggest is: in order to establish that there has been a breach of the requirements of natural justice, the applicants need to show that there has taken place during the course of the procedure (whether at the inquiry or at the post-inquiry stage) something that a reasonable person, viewing the matter objectively and knowing all the facts, would consider had caused a risk of unfairness or injustice as a result.

The applicants accept that matters of general transport policy were not within the ambit of the inquiry in the sense of being matters that the inspector had to consider in his quasi-judicial capacity. The applicants do not complain of the way in which the inspector dealt with the matter in paragraph 6 (f) (iii) of his report (see per Lord Edmund-Davies, post, p. 112F-G), but he put the Red Book into the wrong category: it was not policy at all, either in the dictionary sense or in the Lord Chancellor's Rules sense. There are, therefore, two consequences of the inspector having ruled as he did that the Red Book forecasts fell into the policy category: (1) the evidence led by the department could not be tested in cross-examination; (2) the evidence and arguments raised on the

matter by the objectors were not accorded any weight by the inspector in his ultimate conclusions. He was regarding the matters put forward by the objectors (their submissions on the Red Book) as going in as a matter of courtesy: he was just letting the objectors blow off steam; it was not, in his view, a matter that fell to be considered.

The inspector in his report, para. 17, sets out certain policy assumptions as to general matters of policy that are outside the scope of the inquiry: that there is no forced restriction in the ownership of vehicles and that means of propulsion for road vehicles will be available in the foreseeable future; they are the current policy of the Secretary of State and it is not for the inspector to say that they are wrong: road use, fuel, rationing, etc.

The applicants do not agree that the purpose of the inquiry is solely or merely to inform the Secretary of State's mind as to the nature of the objections. That was an old view, taken, for example, by the House, of the New Towns Act 1946, in *Franklin v. Minister of Town and Country Planning* [1948] A.C. 87. It is not sufficient today in relation to a motorway inquiry. The purpose of an inquiry under the Act of 1959 (and the position is the same whether it is a scheme of the Secretary of State or of a local authority) is to ensure that, where there has been an objection to a scheme, the facts and arguments relevant to that scheme are to be ascertained and weighed by an independent person in a quasi-judicial manner. Factual matters are matters that only an inquiry can properly test, so, where facts are put forward, as, for example, in the Red Book, they should be examined. The inquiry takes place against a background of national policy, and that cannot be questioned.

The evidence given by the traffic engineer, Mr. Brooks, shows that he had considerable knowledge of the Red Book. The applicants wanted to get from him in cross-examination that the Red Book forecasts were so variable that they were in no way a useful guide. They would have expected to be able to show the inspector that the Red Book was a document on which little or no reliance could be placed. The question is whether he should have placed on it the conclusions that he did. It was the forecasts in this case that were decisive; three passages in the report bear this out: para. 573, dealing with "general environmental objections" (a matter of very fine judgment), para. 567 ("Traffic forecasts") and para. 623 ("Need for the proposals").

Whatever figures one uses, a fundamental is what future growth will be. The whole process of extrapolation (going by the Red Book, subject to very minor adjustments, and taking a percentage nationally as an approach to forecasting) was a process that the objectors wished to attack. They were effectively prevented even from putting forward a positive case because of what the

inspector said at the outset of the inquiry. They were told that it would be irrelevant. That has been their case from the outset. The question is whether the inspector (not the Secretary of State) regarded the Red Book as gospel. The objectors had a right to have the matter investigated by an independent person.

There would not have been a denial of natural justice if, Mr. Brooks having disclaimed ability to deal with the Red Book, the Secretary of

State had refused to send someone else. That would, however, have resulted in the inspector putting less weight on the Red Book.

The substance of the applicants' complaint only becomes apparent when one considers the Leitch report, in which there is a thorough condemnation of the methods used in the Red Book. A government department does not have a monopoly of received wisdom in relation to such matters, and justice cannot, therefore, be done by leaving them to be assessed by the department's own experts. The objectors have the right to have the matter tested at a public inquiry, and in English law cross-examination is the recognised and proper method of testing disputed evidence of this kind.

Combining those submissions with the facts of the case, there is plainly a risk that injustice has resulted through the loss to the objectors of the chance that the inspector would have concluded that he should not be "generally guided" by the forecasts supplied and that, therefore, the absolute necessity that could alone, in his view, justify the schemes was not made out. He should have reported that the environmental objections to the schemes were so great that the material before him did not convince him that they should nevertheless be confirmed. The objectors were constructive in the sense that they put forward alternative suggestions.

There was a serious case to be put forward here and the failure by those who relied on the Red Book to allow it to be tested in cross-examination was a failure that must have resulted in injustice, and in unfairness, which is a linked but slightly different concept.

The exception contained in the Lord Chancellor's Rules to the general rule that cross-examination is permitted (that it should be disallowed if it goes to the merits of government policy) is limited to matters of general political judgment in which values and opinions determine what is done. It does not cover matters of fact or matters of expert opinion or matters of science or the compilation of statistics: these are for the court to determine. As to the meaning of "policy," see the Report of the Committee on Administrative Tribunals and Inquiries (1957) (Cmd. 218) ("the Franks report"), paras. 314 et seq., 318. The applicants emphasise the central importance of the inspector's recommendation. Each objector has the right to be heard, and to cross-examine, though the inspector can say that the point has already been put and an answer given. The Franks Committee's recommendation, at para. 343, that the inspector's report should be published wherever possible does more easily conduce to control by Parliament. If there were no published report, one could more easily say that the purpose of the inquiry was just to inform the mind of the Secretary of State.

It may have been futile to say that the M1 motorway was not needed as a matter of policy, but that cannot shut off factual material on the matter. The

government's policy to build motorways was not properly considered as a matter of policy. It is a fair statement of policy to have a satisfactory network of roads, but the statement of policy in paragraph 1 (2) of the inspector's report is not properly a statement of policy at all; it is ultra vires and unjustified and should be struck out: see the Act of 1959, Sch. 1, para. 9.

It was not enough to permit the objectors merely to put forward their opinions as to why the schemes were not needed; it was also a requirement of natural justice in the context of this kind of hearing that they should know what case they had to meet.

What comes out of the Franks report, paras. 262-277, is that the inquiry process has been made subject to important safeguards to ensure that natural justice, in a very developed form, applies, bearing in mind that after the inquiry, subject to any fresh evidence, the final decision is an administrative, policy decision based not only on the facts reported on but also on other considerations: see the Tribunal and Inquiries Act 1971, s. 11; the Compulsory Purchase by Local Authorities (Inquiries Procedure) Rules 1962 (S.I. 1962 No. 1424), the Rules of 1967, rr. 5, 6, 7, and the Rules of 1976. At all times during the inquiry stage, the Secretary of State is engaged in a quasi-judicial process, as is the inspector, and the requirements of natural justice must be observed.

The loss of the chance of a favourable recommendation by the inspector amounts to a breach of natural justice. The applicants accept that the requirements of natural justice are not a set of rules and that when there is a public hearing the situation is very different from what it is when it is held behind closed doors by a committee. It varies from case to case. In the context of public inquiries, however, where Parliament has decreed that there should be a hearing, an investigation, natural justice requires not merely knowing what the case is that one has to meet but also the testing of that case through the time-honoured method of cross-examination, which alone in our system is the satisfactory method of testing. The function of the inspector is not merely to hear and report upon objections. Under the Rules applicable in practice, and now by law, he has a duty either to make recommendations to the Secretary of State or to give reasons for not making recommendations. There must be a good reason for not making recommendations: for example, if the evidence before the inspector is insufficient for him to form a conclusion, or if, on an assessment of the material before him, factors are so evenly balanced that only from the application of policy considerations could a decision emerge. In making recommendations, the inspector must consider the evidence and arguments submitted by both the promoting authority and the objectors, for "...an objection cannot reasonably be considered as a thing in itself, in isolation from what is objected to" (the Franks report, para. 271).

Cooper v. Wandsworth Board of Works (1863) 14 C.B.N.S. 180, 187, shows that from then on the reason for this implied duty to comply with the rules of natural justice is not that there is a *lis* but because of the nature of the act done. [Reference was made to the Tribunals and Inquiries Act 1958 and to the Town and Country Planning Act 1959, s. 33.] The applicants do not submit that one looks only at the rules of procedure to see what the requirements of natural justice are, but the rules have been devised under the authority of Parliament and to give effect to the recommendations of the Franks committee. The court has quite independently its own rules, safeguards, referred to compendiously as "the

principles of natural justice." The two are thus not mutually exclusive. One must look at the development of natural justice by the courts. [Reference was

made to *Hopkins v. Smethwick Local Board of Health* (1890) 24 Q.B.D. 712, 714; *Errington v. Minister of Health* [1935] 1 K.B. 249.] In *re London-Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2) 1938* [1939] 2 K.B. 515 was not correctly decided, even at that time. The decision was based on the fact that it was a different sort of inquiry and, therefore, there was no need for any evidence to be called in support of the proposals and no denial of natural justice in refusing to allow any cross-examination. Given that that compulsory purchase order was as much an interference by a public authority with private property, the protection given to objectors ought to have been the same. If that is wrong, *In re London-Portsmouth Trunk Road* certainly does not represent the position today. That would today be regarded as in contravention of the rules of natural justice. The Act of 1959 brings schemes of the minister and of the local authority into one enactment and applies the requirement for a local inquiry to both without distinction. Parliament must have envisaged that there would be an inquiry with the same safeguards in each case. Secondly, there has been a further assimilation of the principles applicable to a minister's scheme and to a local authority's scheme by the adoption of uniform rules.

In relation to what task is the minister required to act fairly? See *Franklin v. Minister of Town and Country Planning* [1948] A.C. 87, where there was a limited inquiry: see per Lord Thankerton, at p. 106, whose general statement does not apply in the present case; *Lovelock v. Secretary of State for Transport* [1979] R.T.R. 250; *Marriott v. Minister of Health* (1935) 52 T.L.R. 63, 66-67. The purpose of the inquiry is to inform not just the Secretary of State but also Parliament and the public at large. The Secretary of State is answerable for his final decision to Parliament. Parliament, and the general public, however, have neither the time nor the expertise to ascertain or weigh the relevant facts. The inquiry process, if carried out quasi-judicially, provides Parliament and the general public, including the objectors, with the means of judging the Secretary of State's policy decision. The value of the inspector's report is that it provides for Parliament "the advantage of being able to understand the pros and cons of the matter": per Lord Pearce in *Padfield v. Ministry of Agriculture, Fisheries and Food* [1968] A.C. 997, 1054

On cross-examination, see *Marriott v. Minister of Health*; *Errington v. Minister of Health* [1935] 1 K.B. 249; *Wednesbury Corporation v. Ministry of Housing and Local Government (No. 2)* [1966] 2 Q.B. 275, 302; *Nicholson v. Secretary of State for Energy*, 76 L.G.R. 693, 701, 702.

As to the facts on the second issue (the facts that occurred subsequent to the inquiry), that design capacity means the desirable level is not in accordance with the inspector's report. The new capacities can also be exceeded. It is manifestly unfair that a decision should be made on such changes without reference to the objectors. They made representations to the Secretary of State, but that is not good enough. They should have had the opportunity to have the new situation objectively weighed by the inspector. They were entitled to have their views on that matter heard. Secondly, the traffic census carried out in August 1974 showed the department's figures to be entirely wrong.

As to where one draws the line with regard to new material constantly coming into the department, the court must look at the particular material and

determine whether it is of such importance that injustice has resulted through its not having been referred to the objectors. In many cases, but not the present, the objectors could be satisfied by a letter from the Secretary of State. In the particular circumstances of this case, he probably would have been under an obligation to cause the inquiry to be reopened. The applicants put it in that way because they do not have to go that far: the Secretary of State never even informed them of the material that he considered significant and of how significant he thought that it was and allowed them to comment on it. He never informed them at all: the applicants rely on his letter of May 25, 1976 [see per Viscount Dilhorne, post, p. 109F-G]. [Reference was made to Technical Memorandum H 3/75.]

It is elementary that, where one has sought by various means to predict that at a certain date a certain volume of traffic will be travelling on certain roads, one must compare that hypothesis with reality and test and evaluate it in that light, making such adjustments as are necessary due to unforeseen happenings: for example, in the present case, the 1974 oil crisis.

