

APPEAL REFERENCE: APP/D0121/W/20/3259234

**IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 78 OF
THE TOWN AND COUNTRY PLANNING ACT 1990**

**BRISTOL AIRPORT, NORTH SIDE ROAD, FELTON,
WRINGTON BS48 3DP**

COSTS APPLICATION BY NORTH SOMERSET COUNCIL

1. This is an application for an order that Bristol Airport should pay North Somerset Council (“NSC”) the full costs that it has incurred in dealing with the appeal against the refusal of planning permission since the 20 April 2021.
2. On the 20 April 2021 the Government announced that:
 - (a) It was adopting the Committee on Climate Change’s recommendation for the 6th Carbon Budget (“the 6CB”) i.e. it was adopting “the world’s most ambitious climate change target into law to reduce emissions by 78% by 2035 compared to 1990 levels”;¹
 - (b) International aviation emissions are to be included in the UK’s emissions when determining compliance with domestic climate change targets including the 6CB target and the net zero 2050 target.
3. Thus, the context for consideration of the climate change issues was materially different as from the 20 April 2021 compared to the position that Officers advised in respect of.
4. As we have explained in our closing submissions, there is a statutory duty upon the Secretary of State to ensure attainment with the 6CB target and net zero 2050.
5. Section 1(1) of the Climate Change Act 2008 provides:

¹ To use the language of the Government’s announcement of the 20th April 2020.

"It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline."

6. Section 4(1) of the Climate Change Act 2008 provides:

"It is the duty of the Secretary of State – ... (b) to ensure that the net UK carbon account for a budgetary period does not exceed the carbon budget."

7. It is wrong in law to suggest that these statutory duties do not apply to a determination in a s. 78 appeal by an Inspector on behalf of the Secretary of State. An inspector stands in the shoes of the Secretary of State and just as the Secretary of State would be subject to these duties if he was the decision maker, so an inspector is when they take the same decision.

8. The CCC explained in its 6th Carbon Budget report:

*"Aviation is one of the sectors in which we expect there to be significant remaining positive emissions by 2050, given the limited set of options for decarbonisation. Remaining residual emissions will need to be offset by greenhouse gas removals (see section 11) for the sector to reach Net Zero."*²

9. Accordingly, that the aviation sector would have to rely upon Greenhouse Gas Removal measures in order to meet 6CB target and the net zero 2050 target was evident as at 20th April 2021.
10. Mr Osund-Ireland confirmed in XX that this remains the case. Within the Jet Zero consultation all of the illustrative pathways produced by the DfT also show a need to rely upon GGR measures for the aviation sector to achieve net zero 2050.
11. The extent of GGR capacity as at the 6CB period and as at 2050 is unknown and uncertain³, and has not been addressed by BAL in its evidence. There are many sectors that will have to compete for the available GGR capacity (e.g. agriculture). Thus, as part of identifying the scale of carbon emissions that the aviation sector can be permitted to emit in order to ensure the attainment of the relevant climate change targets, the Government has to determine:

