

**IN THE COURT OF APPEAL
CIVIL DIVISION**

CO:

ON APPEAL FROM SIR THAYNE FORBES SITTING AS A JUDGE OF THE HIGH COURT

**IN A MATTER UNDER SECTION 288 OF THE TOWN AND COUNTRY PLANNING ACT
1990**

BETWEEN:

**CAROL BARBONE AND BRIAN ROSS
(on behalf of Stop Stansted Expansion)**

Appellants

-and-

**(1) THE SECRETARY OF STATE FOR TRANSPORT
(2) THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT**

Respondents

-and-

**(1) BAA LIMITED AND STANSTED AIRPORT LIMITED
(2) UTTLESFORD DISTRICT COUNCIL AND OTHERS**

Interested Parties

**SKELETON ARGUMENT SUBMITTED ON BEHALF OF THE APPELLANTS FOR
PERMISSION TO APPEAL**

References: [x] in bold face and square brackets are to page numbers in the appeal bundle
(IR x) are to paragraph numbers in the Inspector's Report dated 14 January 2008
(SSL x) are to paragraphs numbers in the Secretaries of State's decision letter dated 8 October 2008

Time estimate: 2 days (for the hearing of the appeal)

I. Introduction

1. On 13 March 2009, Sir Thayne Forbes sitting as a Judge of the High Court dismissed the Appellants' application under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") to quash the decision of Defendants, the Secretary of State for Transport and the Secretary of State for Communities and Local Government ("the Secretaries of State"), dated 8 October 2008. That decision allowed an appeal by the First Interested Parties, BAA Ltd and Stansted Airport Limited ("BAA") under section 78 of the 1990 Act against the decision of the Second Interested Party, Uttlesford District Council, to refuse planning permission for BAA's proposal for the development of land at Stansted Airport without complying with conditions pertaining to a previous planning permission in respect of that airport dated 16 May 2003 (ref: UTT/1000/01/OP) ("the 2003 Permission"). The development project comprised by the application/appeal has been identified by all parties as the "G1 project".
2. The G1 project sought increased flights and passenger throughput on the existing, single runway at Stansted Airport. A further application for planning permission, known as the "G2 project" (as yet undetermined), seeks the development of a second runway at Stansted. By the G1 project, BAA sought the variation of condition ATM1 of the 2003 Permission, that had previously limited the number of air transport movements ("ATMs") to 241,000 per annum, to permit 264,000 ATMs (i.e. an increase of 23,000 ATMs). BAA also sought to vary condition MPPA1, which had previously limited the number of passengers permitted at Stansted to 25 million passengers per annum ("mppa"), to permit "about 35 mppa" (i.e. an increase of 10mppa).
3. SSE have argued, and will on appeal submit, that by their decision letter the Secretaries of State concluded that the following two issues were not material planning considerations to be weighed in the planning balance in making the decision to approve G1, namely:
 - (i) That the G1 proposal would have a negative effect on the tourism trade deficit (i.e. the difference between the expenditure of UK tourists overseas and the expenditure of foreign tourists in the United Kingdom) ("the tourism trade deficit"), in the sum of £12.6bn; and

- (ii) That the G1 proposal would lead to the annual emission of an additional 1.06 million tonnes of carbon dioxide (“CO₂”) and additional emissions of other harmful greenhouse gases.

And in so determining, the Secretaries of State erred in law.

- 4. SSE further argued, and will on appeal submit, that the Secretaries of State had, by their decision letter, decided that the noise effects of the G1 proposal, whilst not insignificant, could not lead to the refusal of permission because that would impermissibly contravene Government policy as expressed in the Air Transport White Paper (which was to promote aviation expansion at Stansted).
- 5. This is an appeal which therefore raises points of compelling public importance. In particular:
 - (i) Whether:
 - (I) The Secretaries of State did, as a matter of proper construction of their decision letter, decide that a negative effect on the tourism trade deficit in the sum of £12.6bn was an immaterial planning consideration; and if so whether,
 - (II) They erred in law in so deciding, given that *inter alia*:
 - a. The Government has stated that proposals such as G1 should be subject to a rigorous economic assessment at a Planning Inquiry, and all economic effects taken into account;
 - b. Economic assessment of the G1 proposal identified that the G1 proposal would result in a substantial widening of the tourism trade deficit whereas the Government’s expectation, when formulating its policy, was that the proposal would have the benefit of narrowing of the tourism trade deficit; and
 - c. The estimated direct economic gain of £1bn that would result from the G1 proposal was taken into

consideration as a benefit of the G1 proposal in the same decision letter.

(ii) Whether:

(I) The Secretaries of State did, as a matter of proper construction of their decision letter, decide that the annual emission of an additional 1.06 million tonnes of CO₂ and additional emissions of other harmful greenhouse gases was an immaterial planning consideration; and if so whether,

(II) They erred in law in so deciding, given that *inter alia*:

- a. The Government has stated all environmental effects of the G1 proposal should be taken into account in deciding whether or not it should be permitted;
- b. Regulation 3 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (“the 1999 Regulations”) requires a decision-maker to take all of the “environmental information” relating to a proposed development into account;
- c. The Government’s own admission that the creation of an Emission Trading Scheme that included aviation, as envisaged in the Air Transport White Paper and the Air Transport White Paper Progress Report, may not provide a total solution to the tension between an increase in aviation and the need to reduce emissions of CO₂ and other harmful greenhouse gases; and
- d. The Government’s own description of climate change, i.e., that it is the most serious global environmental threat that there is.