The general propositions that govern the court's attitude to a complaint of the present kind are as follows. 1. The duty to observe the principles of natural justice continues beyond the close of the inquiry. 2. It is a well-established principle of natural justice that new matter should not be taken into account by the minister without the parties concerned having an opportunity to deal with it. This is subject to three qualifications: (i) the minister is entitled to have regard to matters of policy (including changed policy); (ii) he is entitled to have regard to matters outside the ambit of the inquiry; (iii) the new matter must be one of substantial importance. 3. In considering what the Secretary of State ought to do, the court must look at all the circumstances: sometimes it may be enough for the Secretary of State to invite representations; sometimes the matters in question will be so substantial that the reopening of the inquiry will be called for. All the rules (those of both 1967 and 1976) seek to apply natural justice.

The applicants put their case higher than saying that no reasonable minister here could have failed to reopen the inquiry. The discretion to reopen must be exercised so as to conform with the principles of natural justice. Those principles plainly apply in the present case. [Reference was made to *B. Johnson & Co. (Builders) Ltd. v. Minister of Health* [1947] 2 All E.R. 395.]

So far as natural justice is concerned, it makes no difference whether the relevant material was obtained by the Secretary of State himself or through his department. [Reference was made to *Darlassis v. Minister of Education* (1954) 4 P. & C.R. 281.] If the new matter that comes to light is of a substantial nature and affects the material that was relevant to and debated at the inquiry, natural justice requires that the objectors should have the opportunity of dealing with it. That is the case whether the deciding authority is a minister of state or some other body and

whether the new information is matter that has been gathered by the minister or by the department or comes from elsewhere. This is because the purpose of requiring the deciding authority to give the respective parties an opportunity to deal with the new material (which is a purpose that applies to all the kinds of decision to which natural justice applies) is that the persons affected must have knowledge of the case that they have to meet: see *Errington v. Minister of*

Health [1935] 1 K.B. 249. No distinction should be drawn between a scheme of this kind and one promoted by a local authority. There is nothing in principle or authority that should lead the House to hold that natural justice does not apply, or applies in some less measure, because it is the minister who has promoted the scheme. On the contrary, the law on natural justice shows that it is the person or body who decides and who may have initiated the process who still has to apply the principles of natural justice. It is the nature of the thing done that requires the application of natural justice: see *Cooper v. Wandsworth Board of Works*, 14 C.B.N.S. 180.

If the scheme is quashed, the consequence is that the Secretary of State, if he wishes to continue to promote it, must hold an inquiry according to law. He has not got to start again; he can reopen the inquiry to deal with such matters as were either not sufficiently dealt with before (cross-examination on the traffic forecasts) or are new.

Arden following. From the cases cited, and many other cases dealing with the subjects both of natural justice and of the inquiry process, a framework and a pattern emerges that, when applied to the present case, suggests most forcefully that the applicants did not have what may variously be termed "a fair hearing" or a "fair crack of the Fairmountwhip."

It is an elementary proposition that the property rights of individuals are not lightly to be interfered with, not to be interfered with without what the Americans call "due process." For a long time, Parliament was most cautious in its approach to the growing demands of administration for property. Commissions of inquiry were appointed; there were direct parliamentary hearings. With the growth of local administration, following the early public health reports of the 1830s, this became impracticable and so-called administrative powers of appropriation or interference with property were accorded to various administrative bodies. The response of the courts to this was forthright: natural justice demanded that a man receive notice of an intended encroachment on his rights in his own property. He was entitled, at the least, to a fair consideration of the matter. The term was used, not in the public inquiry sense "a fair hearing." Reference is made to this history because it is important not to lose sight of the reason why the courts inserted this requirement. It was not for the sake of the hearing itself. That would be an empty right. The court is concerned not with the form but with the substance of the right. It is for the sake of what the hearing affords, of what protection the law gives to the individual whose rights are to be interfered with. The question becomes: what does that protection amount to? Not merely that the local authority should take the individual's representations into account, for that, too, would necessarily be implied as a relevant

consideration. Natural justice has always meant a higher standard than the mere administrative test of "taking into consideration." Its import has always been protection, and, once Parliament had entrusted an administrative body with the relevant powers to interfere with property, the only protection that the courts could offer was the concept of the fair hearing, and its consequence that during the hearing stage there would be a fair and balanced consideration of the relevant matters, albeit that at the end of the day the public authority would have the power so to weigh up the material that it had gathered in that decision-making process according to its policies and the public interest.

The inquiry process is no more than Parliament's equivalent of, but never a substitute for, a similar processing of the material relevant to a decision. To some extent, the objective is the same: to protect the rights of individuals affected. To some extent, there is said to be the purpose of "informing the minister's mind," a purpose hardly inconsistent with or mutually exclusive of protecting individuals; one might say that it would be sad indeed if the two were automatically mutually exclusive. To some extent, there is the proposition, as set out in *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997, of permitting Parliament to weigh the pros and cons: the "parliamentary answerability" of the minister. This last purpose is designed to achieve an effect not qualitatively different from that which the courts intend through natural justice, that is, that if a person is deprived of property through the judicial process, through the courts, then he has his redress in the appeal structure. It is trite to remark that there is no appeal from a decision of a minister, and clearly there is not to the courts. There remains, however, an appeal within the political process. This may appear theoretical, for elections today are not lost and won on individual clearance schemes, nor on motorway schemes. The prospect remains, however, of utilising the political process, whether through one's member of parliament or through the democratic process, of making an issue of an administrative intervention in a most basic property right itself. This redress is only effective if it is possible to point to a case and say: that was a "political" act in the sense of its being an act based on policy or on a particular conception of public benefit. It affords as much protection to the administrator as it does to the individual, for the administrator is entitled to be protected from attack for his least political, most common-sense actions; for example, in relation to the clearance of a slum property that no reasonable man, or inspector, could think worth preserving.

Whether by means of natural justice or by compliance with what the law understands by an adequate and proper inquiry it should properly be seen that protection of the individual is afforded to him by application of the relevant facts of the situation under consideration. It is that protection that the courts must uphold. If administrators could apply this process not to the relevant or correct facts of the situation but to a hypothetical case structured to secure the finding at the end of that process that justifies the decision, it would have taken away from the individual in question the right to a fair and impartial assessment. The *quid pro quo* is that, if the fair and impartial assessment does justify the decision,

then so much the less is the minister politically answerable. In the present case, the Secretary of State has proceeded on what is now shown to be an entirely incorrect premise; it is incorrect not just because the Leitch Committee deprecated its use but also because the figures that came to light before the decision did not bear out the predictions. Further, design standards, the road capacities, were revised, again before the decision. Lastly, there was a revision of the predictions, before the decision. In this case, given the finely balanced nature of the inspector's decision, there is a strong possibility, or even a likelihood, that the inspector would now say that, on the grounds of traffic need, this scheme was not justifiable.

Rippon Q.C. in reply. As to the consequences of the quashing of these schemes, there is at any rate very considerable doubt as to what the consequences of a "semi-quash" are. Technically, the court quashes the schemes, but it is very important that the Secretary of State should know at what point

the inquiry should be reopened. At any time now, he may resolve the difficulty regarding extrapolation and the causative element. The same inspector may not be available, but that is not essential. The supporters of the schemes might also want to be heard. One has to look at the particular Act and at the procedure that that particular Act requires.

In looking at the purpose of an inquiry, help can be found in the opinion of Lord Thankerton in *Franklin v. Minister of Town and Country Planning* [1948] A.C. 87. The basis test is fairness, and, if one looks at the whole of the inspector's report and the decision letter in the present case, the inspector and the Secretary of State have acted fairly and responsibly. The objectors were in no way prejudiced by the conduct of the inquiry and the decision-making process. They have been heard at every stage. It cannot be said that there were circumstances here in which no reasonable minister could have failed to reopen the inquiry or in which no reasonable inspector could have made the recommendation that the inspector made. One cannot say: "if any inspector had known that, he would have changed his mind." One can go on making representations up to and after the decision letter.

It is difficult to conceive of an inquiry where there will not be a mass of new material coming to the minister. There may well be political pressure on him to reopen the inquiry.

The withdrawal by the Secretary of State of paragraph 1.2 of his statement of case at the inquiry [see per Viscount Dilhorne, post, p. 106G] did not open a debate on national transport strategy. The Secretary of State was saying as his starting point that it was his policy to adopt this methodology nationally. (Noise standards also change from time to time; cross-examination on his methodology as regards noise should also have been excluded.)

The Secretary of State adopts the judgment of Templeman L.J.

"Need" for the Secretary of State covers a wider spectrum than it does for an inspector at a particular local inquiry. Some help as to "policy" may be found from both the Oxford English Dictionary and the Shorter Oxford English Dictionary.

The question is not whether the Red Book was right or wrong: it was neither right nor wrong. It was not gospel and was not treated as such. It was the best methodology available at the time. Equally, the Leitch methodology is not gospel. The applicants cannot, therefore, say that they have been deprived of a recommendation in their favour. Their contentions that the Red Book had an "important influence" and that it had a "probable influence on the outcome" cannot be sustained.

As to the applicants' submission on *Franklin v. Minister of Town and Country Planning* [1948] A.C. 87 that that is not a proper description of an inquiry under the Act of 1959, that *In re London-Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2) 1938* [1939] 2 K.B. 515 was wrongly decided at the time and that *Lovelock v. Secretary of State for Transport* [1979] R.T.R. 250 should be overruled, the Act of 1959 is a consolidation Act, with minor amendments, and two earlier Acts incorporated into it, the Trunk Roads Act 1946, Sch. 2, and the Special Roads Act 1949, Sch. 1, used virtually the same words. The procedures were never altered. Parliament must have had *Franklin* and *In re*

London-Portsmouth Trunk Road in mind. The Act of 1949 was passed only a year after the decision in Franklin.

An inquiry into a scheme under section 11 of the Act of 1959 is held for the guidance and information of the Secretary of State so as to improve the quality of the administrative decision that he eventually takes.

Schiemann. It is likely that during a 100 day inquiry there will have been innumerable refusals to allow cross-examination, but in the context of traffic it was only on the Red Book that the inspector refused to allow it, not on questions of assignment. As to whether he refused to allow cross-examination on any other of the factors that are taken into account in calculating need, it depends how one defines "need." For example, someone may say that lorries are thundering past his door and that therefore there is a need for a motorway. The Secretary of State cannot say to what degree there was a reduction of cross-examination on, for example, noise methodology. There are different ways of measuring noise, and there was some dispute at the inquiry as to the method of dealing with it. There was no complaint of refusal to allow cross-examination; the complaint, so far as one can see, has been exclusively with regard to the Red Book. The proper document from which to get the Secretary of State's definition of "need" is the inspector's report rather than the documents behind it (rather than, for example, the Secretary of State's statement of case).

There are provisions for compensation for planning blight; they are rather narrowly defined: see Town and Country Planning Act 1971, s. 192 et seq.

The proof of evidence of the objector Mr. J. L. MacKernan [see per Lord Lane, post, pp. 121F - 122E], together with the questions and answers on it, went to the Secretary of State with the inspector's report.

Except for the figures for "combined design capacities: current at inquiry" (column 1), the Secretary of State does not accept the analysis prepared by the applicants after August 1976 and presented to the Court of Appeal [see per Templeman L.J., 78 L.G.R. 10, 25]. In particular,

he does not accept the figures for "combined design capacities: new - post inquiry" (column 2) and "traffic flows (p.c.u.) revised (H 3/75)" (column 6). Some of the figures were wrong and were corrected. The Secretary of State did not object to the analysis going in the Court of Appeal, but he did not accept its relevance or accuracy. He does not accept the actual figures, but the substance of the applicants' point is right: that the actual traffic flow was less than had been relied on at the inquiry.

Lord Gifford. If the House is not happy about this analysis, the applicants rely on the actual traffic counts made in August 1974.

Schiemann. The Secretary of State accepts that, in respect of the A41 and A34, post-inquiry capacity exceeds the revised capacity, properly calculated, for 1990, i.e. he accepts that column 2 of the August 1976 analysis exceeds column 6. He does not accept that in respect of any other "bunch" of roads in that analysis.

[LORD DIPLOCK. Their Lordships propose to exclude this analysis from consideration.]

