# In the High Court of Justice
# King's Bench Division
# Administrative Court

**CO/3570/2022**

**In the matter of an application for judicial review**

**THE KING**

on the application of

**JENNIFER DAWES**

**Claimant**

**-and-**

**SECRETARY OF STATE FOR TRANSPORT**

**Defendant**

**RIVEROAK STRATEGIC PARTNERS LIMITED** **Interested party**

**Notification of the Judge's decision on (1) the application for permission to amend the grounds of claim and (2) the application for permission to apply for judicial review (CPR 54.11, 54.12)**

Following consideration of the documents lodged by the claimant (except for the reply); and (1) the objections of the defendant and the interested party to the application to amend the grounds of claim and (2) the acknowledgements of service filed by the defendant and the interested party

**ORDER by the Honourable Mr Justice Lane**

1. The application for permission to amend the grounds of claim is refused.

2. The application for permission to apply for judicial review is refused.

3. Subject to paragraphs 4 to 6 below, the costs of preparing the defendant's acknowledgement of service are to be paid by the claimant to the defendant, summarily assessed in the sum of £20,544.80.

4. This is an Aarhus Convention claim within the meaning of CPR 45.41. Pursuant to CPR 45.43, the claimant's liability in costs is therefore limited to £5,000.

5. Paragraphs 3 and 4 above constitute a final costs order unless within 14 days of the date of this Order the claimant files with the Court and serves on the defendant a notice of objection setting out the reasons why she should not be required to pay costs (either as required by the costs order, or at all). If the claimant files and serves notice of objection, the defendant may, within 14 days of the date it is served, file and serve submissions in response. The claimant may, within 7 days of the date on which the defendant's response is served, file and serve submissions in reply.

6. The directions at paragraph 5 apply whether or not the claimant seeks reconsideration of the decision to refuse permission to apply for judicial review.

(a) If an application for reconsideration is made, the Judge who hears that application will consider the written representations filed pursuant to paragraph 5 above together with such further oral submissions as may be permitted, and decide what costs order if any, should be made.

(b) If no application for reconsideration is made or if an application is made but withdrawn, the written representations filed pursuant to paragraph 5 above will be referred to a Judge and what order for costs if any, should be made will be decided without further hearing.

7. Pursuant to CPR 45.43(3) the defendant's costs liability is limited to £35,000.

8. No order for costs in respect of the interested party.

**Reasons**

1. The application for permission to amend is refused on the basis that none of the proposed additional grounds is arguable: Kawasaki Kisen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33. For convenience, I shall give the reasons for this conclusion after I have addressed the original grounds.

2. I have not taken account of the claimant's reply, filed on 2 November 2022. There is no right to file such a document. If a claimant wishes to file a reply, the Administrative Court's Judicial Review Guide 2022 makes it plain that she must make an application for permission. Since no such application was made in the present case, I have decided not to take the reply into account. It is unacceptable for a professionally represented party to flout the requirement to make such an application.

3. **Ground 1(a): procedural unfairness.** (i) The defendant's decision letter (DL) explained why he took the view that the weight to be accorded to the Azimuth Report did not fall to be reduced because it was informed by interviews that were not disclosed for reasons of commercial sensitivity. That conclusion was unarguably open to the defendant as a matter of judgment and it is not arguable that any procedural unfairness or indeed other arguable illegality resulted. (ii) The IBA report was published on the PINS website on 12 January 2022 and was thus available to the public from that date. Another party was able to make representations on that report. The defendant was not required by the rules or any common law principle of fairness to issue an express invitation to comment on the IBA report. In any event, the fact that the claimant could have made comments on the IBA report means that she has not shown any arguably material prejudice: George v SSE (1979) 77 LGR 689; Malloch v Aberdeen Corporation [1971] 1 WLR 1578.

4. **Ground 1(b): erroneous interpretation of the *Making Best Use* policy.** MBU plainly does not *require* an assessment of need. The defendant was therefore correct to say so in the DL. The suggestion that MBU in some way needs to be read in the light of the ANPS founders on the fact that the DL specifically referred to paragraph 1.42 of the ANPS. Furthermore and in any event, the defendant did consider the issue of need in the DL. This was on the basis that MBU does not *preclude* consideration of that issue.