(iii) Whether:

- (I) The Secretaries of State did, as a matter of proper construction of their decision letter, decide that the noise effects of the G1 proposal, whilst not insignificant, could not lead to the refusal of permission because that would impermissibly contravene Government policy as expressed in the Air Transport White Paper; and if so whether,
 - (II) They have thereby erred in law through failing to follow the approach which they acknowledge was required of them, namely to take into account all of the environmental effects of that proposal, even if to do so would lead to a refusal in frustration of Government policy.
6. This appeal has a real prospect of success and, further, the public interest matters raised constitute a compelling reason why the appeal should be heard.

II. The Air Transport White Paper

7. The G1 proposal was supported as a matter of national policy by The Future of Air Transport White Paper (“the ATWP”) published by the Government on 16 December 2003. The ATWP seeks to provide a strategic framework for the development of airport capacity over the next 30 years (para. 1.1). The ATWP sets out the Government’s support for the expansion of aviation in the United Kingdom subject to a “balanced approach” that recognised the costs and benefits of air travel (para. 2.1).
8. In chapter 3 of the ATWP the Government addresses, *inter alia*, climate change (at paras. 3.35 to 3.43). The ATWP acknowledges the effects of radiative forcing (that the climate change effects of emissions from aviation at altitude are between two and four times greater than from CO₂ alone) (at para.3.36). The ATWP concludes that the “best way of ensuring that aviation contributes towards the goal of climate stabilisation would be through a well-designed emissions trading scheme” (at para. 3.39). This conclusion is caveated, however, by the statement that “the Government recognises that they may not provide a total solution” (at para. 3.42). The reasons for this caveat are set out at Annex B.

9. Chapter 4 of the ATWP deals with, *inter alia*, the economics of the aviation industry. It acknowledges the widening tourism trade deficit, notes that the Government has launched a series of campaigns to attract foreign visitors and encourage domestic tourism and concludes that “limits on air capacity would greatly disadvantage incoming tourism, through decisions by travellers from overseas to switch to more convenient and lower-cost destinations away from the UK” (at para. 4.23). In Annex E of the ATWP, the Government declares its expectation that the expansion of UK airports would lead to a narrowing of the tourism trade deficit reduction, stating that its “forecast of underlying demand for leisure trips is stronger for foreign residents than for UK travellers.”

10. Similarly, the Department of Transport’s consultation document which preceded the ATWP (“The Future Development of Air Transport in the United Kingdom, South East”, DfT, February 2003 (at para. 14.37) stated:

“The Government’s forecasts of underlying demand for leisure trips is stronger for foreign residents than for UK travellers. If capacity is provided to meet that demand... over time the higher number of foreign tourists coupled with their higher average expenditure could bring total expenditure levels broadly into line.”

In other words, the Government was aware of the tourism trade deficit and believed that the expansion of aviation at, *inter alia*, Stansted would narrow that deficit.

11. Chapter 11 of the ATWP deals with the South East of England. Paragraph 11.1 provides that the Government supports “making best use of the existing runway at Stansted”. More detail is provided at paragraphs 11.24-11.26. Paragraph 11.26 provides:

“... Making full use of Stansted would generate large *net* economic benefits. We therefore support growth at Stansted to make full use of the existing runway...” (emphasis added)

12. At paragraph 11.25, the ATWP comments:

“... Daytime noise impacts would not be greatly worse as a result of an increase to 35mppa: forecasts suggest that the area within the 57dBA noise contour in 2015 with the maximum use of the runway would be about 43 sq.km—the same as the contour limit set as a condition of the recent planning permission for development to 25mppa...”

13. The support expressed for the expansion of aviation in the ATWP was reiterated by the Government in a Progress Report on the ATWP (published in December 2006) (“the ATPR”) (see para. 1.2).

III. Climate Change and Development Control: The Legal and Policy Context

14. As noted above, the Government made it clear in the ATWP that “the best way of ensuring that aviation contributes towards the goal of climate stabilisation would be through a well designed emissions trading regime” (at para. 3.39). This position was reiterated by the Government in the ATPR. The Government indicated that it proposed to include flights within and from the EU Member States in the European Union’s Emissions Trading Scheme (“the EU ETS”) with effect (it then hoped) from 2008.
15. At the time of the public inquiry into the G1 proposal, aviation emissions had not been included within the EU ETS. A directive amending Directive 2003/87/EC (the legislation that created the previous form of the EU ETS) to include aviation in the ETS was published on 13 January 2009, Directive 2008/101/EC (“the 2008 Directive”). The 2008 Directive treats aviation emissions in the same way that the EU ETS treats emissions from all other installations. In other words, it does not take account of the radiative forcing impact of aviation emissions, which increase the global warming impact of aviation emissions by up to four times the impact of the CO₂ emissions alone. Further, the 2008 Directive applies to CO₂ emissions only and does not include the other greenhouse gas emissions associated with aviation.
16. In development control more generally, the Government has, in legislation passed after the publication and in previous planning decisions, accepted that the climate change impacts of a proposed development is a material planning consideration. For example:
 - (i) Section 19 of the Planning and Compulsory Purchase Act 2004 (as amended by the Planning Act 2008) places a duty on a local planning authority to include policies in their development plan documents designed to secure that the development and use of land in their area contribute to the mitigation of, and adaptation to, climate change.