[Reference was made to the Report on the Review of Highway Inquiry Procedures (1978) (Cmnd. 7133), para. 10.]

Their Lordships took time for consideration.

February 7.

PANEL: Lord Diplock, Viscount Dilhorne, Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Lane

JUDGMENT BY-1: LORD DIPLOCK.

JUDGMENT-1:

LORD DIPLOCK.: My Lords, this appeal arises out of a local inquiry which lasted 100 days into two proposed schemes made by the Secretary of State for the Environment ("the minister") under section 11 of the Highways Act 1959, for the provision of two approximately 15-mile lengths of special road (i.e. motorway), through rural areas to the south and south-east of Birmingham. I shall refer to these as "M42 Bromsgrove" and "M40 Warwick." They were intended to form an integral part of the national network of motorways when it is eventually completed and as part of that network catering for traffic between the north-west and south-east of the country and between the north-east and south-west.

The procedure to be followed by the minister in making schemes under section 11 of the Act is to be found in Part II of Schedule 1. It is not necessary to set it out in detail; it suffices to say that paragraph 9 provides for the lodging of objections by persons appearing to the minister to be affected by the proposed scheme and goes on to provide that if any such objection is not withdrawn "the minister shall cause a local inquiry to be held." There is a discretion in the minister to dispense with an inquiry if he is satisfied that circumstances exist that make it unnecessary; but that does not apply to the instant case. The local inquiry was held.

The Act itself says nothing more than this about the scope of the inquiry or the procedure to be followed at or after it, save that paragraph 10 of Schedule 1 provides:

"After considering any objections to the proposed scheme which are not withdrawn, and, where a local inquiry is held, the report of the person who held the inquiry, the minister may make or

confirm the scheme either without modification or subject to such modifications as he thinks fit."

So before reaching his decision the minister must consider the objections, so far as not withdrawn, and the report of the inspector who held the local inquiry, before he makes up his mind whether to exercise his administrative discretion in favour of making the scheme either in its original form or with modifications or not making it at all; and section 12 of the Tribunals and Inquiries Act 1971 requires him to give reasons for his decision. At the time of the inquiry in the instant case no rules regulating the procedure to be followed at the inquiry had been made under section 11 of the latter Act. The Highways

(Inquiries Procedure) Rules 1976 did not come into force until long after the inquiry in the instant case had closed. The minister had, however, announced his willingness at local inquiries into proposed schemes for motorways to comply with those rules that were already applicable in case of compulsory acquisition of land by ministers - the Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1967. These are in substantially the same terms as the subsequent rules of 1976, but with one difference to which I shall be referring later.

My Lords, before I come to the specific complaints as to the procedure followed at the local inquiry and thereafter before the minister's decision, which have been held by a majority of the Court of Appeal to justify quashing the minister's decision on the ground that the objectors were denied natural justice, I think that it is useful to give some general consideration to the scope and purpose of a local inquiry into a scheme for a motorway which the minister himself proposes to make under section 11 of the Highways Act 1959, and also to the functions of the inspector by whom such an inquiry is held and of the minister after the inspector's report has been received by him and before he has made his decision.

The provision and improvement of a national system of routes for through traffic for which a government department and not a local authority should be the highway authority has formed a part of national transport policy since the passing of the Trunk Roads Act in 1936. As part of this national network, or superimposed upon it, there have been constructed by stages during the course of the last 30 years special roads familiarly known as motorways which were first authorised by the Special Roads Act 1949. The construction of motorways is a lengthy and expensive process and it has been the policy of successive governments, which would in any event have been dictated by necessity, to construct the network by stages. The order in which the various portions of the network are to be constructed thus becomes as much a matter of government transport policy as the total extent and configuration of the motorway network itself. It also has the consequence that schemes for the provision of special roads which the minister proposes to make under section 11 of the Highways Act 1959 deal with comparatively short stretches in a particular locality of what, when the other stretches are completed, will be integral parts of the national network. It follows, therefore, that there will be a whole series of schemes relating to

successive stretches of the national network of motorways each of which may be the subject of separate local inquiries under Schedule 1, paragraph 9, to the Act.

scheme made by the minister under section 11 does no more than authorise the construction of the stretch of motorway to which it relates. It does not follow that the construction of that stretch will begin immediately or within any fixed time limit or, indeed, at all. Section 286 provides for its revocation or amendment by a subsequent scheme which may be made at any time either before or after construction has begun. Before construction can start however it will be necessary to make compulsory purchase orders in respect of the lands required for the motorway and its approach roads and these in turn are likely to be the subject of further local inquiries. So from the publication of the draft scheme to the actual construction of the stretch of motorway which is authorised the process is necessarily a long one in the course of which circumstances may alter

and even government policy may change.

Where it is proposed that land should be acquired by a government department or local authority and works constructed on it for the benefit of the public either as a whole or in a particular locality, the holding of a public inquiry before the acquisition of the land and the construction of the works are authorised has formed a familiar part of the administrative process ever since authorisation by ministerial order of compulsory acquisition of land for public purposes began to be used to replace parliamentary authorisation by private bill procedure in the 19th century. The essential characteristics of a "local inquiry," an expression which when appearing in a statute has by now acquired a special meaning as a term of legal art, are that it is held in public in the locality in which the works that are the subject of the proposed scheme are situated by a person appointed by the minister upon whom the statute has conferred the power in his administrative discretion to decide whether to confirm the scheme. The subject matter of the inquiry is the objections to the proposed scheme that have been received by the minister from local authorities and from private persons in the vicinity of the proposed stretch of motorway whose interests may be adversely affected, and in consequence of which he is required by Schedule 1, paragraph 9, to hold the inquiry. The purpose of the inquiry is to provide the minister with as much information about those objections as will ensure that in reaching his decision he will have weighed the harm to local interests and private persons who may be adversely affected by the scheme against the public benefit which the scheme is likely to achieve and will not have failed to take into consideration any matters which he ought to have taken into consideration.

Where rules regulating the procedure to be followed at a local inquiry held pursuant to a particular statutory provision have been made by the Lord Chancellor under section 11 of the Tribunals and Inquiries Act 1971, the minister and the inspector appointed to hold the inquiry must observe those rules; but no such rules were applicable in the instant case - they had not yet been made. The Highways Act 1959 being itself silent as to the procedure to be followed at the inquiry, that procedure,

within such limits as are necessarily imposed by its qualifying for the description "local inquiry," must necessarily be left to the discretion of the minister or the inspector appointed by him to hold the inquiry on his behalf, or partly to one and partly to the other. In exercising that discretion, as in exercising any other administrative function, they owe a constitutional duty to perform it fairly and honestly and to the best of their ability, as Lord Greene M.R. pointed out in his neglected but luminous analysis of the quasi-judicial and administrative functions of a minister as confirming authority of a compulsory purchase order made by a local authority, which is to be found in *B. Johnson & Co. (Builders) Ltd. v. Minister of Health* [1947] 2 All E.R. 395, 399-400. That judgment contains a salutary warning against applying to procedures involved in the making of administrative decisions concepts that are appropriate to the conduct of ordinary civil litigation between private parties. So rather than use such phrases as "natural justice" which may suggest that the prototype is only to be found in procedures followed by English courts of law, I prefer to put it that in the absence of any rules made under the Tribunals and Inquiries Act 1971, the only requirement of the Highways Act 1959, as to the procedure to be followed at a local inquiry held pursuant to Schedule 1, paragraph 9, is that it must be fair to all those who have an interest in the

decision that will follow it whether they have been represented at the inquiry or not. What is a fair procedure to be adopted at a particular inquiry will depend upon the nature of its subject matter.

What is fair procedure is to be judged not in the light of constitutional fictions as to the relationship between the minister and the other servants of the Crown who serve in the government department of which he is the head, but in the light of the practical realities as to the way in which administrative decisions involving forming judgments based on technical considerations are reached. To treat the minister in his decision-making capacity as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone in constitutional theory is accountable to Parliament is to ignore not only practical realities but also Parliament's intention. Ministers come and go; departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise. It is they who in reality will have prepared the draft scheme for his approval; it is they who will in the first instance consider the objections to the scheme and the report of the inspector by whom any local inquiry has been held and it is they who will give to the minister the benefit of their combined experience, technical knowledge and expert opinion on all matters raised in the objections and the report. This is an integral

part of the decision-making process itself; it is not to be equiparated with the minister receiving evidence, expert opinion or advice from sources outside the department after the local inquiry has been closed.

The content of a draft scheme under section 11 of the Highways Act 1959 for a stretch of motorway to be made by the minister is purely factual. It describes the proposed route of the motorway and its connecting roads by reference to a deposited plan. It discloses no reasons why the department considers that it is in the public interest that the construction of this particular stretch of motorway should be authorised at this particular time upon the particular line shown in the deposited plan. If the minister is to give proper consideration to objections to the scheme by persons in the vicinity of the proposed stretch of motorway, as he is required to do by Schedule 1, paragraph 10, fairness requires that the objectors should have an opportunity of communicating to the minister the reasons for their objections to the scheme and the facts on which they are based. The Highways Act 1959 requires that the form in which that opportunity is to be afforded to them is at a local inquiry. Fairness, as it seems to me, also requires that the objectors should be given sufficient information about the reasons relied on by the department as justifying the draft scheme to enable them to challenge the accuracy of any facts and the validity of any arguments upon which the departmental reasons are based.

A draft scheme is likely to attract supporters as well as objectors; to modify the scheme so as to meet an individual objection, for instance as to the line of the motorway or any connecting roads, may have the result of transferring the adverse effect of the scheme from the objecting property-owner

to someone else who had no reason to object to the draft scheme as originally published. Fairness would suggest that supporters of the scheme should also be heard and would require that before a decision is made to modify a draft scheme those adversely affected by the modification should be given an opportunity of stating their reasons for objecting to it.

In the instant case the public inquiries into the two schemes which were for two adjoining stretches of the national motorway network were held together. There were 170 objections to the schemes which had not been withdrawn when the combined inquiry began. There were about 100 different parties who took part in it and made representations to the inspector orally or in writing in objection to or in support of the schemes. Many of these called witnesses in support of their representations. The hearing of the inquiry by the inspector took 100 working days between June 1973 and January 1974. He made his report to the minister on June 12, 1975.

It is evident that an inquiry of this kind and magnitude is quite unlike any civil litigation and that the inspector conducting it must have a wide discretion as to the procedure to be followed in order to achieve its objectives. These are to enable him to ascertain the facts that are relevant to each of the objections, to understand the arguments for and against them and, if he feels qualified to do so, to weigh their respective

merits, so that he may provide the minister with a fair, accurate and adequate report on these matters.

Proceedings at a local inquiry at which many parties wish to make representations without incurring the expense of legal representation and cannot attend the inquiry throughout its length ought to be as informal as is consistent with achieving those objectives. To "over-judicialise" the inquiry by insisting on observance of the procedures of a court of justice which professional lawyers alone are competent to operate effectively in the interests of their clients would not be fair. It would, in my view, be quite fallacious to suppose that at an inquiry of this kind the only fair way of ascertaining matters of fact and expert opinion is by the oral testimony of witnesses who are subjected to cross-examination on behalf of parties who disagree with what they have said. Such procedure is peculiar to litigation conducted in courts that follow the common law system of procedure, it plays no part in the procedure of courts of justice under legal systems based upon the civil law, including the majority of our fellow member states of the European Community; even in our own Admiralty Court it is not availed of for the purpose of ascertaining expert opinion on questions of navigation - the judge acquires information about this by private inquiry from assessors who are not subject to cross-examination by the parties. So refusal by an inspector to allow a party to cross-examine orally at a local inquiry a person who has made statements of facts or has expressed expert opinions is not unfair per se.

Whether fairness requires an inspector to permit a person who has made statements on matters of fact or opinion, whether expert or otherwise, to be cross-examined by a party to the inquiry who wishes to dispute a particular statement must depend on all the circumstances. In the instant case, the question arises in connection with expert opinion upon a technical matter. Here the relevant circumstances in considering whether fairness requires that cross-examination should be allowed include the nature of the topic upon which

the opinion is expressed, the qualifications of the maker of the statement to deal with that topic, the forensic competence of the proposed cross-examiner, and, most important, the inspector's own views as to whether the likelihood that cross-examination will enable him to make a report which will be more useful to the minister in reaching his decision than it otherwise would be is sufficient to justify any expense and inconvenience to other parties to the inquiry which would be caused by any resulting prolongation of it.

