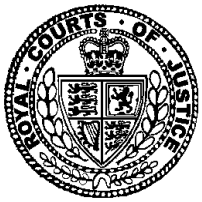

Neutral Citation Number: [2025] EWHC 1101 (Admin)

Case Nos: AC-2022-LON-002885 (CO/3830/2022)
AC-2022-LON-002891 (CO/3840/2022)
AC-2024-LON-000332

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 May 2025

Before :

MRS JUSTICE LANG DBE

- -

Between :

AC-2022-LON-002885 & AC-2024-LON-000332

THE KING **Claimant**

on the application of

POSSIBLE (THE 10:10 FOUNDATION)
- and -
SECRETARY OF STATE FOR TRANSPORT **Defendant**

AC-2022-LON-002891

THE KING **Claimant**

on the application of

GROUP FOR ACTION ON LEEDS BRADFORD AIRPORT (ACTING THROUGH NICHOLAS MARK HODGKINSON)
- and -
SECRETARY OF STATE FOR TRANSPORT **Defendant**

- -

- -

David Wolfe KC, Peter Lockley, Stephanie David and Celia Reynolds (instructed by **Leigh Day**) **for the Claimant in AC-2022-LON-002885 & AC-2024-LON-000332**

Estelle Dehon KC and Ruchi Parekh (instructed by **Leigh Day**) for the **Claimant in AC-2022-LON-002891**
Galina Ward KC, Andrew Byass and Rose Grogan (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 1 – 4 April 2025

- -

Approved Judgment

This judgment was handed down remotely at 12 noon on 8 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LANG DBE

Mrs Justice Lang:

1. The Claimants seek to challenge, by way of judicial review, the Defendant's decision of 19 July 2022 to publish the Jet Zero Strategy ("the JZS"), setting out the Government's strategy for decarbonising the UK aviation sector by 2050, and the Defendant's 2023 Review decision ("the 2023 Review") that the JZS remained the appropriate strategy to pursue aviation decarbonisation. The Claimants' primary issue is that the Defendant has not proposed in the JZS Direct Demand Management ("DDM") measures to limit and control aviation. However, they recognise that the merits of this strategy are a matter for the elected government to decide, not judges (*R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020, at [54] - [56]).

2. Possible (The 10:10 Foundation) ("Possible") is a climate action charity and pressure group, campaigning for a zero-carbon society, by measures such as a frequent flyer levy.

3. The Group for Action on Leeds Bradford Airport ("GALBA") is an unincorporated association, comprising a group of concerned individuals from West Yorkshire whose aim is to prevent any expansion of Leeds Bradford Airport. It acts by Mr Hodgkinson, who is a member of GALBA's Committee.

4. Possible's first claim ("Possible Claim 1"), which challenged the Defendant's JZS decision, was issued on 18 October 2022. Possible subsequently filed its second claim ("Possible Claim 2"), issued on 31 January 2024, which challenged the 2023 Review.

5. On 14 March 2023, Sir Duncan Ouseley, sitting as a Judge of the High Court, refused permission to apply for judicial review on ground 1 of Possible Claim 1, and adjourned the permission application on grounds 2, 3, 4 and 5 to be heard at a "rolled-up hearing". Sir Duncan Ouseley also ordered that Possible Claim 1 should be case managed and heard together with the GALBA claim.

6. On 15 July 2024, I directed that Possible Claim 2 should be heard, as a rolled-up hearing, on the same occasion as Possible Claim 1 and the GALBA claim.

7. Possible has not pursued its renewed application for permission on ground 1 of Possible Claim 1, which alleged that the Defendant failed to interpret and properly apply his obligations under section 13(1) of the Climate Change Act 2008 ("CCA 2008"). Possible has also not pursued ground 3 of Possible Claim 1, which alleged that the Defendant unlawfully failed to give cogent reasons for departing from the advice of the Climate Change Committee ("CCC"). Possible has conceded that these grounds are not arguable, in the light of the Court of Appeal's decision in *R (Global Feedback Limited) v Secretary of State for Environment, Food and Rural Affairs and Secretary of State for Energy Security and Net Zero* [2024] 1 WLR 2923 ("*Global Feedback*"), and the Supreme Court's dismissal of the application for permission to appeal[1]. Possible accepts that "the duty in section 13(1) of the CCA 2008 does not apply to the SST"[2].

[1] Possible Claim 1 and the GALBA claim were stayed by consent pending the Supreme Court's decision in *Global Feedback*.
[2] Paragraph 4(a) and (c) of Possible's Amended Statement of Facts and Grounds, 6 September 2024.

8. On 17 March 2025, Sir Peter Lane, sitting as a High Court Judge, granted Possible permission to amend its grounds in Possible Claim 1 to add ground 6.

9. The grounds of challenge in Possible Claim 1 may be summarised as follows:

   i) **Ground 1**: No longer pursued, in the light of the decision in *Global Feedback*.

   ii) **Ground 2**: In developing and adopting the JZS, the Defendant breached (a) the *Tameside* duty of inquiry and (b) the requirement to have regard to obviously material considerations, both on the basis that either (i) the JZS was a policy or proposal or a package of policies or proposals, prepared by the Defendant for the purpose of the continuing obligation on the relevant Secretary of State under section 13(1) of the CCA 2008; or (ii) the JZS sets out the policies relied upon by the Defendant in relation to how he intends to decarbonise aviation.

   iii) **Ground 3**: No longer pursued, in the light of the decision in *Global Feedback*.

   iv) **Ground 4**: The Defendant's decision was based on a consultation which was unlawful because he had a closed mind in relation to DDM measures.

   v) **Ground 5**: The Defendant's decision to exclude DDM measures unlawfully failed to take account of an obviously material consideration, namely, that DDM is by far the most effective way to reduce aviation's non-CO_2 climate impacts.

   vi) **Ground 6**: The Defendant failed to have or give any rational reasons when rejecting the firm advice of his officials, set out in a ministerial submission dated 29 April 2021, that he needed to address the issue of DDM in the forthcoming consultation.

10. The grounds of challenge in Possible Claim 2 may be summarised as follows:

   i) **Ground 1**: No longer pursued.

   ii) **Ground 2**: Unlawfully, the Defendant's 2023 Review was not informed by a process of public consultation.

   iii) **Ground 3**: No longer pursued, in the light of the decision in *Global Feedback*.

   iv) **Ground 4**: The Defendant unlawfully breached the *Tameside* duty of inquiry and failed to have regard to other obviously material considerations in deciding to maintain the "High Ambition" scenario set out in the JZS.

   v) **Ground 5**: No longer pursued, in the light of the decision in *Global Feedback*.

   vi) **Ground 6**: The Defendant unlawfully failed to discharge the *Tameside* duty of inquiry in the context of considering the DDM policy options.

   vii) **Ground 7**: The Defendant unlawfully fettered his discretion and/or failed to conscientiously consider (for the purposes of this further decision) even the responses to the original JZS consultation.

   viii) **Ground 8:** No longer pursued.

11. The GALBA claim was issued on 19 October 2022. On 14 March 2023, Sir Duncan Ouseley, sitting as a Judge of the High Court, refused permission on ground 1, and adjourned the permission application on all other grounds to be heard at a rolled-up hearing. Sir Duncan Ouseley also ordered that the GALBA claim should be case managed and heard together with Possible Claim 1. GALBA's grounds of challenge (as amended and re-numbered on 6 September 2024) may be summarised as follows:

    i) **Ground 1**: The Defendant failed to carry out a lawful consultation. The Defendant's stated "red line" approach to DDM measures meant that an option of central significance was excluded from the consultation, such that the Defendant (i) did not consult at a formative stage; and (ii) failed conscientiously to consider consultee responses (including as regards non-CO_2 emissions). Subsequent consideration of the consultee responses a year after the decision could not cure the legal error.

    ii) **Ground 2**: The Defendant failed to carry out a cost/benefit impact assessment. The Defendant's decision not to carry out an impact assessment on the apparent (and erroneous) basis that the JZS was a "strategy" as opposed to "policy" was a breach of his *Tameside* duty to make sufficient inquiries.

    iii) **Ground 3**: The Defendant failed to take into account relevant planning decisions on airport expansion, which were an obviously material consideration, thereby creating a lacuna in addressing the climate change impacts of airport expansion.

    iv) **Ground 4**: The Defendant failed to discharge his public sector equality duty ("PSED") contrary to section 149 of the Equality Act 2010 ("EA 2010"). The Defendant accepted that the JZS may have impacts on those who share the protected characteristic of race, but failed to evidence that this was known personally to ministers and that it fed into the final JZS.

12. The Defendant resists all the Claimants' grounds on the basis that they are unarguable and permission should be refused. Alternatively, if permission is granted, the claims should be dismissed. The Defendant further submits that the effect of the 2023 Review is that the challenges to the lawfulness of the JZS consultations in JZS1 (Possible Claim 1, ground 4 and the GALBA claim, ground 1) and relating to the PSED (the GALBA claim, Ground 4) are now academic, because there has been a fresh decision to continue to pursue the JZS in any event. Alternatively, the Court is invited to refuse to grant permission to apply for judicial review for these grounds pursuant to section 31(3D) Senior Courts Act 1981 ("SCA 1981"), or to refuse relief pursuant to section 31(2A) SCA 1981, because it is highly likely that the decision to adopt the JZS would have been the same, even if any legal error of the type alleged had not occurred.

Background and facts

13. The facts set out in this section are drawn from the documentary evidence and from the two witness statements of Ms Holly Greig ("Greig 1/x and Greig 2/x"), who is the Deputy Director, Integrated National Transport Strategy at the Department for Transport.

The CCA 2008 and the Net Zero Strategy

14. In June 2019, the CCA 2008 was amended to include a target of net zero greenhouse gas emissions by 2050. The CCA 2008 also includes a requirement for a series of five-yearly carbon budget periods, which are set in advance of each carbon budget, and restrict the amount of greenhouse gas the UK can legally emit in a five-year period to ensure progress is made towards the overall 2050 target. The Court of Appeal confirmed in *Global Feedback* that the statutory scheme under the CCA 2008 envisages the duties laid down in Part 1 of that Act being discharged by one Secretary of State (at [78]). Preparation by another Secretary of State of a strategy that may have the effect of reducing greenhouse gas emissions and assisting the achievement of net zero does not itself engage the statutory functions under the CCA 2008 (at [85], [92-94], [101]).

15. The Net Zero Strategy was published by the Secretary of State for Business Energy and Industrial Strategy ("SSBEIS") in October 2021. The office of SSBEIS has since been dissolved. Functions under the CCA 2008 are now the responsibility of the Secretary of State for Energy, Security and Net Zero ("SSESNZ").

16. The Net Zero Strategy was presented to Parliament, pursuant to section 14 CCA 2008, and set out the policies and proposals adopted in order to satisfy the duty under section 13 CCA 2008 to prepare such policies and proposals as the Secretary of State considers will enable the UK's carbon budgets to be met and the UK economy to be decarbonised by 2050. As explained in Greig 1/14, a department's or sector's contribution to meeting Carbon Budgets and the pathway to net zero is described as an "effort share". The effort shares are not legally binding but are used as internal guidelines or tools to support policy development and aid the SSESNZ to monitor sector contributions.

17. The Net Zero Strategy sets out policies on transport in section 3v. In its list of key commitments it states that the UK intends to:

> "[b]ecome a leader in zero-emission flight, kick-starting commercialisation of UK sustainable aviation fuels (SAF), and developing a UK SAF mandate, to enable the delivery of 10% SAF by 2030, and we will be supporting UK industry with £180m funding to support the development of SAF plants."

18. At paragraph 8, it refers to the Transport Decarbonisation Plan, stating in particular:

> "We will address aviation emissions through new technology such as electric and hydrogen aircraft, the commercialisation of sustainable aviation fuels, increasing operational efficiencies, developing and implementing market-based measures and GHG removal methods, while influencing consumers to make more sustainable choices when flying."

19. Under the heading "Aviation", it states:

> "40. Earlier this year we consulted on our Jet Zero Strategy, which will set out the steps we will take to reach net zero aviation emissions by 2050. We have also consulted on a target for UK domestic aviation to reach net zero by 2040.