- (ii) Section 5 of the Planning Act 2008 requires a national policy statement to include an explanation of how it takes account of “Government policy relating to the mitigation of, and adaptation to, climate change”.
- 17. The materiality of the climate change impacts of a proposed development to a decision on planning permission is confirmed in a number of planning policy documents. For example:
 - (i) Pursuant to Planning Policy Statement 1: Delivering Sustainable Development (“PPS1”) (31 January 2005) local planning authorities must promulgate and apply policies which drive down the need to use energy and so reduce emissions (at para. 13).
 - (ii) The Government’s Sustainable Development Strategy “Securing the Future: Delivering UK Sustainable Development Strategy” (March 2005) required the Department of Transport to reduce aviation emissions.
 - (iii) The Planning and Climate Change Supplement to PPS1 (December 2007) set out the Government’s belief that “climate change is the greatest long-term challenge facing the world today” (at para. 3), stated that there was therefore “an urgent need for action on climate change”. The Supplement emphasises that the climate change implications of a proposed development is a material consideration in determining whether to grant planning permission (see, for example, para. 11).
 - (iv) Planning Policy Statement 22 (Renewable Energy) makes clear that even a limited and small contribution to renewable energy (and therefore the reduction of greenhouse gas emissions) is a material planning consideration weighing in favour of a proposal (see para. 1(vi)).
- 18. Also relevant to the materiality of climate change to a decision to grant of planning permission are the following:
 - (i) The Report of the Stern Review on the Economics of Climate Change (October 2006), made it clear that action to stabilise and then begin to reduce human contributions to climate change within the next 10, or at most 20, years was likely to prove decisive. It further recognised that

international aviation must be included within any meaningful climate change policy and action. The Government has strongly endorsed Stern's findings.

(ii) Section 1 of the Climate Change Act 2008 sets a target of an 80% reduction in CO₂ emissions by 2050.

(iii) In a statement to Parliament on 15 January 2009, the Secretary of State for Transport announced a new target to limit aviation emissions in the United Kingdom to below 2005 levels by 2050.

19. In applications for planning permission outwith the aviation sphere, there can be no doubt that the impacts of a proposed development on climate change (positive or negative) are material planning considerations. SSE has maintained that Government policy as expressed in the ATWP cannot render a material consideration in all other areas of development control, immaterial when the application for planning permission is for an aviation proposal.

IV. The Proper Approach to an Application for Planning Permission Supported by the ATWP

20. The parties agreed that the proper approach to a planning application supported by the ATWP was as set out by the Learned Judge at paragraphs 5-6, and 9 of his judgment. In particular, what constitutes a material consideration is a question of law, whilst the relative weight to be placed on each material consideration is a matter of planning judgment, *Tesco Stores Ltd v. Secretary of State* [1995] 1 WLR 759.

21. Notably, the Secretaries of State accepted (in their skeleton argument at para.12) that they had to determine whether planning permission should be granted for the G1 proposal after "a proper evaluation of all its environmental and economic effects, even if that process led them to refuse planning permission and so to frustrate the Government's published policy of support for making full use of the existing runway at Stansted Airport..."

22. This admission accorded with the submissions made by the Government to the High Court in the judicial review of the ATWP, *R (Essex County Council and others) v.*

Secretary of State for Transport [2005] EWHC 20 (Admin) that the ATWP was not a development consent and pursuant to the Town and County Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (“the 1999 Regulations”) that it would be open for an objector to make a case at an Inquiry the adverse effects of a proposed development revealed by environmental assessment are such that planning permission should be refused.

23. This admission also accorded with the statements made to Parliament on 19 April 2004 by Ms Yvette Cooper MP, the then Parliamentary Under-Secretary of State in the ODPM, during a debate on the Planning and Compulsory Purchase Act 2004. Ms Cooper was responding in Parliament to Lords’ amendments which proposed: (i) that Economic Impact Assessments be required on major infrastructure proposals; and (ii) that an Inspector be always at liberty to consider the need for a development even though it was specifically proposed in a White Paper.
24. The Minister stated that both amendments were unnecessary. So far as economic issues were concerned the Minister stated as follows:

“... the Inspector will still need to consider the balance between a project’s economic impact and other benefits, and will still be able to consider the rigour of different analyses and assessments that are put forward, as is the case at the moment. We in no way dispute the importance of rigorous economic assessment and its role in any analysis of a major infrastructure project and in the debates that are necessary at the planning level. Material considerations that are disputed, whether economic, environmental, social, even aesthetic, will obviously be the territory of the Inquiry.”
25. As such, it was agreed by all parties that the Secretaries of State, in order lawfully to have granted planning permission to the G1 proposal, should have had regard to all of its environmental and economic effects.

V. The Decision of the Secretaries of State

26. On each of the substantive issues relevant to this appeal - the economic effects, the climate change effects of the G1 proposal and noise - the Secretaries of State agreed with the reasons of the Inspector.

