IN THE HIGH COURT OF JUSTICE **CO**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION UNDER SECTION 288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

BETWEEN:

STOP STANSTED EXPANSION

Claimant

-and-

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

Defendants

-and-

(1) BAA LTD AND STANSTED AIRPORT LTD
(2) UTTLESFORD DISTRICT COUNCIL
(3) ESSEX COUNTY COUNCIL
(4) HERTFORDSHIRE COUNTY COUNCIL
(5) STANSTED AIRLINE CONSULTATIVE COMMITTEE
(6) NATIONAL TRUST
(7) MUCH HADHAM PARISH COUNCIL
(8) SAFFRON WALDEN AND DISTRICT FRIENDS OF THE EARTH

Interested Parties

GROUNDS OF APPEAL

A. Introduction

The Section 288 Application

1. This is an application by Stop Stansted Expansion, the Claimant ("SSE"), made under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") [page 1056-1058], to quash the decision of the Secretaries of State for (1) Communities and Local Government and (2) Transport, the Defendants ("the Secretaries of State"), made by decision letter on 8th October 2008 [page 1028-1048] under section 266 [page 1054] of the 1990 Act. The Secretaries of State thereby allowed an appeal by BAA Ltd. and Stansted Airport Ltd., the First Interested Party ("BAA"), against the decision of Uttlesford District Council, the Second Interested Party ("Uttlesford"), made on 30th November 2006 [page 331-333], to refuse planning permission under section 73 of the 1990 Act [page 1049] for the development of land at Stansted Airport without complying with conditions pertaining to a previous planning permission in respect of that airport (ref. UTT/1000/01/OP, dated 16th May 2003 [page 99a-n]). The development comprised by the application/appeal has been identified by all parties as being "G1".

2. BAA's appeal under section 78 [page 1052] came to be decided jointly by the Secretaries of State pursuant to section 266 [page 1054] of the 1990 Act because the application for planning permission was made by a statutory undertaker to develop operational land. The appeal was considered at an Inquiry held between 30th May 2007 and 19th October 2007 by an Inspector appointed by the Secretaries of State, Alan Boyland, who reported to the Secretaries of State on 14th January 2008 [relevant sections at pages 522-987], recommending that the appeal be allowed and that planning permission be granted subject to conditions. By their decision letter dated 8th October 2008 [page 1028-1048], the subject of this section 288 application, the Secretaries of State agreed with that recommendation.

3. The context within which the application/appeal came to be considered was that in 2003 the Government published the Future of Air Transport White Paper ("ATWP") [page 100-179] strongly supporting, as a matter of national policy, certain proposals to expand aviation in the UK, including at Stansted Airport, asserting both that such expansion was urgently needed and that it would generate large economic benefits for the nation. In 2006, the Government published a Progress Report on that White Paper ("ATPR") [page 334-368], stating its policy for the reconciliation of the proposed expansion of aviation (which would emit millions of

tonnes of carbon dioxide ("CO_2") and other greenhouse gas emissions[1]) with its policy to drive down such emissions, principally through supporting the inclusion of aircraft emissions from flights within and from European Union ("EU") member states in an EU scheme for the trading of carbon emissions ("ETS").

4. In the course of an application for judicial review in respect of aspects of the ATWP, R (*Essex County Council and others) v. Secretary of State for Transport* [2005] EWHC 20 (Admin) ("the *Essex County Council"* case), and in the course also of Parliamentary debates following proposed Lords' amendments proposed to be made to indirectly related legislation going through Parliament[2], several statements were made by and on behalf of the Government to the effect that, *even though certain proposals were supported by the White Paper* (and other proposals supported by other similar White Papers) *as a matter of national policy and on the basis of asserted need and economic benefit*:

    a. It would be both possible and legitimate for objectors to such a proposal to make a case at any subsequent Planning Inquiry that the adverse environmental and other effects were such that permission should be refused notwithstanding that refusal would frustrate national policy;

    b. The Inspector at such a Planning Inquiry, and ultimately the decision-maker, would not be precluded from considering the need for a proposed development, albeit that this consideration would be undertaken in the context of what was said about need in the national policy statement;

    c. The Inspector would, accordingly, consider as part of the Inquiry:

        i. The economic effects of the proposed development, including by way of a rigorous economic assessment; along with

        ii. All other aspects of the application, including all of the environmental effects,

    so as to be able "to consider the balance between a project's economic impact and other benefits at the planning level", such being material considerations stated to be "obviously within the territory of the Inquiry".

[1] Aviation contributes to global warming through the emission of greenhouse gases. As well as CO_2, these include oxides of nitrogen ("NOx") and water vapour which can form condensation trails ("contrails") and cirrus clouds.

[2] The Planning and Compulsory Purchase Bill

5. In the case of G1, however, the Inspector recommended, and the Secretaries of State agreed, that:

    a. The policies enshrined by the ATWP and the ATPR were not susceptible to challenge at the Inquiry;

    b. The ATWP settled the urgent need for the proposed expansion of aviation at Stansted (and by implication settled the urgent need for the other proposals supported by the ATWP);

    c. Although the G1 proposal would cause a "not insignificant" impact by virtue of increased noise, this could not justify a refusal of permission since such refusal would amount to a challenge to Government policy (which by implication would be the approach to be taken in respect of other aviation proposals supported by the ATWP);

    d. The CO_2 and other greenhouse gas emissions which would result from the G1 proposal (and by implication the emissions which would result from the other aviation proposals supported by the ATWP) were not a material planning consideration to be taken into account in the weighing of the planning balance;

    e. Neither was economic cost of those emissions a material consideration to be taken into account into the weighing of that planning balance; and that

    f. Neither was the economic deficit which would be caused to the UK's balance of trade by such expansion a material consideration to be taken into account into the weighing of that planning balance.

6. The Claimant contends that, in the light of the representations referred to above, made by and on behalf of the Government to both the High Court and Parliament, the Secretaries of State made the following errors of law in so deciding:

    a. **The Secretaries of State misapplied their own policy**, which was set out accumulatively in the ATWP, the ATPR, their own statements to the High Court in the *Essex County Council* case and their statements to Parliament, the totality of which policy was:

        i. To promote the expansion of aviation as set out in the ATWP upon the basis of:

            a. An assertion of need; and

            b. An assumption of net economic benefit (which was itself a significant input into the need);

ii. To seek to address the tension between the promotion of aviation and the need to tackle climate change by attempting to include aviation's CO_2 and other greenhouse gas emissions in the EU ETS;

iii. To have the planning balance of each specific aviation proposal promoted by the ATWP weighed at any subsequent Inquiry, that balance to include the assertion of need within the ATWP, but with all of the environmental effects and economic impacts taken into account and rigorously assessed, in the context of:

a. What the ATWP said about need; and

b. The Government's policy intention to address the tension between aviation and climate change through, in part, attempting to include aviation's CO_2 and other greenhouse gas emissions in the EU ETS;

iv. To refuse planning permission, even for an aviation proposal supported by the ATWP, and in frustration of that aspect of Government policy, if, on the evidence adduced at the Inquiry, the environmental and other harms attendant on that proposal were not justified either by need or net economic benefit.

b. **The Secretaries of State thereby breached the Claimant's legitimate expectation that**:

i. The Government's policy would be applied as above; so that

ii. All of the matters referred to in paragraph 5(c), (d), (e) and (f) above would properly be taken into account in the weighing of the planning balance, even if to do so might lead to a refusal of permission which would frustrate Government policy.

c. **The Secretaries of State thereby failed properly to take into account all of the considerations relevant to the proposed development,** in particular the matters referred to in paragraph 5(c), (d), (e) and (f) above.

d. **The Secretaries of State thereby breached Regulation 3 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999**, [page 1066] specifically in relation to their conclusions on

noise and on the correct approach to aviation emissions of CO_2 and other greenhouse gases.

e. **The Secretaries of State, in so deciding, gave inadequate, unintelligible and/or improper reasons for their decision**, in that the principal reason given in each of the above regards for deciding as they did was to prevent an illegitimate challenge being made to Government policy, when the Government had itself stated to both the High Court and Parliament that it was entirely possible and legitimate to adduce evidence on all environmental and economic adverse effects at the Inquiry, even if the end result might be a refusal of planning permission in frustration of national policy.

7. The Claimant, by an application appended to this Claim Form, makes an application for a Protective Costs Order.

B. Factual Background

Stop Stansted Expansion

8. SSE was established in 2002 in response to the Government's consultation on expanding UK airports and, particularly, to address the threat posed by expansion plans for Stansted Airport subsequently defined in the 2003 ATWP. Its objective, in summary, is to contain the development of Stansted Airport within tight limits that are truly sustainable. SSE's parent organisation, the North West Essex and East Herts Preservation Association (NWEEHPA), was founded in 1965 in response to a similar expansion threat. SSE operates as a working group of NWEEHPA. Members of SSE's Executive Committee are appointed by the Executive Committee of NWEEHPA, in accordance with NWEEHPA's Constitution.

9. Since SSE was formed, its support base has steadily grown and today it has over 7,000 members and online supporters. These include around 140 special interest and environmental organisations, Parish and Town Councils and other communities threatened by airport expansion.

The Conditions that Formed the Subject of BAA's G1 Application

10. There is currently one runway at Stansted. Its use is subject to conditions attached to planning permission UTT/1000/01/OP [page 99a-n], two of which were the subject of BAA's section 73 application and section 78 appeal. They limited, respectively: (1) the passenger throughput; and (2) the number of Air Transport Movements ("ATMs") permitted at Stansted Airport, as follows:

> *"MPPA1: The passenger throughput at Stansted Airport shall not exceed 25 million passengers in any twelve calendar month period.*
> *Reason: To ensure that the predicted effects of the development are not exceeded."*[page 99m]
>
> *"ATM1: Subject to ATM2 below, from the date that the terminal extension hereby permitted within Site "A" opens for public use, there shall be at Stansted Airport a limit on the number of occasions on which aircraft may take-off or land at Stansted Airport of 241,000 ATMs during any period of one year of which no more than 22,500 shall be CATMs (Cargo Air Transport Movements).*
> *Reason: To protect the amenity of residents who live near the airport and who are affected by, or may be affected by, aircraft noise."* [page 99l-m]

11. BAA's section 73 application sought permission not to comply with either of the above conditions, thereby removing any limit on either passenger throughput or ATMs at Stansted. However, in a supporting letter submitted with their planning application it was indicated on behalf of BAA that, so far as condition ATM1 was concerned, the application sought the condition's variation to a new level of 264,000 ATMs, including limits of 243,500 Passenger ATMs ("PATMs") and 20,500 Cargo ATMs ("CATMs"). By a further letter, dated 20th March 2007, [page 449-450] it was indicated on behalf of BAA that it would offer to the Inquiry a planning condition that would control air passengers to "about 35 million passengers per annum (mppa)" [page 449]. Accordingly, and by the above letters, at the G1 Inquiry BAA sought an increase in the permitted ATMs of 23,000 per annum; and an increase in the permitted passenger throughput at Stansted of 10 million passengers per annum. To put this in context, in 2007 Birmingham Airport (the UK's 6th largest) handled 9.1 million passengers and Luton Airport (the UK's 5th largest) handled 9.9 million, in each case a passenger throughput of less than the increase sought by BAA through the Stansted G1 project.

