IN THE HIGH COURT OF JUSTICE **CO/10952/2008**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

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

BETWEEN:

CAROL BARBONE AND BRIAN ROSS
(ON BEHALF OF STOP STANSTED EXPANSION)

Claimants

-and-

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

Defendants

-and-

BAA LTD AND STANSTED AIRPORT LTD and Others

Interested Parties

SKELETON ARGUMENT ON BEHALF OF THE CLAIMANTS

References: in bold face and square brackets to page numbers in the Claimants' Bundle

Time estimate: five days (with one day for pre-reading and one day for judgment)

Essential reading: *The Future of Air Transport* White Paper ("the ATWP"): chapter 2 **[120-125]**, Chapter 3 **[128-140]**, Chapter 11 **[142-144, 146-147]**

The Future of Air Transport Progress Report ("the ATPR"): sections 1 and 2 **[336-347]**

Statement to Parliament by Yvette Cooper MP dated 19 April 2004 **[180-181]**

R (Essex County Council) v. Secretary of State for Transport [2005] EWHC 20 (Admin)

Witness statement of Michael Ash in the *Essex County Council* case **[242-265]**

Witness statement of Michael Fawcett in the *Essex County Council* case **[216-241]**

Inspector's Report dated 14 January 2008:

- Chapter 4—the Case for BAA: economic effects **[576-600, 730-746]**, noise **[601-626]**, climate change **[720-730]**;
- Chapter 6—the Case for SSE: economic effects **[828-829, 880-883]**, noise **[852-856]**, climate change **[825-828, 874-880]**;
- Chapter 14—Inspector's conclusions: **[919-986]**.

Letter from Secretaries of State for Transport and Communities and Local Government to Cameron McKenna dated 8th October 2008 **[1028-1048]**.

I. Introduction

1. This is an application made by representatives of Stop Stansted Expansion ("SSE") under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") to quash the decision of the Secretaries of State for (1) Communities and Local Government and (2) Transport ("the Secretaries of State"), given by decision letter on 8th October 2008 **[1028-1048]**, whereby they allowed an appeal by BAA Ltd. and Stansted Airport Ltd., ("BAA") against the decision of Uttlesford District Council ("Uttlesford") **[331-333]** to refuse planning 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) **[99a-n]**). The development project comprised by the application/appeal has been identified by all parties as being "G1".

2. The G1 project sought increased flights and passenger throughput on the existing, single, runway at Stansted **[330a-330l]**. (A further proposal, known as "G2" seeks the development of a second runway at Stansted and is to be considered at a Planning Inquiry commencing April 2009). In order to increase flights and passenger throughput on the existing runway, two conditions attached to planning permission UTT/1000/01/OP **[99a-n]**, granted in 2003, needed to be either amended or discharged, those conditions limiting, respectively, the number of passengers permitted at Stansted Airport to 25 million passengers per annum ("mppa") ("Condition MPPA1" **[99m]**) and the number of air transport movements ("ATMs") at Stansted to 241,000 per annum ("Condition ATM1" **[99l-m]**).[1]

3. BAA's application sought permission to comply with neither of the above conditions. On its face, therefore, the application sought to remove any limit on passenger throughput or ATMs at Stansted on the existing runway. However, in a supporting letter submitted with their planning application **[330a-330d]**, BAA stated that they sought the variation of Condition ATM1 to a new level of 264,000 ATMs (i.e. an increase of 23,000 ATMs) **[330b]**. So far as Condition MPPA1 was concerned, by a further letter dated 20th March 2007 **[449-450]**, BAA stated through its solicitors that it would offer to the Inquiry a planning condition that would control air passengers to "about 35 million passengers per annum (mppa)" (i.e. an increase of 10mppa) **[449]**.

[1] Planning permission UTT/1000/01/OP also imposed condition AN1 which limited the area to be enclosed by the 57dB(A)Leq 16hr contour to an area of 43.6 sq.km **[99i]**.

4. To put this in context, in 2007 Birmingham Airport (the UK's 6th largest) handled 9.1 million passengers **[521a]** and Luton Airport (the UK's 5th largest) handled 9.9 million passengers **[521a]**, in each case a passenger throughput of less than the increase sought by BAA through the G1 project at Stansted.

5. The G1 project was supported as a matter of national policy by The Future of Air Transport White Paper ("the ATWP") **[100-179]** published by the Government on 16th December 2003. However, following the publication of the ATWP, the Government clearly, correctly and repeatedly stated - both to Parliament and to the High Court - that when making any decision on a project supported by the ATWP, the decision-maker would be required to take into account all of the environmental impacts and economic effects of that project, even if to do so might lead to a refusal of planning permission for that project, in frustration of the national policy support for it expressed within the ATWP.