Economic Effects

27. In relation to the economic effects of the G1 proposal, and whether the tourism trade deficit should be taken into consideration when calculating those effects, the Inspector concluded:

- (i) That although the ATWP suggests that making full use of Stansted would generate net economic benefits, no figure was placed on these (IR 14.230).
- (ii) That the evidence advanced on economic benefits by BAA was a “relatively crude approach to quantifying the direct benefits of G1” (IR 14.233) and that as a result he could place “relatively little reliance” upon it (IR 14.235). The Inspector adopted the figure of £1bn of direct economic benefits advanced by SSE, and accepted BAA’s contention that such a benefit “could reasonably be viewed as large” (IR 14.235). He concluded that “within the framework of the ATWP, these likely direct benefits carry weight in favour of the proposal” (IR 14.235).
- (iii) The Inspector noted that the evidence advanced by SSE as to the tourism trade deficit that would result from the G1 proposals (being a net economic disbenefit of £12.6bn upon the UK trade deficit) had not been disputed.
- (iv) The Inspector concluded in relation to that £12.6bn of economic disbenefit (at 14.237):

“The ATWP refers to the value of outbound as well as inbound tourism, but nevertheless recognises the widening gap in the tourism balance of payments. It therefore appears that the deficit has been taken into account in drawing up national policy. Furthermore, there has previously been a specific rejection by the Government of basing a restriction of aviation capacity on this factor. I understand that this position is at least in part to the social benefits of tourism that the Government acknowledges, irrespective of whether BAA is correct to argue that outbound tourism expenditure can be taken to reflect the monetary value of those benefits. No indication is given in the ATWP that any particular threshold of the balance of payments deficit on the current account should bring consideration of this factor into the equation in weighing economic benefits, nor is there any indication that its consideration of the economic effects is limited

to the balance of payments on the current account. In essence this matter raises broad considerations relating to the operation and management of the national economy, which is a question of Government policy that goes beyond the scope of the current appeal. Whilst noting the scale of the deficit, I therefore do not suggest that it should be included as part of a calculation of net benefits of the proposal or given significant weight having regard to the context set by the ATWP.”

- (v) In his concluding paragraphs that dealt with how the economic benefits should be weighed in the balance, the Inspector stated:

“14.262 I conclude that the growth of Stansted by way of making increased use of the existing runway is consistent with Government policy in the ATWP. It would contribute towards meeting a need identified in this to be of national importance. There is evidence that it would deliver large economic benefits, although in my opinion the evidence does not reliably quantify this. There is no indication in Government policy that outgoing tourism expenditure should be deducted from the calculation of net benefits...

14.264 Having regard to the context set by Government policy, I conclude that the proposal would give rise to economic benefits that carry significant weight in favour of the proposal...”

28. The Secretaries of State agreed with the Inspector’s reasoning and conclusions on the adequacy of the economic benefits of the G1 proposal, and that there was evidence that the proposal would deliver large direct economic benefits (albeit that they accepted that the evidence did not reliably quantify this) (SSL 43). The Secretaries of State made no comment as to implications of the tourism trade deficit.
29. In their overall conclusions (SSL 51-53), the Secretaries of State concluded that there would be large economic benefits (SSL 51), but made no mention of the tourism trade deficit at all (and most particularly, in the list of factors weighing against the G1 proposal, even slightly, in SSL 52).

Climate Change

30. In relation to the climate change impacts of the G1 proposal, the Inspector concluded:
- (i) The Inquiry was not the place to challenge Government policy on carbon emissions and climate change (IR 14.40).
 - (ii) It was not necessary to consider climate change as a specific issue, although the effects of climate change fell to be assessed and weighed in the overall conclusion (IR 14.41).
 - (iii) Notwithstanding this, the Inspector did not assess or weigh the environmental effects of the CO₂ and other greenhouse gas emissions that would be caused by the G1 proposal in his overall conclusion: he did not, for example, mention the additional 1.06m tonnes of annual CO₂ emissions.
 - (iv) The Government's policy on aviation as set out in the ATWP addressed expressly the issue of climate change: "here and elsewhere, the Government makes clear that it does not consider it necessary for every sector in the economy to follow the same path with respect to greenhouse gas emissions. Thus increases in one sector do not necessarily conflict with the overall approach..." (IR 14.75).
 - (v) The ATPR addressed climate change issues. It expressly took into account the findings of the Stern Review and the other documents published since the ATWP in 2003. The Inspector found that "having taken all these developments into account, the ATPR reaffirms the Government's commitment to the ATWP strategy" (IR 14.76).
 - (vi) The Inspector noted that "Government policy seeks to reconcile growth in aviation to meet the needs identified in the ATWP with action to address climate change". As such, arguments that the correct balance had not been struck were outside of the scope of the Inquiry (IR 14.77).
31. The Secretaries of State agreed with the Inspector's conclusions. They stated (SSL 29):
- "... They share the Inspector's view that Government policy seeks to reconcile growth in aviation to meet the needs identified in the ATWP with action to address climate change... They also agree with the Inspector's

conclusion that questions of the appropriateness and effectiveness of Government policies on aviation and climate change, and their compatibility, are matters for debate in Parliament and elsewhere, rather than through this appeal...”

32. In their overall conclusion (SSL 51-53), the Secretaries of State did not mention the climate change implications of the G1 proposal as being a matter that weighed either for or against the grant of planning permission, even slightly.