The Future of Air Transport White Paper ("ATWP")

12. In the conduct of their appeal, BAA relied heavily upon the Government's ATWP, published in December 2003, in which it was stated as follows:

> *"11.11 In summary, our principal conclusions about new runway capacity in the South East are:*
>
> - *we support making best use of the existing runway at Stansted …;*[page 144]
>
> …
>
> *11. 26 Because we expect there to be an increasingly severe shortage of runway capacity at the major South East airports over the remainder of this decade, making full use of the available capacity at Stansted will be essential to avoid stifling growth. 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 and expect the airport operator to seek planning permission in good time to cater for demand as it arises."* [page 147]

The Environmental Parameters: Aviation, Climate Change and the ATWP Progress Report

13. The "environmental effects"[3] which fell to be considered as a result of the proposed increased use of the existing runway at Stansted included those in respect of aircraft and ground noise, air pollution, demand on water, road traffic, impact on health, and the emission of global warming gases.

14. So far as the emission of global warming gases is concerned, there is an unavoidable tension in Government policy between, on the one hand, its policy to expand aviation as contained in the ATWP and, on the other, its commitment to tackle the threat of global warming. In particular, there has been a notable shift in the Government's appreciation of the threat posed by global warming, and of the need to take urgent and decisive action to address that threat, since the publication of the ATWP in 2003.

[3] The definition of "environmental information" in Reg 2(1) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 makes express reference to "environmental effects" see: para 21 below. [page 1059]

15. The new appreciation of the threat posed by climate change, and of the need for urgent and decisive action, is reflected in all of the following actions taken after the publication of the ATWP in December 2003:

    a. The publication in February 2005 of PPS1 with the effect that Local Planning Authorities must promulgate and apply policies which drive down the need to use energy and so reduce emissions (at para. 13) [page 287];

    b. The publication in March 2005 of "Securing the Future: Delivering UK Sustainable Development Strategy", which warned in respect of climate change that wrong choices now would prejudice future generations. A key contribution from the Department for Transport was stated to be to reduce aviation emissions [at page 276a];

    c. The publication in October 2006 of Report of the Stern Review on the Economics of Climate Change, making 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, and recognising also that, henceforth, international aviation must be included in any meaningful climate change policy and action [pages 299-330];

    d. The publication in December 2006 of the draft Planning and Climate Change Supplement to PPS1, setting down the target of reducing CO_2 emissions by 60% by 2050 [at pages 369-395];

    e. The publication in March 2007 of the Draft Climate Change Bill 2007[4] [pages 396-448]; and

    f. The announcement by the Prime Minister in September 2008 of the Government's intention to move to a target of an 80% cut in carbon emissions by 2050 rather than a 60% cut - equivalent to a halving of the previous carbon budget. The 80% target was confirmed as the Government's new policy in October 2008 (shortly after the date on which the Secretaries of State issued their decision letter).

16. BAA produced evidence at the Inquiry showing that its proposed increased use of the existing runway at Stansted would result in an additional 1.06 million tonnes CO_2 alone[5] per annum. At the Inquiry SSE adduced evidence to the effect that, on the basis of a target of achieving a

[4] In their decision letter of 8 October 2008, the Secretaries of State afforded the Climate Change Bill "little weight" because it was not yet enacted. The Bill passed the third reading only days later on 28 October 2008 (by 463 votes to 3).

[5] BAA did not assess the other greenhouse gas emissions which would arise from G1.

60% reduction in CO_2 emissions by 2050, aviation's CO_2 emissions would, by 2050, equal between 25% and 67% of the UK's carbon budget, and, on the basis of a target of achieving an 80% reduction in emissions by 2050, aviation's CO_2 emissions would, by 2050, equal between 50 % and 135% of the UK's carbon budget. Moreover, it was accepted at the Inquiry that aircraft emissions have an increased effect on climate change by virtue of being at high altitude and as a result of radiative forcing. Stern considered, based on the scientific evidence accepted by the Government, that a factor of between 2 and 4 should be applied to aviation's CO_2 emissions to account for this.

17. The Government has strongly endorsed Stern's findings and, as recommended, has recognised that international aviation must be included in any meaningful climate change policy and action. In the ATPR published in December 2006, however, the Government has also re-affirmed the ATWP's support for major continued expansion of aviation at Stansted and elsewhere. The Government's main proposal for seeking to reconcile climate change policy with aviation expansion was to include flights within and from EU member states in the EU ETS[6] with effect (it hoped) from 2008, which scheme was therefore considered in detail by SSE at the Inquiry[7].

C. The Required Approach as advocated by SSE

18. SSE accepted at the Inquiry that:

    a. The ATWP provided an affirmative answer to the question of whether aviation expansion is supported in principle because the Government believed (at that time) that it would deliver "large economic benefits"[8] [page 147];

    b. The statement within the ATWP that best use must be made of the existing runway at Stansted was the starting-point and backcloth to deliberations at the Inquiry, being a "material consideration" which must be taken into account and given such weight as appropriate; and that

[6] Whilst described as an emissions trading scheme, the EU ETS is in practice only a carbon trading scheme.
[7] In the ATWP (2003) it was stated that the Government hoped that aviation would be included in the EU ETS from 2008. The target has now slipped to 2012 ("Draft Guidelines on monitoring, reporting and verification (MRV) of greenhouse gas emissions for the aviation sector under the European EU-ETS", EC October 2008).
[8] ATWP, para 11.26 [page 1068].

c. Considerable weight had to be given to the Government policy statement that best use should be made of the existing runway at Stansted.

19. SSE submitted, however, that the actual weight to be attached to the above material planning considerations must depend upon the extent to which the assumptions upon which they were based accorded with the balance of the evidence adduced at the Inquiry, tested by cross-examination. It did so for the following reasons.

20. Firstly, and as required by section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") [page 1068], the appeal application was to be determined in accordance with the Development Plan unless material considerations indicated otherwise. The ATWP did not, and indeed could not, permit this statutory requirement to be sidestepped. This was expressly acknowledged by BAA's planning witness in the course of cross-examination by SSE (and the ATWP itself emphasised that it did not authorise or preclude any particular development[9]). In the terminology of section 38(6) of the 2004 Act, the ATWP was not part of the Development Plan; it was just a material consideration, albeit a weighty one, to be considered alongside all other material considerations, including the subsequent statements of Government policy on other cognate issues – and including those on global warming referred to above.

21. Secondly, neither could the ATWP sidestep the requirements of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the EIA Regulations"). Regulation 3 provided that "the Secretary of State shall not grant planning permission pursuant to an application to which the Regulation applies" unless he "has first taken the environmental information into consideration" [page 1066]. The G1 application was an application to which the EIA Regulations applied. Regulation 2(1) defines "environmental information" as:

> *"… the environmental statement including any further information and any other information… and any representations duly made by any other person about the environmental effects of the development"* [page 1060]

The ATWP did not, and could not, therefore determine whether the actual environmental effects of a proposed development outweigh the need for that development; that was to be subject to separate consideration by the Secretary of State in accordance with Regulation 3.

[9] ATWP, Executive Summary, [page 108-114].

22. Thirdly, it had been made clear by statements made by and on behalf of the Government to both:

    a. The High Court in the *Essex County Council* case; and

    b. Parliament,

    and thereby to the wider public, including those most affected by the proposed expansion of passenger throughput at Stansted, that the ATWP did not and could not settle the question of whether all of the environmental and other harms inherent to the expansion at Stansted to 35 million passengers per annum were justified either by the net economic benefits of such development (as assumed by the ATWP) or by the need for such development (as asserted by the ATWP, which itself was heavily dependent on the assumption as to the level of net economic benefits of the same).

(a) Government Statements to the High Court

23. So far as Government statements to the High Court are concerned:

    a. In the *Essex County Council* case, it was stated on behalf of the Secretary of State as follows in the Detailed Grounds:

        "10. For his part, the Secretary of State accepts:

        (i) that it is implicit in the concept of environment appraisal under EU law that the decision-maker, before he grants a 'development consent', must consider the content of the Environmental Assessment and decide whether, on the facts, the 'development consent' should be issued notwithstanding any adverse environmental effects revealed by the assessment. This necessarily means balancing those adverse effects against the need for the development;

        (ii) on the facts of this case, it will accordingly be possible and legitimate for the Claimants in the present proceedings, or anybody else, to make a case at any inquiry (following an application for planning permission) that the adverse effects revealed by the environment assessment are such that any development consent should be refused notwithstanding the fact that refusal will frustrate national policy; ... [page 187]

        11. In each case and in accordance with trite principles of public law, it will be for the plan making or decision making body to determine the weight and

significance to be given to the White Paper's policies, having regard to the balance of all other policy and planning considerations which are material to the decision which it is required to make in the performance of its statutory duties.…[page 188]

19 … The ATWP is not, on any reasonable view, a 'development consent'; and as already indicated, the Secretary of State accepts that it will be necessary for subsequent decision-makers to consider the results of environmental assessment before deciding whether or not to issue such a 'development consent." [10] [page 193]

b. In a Witness Statement submitted on behalf of the Secretary of State in the above *Essex County Council* case, it was further confirmed that it was "important" to recognise that no statements, even of policy, and whether at the national or regional level, could pre-empt any decision on an application for planning permission.

c. The above Witness Statement went on to state expressly, so far as need was concerned, that:

"The establishment of need for a type of development in a policy statement does not mean that an Inspector, and ultimately the decision-maker, will be precluded from considering the need for the proposed development, but that this will be done in the context of what is said about need in the national policy statement…" [11].[page 253]

d. The above concession was expanded upon by Counsel for the Secretary of State in the *Essex County Council* case, with Counsel expressly submitting not only that the ATWP did not authorise any development, but that it "merely informed and guided the consideration of planning applications".

e. It followed, Counsel went on to submit, that it was both possible and legitimate to argue at any subsequent Inquiry in respect of Stansted that the adverse environmental impacts were such that planning permission should be refused notwithstanding that this would frustrate national policy.