> 41. We are supporting the development of new and zero carbon UK aircraft technology through the Aerospace Technology Institute (ATI) programme and fund zero emission flight infrastructure R&D at UK airports. As part of the Jet Zero ambition, the Aerospace Technology Institute (ATI) provides R&D funding, matched by industry, to support the design and development of new aerospace technologies, with particular focus on zero carbon technologies, that are most likely to grow the UK's share in the global market. We are also investing £3 million in 2021/22 through the Zero Emission Flight Infrastructure competition to accelerate R&D into infrastructure requirements at airports and airfields to handle new forms of zero emission aircraft.
>
> 42. We will accelerate the commercialisation of UK sustainable aviation fuels (SAF). Our ambition is to enable delivery of 10% SAF by 2030 and we will be supporting UK industry with a £180 million funding to support the development of SAF plants. This builds on our recently launched £15 million Green Fuels, Green Skies competition. We will also establish a SAF clearing house, the first of its kind announced in Europe, to enable the UK to certify new fuels."

20. The decisions of the SSBEIS on 17 October 2021 (a) to approve the proposals and policies prepared under section 13 CCA 2008 as set out in the Net Zero Strategy; and (b) to lay the Net Zero Strategy before Parliament as a report under section 14 CCA 2008, were the subject of a successful judicial review claim. In *R (Friends of the Earth and others) v SSBEIS* [2022] EWHC 1841 (Admin), Holgate J. granted declaratory relief to the effect that the Net Zero Strategy did not comply with the obligations under sections 13 and 14 CCA 2008, and ordered the SSESNZ to lay before Parliament a compliant report before the end of March 2023. The Net Zero Strategy itself was not quashed.

21. The judicial review claim in respect of the Net Zero Strategy did not involve any challenge to, or determination that, the approach to aviation in the Net Zero Strategy summarised above was unlawful, or in breach of sections 13 or 14 CCA 2008.

22. In order to seek to comply with the Court's order in the Net Zero Strategy Judgment, on 30 March 2023, the SSESNZ duly laid before Parliament the Carbon Budget Delivery Plan. The Carbon Budget Delivery Plan stated that it was being published to inform Parliament and the public of the Government's proposals and policies to enable the delivery of Carbon Budgets 4, 5 and 6. It was explained that in order to assess the package of proposals and policies against carbon budgets, the expected emissions savings for all proposals and policies were calculated, where they could be quantified. Consideration was also given to the potential emissions savings of policies where it was not currently possible to quantify the associated emissions savings.

23. Appendix B of the Carbon Budget Delivery Plan set out the policies and proposals that were identified as enabling carbon budgets to be met. For aviation, the following quantified policies were included (in table 5 of Appendix B): (a) [139] Domestic Aviation Decarbonisation; (b) [144] Aircraft Support Vehicle Decarbonisation; (c)

[145] Increasing the take-up of Sustainable Aviation Fuels; (d) [146] Zero Emission Flight ("ZEF") from 2035; (e) [147] High Fuel Efficiency Savings in Operational Aircraft; and (f) [148] Carbon Pricing in Aviation.

24. The Carbon Budget Delivery Plan was also the subject of a successful judicial review in *R (Friends of the Earth) v SSESNZ* [2024] EWHC 995 (Admin). Sheldon J. held that the SSESNZ had determined to make the Carbon Budget Delivery Plan on the mistaken understanding that each of the proposals and policies forming the package of measures set out in the Carbon Budget Delivery Plan would be delivered in full. The Judge ordered the SSESNZ to lay before Parliament, by no later than 2 May 2025, a new report under section 14 CCA 2008 that sets out the policies and proposals which the SSESNZ considers will enable the sixth carbon budget to be met. This claim did not involve any challenge to, or determination that, the approach to aviation was unlawful, or in breach of sections 13 or 14 CCA 2008.

25. According to Greig 1/18, in preparing the revised section 14 report, officials have been undertaking work to assess and mitigate delivery risk. Updated modelling has also been undertaken for the JZS trajectories, to take into account aviation model developments, updated macroeconomic inputs, and updated UK emissions trading scheme price series since the publication of the "Jet Zero Strategy: One year on" document. The updated modelling has resulted in some changes to the amount of emissions savings projected for each measure in the JZS, but the strategic approach remains the same.

CCC advice

26. The CCC, which is an expert advisory body, has recommended DDM on a number of occasions, including the following:

    i) 'Progress in reducing emissions 2020 Report to Parliament (June 2020): this advised: "Demand management policies in place [in the early 2020s] to ensure emissions remain aligned with a net-zero emissions pathway, if efficiency and low-carbon fuels under-deliver".

    ii) 'The Sixth Carbon Budget: The UK's Path to Net Zero' (December 2020): this explained that the Balanced Net Zero Pathway was based on a gradual reduction in aviation emissions due to demand management, improved efficiency and a modest use of sustainable aviation fuels. The CCC referred to the difficulty, at that stage, of applying a fixed ratio of multiplier to estimate non-CO_2 emissions, but advised that aviation non-CO_2 warming should be capped by or before 2050 and that without such mitigation "this would require year-on-year demand growth to be reduced to essentially zero by or before 2050".

    iii) 'The Sixth Carbon Budget: Aviation' (December 2020): this advised:

> "Demand management policy should be implemented, as given expected developments in efficiency and SAF deployment, demand growth will need to be lower than baseline assumptions, and likely constrained to 25% growth by 2050 from 2018 levels for the sector to contribute to UK Net Zero.

> If efficiency or SAF do not develop as expected, further demand management will be required. Conversely, if efficiency and SAF develop quicker, it may be possible for demand growth to rise above 25%, provided that additional non-CO_2 effects are acceptable or can be mitigated.
>
> A demand management framework will therefore need to be developed and in place by the mid-2020s to annually assess and, if required, act as a backstop to control sector GHG emissions and non-CO_2 effects."

iv) 'Progress in reducing emissions 2021 Report to Parliament' (June 2021): this stated that the "[l]ack of ambition for aviation demand management would result in higher emissions of 6.4 $MtCO_2e$/year in 2030 relative to the CCC pathway for aviation emissions." It called for " assessment of the UK's airport capacity strategy and a mechanism for aviation demand management", referring to the need to consider future airport capacity alongside appropriate price incentives. A "priority recommendation" was for a demand management framework to be developed (by 2022) and be in place by the mid-2020s to annually assess and, if required, control greenhouse gas emissions and non-CO_2 effects.

v) 'Progress in reducing emissions 2022 Report to Parliament' (June 2022): the CCC's assessment of the Net Zero Strategy was that it was "not fully credible until the Government develops and begins to implement contingency plans … in particular by including demand-side policies". On aviation, the CCC stated:

> "The Government's announcements on aviation to date have not set any ambition to constrain aviation demand growth through policy, beyond vague proposals on carbon pricing, despite demand measures being one of the few interventions that lowers both CO_2 emissions and non-CO_2 effects from aviation. Given the risks outlined above, as well as risks of under-delivery on emissions reductions in other sectors, the Government should actively develop the option to implement policy to manage aviation demand."

vi) 'Progress in reducing emissions 2023 Report to Parliament' (June 2023): the CCC highlighted the unaddressed risks in respect of sustainable aviation fuel, and that "insufficient policy has been brought forward to address demand management". The CCC noted that the emissions from flying were not reflected in the cost of flying, which could be addressed using fiscal policies, such as frequent flyer levies and taxation. A priority recommendation was that "[n]o airport expansions should proceed until a UK-wide capacity-management framework is in place to annually assess and, if required, control sector GHG emissions and non-CO_2 effects". The CCC further advised:

> "Given demand management is an effective way of reducing aviation CO_2 and non-CO_2 emissions, demand policies could be viewed as an alternative measure for course correction."

Development of an aviation decarbonisation strategy

27. In December 2018, the 'Aviation 2050' Green Paper consultation was published. The consultation set out the Government's initial position on the key aviation issues through to 2050 and proposed several measures to achieve this, including to:

    i) Accept the CCC's recommendation that emissions from UK-departing flights should be at or below 2005 levels in 2050 set out in the CCC's 2017 Report to Parliament 'Progress in preparing for climate change'.

    ii) Keep non-CO_2 emissions under review and reassess the UK's policy position as more evidence becomes available.

    iii) Consider the use of all feasible abatement options, particularly in-sector measures to ensure effective action is taken at the national and international level. This includes policies that may evolve over the long term such as technological developments, operational efficiencies, sustainable fuels, market-based measures, demand management and behavioural change.

28. On 14 July 2021, the Defendant published the Transport Decarbonisation Plan. It set out a strategy for decarbonising all modes of transport to support delivery of the UK's legally binding carbon budgets and net zero by 2050 target. It outlined plans to deliver the necessary carbon reductions to reach net zero aviation by 2050 and set out 11 commitments to achieve this. These included commitments relating to fuel efficiency improvements, uptake of sustainable aviation fuels and introduction of zero emission aircraft. The Transport Decarbonisation Plan set out a wide range of projections for aviation emissions based on illustrative scenarios that were produced for the Jet Zero Consultation and noted that further detail on the plans to decarbonise aviation would follow in the JZS.

29. In May 2022, the Defendant published 'Flightpath to the Future: a strategic framework for the aviation sector' which presented the Government's vision for a modern, innovative, and efficient sector over the next 10 years. Following the COVID-19 pandemic and the significant impacts it had on passenger demand and the aviation sector, it was designed to give a clear direction of travel to the sector for the next decade as it recovered. It outlined the Government's commitment to sustainable aviation and committed to the publication of a 'Jet Zero Strategy' later that year, further setting out the policy approach.

The JZS

30. Ms Greig's evidence was that the Defendant's written statement to Parliament on 19 July 2022 explained the purpose of the JZS, as follows (Greig 1/32):

> "The [JZS] sets a trajectory for the sector to reach net-zero by 2050 – or Jet Zero as we define it. Its delivery will see UK aviation emissions reduce even further than the levels called for by our climate advisors – with a pathway that should see emissions never-again reach the pre-pandemic levels of 2019.

> To deliver this outcome, alongside our Jet Zero target we aim for domestic aviation and airports to be net zero and zero-emission respectively by 2040.
>
> It is a strategy that will both decarbonise the sector and allow people to keep flying. Pre-pandemic, aviation contributed at least £22 billion to our economy and 230,000 direct jobs across the country. It is crucial that we support the rapid development of technologies that maintain the benefits of air travel whilst maximising the opportunities that decarbonisation brings to the UK.
>
> Those opportunities include the domestic production of sustainable aviation fuels (SAF), which could support up to 5,200 jobs by 2035 and help regenerate industrial sites across the country, notably in areas outside London, such as the North-East, contributing to levelling up the UK and improving our fuel security. We have today set out a new commitment of having at least five commercial SAF plants under construction by 2025, and we have also confirmed that the Government will mandate at least 10% SAF to be blended into conventional aviation fuels by the end of the decade – one of the most ambitious targets globally.
>
> Bolstering that effort means investing in pioneering projects. This is why today we are also launching the Advanced Fuels Fund with a £165 million competition, building on previous funding, such as the £15m Green Fuels, Green Skies competition, to stimulate the start-up of commercial SAF production facilities in the UK. Alongside this, we have also announced that we are progressing to the next phase of our £1 million competition to deliver the first ever net zero transatlantic flight powered by 100% SAF.
>
> […]
>
> The Jet Zero strategy will future proof the aviation industry, securing the economic benefits of new green jobs and industries, and delivering the technologies and fuels that will keep passengers flying in a decarbonised world."

31. The JZS explains (page 13, footnote (i)) that it is consistent with, but distinct and independent from the Net Zero Strategy, the Transport Decarbonisation Plan and Flightpath to the Future:

> "The approach set out in this Strategy is aligned with the Net Zero Strategy (NZS), Transport Decarbonisation Plan (TDP), and Flightpath to the Future. The NZS set out our economy-wide plan for achieving net zero by 2050, for meeting our carbon budgets and Nationally Determined Contribution under the Paris Agreement. The TDP set out the Government's commitments

> and actions needed to decarbonise the entire transport system. The Flightpath to the Future set out our strategic framework for the aviation sector, which focusses on establishing a modern, innovative, and efficient sector over the next ten years with decarbonisation and sustainability key priorities. The Jet Zero Strategy builds on these three documents setting out our framework and plans for decarbonising aviation."