6. The basis of SSE's challenge against the decision of the Secretaries of State to grant permission for the G1 project is that, having made the above statements, the Secretaries of State conspicuously failed in respect of the G1 project to do what the Government had acknowledged was required of them. The failure of the Secretaries of State in this regard will be demonstrated by their consideration of three areas of substantive concern arising from the G1 project, namely:

    a. The economic effects of that project, in particular its impact on the UK balance of trade;

    b. The noise impact of that project; and

    c. The emission of the millions of tonnes of carbon dioxide ('CO_2') and other greenhouse gas emissions which would result from the project's implementation.

7. If SSE's challenge succeeds in respect of any of the above three areas of substantive concern, the error of law thereby found will be sufficient for the decision of the Secretaries of State to grant planning permission for the G1 project to be quashed in order that it might be re-determined in accordance with law.

II. Factual Background

The ATWP

8. As already noted, in December 2003 the Government published the ATWP **[100-179]**, which supported certain proposals to expand aviation in the UK, including at Stansted Airport. It did so in the following terms:

> "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 …; **[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." **[147]**

Statements to Parliament

9. At or around the same time as it published the ATWP, the Government was also in the process of taking through Parliament the Planning and Compulsory Purchase Act 2004 (for which Royal Assent was given on 13 May 2004). In the course of that legislative process, and on 19 April 2004, Ms Yvette Cooper MP, the then Parliamentary Under-Secretary of State in the ODPM, had to respond in Parliament to Lords' amendments which proposed: (i) that Economic Impact Assessments be required on major infrastructure proposals; and (ii) that an Inspector be always at liberty to consider the need for a development even though it was specifically proposed in a White Paper **[180-181]**.

10. The Minister stated that both amendments were unnecessary. So far as economic issues were concerned the Minister stated as follows **[180]**:

> "… 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 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."

11. As for the issue of "need", the Minster confirmed as follows **[180-181]**:

"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."

Statements Made to the High Court

12. Moreover, the Government further confirmed all of the above when certain aspects of the ATWP were thereafter the subject of three joined applications for judicial review made in 2004. In its Detailed Grounds of Opposition filed in *R (Essex County Council and others) v. Secretary of State for Transport* [2005] EWHC 20 (Admin) ("the *Essex County Council* case"), the Government accepted that the comments of the Minister in relation to need in the context of the Planning and Compulsory Purchase Bill were compatible with the correct approach to the status of the ATWP (at para. 12) **[188]**. Further, in the course of arguing the *Essex County Council* case, the Secretary of Transport made the following concessions:

    a. The ATWP was not a development consent (i.e. a grant of planning permission) (see: Detailed Grounds for Opposing Judicial Review (at para. 19) **[193]**; and Witness Statement of Michael Ash, Deputy Director and Chief Planning in the Town and Country Planning Directorate, ODPM (16.9.04) (at para. 7.16)) **[252]**. Counsel for the Secretary of State, in oral submissions, emphasised that "the White Paper did not itself authorise any particular development" and that the "policies would merely 'inform and guide the consideration of specific planning applications'" (see: *Essex County Council* case at paragraph 223);

    b. As for the asserted "need" for a development project supported by the ATWP, the Witness Statement of Michael Ash stated as follows (at para. 7.17) **[253]**:

        > "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…";

    c. The concept of environmental appraisal under European law meant that a decision maker, before granting planning permission, must consider the environmental appraisal and determine whether planning permission should be issued notwithstanding any adverse environmental effects revealed by the assessment (see: Detailed Grounds for Opposing Judicial Review at para. 10(i) **[187]**);

d. Accordingly, a decision-maker must determine the weight and significance to be given to the ATWP's policies, "having regard to the balance of all other policy and planning considerations which are material…" (see: Detailed Grounds for Opposing Judicial Review (at para. 10(iii)) **[187]**);

e. As such it would be possible for an objector to make a case at an Inquiry following an application for planning permission that the adverse effects revealed by the environmental assessment are such that any development consent should be refused "notwithstanding the fact that refusal will frustrate national policy…" (see: Detailed Grounds for Opposing Judicial Review (at para. 10(ii)) **[187]**, and Witness Statement of Michael Fawcett, Head of the Airports Policy Division, Department of Transport (17.9.04) **[217]**).