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[10] *Essex County Council* Case: Defendant's detailed Grounds for opposing Judicial Review, 17 September 2004, paras 10 and 19, page 187 and 193.

[11] *Essex County Council Case*: Witness Statement by Michael Ash, Deputy Director and Chief Planner in the Town and Country Planning Directorate, ODPM on behalf of Secretary of State, 16 September 2004, para 7.17 [page 253].

f. And if further confirmation were needed, another Witness Statement filed on behalf of the Secretary of State in the same case stated:

> *"The Department and the Secretary of State accept that the obligation, in European Law, to consider an Environmental Impact Assessment before granting a development consent necessarily carries with it an obligation to consider whether that development consent should be refused because of alleged adverse environmental impacts, even if such a refusal would frustrate government policy."* [12] [page 217]

24. The above concessions and submissions were rightly made. If it were otherwise there would be a fundamental breach of the EIA Regulations and general principles of public law.

(b) Statements to Parliament

25. So far as statements to Parliament are concerned, during the passage of the Planning and Compulsory Purchase Bill on 19th April 2004, the then Parliamentary Under-Secretary of State in the ODPM, Ms Yvette Cooper MP, was obliged to deal with Lords' Amendments[13]. The amendments proposed: (1) that Economic Impact Assessments be required on major infrastructure proposals; and (2) that an Inspector be always at liberty to consider the need for a development even though it was specifically proposed within a White Paper. In both aspects, the Minister said, the Lords' Amendments were unnecessary.

26. So far as economic issues were concerned the Minister stated as follows:

> *"… the Inspector will consider the economic effects, along with all the other aspects of the application as part of the Inquiry. Those would also include environmental and any other impacts, and local people would have a further opportunity to raise their concerns, including any concerns on economic aspects, at the Inquiry. If the economic impact is disputed, concerns can be raised about that, too… The Government do not want to predetermine through the legislation which issues the Inspector should consider or focus on at an Inquiry. The*

[12] Ibid, Witness Statement by Michael Fawcett, head of the Airports Policy Division, Department for Transport on behalf of Secretary of State, 17 September 2004, para 2 [page 217].
[13] SSE was closely and directly involved in promoting some of these because of its concern, even at that time, about the risk of unfairness in the new major infrastructure procedures.

Inspector will need to be able to consider what the particular issues to be resolved are, and what to devote Inquiry time to, in each particular case."

"… 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."[page 180]

27. As for the issue of "need", the Minster confirmed as follows:

"Again, we do not think that that requirement is necessary. Throughout the progress of the Bill, the Government have said that where there is a national policy statement White Paper, it should help to reduce the argument at a Planning Inquiry about the need for a specific development at a particular site—but that of course, the Inspector is likely to have to consider the balance between need and other factors. Those who oppose a specific development will be able to present their arguments against it, and it is right that they should have the opportunity to do so. It has never been the Government's intention to rule out the possibility of the Inspector spending some time considering need, but that will be done in the context of what is said about need in the national policy statement. The Inspector must ensure that all relevant impacts of a specific development are considered during an Inquiry, and that means all material considerations, together with relevant impacts such as the economic or environmental impact." [page 180-181]

28. It is accepted that the above statements to Parliament were made in respect of legislative provisions concerning the consideration of "major infrastructure projects". The definition of a major infrastructure project, as set out in section 76A of the 1990 Act (inserted by section 44 of the 2004 Act) [page 1050-1051], is a development which the Secretary of State considers to be of national or regional importance. If the Secretary of State considers a development to be a major infrastructure project, he has discretion to call in the application. Under section 76A(5) of the 1990 Act [page 1051], where the Secretary of State does call in an application for

planning permission, the applicant must prepare and submit an Economic Impact Report. It follows that where an application is made for a development of national or regional importance, the economic impacts of that development constitute a material planning consideration.

29. That the Secretary of State does not exercise his discretion to call in an application under section 76A, however, does not preclude that project from being of national or regional importance.

30. Since it is clear from the policy support accorded by the ATWP that the G1 project meets the definition of a major infrastructure project, and even though the G1 application was not called in under section 76A of the 1990 Act, the economic impact of the G1 development must therefore constitute a material planning consideration in respect of that proposal. If it were otherwise, the materiality of the economic impacts of a development of national or regional importance would depend upon whether the Secretary of State has exercised his discretion to call in the application under section 76A.

31. As the Minister made clear in her statement to Parliament, projects that fall within the definition of a major infrastructure project must be subject to "a rigorous economic assessment" of that proposal.

SSE's Conclusion as to the Required Approach

32. Accordingly, the required approach to be taken to the proposed development, derived from the 1990 Act, the 2004 Act, the ATWP, the ATPR, and the statements of the Secretaries of State to both the High Court and to Parliament, was one of weighing the planning balance in accordance with the evidence adduced at the Inquiry on all relevant planning considerations, economic and environmental, albeit in the context of what was said about need in the ATWP.

33. Moreover, it was the Government's stated position that if, upon "a rigorous economic assessment" at the Inquiry, and full consideration of "its environmental and other impacts", the balance of the evidence was that the harm occasioned by the proposal was not outweighed by the level of net economic benefits or justified by "need" as asserted by the ATWP, itself heavily dependent on the assumed economic case for the proposal, then planning permission should be refused even if refusal frustrated one aspect of stated Government policy – in the

instant case, the asserted priority of making "best" use of the existing runway at Stansted as expressed in the ATWP.

D. BAA's Case on: Climate Change and Economic Harm/Benefits

Climate Change

34. BAA chose to call no direct evidence on climate change. Its argument was, essentially, that the effect of aviation's greenhouse gas emissions was not a matter properly to be dealt with at a planning inquiry, for the following reasons:

    a. The additional 1.06m tonnes per annum of CO_2 emissions of the appeal proposal would "have no significant effect upon the climate";

    b. In the ATPR the Government had made it clear that its policy was to deal with the emissions from aviation by other means, in particular by including CO_2 emissions from flights within and from EU member states in the ETS "as soon as practicable";

    c. A challenge to the likelihood and efficacy of including CO_2 emissions from flights within and from EU member states in the ETS as soon as practicable constituted an attack on Government policy;

    d. It was not open to the Inquiry to go behind Government policy;

    e. Further, in August 2007 the Department for Transport, had published a Consultation Document on Emissions Cost Assessment ('ECA') which stated (at para. 2.4, [page 1000]) that the ECA was "not intended to be carried out in response to any specific proposals for development at an individual airport and is not intended for use in the context of a planning Inquiry".

Economic Harm/Benefits

35. BAA also chose to call no direct evidence on the economic justification for its proposed development, relying exclusively on the broad estimates and assumptions contained within the ATWP. BAA's argument in this regard was essentially as follows:

    a. Any evidence adduced at an Inquiry challenging the economic or other benefits of a project as identified by the Government in a national policy statement should be considered within the context of what is said about need and benefits in the national policy statement;

b. The ATWP settled the question of the need to make best use of the existing runway at Stansted;

c. A challenge to the Government's judgment on the economic benefits of making best use of the existing runway at Stansted constituted an attack on Government policy;

d. As before, it was not open to the Inquiry to go behind Government policy.

36. The extent of BAA's economic case at the Inquiry was, accordingly, contained within two papers in the appendices to the Proof of their planning witness.

E. SSE's Case on: Policy, Climate Change and Economic Harm/Benefits

Policy

37. Since it was central to BAA's case on both climate change and economic harm/benefits that SSE could not question Government policy, it was necessary, first, to understand what the law understands a "policy" to be. In particular, "policy", as defined by Lord Diplock in *Bushell v. Secretary of State for the Environment* (1981) AC 75 was "descriptive of departmental decisions to pursue a particular course of conduct". In other words, a "policy" describes what the Government actually proposes to do; it does not describe the inputs and assumptions that underpin that proposal.

38. By the above statements to both the High Court and Parliament, Government had made it clear that it was both "possible and legitimate" for SSE to make a case at the Inquiry, including by way of "a rigorous economic assessment", that the adverse effects of the proposed G1 development were such that planning permission should be refused notwithstanding the fact that refusal would frustrate national policy. It was, accordingly, both "possible and legitimate" for SSE to challenge by evidence adduced at the Inquiry, the inputs and assumptions which underpinned Government policy, even if to do so might result in a refusal of planning permission which frustrated that policy.

Climate Change

39. SSE's case on the materiality of climate change was, in the above context, as follows:

a. In the case of a planning application where a very substantial increase in CO_2 and other greenhouse gas emissions would ensue if the development were to be approved, the fact of those emissions was plainly an "environmental effect" for the purposes of the EIA Regulations, upon which "environmental information" was to be considered before any planning permission could be granted. It was, accordingly, a relevant planning consideration and must be weighed in the balance alongside all other harms to the environment and amenity (and to the economy, if any). It should be noted that SSE pointed to the damaging effects of both CO_2 emissions *and* aviation's other greenhouse gas emissions arising from the G1 proposal;

b. No policy statement could convert that material consideration into an immaterial consideration: the language of policy must always give way to the requirements of statute (see in this regard: the Town and Country Planning Encyclopedia, Vol 2, at 2-3290/2);

c. Indeed, the environmental harm caused by the additional CO_2 and other greenhouse gas emissions should attract significant weight, derived from the Government's own characterisation of climate change as being the biggest single issue to be confronted and the clear statements of the Government's position as set out, for example, in the Planning and Climate Change Supplement of PPS1[14]:

> *"The Government believes that climate change is the greatest long-term challenge facing the world today. Addressing climate change is therefore the Government's principal concern for sustainable development."*[page 383]
>
> *"There is therefore an urgent need for action on climate change."* [pages 383]

40. BAA's argument that the increase in emissions occasioned by the proposed development would have "no significant effect on the climate" and so could be ignored, was wrong. Taken to its logical conclusion it would mean that CO_2 and other greenhouse gas emissions were never taken into account on any planning application, not even for the most energy-intensive of development proposals (or, indeed, in respect of development proposals which would have a

[14] 'Planning and Climate Change: Supplement to PPS 1', Dec 2007, paras 2 and 5, page 383.

beneficial effect[15]). That could not possibly be right (and was not the approach that had been taken in other Inquiries, such as the Thames Gateway Bridge proposal). Rather, if, in planning terms, global warming was the accumulative result of energy emitted from countless development proposals, it was to be addressed by taking those emissions into account in *all* of those proposals; BAA's approach asserted that you took them into account in *none*.

