Claim No. CO/1063/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
In the matter of a claim for judicial review
B E T W E E N:

THE QUEEN
On the application of
MARTIN BARRAUD

Claimant

-and-

CIVIL AVIATION AUTHORITY

Defendant

-and-

(1) SECRETARY OF STATE FOR TRANSPORT
(2) GATWICK AIRPORT LIMITED
(3) NATS EN ROUTE PLC

Interested Parties

PERMISSION HEARING ON 1ST JULY 2015

Mr Justice Haddon-Cave

ORDER

Permission to apply for judicial review is refused.

REASONS

Background

1. The Claimant is a resident of Kent and chairman of "GatwickObviouslyNot.org", an umbrella group of residents affected by noise from overflying aircraft in the environs of Gatwick Airport and acts as a representative claimant pursuant to CPR r.19.6(1). *Locus standi* is not in issue.

2. The Claimant seeks permission to challenge by way of judicial review the alleged failure of the Civil Aviation Authority ("CAA") to comply with its duties under paragraph 9 of the Civil Aviation Authority (Air Navigation) Directions 2001 (incorporating the Variation Direction 2004) ("the 2001 Directions") following changes to the vectoring practices on westerly approaches to Gatwick Airport by the Third Interested Party, Nats En Route Plc ("NERL").

3. I have read the voluminous materials and legislation and considered (i) the Claimant's Statement of Facts and Grounds, Submission on Permission and

Skeleton Argument, (ii) the Defendant's Summary Grounds for Contesting the Claim and Skeleton Argument and (iii) the Third Interested Party's Summary Grounds of Resistance. I have also had the benefit of hearing oral argument from Counsel on all sides on permission.

Paragraph 9 of the 2001 Directions

4. The question before the court turns on a relatively short point of construction as to the scope of paragraph 9 of the Civil Aviation Authority (Air Navigation) Directions 2001 (incorporating Variation Direction 2004) (the "2001 Directions"), in particular the meaning of the term "*changes to… airspace arrangements"* in the chapeau to paragraph 9 (underlining added):

> *"9. Where changes to the design or to the provision of airspace arrangements, or to the use made of them, are proposed, including changes to air traffic control procedures, or to the provision of navigational aids or the use made of them in air navigation, the CAA shall:*
>
> *(a) where such changes might have a significantly detrimental effect on the environment, advise the Secretary of State for Transport of the likely impact and of plans to keep that impact to a minimum;*
>
> *(b) where such changes might have a significant effect on the level or distribution of noise and emissions in the vicinity of a civil aerodrome, ensure that the manager of the aerodrome, users of it, any local authority in the neighbourhood of the aerodrome and any other organisation representing the interests of persons in the locality, have been consulted (which might be undertaken through the consultative committee for the aerodrome where one exists);*
>
> *(c) where such changes might have a significant effect on the level or distribution of noise and emissions under the arrival tracks and departure routes followed by aircraft using a civil aerodrome but not in its immediate vicinity, or under a holding area set aside for aircraft waiting to land at a civil aerodrome, ensure that the manager of the aerodrome and each local authority in the areas likely to be significantly affected by the proposed changes, have been consulted;*
>
> *and where such changes might have one or more of the effects specified in paragraphs 9 (a), (b) and (c) of this Direction, the Civil Aviation Authority shall refrain from promulgating the change without first securing the approval of the Secretary of State."*

Submissions

5. The Claimant contends that the changes to vectoring practices by NERL amount to "*changes to the design or to the provision of airspace arrangements, or to the use made of them, including changes to the air traffic control procedures…*"

within the true meaning of paragraph 9 and, accordingly, the CAA came under a duty (a) to *"advise"* the Secretary of State for Transport ("Secretary of State") of the likely environmental impact, (b) to *"ensure"* consultation with *inter alios* organisations representing the interests of persons affected persons in the locality, and (c) to *"refrain from promulgating"* the change without first securing the approval of the Secretary of State. Alternatively, the Claimants submit that, in so far as it could be said that interpretation of paragraph 9 is a matter for the CAA, it would be perverse and contrary to the principle of consistency in exercising administrative law functions for the CAA not to treat as airspace changes other changes that, whilst not listed in CAP 725 para.vii, are of the same practical effect in terms of their impact on the environment and residents on the ground.