5. **Ground 1(c): irrational reliance on qualitative, rather than quantitative evidence of need.** The defendant was unarguably entitled to place weight on the qualitative elements of the Azimuth Report, for the reasons contained in the DL. That report in any event also contained an element of quantitative analysis. DL89-94 addressed both qualitative and quantitative issues. It was unarguably not irrational for the defendant to place greater weight on qualitative issues. Need does not necessarily equate to quantitative need: R (ClientEarth) v SSBEIS [2021] EWCA Civ 43. The defendant clearly did take the York Aviation report into account: DL79, 89.

6. **Ground 2(a): failure to have regard to relevant considerations regarding climate change.** On a proper reading of the DL, the defendant unarguably took account of (i) ExA's view that significant climate effects would be avoided; (ii) ExA's view that there would nevertheless be a material impact on the ability of the Secretary of State to meet the carbon reduction targets under the Climate Change Act etc; (iii) the Aviation 2050 consultation paper; and (iv) the sixth carbon budget. Ultimately, this ground is merely a disagreement with the conclusion at DL149.

7. **Ground 2(b): breach of *Tameside* duty in not considering the proposed development's contribution to the net zero target and the sixth carbon budget.** The defendant at DL145 recorded the budgets for the sixth carbon budget and for the sector target. DL148 is referring to the ExA's findings. R (Friends of the Earth Ltd) v SSBEIS [2022] EWHC 1841 (Admin) was about the Secretary of State's duties under section 13 of the CCA. There is nothing in that judgment which prevents the defendant from relying on measures outside the planning system in order to inform his conclusion on whether the proposed development would materially affect the attainment of the sixth carbon budget.

8. **Ground 2(c): breach of section 1 of the Climate Change Act 2008.** The CCA targets apply across may more sectors than merely aviation. The claimant cannot point to anything which arguably shows consenting to the proposed development would result in a breach of the duty under section 1 of the CCA.

9. **Proposed ground 1(d): acting on wrongful advice that growth potential at other airports was not a material consideration.** This proposed ground is unarguable. There is no material difference between the reference in draft DL97 to "very little weight" being given to potential capacity at other airports and the reference in DL102 that, even if the matter were material, the defendant gave it "no significant weight". The attribution of weight in this context was unarguably for the defendant.

10. **Proposed ground 2(d): failure to consider change in position on weight to be given to climate change.** This proposed ground is also unarguable. The defendant was provided with a briefing paper that included the original (now quashed) decision of the defendant and a draft revised DL.

The defendant is to be treated as having considered all of this. The briefing paper did not need to refer expressly to everything that was mentioned in the other documents. This includes the sixth carbon budget. The shift from giving the climate change issue moderate weight against the development to treating the issue as neutral was unarguably open to the defendant, in the light of the subsequent Transport Decarbonisation Plan and the Jet Zero Strategy, explaining how the government will use the emission trading scheme and CORSIA as part of its strategy to achieve net zero without directly limiting aviation demand.

11. **Proposed ground 3: ministerial briefing legally insufficient and misleading.** As I have said, the defendant's briefing included the draft DL, which contained a detailed analysis of need. It is not arguable that the defendant was misled, including as to the Jet Zero Strategy, which was referred to in the draft DL (as an emerging matter) and in the DL (as a published document). The allegation that the *Gunning* principles were breached is also unarguable. All of the documents provided to the defendant with the briefing paper need to be read as a whole. It is plain from them that the defendant conducted a meaningful consultation and that the representations made were adequately addressed.

Signed: *MR JUSTICE LANE*

Dated: *12 January 2023*

**The date of service of this order is calculated from the date in the section below**

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**For completion by the Administrative Court Office**

Sent / Handed to

**either** the Claimant, and the Defendant [and the Interested Party]
**or** the Claimant's, and the Defendant's [and the Interested Party's] solicitors

Date: **16/01/23**

Solicitors**: HARRISON GRANT RING SOLICITORS**
Ref No. **DAW00107/AG**

**Notes for the Claimant**

If you request the decision to be reconsidered at a hearing in open court under CPR 54.12, you must complete and serve the enclosed Form 86B within 7 days of the service of this order.

A fee is payable on submission of Form 86B. ***For details of the current fee please refer to the Administrative Court fees table at*** https://www.gov.uk/court-fees-what-they-are.

Failure to pay the fee or submit a certified application for fee remission may result in the claim being struck out.

The form to make an application for remission of a court fee can be obtained from the gov.uk website at https://www.gov.uk/get-help-with-court-fees