- (a) the total GGR capacity that can be ensured at the relevant dates; and

² CD 9.34 p.176

³ Agreed Osund-Ireland in XX to RTQC

- (b) the proportion of that capacity that should be ascribed to each sector including the aviation sector.
12. BAL does not grapple with either of these two matters in its closing submissions. It has no answer to these points.
13. The Secretary of State recently explained⁴ in respect of the Jet Zero consultation that it:
- “sets out proposed policies that will be needed for aviation to meet net zero emissions by 2050. These policies will influence the level of aviation emissions the sector can emit and the cost of flying in the future, both of which are relevant to considering whether any of the policy set out in the ANPS would have been materially different had these circumstances been anticipated at the time of designation.”*
14. This confirms that the policies needed for the aviation sector to meet net zero have not yet been adopted. It also confirms that the amount of carbon that the aviation sector will be permitted to emit consistent with ensuring the attainment of the 6CB and net zero 2050 targets has not yet been determined. Again, BAL has not grappled with this position in its closing submissions.
15. Thus, as at the 20 April 2021 and now, the scale of carbon emissions that the aviation sector can be permitted to emit consistent with ensuring the attainment of the 6CB and net zero 2050 targets had not been determined by Central Government and this remains the position. BAL does not contend otherwise in its closing submissions.
16. BAL and NSC agree that only Central Government can set out the pathway to attainment with the 6CB target and net zero 2050 for the aviation sector.
17. As at 20 April 2021, the Government had not adopted any policy which establishes that unrestricted growth of the aviation sector, including the growth proposed in the present Appeal at Bristol Airport, can come forward consistent with ensuring the attainment of the 6CB target and/or net zero 2050. BAL does not suggest otherwise in its closing submissions.
18. As at the present date, the Government still has not adopted any policy in this regard, although in the Jet Zero consultation it has undertaken a consultation process in relation to some illustrative pathways for the aviation sector to 2050. That consultation

⁴ See INQ62

is to be given limited, if any, weight for reasons explained in the NSC closing submissions⁵, and as agreed by Mr Osund-Ireland in XX.

19. As at the present date, the Government has still not adopted any policy nor even produced any draft illustrative pathway or sectoral target for the aviation sector so as to ensure attainment of the 6CB target⁶. No assessment has been undertaken by Government against the 6CB target and none has been provided to this Inquiry. Just as with the position at 2050, Government has not identified the amount of carbon emissions the aviation sector will be permitted to emit so as to ensure the attainment of the 6CB target. BAL does not contest any of these points in its closing submissions.
20. Thus, the scale of emissions which the aviation sector can permit consistent with the duties to ensure the attainment of the 6CB target and the net zero 2050 target was unknown as at 20 April 2021 and it remains unknown. BAL does not suggest otherwise in its closing submissions.
21. There is no adopted assessment which demonstrates that all of the pipeline development proposed at airports in the UK (agreed by Mr Osund-Ireland in XX to be an additional 88mppa including expansion at Heathrow and Gatwick) can be accommodated whilst ensuring the attainment of the 6CB target and net zero 2050. BAL does not suggest otherwise in its closing submissions.
22. The need to constrain the growth of airports was not ruled out by Government as at 20th April 2021 and is still has not been in any adopted policy statement. Indeed, the need to constrain the growth of airports cannot rationally be ruled out in advance of the identification of the scale of emissions that the aviation sector can be permitted to emit consistent with ensuring the attainment of the 6CB target and net zero 2050. There is no answer to these conclusions in BAL's closing submissions.
23. As a consequence, the need for Government to have to undertake an exercise in the future in order to choose which airports can grow and which cannot grow, is a process which cannot be ruled out as Mr Osund-Ireland accepted in XX. This was the case as at 20th April 2021 just as it remains the case now. There is no answer to this in BAL's closing submissions.

⁵ See NSC closing submissions paragraphs 33 and following.

⁶ See INQ42 DfT response in rows 23 and 24 – *"The Jet Zero Consultation does not seek views on sectoral targets relating to the Sixth Carbon Budget."*

24. As at the 20 April 2021 and at the present date:
- (a) There was and is no evidence which proves all of the 88 mppa of pipeline airport growth in respect of UK airports could be permitted to come forward on a basis consistent with ensuring attainment of the statutory duties in sections 1 and 4 of the CCA 2008.; and
 - (b) There was and is no evidence which proves that, in any exercise in which the Government chooses which airports should be permitted to grow and which should not, Bristol Airport would inevitably be selected to grow to the extent sought in the present appeal on a basis consistent with ensuring attainment of the statutory duties in sections 1 and 4 of the CCA 2008.
25. The closing submissions presented on behalf of BAL do not grapple with these points in any way. That is because there is no answer to them.
26. The UKETS and CORSIA do not provide an answer to these matters because, as the Jet Zero consultation recognises, they are a component but cannot and will not provide the whole solution. The existence of them does not demonstrate that they can be relied upon to enable the entirety of desired airport growth to come forward on a basis which is consistent with ensuring the attainment of the 6CB and net zero 2050 targets.
27. Paragraph 188 of the NPPF is not the answer since there is no evidence that existing mechanisms and policies will ensure the attainment of the 6CB and net zero 2050 targets. NSC does not challenge that those regimes cannot be operated effectively; rather NSC's position is that it has not been demonstrated and is not the Government's position that those measures will ensure attainment of the relevant climate change targets.
28. It follows that it has not been demonstrated that, and cannot rationally be assumed that, the Government can and will achieve the 6CB target and net zero 2050 whilst allowing all airports to expand. Since the legal duties within the CCA 2008 require that the Secretary of State must ensure the attainment of the 6CB and net zero 2050, a grant of planning permission for the proposed development would give rise to a breach of the statutory duties in sections 1 and 4 of the CCA 2008.
29. Accordingly, it was evident that to grant planning permission for the proposed development was unlawful as at the 20th April 2021 and that remains the position.