The circumstances in which the question of cross-examination arose in the instant case were the following. Before the inquiry opened each objector had received a document containing a statement of the minister's reasons for proposing the draft scheme. It was itself a long and detailed document, and was accompanied by an even longer and more detailed one called "Strategic Studies Information," which gave an account of various traffic studies that had been undertaken between 1964 and 1973 in the area to be served by M42 Bromsgrove and M40 Warwick, the methodology used for those studies and the conclusions reached. The second paragraph of the minister's statement of reasons said: "The government's

policy to build these new motorways" (sc. for which the two schemes provided) "will not be open to debate at the forthcoming inquiries [sic]: the Secretary of State is answerable to Parliament for this policy."

"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. So much the respondents readily concede.

At the other extreme the selection of the exact line to be followed through a particular locality by a motorway designed to carry traffic between the destinations that it is intended to serve would not be described as involving government policy in the ordinary sense of that term. It affects particular local interests only and normally does not affect the interests of any wider section of the public, unless a suggested variation of the line would involve exorbitant expenditure of money raised by taxation. It is an appropriate subject for full investigation at a local inquiry and is one on which the inspector by whom the investigation is to be conducted can form a judgment on which to base a recommendation which deserves to carry weight with the minister in reaching a final decision as to the line the motorway should follow.

Between the black and white of these two extremes, however, there is what my noble and learned friend, Lord Lane, in the course of the hearing described as a "grey area." Because of the time that must elapse between the preparation of any scheme and the completion of the stretch of motorway that it authorises, the department, in deciding in what order new stretches of the national network ought to be constructed, has adopted a uniform practice throughout the country

of making a major factor in its decision the likelihood that there will be a traffic need for that particular stretch of motorway in 15 years from the date when the scheme was prepared. This is known as the "design year" of the scheme. Priorities as between one stretch of motorway and another have got to be determined somehow. Semasiologists may argue whether the adoption by the department of a uniform practice for doing this is most appropriately described as government policy or as something else. But the propriety of adopting it is clearly a matter fit to be debated in a wider forum and with the assistance of a wider range of relevant material than any investigation at an individual local inquiry is likely to provide; and in that sense at least, which is the relevant sense for present purposes, its adoption forms part of government policy.

The "need" for a new road to carry traffic between given destinations is an imprecise concept. If it is to be used as an important factor in comparing one situation with another for the purpose of determining priorities, there must be uniform criteria by which that need in each locality is to be measured. The test of future needs in the design year which the department has adopted is: whether, if the new stretch of motorway is not constructed, there will be undue congestion of traffic on existing roads, either in the locality or forming other parts of the national network of motorways, for which the new stretch of motorway would provide an alternative route. To apply this test of need to a design year 15 years ahead involves, among other things, estimating (1) the amount of traffic that the existing roads in the locality are capable of bearing without becoming so congested as to involve unacceptable delays; and (2) the amount of traffic that in the absence of the new stretch of motorway would in the design year be using those existing roads which the motorway is intended to relieve.

The methods used by the department for arriving at these estimates are very complicated. So far as I am capable of understanding them as one who is by now (I hope) a reasonably well-informed layman, it is obvious to me that no one who is not an expert in this esoteric subject could form a useful judgment as to their merits. The methods used are kept under periodical review by the department's own experts as a result of which they are revised from time to time. They are described in published documents. One which it will be necessary to mention dealt with the capacity of rural roads; but that which is most relevant to the respondents' complaint about refusal to permit cross-examination in the instant case has been referred to as the "Red Book." It was published in 1968 under the title Traffic Prediction for Rural Roads (Advisory Manual on) and described the method that had been used for predicting the growth of traffic up to the design year on the roads which the M42 Bromsgrove and M40 Warwick were intended to relieve. Important features of the method set out in the Red Book for predicting traffic that will be using the roads in a particular locality are the assumptions (1) that in general, traffic on rural roads throughout the country will grow at the same rate in all areas, except where exceptional changes can be foreseen as likely to take place in a particular locality; and (2) that the annual rate of growth will fall off as vehicle ownership in the country approaches saturation point; and that the best way of predicting what the growth will have been up to a particular design year is by assuming that it can be graphically represented by a curve that is asymptotic (i.e. broadly "S"-shaped) and whose shape where it represents future years can be extrapolated (i.e. predicted) from the shape of the curve which represents the observed annual increase in vehicle registrations over past years. It was recognised that predictions as applied to individual roads could only be very approximate and

were subject to margins of error as high as 10 per cent. to 20 per cent.

The decisions to make these two assumptions for the purpose of calculating and comparing what traffic needs will be in all localities throughout the country in which it is proposed to construct future

stretches of the national network of motorway might not, in a general context, be most naturally described as being government policy; but if a decision to determine priorities in the construction of future stretches of the national network of motorways by reference to their respective traffic needs in a design year 15 years ahead can properly be described as government policy, as I think it can, the definition of "traffic needs" to be used for the purposes of applying the policy, viz. traffic needs as assessed by methods described in the Red Book and the departmental publication on the capacity of rural roads, may well be regarded as an essential element in the policy. But whether the uniform adoption of particular methods of assessment is described as policy or methodology, the merits of the methods adopted are, in my view, clearly not appropriate for investigation at individual local inquiries by an inspector whose consideration of the matter is necessarily limited by the material which happens to be presented to him at the particular inquiry which he is holding. It would be a rash inspector who based on that kind of material a positive recommendation to the minister that the method of predicting traffic needs throughout the country should be changed and it would be an unwise minister who acted in reliance on it.

At the local inquiry into the M42 Bromsgrove and the M40 Warwick, objectors including the respondents, whose property would be affected by the scheme, and the M42 Action Committee, a "pressure group" which supported them primarily upon environmental grounds, had studied in advance the minister's reasons for the schemes, the "Strategic Studies Information" and the Red Book. They came to the inquiry prepared to criticise the methods used to predict the traffic needs in the design year on local roads in the localities of the M42 Bromsgrove and M40 Warwick and to call evidence of witnesses with professional qualifications to testify to their unreliability. The circumstances in which the inspector was induced to give an early ruling as to what evidence he would admit and what cross-examination he would allow are recounted in the speeches of my noble and learned friends. In the result - and when one is considering natural justice it is the result that matters - the objectors were allowed to voice their criticisms of the methods used to predict traffic needs for the purposes of the two schemes and to call such expert evidence as they wanted to in support of their criticisms. What they were not allowed to do was to cross-examine the department's representatives upon the reliability and statistical validity of the methods of traffic prediction described in the Red Book and applied by the department for the purpose of calculating and comparing traffic needs in all localities throughout the country. This is the only matter in relation to the conduct of the inquiry by the inspector of which complaint is made.

Was this unfair to the objectors? For the reasons I have already given and in full agreement with the minority judgment of Templeman L.J. in the Court of Appeal, I do not think it was. I think that the inspector was right in saying that the use of the concept of traffic needs in the design year assessed by a particular method as the yardstick by which to determine the order in which particular stretches of the national network of motorways should be constructed was government policy in the

relevant sense of being a topic unsuitable for investigation by individual inspectors upon whatever material happens to be presented to them at local inquiries held throughout the country.

In June 1975 the inspector sent his report to the minister. He recommended that both schemes should be made as drafted but subject to a considerable number of relatively minor modifications; and he duly reported to the minister the criticisms of the Red Book method of forecasting traffic growth that he had received. As regards traffic needs in the design year, the inspector came to the conclusion that he ought to be guided by the department's forecasts while at the same time recognising the wide margin of error to which they were admitted to be subject. He added:

"It may well be that more up-to-date and authoritative forecasts will have become available by the time you consider this report; if so, you will, I trust, be in a position to assess my conclusions in the light of this later information."

The inspector's prophecy had been borne out by the time the minister made his decision on August 5, 1976. In August 1974, new standards for assessing the capacity of rural roads were adopted and published by the department. Experience had shown that 2S a result of improvements in motor vehicles and road construction modern roads were capable of carrying more traffic than they had been credited with under the previous system by which capacity was estimated. In 1975, the method described in the Red Book for predicting traffic growth on rural roads was abandoned by the department and replaced by a revised method. It is not necessary to describe the changes except to say that they resulted in predictions of slower growth than the Red Book method. The respondents claim that it was a denial of natural justice to them on the minister's part not to reopen the local inquiry so as to give to objectors an opportunity of criticising these revised methods of assessment, cross-examining the department's representatives about them and advancing arguments as to the strength they added to the objectors' case.

As a further ground for reopening the inquiry, the respondents also relied upon the fact that in 1974 actual traffic counts were made on roads in the areas affected by M42 Bromsgrove and M40 Warwick which could be compared with figures that had been predicted for that year at the inquiry by extrapolation from actual counts that had been made in 1968. The actual numbers were substantially less than those that had been predicted. This is not at all surprising when it is borne in mind that 1974 was the oil crisis year and I need say no more about it.

My Lords, in the analysis by Lord Greene M.R. in *B. Johnson & Co. (Builders) Ltd. v. Minister of Health* [1947] 2 All E.R. 395, 399-400 of the common case in which a minister's functions are to confirm, modify or reject a scheme prepared and promoted by a local authority, it is pointed out that the minister's ultimate decision is a purely administrative one. It is only at one stage in the course of arriving at his decision that there is imposed on his administrative character a character loosely described as being quasi-judicial; and that is: when he is considering

the respective representations of the promoting authority and of the objectors made at the local inquiry and the report of the inspector upon them.

In doing this he must act fairly as between the promoting authority and the objectors; after the inquiry has closed he must not hear one side without letting the other know; he must not accept from third parties fresh evidence which supports one side's case without giving the other side an opportunity to answer it. But when he comes to reach his decision, what he does bears little resemblance to adjudicating on a lis between the parties represented at the inquiry. Upon the substantive matter, viz., whether the scheme should be confirmed or not, there is a third party who was not represented at the inquiry, the general public as a whole whose interests it is the minister's duty to treat as paramount. No one could reasonably suggest that as part of the decision-making process after receipt of the report the minister ought not to consult with the officials of his department and obtain from them the best informed advice he can to enable him to form a balanced judgment on the strength of the objections and merits of the scheme in the interests of the public as a whole, or that he was bound to communicate the departmental advice that he received to the promoting authority and the objectors.

If the analogy of a lis inter partes be a false analogy even where the scheme which is the subject of the local inquiry is not a departmental scheme but one of which a public authority other than the minister is the originator, the analogy is even farther from reflecting the essentially administrative nature of the minister's functions when, having considered in the light of the advice of his department the objections which have been the subject of a local inquiry and the report of the inspector, he makes his decision in a case where the scheme is one that has been prepared by his own department itself and which it is for him in his capacity as head of that department to decide whether it is in the general public interest that it should be made or not. Once he has reached his decision he must be prepared to disclose his reasons for it, because the Tribunals and Inquiries Act 1971 so requires; but he is, in my view, under no obligation to disclose to objectors and give them an opportunity of commenting on advice, expert or otherwise, which he receives from his department in the course of making up his mind. If he thinks that to do so will be helpful to him in reaching the right decision in the public interest he may, of course, do so; but if he does not think it will be helpful - and this is for him to decide - failure to do so cannot in my view be treated as a denial of natural justice to the objectors.

In the instant case the respondents were in fact aware of the advice the minister had received from his department upon two matters after the local inquiry had closed and before he made his decision. That advice was disclosed in the two publicly available documents that I have mentioned, which announced revisions in the methods to be used by the department, including the minister as its head, in estimating the capacity of rural roads to carry traffic and the predictions of traffic growth on rural roads. Both of these changes in government policy as to the yardstick by which the traffic need for one stretch of the national network of motorways is to be compared with the traffic need for another

were relevant to the minister's decision in August 1976 whether to authorise the schemes for the construction of M42 Bromsgrove and M40 Warwick then or to let them lapse. So the department did their sums again, applying the revised methods of estimation and prediction. The results of these fresh calculations are stated by the minister in those paragraphs of the letter giving the reasons for his decision which are cited by Templeman L.J. in his judgment. It suffices

for my purpose to say that, having regard to the later design year that had become appropriate in view of the lapse of time since 1972 when the schemes were first prepared, the minister was of opinion that the traffic needs for the M42 Bromsgrove and for the M40 Warwick disclosed by using the revised methods of estimation and prediction did not differ so materially from those estimates of traffic needs arrived at by the unrevised methods on which the department had relied in its evidence at the local inquiry as to affect the minister's decision to accept the inspector's recommendation that the schemes should be made, despite the fact that it was the latter that were the departmental estimates which the inspector had before him when he made his recommendations.