Judgment in the Essex County Council Case

13. Accordingly, in his judgment in the *Essex County Council* case, Sullivan J (as he then was) confirmed that (at para. 222):

> "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 … 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."

14. Sullivan J was considering a particular form of runway at Stansted Airport that the ATWP sought to prescribe. However, just as the comments of Sullivan J are true for the runway which he was then considering, so they are also true for the particular proposal at issue in this application – the existing runway at Stansted and its contemplated capacity of 35mppa.

Subsequent Statements of Government Policy on Climate Change

15. Thereafter, and following both the Government's statements to the Commons as to the proper remit of a Planning Inquiry into a project supported by the ATWP (viz., that it was to cover *all* economic and environmental impacts) and the judicial review into the ATWP (whereby it was confirmed that this was required as a matter of law *even if it led to a refusal of permission for a project promoted by the ATWP*), the Government promulgated the following policy documents on one of the most obvious environmental impacts inherent to the expansion of aviation – the consequential emission of global warming gases:

    a. Planning Policy Statement 1: Delivering Sustainable Development ("PPS1") (31st January 2005) **[277-298]**, whereby Local Planning Authorities must promulgate and apply policies which drive down the need to use energy and so reduce emissions (at para. 13) **[287]**;

    b. The Government's Sustainable Development Strategy "Securing the Future: Delivering UK Sustainable Development Strategy" (March 2005) **[266-276a]**, which required the Department for Transport to reduce aviation emissions **[276a]**;

    c. The Report of the Stern Review on the Economics of Climate Change (October 2006), which made it clear that action to stabilise, and then begin to reduce, human contributions to climate change within the next 10, or at most 20, years was likely to prove decisive, and which recognised also that international aviation must be included in any meaningful climate change policy and action **[299-330]**;

    d. The draft Planning and Climate Change Supplement to PPS1 (December 2006) **[369-395]**, which set the target of reducing CO_2 emissions by 60% by 2050 **[383]**;

    e. The Draft Climate Change Bill published in March 2007 (and enacted on 28 October 2008 shortly after the date on which the Secretaries of State issued their decision letter) **[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 (again shortly after the date on which the Secretaries of State issued their decision letter).

16. So far as aviation and climate change is concerned, the Government has strongly endorsed Stern's findings referred to at (c) above and, as recommended, has recognised that international aviation must be included in any meaningful climate change policy and action. In the ATWP, the Government concluded:

> ''… the best way of ensuring that aviation contributes towards the goal of climate stabilisation would be through a well designed emissions trading regime… We are pressing for the development and implementation through ICAO of such a regime…" (at para. 3.39) **[139]**

17. The Government's main proposal for seeking to reconcile climate change policy with proposals to expand aviation, as published in a Progress Report on the ATWP in December 2006 ("the ATPR" **[334-368]**), is to include flights within and from EU Member States in the European Union's Emissions Trading Scheme ("the EU ETS")[2], with effect (it then hoped) from 2008 **[341]**. Subject to the policy intention of including flights within the EU ETS, however, the Government re-affirmed in the ATPR the support for major continued expansion of aviation at Stansted and elsewhere **[336]**.

18. The Government has very recently announced three additional measures aimed at limiting the climate change impact of aviation:

    a. Limiting the initial extra capacity proposed for Heathrow to around half of the original proposal (see the Government's decision as to a third runway at Heathrow Airport **[1048(3)-1048(30)]**;

    b. A statement to Parliament by the Secretary of State for Transport on 15 January 2009 that new slots at Heathrow will have to be 'green slots' so that only the cleanest planes would be allowed to use the new slots that will be made available **[1048(2)]**; and

[2] Whilst described as an "Emissions" Trading Scheme, the EU ETS is in practice only a carbon trading scheme.

c. In the same statement the Secretary of State for Transport announced a new target to limit aviation emissions in the UK to below 2005 levels by 2050 **[1048(1)-1048(2)]**.

III. The Required Approach to Aviation Projects Supported by the ATWP as a Matter of National Policy

19. It has always been acknowledged by SSE that the above national policy to expand aviation at Stansted, expressed in the ATWP, formed the essential backcloth against which the G1 project was to be determined. In particular, SSE accepted at the Inquiry that:

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

b. The statement within the ATWP that best use must be made of the existing runway at Stansted **[147]** was the starting-point to deliberations at the Inquiry and a material consideration which must be taken into account and given appropriate weight.

20. Moreover it has, likewise, always been acknowledged by SSE that the national policy to reconcile the proposed expansion of aviation with the simultaneous policy intention to drive down emissions primarily by including flights within the EU ETS was also a material consideration to which appropriate weight had to be given.