6. The CAA contends that the reference in paragraph 9 to *"changes to… airspace arrangements"* is to changes by the CAA to notifiable airspace classification or procedures, *i.e.* changes mandated in UK Notice to Airmen ("NOTAM") or in UK Aeronautical Information Publication ("UKAIP"). It does not include changes to vectoring practices by NERL within existing CAA mandated *"airspace arrangements"*. So long as changes to vectoring practices by NERL are compliant with NOTAMs and UKAIPs, the CAA has no approval function under the relevant legislation. Further, changes to vectoring practices do not amount to *"air traffic control procedures"*. The CAA submits that the claim is unarguable and permission should be refused.

7. NERL supports the position of the CAA. It contends that the changes to the vectoring practices of which the Claimant complains do not constitute changes to *"airspace arrangements"* within paragraph 9 of the 2001 Directions. They simply constitute operational decisions by NERL and its air traffic controllers who are free to use all the relevant designated airspace, in this case the GRMA (Gatwick Radar Manoeuvring Area).

Analysis

8. The Claimants' construction requires the CAA to ensure public consultation whenever an Air Navigation Services Provider ("ANSP") alters its operational or other practices in a way which might have a significant environmental effect, notwithstanding that the CAA may have no power of approval over such alteration of practices.

9. In my judgment, the Claimant's construction is clearly wrong for thee reasons:

   (1) First, it is contrary to the express language of paragraph 9.

   (2) Second, it is contrary to the architecture of the legislation.

   (3) Third, it is unworkable.

(1) Construction

10. The Claimant's construction of paragraph 9 is that the CAA has a duty to advise the Secretary of State and ensure consultation whenever a change to the use made of airspace arrangements *"might have a significantly detrimental effect on the distribution of noise or emissions in the vicinity of a civil aerodrome"*.

11. However, the Claimant's construction ignores the express wording of paragraph 9. Paragraph 9 expressly refers to *"changes* to… *airspace arrangements"* which are (a) *"proposed"* to the CAA and (b) require *"promulgating"* by the CAA. In my judgment, paragraph 9 is clearly directed to *"changes to… airspace arrangements"* which the CAA has the power to approve or decline. It is clear from the wording that paragraph 9 presupposes that the changes being referred to are ones which the ANSP (a) require the prior approval from the CAA to make in the first place and (b) need promulgating by the CAA. However, NERL did not require the CAA's approval for these alterations to its vectoring practices; at all material times, the changes were compliant with notified airspace parameters (see further below). Further NERL did require the CAA to *"promulgate"* such changes; NERL publishes such vectoring changes itself. In short, these were operational changes which NERL, as an ANSP, had the power itself to make and publish itself in MATS Part II (its Manual of Air Traffic Services Part II). The CAA has no role to play in respect of approving or declining or otherwise sanctioning such changes to NERL's vectoring practices. These matters were entirely within the purview of NERL.

12. It is axiomatic under the aviation legislative framework that an ANSP may change its practices within notified parameters without first seeking CAA approval. So long as changes made to the use of airspace arrangements by an ANSP remain compliant with existing NOTAMS and UKAIP, the CAA has no regulatory role to play by way of approval and or promulgation. In this case, the alteration to vectoring practices by NERL were compliant with the existing notified features of airspace (NOTAMS and UKAIP). The *"airspace arrangements"* remained unaltered. There was no change to STAR (Standard Arrival Routes). The use of notified LTMA (London Terminal Manoeuvring Area) airspace remained with terminal control operations at Gatwick. There was no change to NERL's RMA (Radar Manoeuvring Area). The ILS (Instrument Landing System) remained the same. No safety issue arose. There was nothing for the CAA to approve or promulgate. Accordingly, such vectoring changes did not fall within paragraph 9 of the 2001 Directions.