My Lords, what the respondents really wanted to do in seeking the reopening of the local inquiry was to hold up authorisation of the construction of M42 Bromsgrove and M40 Warwick until the revised methods adopted by the department for estimating the comparative traffic needs for stretches of the national network of motorways which have not yet been constructed had been the subject of investigation at the reopened inquiry. For reasons that I have already elaborated, a local inquiry does not provide a suitable forum in which to debate what is in the relevant sense a matter of government policy. So the minister was in my view fully justified in refusing to reopen the local inquiry and in refusing to defer his decision whether or not to make the schemes until after this had been done and he had received a further report from the inspector. So the second ground on which the respondents claim they have suffered a denial of natural justice in my view also fails.

The schemes were, in my view, validly made by the minister on August 5, 1976, and I would allow the appeal.

I would not, however, part from this case without remarking that the making of a scheme under section 11 of the Highways Act 1959 is by no means the end of the matter. More than three years have passed since the schemes were made in the instant case; the next step, the procedure for making compulsory purchase orders in respect of land needed for the construction of the motorways, has not yet been put in hand. The pendency of the present litigation would have prevented this even if the minister had wanted to start construction by now. In the meantime, even since the minister's decision, there have been further revisions in the method of estimating traffic need in future years. These have now been adopted by the minister on the recommendation of an expert departmental committee, appointed for this purpose. In making his administrative decision whether and when to proceed with the actual construction of M42 Bromsgrove or M40 Warwick, pursuant to the authorisation granted by the schemes, the minister will take into consideration

traffic needs as assessed by whatever is the method that it is then the policy of the department to adopt as the most reliable available. But schemes authorising the construction of motorways and decisions to act on such authorisations cannot be held up indefinitely because the current methods of estimating and predicting future traffic needs are imperfect and are likely to be improved as further experience is gained. Comparative traffic needs must be measured by the best yardstick available at the time of the decision and it is in the nature of the problem with which the minister is confronted that this may not be the same at the times when each of the successive decisions is taken: viz. to publish the draft scheme, to make the scheme and to proceed with the construction of the stretch of motorway authorised by the scheme.

That is why in the last letter from the department to the objectors that was put in evidence in the instant case and was dated after the minister's decision had been made, it was said:

"If your committee wishes to make further representations, such representations can always be considered by the Secretary of State as part of the continuous consideration of any of the department's proposals."

JUDGMENTBY-2: VISCOUNT DILHORNE.

JUDGMENT-2:

VISCOUNT DILHORNE.: My Lords, section 11 of the Highways Act 1959 gives the Minister of Transport power to make a scheme authorising the provision of a special road if the road is to be provided by him. If the special road is to be provided by a local highway authority, the scheme authorising it is made by the local highway authority and confirmed by the minister.

Any scheme for such a road, whether proposed by the minister or submitted to him by a local highway authority, must be published in accordance with the requirements of paragraph 7 of Schedule 1 to the Act. If any objection to the proposed scheme is received by the minister within the stipulated period and is not withdrawn, the minister must cause a local inquiry to be held though in certain circumstances he may dispense with that if he is satisfied that the holding of an inquiry is unnecessary (Schedule 1, paragraph 9). Then, after considering any objections which are not withdrawn, and, when a local inquiry is held, the report of the person who held the inquiry, the minister may make or confirm the scheme either without modification or subject to such modifications as he thinks fit (Schedule 1, paragraph 10).

Two schemes were published in accordance with the statutory requirements for the provision under section 11 of two stretches of motorway, one 18.5 miles in length to form the Bromsgrove section of the proposed M42, and the other about 13.2 miles in length to form the Warwick section of the proposed M40. 900 objections were lodged and, as 170 of them were not withdrawn, the Secretary of State caused a local inquiry to be held. When it has been decided that the construction of a particular motorway is desirable, schemes are published in relation to different stretches of the motorway with the consequence that there may be a number of local inquiries in respect of each motorway. Then, if a scheme is made or confirmed, there may be more local inquiries

if objection is taken to the acquisition of the land required. It is a lengthy process.

The Franks committee in 1957 in their report on administrative tribunals and inquiries (Report of the Committee on Administrative Tribunals and Inquiries (1957) (Cmnd. 218), paras. 280, 281) recommended that before a local inquiry was opened particulars of the case for the proposal should be given in the form of a written statement and that the views of the minister responsible should be given in the form of a policy statement as fairness required that those whose individual rights and interests were likely to be adversely affected by the action proposed should know in good time the case they had to meet.

In accordance with this recommendation the department produced and sent to

objectors a lengthy "statement of case" for their proposals. It was accompanied by a "Statement of policy by the Secretary of State for the Environment."

The introductory paragraphs of the statement of case read as follows:

"1.1 It is the government's policy as part of a strategic trunk road network to be completed by the early 1980s to build new motorways to provide relief to the M1/M6 and trunk roads in the Oxford-Birmingham corridor and for the M5 and trunk roads in the Birmingham-Nottingham corridor. The M42 Bromsgrove section and the M40 Warwick section are integral parts of these new motorways. (Policy statement appended.) 1.2 The government's policy to build these new motorways will not be open to debate at the forthcoming inquiries: the Secretary of State is answerable to Parliament for this policy. But objectors will be free to argue, if they so wish, that the M42 Bromsgrove section and M40 Warwick section should not be built upon the line at present proposed by the Secretary of State in his draft published schemes and that the Umberslade interchange should be differently located. 1.3 This statement of case will, therefore, explain the background against which the Secretary of State reached his policy to build the motorways and the need which they are intended to serve. It will be explained how the published lines of the M42 Bromsgrove section and the M40 Warwick section and the published location of the Umberslade interchange were selected."

The policy statement also stated that it was the government's policy to build these motorways and that the Bromsgrove and Warwick sections were integral parts of them. It repeated that the Secretary of State's general policy of providing the strategic network would not be open to debate at the inquiries into the proposals for the Bromsgrove and Warwick sections.

The Franks committee recognised that broad policy was something for which a minister was answerable to Parliament alone and had no wish to suggest that the statement of policy should be automatically open to debate at a local inquiry. They said that a minister should be free, when issuing a statement of policy, to direct in writing that the whole or certain parts of it were not open to discussion at the inquiry. "This power" they said, "would avoid useless discussion of policy in

the wrong forum, but the manner of its exercise would itself be open to criticism in the right forum - Parliament" (para. 288.)

The Highways Act 1959 contains no provision requiring those appearing at a local inquiry to observe and to comply with such directions as a minister might give as to the matters which might be discussed thereat. If in the present case the directions of the Secretary of State had been observed, then at the inquiry there would have been no consideration of the need for these motorways of which the Bromsgrove and Warwick sections were integral parts. All that could have been considered was the line these sections should take. This was, we were told, the first inquiry at which the need for the proposed motorways was challenged and debated.

It came about in this way. The report of the inspector shows that directly the inquiry was opened on June 12, 1972, it was submitted that the view was not tenable that debate on the need for these motorways could be excluded from the inquiry, and the inspector's ruling on the following three questions was sought:

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"1. Would evidence that this motorway (i.e. M42) is not necessary be admitted? 2. If so, would the inspector be willing to listen to such evidence and report it to the Secretary of State? 3. If answers to both the above questions were in the affirmative, would the Secretary of State be prepared to take such a report into consideration?"

In giving his ruling the inspector said it was entirely for him to decide any question of relevancy but that in deciding as to relevancy he would not be restrictive and would admit any evidence or submission which was aimed at rebutting the department's case on the question of the need for the motorway; nevertheless he would not allow the inquiry to be made into an inquiry into the government's general transport policy as such matters were for Parliament to decide and could not usefully be discussed at a local public inquiry. In answer to the three questions on which he was asked to rule, he said he would admit evidence which appeared to him to be relevant and report to the Secretary of State on all evidence given at the inquiry and that the third question was a matter for the Secretary of State.

Subsequently he amplified his ruling and said that he would not necessarily prevent an objector from giving evidence which was irrelevant but that he would not require the department to deal with such evidence "nor would [he] allow the department's witnesses to be cross-examined on the matters raised."

By agreement paragraph 1.2 of the statement of case and the last paragraph of the statement of policy were deleted with the result that the restriction which the Secretary of State had sought to impose on the matters which might be discussed at the inquiry was treated as inoperative.

After the inspector had dealt with a number of other submissions, witnesses were called to explain the department's case. It used to be exceptional for a department to do this (see the Franks committee's report (Cmnd. 218), para. 314) and then only the evidence and submissions of the objectors were heard at the inquiry. That committee saw no

reason why the factual basis for a departmental view should not be explained and its validity tested in cross-examination. Their proposals were, they said, designed to broaden the scope of the inquiry sufficiently to give individual objectors reasonable opportunities for testing the case against them and the evidence for that case (para. 316). As I have said, the committee thought that the minister should have power to direct that policy should not be discussed at an inquiry, but, as a policy usually has a factual basis, the line between what the committee thought should be done and what a minister should be able to direct should not be done is indefinite.

One consequence of the implementation of the recommendation that a department should call evidence in support of its case is that the procedure at an inquiry now more closely resembles that of a trial than it did. A trial ends with a decision in favour of one party. An inquiry does not. There is no lis between a minister and his department on the one hand and the objectors on the other. An inquiry is followed by the inspector reporting to the minister on the evidence given at the inquiry and his conclusions thereon and recommendations. The minister then has to decide and in reaching his decision he may have regard to policy considerations not discussed at the inquiry. If there were a lis between the minister putting forward a scheme or proposal and the objectors, then indeed

the minister would be judge in his own cause.

Brought about as it is by the lodging of objections, the primary purpose of a local inquiry must be

"...to ensure that the interests of the citizens closely affected should be protected by the grant to them of a statutory right to be heard in support of their objections, and to ensure that thereby the minister should be better informed of the facts of the case" (Franks committee's report (Cmnd. 218), para. 269).

If objectors are given a full opportunity of being heard in support of their objections, I find it difficult to see that a complaint of unfairness or an allegation of a denial of natural justice in the conduct of the inquiry can be well-founded.

The witnesses called for the department at this inquiry dealt with a wide variety of matters, including traffic studies that had been made, traffic predictions for the future and the testing of alternatives to the motorways proposed. Owing to the time it takes to provide a new motorway it is necessary to forecast traffic flows 15 years ahead, at the end of what is called the "15-year design period."

These witnesses fully explained the department's case and the grounds on which it was proposed that these motorways should be made. The department thought that without these motorways all the roads considered, the A34, A41, A423, M5, M1 and M6, would "carry flows substantially in excess of twice the design capacity in 1990" and that with them the flows would not exceed twice the design capacity except in two urban lengths

In making their traffic forecasts, the department had applied the methods prescribed in a booklet published by them in 1968 called Traffic Prediction for Rural Areas (Advisory Manual on) (hereafter referred to

as "the Red Book") and they accepted that in the light of knowledge gained since its publication it would be proper to reduce all their traffic forecast based on these methods by 8 per cent. in 1974 and by 7 per cent. in 1990. These methods were used not only for determining whether there was need for a particular motorway but also in determining the priority of proposed motorways.

The inspector after hearing all the evidence called and submissions made at this inquiry which started on June 12, 1973, and ended on January 29, 1974, after over 100 sittings concluded that the justification of the department's proposals was ultimately dependent on the traffic forecasts. He said that it was an unavoidable difficulty that forecasts so far ahead as the design year (1990) must be uncertain to a greater or less degree and that the department's forecasts depended on traffic surveys and the projection of traffic flows from these surveys forward to 1968 ("the base year"), 1974 (the then present year) and 1990 (the design year) and finally on a computer assignment of the traffic identified to the various roads in the network.

All these processes, were, he said, criticised by objectors.