21. However, whilst the expressions of national policy support for the proposal to expand the use of existing runway at Stansted, subject to the intention to include aviation within the EU ETS, was clearly a weighty material consideration to take into account at the Inquiry into the G1 project, it was clear that the policy support for G1 within the ATWP did not settle matters in favour of the G1 project, or avoid in any way the duty of the decision-makers to take into account all of the economic and environmental impacts of that project when determining whether planning permission should be granted. This has been confirmed by the above Government statements to Parliament; by the concessions made on behalf of the Government in the *Essex County Council* case; and by the judgment in that case.

22. The above duty arises as a matter of both domestic and European law by virtue, respectively, of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") and the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the EIA Regulations"). Specifically:

a. By virtue of section 38(6) of the 2004 Act **[1068]**, the G1 project was to be determined in accordance with the Development Plan unless material considerations indicated otherwise. The ATWP did not permit the statutory requirement provided for by section 38(6) to be sidestepped. Moreover, in the terminology of section 38(6), 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 – including those on global warming referred to above;

b. Neither could the ATWP sidestep the requirements of the EIA Regulations. In particular, the ATWP did not determine whether the actual environmental effects of a proposed development outweighed either the need for or benefits of that proposal. That was to be subject to separate consideration by the Secretaries of State for the following reasons, and upon the following basis:

i. The G1 application was an application to which the EIA Regulations applied.

ii. Regulation 3 of the EIA Regulations provides 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" **[1066]**.

iii. Regulation 2(1) of the EIA Regulations defines "environmental information" for these purposes 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" **[1060]**.

iv. Accordingly, the Secretaries of State were precluded in this case from granting planning permission until they had taken into consideration all of the environmental information , including all of the information advanced by

SSE and others as to the noise effects of G1 and its climate change implications.

23. Taken as a whole therefore - and in the light of the ATWP, the ATPR, Government Statements to both Parliament and the High Court - the approach to be taken to those aviation projects supported by the ATWP was to be as follows, as expressly acknowledged by Government and as required by law:

a. Government policy was 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. Government policy was 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. Government has acknowledged, however, that it was necessary to have the planning balance of each specific project promoted by the ATWP weighed at any subsequent Inquiry, 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;

even if to do so would lead to the frustration of Government policy.

24. The above necessarily contemplated, therefore, that following this required approach would, necessarily, lead to the refusal of planning permission, even for a project supported by the ATWP, if, on the evidence adduced at the Inquiry, the environmental and other harms (including economic) attendant on that project were not justified either by need or identified economic benefits.

25. It is in the light of the above that the Secretaries of State's consideration of the three areas of substantive concern arising from the G1 project falls itself to be considered, namely:

a. The economic effects of that project, in particular its impact on the UK balance of trade;

b. The noise impact of that project; and

c. The emission of the millions of tonnes of global warming gases which would result in the years following the project's implementation.

IV. The Position of the Parties on the Economic Effects of the G1 Project

The Case for BAA **[576-600, 730-746]**

26. Despite the above representations by Government as to the proper remit of the Inquiry, which included testing projects promoted by the ATWP by "rigorous economic assessment" **[180]**, BAA 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 **[581]**;

b. The ATWP settled the question of the need to make best use of the existing runway at Stansted **[577, 580]**;

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 **[577, 580]**; and

d. It was not open to the Inquiry to go behind Government policy **[579-580]**.

27. The extent of BAA's economic case at the Inquiry was, accordingly, contained within two papers in the Appendices (prepared by third parties) to the Proof of their planning witness **[451-496]**.

The Case for SSE **[828-829, 880-883]**

28. Without anyone to cross examine on the two papers on economics included in the Appendices, SSE submitted a detailed rebuttal of them, pointing out that they largely relied upon broad assertions of wider economic benefits, expressed in generalised terms **[515-521]**. 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 **[828]**.