Noise

33. In relation to the harm caused by the additional air noise resulting from the G1 proposal, the Inspector concluded:

“14.115 The area of the 57 dBA Leq contour at 35 mppa (33.9 km²) would be well within the limit currently imposed by condition AN1 attached to the 2003 permission (43.6 km²) which, it may be inferred, was considered acceptable at the time that it granted this permission. The population within the contour (3550) would also be significantly less than the 4850 predicted for 25mppa at the time of the 15+ application, which resulted in the 2003 permission, and than the 5,000 assumed for maximum use of the existing runway in the SERAS exercise that informed the ATWP.

14.116 That is certainly not to say that the effects would be insignificant. I do not overlook the fact that the noise increases arising from the proposed development would be over and above the existing noise which, it is abundantly clear, many already find annoying or worse. The effects referred to include interruption of conversation and the enjoyment of music, radio and TV, loss of concentration, interference with church services, cultural and community events and the quiet enjoyment of gardens and the countryside, and a general loss of tranquillity. It is widely predicted that increased aircraft movements would exacerbate all these effects and diminish the number and lengths of the periods of respite between noise events.

...

14.142 The numerous references in representations to sleep disturbance and my own experience leave me in no doubt that this is a significant impact of the current air noise climate... I find the evidence regarding the health

effects of sleep disturbance due to noise to be more convincing, and it seems to me that any increase in the number of movements at night would be harmful in this respect.

...

14.147 For the above reasons I consider that for those within the contours, and to a reducing extent some way beyond, noise from the increased ATMs arising from the G1 development would be harmful to the living conditions and health of residents and to the quality of life in the area including cultural and leisure activities. Some, but not all, of this harm could be mitigated..."

34. When the Inspector came to balance that identified harm against the need set out in the ATWP, however, he concluded (at IR 14.149):

"It is implicit in the cases of a number of objectors that the noise impacts here should outweigh the need identified in the ATWP, notwithstanding that those impacts would if anything be less than was assumed in the White Paper. This course would either lead to a failure to provide the additional capacity seen by the ATWP as the first priority in the South East or to a need to provide additional capacity (beyond that already proposed) at other airports where the number of people affected by noise is likely to be greater. Either way it amounts to a challenge to Government policy and as such is beyond the scope of this report for the reasons I have already indicated."

35. The Secretaries of State agreed with the Inspector's conclusion as to the harm that would be caused to residents by noise caused by the increasing ATMs (SSL 31). They concluded, however, that "the factors that weigh in favour of the proposal, notably compliance with the ATWP and the development plan, outweigh the harm identified" (SSL 53).

VI. The Judgment of the Learned Judge

Economic Effects

36. In relation to the tourism trade deficit, the Learned Judge concluded:

- (i) That the tourism trade deficit had been taken into account in the ATWP, but stated "the ATWP does not suggest that this widening gap should be

reduced by restricting outbound tourism by UK residents or that any such approach would be appropriate to deal with such a phenomenon” (at para. 48).

- (ii) That the ATWP’s support for the expansion of passenger numbers at Stansted was “founded on the Government’s judgment that the balance of national socio-economic advantage favours such a policy and that one of the many matters taken into account when reaching that judgment was the so-called “tourism deficit””(at para. 49).
- (iii) As such, and pursuant to the decision of the House of Lords in *Bushell v. Secretary of State for the Environment* (1981) AC 75, 98 (per Lord Diplock), by seeking at a planning appeal to bring the “tourism deficit” into account against a particular air transport scheme SSE were seeking to challenge Government policy (at para. 50).
- (iv) That it was not irrational or perverse for either the Inspector or the Secretaries of State to give weight to the direct economic benefits of the G1 proposal whilst declining to give any weight to the tourism trade deficit (para. 51).

37. The Learned Judge concluded, therefore (at para. 52):

“I am therefore satisfied that the Inspector was entitled to deal with this matter in the way that he did... the Inspector clearly considered the evidence on this issue very carefully and, far from ignoring the scale of the tourism trade deficit, he identified and noted it. However, for the perfectly sound reasons that he gave, he correctly concluded that it should not be included as part of a calculation of the net benefits of the G1 proposal, nor should it be given significant weight having regard to the policy context set by the ATWP.”

Climate Change

38. In his consideration of the impacts of the G1 proposal on climate change, the Learned Judge concluded:

- (i) That the Inspector was entitled to reach the conclusion that the ATWP explicitly addressed the issue of climate change (at para. 77).
- (ii) That the case of SSE was an attack on national transport policy, and therefore outwith the scope of a planning inquiry (relying on *Bushell*) (at para. 85).
- (iii) That the approach of SSE was not based on the anticipated local effects of the aircraft emissions associated with the G1 proposal, but on the global impact of that national planning policy (at para. 86).
- (iv) That the approach of the Inspector and the Secretaries of State disclosed no error of law (at para. 87).

Noise

39. Finally, as to the impacts of air noise, the Learned Judge concluded (at paragraphs 65 and 66):

“... paragraph 14.149 of the IR must not be read in isolation. I also agree that when it is read in the full context of the IR and the DL it cannot sensibly be taken as evidence that the Inspector (still less the Secretaries of State) concluded that the ATWP established a need for the G1 proposal which necessarily overrode the harmful noise impacts of that proposal, rendering their inclusion in the planning balance meaningless (despite the terms of the relevant paragraphs of the IR and DL in which the planning balance was drawn...).