32. Ms Greig gives an overview of the JZS, at Greig 1/35-37:

> "35. When developing the JZS, the ambition at the time was to go further than the NZS and set a world-leading, ambitious goal of net zero emissions from the aviation sector by 2050. It was produced in addition to the TDP, FTTF, and NZS to address the complex issues involved in decarbonising aviation. The Government considers aviation a "hard to abate sector" due to the time it takes to adapt the design and operation of aircraft, and the relatively nascent and costly nature of technologies needed to decarbonise. The international nature of the aviation sector is an additional challenge, and the global development of fuels, technologies and infrastructure is necessary to support the aims of the UK sector to achieve its net zero goal. All this also helps to understand why aviation emissions were excluded from the 2050 target in the CCA.
>
> 36. The JZS recognised, however, that air travel provides significant social benefits that must be considered in the context of aviation decarbonisation. This includes visiting distant friends and relatives, providing a range of holiday destinations and broadening people's cultural experiences. It also recognised that aviation is a major contributor to the UK economy, stating:
>
> > "Before COVID-19, it facilitated £95.2 billion of UK's non-EU trade exports; contributed at least £22 billion directly to GDP; directly provided at least 230,000 jobs across all regions of the country and underpins the competitiveness and global reach of our national and our regional economies."
>
> 37. In balancing these complexities and important competing benefits during the development of the JZS, the SST also considered the advice provided by the CCC in their various reports between 2020 and 2022, in particular the CCC's advice that DDM measures would be required to achieve sufficient reductions in aviation emissions, as well as its advice on measuring and limiting non-CO_2 emissions, and on no net expansion of UK airport capacity unless the aviation sector was on track to its net zero goals. The SST accepted various aspects of the CCC's advice and a number of their recommendations, but rejected the advice on DDM, for reasons I discuss below."

33. Ms Greig identifies the similarities and differences between the JZS and the CCC's advice at Greig 1/70-75:

> "70. As I state above (§37), when deciding upon the approach to take to DDM measures, the SST had regard to the advice provided by the CCC that DDM measures would be required to achieve sufficient reductions in aviation emissions. It is of note, in this regard, that the CCC's 'Balanced Pathway' and the JZS 'High Ambition Scenario' share much of the same underlying assumptions. The aviation pathway developed by the CCC uses the Department's aviation model. The CCC's baseline passenger numbers, airport capacities and underlying economic assumptions are consistent with those in the JZS (subject to the limited updates made to the aviation model prior to the JZS further technical consultation).
>
> 71. The CCC's 'Balanced Pathway' differs from the JZS in three ways. First, it is based on limiting passenger growth to 25% above 2018 levels, in line with their recommendations, against a baseline of 64% growth. Second, it assumed a different level of SAF uptake (the CCC assumes a 25% SAF uptake by 2050, rising to 95% in their Tailwinds scenario, while the JZS 'High Ambition Scenario' reaches 50% in 2050). Third, it does not make any assumption about the uptake of zero emission aircraft.
>
> 72. All assumptions in the JZS, including those regarding the uptake of SAF and zero emissions aircraft, where the Department's assessment differs from that of the CCC, were based on evidence and subsequent analysis and assessments conducted by departmental experts. Some of the evidence utilised in the JZS assumptions was not available at the time the CCC carried out its analysis to establish its 'Balanced Pathway'. The assumptions on the uptake of SAF and zero emission aircraft in the High Ambition scenario, and justifications for these assumptions, are set out in each of the analytical documents accompanying the 2021 Consultation, the JZS further technical consultation and the final JZS.
>
> 73. The CCC's Sixth Carbon Budget advice, published in December 2020, was one of several evidence sources considered when formulating the approach to the JZS consultation. The CCC's report considers a wide range of potential SAF uptakes across its five scenarios, ranging from 5% to 95% in 2050. Therefore, the JZS High Ambition assumption of 50% in 2050 is well within this range. The CCC's report did not include analysis on zero emission aircraft as the Department's aviation model, also used by the CCC, did not have the capability to model these aircraft types prior to the JZS analysis. Referring to electric and hydrogen aircraft, their report states that "2050 penetrations of these options are likely to be limited, or they could occupy small niches".

> 74. However, ultimately the assumptions used in the JZS analysis were the result of technical judgements made by experienced analysts working within the Department, following significant engagement through the two consultation exercises. Alongside the CCC's report, a range of other evidence sources were considered, some of which were published after the CCC's report, including the Air Transport Action Group's (ATAG) Waypoint 2050 report (published September 2020), the Destination 2050 report (published February 2021), the International Air Transport Association's (IATA) Technology Roadmap (published 2019), Sustainable Aviation's roadmap (published 2019), Clean Sky 2's report into hydrogen-powered aviation (published May 2020), and news and press releases from relevant companies such as ZeroAvia and Airbus.
>
> 75. These matters supported the view of officials, and ultimately the SST's decision, that it was not necessary for the proposed JZS to include DDM measures, in contrast to the approach recommended by the CCC."

The 2021 consultation

Preparation

34. Ms Greig describes the preparation for the 2021 consultation in Greig 1/41-44. Between August 2020 and January 2021, Department for Transport officials built an Aviation Decarbonisation Team and developed ideas for a net zero aviation consultation. Officials discussed decarbonisation with the Minister for Aviation, met with stakeholders, including the Aviation Environment Federation and the Civil Aviation Authority, and engaged with internal departmental analysts on demand scenarios and climate change.

35. On 11 January 2021, the work programme for the consultation was presented to the Aviation Decarbonisation Board. This is an official-only cross-government board, which was set up in November 2020, and was re-named as the Jet Zero Delivery Forum in October 2022. It was set up to enable attendees to engage with, debate and reach a consensus regarding policies relating to aviation decarbonisation. The work programme presented to the Aviation Decarbonisation Board included a section on demand management, looking at the arguments for and against such measures. It considered demand reviews in 2025, 2030 and 2035, which were intended to assess whether the sector was meeting the emissions targets set, and if not, whether demand management measures needed to be deployed. Officials considered that demand did not need to be restricted but this would be kept under review.

36. Between January and March 2021, there was a series of official-level policy workshops run on key areas that were to be considered as part of the consultation. This included workshops on sustainable aviation fuels, greenhouse gas removals, environmental information, market-based measures, aircraft, and airports, airspace and demand. The slide pack used for these workshops set out the draft levers for the strategy. Under the heading "demand management", it stated that "we do not think that demand needs to

be restricted but will keep under review: if the sector is not on track, we will act". Officials concluded, based on analysis undertaken, that net zero aviation was achievable even with increased demand and capacity expansion.

37. Following these workshops, consideration was given to consulting on a strategic approach which would not be based on constraint, and rejecting any need for measures that would directly limit demand for flights or passenger numbers, but where stronger demand management policies could ultimately be deployed as a backstop or last resort in the event a technology-focussed approach were proven to be off track.

38. In a ministerial submission dated 29 April 2021, officials noted that the CCC, non-governmental organisations and industry were "calling on Government to confirm whether it intends to moderate aviation demand". Their recommendation was as follows:

> "That you agree we must address the issue of 'demand management' in the Transport Decarbonisation Plan (TDP) and Net Zero Aviation Consultation (NZAC), that it is currently credible to **reject measures to directly limit demand for flights or passenger numbers**, if this is done alongside consulting on a position that **stronger demand management policies are deployed as a "back stop" or "last resort"** in the event our technology-focussed approach is proven to be off-track; this will assure our approach is more robust, and galvanise action on our priority technology measures."

39. In the section headed "Background", the submission stated:

> "3. 'Demand management' is a widely recognised and used term to describe a spectrum of actions to moderate the number of flights/passengers. Annex 1 illustrates this broad range.
>
> 4. In their Carbon Budget 6 advice, the CCC made two demand-related recommendations: that we operate a 'no net expansion of UK airport capacity policy, and that 'demand is constrained to 25% growth by 2050 from 2018 levels'. To reduce carbon emissions France recently announced their intention to ban internal flights where train alternatives under 2.5 hours exist, and 80% of members of the UK Climate Assembly in 2020 supported a tax on frequent flyers to do the same. There is public and industry interest in the UK's approach.
>
> 5. The TDP and NZAC will set out how we will achieve net zero aviation, and the associated co-benefits on noise and air quality. Given (1) advice of the CCC, (2) requests for clarity from the sector, (3) that expansion plans for the 21 biggest airports see capacity growth of up to 67% by 2050, (4) suggestions of public support and (5) action from international partners on domestic flights, we believe the UK must set out its position on this issue."

40. In the section headed "Considerations", the submission stated:

"6. **We do not recommend adopting the approach suggested by the CCC to immediately limit airport expansion or directly constrain passenger growth**. Covid has had a significant impact on the aviation sector and may well lead to lower long-term demand forecasts as a result. Now is not the time to be announcing further curbs on the sector.

7. Crucially, there are alternatives. The CCC's "Widespread Innovation" scenario sees greater emissions reductions than their "Balanced Pathway" despite double the demand growth, because of greater uptake of decarbonisation technologies. Sustainable Aviation's 2020 Roadmap sees net zero reached in 2050 with a 65% increase in demand. A similar European study saw net zero reached with just 8% residual emissions, with no direct demand constraint. Rather than an overly precautionary approach that seeks to limit demand now - at significant economic and social cost - we advocate for a technology- focused approach, to accelerate the transition to zero and net zero emission flight.

8. To support this, we recommend consulting on deploying measures that constrain supply as a 'last resort', only to be used if both (a) the sector was proven to be off-track in delivering the emissions reductions we need, and (b) there were no other intervention options to reduce emissions. This has two advantages by ensuring:

a. A credible pathway to net-zero: Technology-led pathways are promising, but there is no guarantee of success. The technologies we need - sustainable aviation fuels, zero emission aircraft, and greenhouse gas removal technologies - are all at an early stage; and we cannot guarantee they will deliver the carbon savings required. Retaining the option of further managing demand if the technology does not deliver will strengthen the credibility and robustness of our net zero pathway, and moderate some criticism of us not taking on board the CCC's advice, and lagging behind our international partners.

b. Ensuring sector-wide focus on technology led net-zero: for the technology-led approach to succeed, it will need all parts of the aviation sector to play their part: aerospace manufacturers, airports and airlines. Knowing that a lack of decarbonisation progress may limit their growth potential will incentivise progress, galvanise efforts and ensure such a backstop is never required. Without certainty on the government's position, parts of the sector may feel immune to their decarbonisation obligations.

9. Ministers have removed references to a demand 'backstop' or 'last resort' from submissions on the TOP and NZAC. However, describing interventionist demand management measures as a 'last resort' has been suggested by Jet Zero Council CEO (and

> Heathrow COO) Emma Gilthorpe, who views it as proportionate for a responsible Government committed to its climate change targets. It is also favoured by the pan-sector Sustainable Aviation partnership. Whilst neither want to see Government restrict demand, they are concerned that without reference to it as a 'last resort', our plans will not be seen as credible, and the sector will not sufficiently focus on making the transition. We agree."

41. Ms Gilthorpe's views on demand management, summarised at paragraph 9 in the quote above, were summarised in an email from Mr D. Abelscroft, Head of Strategy & Technology, Aviation Decarbonisation Division, to Ms Greig, dated 16 April 2021. Ms Gilthorpe did not think that demand management was "a good idea, and that costs will outweigh the benefits" but she agreed that it had to be addressed in the consultation, given the CCC report. In her view, demand management should be acknowledged as a last resort only. Whilst these were expressed as her views and she was not speaking in a representative capacity, her position as Industry Chief Executive Officer on the Jet Zero Council and Chief Operating Officer at Heathrow, meant that it was part of her role to reflect the position and views of the aviation industry.

42. Annex 1 to the ministerial submission, titled "What is 'demand management'?", identified areas such as modal shift (affecting demand by making alternative lower carbon transport modes available); increasing the cost of flights; and constraining supply by preventing the expansion of airports, limiting passenger numbers, and banning flights on short routes where there is a rail link.

43. Annex 2 summarised action taken by other countries to curb demand. Annex 3 addressed airport expansion plans and current government policy in the 'Airports National Policy Statement' ("NPS") and 'Beyond the Horizon – The Future of UK Aviation: Making Best Use of Existing Runways' ("MBU"). It warned that consulting on stronger demand management as a last resort may add uncertainty to the planning system and affect investor confidence.

44. The Defendant (then Grant Shapps MP) responded on 10 May 2021, rejecting officials' recommendation to consult on demand management. The readout of the decision is in an email of 10 May 2021. The views of the Defendant, and Minister Maclean and Aviation Minister Courts were briefly expressed in annotations on the ministerial submission and an email from the Defendant's private secretary. Drawing these responses together, the Defendant was clear that he would never endorse demand management; he wanted to see more flying and therefore global opportunities for Britons and therefore "we must simply work for tech solutions". The Defendant agreed with views expressed by the Aviation Minister that (1) we can only address the issue of demand management in the consultation if we clearly reject it; (2) exploring demand management, even as a backstop, would begin a "slippery slope towards restricting travel and closing down the world"; (3) "we should continue to make clear that technology must and will provide the answers, and that it's not Government's role to engineer people's lives and choices". The Aviation Minister also stated that "he wanted to get people flying (not stop them)", and he did not want to "make it harder for the sector that has already been battered by the pandemic". The Ministers and the Secretary of State wished to make clear that there would be reviews every 5 years to make sure the trajectory was on track.