29. 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 **[497-514]**, including as follows:

    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)[3], was insufficient for the purposes of assessing the economic effects of any particular planning application **[517]**;

    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 had been broadly estimated on a combined basis for the relevant airports and had assumed, and were highly dependent upon, very substantial growth in business passengers at Stansted when the

[3] 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 be benefits—even though only broad—would be sufficient for ranking purposes.

projections contained in the G1 application demonstrated that the development proposed would not fulfil that expectation **[880-881]**;

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 **[880-881]**;

c. So far as the G1 project itself was concerned, SSE contended *inter alia* 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 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 **[880-882]**;

ii. There would be no additional economic benefits in relation to cargo traffic – a point accepted by all the parties **[881]**;

iii. There would be negative economic impacts in relation to the reduced capacity for corporate business aircraft **[881]**;

iv. There would be a substantial negative economic impact arising from the cost of aviation's CO_2 and other greenhouse gas emissions **[881-882]**;

v. There would, in particular, 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. In particular, the evidence adduced by SSE was 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 **[881]**. The SSE calculation was in net present value ('NPV') terms and was arrived at in accordance with the methodology set down in the HM Treasury Green Book **[881]**. Again importantly, this was not contested by any of the parties.

30. 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 net economic impact was substantially and demonstrably negative **[883]**.

V. The Positions of the Parties in Relation to the Noise Impacts of the G1 Project

The Case for BAA **[601-626]**

31. BAA adduced substantive evidence on noise impacts but did so against a backdrop of the following argument:

    a. The likely noise effects of the development had already been taken into account in the formulation of Government policy. In particular, it was Government policy to cater for the forecast growth in aviation in the UK up to the level set out in the ATWP and ATPR (Proof of Evidence of John Rhodes, paras. 9.9-9.13);

    b. So far as noise at Stansted in particular was concerned:
        i. There were relatively low levels of population directly affected by noise from Stansted **[602, 608]** (and see Proof of Evidence of John Rhodes, paras. 9.20-9.25); and
        ii. The noise impacts of the G1 project, when assessed on the basis of the 57dB contour, were less than permitted by Uttlesford in granting planning permission in 2003 (UTT/1000/01/OP **[99a-n]**) (and see Proof of Evidence of John Rhodes, para. 9.26). That permission was, in addition to being made subject to the two conditions the subject of the G1 application/appeal, made subject also to Condition AN1 which provided that the area enclosed by the 57 dB contour should not exceed 43.6 sq km. The effects of the increased activity represented by the G1 project would in fact be a smaller noise foot print **[609]**;

    c. At the time that the Government announced its support for the maximum use of the existing runway at Stansted, it was specifically informed of the likely noise consequences of expansion to 35 mppa **[602-603]**. It was, accordingly, clear that the Government did not regard the air noise impacts of "making full use" of the existing

runway to be "unacceptable" **[603]** (and see Proof of Evidence of John Rhodes, para. 9.12); and

d. Once again, it was not the place of the Inquiry to question Government policy **[603]**.

The Case for SSE **[852-856]**

32. Again by way of contrast to the position taken by BAA, SSE's case on noise included as follows:

a. The 57dBA contour was not a sufficient basis for assessing the noise impacts (see, for example, IR paras 6.240-6.256 **[852-855]**);

b. The May 2003 planning permission which "limited" the 57dBA noise contour to an area of 43.6 sq km, represented a massive overprovision primarily because the 243,000 ATMs that had been approved was far more than necessary to handle 25mppa (the latter point not being in contention). Comparisons against the May 2003 permission were therefore wholly artificial, there being no prospect of anything approaching a 43.6sq km 57dBA contour arising from 25mppa **[852]**;

c. Furthermore, even from the information supplied on noise by BAA it was clear that increased noise at 35mppa would have very significant impacts **[852-856]**. For example, there would be over 50% more households in the 57dBA area when compared to the projected 25mppa scenario in 2014 (see IR at para. 6.238 **[852]**), and in the 35mppa case at Thaxted, which was just on the 57dBA contour line, there would be nearly 300 noise events per day above 64 decibels – a level which would interrupt conversation every three to four minutes (see IR at para. 6.240(v) **[852-853]**);

d. Just as the ATWP could not in law "settle" the issue as to the economic case for the G1 project, neither could the ATWP settle the acceptability of the above, and other, noise impacts being inflicted **[821]**.

VI. The Positions of the Parties in Relation to the Effects of G1 on the Emission of Global Warming Gases and on the Materiality of Climate Change

BAA's Case **[720-730]**

33. So far as the emission of global warming gases is concerned, BAA produced evidence at the Inquiry showing that its proposed increased use of the existing runway at Stansted would result in an additional 1.06m tonnes annually of CO_2 alone **[875**], in addition to which there would be other greenhouse gas emissions which BAA did not assess or quantify. Further, 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. Despite this, however, and despite also the remit of the Inquiry which, as above, included consideration of all of the environmental effects of a project promoted by the ATWP, BAA chose to call no direct evidence on climate change. BAA's argument was that the effect of aviation's greenhouse gas emissions was an immaterial consideration, not even 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" **[721]**;

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" **[723-725, 727-729]**;

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 **[727-728]**; and

d. As before, it was not open to the Inquiry to go behind Government policy **[727-728]**.