13. The use of the term *"promulgating"* in paragraph 9 is instructive. The term indicates that the *"changes to… airspace arrangements"* referred to are 'notifiable' airspace changes, *i.e.* changes requiring approval by the CAA and promulgating by a NOTAM or UKAIP. The term *"promulgate"* is a familiar one in the CAA regulatory lexicon. It appears in paragraph 1 of the 2001 Directions which lays down the CAA's air navigation functions, *viz.*: *"It shall be the duty of the CAA to develop, promulgate, monitor and enforce a policy for the sustainable use of UK airspace…"*. It appears in *e.g.* paragraph 2(h) which refers to the CAA's duty to *"… co-ordinate, determine and promulgate temporary changes in the utilization of UK airspace…"*. It appears in *e.g.* CAP 724 *Airspace Charter* and CAP 725 *CAA Guidance on the Application of the Airspace Change Process.* The only means by which CAA can *"promulgate"* a proposed *"change to…*

airspace arrangements" is by formal notification in a NOTAM or UKAIP (see *e.g.* CAP 724). Such promulgation by way of a NOTAM or UKAIP is only required in relation to notifiable airspace changes. The Claimant's submission that *"promulgating"* in the context of paragraph 9 of the 2001 Directions bears a general, rather than a technical, meaning is unarguable.

14. The CAA's air navigation listed functions include being responsible for *e.g. "the form and content of the [UKAIP]"* (paragraph 2(c) of the 2001 Directions). The CAA's air navigation functions do not include prescribing, or approving, the content of NERL's ATC (Air Traffic Control) operational practices. Nor should they because these are operational matters within the expertise of NERL as the relevant ANSP charged with these ATC responsibilities. Changes to vectoring practices are not notifiable changes to *"air traffic control procedures"*. NERL's vectoring changes are not listed in para.vii of CAP 725. This is because they are not notifiable airspace changes.

The 2014 Guidance

15. The 2001 Directions must also be read in context, in particular, against the background of the Secretary of State's *Guidance to the CAA on Environmental Objectives Relating to the Exercise of Air Navigation Functions 2014* (the "Guidance") which replaced earlier similar Guidance. Section 70(2)(d) of the Transport Act 2000 requires the CAA to take account of any guidance on environmental objectives given to it by the Secretary of State. Under section 66(1) and section 68(1) of the Transport Act 2000, the Secretary of State may give directions to the CAA regarding the manner in which it carries out its air navigation functions. The 2001 Directions were issued under section 66(1). The 2014 Guidance explains that the purpose of the 2001 Directions is to set out the circumstances when the CAA must also seek the approval of the Secretary of State for airspace changes which might have significant environmental effect and annexes paragraphs 8 and 9 of the 2001 Directions (Annex B).

16. The 2014 Guidance governs how the CAA interprets its environmental duties *"in respect of approving changes to the UK's airspace structure"* (paragraph 1.1). The objectives of the 2014 Guidance are two-fold: (a) *"to improve the efficiency"* of the UK airspace network including mitigating the environmental impact of aviation, and (b) to reaffirm *"the need to consult local communities"* near airports when *"airspace changes"* are being considered near these airports (paragraph 1.3). It is clear that the *"airspace changes"* being referred to in paragraph 1.3 of the 2014 Guidance are those necessarily requiring approval by the CAA, *i.e.* notifiable changes requiring promulgating by NOTAMS or UKAIP.