41. BAA's further argument that, through the ATWP and ATPR, the Government had made it clear that it intended to deal with the emissions from aviation by other means, in particular by including them within the international trading of carbon, did not mean that the issue of aviation's CO_2 and other greenhouse gas emissions did not fall properly to be weighed in the balance at the Inquiry. In particular:

    a. With Lord Diplock's comments in *Bushell v. Secretary of State for the Environment* (1981) AC 75) in mind, from which the distinction was to be drawn between a "policy" (i.e., what the Government actually proposes to do) and any statement of fact, assumption or belief which underpinned that policy, a distinction was to be drawn between: (1) statements of Government policy within the ATWP and ATPR: and (2) claims of fact, assumption or belief within the ATWP and ATPR which were but an input into that policy;

    b. The statement within the ATWP (at para 3.39, page 139) that, "The Government therefore believes that the best way of ensuring that aviation contributes towards the goal of climate stabilisation would be through a well-designed emissions trading regime", was an expression of belief rather than a policy statement – and the belief was itself qualified by the words "well-designed";

    c. The statement within the ATPR (at para 2.10, page 341) that the "inclusion of aviation in the Emissions Trading Scheme (was) the most efficient and cost-effective way to ensure that the sector plays its part in tackling climate change", was a claim of fact rather than a policy statement;

    d. Moreover, the above claim was not supported by the evidence. In particular, the history of the EU ETS and the lack of progress in including aviation in the scheme

[15] If right, BAA's argument would appear to mean, for example, that in the energy sector the advantage of a wind farm as compared to (say) a coal-fired power station to the global environment would not be a planning consideration. That cannot be right, however, since PPS22, at para. 1 (vi) makes it clear that even limited and small contribution to renewable energy is a material planning consideration weighing in a proposal's favour. If so, however, then it must follow that large-scale emissions are a material consideration weighing against a proposal.

did not justify the Government's confidence that it would achieve the benefits claimed for it in the ATWP Progress Report;

e. Accordingly, the policy of introducing aviation into the EU ETS (which policy was not challenged by SSE at the Inquiry), begged the question as to whether, on the evidence, that policy was likely to be implemented expeditiously so as to deal effectively with the additional emissions which would otherwise be caused by the proposed development;

f. This was questionable, given that:

   i. The Government's intention to include CO_2 emissions from flights within and from the EU in the ETS had not yet been fulfilled, and nobody could be certain that it would;

   ii. Even if fulfilled, that policy could not begin to have any beneficial effect for 3½ to 4½ years at the earliest;

   iii. Disagreements and negotiations about any number of contentious issues could very easily put this back years more. SSE's witness referred, in this regard, to the different negotiating positions taken by a number of EU Member States and to the fact that the US remains strongly opposed to any attempt to apply the scheme to American carriers, arguing that it would be in breach of international law to do so[16];

   iv. Whether including aviation in the EU ETS would actually secure real emissions reductions was highly dependent on the answers eventually agreed to these currently unresolved, and potentially highly controversial, implementation questions;

   v. Phase 1 of the scheme had achieved little and there was no justification for assuming that future phases would be reformed to do significantly better, and there were, currently, no proposals to make them do well enough to meet post-2012 emissions targets.

   vi. The proposed EU ETS would deal with aviation CO_2 emissions alone and not its other greenhouse gas emissions, and it would treat aviation CO_2 emissions in the same way as it treated all other CO_2 emissions,

[16] The Government's current expectation is a 2012 start date and if this is achieved it will be four years later than the expectation stated in the ATWP.

with no account taken of the point made by Stern, on the basis of the scientific evidence that aviation emissions were likely to be between two and four times more damaging than its CO_2 emissions alone;

g. Even though the Department for Transport Consultation Document on the ECA, stated the Department's belief that an ECA "should not be carried out on an ad-hoc basis to inform the consideration by the planning system of individual airport development proposals", this could not – for the reasons set out in paragraph 39(b) above - have the effect of converting what was otherwise a plainly material consideration, viz., the CO_2 and other greenhouse gas emissions attendant upon the G1 proposal, into an immaterial consideration;

h. In estimating the net economic benefits of airport expansion projects, the Department for Transport had itself included estimates of the economic cost of the CO_2 and other greenhouse gas emissions that would ensue from the airport expansion projects.

Economic Harm/Benefits

42. Again with Lord Diplock's comments in *Bushell v. Secretary of State for the Environment* (1981) AC 75 in mind, from which the distinction was to be drawn between a "policy" (i.e., what the Government actually proposes to do) and any statement of fact, assumption or belief which underpinned that policy, it was necessary to consider precisely what the Government had said in the ATWP upon which BAA relied so heavily: "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…"

43. The quotation was made up of two sentences. The second sentence was a statement of Government policy, namely that the Government supports in principle growth at Stansted to make full use of the existing runway. The first sentence was not a statement of policy at all, however. It was but an input into that policy, namely a statement of the Government's belief, or assumption, based on the work which had then been undertaken, that full use of Stansted would generate large net economic benefits. It is to be noted in this regard that, at IR para. 14.68, [page 932-933] the Inspector stated that he "inclined to SSE's view" on this interpretation.

44. As was made clear by the Government's statements to both the High Court and Parliament set out above, SSE was fully entitled to subject the belief or assumption contained within the first sentence relied upon to a "rigorous economic assessment" at the Inquiry, albeit "in the context of what (was) said about need in the national policy statement", such being "obviously" within "the territory of the Inquiry", even if the consequence of that assessment might be to frustrate that aspect of Government policy contained within the second sentence upon which reliance was placed.

45. Without anyone to cross examine on the two papers on economics included in the Appendices to the BAA's planning proof, SSE submitted a detailed rebuttal of them, pointing out that they largely relied upon broad assertions of wider economic benefits, expressed in generalised terms. SSE pointed out, moreover, that nowhere had BAA presented any evidence – direct or indirect – of the economic benefits specifically attributable to the particular development proposed.

46. Further, and by way of contrast to BAA's position at the Inquiry, SSE called considerable direct evidence on the issues of the economic harm/benefit of the proposed development, including to the following effect:

    a. The high-level assessment of the economic effects of airport expansion undertaken in the course of preparing the ATWP, whilst fit for purpose in terms of providing broad estimates to Ministers of the economic benefits of various options at a time when Ministers were looking to decide upon "a strategic framework for the development of air travel over the next 30 years" (as the ATWP describes itself), was insufficient for the purposes of assessing the economic effects of any particular planning application. Ministers were at that time interested in examining the relative economic benefits of various options, and packages of options, and, provided the assumptions and methodology were consistently applied, the estimates of economic benefits – even though only broad - would be sufficient for ranking purposes;

    b. Importantly:

        i. There was no specific economic assessment for making full use of Stansted;

        ii. The economic benefits identified in the ATWP for making full use of runway capacity in the South East assumed, and were highly

dependent upon, very substantial growth in business passengers when the projections contained in the G1 application demonstrated that the development proposed would not fulfil that expectation;

iii. The broad economic assessment carried out for the ATWP also assumed that the UK leisure passenger sector would grow far more slowly than other sectors. However, the projections contained in the G1 application showed that the development proposed would predominantly cater for growth in UK leisure passengers;

c. So far as the proposed G1 development was concerned, SSE contended that:

i. Both the direct economic benefits and the wider economic benefits in relation to passenger traffic would be very much smaller than expected at the time of the ATWP and ATPR because there would be so few additional business passengers. Indeed if BAA had provided projections beyond 2014/15, progressively more business passengers would be handled within the 25 mppa cap because of the tendency BAA described for business passengers to displace leisure passengers if capacity was constrained;

ii. There would be no additional economic benefits in relation to cargo traffic – a point accepted by all the parties;

iii. There would be negative economic impacts in relation to the reduced capacity for corporate business aircraft;

iv. There would be significant employment substitutional impacts which, taken together, outweighed the direct and indirect beneficial employment benefits of the proposed development;

v. There would be a requirement to “import”' employees, including from outside the UK, due to shortages in the local labour market;

vi. There would be a very substantial negative impact on the UK trade deficit in result of the proposed development by virtue of the manner in which Stansted operated, generating so many leisure trips abroad by UK residents;

vii. There would be a substantial negative economic impact arising from the cost of aviation’s CO_2 and other greenhouse gas emissions, based on Stern's analysis; and

viii. The threat of the proposed development had already had a significant adverse economic impact upon local homeowners.

47. So far as (c)(vi) above is concerned, the evidence adduced by SSE was to the effect that there would be a net economic disbenefit of £12.6bn upon the UK trade deficit if the passenger throughput at Stansted increased from 25mppa to 35mppa. The SSE calculation is in net present value ('NPV') terms and was arrived at in accordance with the methodology set down in the HM Treasury Green Book. It was not contested by any of the parties.

48. So far as (c)(vii) above is concerned, SSE used the same NPV methodology to quantify the economic cost of the additional carbon emissions which would be generated by the proposed development. SSE based its calculations on its assessment that G1 would result in an increase of 0.99m tonnes of CO_2 per annum, slightly less than BAA's assessment of 1.06m tonnes per annum. SSE's financial calculations were based on Stern's estimate of the social cost of carbon which equated to about £76.50 per tonne of CO_2 (at 2007 prices). Allowing for phased growth of the proposed development, SSE calculated the economic cost of the carbon emissions (again in NPV terms) at between £3.2bn and £6.3bn for growth to 35mppa. This calculation reflected Stern's recommendation that, in order to reflect the true economic cost of aviation emissions, these should be factored by between 2 and 4 times the cost of the carbon emissions alone[17].