SSE's Case on Global Warming Gases and the Materiality of Climate Change **[825-828, 874-880]**

34. SSE's case on the materiality of climate change was, again, in stark contrast to BAA's position, 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 **[828]**;

b. It was, accordingly, plainly a relevant planning consideration and must be weighed in the balance alongside all other harms to the environment and amenity **[827-828]** (and to the economy, if any);

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, as follows in the Planning and Climate Change Supplement of PPS1 (at paras. 2 and 5 **[383]**), which post-dated the ATWP (and the ATPR):

> "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." **[383]**
>
> "There is therefore an urgent need for action on climate change." **[383]**;

e. The fact that the Government had made it clear that it intended to deal with the emissions from aviation by including them within a "well designed emissions trading regime", 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 **[827-828]**. In particular:

   i. 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 **[876]**;

   ii. This was highly questionable, however, given that:

1. 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 **[876]**;
2. Even if fulfilled, that policy could not begin to have any beneficial effect until 2012 at the earliest **[876]**;
3. 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[4] **[876]**;
4. 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 **[876]**;
5. 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 **[876]**;

iii. In any event, the proposed EU ETS is intended to deal with aviation CO_2 emissions alone and not its other greenhouse gas emissions (see: Annex to Directive 2008/101/EC, amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community) **[1094(16)]**; and will treat aviation CO_2 emissions in the same way as it treats all other CO_2 emissions, 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, a point also acknowledged in EU Directive 2008/101/EC (see: the Preamble at paragraph 19) **[1094(3)]**.

[4] 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.

f. Finally, 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. 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* **[827]**.

VIII. The Inspector's Report

Economic Effects

35. The Inspector stated *inter alia* as follows in respect of the issues of economic harm/benefit raised by SSE (IR paras. 14.230-237 **[965-967]**, 14.247-250 **[969-970]**, 14.262 **[972]** and 14.264 **[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 **[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 **[966]**, see also 14.231-14.232 **[966]**);

c. The Inspector concluded in relation to BAA's economic evidence **[966-967]**:

> "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 £1bn, 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";

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 had not been disputed (IR para. 14.236 **[967]**) (being a net economic disbenefit of £12.6bn upon the UK trade deficit **[967]**, to be compared with BAA's crudely quantified direct benefits, potentially in the sum of just £1bn as above);

e. The Inspector then went on to state, however, as follows **[967]**:

> "14.237 … 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."

f. The Inspector concluded in relation to economic benefits as follows **[972-973]**:

> "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.…
>
> 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…"

Noise

36. So far as the noise was concerned, the Inspector found the G1 proposal to cause harm at IR paragraphs 14.115-116 **[941]**, 14.142 **[946]**, and 14.147 **[947]**):

> "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 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…"

37. However, despite this the Inspector concluded as follows on noise (at IR 14.149, **[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."

Global Warming Gases and the Materiality of Climate Change

38. Finally, 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 **[927]** and 14.72-80 **[933-935]**):

a. The Inquiry was not the place to challenge Government policy on carbon emissions and climate change (IR para. 14.40 **[927]**);

b. 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 **[927]**);

c. However, the Inspector did not assess or weigh the environmental effects of the CO_2 and other greenhouse gas emissions that would be caused by the G1 proposal in his overall conclusion. He confined himself to assessing and weighing only the Government policy context (IR para. 14.80 **[935]**). The additional 1.06m tonnes of annual CO_2 emissions was not even mentioned;

d. 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 **[933-934]** and paras. 14.72-14.74 **[933]**);

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

f. "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 **[934]**).

Recommendation

39. Having dismissed SSE's case on all of the three substantive concerns, the Inspector recommended that planning permission be granted **[987]**.

IX. The Secretaries of State's Decision Letter

40. The Secretaries of State agreed with all of the Inspector's reasoning on the three matters of substantive concern in their decision letter, dated 8th October 2008 **[1028-1048] -** on economic effects at SSL para. 43 **[1038]**, making no comment whatsoever about the finding of a considerable UK trade deficit accruing from the G1 proposal; on noise at SSL para. 31 **[1035]**; and on global warming gases and the materiality of climate change at SSL para. 29 **[1034]**. Having thus dismissed SSE's case on each of the three substantive concerns, the Secretaries of State agreed with the Inspector's recommendation and purported to allow the appeal and grant planning permission for the G1 project **[1041]**.

