

The logo for BAAN (Bristol Airport Action Network) is displayed in a light blue rectangular box with a subtle drop shadow. The word "BAAN" is written in a bold, dark blue, sans-serif typeface.

TOWN AND COUNTRY PLANNING ACT 1990

**Appeal by Bristol Airport Limited concerning land at North Side Road, Felton,
Bristol, BS48 3DY**

**DEVELOPMENT OF BRISTOL AIRPORT TO ACCOMMODATE 12
MILLION PASSENGERS PER ANNUM**

Planning Inspectorate Reference: APP/D0121/W/20/3259234

Local Planning Authority Reference: 18/P/5118/OUT

Date of Inquiry: July-October 2021

LEGAL SUBMISSIONS
of
BRISTOL AIRPORT ACTION NETWORK
(BAAN)

4 October 2021

Introduction

1. These legal submissions address two points relevant to the determination of the appeal:
 - 1.1 The Appellant's case, developed primarily through cross-examination, that paragraph 188 of the NPPF requires the Inspectors to assume that the UK Emissions Trading Scheme ("**UK ETS**") will address the climate change impact of increased aviation emissions caused by expansion of Bristol Airport; and
 - 1.2 The correct understanding of the legal obligations imposed by the Paris Agreement.

Other pollution control regimes and UK ETS

2. Paragraph 188 of the NPPF 2021 (previously paragraph 183) provides:

"The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities."
3. The Appellant referred in passing to this paragraph in their Statement of Case (pg 39). During cross-examination of BAAN's planning and policy witness, Mr Hunter Jones, it was put in relation to the UK ETS that paragraph 188 of the NPPF means that the Inspectors should assume as a matter of policy that other regimes will operate effectively. Mr Hunter Jones responded that the paragraph meant it should be assumed the policy will operate "as it says on the tin", but not that it will solve all the problems it is seeking to solve. His evidence was that the UK ETS is not a full solution to the impacts of the proposal and he referred to Dr Hinnells' evidence that it is too blunt an instrument to be relied on.
4. The caps on emissions imposed by UK ETS, as it currently legislated, will cease in 2030.¹ Accordingly, as was accepted by Dr Ösund-Ireland in cross-examination, the

¹ CD 9.036, p. 14-15,

UK ETS as it stands will not run to the Sixth Carbon Budget period, nor the full period up to the attainment of Net Zero by 2050. Further, as the law currently stands, the UK ETS applies only to flights going to and from the UK, the EEA and Gibraltar (Schedule 1(1), Article 4(1), Greenhouse Gas Emissions Trading Scheme Order 2020).² Accordingly, the scheme would not apply to all of the flights arriving at and departing from Bristol Airport.

5. The case law on the overlap between the planning regime and the various regimes concerned with environmental protection is long standing: from *Gateshead MBC v SSE* [1995] Env LR 37 (CA) (“**Gateshead**”) at 43 (recognising the overlap between the planning and environmental protection system under the Environmental Protection Act 1990) to *W E Black Ltd v SSE* [1997] Env LR 1 (QBD) (“**WE Black**”) at 9 (recognising the overlap between planning and the regulatory system under the Water Industry Act) to *R(Frack Free Balcombe Residents Association) v West Sussex CC* [2014] EWHC 4108 (Admin) (“**Frack Free Balcombe**”) at §100 (recognising the overlap between planning and the regulatory system under the EA and HSE relevant to well testing).
6. What the case law goes on to say, however, is that a policy or decision made in under the pollution control regime does not predetermine the outcome of any decision made in the other regime, and that the “assumption” that those regimes will operate effectively is rebuttable on the evidence before the decision-maker.
7. It was made very clear by the Court of Appeal in the *Gateshead* decision that a decision in one regime (there the planning regime) does not predetermine the outcome of any decision in the other regime (there the pollution control regime). The appellant in *Gateshead* specifically relied on the argument that a grant of planning permission for an incinerator, which took into account arguments about emissions impact, would necessarily mean that there was “almost no prospect” that the assessment of the emissions impact of the proposed incinerator by the Environment Agency’s (“**EA**”) predecessor would result in anything other than an authorisation for operation of the plant (at 48). The Court of Appeal disagreed robustly: the grant of planning permission did not inhibit the EA’s predecessor from refusing authorisation if they decided that was the proper course (at 50). The

² CD 9.036, p. 37

corollary also applies – a decision under the pollution control regime, such as implementation of the UK ETS, does not inhibit the planning decision-maker from refusing planning permission if that is the proper course in light of the evidence before that decision-maker.

8. The court has emphasised that a planning inspector must not simply rely on the pollution control regime to “abdicate responsibility for his decision making”: *Norman v SSHCLG* [2018] EWHC 2910 (Admin) (“**Norman**”) at §52.
9. There are two relevant matters of discretion which apply to planning decision making which encompass material considerations that are also touched on by other regulatory regimes:
 - 9.1 First, a decision-maker may “assume” that separate pollution control regimes will operate effectively (NPPF §188; *Frack Free Balcombe* §§28-29; *Norman* §52). This is not, however, an irrebuttable **presumption**. It is an assumption. There will be circumstances in which that assumption cannot properly be made and the case law recognises that there must be evidence to justify the assumption being made: *Frack Free Balcombe* §§100-101; *Norman* §§52-53. In order for the assumption to hold, the decision-maker needs to be satisfied that the issues can or will adequately be addressed, so evidence is needed to justify reliance on the assumption.
 - 9.2 Second, a planning decision-maker may, in the exercise of his/her “discretion consider that matters of regulatory control could be left to the statutory regulatory authorities to consider”: *Frack Free Balcombe* §100. This is a particular aspect of the assumption in §9.1 above – that unresolved issues; or issues that have not yet arisen, can be left for other regulators to address. Again, there must be evidence to justify this assumption, and if the evidence is such that the assumption is not justified, it cannot be made.
10. Accordingly where, as a matter of law, the UK ETS will cease in 2030; that it will not run to the Sixth Carbon Budget period, nor the full period up to the attainment of Net Zero by 2050; that it applies only to flights going to and from the UK, the EEA and Gibraltar; and, where there is evidence before the Inquiry that that the UK ETS does not provide a solution to addressing the additional greenhouse gas (“**GHG**”)

emissions caused by the proposed expansion of Bristol Airport, the assumption in paragraph 188 of the NPPF cannot be made. The presumption in that paragraph is rebutted and it would be wrong as a matter of law to assume that the existence of the UK ETS, even when operating “effectively” on its own terms, provides adequate mitigation for the impacts of the proposal.