The consultation

45. The first consultation on the JZS took place over 8 weeks between 14 July 2021 and 8 September 2021. In accordance with the Defendant's decision, the strategy consulted upon excluded DDM measures, and proposed a technology-led approach to decarbonising. Modelling assumed that airport growth would occur in the future without intervention.

46. The JZS made it clear to the reader that flying was considered to be a benefit and was not to be restricted by DDM, as follows.

47. The Foreword stated:

> "It is a strategy that will deliver the requirement to decarbonise aviation, and the benefits of doing so, whilst allowing the sector to thrive, and hardworking families to continue to enjoy their annual holiday abroad; we want Britons to continue to have access to affordable flights, allowing them to enjoy holidays, visit friends and family overseas and to travel for business.
>
> Decarbonising, whilst retaining the connectivity we cherish and preserving our aviation sector means we must act quickly to revolutionise the technologies needed across the aviation industry: develop cleaner aircraft, produce and use more sustainable fuels, and make our airspace and airports more efficient.
>
> This is your opportunity to help shape our strategy and give your perspective on how we decarbonise the aviation sector whilst continuing to benefit from the connectivity, jobs and economic benefits it provides."

48. The Introduction stated, at 1.1 to 1.2:

> "1.1 Aviation and the UK go hand in hand. We were pioneers of early flight, and the sector has long been at the heart of our economic success. It is vital for trade and the distribution of goods, creates jobs, connects friends and family, and – crucially for an island nation – links us to the rest of the world. Flight is essential for our Global Britain ambitions of openness as a society and an economy.
>
> 1.2 The importance of aviation to the UK is why we are supporting the sector through the COVID-19 pandemic – by the end of September 2021, the air transport sector (airlines, airports, and related services) will have benefited from around £7bn of government support. But we know that the virus has had a devastating effect, and our airports, airlines and aircraft manufacturers are all feeling the financial impact of reduced demand."

49. Chapter 2, titled "Our Approach and Principles", which identified three guiding principles, described the overall aim of the strategy as follows:

> "2.1 The aim of our strategy is for aviation to decarbonise in a way that preserves the benefits of air travel and delivers clean growth of the UK sector by maximising the opportunities that decarbonisation can bring."

50. The section on "Influencing Consumers" explained that "[w]e want to preserve the ability for people to fly whilst supporting consumers to make sustainable travel choices". It added:

> "3.39 Flying is a social and economic good, and one that we wholeheartedly support as a key part of building a Global Britain; our strategy will focus on decarbonising aviation and delivering sustainable flying for everyone. This Government is committed to tackling the CO_2 emissions from flights, whilst preserving the ability for people to fly.
>
> 3.40 COVID-19 has devastated passenger numbers over the short-term, and we do not yet know what the longer-term effects on demand might be. Only as the pandemic continues to come under control and consumer confidence returns, will we begin to understand how it will affect the sector over the longer-term.
>
> 3.41 Nonetheless, even if the sector returns to a pre-COVID-19 demand trajectory, as we have assumed in our analysis, we currently believe the sector can achieve Jet Zero without the Government needing to intervene directly to limit aviation growth. The industry's need to rebuild from a lower base is likely to mean that plans for airport expansion will be slower to come forward. Our analysis shows that there are scenarios that can achieve similar or greater CO_2 reductions to those in the CCC's Balanced Pathway(which limits growth to 25% by 2050 compared to 2018 levels compared to a baseline of 65% growth) by focussing on new fuels and technology, with the knock-on economic and social benefit, rather than capping demand."

51. Views were sought on the proposed approach to five core policy measures, namely:

    i) System efficiencies.

    ii) Sustainable aviation fuels.

    iii) Zero-emission flight (the decarbonisation of aircraft, including hydrogen-electric and battery-electric aircraft).

    iv) Carbon markets and greenhouse gas removal technologies.

    v) Influencing consumers to make sustainable travel choices when booking flights.

52. Chapter 4 addressed non-CO_2 impacts from aviation and sought views on its proposals:

> "We are working to address non-CO_2 impacts in the following ways:
>
> • Many of the measures to improve efficiencies, rollout SAF, and accelerate zero emission flight are expected to have a positive impact on reducing non-CO_2 emissions and effects. Where there is evidence to the contrary, we will carefully consider the overall impact on the climate.
>
> • We are improving our understanding of the impact of the non-CO_2 emissions and will ensure that the latest scientific understanding of aviation non-CO_2 effects is used to inform our policy.
>
> • ICAO now has standards in place to regulate all aircraft emissions with significant climate effects. We will continue to negotiate for these to be improved over time as well as consideration of other measures such as operational guidance and regulation of fuel composition.
>
> • We will consider the outcomes of EUROCONTROL's Contrail Prevention Trial and whether it would be beneficial to undertake similar trials in the UK in the future."

53. Consultees' views were also specifically sought on the proposed interim target of net zero domestic aviation by 2040, and the illustrative scenarios set out as possible trajectories to net zero aviation 2050.

54. The consultation concluded with 15 questions, none of which directly invited comment on DDM, although many consultees raised DDM in their responses.

Jet Zero Consultation: Evidence and Analysis

55. The 2021 consultation was accompanied by the 'Jet Zero Consultation: Evidence and Analysis' ("the EAD") which contained detailed expert evidence and analysis produced by experienced analysts to explain the proposal and to facilitate comment. Additionally, a further Jet Zero Consultation dataset was published on 13 August 2021, which set out additional details of the assumptions underpinning each of the illustrative scenarios in the 2021 Consultation.

56. The introduction to the EAD noted that net zero aviation would be achieved through a mix of different technologies, including the adoption of sustainable aviation fuel and zero emission flights. It stated that these technologies were in the early stages of development and there was significant uncertainty regarding the expected cost, availability, and uptake of these technologies over the coming decades.

57. Paragraph 1.2 of the introduction then explained that the EAD "summarises evidence provided by the Climate Change Committee (CCC), industry, academics, and others, on the potential emissions reductions, uptake, and cost of abatement measures in aviation". This evidence included, but was not limited to, the Department's aviation

model (which is also used by the CCC), BEIS guidance on carbon valuation, timelines for the deployment of zero-emission aircraft, and aviation decarbonisation future scenarios from the CCC.

58. The EAD described each of the five proposed measures to deliver net zero and the underlying assumptions for each of those measures. It confirmed that, apart from the application of a carbon price, none of the scenarios assumed any additional demand management measures (paragraph 3.3). These assumptions were then used to model the four illustrative scenarios in the 2021 Consultation as alternative pathways for reaching net zero aviation by 2050. These scenarios were:

    i) **Scenario 1**: Continuation of current trends, represented no step-up in ambition on sustainable aviation fuel or annual efficiency improvements, nor any introduction of zero emission aircraft. However, this scenario did include a carbon price on international flights that were not currently captured by UK Emissions Trading Scheme. The carbon price by 2050 in this scenario was set at £231/tCO_2, with a projected 60% increase in passengers between 2018-2050. UK aviation residual emissions were estimated to be 35,735,870 tonnes of CO_2 by 2050, compared to 36,416,308 tonnes of CO_2 in 2019.

    ii) **Scenario 2**: High ambition, represented a step-up in ambition on efficiency improvements, sustainable aviation fuel uptake and the introduction of zero emission aircraft. The carbon price by 2050 in this scenario was set at £231/tCO_2, with a projected 60% increase in passengers 2018-2050. UK aviation residual emissions were estimated to be 20,926,111 tonnes of CO_2 by 2050, compared to 36,416,308 tonnes of CO_2 in 2019.

    iii) **Scenario 3**: High ambition with a breakthrough on sustainable aviation fuel, represented a speculative scenario where carbon price is higher, and sustainable aviation fuel emerges as a more cost-effective solution, comprising a very high proportion of aviation fuel usage by 2050. The carbon price by 2050 in this scenario was set at £346/tCO_2, with a projected 58% increase in passengers between 2018-2050 (adjusted as a result of high carbon price). UK aviation emissions were estimated to be 8,643,918 tonnes of CO_2 by 2050, compared to 36,416,308 tonnes of CO_2 in 2019.

    iv) **Scenario 4**: High ambition with a breakthrough on zero emission aircraft, represented a speculative scenario where carbon price is higher and there is a significant advance in zero emission technology alongside an acceleration of current aircraft replacement rates. The carbon price by 2050 in this scenario was set at £346/tCO_2, with a projected 58% increase in passengers between 2018-2050 (adjusted as a result of high carbon price). UK aviation residual emissions were estimated to be 17,440,509 tonnes of CO_2 by 2050, compared to 36,416,308 tonnes of CO_2 in 2019.

59. The EAD set out a rationale and a source for the underlying technical assumptions used in each pathway. The modelling demonstrated that a jet zero target could be achieved without directly limiting demand, and with potential economic and social benefits.

60. Ms Greig also refers to the JZS analytical annex, at Greig 1/59:

> "This approach to modelling capacity was consistent with the EAD to the JZS analytical annex, which was published at the same time as the JZS. In the JZS analytical annex, the assumptions on passenger demand were higher than those in the EAD. This is due to the significant aviation model development that occurred between the two publications and the updated carbon price assumptions that were introduced in the Jet Zero further technical consultation 2022. In the JZS analytical annex, passenger numbers in Scenario 1 were 74% higher in 2050 than 2018 and in scenarios 2, 3 and 4 they were 70% higher."

Jet Zero further technical consultation 2022

61. On 3 February 2022, advice was sent to the Defendant and his ministers, recommending that the Department for Transport's updated aviation model and new carbon price assumptions should be used in the illustrative scenarios proposed for the JZS, and to do a short technical re-consultation on the updated scenarios.

62. Previous carbon price assumptions used in the EAD were sourced from BEIS guidance on carbon valuation. However in their September 2021 update, BEIS changed the methodology, which meant their carbon values no longer reflected the carbon prices airlines operators face in the short-medium term. It was therefore decided, and agreed with BEIS, that the Department for Transport would produce its own set of carbon price assumptions to be used in the JZS further technical consultation.

63. On 16 February 2022, the Defendant and his ministers agreed to re-consult as proposed. The further technical consultation was published on 21 March 2022 and was open for 5 weeks, until 25 April 2022. 150 responses were received.

Demand management in the 2021 and 2022 consultations

64. Ms Greig describes (at Greig 1/66 – 67) the distinction drawn between DDM (such as stopping airport expansion or reducing landing slots) and indirect demand management (such as carbon pricing or increased costs of fuels or technologies passed on to passengers). The Defendant rejected measures related to DDM and maintained this position as a "red line" throughout the process. However, the 2021 consultation explained, at page 39, paragraph 3.44:

> "We expect the approach set out in this draft strategy could impact demand for aviation indirectly. Where new fuels and technologies are more expensive than their fossil-fuel equivalents, and where the cost of CO_2 emissions are correctly priced into business models, we expect, as with any price rise, a moderation of demand growth."

65. In the 2021 consultation, the indirect impact on demand was reflected in the illustrative scenarios, with demand impact due to carbon pricing accounting for 8.8% emissions savings in 2050. In the JZS further technical consultation in 2022, this figure was increased to 27%, which was reflected in the final JZS.

The decision to publish the JZS

66. On 26 May 2022, a ministerial submission was sent to the Defendant and his ministers seeking agreement to the JZS policies, and approval to publish the Summary of Consultation Responses. The Summary of Consultation Responses document, at Annex A, noted where DDM measures had been raised as part of responses to individual questions. It also included a section on DDM which stated:

> "*There were no direct demand management proposals included in the Jet Zero Consultation, however, these measures were raised in response to many of the questions asked*.
>
> Responses from the aviation industry were largely supportive of the proposals set out in the consultation; however, there was significant challenge from individual respondents and some organisations regarding the lack of direct demand management proposals, which were perceived as measures which could have a more immediate effect on reducing emissions from aviation. The most frequently raised subjects were airport expansion, with references to the Government's Airports National Policy Statement and its Making Best Use of Existing Runways policies; a frequent flyer levy; taxing aviation fuel and adding VAT to ticket sales. Encouraging more sustainable modes of transport, such as travelling by rail rather than via domestic flights, was also a common theme. These responses often referenced the CCC's Balanced Net Zero Pathway for aviation where growth is restricted to 25% by 2050 compared to 2018 levels, compared to unconstrained growth of around 65% over the same period. Respondents suggested a further scenario could be included in the final Jet Zero Strategy, which explored the impacts of reduced demand."

67. Ministers were also provided with an equalities analysis of the JZS policies, including DDM measures ("the May 2022 EqA"). Officials highlighted to the Defendant that he was required to have due regard to the PSED when considering the policies set out.