49. Accordingly, SSE submitted that, on the evidence at the Inquiry, the economic benefits anticipated in respect of the proposed development by the ATWP simply did not exist in this particular case. In fact, the economic impacts were substantially and demonstrably negative. This necessarily undermined a very significant aspect of the Government's assumption within the ATWP that the expansion of Stansted would be beneficial in net economic terms; and, in any event, fundamentally altered the balance between harm and benefit assumed by the ATWP.

[17] In December 2007 (i.e. after the G1 Inquiry ended) the Government abandoned its previous methodology for addressing the social cost of carbon ('SCC') and replaced this with a shadow price of carbon ('SPC') based on a stabilisation trajectory. The new methodology significantly reduces the cost. Re-working SSE's G1 assessment using the new methodology produces a cost range of £1.6bn to £3.1bn – about half of SSE's original assessment but still a substantial economic disbenefit to weigh in the balance alongside the balance of payments impact and other considerations.

F. The Inspector's Report

The Issues

50. At paragraph 14.43 of the Inspector's Report ("IR") [page 927-928], the Inspector identified the issues to which the G1 proposal gave rise, including so far as is relevant:

> *"1) Whether or not it would be premature to make a decision on the appeal at this time;*
>
> *2) The extent to which the proposals accord in principle with current Government policy, with the statutory development plan and with the emerging Regional Spatial Strategy for the East of England;*
>
> *3) The effects of the proposals on the living conditions and health of residents in the area, particularly in terms of aircraft noise and air pollution;*
>
> *4) The effects of aircraft noise on the quality of life of the area in terms of the educational, cultural and leisure activities of communities;*
>
> *5) The effects of increased housing pressures arising from expansion of the airport on the nature and character of communities in the area;*
>
> *…*
>
> *10) The economic (including employment) benefits of the proposals."*

51. At IR paragraph 14.39, the Inspector stated as follows so far as Issue 10 above was concerned:

> *"14.39… (P)reliminary issue 10 purported to balance economic benefits against social and environmental effects. It was derived from UDC's reason for refusal no. 9, but I recognise that it does not reflect the approach to sustainable development set out in PPS1. I consider that the issue should be restricted to assessment of the economic (including employment) benefits, with these being one of many factors drawn together in my overall conclusion."*[page 927]

The Required Approach in the light of Government Policy on Air Transport

52. As to the correct approach to the ATWP, the Inspector concluded:

    a. That although the ATWP was not part of the statutory development plan, it should be accorded considerable weight as a material consideration in this appeal (IR para. 14.60 [page 931], but see also 14.46-14.53 [page 928-929], 14.55-14.58 [page930]);

b. That the ATWP stated that making best use of the existing runway at Stansted was supported and that making full use of the available capacity there was essential to avoid stifling growth (IR para. 14.62 [page 931], but see also 14.61 [page 931]).

53. The Inspector went on to set out how he viewed the correct approach to the ATWP in light of the reliance by the Claimant (and others) on the environmental and economic harm that would arise from the proposed development:

> *"14.66 Returning to the question of need for the G1 development, UDC and SSE submit that this is not 'settled' by the ATWP but must be considered in each individual case against any adverse environmental effects. In doing so they largely rely on submissions made in support of the legal challenge to the ATWP to which I have referred above. As already discussed, this did not address the policy relating to making full use of the existing runway at Stansted. SSE also cites a statement to the House of Commons by the then Parliamentary Under-Secretary of State in the ODPM, which post-dates the Court judgement in the case referred to.*
>
> *14.67 To my mind there is less between the parties on this matter than at first appears. Indeed, there seems to be agreement that need has to be considered in the light of national policy on the matter and, crucially, that economic benefits and environmental and other harm also have to be weighed in the balance. That is the basis on which I have approached my consideration of this appeal. I take the need as established by the national policy, but not as necessarily overriding all other considerations.*
>
> *14.68 Reference is made by SSE to the passage in para 11.26 of the ATWP in which it is stated that: '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…'. SSE submits that, while the second sentence is a statement of policy, the first is not policy but a statement of the Government's belief as to the facts that provide an input to the policy statement in the second sentence. BAA, on the other hand, takes the view that the first sentence is a necessary part of the Government's policy decision and so not open to challenge in a planning Inquiry. I incline towards SSE's view on this. To my mind the first sentence is an explanation of a key factor underpinning the policy set out in the second. I*

recognise the need to address the question of the actual economic benefits that would accrue from the G1 proposal, but do not accept that this exercise provides a basis for challenging the merits of Government policy in the context of this appeal. As I have indicated previously, that is outside the ambit of this report.

14.69 That is not to say that the economic benefits of the G1 proposal are not a material consideration to be weighed with all others, nor is it to say that they are settled by the ATWP. Equally, it is undisputed that the environmental and other impacts of the proposal are not settled by the ATWP but fall to be considered and weighed with the other material considerations. I address these matters later in these conclusions.

14.70 It is also undisputed that the ATWP 'does not authorise … any particular form of development' but makes it clear that any proposals will need to be considered through the planning system in the normal way.

14.71 To sum up, I conclude that the policy in the ATWP establishes an urgent need to provide additional runway capacity in the South East with priority being given to making best use of existing runways. In particular, it supports making full use of the existing runway at Stansted. This is, nevertheless, subject to all normal planning considerations." [page 932-933]

Findings of Harm

54. So far as the effects of the proposed development on noise and on the nature and character of the communities in the area (issues 3,4 and 5 above) were concerned, the Inspector found the G1 proposal to cause the following harms to interests of acknowledged planning importance (at IR paragraphs 14.115-116 [page 941], 14.142 [page 946], 14.147 [page 947] and 14.167-8 [page 951-952]):

> ***"The effects of the proposals on the living conditions and health of residents in the area, particularly in terms of aircraft noise and air pollution*** *(Main issue 3)*
> *and*
> ***The effects of aircraft noise on the quality of life of the area in terms of the educational, cultural and leisure activities of communities*** *(Main issue 4)*
> **…**

14.115 The area of the 57 dBA Leq contour at 35 mppa (33.9 km^2) would be well within the limit currently imposed by condition AN1 attached to the 2003 permission (43.6 sq km) which, it may be inferred, was considered acceptable by UDC at the time that it granted this permission. The population within the contour (3550) would also be significantly less than the 4850 predicted for 25 mppa 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 tranquility. 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 recognise that noise causes annoyance, but the evidence I have seen on the extent to which this causes clinical stress and other medical conditions is inconclusive. While there is no proposal to increase the permitted number of flights in the night quota period, I have already noted that there remains scope for an increase in flights then, albeit with quieter aircraft, and it is undisputed that there would be more arrivals and departures in the morning shoulder period. 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…"

55. In relation to the appropriate balance to be struck in relation to noise, the Inspector concluded (at IR 14.149, page 948]):

"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."

56. The Inspector turned then to the effects of increase housing pressures arising from expansion of the airport on the nature and character of communities in the area (main issue 5). He recommended as follows:

"14.167 … I consider that, in view of its scale, some intensification of these effects could be expected with the proposal, involving further erosion of traditional social linkages in smaller settlements and increased unauthorised activity. Appropriate mitigation is put forward by way of the community fund and parking enforcement contributions, but there would remain a possibility of unmitigated residual effects.

14.168 … My findings do… indicate some adverse effects under criterion 2 with regard to impact on residential areas as a matter to be taken into account in the overall assessment under this policy."[18] [pages 951-952]

[18] The reference to criterion 2 is to criterion 2 in Policy BIW9 of the Essex & Southend on Sea Structure Plan (2001). Policy BIW9 provides in relevant part "proposals for new development relating to any existing operational airport or airfield…, will be… determined in relation to the following criteria… (2) air travel needs of residents, business and air sports users…".

The Materiality of Climate Change and the ATWP Progress Report

57. The Inspector took the following approach to the question as to whether climate change was material in determining the G1 application (at IR paras. 14.40-14.41 [page 927] and 14.72-80 [page 933-935]):

    a. That the Inquiry was not the place to challenge Government policy on carbon emissions and climate change (IR para. 14.40, page 927);

    b. That it was not necessary to consider climate change as a specific issue, although the environmental effects of climate change fall to be assessed and weighted in the overall conclusion (IR para. 14.41, page 927);

    c. 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 para. 14.75, page 933-934, see also 14.72-14.74, page 933);

    d. The ATPR addressed climate change issues. It expressly took into account the findings of the Stern Review and the Eddington Report, and other documents published since the ATWP in 2003. The Inspector noted that "having taken all these developments into account, the ATPR reaffirms the Government's commitment to the ATWP strategy" (IR para. 14.76, page 934);

    e. "Government policy seeks to reconcile growth in aviation to meet the needs identified in the ATWP with action to address climate change". Arguments that the correct balance had not been struck were outwith the scope of the Inquiry (IR para. 14.77, page 934);

    f. The EU ETS and the ECA were both at the consultation stage, and so could be accorded limited weight only. Further, in relation to the ECA that was at a strategic level; it did not address individual airports; it stated that it should not be applied to individual airport development proposals and it states that it was "not intended for use in the context of a planning inquiry" (IR para. 14.79, page 934 and see also paras. 14.77-14.78, page 934).