In this appeal we are concerned only with one of them, the projection of

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traffic flows calculated as prescribed by the Red Book. Considerable expert evidence was called by objectors to establish that more reliable forecasts could be made by the use of different and more sophisticated methods and it was contended that if these methods were used the need for these motorways in 1990 was not established. In accordance with his ruling the inspector allowed this evidence to be given but he did not allow cross-examination of the department's witnesses on the methods prescribed by the Red Book or as to these other methods. He thought that he ought to be generally guided by the department's forecasts but said that he should guard against crediting them with a precision they could not in fact possess and that this applied especially to predictions for 1990. He also said:

"It may well be that more up-to-date and authoritative forecasts will have become available by the time you consider this report; if so, you will, I trust, be in a position to assess my conclusions in the light of this later information."

He concluded that there was a need for these motorways.

It is against this background that the allegation that the refusal to permit the cross-examination of civil servants as to the validity of the methods prescribed in the Red Book and as to the more sophisticated methods put forward on behalf of the objectors falls to be considered.

It is clear that the objectors at this inquiry had every opportunity of putting forward their case. An inspector at an inquiry has a wide discretion as to its conduct. He may, in my view, properly disallow a particular line of cross-examination if it is not likely to serve any useful purpose. An admission or expression of view in the course of cross-examination at a trial may well affect the result, but the views of departmental witnesses as to the comparative merits of different methods of forecasting traffic elicited in the course of cross-examination are not likely to affect the ultimate outcome.

In the lengthy and detailed report of the inspector the evidence of the expert witnesses called by objectors was faithfully recorded. It was there for the Secretary of State to see and to consider, no doubt in the light of advice he received from the civil servants in his department. I cannot think that the expression of views at the inquiry by civil servants as to methods of forecasting traffic would have assisted him or have served any useful purpose.

In my opinion the inspector was fully entitled in the exercise of his discretion to refuse to allow that cross-examination and only if one treats proceedings at an inquiry as a trial - which they are not - can any ground be found for saying that in disallowing this cross-examination there was a denial of natural justice or unfairness. In my opinion there was not.

After the inquiry had closed on January 29, 1974, and before the inspector had made his report to the Secretary of State, the department published two technical memoranda; the first, published on August 12, 1974, on "Design Flows for Motorways and Rural All-Purpose Roads" and the second, published in February 1975, on "Standard Forecasts of Vehicles and Traffic."

The first of these revised the design flow standards, its first paragraph stating:

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"Observation, traffic counts and speed/flow studies have shown that modern roads are capable of safely carrying higher numbers of vehicles than the flow levels for which they are currently designed."

The second of these provided a new basis for forecasting future traffic and superseded the forecasts based on the Red Book. Slower growth of traffic was predicted.

A census taken in August 1974 of traffic on the relevant roads showed that it was less than anticipated in that year.

It was consequently claimed that the department's case at the inquiry was invalidated. After the first of these memoranda was published the reopening of the inquiry was sought. This was not agreed to. On June 12, 1975, the inspector reported and on May 25, 1976, a letter was written on behalf of the department to the chairman of the Midland Motorways Action Committee which contained the following paragraph:

"As I explained in my letter of January 15, before he decides about the motorway schemes, the Secretary of State will take into account all the relevant information available to him. This will include any new information which has a bearing on the proposals considered at the public inquiries and if the consideration of such new information leads the Secretary of State to disagree with the inspector's recommendations about the schemes, there will be an opportunity, in accordance with the usual practice, for the objectors to comment on the information."

On August 18, 1976, a further letter was written on behalf of the department to the chairman of that committee. Its final paragraph stated:

"If your committee wishes to make further representations, such representations can always be considered by the Secretary of State as part of the continuous consideration of any of the department's proposals."

On August 19, 1976, the Secretary of State gave his decision. He agreed generally with the inspector's recommendations. In the decision letter he said that the department's traffic evidence at the inquiries had been re-examined in the light of developments since they concluded, that the department's evidence at the inquiries as to road capacities was in line with the new standards, and that re-examination of their traffic forecasts on the new basis strengthened the traffic elements of the case for the new motorways. Paragraph 112 of the letter stated:

"The general changes relating to design flow standards and traffic forecasts which have taken place since the inquiries have been fully taken into account by the Secretary of State who is satisfied that these do not materially affect the evidence on which the inspector made his recommendations. He is convinced that the schemes are needed and should be constructed as soon as funds and other road programme priorities permit."

It is now said that failure to reopen the inquiry was a denial of natural justice. I cannot regard this contention as well founded. If it had been reopened, objectors would, it is true, have been able to comment on the new standards and their effect in relation to the proposed motorways and on the

disparity between the actual and anticipated traffic in 1974. But without any reopening of the inquiry they could make such comments on these matters as they desired to the Secretary of State and they would have been considered by him. In the circumstances I cannot see that there was any denial of justice or unfairness to objectors by the refusal to reopen the inquiry.

My Lords, the history of this lengthy and expensive litigation shows in my opinion the desirability of ministers having power, for the exercise of which they would be responsible to Parliament, to limit the matters which may be discussed at a local inquiry. If the need for a particular motorway can be discussed at every inquiry held in consequence of objections to a scheme to construct a part of it, the time it takes to deal with these matters is bound to be extended. If the need for a motorway is to be debated at one inquiry, I find it difficult to see any reason why it cannot be considered at others. As was said in the Report on the Review of Highway Inquiry Procedures (1978) (Cmnd. 7133):

"...local inquiries are unsuitable for examining technical issues, such as methods of trunk road assessment, which have a national impact. But technical matters must not be immune from rigorous examination by an independent body. The Leitch committee has already made recommendations on these subjects. The new standing advisory committee, to be chaired by Sir George Leitch, which is being set up by the Secretary of State for Transport, will have a continuing responsibility to monitor developments in methods of technical assessment."

How much time was spent at this inquiry in examination of technical issues I do not know but with such issues being monitored by a standing advisory committee the case for not permitting them to be debated at a local public inquiry appears to me strong.

For the reasons I have stated I would allow this appeal.

JUDGMENTBY-3: LORD EDMUND-DAVIES.

JUDGMENT-3:

LORD EDMUND-DAVIES.: My Lords, on November 3, 1972, the appellant published draft schemes under section 11 of the Highways Act 1959 for the construction of two sections of motorway. His Statement of Policy was in the following terms:

"It is the government's policy: 1. As part of a strategic trunk road network to be completed by the early 1980s to build new motorways to provide relief to the M1/M6 and trunk roads in the Oxford-birmingham corridor and for the M5 and trunk roads in the Birmingham-Nottingham corridor. The M42 Bromsgrove section and the M40 Warwick section are integral parts of these motorways. 2. To construct the motorways to standards which will permit them to absorb the increasing traffic loads expected in the next 20 years so that traffic will flow freely and without interruption from congestion. 3. To construct the motorways to standards which will minimise the risk of accident and injury. 4. To construct the motorways on routes which will secure the maximum economic benefit for the nation and the communities through which they pass, whilst taking account of the need to preserve property and amenity."

In its original form, the Statement of Policy ended in this way:

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"The Secretary of State's general policy of providing the strategic network will not be open to debate at the forthcoming inquiries into the proposals for the M42 (Bromsgrove section) and for the M40 (Warwick section), nor will such related questions of policy as the diversion of goods in transit from the roads to the railways or restricting the growth of road transport."

If the proposed M42 route were adopted, it would divide into four sections the farm-land of the respondent John Bushell at Alvechurch and would also affect leasehold property owned by the respondent Terence James Brunt. They lodged objections to the schemes and joined with others in forming the "M42 Action Committee," which in its turn became a member of the Midland Motorways Action Committee. By the time the local inquiry set up by the appellant opened on June 12, 1973, there were 170 objectors.

At the outset, objection was taken by learned counsel for the M42 Action Committee to the following paragraphs in the appellant's Statement of Case:

"1.2. The government's policy to build these new motorways will not be open to debate at the forthcoming inquiries: the Secretary of State is answerable to Parliament for this policy. But objectors will be free to argue, if they so wish, that the M42 Bromsgrove section and M40 Warwick section should not be built upon the line at

present proposed by the Secretary of State in his draft published schemes... 1.3. This statement of case will, therefore, explain the background against which the Secretary of State reached his policy to build the motorways and the need which they are intended to serve. It will be explained how the published lines of the M42 Bromsgrove section and the M40 Warwick section... were selected."

Counsel for the objectors stated that he wished to call evidence that there was no need for the M42 scheme and also wished to cross-examine the department's witnesses on that topic, and submitted that the prohibition contained in the statement of case was unsupported by the provisions of the Act of 1959. He therefore sought the inspector's ruling on the following questions:

"1. Would evidence that this motorway (i.e. M42) is not necessary be admitted? 2. If so, would the inspector be willing to listen to such evidence and report it to the Secretary of State? 3. If answers to both the above questions were in the affirmative, would the Secretary of State be prepared to take such a report into consideration?"

The inspector's ruling must be quoted verbatim:

"f. i. In giving my ruling I stated that counsel for the department had confirmed my understanding that it was entirely for me, as inspector, to decide any question of relevancy. I said that, in applying my decision as to what was relevant, I would not seek to be restrictive and that, in particular, I would admit any evidence or submission which was aimed at rebutting the department's case on the question of the need for the motorway. Nevertheless I could not allow the inquiry to be made into an inquiry into the government's general transport policy; such matters were for Parliament to decide and they could not properly or usefully be discussed at a local public inquiry. ii. I gave answers as follows to the three questions put by Mr. Marnham: 1. I would admit evidence

that appeared to me to be relevant on the above criteria. 2. I would report to the Secretary of State on all evidence given at the inquiry. 3. This would be a matter for the Secretary of State. iii. Subsequently during the inquiry, on a number of occasions, I amplified my ruling by explaining that I would not necessarily prevent an objector from giving evidence which was irrelevant on the criteria of i. above but that, nevertheless, I would not require the department to deal with such evidence (i.e. rebut or cross-examine it) nor would I allow the department's witnesses to be cross-examined on the matters raised. My conduct of the inquiry was guided by my ruling as amplified. g. As a result of my ruling it was suggested by Mr. Norris (Council for the Protection of Rural England (Worcestershire Branch)) that paragraph 1.2 should be deleted from the department's statement of case; no objection to this was raised by counsel for the department and, by common agreement, the deletion was effected. The similar last paragraph of the statement of policy of

the Secretary of State annexed to the statement of case was not at this time specifically deleted, but it was accepted by the department in a circular letter dated August 31, 1973, that, as a consequence of the agreed deletion of paragraph 1.2, it should be disregarded."

It should be added that the inspector's ruling was expressed to extend to the hearing of M40 objections as well as those relating to M42.

The ruling rendered this inquiry unique of its kind, and that fact may go a long way towards explaining the unexpected difficulty by which the inspector found himself confronted and of which, as I hold, he fell foul. For, seemingly unlike in all previous inquiries, it followed from his ruling that a cardinal question in this particular inquiry was whether there existed a need for the contested sections of the new motorways. That topic constantly recurred during the 100 working days it lasted, and when the inspector's report ultimately emerged in June 1975 the very first of his "General conclusions on the proposals" was introduced in this way:

"623. Need for the proposals. a. On the evidence which I have heard and, in particular, on the basis of the traffic forecasts given in evidence by the department, I conclude that there is a need for trunk road schemes to provide relief to the M1/M6 and trunk roads in the Oxford/Birmingham corridor and to M5 and roads in the SW/Birmingham corridor." (Emphasis added.)

That the appellant in his turn attached no less importance to the issue of need emerged with clarity from his decision letter of August 19, 1976, as to which I respectfully adopt the pungent comments of Shaw L.J. below. 78 L.G.R. 10, 20.

The key witness for the department in this respect was Mr. J. A. Brooks, a traffic engineer who very favourably impressed the inspector. A proof of his evidence was produced to the Court of Appeal, and three comments may fairly be made about it. (1) It recognised the fundamental importance of establishing the need for the proposed schemes. (2) It accepted that need depended to a great extent upon traffic projections, thus foreshadowing the view of the Leitch committee (Report of the Advisory Committee on Trunk Road Assessment, 1977, para. 19.1) that "Traffic forecasts are of central importance in the decision to build roads." (3) For Mr. Brooks the proper starting-point for such projections was the Ministry of Transport's Advisory Manual on Traffic Prediction for Rural

Roads, issued in 1968 and commonly known as "the Red Book." Lord Denning M.R. was, with respect, clearly right in observing, 78 L.G.R. 10, 16 that, with certain modifications which the department accepted: "The Red Book was the sheet-anchor of the department at the inquiry..." The data contained in it provided the basis of the traffic forecasts given on behalf of the department, and the forecasts themselves were arrived at by applying the extrapolatory methods advocated in the Red Book.