X. The Grounds of Challenge

41. As already noted, the core of SSE's challenge to the decision by the Secretaries of State is the complaint that, despite the Government having clearly (and correctly) represented that when making their decision on the G1 project, they would take into account all of the environmental impacts and economic effects of that project, including so far as the latter was concerned by way of "rigorous economic assessment", even if this might lead to a refusal of planning permission in frustration of the support afforded the project by the ATWP, the Secretaries of State failed conspicuously to do what was required of them. In particular:

    a. They ignored entirely the very considerable, and undisputed, negative impact on the UK's balance of trade of the G1 project;

    b. They determined that the "not insignificant" noise impacts of the proposal could not outweigh the need for expanded aviation identified in the ATWP, on the very basis that if it were otherwise this would amount to a challenge to the national policy espoused by the ATWP; and

c. They decided that the millions of tonnes of aviation emissions which would ensue over the years as a result of G1 was an entirely immaterial planning consideration, not an environmental effect even to be taken into account.

42. The errors of law thereby made by the Secretaries of State can be formulated in various ways as set out in the detailed Grounds of Challenge. In particular:

a. The Secretaries of State misapplied their own policy as to the proper approach to be taken to aviation proposals supported by the ATWP, whereby they should have taken into account all of the environmental impacts and economic effects of the G1 project, even if to do so might lead to the refusal of that project;

b. The Secretaries of State breached the legitimate expectation, created by their own representations to both the High Court and Parliament, that they would take into account all of the environmental impacts and economic effects of the G1 project even if to do so might lead to the refusal of that project;

c. In consequence they failed to take into account all of the environmental impacts and economic effects of the G1 project, including the considerable deficit it would occasion to the UK balance of trade, the noise impact it would have on local residents and the millions of tonnes of global warming gases which would be emitted;

d. They thereby breached Regulation 3 of the EIA Regulations by failing to take into account all of the environmental information before them prior to granting planning permission; and in addition

e. They gave wholly inadequate and improper reasons for deciding as they did.

Misapplication of their Own Policy on the Approach to Aviation Projects Supported by the ATWP

43. It will be seen that it was central to BAA's case on each of the above matters of substantive concern - the economic effects of the G1 project, its noise impact, and its emission of global warming gases - that SSE could not question Government policy in any of these regards. However, the Government had itself made it clear through the above representations to both the

High Court and Parliament that, even in the case of those projects supported by the ATWP as a matter of national policy:

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 (including economic) were such that permission should be refused notwithstanding that refusal would frustrate one aspect of national policy;

b. The Inspector at such a Planning Inquiry, and ultimately the decision-maker, would therefore 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 that

d. The Inspector and the Secretaries of State would thereby 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", even if to do so might lead to a refusal of permission in frustration of one aspect of national policy.

44. Accordingly, in deciding as they did, the Secretaries of State misdirected themselves as to the totality of their own policy as described in paragraph 21 above, in that:

a. They did not take all economic effects into account in the weighing of the planning balance – they ignored in particular a very considerable deficit to the UK balance of trade;

b. In relation to the significant environmental effect of noise, contrary to that which they had previously stated – viz., that they would weigh all of the environmental harms in

the planning balance even if to do so might lead to a refusal of the G1 project when it was promoted within the ATWP as a matter of national policy - they determined that these harms could not merit the refusal of permission precisely because to do so would frustrate Government policy to promote the proposed development; and

c. They ignored entirely the CO_2 and other greenhouse gas emissions of the proposal.

Breach of Legitimate Expectation

45. Moreover, the Secretaries of State thereby breached the legitimate expectations, vested by their statements to both the High Court and Parliament, that, in deciding whether or not to grant planning permission for the appeal proposal, the Defendants would take conscientiously into account, and weigh as relevant planning considerations, all of the evidence adduced by SSE and others as to the economic and environmental harms of the appeal proposal and 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.

46. As a matter of law, these statements plainly founded the above legitimate expectations in that:

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.

47. 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)). In the instant case, the requirements of fairness manifestly require the substantive legitimate expectations raised by the Government's statements to be fulfilled. To act otherwise constitutes an obvious abuse of power.

48. 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 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; and
    iii. The Government recognises the importance of the trade deficit and operates a number of policies for encouraging its reduction[5];

b. The adverse noise impacts on local residents was also discounted; and

c. The millions of tones of global warming gas emissions was ignored as an immaterial planning consideration.