... the Inspector explicitly directed himself that such would not be a permissible approach to determining the planning appeal. I agree with Mr Mould [leading counsel for the Secretaries of State] that paragraph 14.149 was clearly the Inspector’s riposte to the implicit assertion by some objectors that the noise impacts of Stansted must necessarily (and, thus, always) override the established policy need for additional runway capacity, even where (as the Inspector had found) the actual noise impacts of the G1 proposal were less severe than the ATWP had itself assumed, when lending its support to a policy of making full use of the existing runway at Stansted...”

40. Sir Thayne Forbes dismissed the Appellant's claim for these reasons.

VII. The First Ground of Appeal: the Tourism Trade Deficit

41. The Learned Judge made the following errors of law in his approach to the materiality of the tourism trade deficit.

42. First, his judgment fails to identify whether as a matter of fact, the Inspector (and thereafter the Secretaries of State) considered the tourism trade deficit to be a material planning consideration or not. The Learned Judge suggests that it was "identified and noted" by the Inspector, but that it "should not be included as part of a calculation of the net benefits of the G1 proposal". It is not apparent from the reasoning of the Learned Judge whether he concluded that the Secretaries of State dismissed the tourism trade deficit as an immaterial consideration, or whether the Secretaries of State considered it, but accorded it little weight.

43. If the Learned Judge determined that the Inspector (and thereafter the Secretaries of State) considered the tourism trade deficit to be a material planning consideration, such a conclusion is entirely inconsistent with the Inspector's reasoning and the Secretaries of State's decision letter for the following reasons.

(i) IR 14.237 must be read with IR 14.340, and with the conclusions of the Secretaries of State (at paras. 43, 51 and 52 of their decision letter). Taken as a whole, these paragraphs make it plain that neither the fact nor the amount of the tourism trade deficit was treated as a material consideration, potentially to be weighed in the planning balance. Notably:

(a) In IR 14.340 the Inspector makes it quite clear that he concluded that Government policy precluded the deduction of the net outward expenditure on tourism from the benefits to derive the net benefits.

(b) Similarly, in paragraph 43 of the Secretaries of State's decision letter, which deals with the economic benefits of the proposal, the tourism trade deficit is not mentioned.

(c) Neither is it mentioned at paragraph 52 of the Secretaries of State's decision letter, where the factors that weigh against the G1 proposal are balanced.

(ii) The Inspector provides four reasons in IR 14.237 for not including the amount of the tourism trade deficit in his consideration of the economic effects of the G1 proposal:

- (a) That the tourism trade deficit has been taken into account in the formulation of the ATWP;
- (b) That the Government has specifically rejected a restriction of aviation capacity as a result of the tourism trade deficit;
- (c) No indication is given in the ATWP that any particular threshold of balance of payments deficit should bring the tourism trade deficit into the equation;
- (d) That this matter raises broad considerations as to the operation and management of the national economy, which is a question of Government policy and so beyond the scope of this appeal.

However, each of these reasons is relevant only to the materiality of the tourism trade deficit, and not to the proper weight that should be accorded to it.

(iii) It was BAA's case at the Inquiry (a case not rejected expressly by the Inspector) that the effects of the tourism trade deficit were not material (see Appendix 1 to the proof of John Rhodes (BAA's planning witness)—the Tribal Report at para. 2.11 and IR 4.962).

44. In conclusion, the only sensible reading of the Inspector's reasoning, and the Secretaries of State's decision letter is that the tourism trade deficit was not taken into account as a material consideration.

45. That failure constituted an error of law: the tourism trade deficit is a material consideration, and as such, should have been weighed in the balance by the Inspector and the Secretaries of State for the following reasons:

(i) The Government, through the statements of Yvette Cooper MP, confirmed that a rigorous economic assessment of a proposal such as the G1 proposal required consideration *at the planning level* of all of the economic effects. Any rigorous economic assessment of a major aviation proposal should plainly take into account its impact on the tourism trade deficit.

- (ii) The Government, in the ATWP, considered that the benefit attributable to the UK economy as a result of inbound tourism would be a material planning consideration (see the third paragraph of the Foreword, and para. 2.5).
- (iii) If inbound tourism attributed to expanded aviation is recognised as a benefit to the United Kingdom economy (by bringing money into the United Kingdom) then plainly any consequential outbound tourism (taking money out of the United Kingdom) is a disbenefit to the UK economy to be netted against that which was coming in to reveal the true balance of tourist trade.
- (iv) The Government has never stated that the tourism trade deficit is immaterial. To the contrary, as noted in the ATWP (at para. 4.23) the Government had put in place a number of measures to attract foreign visitors and to encourage domestic tourism in the face of the acknowledged widening gap in the tourism trade deficit. This indicates both the Government's concern as to the tourism trade deficit and the obvious materiality of it to any rigorous economic assessment of each aviation proposal supported by the ATWP.
- (v) The Government's view, at the time of the ATWP, was that the impact of its proposals to expand aviation on the tourism trade deficit was a material impact, and further, that this would be a beneficial impact. It was one of the reasons advanced in support of making the best use of the existing runway at Stansted (see para. 11.26 of the ATWP). The Government forecast that "underlying demand for leisure trips was stronger for foreign residents than for UK travellers" (Annex E to the ATWP), and that if capacity was provided to meet that demand, over time the higher number of foreign tourists coupled with their higher average expenditure could bring total expenditure levels into line (see "The Future Development of Air Transport in the United Kingdom: South East", DfT, Feb 2003, para. 14.37).
- (vi) In short, at the time of the ATWP, the Government envisaged that the expansion of Stansted would help to narrow the tourism trade deficit.