Economic Harm/Benefit

58. The Inspector stated *inter alia* as follows in respect of the issues of economic harm/benefit raised by SSE (IR paras. 14.230-237 [pages 965-967], 14.247-250 [pages 969-970], 14.262 [page 972] and 14.264 [page 973]):

a. The Inspector noted that although the ATWP suggests that making full use of Stansted would generate net economic benefits, no figure was placed on these (IR para. 14.230, pages 965-966;

b. Examining the evidence on economic benefits advanced by BAA, the Inspector concluded that this was a "relatively crude approach to quantifying the direct benefits of G1". Further, "it was not possible to be confident that it reflects the particular elements of air traffic forecasts that underlie the appellant's analysis of the differences between the 25 and 35 mppa cases" (IR para. 14.233 [page 966], see also 14.231-14.232 [page 966]);

c. The Inspector concluded in relation to BAA's economic evidence:

> *"14.235 Having regard to these factors, and in the absence of an analysis that is particular to the forecast characteristics of the increment between the 25 and 35 mppa cases for Stansted, I consider that relatively little reliance can be placed on the appellants' figure as to the precise direct benefits that would derive from G1. I note the general wish of BAA to rely on the benefits of full use indicated by the ATWP, but that relates to the matter of context rather than the detail to which the calculation of specific user benefits is directed. I consider that the appellants' case falls short of a robust demonstration of these. It is worth recording at this point that no professional economist gave oral evidence to the Inquiry for any party. SSE estimated a substantially lower figure for direct benefits of £1b, but with no supporting analysis. Nevertheless, I accept the contention of BAA that even at this much reduced level the benefits could reasonably be viewed as large, and I accept on the basis of the analysis that is available that they would be at least of this order of magnitude. Within the framework of the ATWP, these likely direct benefits carry weight in favour of the proposal."* [page 966-967]

d. The Inspector then considered the evidence advanced by SSE as to the trade deficit that would result from the G1 proposals. He noted that SSE's figures (as set out in para. 47 above) had not been disputed, but stated 'I note that they relate to the current account which I understand to represent only one of several components of

the overall UK balance of payments' (IR para. 14.236, page 967). The Inspector then considered the approach in the ATWP:

> *"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 due 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 these benefits. No indication is given in the ATWP that any particular threshold of 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 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. While 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."* [page 967]

e. The Inspector noted other indirect effects that he stated were not quantified, namely the number of foreign business travellers and non-ATMs (IR paras. 14.247 and 14.248, page 969). He stated that in relation to cargo traffic, the levels are forecast to be the same at both 25mppa and 35mppa, and so there would be no change in the wider effects generated by such traffic (IR para. 14.249, page 969);

f. Finally, the Inspector addressed the question of whether the social cost of carbon should be considered when assessing the economic benefits of the G1 proposal. He concluded (IR para. 14.250. page 970):

> *" … The Government in the ATWP and ATPR sets out the intention that the carbon costs of the aviation industry should be internalised at a rate reflecting a range around these trajectories, and that from 2010 aviation*

passengers will face an additional cost linked to their climate change emissions. The Government's emissions cost assessment proposals are currently at consultation stage. I consider these to be matters of national policy rather than open to review through this appeal. Given the Government's clearly stated position, I do not suggest that a calculation of climate change costs be included in the economic assessment of this proposal."

g. The Inspector concluded in relation to economic benefits as follows:

"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 direct 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. The proposal would generate some employment growth of relatively modest scale, although in line with the emerging RSS. Other identified likely indirect economic effects would be either unquantified negative impacts or involving no change by comparison with the 25 mppa case. In the context of current Government policy, there is no basis for a calculation of climate change costs forming part of the economic assessment of the proposal.

…

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…"[page 972—973]

Overall Conclusions

59. The Inspector reached the following overall conclusions (IR paras. 14.331 [page 966], 14.334 [page 985], 14.340 [page 986] and 14.344-345 [page 986]):

"14.331 To sum up, I have concluded that the principle of making full or best use of the existing runway at Stansted Airport is in accordance with Government aviation policy in the Future of Air Transport White Paper (ATWP). This takes account of climate change issues, but the appropriateness and effectiveness of Government policies on aviation and climate change and their compatibility are

matters for debate elsewhere rather than through this appeal. While strong views have been expressed on these matters, I therefore do not make recommendations regarding them, nor has it been appropriate for the appeal to be used as a forum to question the likely effectiveness of Government policy in the context of this proposal. However, the ATWP does not pre-determine the appeal, which requires an assessment of both benefits and harm.

…

14.334 I have concluded that additional air noise, and to a lesser extent, ground noise would be harmful to the living conditions and health of residents and to the quality of life in the area. Some, but not all, of this harm could be mitigated. The proposed development would thus conflict with criteria in Structure Plan and Local Plan policies, but the policies require this to be weighed against the need for the development, which in this case is established by the ATWP. …

…

14.340 The ATWP indicates that making full use of the runway would 'generate large net economic benefits', which I take as an input to the policy rather than a statement of policy in itself. There is evidence that the proposal would bring large direct economic benefits and some indirect economic benefits though these are not reliably quantified. There would be net outward expenditure on tourism, but Government policy does not suggest that this should be deducted from the benefits to derive the net benefits. There is also no basis in current Government policy for including climate change costs in the economic assessment of the proposal. Using the framework for assessment set out by the Government I conclude that the G1 development would give rise to significant economic benefits in accordance with the relevant Structure Plan policy.

…

14.344 In the absence of any significant harm in a number of respects as indicated above and of substantial conflict with the development plan, I conclude that the economic and other benefits I have identified, together particularly with the accordance with national policy on aviation generally and particularly the specific policy support for making the best or full use of the existing runway at Stansted outweigh the harm I have found in respect of noise and the effects on the nature and character of communities.

14.345 For all the above reasons, I conclude that the appeal should be allowed."

G. The Secretaries of State's Decision Letter

60. The Secretaries of State gave their reasons for agreeing with the Inspector's recommendation in their decision letter, dated 8th October 2008 [page 1028-1048], as follows:

    a. That the ATWP and the ATPR were material considerations. The ATWP should be accorded considerable weight as a material consideration (SSL para. 18, page 1032);

    b. That as neither the Planning Bill nor the Climate Change Bill had been enacted, they must be afforded little weight as both might be subject to change (SSL para. 23, page 1033);

    c. That the Secretaries of State had taken into account as material considerations the "Consultation on the Commission's proposal to include aviation in the European Union emissions trading scheme" and the "Consultation on the Emissions Cost Assessment" but both had been given limited weight (SSL para. 24, page 1033);

    d. In the case of ECA, the Government had "made clear that it is a national analysis and will not be carried out on an ad-hoc basis to inform the consideration by the planning system of individual airport development proposals" (SSL para. 24, page 1033);

    e. The Secretaries of State agreed with the Inspector's assessment of the main issues (SSL para. 27, page 1034);

    f. In relation to the proper approach to the ATWP, the Secretaries of State concluded (SSL para. 28, page 1034):

> *"The Secretaries of State agree with the Inspector's reasoning and conclusions on Government policy on air transport as set out in IR14.46-14.71. They agree that while the ATWP is not part of the statutory development plan, it should be accorded considerable weight as a material consideration in this appeal (IR14.60). They also agree that the policy in the ATWP establishes an urgent need to provide additional runway capacity in the south east, with priority being given to making best use of existing runways and in particular it supports making full use of the existing runway*

at Stansted (IR14.71). They further agree that this is, nevertheless, subject to all normal planning considerations (IR14.71)."

g. On Climate Change, the Secretaries of State adopted the Inspector's reasoning, noting (SSL para. 29, page 1034):

"The Secretaries of State agree with the Inspector's reasoning and conclusions on Government policy on climate change as set out in IR14.72-14.80. 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 (IR14.77). 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 (IR14.80)."

h. The Secretaries of State agreed with the conclusions and reasoning of the Inspector in relation to aircraft noise as set out in the IR at paragraphs 14.91-14.149 (SSL para. 31, page 1035);

i. As to the effects of the increased housing pressures arising from expansion of the airport on the nature and character of communities in the area, the Secretaries of State concluded (SSL para. 32, page 1035):

"32. The Secretaries of State agree with the Inspector's reasoning and conclusions on the effects of increased housing pressures arising from expansion of the airport on the nature and character of communities in the area as set out in IR14.155-14.168. The Secretaries of State agree that, while the evidence is tenuous, some intensification of adverse effects could be expected with the proposal, involving further erosion of traditional social linkages in smaller settlements and increased unauthorised activity (IR14.167). They also agree that with respect to SP Policy BIW9, under criterion 6 there is no evidence that there would be a requirement for new housing or associated community facilities as a result of the development that could not be met, but that the findings do indicate some adverse effects with regard to impact on residential areas (IR14.168)."

j. Overall, the Secretaries of State concluded (SSL paras. 51 *et seq.* page 1040-1041.):

*"**Overall Conclusion***

51. The Secretaries of State consider that the proposal would accord with the ATWP, including that it seeks to reconcile growth in aviation to meet the needs identified in the ATWP. They also consider that in terms of principle, the appeal proposal is not in conflict with the development plan. The proposal would also be acceptable and in line with the development plan, the ATWP, and national policies in other respects, including that: there is no evidence that the proposal would breach relevant local and national policies relating to nitrogen depositions on vegetation; there would be adequate provision of water resources, including that sewerage and drainage capacity would be adequate; the road network and rail and coach access would be adequate; and, that there would be large direct economic benefits.

52. Factors weighing against the proposal are: that additional noise would be harmful to the living conditions and health of residents and to the quality of life in the area; that there would be some negative health effects due to changes in levels of air pollution, though these would be small and not a significant conflict with the development plan; that there could be further erosion of traditional social linkages in smaller settlements and increased unauthorised activity and some adverse effects with regard to impact on residential areas; and, that NOx levels are a cause for concern in terms of their impact on Hatfield Forest and nearby protected woodland.

53. Having weighed up all relevant considerations, the Secretaries of State are satisfied that the factors which weigh in favour of the proposal, notably compliance with the ATWP and the development plan, outweigh the harm identified. They therefore do not consider that there are any material considerations of sufficient weight which would justify refusing planning permission.

Formal Decision

54. Accordingly, for the reasons given above, the Secretaries of State agree permission for the removal of condition MPPA1 and variation of condition

ATM1 attached to planning permission ref UTT/1000/01/OP, dated 16 May 2003, subject to the conditions set out in Annex A."

H. The Grounds of Challenge

61. At the core of SSE's challenge to the decision by the Secretaries of State is the complaint that, having so clearly (and correctly) represented that when making their decision they were required to take into account all of the impacts of an application to expand Stansted Airport, including all of the environmental impacts and all of the economic impacts, even if to do so might lead to a refusal of planning permission for a proposal supported by the ATWP and in frustration of that aspect of Government policy, the Secretaries of State failed conspicuously to do what they acknowledged was required of them.

62. In result, and on application for a very significant expansion of aviation, where it was inevitable that millions of tonnes of aviation emissions would ensue over the years, where it was likewise inevitable that there would be adverse noise impacts, and where the likelihood of a considerable negative impact on the UK's balance of trade was obvious, they failed properly to take into account any of those emissions, any of those noise impacts, or any resulting impact on the balance of trade.