The respondents sought to challenge those methods at the outset by cross-examination. They wanted an opportunity to demonstrate out of the mouths of the department witnesses themselves that the Red Book methodology was neither accurate nor reliable. But the department

resisted their application to do so, submitting that the procedures adopted in the Red Book were "government policy" and so within the inspector's classification of "irrelevant matter." Most regrettably, the inspector upheld that submission and ruled that no such cross-examination could be permitted.

The department has since sought to support that ruling in a variety of ways. Sir Douglas Frank Q.C. said in the course of his judgment, 76 L.G.R. 460, 469:

"Mr. Woolf [for the department] argued that a scheme under section 11 relates only to the prescription of a route or, as it is commonly called, 'the line,' and that the question of the need for it strictly does not arise at the inquiry, and he remarked that this was the first case where the [department] had given evidence of need. He contended that the Red Book provided no more than a statistical basis on which evidence was given and that because of the 'boundary conditions' it was based on or incorporated matters of policy of the Secretary of State. Further, there was no reason to think that the engineer who based his evidence on the Red Book could give evidence on it; indeed, it was self-evident that he could not. The department is entitled to have its own criteria for deciding need; it is not in the capacity of a party, and he referred to *Franklin v. Minister of Town and Country Planning* [1948] A.C. 87 and *T. A. Miller Ltd. v. Minister of Housing and Local Government* [1968] 1 W.L.R. 992."

What happened later in the Court of Appeal may be gathered from the following passage in the judgment of Lord Denning M.R., who commented thus on the inspector's ruling, 78 L.G.R. 10, 16:

"This attitude was supported by Mr. Schiemann before us. He said that the traffic forecasts were government policy in themselves; or alternatively that it was government policy that they should be accepted: and on this account cross-examination should not be allowed. They came, he said, within the description of policy within the report of Lord Franks's committee (Cmd. 218) at paragraph 318: 'The evidence to be required of such witnesses should... be confined to factual matters, as opposed to policy matters, and the inspector should ensure that this distinction is observed.'"

Before your Lordships, however, Mr. Rippon Q.C., for the department, manifested difficulty in maintaining that the Red Book could itself be regarded as embodying government policy. His difficulty was understandable, and indeed Sir Douglas Frank had rejected the submission outright, saying, 76 L.G.R. 460, 472:

"... [the Red Book] was prepared by... the Ministry of Transport for the guidance of engineers in the design of rural roads and accordingly does not purport to be a document containing government policy; on the contrary it is no more than a technical guide."

Rightly agreeing, as I think, with the learned trial judge on this point, Lord Denning M.R. said of the Red Book, 78 L.G.R. 10, 16:

"...I do not regard these traffic forecasts as government policy at all. They are the predictions by the department's experts about the future. They are just as much matters of fact as the evidence of a medical man as to the prognosis of a disease."

Templeman L.J. took the opposite view, but I have found it difficult to deduce his reasons for doing so. He largely restricted himself to asserting, 78 L.G.R. 10, 21:

"...the inspector gave full weight to the criticisms which had been voiced, he was fully aware of the dangers and difficulties and unpredictability of national and local predictions of traffic extending over a period of 15 years and in this difficult field he made recommendations which were open to him to make."

But for my part I respectfully regard this as an unwarranted assumption to make in respect of evidence not subjected to the customary form of challenge.

My Lords, for the present I defer considering whether the outcome of the inquiry would, or might have been, different had cross-examination been allowed. The topic now under consideration relates solely to the propriety of its refusal. I have natural diffidence in differing from your Lordships in regarding that refusal as clearly wrong, but such is my considered view. It is beyond doubt that the inspector could - and should - disallow questions relating to the merits of government policy. But matters of policy are matters which involve the exercise of political judgment, and matters of fact and expertise do not become "policy" merely because a department of government relies on them. And, as the Franks committee had put it in 1957: "We see no reason why the factual basis for a departmental view should not be explained and its validity tested in cross-examination." (Report of the Committee on Administrative Tribunals and Inquiries (Cmd. 218), para. 316.)

Then, if the Red Book is not "government policy," on what basis can the cross-examination of departmental witnesses relying on its methodology be properly refused? Sir Douglas Frank Q.C. surprisingly asserted, 76 L.G.R. 460, 472-473 (a) that its authors "were the only persons competent to answer questions on it," and (b) that "it seems to me necessarily to follow that the inspector was entitled to disallow cross-examination on it of a person who had had nothing to do with its preparation." But expert witnesses frequently quote and rely upon the publications of others and are regularly cross-examined upon the works so relied upon even though they played no part in their preparation. Nor, my Lords, is it right to assume, as was suggested in the course of the inquiry and as some of your Lordships appear to accept, that Mr. Brooks, the highly qualified and experienced traffic engineer, would have been incompetent to deal in cross-examination with questions directed to establishing the unreliability of the Red Book methodology upon which he himself heavily relied,

albeit not without some emendations. Indeed, in paragraph 567 of this report the inspector described the witness as "thoroughly competent."

Pausing there, I conclude that the grounds hitherto considered for refusing cross-examination are unacceptable. But is it the case that, in an inquiry such as that with which this House is presently concerned, some special rule prevails which renders regular a procedure which in other circumstances would undoubtedly have been condemned as irregular? The general law may, I think, be summarised in this way: (a) In holding an administrative inquiry (such as that presently being considered), the inspector was performing quasi-judicial duties. (b) He must therefore discharge them in accordance with the rules of natural justice. (c) Natural justice requires that objectors (no less than departmental representatives) be allowed to cross-examine witnesses called for the other side on all relevant matters, be they matters of fact or matters of expert opinion. (d) In the exercise of jurisdiction outside the field of criminal law, the only restrictions on cross-examination are those general and well-defined exclusionary rules which govern the admissibility of relevant evidence (as to which reference may conveniently be had to *Cross on Evidence*, 5th ed. (1979), p. 17); beyond those restrictions there is no discretion on the civil side to exclude cross-examination on relevant matters.

There is ample authority for the view that, as Professor H. W. R. Wade Q.C. puts it (*Administrative Law*, 4th ed. (1977), p. 418): "...it is once again quite clear that the principles of natural justice apply to administrative acts generally." And there is a massive body of accepted decisions establishing that natural justice requires that a party be given an opportunity of challenging by cross-examination witnesses called by another party on relevant issues; see, for example, *Marriott v. Minister of Health* (1935) 52 T.L.R. 63, per Swift J., at p. 67 - compulsory purchase orders inquiry; *Errington v. Minister of Health* [1935] 1 K.B. 249, per Maugham L.J., at p. 272 - clearance order; *Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 Q.B. 465, per Diplock L.J., at pp. 488A, 490E-G; and *Wednesbury Corporation v. Ministry of Housing and Local Government* (No. 2) [1966] 2 Q.B. 275, per Diplock L.J., at pp. 302G-303A - local government inquiry.

Then is there any reason why those general rules should have been departed from in the present case? We have already seen that the parameters of the inquiry, as agreed to by the department representatives, embraced need as a topic relevant to be canvassed and reported upon. We have already considered the unacceptable submission that the Red Book was "government policy." And, while I am alive to the inconvenience of different inspectors arriving at different conclusions regarding different sections of a proposed trunk road, the risk of that happening cannot, in my judgment, have any bearing upon the question whether justice was done at this particular inquiry, which I have already explained was, in an important respect, unique of its kind.

There remains to be considered the wholly novel suggestion, which has found favour with your Lordships, that there is a "grey area" - existing, as I understand, somewhere between government policy (which admittedly may not be subjected to cross-examination) and the exact "line" of a section of a motorway (which may be) - and that in relation

to topics falling within the "grey area" cross-examination is a matter of discretion. I find that suggestion to be too nebulous to be grasped.

Furthermore, why such an area should exist has not been demonstrated - certainly not to my satisfaction - nor have its boundaries been defined, unlike those existing restrictions on cross-examination to which I have already referred. And I confess to abhorrence of the notion that any such area exists. For the present case demonstrates that its adoption is capable of resulting in an individual citizen denied justice nevertheless finding himself with no remedy to right the wrong done to him.

My Lords, it is for the foregoing reasons that I find myself driven to the conclusion that the refusal in the instant case to permit cross-examination on what, by common agreement, was evidence of cardinal importance was indefensible and unfair and, as such, a denial of natural justice. But, even so, can it be said that no prejudice to the respondents resulted? It was urged for the appellant that, by allowing objectors to call witnesses to attack the Red Book methodology and including their proofs among the papers submitted to the Secretary of State by the inspector when he reported, the inspector had, in effect, put the objectors in as good a position as if he had indeed permitted cross-examination on the Red Book. But that cannot be so. The inspector was no mere messenger charged simply to convey to the minister the views of those appearing before him. His duty was to make recommendations, and these he arrived at by treating as "irrelevant" material evidence for the objectors and by intimating to the department's counsel that they need not cross-examine upon it. That evidence therefore manifestly played no part in the formation of the inspector's conclusions.

That the objectors were in truth prejudiced is, in my judgment, clear. Professor Wade has warned (*Administrative Law*, 4th ed., p. 454): "...in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly" and Lord Wright said in *General Medical Council v. Spackman* [1943] A.C. 627, 644-645:

"If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."

Again, in *Annamunthodo v. Oilfields Workers Trade Union* [1961] A.C. 945 Lord Denning, delivering the judgment of their Lordships, said, at p. 956:

"If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. It is prejudice to any man to be denied justice. He will not, of course, be entitled to damages if he suffered none. But he can always ask for the decision against him to be set aside."

The Act of 1959 expressly provides that the court may quash a scheme or order if it is satisfied that the interests of an applicant have been

substantially prejudiced. In *Miller v. Weymouth and Melcombe Regis Corporation* (1974) 27 P. & C.R. 468 Kerr J. rightly said, at p. 476:

"If there is a possibility that the applicants' interests may have been prejudiced, as in the line of cases in which ministers received evidence from improper sources or applicants were deprived of an opportunity to make

representations, then the court will in general readily accept that they have satisfied this requirement because they can show that they have lost a chance:..."

My Lords, I consider that such test has here been abundantly satisfied, for the most effective "representations" can and often are made in the process of cross-examination. The affidavit of the respondent Mr. Bushell, produced before the Court of Appeal, described in some detail the lines of cross-examination which would have been followed but for the inspector's ruling. It is true that, as already indicated, he nevertheless permitted the objectors to call witnesses supporting such cross-examination, even though he said it was "irrelevant." That evidence was later repeated to the Leitch committee. It is not necessary to examine its report (Report of the Advisory Committee on Trunk Road Assessment, 1977) in detail, but it contained substantial criticisms of Red Book methodology, and, to take one example, declared in paragraph 28.2:

"...The department's current methods, because they are based on extrapolatory techniques, are generally insensitive to future policy changes. It is therefore preferable to adopt a 'causal' model..."

Had the inspector not ruled as he did, I hold that there was a very real possibility that cross-examination of the department witnesses on the lines projected might have created serious doubts in his mind regarding their traffic forecasts and therefore as to whether need for the motorways had been established. And those doubts, particularly when combined with certain important environmental factors which clearly troubled the inspector (see, for example, paragraph 623 (c) of his report), could well have led him to different conclusions and findings. As matters turned out, however, I consider that the objectors were denied what Lord Russell of Killowen described in *Fairmount Investments Ltd. v. Secretary of State for the Environment* [1976] 1 W L.R. 1255, 1266 as "a fair crack of the whip." On that ground alone, I am for upholding the majority view of the Court of Appeal in favour of quashing the minister's decision accepting (albeit with modifications) the inspector's recommendation in favour of the two draft schemes.

Such being the conclusion to which I am driven, I do not propose to adjudicate upon the further complaints of the respondents regarding post-inquiry events. Certainly no consideration by the minister of further material could cure the fatal flaws in the report. I accept that the minister's ultimate decision was a purely administrative act. But that fact does not render his decision unassailable where, as here, it was preceded by and based upon a substantial injustice. I would therefore dismiss this appeal.