- (vii) Far from challenging Government policy, SSE's case in regard to the tourism trade deficit was to point out that the G1 proposal being promoted by BAA, would have the opposite effect to that which the Government had expected. SSE demonstrated that, in 2007, some 4 years after the ATWP, the Government's assumption that the expansion of Stansted would have net economic benefits (including by the narrowing of the tourism trade deficit) no longer held true. Rather, it would make the deficit £12.6 bn (at net present value) worse.
 - (viii) The ATWP specifically required each application for planning permission to be considered on a case by case basis through the normal planning process. Such consideration included the need for a rigorous economic assessment.
 - (ix) Sir Thayne Forbes failed entirely to address the question of whether the tourism trade deficit was a material consideration to be taken into account as a matter of law.
46. Further, the reasons provided by the Inspector at IR 14.237 for refusing to include the tourism trade deficit in the net economic effects of the G1 proposal reinforce, rather than detract from, the materiality of the tourism trade deficit:
- (i) First, the Inspector concluded that the ATWP took account of the existence of the deficit. As noted above, that is entirely correct. But the ATWP took account of the existence of the deficit by assuming that, *inter alia*, expansion at Stansted would narrow the tourism trade deficit not widen it. That this particular proposal does not have the effect contemplated by the Government in the ATWP is highly material.
 - (ii) Second, the Inspector concluded that the Government had previously specifically rejected a restriction of airport capacity as a result of the tourism trade deficit, namely in the Government's Response to the Environmental Audit Committee. But this was published at the same time as the ATWP (December 2003), it was based on the same information as the ATWP and so it's unsurprising that in December 2003 the Government came to the same conclusion as in the ATWP. All that the Government's response to the Environmental Audit Committee did was to confirm the

expectation that the Government had at that time, namely that restricting capacity would cause the tourism trade deficit to widen.

- (iii) Third, the Inspector stated that no indication is given in the ATWP that any particular threshold of a tourism trade deficit should bring this factor into account. It is difficult to see why the absence of a specific threshold renders the tourism trade deficit immaterial. But in any event, the ATWP (in the supporting document “Passenger Forecasts: Additional Analysis” at page 68) did provide a benchmark: it showed the expected effects on the tourism trade deficit if Stansted was permitted to expand to 35 mppa (albeit in passenger number terms rather than in monastery terms, but the latter flows from the former). In other words, the Government did, at the time of the ATWP, undertake a localised analysis of the passenger mix at Stansted and those localised projections provide a benchmark against which to judge the G1 proposal, that benchmark being one that had contributed to the Government’s view that making best use of the existing runway at Stansted would deliver large economic benefits. That benchmark could be compared to the more up-to-date forecasts of passenger mix provided by BAA in its Environmental Statement.
- (iv) Fourth, the Inspector stated that the arguments of SSE on the tourism trade deficit were, in effect, an attack on Government policy and so outwith the scope of the Inquiry. This determination was entirely inconsistent with the Inspector’s conclusion (endorsed by the Secretaries of State) that an expectation of large economic benefits resulting from the making best use of the existing runway at Stansted was not of itself a Government policy. As such, the question of whether economic benefits would in fact result was one aspect of a rigorous economic assessment and a proper question for the Inspector at the Inquiry.

47. Further, the quantification of the effect of the G1 proposal on the tourism trade deficit, being the figure of £12.6 bn figure, was uncontested. It was by far the largest economic effect of the proposed development. The Inspector regarded the £1 bn of direct economic benefits flowing from the G1 proposal as “large” (see IR 14.235). In those circumstances, to conclude as the Learned Judge did (at para. 51) that it was not perverse to include the direct benefits whilst ignoring the tourism trade deficit, constitutes a plain error of law.

VIII. The Second Ground of Appeal: Climate Change

48. A natural and ordinary reading of the Inspector's reasons, and the decision letter of the Secretaries of State makes it clear that neither took the additional annual CO₂ and other aviation greenhouse gas emissions that Stansted would generate into account as a material consideration:
- (i) Although the Inspector stated that he would assess and weigh the environmental effects of the G1 proposal (including climate change) (IR 14.41), nowhere in his decision letter does he attribute any weight (even little weight) to the environmental effects of the additional CO₂ and other greenhouse gas emissions from the G1 proposal (see IR 14.331-14.345).
 - (ii) Similarly, the Secretaries of State did not weigh the climate change implications of the G1 proposal in the balance (SSL 51-53).
49. As a result, it's plain that both the Inspector and the Secretaries of State determined that the environmental effects of the CO₂ emissions from the G1 proposal were immaterial.
50. The Learned Judge, however, failed to determine whether the Inspector (and therefore the Secretaries of State) had identified the effects on climate change of the G1 proposal as a material consideration or simply placed no weight upon them.
51. Further or alternatively, the Learned Judge failed to find that as a matter of law, the CO₂ emissions that would result from the G1 proposal were a material planning consideration. In particular, the CO₂ emissions of the G1 proposal constitute "environmental information" within the definition in regulation 2 of the 1999 Regulations. As such, a decision maker is required to take those emissions into account pursuant to regulation 3. The Secretaries of State failed to do so. The Learned Judge failed even to address this point.
52. Moreover, climate change emissions are unquestionably a material planning consideration in development control in general (see, for example, PPS1, the Planning and Climate Change Supplement to PPS1, PPS22).