68. Annex B set out updates or changes to policies since the 2021 consultation, which are listed in Greig 1/83. They included a commitment to work with the CCC to explore their recommendation for no additional non-CO_2 warming from aviation after 2050 and to develop a methodology to monitor the non-CO_2 impacts from aviation on a regular basis, responding to consultation responses.

69. The Defendant agreed the recommendations in the submission and further work was then undertaken to complete the JZS for final approval. On 27 June 2022, a further ministerial submission was sent to the Defendant and his ministers, seeking their agreement to publish the amended version of the JZS. A revised draft of the Summary of Consultation Responses was provided, which included a government response to each question asked in the consultation, which was intended for publication, with the JZS (the earlier Summary of Consultation Responses submitted in May 2022 had not been published). An updated equalities analysis was also sent to the Defendant to

consider. On 1 July 2022, Special Advisers provided feedback and proposed some amendments, and further modifications were made.

70. Following the Defendant's final approval, the JZS was published on 19 July 2022, with accompanying documents.

Consultation responses

71. There were 1,341 responses to the 2021 consultation. Departmental officials conducted an in-depth analysis of responses for each of the five core policy measures, to inform further policy development. The main themes included strong support for a 2040 net zero target for domestic aviation and a CO_2 emissions reduction trajectory to 2050; broad support for the High Ambition scenario; and concerns that the annual efficiency assumptions were being over-optimistic. On 2 February 2022, officials updated the Defendant on their findings, including ongoing work and next steps for policy development. A comparison with policies proposed by other countries was also included.

72. Officials also carried out an in-depth analysis of the responses on DDM, which were raised across all consultation questions. They were focussed around stopping the expansion of airports, increased taxation, and policies to target frequent flyers. Many consultees expressed the view that DDM could have an immediate impact on reducing emissions.

73. Officials also carried out an in-depth analysis of the 150 responses to the JZS further consultation in 2022.

74. As stated above, a Summary of Consultation Responses was submitted to the Defendant and his ministers on 26 May 2022 and a revised version, which included departmental responses, was submitted on 27 June 2022.

75. Question 2 of the 2021 Consultation asked for views on the illustrative scenarios. There were mixed responses. Some consultees felt that the scenarios were overly reliant on technology that may not be commercially viable by 2050, were not backed up with sufficient evidence and were too speculative. Alternative scenarios were suggested, notably, to include DDM and to include the non-CO_2 impacts from aviation. Similar points were raised in response to the 2022 further technical consultation.

76. In response to the issue of non-CO_2 emissions, the Defendant stated:

> "Some responses to both consultations raised the need to also consider non-CO_2 emissions from aviation. We recognise that both the CO_2 emissions and non-CO_2 impacts of aviation affect the climate, and through the Jet Zero Strategy we have set out our commitments to develop our understanding and potential mitigations of these impacts. Although CO_2 makes up the vast majority of GHG emissions for aviation, the illustrative scenarios presented in the Jet Zero Strategy are expressed as CO_2e which includes emissions from other GHGs such as methane (CH_4) and nitrous oxide (N_2O).

> The analysis does not currently take into account the effects of other non-CO_2 impacts such as contrails and Nitrogen oxides (NOx) emissions due to the current uncertainties around their scale, and a lack of a clear methodology to monitor the non-CO_2 impacts of aviation. However, we continue to work closely with academia and industry as the scientific understanding develops in this area, and will consider introducing a methodology to monitor these impacts as the evidence becomes available. As before, our five-year reviews will enable us to update our modelling, which could include analysis of non-CO_2 impacts as and when the science allows."

77. Issues concerning non-CO_2 emissions were also raised in response to questions 12 and 15.

78. The Defendant made an overall response to the responses concerning DDM, as follows:

> "Whilst we did not consult on any direct demand management measures through either the Jet Zero consultation or further technical consultation, this theme was raised regularly by respondents to every question posed.
>
> The aviation sector is important for the whole of the UK economy in terms of connectivity, direct economic activity, trade, investment and jobs. Before COVID-19, it facilitated £95.2bn of UK's non-EU trade exports; contributed at least £22bn directly to GDP; and directly provided at least 230,000 jobs across all regions of the country.
>
> The Government remains committed to growth in the aviation sector where it is justified and to working with industry to ensure a sustainable recovery from the pandemic. Our analysis set out in the Jet Zero further technical consultation shows that the aviation sector can achieve Jet Zero without the Government needing to intervene directly to limit aviation growth, with scenarios that can achieve our net zero targets by focusing on new fuels and technology, with knock-on economic and social benefits, without limiting demand. Our "High ambition" scenario, has residual emissions of 19.3 $MtCO_2e$ in 2050, compared to 23 $MtCO_2e$ residual emissions in the CCC's Balanced Pathway. We recognise that to achieve this trajectory we will need to see significant investment in, and uptake of, new technologies and operational processes and the Government is committed to working with the sector to ensure we achieve our aims.
>
> Furthermore, our analysis includes updated airport capacity assumptions consistent with known expansion plans at UK airports and where our forecasting suggests higher demand in the future. Airport growth has a key role to play in boosting our global connectivity and levelling up in the UK. The Government

is, and remains, supportive of airport expansion where it can be delivered within our environmental obligations. Our existing policy frameworks for airport planning - the ANPS and MBU - provide a robust and balanced framework for airports to grow sustainably within our strict environmental criteria. We do not, therefore, consider restrictions on airport growth to be a necessary measure.

Although our strategy does not include direct demand management measures, in our updated "High ambition" scenario, the demand impact of carbon pricing results in 27% of abatement in 2050, demonstrating how our economy-wide carbon pricing schemes deliver significant carbon savings and act to moderate demand.

Many respondents expressed their support for a frequent flyer levy (FFL) as the primary tax on the aviation sector. As part of the Treasury's consultation on aviation tax reform, the Government sought views on whether an FFL could replace APD as the principal tax on the aviation sector. In the responses received to the consultation, the Government received a wide range of views on this, which it considered carefully. Following the consultation, the Government published a response which outlined that it was minded to retain APD as the principal tax on the aviation sector, noting particular continuing concerns around the possible administrative complexity and data processing, handling and privacy of an FFL.

The Chancellor also announced a package of APD reforms to be introduced from April 2023 that aim to bolster air connectivity within the Union and further align the tax with the Government's environmental objectives.

….

Our Jet Zero Strategy confirms our approach to supporting consumers to make sustainable travel choices, restates our commitment to global leadership in decarbonising the aviation sector, and emphasises the work we will do with industry and academia to achieve our Jet Zero goals. It also shows our commitment to scaling up the UK SAF industry, and confirms that we will continue to support industrial R&D through the ATI Programme through funding. These policies demonstrate our commitment to tackling climate change and delivering Jet Zero.

As a responsible government, and given the nascent nature of the technologies required to decarbonise aviation, we have committed to reviewing our strategy every five years and adapting our approach based on progress made. We will measure progress against our emissions reduction trajectory and key

> performance indicators which have been set out across each of our policy measures in the Jet Zero Strategy."

The 2023 Review

79. At Greig 2/6, Ms Greig summarises the changes of Government and ministerial positions in 2022. The Secretary of State for Transport was Grant Shapps MP from 24 July 2019 to 6 September 2022; Anne-Marie Trevelyan MP from 6 September 2022 to 25 October 2022; and Mark Harper MP from 25 October 2022 to 5 July 2024.

80. At Greig 2/9 to 11, Ms Greig describes the briefing of the new Secretary of State, Mr Harper MP, on the JZS and the approach to decarbonising aviation at a meeting on 13 December 2022. The Defendant asked for updated information and modelling. In January 2023, officials undertook aviation modelling which showed reduced forecast passenger demand growth under the High Ambition scenario. This updated modelling was included in the development of quantified emissions savings for the purposes of the Carbon Budget Delivery Plan and the document 'Jet Zero Strategy: One year on'.

81. On 28 June 2023, the CCC issued its 2023 Progress Report to Parliament which is summarised at Greig 2/17 to 18, and paragraph 26 above. It considered that the JZS had provided more certainty but risks remained unaddressed, in particular planning for potential delays in nascent technology roll-out. It reiterated its previous position that Government should develop policy options to address aviation demand and made 17 recommendations relating to aviation. Officials advised the Defendant on the Progress Report on 6 July 2023.

82. On 20 July 2023, the Department for Transport published the 'Jet Zero Strategy: One year on' document. It set out the progress made in delivery of its commitments in the JZS, including publication of the second sustainable aviation fuel mandate consultation. It stated that "[t]the updated High Ambition scenario has 18.7 $MtCO_2e$ residual emissions in 2050 compared to 19.3 $MtCO_2e$ in the original analysis. We will continue to keep our modelling under review in light of the latest data and new evidence as it emerges". The document also acknowledged the challenges in delivering net zero aviation.

83. At Greig 2/21, Ms Greig describes the reasons for the 2023 Review as follows:

> "Against the backdrop of the CCC's 2023 Progress Report, and the Department's intention to keep the JZS under review (as reflected in One year on), as well as the ongoing JZS1 litigation, the SST indicated that he would like to reconsider with an open mind DDM policy options, as well as JZS consultation responses, and relevant developments and literature since the JZS consultation, including the CCC's advice, in order to take a new decision on whether DDM should form part of our approach to decarbonising aviation."

84. Accordingly, officials prepared a ministerial submission, dated 6 July 2023, which stated:

"**Issue**

1. This submission provides advice on direct demand management (DDM) in the context of the Jet Zero Strategy (JZS) and the Climate Change Committee's (CCC) latest report, and seeks your view on whether officials should further develop policy options on DDM.

Recommendation

2. That you:

Note the CCC's latest progress report to Parliament and their references to and recommendations on aviation DDM (Annex A and B).

Note the implications for our JZS from updated DfT modelling and the most prominent and relevant external literature since the publication of the JZS (Annex C).

Consider the factual summary of JZS consultation responses that relate to DDM (Annex D), the published summary of consultation responses and government response (Annex E) and the summary of potential DDM policy options (Annex F).

Agree that based on the latest evidence, we should continue to pursue the approach set out in the JZS and **provide a steer** on whether officials should further develop policy options on DDM either as part of the regular JZS review process or sooner.

Background

3. The JZS has been criticised by environmental groups and members of the public for failing to incorporate policy measures on DDM. They suggest Government should have followed the CCC's advice in their Sixth Carbon Budget report, which states that DDM measures should be implemented to limit aviation growth to 25% by 2050 compared to 2018 levels (with unconstrained growth projected at ~65% over the same period). We are defending two judicial review claims against the JZS, which include grounds relating to the CCC's advice, and that the then SoS had a "closed mind" in relation to DDM.

4. The CCC criticised the lack of a demand management framework in the JZS in their June 2022 Annual Report to Parliament. In their 2023 Progress Report on 28 June, they reiterate their position that the JZS is high-risk due to its reliance on nascent technology and make the same core recommendations to introduce measures on DDM as the most effective way of reducing aviation's CO_2 emissions. They again recommend development of policy options to address aviation

demand, including 'no airport expansion without a UK-wide capacity-management framework'.

Considerations

5. The CCC's latest Progress Report provides an opportunity to further consider DDM in our approach to decarbonising aviation, particularly given the high degree of uncertainty within our JZS. This uncertainty derives from many technologies required to decarbonise aviation being in early development, and the intentionally ambitious assumptions made in the JZS about their contribution to emission reductions.

6. We have reviewed the most prominent literature since publication, which demonstrates that our assumptions relating to different technologies continue to be towards the upper end of what is likely to be feasible. We do not consider that any literature reviewed as part of this exercise, including the CCC's most recent report, represent material changes that would require a further public consultation on the JZS.

7. We have also recently updated our modelling, which continues to show that Jet Zero could be achieved under more pessimistic assumptions about future technologies, without the use of DDM. This indicates that our strategy remains reasonable, although given the inherent uncertainty, our approach will continue to reflect a balanced judgement call. The analytical assurance rating is medium. Details of the literature review and our updated modelling, along with an analytical assurance statement are at Annex C.

8. The responses to the JZS consultations relating to DDM should also be considered. The key themes are at Annex D, which largely focussed on preventing unconstrained growth, taxation measures and supporting domestic rail routes. It should be noted that most responses from the aviation industry did not advocate DDM as with the right support, they considered that measures set out in the consultation would be sufficient to meet Jet Zero. Annex E includes the full published summary of responses and government response.

9. Taking these responses and wider literature into account, we have also developed a list of potential DDM policy options that could be taken forward, covering: management of airport capacity; aviation tax measures; and modal shift. This is provided at Annex F.