Failure to Take into Account Relevant Considerations

49. Further, and in direct result of the above, in deciding as they did, the Secretaries of State thereby failed to take into account any of the above 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.

50. Moreover, in placing weight upon the alleged economic benefit of the G1 project (a quantified benefit in the sum of £1bn on which the Inspector found little reliance could be placed), whilst ignoring the considerable economic disbenefit of G1 caused to the UK trade deficit (in the sum of £12.6bn according to the evidence of SSE, which was noted by the Inspector to be undisputed), the Secretaries of State have plainly acted perversely. In particular, it is both unjustifiable and irrational to afford weight to found economic benefits of a given project on one side of the planning balance, whilst affording no weight on the other side of the planning

[5] 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.

balance to acknowledged, and very considerable, economic disbenefits occasioned by the same project.

Breach of the EIA Regulations

51. In deciding as they did, the Secretaries of State also breached the EIA Regulations. As noted above, Regulation 3 of the EIA Regulations **[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.

52. The approach of the Inspector was to identify a number of harmful effects, for example in respect of noise. However, rather than weigh these against the need as identified in the ATWP, the Inspector recommended (and the Secretaries of State agreed) that to conclude that the noise impacts outweighed the need identified in the ATWP would amount "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, **[948]**). The effect of this approach was, therefore, to insulate the environmental impacts one from another, and thereby prevent an overall weighing of assessed harms against need and benefits; and to insulate also 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.

53. 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 **[1067a]** requires an applicant for planning permission to include "an estimate, by type and quantity, of expected… emissions … 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. 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.[6]

54. 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

55. The Secretaries of State gave wholly inadequate and improper reasons for refusing to take the above considerations into account in the weighing of the required planning balance, see *South Buckinghamshire v. Porter* [2003] 2 AC 558.

56. Firstly, the Inspector (with whom the Secretaries of State agreed) gave no intelligible reason for rejecting the economic arguments advanced by SSE. In particular, the Inspector accepted that the statement in para. 11.26 of the ATWP that "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, **[932-933]**). It was, therefore, entirely legitimate for that belief to be fully tested by the "rigorous economic assessment" which the Government invited.

57. It is hardly a "rigorous economic assessment" of all of the economic effects of any proposed development which completely ignores a £12.6bn balance of trade deficit[7] however, still less when the only reason for doing so is that given by the Inspector in IR 14.237 **[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

[6] It is notable that although BAA did not include CO_2 or other greenhouse gas emissions in its Environmental Statement for G1, it has included both in its G2 Environmental Statement.

[7] And also ignores the assessed economic costs of climate change, as set out in the Detailed Grounds of Challenge

consideration of economic effects is limited to the balance of payments on the current account…"

58. In particular, 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 trips by UK residents, 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.

59. Likewise on noise, where the Secretaries of State agreed with the Inspector's reasoning at IR para.14.149 **[948]**, they adopted reasoning which was manifestly inadequate and improper. In particular:

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 even fully identified by the ATWP as the focus of the ATWP was on the 57dBa noise contour;

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 therefore "amount to a challenge to Government policy" encapsulated within the ATWP;

d. The Secretaries of State agreed with the Inspector in respect of the above;

e. They did so, however, when:
    i. Many of the harms which had been found had not even been taken into account in the ATWP in promoting the particular proposal in question; and, moreover,
    ii. 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;

f. As such, the reasoning which the Secretaries of State adopted was a complete contravention of the approach which they had clearly stated they would take, as indeed the law required of them.

The Materiality of Climate Change and the Emission of Global Warming Gases

60. Finally, 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 also inadequate. That reason 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.

61. However, that reason did not address at all the question as to whether, on the evidence, that policy, the implementation of which was not even within the gift of the UK Government, was likely to be implemented expeditiously; nor whether, even if and when implemented, there it would deal effectively with the additional emissions which would otherwise be caused by the proposed development, given that:

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. Disagreements between the EU and the US over the legality of including non EU airlines in the EU ETS could very easily delay effective implementation for many years more, or even prevent it;

d. 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, see Annex to Directive 2008/101/EC **[1094(16)]**;

e. The issue as to 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.

62. In failing to address any of the above issues, the reason 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, manifestly, wholly inadequate. It failed to deal at all with any of the principal, controversial issues which SSE had raised as to why the Government's policy might yield no benefits, see *Porter*.

XI. Relief Sought

63. The Claimants are, therefore, entitled to an Order quashing the Secretaries of State's decision dated 8th 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 16th May 2003) subject to conditions.

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6 February 2009