11. This is particularly so where the Appellant’s case essentially asks the Inspectors to speculate as to the future development of the UK ETS e.g. that it may be extended beyond 2030. Such speculation goes well beyond what paragraph 188 of the NPPF addresses and draws no support from the assumption that existing regime will operate effectively.
12. Further, unlike other pollution control regimes, the UK ETS can only influence emissions indirectly through the regulation of an aviation-wide market for carbon credits; it cannot directly control the emissions caused by the development proposal (as, for example, the sorts of EA permits considered in the case law above would do). Even if a decision-maker concluded that, on the evidence before it, the UK ETS operates effectively, such a conclusion could only extend to an assumption about the market for carbon credits: it could not directly resolve the question of the emissions from the development proposal.

The Paris Agreement

13. The Paris Agreement³ is an obvious material planning consideration as the temperature goal adopted by that agreement is agreed to be relevant to the test of whether the proposed development has a “material impact on the government’s ability to meet its climate reduction targets”, per §3.96 of the Aviation 2050 Strategy.⁴
14. BAAN’s submission is that the Paris Agreement imposes a legal obligation on Parties to the Agreement to achieve the “long-term temperature goal”: to hold “the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial

³ CD 9.26.

⁴ CD 6.05, p. 76.

levels, recognizing that this would significantly reduce the risks and impacts of climate change”.

15. The wording “Holding the increase in the global average temperature to well below 2°C above pre-industrial levels ...” formulates a clear upper limit that must be regarded as binding hard law and an obligation of result, not only of conduct. The threshold of “well below 2°C” (emphasis added) is not an entitlement for Parties to exploit the ‘space’ up to 2°C. It is a maximum limit that shall not be reached. The Paris Agreement’s temperature goal thus contains strong language of legal effect, leaving no discretion for Parties to follow divergent temperature goals.
16. The Inspectors do not need to determine whether the Paris Agreement imposes a separate legal obligation of result in relation to the temperature goal or whether it is a target the attainment of which relies on the legal obligation on each State Party to undertake and communicate Nationally Determined Contributions (“NDCs”) under Articles 3, 4 and 13. In either case, the temperature goal is a relevant climate change target. This is particularly so given the UK’s explicit commitment through the G7 to limiting global warming to 1.5°C.⁵
17. Furthermore, Article 3 of the Paris Agreement requires Parties, via their NDCs “to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2.” (emphasis added). The obligations concerning NDCs are further elaborated in Article 4, meaning that the NDC requirements are situated very firmly in the context of both achieving the global temperature goal and of the urgent need to reach global peaking of GHG. Article 4(2) requires each Party to “prepare, communicate and maintain successive nationally determined contributions that it intends to achieve”.
18. In order to achieve the long-term temperature goal, Article 4(1) requires Parties to “aim to reach global peaking of greenhouse gas emissions as soon as possible”. This aim includes Parties undertaking “rapid reductions” after global peaking, “in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in

⁵ See Professor Anderson’s Appendix 1 in BAAN/W1/2 and the DEFRA and DBEIS Policy Paper on the G7 Communiqué, Appendix 1 ro BAAN/W1/4.

the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty”. In other words, the Paris Agreement embodies not just a consideration concerning 2050 and beyond (“second half of this century”), but a significant focus on emissions reductions in the years up to that point.

19. Article 4(1) also imposes equity obligations, reflecting the “common but differentiated responsibilities” falling on developed countries such as the UK. This is reflected in article 4(4), which focuses on developed country Parties and which requires that they “should continue taking the lead by undertaking economy-wide absolute emission reduction targets.” (emphasis added). “Economy-wide” is not defined and so bears its normal meaning.
20. The Paris Agreement thus takes a very different approach from that in the Kyoto Protocol to achieving the obligations in the United Nations Framework Convention on Climate Change (“UNFCCC”): the Paris Agreement imposes a temperature-based obligation and requires “economy-wide absolute emission reduction targets”. This change in approach means that all emissions affecting the climate are included within the obligations imposed by the Paris Agreement, as all emissions contribute to the rise in global temperature. The impact of international aviation emissions is therefore clearly included within, and relevant to, the legal framework imposed by the Paris Agreement to achieve the global temperature goals.

Conclusion

21. The submissions set out above show:
 - 21.1 Paragraph 188 of the NPPF does not require the Inspectors to presume that the UK ETS will mitigate the GHG impact of the proposed development and the case law clearly established that, where there is evidence that the separate pollution control regime will not address the particular pollution control issue, that means the presumption in paragraph 188 NPPF is rebutted.
 - 21.2 The additional emissions caused by the proposed development are incompatible with the equity principles of the Paris Agreement. The temperature goal imposed by the Paris Agreement is a “climate reduction target”, which BAAN submits imposes a legal obligation of result on Parties

to the Paris Agreement. The temperature goal is in any event relevant to the test to be applied by the Inspectors as to whether the proposed development has a “material impact on the government’s ability to meet its climate reduction targets”.

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