30. BAL's argument, that the amount of carbon emissions that its proposed development would give rise to is small, does not begin to grapple with the points above. It does not remove the fact that, for the reasons set out above, it cannot be established now, and could not as at 20th April 2021, that a grant of planning permission for the proposed would ensure attainment of the 6CB and net zero 2050 targets.
31. Thus, it was the case that as at 20th April 2021, a grant of planning permission for the proposed development would give rise to a breach of the statutory duties in section 1 and 4 of the CCA 2008 and be unlawful. This remains the case.
32. None of this is a surprise to BAL. In its Statement of Case, NSC was clear: "*the BAL proposal is inconsistent with the attainment of the Net Zero 2050 target and is contrary to the NPPF ... policy CS1 of the CS and the duty in the CCA 2008 (as amended) to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline*".⁷
33. The fact that the Government has stated in a footnote that MBU remains of "full effect" does not address the points set out above. That statement does not undermine any aspect of the submissions above.
34. The Government has chosen to adopt carbon emissions targets in advance of adopting the policy framework which establishes how those targets will be delivered. In the period prior to adoption of assessments which demonstrate how the aviation sector can grow and still ensure attainment of those targets, on the basis of the evidence before this Inquiry it cannot rationally be concluded that a grant of planning permission would be lawful. If that creates a moratorium then it is a temporary one, but is a direct consequence of the Government's choice i.e. to adopt targets and then identify the policy approach as opposed to identifying policy approach and then adopting targets.
35. BAL argued in closing that the NSC submission should be rejected because it would have implications for other sectors e.g. housing. But BAL did not produce any evidence to establish that other sectors do not have a relevant policy framework which demonstrates the cumulative illustrative pathway to the 6CB target or net zero 2050. For example, the anticipated electrification of vehicles is expected to deliver net zero

⁷ There was no reference to the 6CB target in the Council's statement of case since the Government had not adopted the 6th Carbon Budget when it was submitted.

in that sector⁸. By contrast it is accepted by BAL, it is accepted that the aviation sector cannot achieve net zero without reliance upon GGR measures as we have explained above. Accordingly, this point does not establish that the NSC submissions set out above are flawed; rather, NSC's submissions are a direct consequence of the approach that Government has followed.

Conclusions

36. The NPPG advises in respect of claims for costs against appellants that:

"The right of appeal should be exercised in a reasonable manner. An appellant is at risk of an award of costs being made against them if the appeal or ground of appeal had no reasonable prospect of succeeding."

37. Since the 20th April 2021, BAL has pursued an appeal which had no reasonable prospect of succeeding since it was then, and remains now, unlawful to grant planning permission.

38. BAL should have withdrawn its appeal on or shortly after the 20th April 2021. To pursue an appeal in these circumstances amounts to unreasonable conduct. That conduct has caused NSC to incur wasted costs in responding to an appeal which could not succeed. On this basis, NSC seeks an award in respect of all of its costs relating to this appeal incurred since the 20th April 2021.

REUBEN TAYLOR QC

MATTHEW HENDERSON

Landmark Chambers.

8 October 2021

⁸ CD9.134 page 36