63. The errors of law thereby made, can be formulated in various ways as follows.

Misapplication of their Own Policy

64. Government policy must be read as a whole. Taken as such, Government policy was as follows:

    a. To promote the expansion of aviation as set out in the ATWP upon the basis of:

        i. An assertion of need; and

        ii. An assumption of large net economic benefit (which was itself a significant input into the need);

    b. To seek to address the tension between the promotion of aviation and the need to tackle climate change by attempting to include aviation in a "well-designed" EU ETS;

c. To have the planning balance of each specific proposal promoted by the ATWP weighed at any subsequent Inquiry, that balance to include the assertion of need within the ATWP, with all environmental and economic impacts taken into account and rigorously assessed, albeit in the context of:

i. What the ATWP said about need; and

ii. The Government's policy intention to address the tension between aviation and climate change through, *inter alia*, attempting to include aviation's CO_2 emissions in a "well-designed" EU ETS;

d. To refuse planning permission, even for a proposal supported by the ATWP and in frustration of that aspect of Government policy, if on the evidence adduced at the Inquiry the environmental harms attendant on that proposal were not justified either by need or net economic benefit. This is clear from the statements of the Secretaries of State to the High Court and to Parliament.

65. Accordingly, in deciding as they did, the Secretaries of State misdirected themselves as to their own policy, in that:

a. They did not take all economic effects into account in the weighing of the planning balance – they ignored all of the economic disbenefits of the proposal upon which SSE gave evidence;

b. They did not take all environmental harms into account in the weighing of the planning balance – they ignored entirely the CO_2 and other greenhouse gas emissions of the proposal; and

c. In relation to the significant environmental effect of noise, although this was taken into account, they determined that these harms could not merit the refusal of permission if refusing planning permission would frustrate Government policy, as enshrined in the ATWP, to promote the proposed development.

Breach of Legitimate Expectation

66. Further or alternatively, the statements made by and on behalf of the Government were to the clear effect that, even though certain proposals were supported by the ATWP as a matter of national policy and on the basis of asserted need and economic benefit:

a. It would be both possible and legitimate for objectors to any such proposal to make a case at a subsequent Planning Inquiry that the adverse environmental and other effects of that proposal were such that permission should be refused

notwithstanding the fact that refusal would frustrate national policy (see para. 23 above);

b. The Inspector, and ultimately the decision-maker, would not be precluded from considering the need for the proposed development, albeit that this consideration would be undertaken in the context of what is said about need in the national policy statement (see paras. 23 to 27 above);

c. The Inspector, and ultimately the decision-maker, would consider:

    i. The economic effects of the proposed development, including by way of a rigorous economic assessment; along with

    ii. All other aspects of the application as part of the Inquiry,

so as to be able "to consider the balance between a project's economic impact and other benefits at the planning level", such being material considerations being stated to be "obviously within the territory of the Inquiry" (see para. 26 above).

67. These statements plainly found a legitimate expectation that, in deciding whether or not to grant planning permission for the appeal proposal, the Defendants would:

a. Take conscientiously into account and weigh as relevant planning considerations:

    i. All of the evidence adduced by SSE and others as to the environmental harms of the appeal proposal; and

    ii. All of the evidence adduced by SSE and others as to the economic need/harms of the appeal proposal; and

b. Decide whether or not to grant planning permission in accordance with the totality of the evidence adduced, even if to refuse permission would frustrate an aspect of Government Policy as expressed in the ATWP.

68. In particular:

a. The representations were expressly made, comprising statements by the Secretary of State to either the High Court or to Parliament (see: *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, 401B per Lord Fraser 401B);

b. By themselves, or taken in combination, each of the representations relied upon by the Claimant was "clear, unambiguous and devoid of relevant qualification" (see: *R v. Inland Revenue Commissioners, ex p. MFK Underwriters* [1990] 1 WLR 1545, 1570);

c. The representations made by Government to the High Court were directed at a class of persons, namely those individuals who opposed an application for planning permission which had policy support in the ATWP (see: *Attorney General for Hong Kong v. Ng Yuen Shiu* 1983] 2 AC 629). The Claimant is plainly a member of that class of persons. Indeed the representations were arguably made directly to the Claimant as an interested party in the *Essex County Council* case;

d. Similarly, the representations made by Government to Parliament were directed at, *inter alia*, a class of persons, namely those individuals who opposed an application for planning permission who wished to raise concerns on the economic impacts of the application at a local planning inquiry. The Claimant is plainly a member of that class of persons;

e. There is no bar to statements in Parliament founding the basis for a legitimate expectation (see: *R (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, *R (Association of British Civilian Internees: Far East Region v, Secretary of State for Defence* [2003] QB 1397, *R (Wheeler) v (1) Office of Prime Minister (2) Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC (Admin) at para 53);

f. The nature of the statements is distinguishable from those relied on by the Claimant in *Wheeler*. In that case, the Divisional Court held that it would impugn Parliamentary sovereignty where reliance placed on statements to Parliament was argued to afford a remedy requiring Parliament to act in a certain way. In the instant case, reliance is placed on statements in Parliament in order to require an Inspector at a Planning Inquiry and/or the Secretaries of State as decision-makers pursuant to that Inquiry to act in a certain way, and in their respective capacities under the Act.

69. The Court of Appeal in *R v. North and East Devon Health Authority, ex p. Coughlan* [2001] QB 213 accepted that where a lawful promise or practice had induced a legitimate expectation of a benefit which was substantive, not simply procedural, the court will "in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power" (at para. 57(c)). The Court of Appeal stated that "once the legitimacy of the expectation is established, the Court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change in policy" (at para. 57(c)).

70. In the instant case, the requirements of fairness manifestly require the substantive legitimate expectations raised by the Government's statements to be fulfilled, so that in making their decision as to whether or not to approve the expansion of aviation at Stansted (and elsewhere) there is a proper weighing of the planning balance, with all of the environmental and economic effects of the proposal fully taken into account, albeit in the context of what is said in the ATWP about need and in the ATPR about the reconciliation of that proposed expansion with the Government's concern to drive down carbon emissions.

71. In deciding as they did however, and explicitly agreeing with the Inspector's conclusions and reasoning on these matters, the Secretaries of State breached all of the above legitimate expectations as follows:

    a. The climate change emissions of the proposed development were ignored entirely in the decision-making, notwithstanding that:

        i. The Government had stated to both the High Court and Parliament that all and any adverse environmental effects and impacts would be taken into account;

        ii. It was BAA's own evidence to the Inquiry that the G1 proposal would result in an additional 1.06 million tones of CO_2 per annum, which was manifestly an adverse environmental impact;

    b. The adverse economic impact of the proposed development on the UK's trade deficit was ignored entirely in the decision-making, notwithstanding that:

        i. The Government had stated to both the High Court and Parliament that all and any adverse economic effects and impacts would be taken into account, following a "rigorous economic assessment" at the Inquiry;

        ii. It was SSE's uncontroverted economic evidence that there would be a net disbenefit to the UK trade deficit of £12.6bn as a result of the proposed development;

    c. The economic cost of the CO_2 and other greenhouse gas emissions were also ignored entirely in the decision-making, notwithstanding that:

        i. The Government had stated to both the High Court and Parliament that all and any adverse environmental effects and impacts would be taken into account;

ii. The Government had also stated to both the High Court and Parliament that all and any adverse economic effects and impacts would be taken into account, following a "rigorous economic assessment" at the Inquiry;

iii. It was BAA's own evidence to the Inquiry that the G1 proposal would result in an additional 1.06 million tones of CO_2 per annum, which was manifestly an adverse environmental impact;

iv. It was the Government's own policy, supported by Stern, to attribute an economic cost to such emissions and to aviation's non-CO_2 emissions;

v. The Government recognises the importance of the trade deficit and operates a number of policies for encouraging its reduction[19].

Failure to Take into Account Relevant Considerations

72. Further, and in result of the above, in deciding as they did, the Secretaries of State thereby failed to take into account any of the following relevant considerations, notwithstanding that it had stated to both the High Court and Parliament that all and any adverse environmental effects and other impacts would be taken into account, including economic impacts, and following a "rigorous economic assessment " at the Inquiry:

a. The fact that the proposed development would result in an additional 1.06 million tonnes of CO_2 per annum as well as an increase in other greenhouse gas emissions;

b. The fact that the proposed development would result in a considerable adverse economic impact on the UK's trade deficit, calculated by SSE to be in the extent of £12.6bn;

c. The fact that the proposed development would result in a further considerable, adverse economic cost, in the range of £1.6bn to £3.1bn even on the basis of applying the Government's revised assessment methodology, by virtue of the costs to be attributed to the above emissions.[20]

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[19] The Government encourages exports, for example, by means of Export Credit Guarantees, Overseas Trade Missions and awards for exporters but it does not offer similar encouragement to imports. The United Kingdom Balance of Payments classifies expenditure on overseas visits by UK residents as an import and expenditure in the UK by foreign tourists as an export.

[20] The CO_2 element of this economic cost amounts to £0.8bn and the non-CO_2 element to between £0.8bn and £2.3bn depending on the multiplier applied between the range of 2 to 4.

Breach of the EIA Regulations

73. In deciding as they did, the Secretaries of State also breached the EIA Regulations. In particular, and as noted above, Regulation 3 of the EIA Regulations [page 1066] requires the Secretary of State to take all of the environmental information before it into account prior to granting planning permission. Government policy, including the ATWP, cannot preclude the need for a full analysis of all of the environmental information. Neither can Government policy, including the ATWP, side-step the requirements of the EIA Regulations.

74. The approach of the Inspector was to identify a number of harmful effects, for example in respect of noise. But rather than weigh these against the need as identified in the ATWP, the Inspector recommended (and the Secretary of State accepted this) that to conclude that the noise impacts outweighed the need identified in the ATWP 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… at other airports.". Further, and in either event, it amounted "to a challenge to Government policy, and as such (was) beyond the scope of this report for the reasons I have already indicated" [IR para. 14.149, page 948].

75. To put it another way, the Inspector indicated that despite the harm which he had found by reference to noise, Government policy as expressed in the ATWP could not be overridden. The effect of the Inspector's conclusions (as accepted by the Secretaries of State) was therefore to insulate the provisions of the ATWP from the requirements of the EIA Regulations. This constitutes a plain error of law: it breaches the duty placed on the Secretary of State by Regulation 3 of the EIA Regulations and it constitutes a misapplication of the ATWP.