10. You will want to consider all of the information in this submission and annexes carefully, and specifically note the ongoing uncertainty relating to the development of technologies and fuels needed to decarbonise aviation. On balance, we

> recommend that you agree we should continue pursuing the approach set out in the JZS as we consider that our underpinning assumptions remain reasonable. We request you also provide a steer on whether we should further develop policy options on DDM as part of the regular JZS review process or sooner. We have committed to reviewing progress against our emissions reduction trajectory annually from 2025, and our overall strategy every five years.
>
> 11. Legal Issues: The legal issues relating to this submission are at Annex G.
>
> 12. Public Sector Equality Duty: An equality analysis for the JZS was carried out (Annex H), which includes considerations of the impact of DDM. It identified that there may be some indirect impacts to people or groups in relation to the protected characteristics of age, disability, and race, as well as local population demographics. A further assessment has not been undertaken at this stage, as the policy proposal has not been developed further since the commitment was made in the JZS. However, the public sector equality duty is a continuing duty and further equality assessments will be undertaken during the development of policy options on DDM if you provide this steer."

85. On 31 October 2023, the SST responded as follows:

> "The Secretary of State, Minister Norman and Baroness Vere have reviewed this submission and agreed, based on the latest evidence, the Department should continue to pursue the approach set out in the Jet Zero Strategy. They also agreed that no further policy development on DDM was required at this time.
>
> The Secretary of State, Minister Norman and Baroness Vere have considered the factual summary of JZS consultation responses that related to DDM, the published summary of consultation responses and Government response and the summary of potential direct demand management policy options. They have also noted the CCC's latest progress report to Parliament (including references to and recommendations on aviation DDM) and implications for the JZS from updated DfT modelling and the most prominent and relevant external literature since the publication of the JZS."

86. During the same period, Government was in the process of preparing the Government Response to the CCC's 2023 Progress Report to Parliament. On 1 September 2023, advice was sent to the Defendant and his ministers which covered the draft recommendations for the whole of transport. This included the recommendation to reject the CCC's recommendation that "no airport expansions should proceed until a UK-wide capacity management framework is in place". The justification stated:

> "The analysis that supports the JZS demonstrates that airport growth can be compatible with our net zero target, and Government policy is to support airport growth. As our evidence and policies have not changed since the CCC's last report, the desired outcome is to set out that our position remains the same but to assure the CCC that we will consider reviewing our planning frameworks should something change".

87. Minister Norman and Baroness Vere read out on the submission on 21 September 2023 stating they were content with the recommendations. The Government response was published on 26 October 2023.

Legal principles

Irrationality

88. In *R (Law Society) v Lord Chancellor* [2019] 1 WLR 149, Carr J. giving the judgment of the Court, described the test for irrationality as follows:

> "98. The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of "irrationality" or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is "so unreasonable that no reasonable authority could ever have come to it": see *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 233-4. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. *Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143, 175 (Lord Steyn). The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it - for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error. Factual error, although it has been recognised as a separate principle, can also be regarded as an example of flawed reasoning - the test being whether a mistake as to a fact which was uncontentious and objectively verifiable played a material part in the decision-maker's reasoning: see *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044."

The *Tameside* duty

89. The duty of sufficient inquiry established in *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, per Lord Diplock, at 1064-1065, was helpfully described in *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647, per Underhill LJ at [70]:

> "70. The general principles on the *Tameside* duty were summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at paras. 99-100. In that passage, having referred to the speech of Lord Diplock in *Tameside*, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since Tameside itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a Wednesbury challenge, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken: see *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37, at para. 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

Material considerations

90. In *R (Friends of the Earth Ltd & Anor) v Secretary of State for Transport* [2021] PTSR 190, Lord Hodge and Lord Sales set out the relevant principles on material considerations as follows:

> "116. ….. A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:

> "… [T]he judge speaks of a 'decision-maker who fails to take account of all and only those considerations material to his task'. It is important to bear in mind, however, … that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process."

117. The three categories of consideration were identified by Cooke J in the *New Zealand Court of Appeal in CREEDNZ Inc v Governor General* [1981] NZLR 172, 183:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."

Cooke J further explained at p 183 in relation to the third category of consideration that, notwithstanding the silence of the statute, "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] … would not be in accordance with the intention of the Act."

118. These passages were approved as a correct statement of principle by the House of Lords in *In re Findlay* [1985] AC 318, 333-334. See also *R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189, paras 55-59 (Lord Brown of Eaton-under Heywood, with whom a majority of the Appellate Committee agreed); *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756, para 40 (Lord Bingham of Cornhill, with whom a majority of the Appellate Committee agreed); and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221, paras 29-32 (Lord Carnwath, with whom the other members of the court agreed). In the Hurst case, Lord Brown pointed out that it is usually lawful for a decision-maker to have regard to unincorporated treaty obligations in the exercise of a discretion (para 55), but that it is not unlawful to omit to do so (para 56).

> 119. As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305; [2018] PTSR 2063, paras 20-26, in line with these other authorities, the test whether a consideration falling within the third category is "so obviously material" that it must be taken into account is the familiar Wednesbury irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411 per Lord Diplock).
>
> 120. It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in *Corner House Research* at para 40. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.
>
> 121. Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in the present case. The question again is whether the decision-maker acts rationally in doing so. Lord Brown deals with a case of this sort in *Hurst* (see para 59). This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight: see, in the planning context, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL), 780 (Lord Hoffmann)."

Grounds of challenge by Possible and GALBA to the JZS 2022

Possible Claim 1, Ground 2 (*Tameside* duty and CCA 2008)

Possible's submissions

91. Possible submitted that, in developing and adopting the JZS, the Defendant breached (a) the *Tameside* duty of inquiry and (b) the requirement to have regard to obviously material considerations, both on the basis that either (i) the JZS was a policy or proposal or a package of policies or proposals, prepared by the Defendant for the purpose of the continuing obligation on the relevant Secretary of State under section 13(1) CCA 2008;

or (ii) the JZS sets out the policies relied upon by the Defendant in relation to how he intends to decarbonise aviation.

92. As a matter of practice, the obligation under section 13(1) CCA 2008 is discharged by the SSESNZ through a process of "commissions" and "returns" from other departments on their policies. Sector teams have primary responsibility for devising the proposals that result in emissions savings. The purpose of the JZS was to set out the Government's policies to decarbonise aviation by 2050. Therefore the JZS was a "proposal or policy" for the purpose of section 13 CCA 2008, prepared by the Defendant, with the intention that the SSESNZ would use the section 13(4) power to take account of the policies and proposals of other national authorities, as explained by the Court in *Global Feedback* at [75], [85] and [93].

93. In the alternative, the Defendant's purpose in developing the JZS was to prepare policies for use by the SSESNZ under section 13(1) CCA 2008 and/or to ensure that aviation will achieve net zero by 2050. Therefore he had to satisfy himself that he had sufficient information to achieve these aims.

94. The duty of inquiry necessarily included consideration of:

i) the deliverability of policies in the JZS, in the light of repeated warnings from the CCC and consultees that the JZS was too optimistic about technological progress;

ii) the timescales over which the policies would take effect;

iii) quantitative projections in respect of each policy measure, including specifically the estimated carbon savings;

iv) the justification of relying upon any unquantified policies to make up the shortfall.

95. Possible no longer pursued any point in relation to emissions from military aviation and withdrew the unpleaded point in paragraph 45(e) of its skeleton argument ("the impact of cumulative risks and uncertainties on deliverability of the JZS overall").

Conclusions

96. In my view, Possible's submissions based on section 13(1) CCA 2008 are unsustainable in the light of *Global Feedback* where similar submissions were rejected by the Court of Appeal.

97. Section 13 CCA 2008 is entitled "Duty to prepare proposals and policies for meeting carbon budgets." It provides as follows:

> "(1) The Secretary of State must prepare such proposals and policies as the Secretary of State considers will enable the carbon budgets that have been set under this Act to be met.
>
> (2) The proposals and policies must be prepared with a view to meeting –

> (a) the target in section 1 (the target for 2050), and
>
> (b) any targets set under section 5(1)(c) (power to set targets for later years).
>
> (3) The proposals and policies, taken as a whole, must be such as to contribute to sustainable development.
>
> (4) In preparing the proposals and policies, the Secretary of State may take into account the proposals and policies the Secretary of State considers may be prepared by other national authorities."

98. Section 14 imposes a duty on the Secretary of State to lay before Parliament a report setting out proposals and policies for meeting the carbon budgets for the current and future budgetary periods.

99. In *Global Feedback*, the Court of Appeal concluded that sections 13 and 14 CCA 2008 did not apply to the preparation by the Secretary of State for Environment, Food and Rural Affairs ("SSEFRA") of the Government's Food Strategy ("the Food Strategy"), which was published on 13 June 2022. The Food Strategy, like the JZS, was identified in the Net Zero Strategy as a measure to support the delivery of net zero. The Court held that the section 13 duty was the sole responsibility of the SSESNZ (and previously the SSBEIS), as the "Secretary of State who bears the primary responsibility for ensuring that carbon budgets are established and met". This was principally because discharging the section 13 duty "effectively requires a strategic and … a "whole-economy", or "economy-wide" judgment to be applied by the Secretary of State" [80].

100. In rejecting the submission that section 13 also applied to the SSEFRA's publication of the Food Strategy and its preparation, the Court held, amongst other things, as follows:

> "83. In our view, the Secretary of State with responsibility for the functions contained in Part 1 is uniquely well placed to discharge the duty in section 13 . He has an overview of the whole economy, is conscious of the likely levels of greenhouse gas emissions in all sectors of it for the budgetary period or periods in question, and is able to judge the potential for appropriate action to ensure the meeting of carbon budgets. The section 13(1) duty therefore corresponds to the "whole economy" or "economy-wide" approach envisaged in Part 1, with a single Secretary of State holding responsibility for the setting and implementation of the carbon budgets.
>
> 84. We reject the piecemeal or multipartite approach to the performance of the section 13 duty advocated by Mr Wolfe, in which that particular task is divided between different ministers and departments of government, each responsible under section 13 for some notional proportion or "share" of the carbon budget for an individual sector of the economy. That is not what section 13 states, and we do not consider it is what Parliament intended.

> 85. This is not to say, however, that other ministers and departments are unable to prepare measures of their own that may have the effect of reducing greenhouse gas emissions and assisting the achievement of "net zero". Such measures may relate to the sector of the economy in which a particular department has responsibilities of its own, and for which its ministers and officials are well equipped to make sensible decisions. Their preparation is not impeded by the provisions in Part 1 of the Climate Change Act. It can aid the meeting of carbon budgets, and may well be of help to SSESNZ in performing his own duty to prepare proposals and policies of his own under section 13. But it does not in itself amount to the performance of that duty. Nor does it engage the other obligations placed on the Secretary of State in Part 1. Assistance of this kind to SSESNZ is made easier by his practice of commissioning returns from other departments. This, however, is a discretionary process and is not itself subject to any statutory procedure. It does not oblige any other minister or department to "prepare such proposals and policies as [they consider] will enable carbon budgets … to be met".
>
> …
>
> 88. Ms Ward submitted that the argument for Global Feedback misunderstands the status and purpose of the Food Strategy. The Food Strategy was not itself a proposal or policy within section 13(1), intended to discharge the obligation imposed on "the Secretary of State" in that provision. Its preparation and adoption did not engage the duties in sections 13 and 14. The kind of assessment held to have been required in Friends of the Earth did not arise in this case.
>
> 89. Ms Ward accepted that the section 13 duty is a continuing one, and not confined to the process of producing a report under section 14. Her basic point was straightforward; section 13 did not apply to the Food Strategy and its preparation.
>
> 90. In our view that is right. We cannot accept Mr Wolfe's argument on this issue. We think Ms Ward's submissions in response are sound. On the central question in the case, identified at the beginning of this judgment, we consider that section 13 of the Climate Change Act did not apply to the preparation of the Food Strategy. As a matter of legal analysis, and on the facts, this seems clear."

101. At [93], the Court also expressly rejected the submission that the Food Strategy was caught by section 13 on the basis that the SSEFRA prepared the strategy to enable his department's share of the carbon budgets to be met. It held:

> "93. … It is true that SSBEIS, when preparing his own proposals and policies under section 13, had looked to other ministers and

> departments, including DEFRA, to acquaint him with relevant strategies of their own. But in doing so he was not transferring to them the duty imposed only upon him. Rather, he was seeking their help in preparing the proposals and policies that he considered would enable the carbon budgets to be met. This was a judgment that he alone had to make under section 13, on the basis of an assessment spanning the whole economy, not merely an individual sector of it such as agriculture or the production of food."