17. The Claimant's construction would bring the 2001 Directive into conflict with the 2014 Guidance. It cannot have been the intention of the framers of the 2001 Direction unilaterally (and by a side wind) to expand the duty of the CAA to ensure consultation on *all* changes, including those not requiring its approval. This would be contrary to the legislative structure. The two documents must be read consistently. It is clear that, like the 2014 Guidance, the airspace *"changes"* referred to in paragraph 9 are those requiring approval by the CAA. Neither

paragraph 8 or 9 of the 2001 Directions grant the CAA any fresh air navigation functions. They are simply concerned with the *manner* in which the CAA exercises its air navigation functions. It is also instructive that paragraph 9 refers not simply to changes to airspace but to changes to *"airspace arrangements"*.

(2) Architecture

18. The Claimants' approach runs counter to the architecture of UK airspace legislative arrangements and the respective roles of the CAA and ANSP. In simple terms, the CAA has the overall strategic and regulatory control of UK airspace, whereas ANSP such as NERL have the tactical responsibility as to the day-to-day use of such airspace and airspace arrangements.

19. The CAA has the duty the duty *"to develop, promulgate, monitor and enforce a policy for the sustainable use of UK airspace…"* (see paragraph 1 of the 2001 Directions cited above), in particular to *"develop national policy for the classification of UK airspace"* (paragraph 2(f)), to *"classify UK airspace in accordance with the national policy"* (paragraph 2(g)), to *"co-ordinate, determine and promulgate temporary changes in the utilization of UK airspace to meet special air navigational requirements"* (paragraph 2(h)), and to *"establish and operate institutional arrangements with regard to air navigation"* (paragraph 4(f)).

20. NERL is licensed by the UK Government to provide UK and Oceanic En-Route ATS and offshore ATS to helicopter operations in the North Sea (para. 4 of Appendix K of CAP 724). This is a delegated function for which NERL have the expertise. NERL's revisions to approach vectoring practices was an operational ATC decision which it was entitled to make and publish itself in MATS Part II without prior approval from the CAA.

(3) Unworkable

21. The Claimant's construction is unworkable. It would be absurd and impractical if CAA approval was required for every change to vectoring practices. The Claimants' construction logically requires the CAA to ensure consultation in relation to *every* change to airspace arrangements, including routine changes to air traffic control practice, which might have a significant effect on the level or distribution of noise or emissions, either in the vicinity of an aerodrome or under arrival tracks or departure routes. Further, the Claimant's construction would introduce real uncertainty; it would be difficult for NERL to know when it did, and did not, have a duty to consult. None of this could not have been intended by the authors of the 2001 Directions.

22. Mr Steel QC attempted to deal with this difficulty by submitting that paragraph 9 is really only directed towards 'permanent' or 'long-term' airspace changes. However, this amounts to an unjustified gloss on the 2001 Directions and finds no support in the wording of paragraphs 9.1 and 9.2 of the 2014 Guidance. Indeed, it is noteworthy that the 2014 Guidance itself refers to airspace changes which are required to be *"proposed"* by an applicant and approved by the CAA (see *e.g.*

paragraphs 6.6-6.7 and 9.8 of the 2014 Guidance and the *Airspace Change Process*). In my view, the Claimant's submission is unarguable.

Wednesbury argument

23. In my judgment, there is nothing in the Claimant's makeweight *Wednesbury* argument. For the reasons given above, there is nothing perverse about the CAA not treating an ANSP's alterations to vectoring practices as notifiable airspace changes. They were not. The CAA's approach has at all times been consistent with the wording of the 2001 Directions and the broader legislatory structure.

Conclusion

24. For these reasons, in my judgement, the Claimants' challenge is unarguable and permission to bring judicial review proceedings must be refused.

Postcript

25. As was acknowledged by Counsel for the CAA, Mr Nardell QC, at the oral hearing, the Secretary of State has a general power to give directions as he thinks necessary or expedient in relation to matters concerned with environmental impact (see s.39 of the Transport Act 2000). This could include further directions to licence holders to consult in certain circumstances. Whether there is a case for doing so in relation to what some might be regard as 'seismic' changes in vectoring practices is, however, a matter for the Secretary of State, not the Courts.