76. The same error of law arises in relation to the effects of the proposed development on climate change. Paragraph 1(c) of Schedule 4 to the EIA Regulations [page 1067a] requires an applicant for planning permission to include "an estimate, by type and quantity, of expected… emissions (… air… etc.) resulting from the operation of the proposed development" in an Environmental Statement. The EIA Regulations do not exclude the emissions relating to climate change. To the contrary, the EIA Regulations require the consideration of all emissions into the air. As such, aviation CO_2 and non-CO_2 emissions, just as any other emissions, must be included by an applicant for planning permission in an Environmental Statement.

77. If an applicant is required to include these matters in an Environmental Statement, then they plainly constitute environmental information as defined in Regulation 2, with the consequence that must be taken into consideration prior to a grant of planning permission under Regulation 3.[21]

78. This construction of the EIA Regulations gains support from the Planning and Climate Change Supplement to PPS1 (December 2007) which states at para. 11 [page 285]:

> *"Planning authorities should adhere to the following principles in determining planning applications:*
>
> *… information sought from applicants should be proportionate to the scale of the proposed development, its likely impact on and vulnerability to climate change and be consistent with that needed to demonstrate conformity with the development plan and this PPS…"*

79. As noted already, Government policy as expressed in the ATWP or ATPR cannot side-step the EIA Regulations. The EIA Regulations require the consideration of all environmental information; that environmental information includes aviation CO_2 and other greenhouse gas emissions. By failing to take this into account, the Secretaries of State therefore breached the EIA Regulations and erred in law.

Failure to give Adequate, Intelligible or Proper Reasons

80. Further, the Secretaries of State gave wholly inadequate, unintelligible and improper reasons for refusing to take the above considerations into account in the weighing of the required planning balance. In particular, the principal reason given in each of the above regards for deciding as they did was to prevent an illegitimate challenge being made to Government policy, when the Government had itself stated to both the High Court and Parliament that it was entirely possible and legitimate to adduce evidence on all environmental and economic adverse effects at the Inquiry, even if the end result might be a refusal of planning permission in frustration of national policy.

[21] It is notable that although BAA did not include CO2 or other greenhouse gas emissions in its Environmental Statement for G1, it has included both in its G2 Environmental Statement.

81. The House of Lords in *South Bucks District Council v. Porter* [2004] UKHL 33; [2004] 4 All ER 775 summarised the law on the proper approach to reasons in the planning context (at para. 36, per Lord Brown) as follows:

> *"The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inferences will not be readily drawn. …. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."*

82. A paradigm example of the Secretaries of State's error of law in the light of the above is to be found in their agreement with the Inspector's reasoning at IR para.14.149 [page 948] on the issue of noise:

    a. The Inspector identified a number of harmful effects of noise resulting from the proposed development, concluding that they were "not insignificant";
    b. Those harms were not fully identified by the ATWP;
    c. The Inspector concluded, however, that the noise impacts could not lead to a refusal of permission since to do so 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… at other airports"; and would "amount to a challenge to Government policy";
    d. He did so, notwithstanding that:
        i. The Government had specifically stated that all environmental effects would be taken into account and weighed in the planning balance even if to do so might lead to a refusal of permission for a proposal supported by the ATWP and in frustration of policy; and
        ii. The harms which had been found had not been taken into account in the ATWP in promoting the particular proposal in question;
    e. As such, the Inspector's reasoning, with which the Secretaries of State agreed, was clearly inadequate, unintelligible and improper.

83. Likewise, the reasons given by the Secretaries of State for deciding as they did in respect of the materiality of CO_2 and other greenhouse gas emissions was that Government policy sought to

reconcile growth in aviation to meet the needs identified in the ATWP with action to address climate change, which policy was not within the remit of the Inquiry. However, that did not address at all the question as to whether, on the evidence, that policy was likely to be implemented expeditiously so as to deal effectively with the additional emissions which would otherwise be caused by the proposed development, when:

a. The Government's intention to include aviation in a well-designed EU ETS had not yet been fulfilled, and nobody could be certain that it would;
b. Even if fulfilled, that policy could not begin to have any beneficial effect for 3½ to 4½ years at the earliest;
c. The EU ETS is not intended to allow for the multiplier effect of aviation emissions of between two and four times higher than the impact of CO_2 emissions alone[22];
d. Disagreements about any number of contentious issues could very easily put this back years more;
e. Whether including aviation in the EU ETS would actually secure real emissions reductions was highly dependent on the answers eventually agreed to these currently unresolved, and potentially highly controversial, implementation questions; and
f. Phase 1 of the scheme had achieved little.

84. In failing to address any of the above issues, the reasons given by the Secretaries of State for deciding as they did in respect of the materiality of CO_2 and other greenhouse gas emissions was therefore inadequate.

85. Likewise, the reason given by the Secretaries of State for ignoring the economic cost of aviation CO_2 and other greenhouse gas emissions was inadequate. That reason was that the ECA "made clear that it is a national analysis and will not be carried out on an ad-hoc basis to inform the consideration by the planning system of individual airport development proposals". That is as may be, but it does not deal at all with the principal issue which was that the increase in the CO_2 and non-CO_2 emissions that would arise from the G1 proposal did have an economic cost, acknowledged by Government, and so fell to be taken into account in some way at least as

[22] In responding to the EC's proposal to include aviation in the EU ETS, the UK Government opposed the use of a multiplier. See "Consultation on the Commission's proposal to include aviation in the European Union emissions trading scheme", DEFRA and DfT (March 2007).

part of the "rigorous economic assessment" of the development proposed as an economic effect to be weighed in the planning balance.

86. As to the economic arguments advanced by SSE, the Inspector gave no intelligible reasons for rejecting those arguments. The Inspector appeared to accept that the statement in para. 11.26 of the ATWP, "making full use of Stansted would generate large net economic benefits", was not of itself a policy but rather "a key factor underpinning the policy" [IR 14.68, page 932-933]. It was therefore legitimate for that belief to be fully and rigorously tested. However, the Inspector went on to conclude (in the same paragraph of his report):

> *"I recognise the need to address the question of the actual economic benefits that would accrue from the G1 proposal, but do not accept that this exercise provides a basis for challenging the merits of Government policy in the context of this appeal. As I have indicated previously, that is outside the ambit of this report."*

87. As for the deficit to the UK's balance of trade which would be occasioned by the proposed development, the reason given by the Government for ignoring this in its entirety was that they agreed with the Inspectors analysis in IR 14.237 [page 967], which was that, "despite the scale of the deficit, it should not be included as part of the calculation of net benefits of the proposal… having regard to the ATWP" because:

> *"No indication is given in the ATWP that any particular threshold of 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 economic effects is limited to the balance of payments on the current account…"*

88. However, the silence of the ATWP on the trade deficit which would be caused by the G1 proposal, which was a direct result of the specific nature of the operations at Stansted being focused on outward-bound leisure, cannot render what is, manifestly, a harmful economic which, pursuant to a "rigorous economic assessment", fell to be quantified and taken into account as a highly relevant consideration, into an immaterial one which should be wholly ignored in the calculation of the proposal's net economic benefit or disbenefit. Further, the Inspector's view on this is wholly puzzling, as it appears to suggest that the significance of the trade deficit is reduced, as it is only one of the components of the United Kingdom's balance of payments.

89. Moreover, SSE has been substantially prejudiced by the failure of the Inspector, and thereafter the Secretaries of State, to articulate properly the reasons for their decision as particularised above. Quite apart from being uncertain as to why the Secretaries of State have determined to grant planning permission for the G1 application, SSE intend to reiterate each of these arguments at the forthcoming second runway application. In the absence of clear reasons as to why these arguments failed in relation to G1, SSE is very seriously prejudiced in relation to its conduct of the G2 Inquiry due to commence in April 2009 to consider a BAA planning application for a second runway at Stansted Airport.

Concluding Remarks

90. In approaching the G1 proposal in the way in which they did, the Secretaries of State effectively treated the ATWP and the ATPR as settling the case for the development, despite the potential environmental harms thereby occasioned by the increase in the CO_2 and non-CO_2 emissions that would arise from the proposal, irrespective of the economic costs of those emissions,[23] and irrespective also of the scale of the adverse effect which the proposal would have on the UK balance of trade, the evidence as to the latter being a net disbenefit of £12.6bn. Further, the adverse noise impacts were dismissed on the ground that if it were to be concluded that these outweighed the need identified in the ATWP this would frustrate Government policy in relation to Stansted and thereby amount to a challenge on Government policy. In so approaching the matter, the Secretaries of State manifestly failed to weigh the full economic and environmental effects of the proposal.

91. Moreover, in so approaching the G1 proposal, the Secretaries of State allowed the matters actually considered in the decision-making process that following the Inquiry to be unduly prescribed. It is particularly noteworthy in this respect that Mr Justice Sullivan had stated as follows in the *Essex County Council* case:

> *"Whatever view is taken, it is one thing to give such an 'indication' at national level, and quite another to give policy support in a White Paper for a particular form of runway, with a particular capacity, at a particular airport, upon the basis of an unpublicised decision that the advantages of obtaining a capacity gain …*

[23] Assessed at between £3.2bn and £6.3bn at the time of the G1 Inquiry based on the prevailing Government methodology and now between £1.6bn and £3.1bn based on the new Government methodology.

outweigh the environmental impacts described in a desk-top study. The adoption of such a prescriptive policy does encroach upon the proper role of an Inspector at a public inquiry, assisted by the detailed information contained in an EIA."

92. Just as the above is true for the particular form of runway which Mr Justice Sullivan was then considering, so it must be true for the particular proposal at issue in the current application – the existing runway at Stansted and its contemplated capacity of 35mppa.

93. For all of the above reasons the Secretaries of State erred in law in deciding as they did.

I. Relief Sought

94. The Claimant seeks the following relief:

    (i) An Order quashing the Secretaries of State's decision dated 8 October 2008 to grant planning permission for the removal of condition MPPA1 and variation of condition ATM1 attached to planning permission ref. UTT/1000/01/OP (dated 16 May 2003) subject to conditions.

    (ii) Such other relief as the Court may consider appropriate.

95. The Claimant has applied for a Protective Costs Order in an application appended to this Claim Form.

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14 November 2008