102. It is clear that the same reasoning and principles necessarily apply to the Defendant's preparation and publication of the JZS. Possible's submissions fail to apply *Global Feedback*. The fact that the JZS, like the Food Strategy, is consistent with the Net Zero Strategy does not mean that its preparation is subject to the same obligations as apply to the preparation of the Net Zero Strategy. The mandatory considerations identified by Holgate J. in *R (Friends of the Earth and others) v SSBEIS* [2022] EWHC 1841 (Admin), now relied upon by Possible in this case, arose in the context of the statutory scheme under the CCA 2008 and the discharge of the section 13(1) duty (per Holgate J. at [204] – [217]).

103. Another illustration of this point arose in *R (Friends of the Earth) v Secretary of State for Environment, Food and Rural Affairs* [2024] EWHC 2707 (Admin) which concerned objectives that had been set by the Secretary of State under section 58(1)(a) CCA 2008 in relation to adaptation to climate change. Chamberlain J. held that the relevant objectives were not required by section 58 to be quantified or even quantifiable (at [116]), and that because "the law does not dictate that the 'objectives' under section 58(1)(a) must be set with at any particular level of specificity, the extent to which delivery risk must be considered will vary" (at [117]). It was only if the Secretary of State had chosen to define the adaptation objectives in a specific and quantifiable way that rationality would dictate the same emphasis on delivery risk as is required under Part 1 CCA 2008 (at [116]). Chamberlain J. rejected the application of the Net Zero Strategy judgment, argued for by the claimant at [110], outside of a context in which the "hard-edged obligations" in sections 1 and 4 CCA 2008 were centrally relevant to the delivery risk in issue (at [116] – [120]).

104. In this case, the Defendant, in the exercise of his discretionary judgment, informed by extensive expert research and assessment, adopted a strategy with the goal of reaching net zero aviation by 2050. Whilst it provides for interim targets (35.4 $MtCO_2$ in 2030, 28.4 $MtCO_2$ in 2040, and 19.3 $MtCO_2$ in 2050: JZS at 1.12), it does not purport to set specific and quantifiable targets in respect of the particular polices relied upon in the JZS to achieve that goal and the interim targets. Instead, it sets out a strategic framework, with six policy measures (JZS, at 3.1) expressed in high-level terms.

105. Consistent with this approach, the JZS emissions trajectory, which is to be used as a means to measure progress, is based on an illustrative scenario, termed the "High Ambition" scenario. The High Ambition scenario relies on a series of assumptions, including in particular about the development of necessary technologies to enable aviation decarbonisation. This informs why the JZS uses the word "trajectory". In doing so, a deliberate distinction is made with the word "budget", which could suggest, or be confused with, the setting of a legally binding maximum amount of emissions

allowed over set periods of time (e.g., 5 years, as is the case with overall carbon budgets). As Ms Greig explains at Greig 1/33:

> "By referring to a trajectory, this more accurately reflects the analysis undertaken because the modelling shows the relative potential contribution of each policy measure being projected up to 2050 on an annual basis based on several key input assumptions. The analysis does not reflect a defined maximum permitted amount of emissions. As stated in the JZS, our intention is to review the trajectory over time and the relative contribution of each measure based on the latest available evidence."

106. The Defendant was entitled to adopt this approach, and he was not under any legal obligation to provide quantitative projections in respect of each policy measure, nor justify reliance on any unquantified policies, as alleged by the Claimant. To succeed in a *Tameside* challenge, Possible would have to establish that no reasonable Secretary of State could have been satisfied that he had the information required. To succeed in a challenge that the Defendant failed to have regard to an obviously material consideration, Possible would have to establish that the Defendant acted irrationally. Those high thresholds are not met here.

107. There is ample evidence that the Defendant and his officials considered the deliverability of the policies in the JZS, and had regard to warnings from the CCC and the views of consultees on this issue. Timescales were also considered. Ms Greig draws together the main points under the heading 'Consideration of delivery risks and uncertainties' at Greig 1/96 – 105. Consideration of the CCC reports is also referenced at Greig 1/108 – 111. Deliverability was considered in the consultations and the responses of consultees on this issue were taken into account.

108. For these reasons, Ground 2 of Possible Claim 1 does not succeed.

Possible Claim 1, Ground 4 and GALBA Ground 1 (Consultation)

GALBA's submissions

109. GALBA submitted that the 2021 consultation was unlawful because a decision to exclude DDM, which was of central significance, was made prior to the consultation, and could not be changed. GALBA accepted that the Defendant was entitled to have a preferred option at the time of consultation. However, the Defendant was required to maintain an open mind on the issue.

110. The 2023 Review did not cure this legal error, nor render the matter academic. By the time of the 2023 Review, long after the JZS had been published, the formative stage of the consultation procedure had long passed. In any event, to the extent that the consultees' responses were belatedly considered, they were made in the absence of any modelling or evidence base, unlike the options that were presented in the consultations.

111. The Defendant's reliance on section 31(2A) SCA 1981 is misplaced (see *Dudley MBC v SSCLG* [2012] EWHC 1694 (Admin)).

112. The Defendant failed to consider consultee responses conscientiously. First, there was a failure to grapple with consultation responses proposing DDM. The Defendant should have been open to considering that his assumptions and scenarios, based on unproven technology, were too risky. Second, the Defendant failed to take into account non-CO_2 submissions in the 2021 consultation or the 2023 Review.

Possible's submissions

113. There was no lawful basis to exclude DDM measures from the scope of the consultation, given the weight of repeated CCC advice, their role in the public debate, the views of officials and the aviation industry that they had to be addressed, and the optimistic and uncertain forecasts for what could be achieved by technology. DDM had been identified as an option in the December 2018 Aviation Green Paper consultation, the 12 October 2020 ministerial submission, in internal departmental discussions, including Ms Emma Gilthorpe's views, and the 29 April 2021 ministerial submission.

114. The 2021 Consultation stated that it was concerned with ensuring the "right policy framework" was put in place (Introduction, 3.1) and so it was unfair not to invite views on DDM measures to achieve this. Having chosen to consult on a broad question, the Defendant could not lawfully exclude consideration of a central option. In doing so, the Defendant undermined public participation in the development of climate policy.

115. The Defendant failed to give conscientious consideration to the consultation responses on DDM.

116. The 2023 Review did not render this ground academic, nor did section 31(2A) SCA 1981 apply, because there was no consultation for the 2023 Review.

117. Possible's submissions on the issue of consultation were made by Ms Dehon KC, by agreement between the parties. Despite this, Mr Wolfe KC (counsel for Possible) submitted a written Reply on consultation, which he did not introduce or explain during the hearing, on the basis that it was not necessary to do so. I subsequently discovered that the Reply contained a new alternative formulation of Possible's case alleging that the reasonable reader would have understood the scope of the consultation to include DDM and therefore expect responses on DDM to be considered.

Conclusions

118. A duty to consult may be imposed by statute. Otherwise, it may arise at common law as a matter of fairness, in clearly defined and established circumstances where:

i) there has been a clear and unequivocal promise to consult; or

ii) an established practice of consultation amounting to a clear and unequivocal promise to consult in the future. In *R (Gaines Cooper) v HMRC* [2011] UKSC 47, Lord Wilson held, at [49]:

> "49. It is an arresting proposition that, having published and regularly revised a booklet in which it purported to

> explain how it would determine claims by individuals to have become non-resident and of which it encouraged widespread use, the Revenue departed from it as a matter of settled practice. Clear evidence would be necessary in order to make the proposition good. But there is another reason for the need for clear evidence in this connection. For, whereas, in the *booklet* the Revenue gave unqualified assurances about its treatment of claims to non-residence which, if dishonoured, would readily have fallen for enforcement under the doctrine of legitimate expectation, it is more difficult for the appellants to elevate a *practice* into an assurance to taxpayers from which it would be abusive for the Revenue to resile and to which under the doctrine it should therefore be held. "[T]he promise or practice…must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured": *R (Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755, per Laws LJ at [43]. The result is that the appellants need evidence that the practice was so unambiguous, so widespread, so well-established and so well- recognised as to carry within it a commitment to a group of taxpayers including themselves of treatment in accordance with it."

iii) or in exceptional cases where a failure to consult would lead to conspicuous unfairness, usually to a clearly defined category of person (see *R (Plantagenet Alliance) v Secretary of State for Justice* [2014] EWHC 1662 at [98] and *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755).

119. There was no statutory duty to consult on the JZS. Moreover, although Possible gave evidence of the numerous occasions when the Defendant had previously consulted on aviation proposals, both on a statutory and a non-statutory basis, it was not part of the Claimants' pleaded case that they had a legitimate expectation that they would be consulted, based upon an established practice amounting to an unequivocal promise to consult in the future. I accept the Defendant's submission that, although there have been numerous consultations in the past (statutory and non-statutory), consultation was not a consistent practice.

120. On this occasion, the Defendant had a broad discretionary power to formulate a strategy and then choose matters on which to consult. He was entitled to consult on his strategy for achieving net zero aviation which was based on the premise that people are allowed to fly and aviation growth is not constrained. He was not proposing a different strategy based on restricting the ability to fly.

121. The Defendant was well aware of the advice of the CCC recommending DDM as a reliable and effective means of reducing emissions, and the view of his officials and others that DDM should be included as a "back stop" proposal (see the ministerial submission of 29 April 2021, at paragraphs 38 to 44 above). I am satisfied that he took those views into account. However, DDM is a controversial issue on which people hold conflicting views, and the Defendant was entitled to disagree with the advice given to him.

122. The Defendant's strategy did not include DDM because he believed there were effective technological alternatives and he wanted to maintain and develop the social and economic benefits of flying. As the JZS stated, the aviation sector "has long been at the heart of our economic success. It is vital for trade and the distribution of goods, creates jobs, connects friends and family, and – crucially for an island nation – links us to the rest of the world"[3]. Whilst the Claimants disagree with the Defendant's strategy, in my view it cannot be characterised as irrational or otherwise unlawful, for the reasons I develop later in this judgment.

123. The issue here is whether the Defendant erred in law in the exercise of his discretion by conducting a consultation that was unfair. Even where consultation is not a legal requirement and is embarked upon voluntarily, it must be carried out lawfully (*R v North and East Devon HA ex parte Coughlan* [2001] QB 213, at [108]). However, the scope of a consultation is likely to be informed by the basis upon which it is being conducted (for example, the terms of a statutory duty to consult), and the purpose of the consultation.

124. The requirements of a lawful consultation were set out in *R (Moseley) v Haringey LBC* [2014] LBC 1 WLR 3947, per Lord Wilson, at [24]-[29].

> "24 Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R (Osborn) v Parole Board* [2014] AC 1115, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed JSC in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested": para 67. Second, it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel": para 68. Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not: "Yes or no, should we close this particular care home, this particular school etc?" It was: "Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our borough, should we make one in the terms which we here propose?"
>
> 25 In *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation,

[3] Introduction to 2021 Consultation, paragraph 1.1

particularly with the parents, had been unlawful. He said, at p 189:

> "Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third . . . that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

Clearly Hodgson J accepted Mr Stephen Sedley QC's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. ….. In Ex p Coughlan, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated, at para 112:

> "It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

The time has come for this court also to endorse the Sedley criteria…."

…..

27 Sometimes, particularly when statute does not limit the subject of the requisite consultation to the preferred option, fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options. For example, in *R (Medway Council) v Secretary of State for Transport, Local Government and the Regions* [2003] JPL 583, the court held that, in consulting about an increase in airport capacity in South East England, the Government had acted unlawfully in consulting upon possible development only at Heathrow, Stansted and the Thames estuary and not also at Gatwick; and see also *R (Montpelliers and Trevors Association) v Westminster City Council* [2006] LGR 304, para 29.

28 But, even when the subject of the requisite consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options. In *Nichol v Gateshead Metropolitan Borough Council* (1988) 87 LGR 435 Gateshead, confronted by a falling birth rate and therefore an inability to sustain a viable sixth form in all its secondary schools, decided to set up sixth form colleges instead. Local parents failed to establish that Gateshead's prior consultation had been unlawful. The Court of Appeal held that Gateshead had made clear what the other options were: see pp 455, 456 and 462. In the *Royal Brompton* case 126 BMLR 134, cited above, the defendant, an advisory body, was minded to advise that only two London hospitals should provide paediatric cardiac surgical services, namely Guys and Great Ormond Street. In the Court of Appeal the Royal Brompton Hospital failed to establish that the defendant's exercise in consultation upon its prospective advice was unlawful. In its judgment delivered by Arden LJ, the court, at para 10, cited the Gateshead case as authority for the proposition that "a decision-maker may properly decide to present his preferred options in the consultation document, provided it is clear what the other options are . . .". It held, at para 95, that the defendant had made clear to those consulted that they were at liberty to press the case for the Royal Brompton.