JUDGMENTBY-4: LORD FRASER OF TULLYBELTON.

JUDGMENT-4:

LORD FRASER OF TULLYBELTON.: My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Diplock, Viscount Dilhorne and Lord Lane. I agree with them and I cannot usefully add to their reasoning.

I would allow the appeal.

JUDGMENTBY-5: LORD LANE.

JUDGMENT-5:

LORD LANE.: My Lords, on November 3, 1972, the Secretary of State for the Environment published draft schemes under the provisions of the Highways Act 1959 in respect of two sections of motorway to the south of Birmingham. One concerned 18.5 miles of the M42 (the Bromsgrove section), the other was 13.2 miles of the M40 (the Warwick section). There were originally 900 objectors. The Secretary of State therefore caused a local inquiry to be held as paragraph 9 of Schedule 1 to the Act requires. By this time the number of objectors had been reduced to 170.

The inquiry lasted 100 working days between June 1973 and the end of January 1974. The inspector was faced with a huge volume of evidence. It took 18 months, - until June 1975 - for him to produce his report. The Secretary of State required another 14 months to consider the matter. On August 6, 1976, he made orders authorising the construction of the two stretches of motorway.

By paragraph 2 of Schedule 2 to the Act of 1959:

"If a person aggrieved by a scheme or order to which this Schedule applies desires to question the validity thereof, or of any provision contained therein... on the ground that any requirement of this Act or of regulations made thereunder has not been complied with ... he may, within six weeks from the date on which the notice... is first published, make an application for the purpose to the High Court."

The respondents to the present appeal, who were amongst the many objectors to the Bromsgrove section scheme, both of them likely to be adversely affected by the proposed road, duly made application to the High Court. The case was tried on December 9, 1977, by Sir Douglas Frank Q.C. sitting as a deputy judge of the Queen's Bench Division. He dismissed the claim. The objectors appealed successfully to the Court of Appeal who on July 30, 1979, by a majority (Lord Denning M.R. and Shaw L.J.; Templeman L.J. dissenting) quashed the orders of the Secretary of State but indicated that any further inquiry should be confined to an examination of whether the volume of traffic in 10 or 15 years' time would be such as to make the new road necessary. The Secretary of State now appeals from the decision of the Court of Appeal.

There are two main issues. First it is said that the inspector, by making certain rulings as to the conduct of the inquiry, in effect deprived the objectors of the opportunity of a fair hearing. Secondly it is said that after the conclusion of the inquiry there emerged a body of evidence casting doubt on the basis upon which the alleged need for the new roads had been calculated; that the Secretary of State should therefore have reopened the inquiry and given the objectors the opportunity of renewing their submissions in the light of the new evidence.

The powers of the court to consider an objector's application are contained in paragraph 3 of Schedule 2 to the Act of 1959 as follows:

"On any such application as aforesaid, the court - ... (b) if satisfied that the scheme or order, or any provision contained therein, is not within the

powers of this Act or that the interests of the applicant have been substantially prejudiced by failure to comply with any such requirement as aforesaid, may quash the scheme or order or any provision contained therein, either generally or in so far as it affects any property of the applicant."

At the outset of the inquiry, application was made by counsel for a body of objectors that the inspector should allow the question of need to be canvassed. Counsel sought a ruling on three questions: (1) Would evidence that the motorway is not necessary be admitted? (2) If so, would the inspector be willing to listen to such evidence and report it to the Secretary of State? (3) If the answers to both questions were in the affirmative, would the Secretary of State be prepared to take such a report into consideration?

The department's "statement of case," paragraph 1.2, as originally presented read as follows:

"The government's policy to build these new motorways will not be open to debate at the forthcoming inquiries: the Secretary of State is answerable to Parliament for this policy. But objectors will be free to argue, if they so wish, that the [roads] should not be built upon the line at present proposed by the Secretary of State in his draft published schemes..."

The inspector ruled that it was entirely for him as inspector to decide any question of relevancy. He would not seek to be restrictive; he would admit any evidence or submission which was aimed at rebutting the department's case on the question of need for the motorway. Nevertheless he would not allow the inquiry to be made into an inquiry into the government's general transport policy; such matters were for Parliament to decide and they could not properly or usefully be discussed at a local public inquiry: in answer to counsel's specific questions he said: (1) he would admit evidence that appeared to him to be relevant on the above criteria; (2) he would report to the Secretary of State on all evidence given at the inquiry; (3) whether the Secretary of State would be prepared to take such a report into consideration was a matter for the Secretary of State himself. In the light of that ruling, counsel for the department agreed that paragraph 1.2 of the department's case should be deleted.

The inspector in his report made this addendum to his ruling at the inquiry:

"Subsequently during the inquiry, on a number of occasion. I amplified my ruling by explaining that I would not necessarily prevent an objector from giving evidence which was irrelevant on the criteria... but that, nevertheless, I would not require the department to deal with such evidence (i.e. rebut or cross-examine it) nor would I allow the department's witnesses to be cross-examined on the matters raised."

The objectors submit that by depriving them of the opportunity of cross-examining the department's witnesses as to how they came to the conclusion that the motorway was necessary the inspector in short did not accord them a fair hearing.

There can be no doubt that the obligation to hold an inquiry comprises the requirement that the inquiry should be fair. If the inquiry is not fair then there has been a "failure to comply" within the terms of paragraph 3 of Schedule 2 to the Act of 1959. If that failure has resulted in the objectors' interests

being substantially prejudiced, then the court may quash the order. What happened was that witnesses from the department, in particular a Mr. Brooks, gave evidence in support of the contention that by 1990 (the then "target year") existing roads would be unable to cope with the then volume of traffic. Their calculations were based upon a document entitled Traffic Predictions for Rural Roads (Advisory Manual on) which has for convenience been called the Red Book. The forecasts in the Red Book were founded on surveys made before and during 1968 projected forward to 1974 by a process of extrapolation and thence to 1990. These calculations involved the use of "standard growth factors." All these matters were explained by Mr. Brooks in his written proof of evidence.

It was the contention of the objectors that the methods of prophesying future traffic levels propounded in the Red Book were unreliable; that to apply a rigid growth factor took no account of the many other factors which would inevitably affect the number of cars on the roads in the future. A number of experts gave evidence on the objectors' behalf to this effect. The inspector, however, true to his initial ruling, did not allow anyone to cross-examine Mr. Brooks on the reliability of the Red Book methods of prediction.

The inspector's report contains more than 450 pages, and deals in detail with the contentions advanced by the objectors and their witnesses. In deciding whether the objectors have been treated unfairly, it is perhaps instructive to set out one paragraph of the report, paragraph 189 (f):

"Mr. MacKernan's objection amounted, essentially, to an attack upon virtually every phase of the technical procedures (network testing, traffic forecasting, cost/benefit analysis and route selection) employed by the department in framing and presenting its proposals. In the paragraphs which follow I endeavour to summarise the salient criticisms made, but it is not possible to deal here with the detailed arguments used nor the multitude of detailed criticisms; these are to be found in the proofs and other documents accompanying this report."

It is clear that all the material was before the Secretary of State and his staff. The only things missing were the replies which Mr. Brooks might have made to questions put to him by the objectors and their representatives. I find it difficult to see how in the circumstances the inability to cross-examine can be described as unfair. There are some occasions when cross-examination may be vital, for example, when at trial a witness's

accuracy of recollection or observation is in question. But this was not a trial, nor was the witness's accuracy being challenged. It was a local inquiry convened because there had been objections to proposals in respect of one stretch of a proposed motorway. The obligation on the Secretary of State under paragraph 10 of Schedule 1 to the Act of 1959 was simply to consider any objections which were not withdrawn and to consider the report of the person holding the inquiry before coming to his conclusion about the scheme. To say, as the objectors do, that because cross-examination would have been allowed at a trial it was wrong to disallow it here is to misunderstand the nature of the inquiry. The refusal of cross-examination did not ipso facto result in unfairness. If cross-examination had been permitted, the result would have been, as is apparent from the extract from the report I have quoted, an even lengthier hearing without any appreciable advantage. Mr. Brooks, it is clear from his written evidence and from the report, would have conceded that the Red Book left much to be desired and that the task of forecasting traffic volume 10 or 15

years ahead was (to say the least) formidable. In the end he would clearly have maintained that the Red Book (subject to various qualifications to that document which had been conceded) was the best guide available at the time. The two opposing points of view, department's on one side and objectors' on the other, would have remained as they were, and as they were presented by the inspector in his report.

The decision not to allow this cross-examination was certainly within the discretion of the inspector and he was right to rule as he did. It was not unfair. Certainly there was no question of the interests of the objectors being substantially prejudiced, and consequently so far as this ground is concerned no reason for the court to consider the desirability of quashing the scheme.

Lord Gifford advanced another parallel argument before this House, although it had not been in the forefront of his contentions before the Court of Appeal and did not appear in the statement of the respondent's case.

The inspector, he submitted, was under a duty not merely to report but also to recommend. By treating the question of need for the motorway as irrelevant he excluded from his mind considerations which might have resulted in a recommendation favourable to the objectors. This is said to be a breach of the rules of natural justice and consequently a failure to comply with the provisions of the Act of 1959 requiring the intervention of the court. I disagree. It would have been inappropriate for the inspector to have made recommendations as to the need for the motorway as a whole. He properly fulfilled his duties by presenting all the material evidence to the minister in his report.

One can test the matter in a practical way. If every inspector at every local inquiry is to determine the question of need and make recommendations accordingly one will along the course of a proposed motorway, as local inquiry follows local inquiry, get a series of decisions, doubtless differing from one another, as to the need for the motorway. The effect, apart from the appalling waste of time and money, would be that the Secretary of State would have to make up his mind on the evidence

available to him rather than on the various recommendations. That end can better be achieved by the method adopted here.

In short, the question of need is a matter of policy or so akin to a matter of policy that it was not for the inspector to make any recommendation. Just as his ruling on cross-examination was in the circumstances correct, so was his decision on this aspect.

I now turn to the second limb of the objectors' case, namely that the Secretary of State should have reopened the inquiry to give to the objectors the opportunity of dealing with new figures and matters which emerged after the close of the inquiry and before the Secretary of State made known his decision.

Three material events took place between the close of the inquiry and the publication of the minister's decision.

First, on August 12, 1974, there came from the department a circular setting out changes in design standards for interurban roads which the Secretary of

State proposed should in the future be adopted. By virtue of improvements in the design of vehicles and the skill of drivers and other similar developments it had been discovered that the capacity of existing roads had been greatly increased.

Secondly, the predictions of traffic volume which were used at the inquiry were subsequently replaced by fresh ones.

Thirdly, there were in 1974 carried out a number of traffic censuses. Thus it was possible to compare the predictions about 1974 traffic volume made at the inquiry with what had actually happened in 1974. The actual 1974 traffic, on at least a number of the important roads, was a great deal less than had been predicted.

As to the first two events, it is clear from paragraphs 11 to 15 of his decision letter that these fresh factors had been taken into account before the decision was made. The results of the traffic censuses in 1974, even assuming them to be typical, could scarcely warrant reopening the inquiry.

Paragraph 112 of the decision letter puts the matter thus:

"The Secretary of State has noted that much of the objection to the proposals relates to the fundamental question of whether the new motorways are needed. In support of the view that they are not, objectors have indicated that they consider the department's traffic evidence was incorrect and unreliable and that there is insufficient traffic to justify the schemes. A great deal of traffic evidence was adduced and debated at the inquiries as reported by the inspector. The general changes relating to design flow standards and traffic forecasts which have taken place since the inquiries have been fully taken into account by the Secretary of State who is satisfied that these do not materially affect the evidence on which the inspector made his recommendations. He is convinced the schemes are needed and should be constructed as soon as funds and other road programme priorities permit."

The minister has to balance his duties to the public in general against the interests of the objectors. There may be circumstances in which the emergence of fresh evidence would as a matter of justice demand the

reopening of an inquiry, circumstances in which no reasonable minister would fail to reopen it. There is no doubt in my mind that this is very far from being such a case.

I would allow the appeal.

DISPOSITION:

Appeal allowed with costs in House of Lords.

SOLICITORS:

Solicitors: Treasury Solicitor; Clinton Davis & Co.

M. G.

[1981] AC 75

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