53. That the ATWP and the ATPR explain Government policy as being to reconcile growth in aviation with action to address climate change by including aviation in a well-designed ETS goes only to the *weight* attributable to the CO₂ emissions of a particular proposal: it cannot make otherwise material planning considerations, immaterial. Government policy cannot override the 1999 Regulations. Neither can Government policy convert what is a material consideration as a matter of law into an immaterial one.
54. Further, the Learned Judge erred in law by concluding that the efficacy of the ETS was outwith the scope of the Inquiry for the following reasons:
- (i) Government itself in the ATWP stated (at para. 3.42) that the economic instruments “may not provide a total solution”, especially “if progress towards agreement at an international level was slow”.
 - (ii) The Government also identified a number of potential problems with coming up with a “well-designed” ETS, namely: that the ETS currently only included CO₂ and not other global warming gases (Annex B, para. 6), that the ETS would need to take account of radiative forcing (Annex B, para. 8) and that there would be difficulties in creating an emissions trading scheme that included countries other than those in the European Union (Annex B, para. 9).
 - (iii) Plainly, if all of these problems could not be overcome, there would not be a “well-designed” ETS as envisaged by the ATWP and ATPR at all.
 - (iv) In those circumstances, the emissions of the G1 proposal could not be entirely disregarded (as envisaged by the Government) on the basis that their contribution to global warming gases would be met entirely by inclusion in such a scheme.
 - (v) As such, and in light of the Government’s own uncertainty as expressed in the ATWP, if all of the environmental effects were to be taken into account before planning permission was granted, it was necessary for the Inspector and the Secretaries of State to consider the most up to date information as to whether the mechanisms anticipated by the ATWP did offer a total (or

near total, or partial or likely or improbable) solution to the reconciliation of expanded aviation and the need urgently to address climate change.

55. For these reasons, the Learned Judge erred when he held that the position taken by SSE at the Inquiry was an attack on Government policy. The decision of the House of Lords in *Bushell* does not prevent this conclusion:

(i) SSE has never challenged the policy of including aviation in the EU ETS (or that the inclusion of aviation in the EU ETS is a material consideration). SSE has, however, sought to rely on how Government itself characterised the EU ETS (i.e. that it may not be a total solution) and indicated what the possible consequences of that might be.

(ii) In any event, the world has moved on very considerably since *Bushell*. That authority, and in particular Lord Diplock's judgment (at pages 98 and 100) must now be read in the light of a completely new scientific reality, never contemplated by Diplock in 1981, namely the awareness that any decision to grant permission for a project such as G1 (which would emit millions of tonnes of global warming gases) will contribute to global warming when global warming represents a potentially catastrophic threat affecting not just (but including) the local community living near Stansted, the whole of the United Kingdom and indeed all of the world. That new reality provides the context within which Diplocks' and Lane's "grey area" is now to be viewed, so that such effects are plainly the proper remit of a Planning Inquiry. Further support is given for this submission by the materiality of climate change to development control decisions in general, as seen in PPS1, the climate change supplement to PPS1 and so on.

IX. The Third Ground of Appeal: the Air Noise Impacts of the G1 Proposal

56. The Learned Judge failed to give the words in IR 14.149 their ordinary and natural reading. That ordinary and natural reading is as follows: the Inspector recommended that those harms which he identified could not lead to a refusal of permission since that would amount to a challenge to Government policy.

57. Further, whilst the Inspector did direct himself as to the correct approach which should have been taken to the noise impacts of the G1 proposal (see IR 14.67, and the judgment at paragraphs 55 and 66), the only place in his decision letter in which the Inspector provided his reasons for weighing the balance as he did (i.e. for the weight he chose to attribute to the “not insignificant harms” caused by noise) is IR 14.149. Indeed, IR 14.149 constitutes the Inspector’s concluding paragraph on noise.
58. The Learned Judge erred in law by concluding that the reasoning of the Inspector in IR 14.149 was “the Inspector’s riposte to the implicit assertion by some objectors that the noise impacts of the G1 proposal at Stansted must necessarily (and, thus, always) override the established policy need for additional runway capacity” (at para. 66). This conclusion does not reflect the ordinary and natural meaning of the language used in IR 14.149, is speculative, and has no foundation in the evidence that was before the Inspector. Notably:
- (i) The case advanced by SSE on noise was simply that noise must be weighed in the balance along with all other economic (and other) disbenefits. SSE certainly did not advance a case that the noise impacts of further expansion at Stansted would *per se* be a reason for the refusal of planning permission.
 - (ii) Nowhere in the Inspector’s report did he criticise SSE (or any other objector) for impermissibly seeking to challenge Government policy on the noise impacts of making the best use of the existing runway at Stansted. That silence can be contrasted with, for example, the Inspector’s comments that SSE’s case on climate change had strayed into criticising Government policy (IR 14.77).

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