Application of the law to the facts

29 Paragraph 3(1)(c) of the Schedule imposed on Haringey the requirement to consult. The requirement was to consult "such other persons as it considers are likely to have an interest in the operation of the scheme". So the subject of the consultation was Haringey's preferred scheme and not any other discarded scheme. It is, however, at this point in the analysis that the division of opinion arose in the Court of Appeal. Sullivan LJ, with whom Sir Terence Etherton C agreed, concluded, at para 18:

> "In this statutory context fairness does not require the council in the consultation process to mention other options which it has decided not to incorporate into its published draft scheme; much less does fairness require that the consultation document contain an explanation as to why those options were not incorporated in the draft scheme."

Pitchford LJ, by contrast, agreed with Underhill J who, at para 27, had concluded: "consulting about a proposal does inevitably involve inviting and considering views about possible alternatives.". It is clear to me that the latter conclusion is correct. It is substantially in accordance with the decisions in the *Gateshead* case 87 LGR 435 and the *Royal Brompton case* 126

> BMLR 134 referred to in para 28 above. Those whom Haringey was primarily consulting were the most economically disadvantaged of its residents. Their income was already at a basic level and the effect of Haringey's proposed scheme would be to reduce it even below that level and thus in all likelihood to cause real hardship, while sparing its more prosperous residents from making any contribution to the shortfall in government funding. Fairness demanded that in the consultation document brief reference should be made to other ways of absorbing the shortfall and to the reasons why (unlike 58% of local authorities in England: see para 15 above) Haringey had concluded that they were unacceptable….."

125. Lord Reed agreed, but confirmed that the duty to consult did not always require consultation about options which have been rejected, as follows:

> "40. That is not to say that a duty to consult invariably requires the provision of information about options which have been rejected. The matter may be made clear, one way or the other, by the terms of the relevant statutory provisions, as it was in *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* (2012) 126 BMLR 134. To the extent that the issue is left open by the relevant statutory provisions, the question will generally be whether, in the particular context, the provision of such information is necessary in order for the consultees to express meaningful views on the proposal."

126. In *R (United Company Rusal) v London Metal Exchange* [2014] EWCA Civ 1271, decided shortly before *Moseley*, Arden LJ, with whom the other members of the Court agreed, held:

> "29 It is also clear from the authorities that the courts have to allow the consultant body a wide degree of discretion as to the options on which to consult: as the Divisional Court held in *Vale of Glamorgan Council v Lord Chancellor and Secretary of State for Justice* [2011] EWHC 1532(Admin) at [24]:
>
> > "there is no general principle that a Minister entering into consultation must consult on all the possible alternative ways in which a specific objective might arguably be capable of being achieved. It would make the process of consultation inordinately complex and time consuming if that were so. Maurice Kay J recognised this in the Medway case, at para 26:
> >
> > > "Other things being equal, it was permissible for him (that is, the Secretary of State) to narrow the range of options within which he would consult and eventually decide. Consultation is not negotiation. It is a process within which a decision maker at a formative stage in the decision

> making process invites representations on one or more possible courses of action. In the words of Lord Woolf MR in *Ex p Coughlan* [2001] QB 213, para 112, the decision-maker's obligation is to let those who have potential interest in the subject matter know in clear terms what the proposal is and why exactly it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this. This passage was approved by the Court of Appeal in *R (Forest Heath District Council) v Electoral Commission Boundary Committee for England* [2010] PTSR 1205, para 54."
>
> 30 Mr Michael Beloff QC …. Cited a number of other authorities for this point, such as *R v Gateshead Metropolitan Borough Council, Ex p Nichol* (1989) 87 LGR 435, *R (Kidderminster and District Community Health Council) v Worcestershire Heath Council* [1999] EWCA Civ 1525 (refusal of permission to appeal), *R (Tinn) v Secretary of State for Transport* [2006] EWHC 193(Admin), and, at the request of McCombe LJ, *R (Beale) v Camden London Borough Council* [2004] EWHC 6(Admin) (Munby J). I need not cite passages from these authorities save the following pertinent dictum of Auld LJ in the *Kidderminster* case:
>
> > "[Regulation 18(1) which required consultation on certain proposals] did not require it to give focus to proposals which it no longer had under consideration. In any event, the process of consultation did not, and designedly could not, preclude outright opposition to the one proposed, which opposition might prompt the authority to reconsider it and/or any of its discarded six options and/or to consider any new ones."
>
> 31 In other words, there is in general no obligation on a public body to consult on options it has discarded. The statement in *De Smith's Judicial Review*, 7th ed (2013), para 7-054 that there should be consultation on "every viable option", taken on its own, is not supported by the authorities."

127. The Defendant relied upon *R (Nettleship) v NHS South Tyneside CCG* [2020] PTSR 928, per Nicola Davies LJ at [56] – [57], where she referred to local guidance stating that there was no requirement, and it would be positively misleading, to consult on adopting options which are not genuinely under consideration, citing *R v Worcestershire Health Council ex parte Kidderminster and District CHC* [1999] EWCA Civ 1525 in support. In my view, the *Kidderminster* case permission decision turned on its own facts.

128. The Defendant also referred to *R (Stephenson) v SSCLG* [2019] EWHC 519 (Admin), at [43] and [51] in which Dove J. applied as a test the question of what would the reasonable reader have discerned from the consultation documents.

129. The case law on when discarded options must be included in a consultation, or at least referred to in the consultation documents, pulls in different directions, reflecting the fact that fairness in this context is highly fact-sensitive. In so far as the authorities conflict on issues of principle, the leading authority is, of course, *Moseley* in the Supreme Court.

130. In my judgment, the JZS consultation was not a consultation on aviation decarbonisation generally; it was a consultation on how to achieve net zero aviation by 2050 consistently with the objective of not directly restricting aviation demand.[4] In choosing to consult on a strategy to achieve a specified objective, fairness did not require that the Defendant also consult upon a different strategy to achieve a different objective. Such an approach would fundamentally undermine and delay the Defendant's lawful adoption of a particular strategy. It would also be contrary to the principle, expressed in the Cabinet Office Consultation Principles 2018, that consultation should only take place on issues which are still at a formative stage:

> "Do not ask questions about issues on which you already have a final view."

In my view, it would have been positively misleading for the Defendant to consult on DDM as an option when he and the Aviation Minister had already formed a firm view against it.

131. I have carefully considered whether the provision of information about DDM was "necessary in order for the consultees to express meaningful views on the proposal" (per Lord Reed in *Moseley*, at [40]).

132. On my reading of the consultation document, it would have been obvious to the reasonable reader that the Defendant did not intend to restrict flying, because the document extolled the economic and social benefits of preserving the ability to fly: see the extracts set out at paragraphs 46 to 50 above. Importantly, DDM was not proposed and it did not appear in any of the illustrative scenarios. In accordance with good practice, the consultation questions gave consultees an opportunity to suggest alternative approaches, but there was nothing to suggest that consultees were being invited to respond on DDM. Many of the consultees, such as Possible and GALBA, were well-informed on the issues surrounding aviation decarbonisation and used this as an opportunity to promote their own views, including advocating for DDM, despite the absence of any questions on DDM. I observe that this is not unusual in public consultations.

133. In my view, it may have been preferable to have included a few lines in the consultation document explaining that, although the CCC had recommended DDM, the Defendant had ruled it out because of its disadvantages, which could have been briefly summarised. This would have provided contextual information to any consultees who

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[4] I agree with the Defendant's submission that the "right policy framework" relied upon by Possible was not a general reference to seeking comments on any and all policies for decarbonising aviation. The consultation sought views on how to achieve the right policy framework in a world where demand was not directly constrained.

were not already well-informed on the issues. However, that is not a sufficient basis upon which to find that the entire consultation was unlawful.

134. The consultation responses and the Defendant's responses to them are summarised at paragraphs 66 to 78 above. In my view, they show that conscientious consideration of the consultation responses took place. As DDM was lawfully outside the scope of the proposed JZS strategy and the consultation, there was no obligation on the Defendant to re-consider his view on DDM in the light of the consultee responses in favour of it. However, officials did carry out an in-depth analysis of the responses on DDM. A detailed response on all consultee responses, including DDM, was provided in the Summary of Consultation Responses, which was provided to the Defendant and his ministers on 27 June 2022. An earlier version without departmental responses was provided to the ministers on 26 May 2022. Possible's criticisms of the timing of the provision to ministers is without foundation. I have no reason to doubt that the Defendant and his ministers considered all the consultation responses. The Defendant can be taken to have read the material he was provided with (see *R (Hunt) v North Somerset Council* [2013] EWCA Civ 1320 at [84] and *R (Save Stonehenge World Heritage Site) v Secretary of State for Transport No 2* [2024] EWCA Civ 1227 at [100]).

135. I turn to consider other points raised by the Claimants in regard to the 2021 consultation. It is not correct that officials considered DDM to be a "central policy option", as alleged by Possible. The point made in the April 2021 submission was that DDM should be consulted on as a "last resort" to add credibility to the overall strategy and not as part of the strategy itself. The Secretary of State was entitled to disagree with this recommendation.

136. The EAD, read as a whole, was clear that the modelling was considered to support a strategy that did not involve DDM. None of the modelled scenarios assumed DDM measures (see EAD paragraph 3.3).

137. The consideration given to reducing non-CO_2 emissions is set out by Ms Greig in Greig 1/112-119. As she explains, the four illustrative scenarios consulted upon excluded non-CO_2 impacts, given the uncertainties around the scale and impact of these emissions from aviation. This is consistent with the approach taken internationally, in the Carbon Budgets and by the CCC. Non-CO_2 emissions are addressed by the JZS at internal pages 55 to 59. The JZS here explains how the measures proposed to be adopted in the JZS are expected also to reduce non-CO_2 impacts, while at the same time setting strategic objectives which are aimed at better addressing such impacts once they, and potential mitigations, are better understood. The Defendant thus plainly understood and took account of how the measures adopted in the JZS addressed non-CO_2 impacts. I also refer to paragraphs 140 to 149 below, which further address the issue of non-CO_2 impacts.

138. For these reasons, Ground 4 of Possible Claim 1 and Ground 1 of the GALBA claim do not succeed.

Possible Claim 1, Ground 5 (Non-CO_2 emissions)

Possible's submissions

139. Possible submitted that, in deciding to exclude DDM, the Defendant gave no consideration to the unique effectiveness and importance of DDM as a way of reducing non-CO_2 impacts, and therefore the overall climate impact of aviation. The effectiveness of DDM in reducing CO_2 impacts was an obviously material consideration because of:

i) the CCC's advice that DDM is one of the few measures that will directly reduce non-CO_2 warming, because warming is largely proportional to total aviation activity;

ii) the sheer scale of the impacts, notwithstanding the uncertainty about the precise magnitude of the impacts;

iii) the acknowledged difficulties of including non-CO_2 impacts within existing greenhouse gas accounting frameworks;

iv) the obvious need to address all sources of warming in order to achieve the temperature goals of the Paris Agreement.

Conclusions

140. The non-CO_2 emissions from aviation include particulate matter (soot), sulphur aerosols, water vapour and nitrogen oxides. While some of these (e.g. nitrous oxides) are named greenhouse gas emissions under the CCA 2008, particulate matter and water vapour are not named greenhouse gas emissions under the CCA 2008 and are therefore not accounted for in carbon budgets.

141. The current uncertainties in both quantifying non-CO_2 impacts, and in understanding the atmospheric interactions resulting from their emissions, mean there is currently no consensus over either the correct methodology to quantify non-CO_2 impacts or how best to address their impacts.

142. In view of the uncertainty about addressing non-CO_2 impacts, it has not been established that DDM is the only or the most effective way to mitigate non-CO_2 impacts. For instance, the JZS at 3.65 and 3.66 cites the potential impacts of the JZS measures, including research showing that sustainable aviation fuels could reduce the warming impact of contrails. Acceleration of Zero Emission Flights are expected to have a positive impact on reducing non-CO_2 impacts.

143. On 22 February 2022, an updating note was sent to the Minister for Aviation setting out aviation's non-CO_2 impacts. It stated that "recent scientific evidence suggests non-CO_2 effects on climate are greater than the effects from CO_2 emissions[…] However, this impact remains highly uncertain in academic literature owing to the complex chemical and physical interactions in the upper atmosphere: the overall impact could be much less or much greater". In particular, depending on conditions, the scale of the effects had a large degree of uncertainty, broadly +/- 70%. The note also set out recent

developments from the Royal Aeronautical Society Greener by Design Group, as well as recent operational trials – including the ECLIF3 project, a contrail prevention trial from EUROCONTROL and SATAVIA's forecasting and navigational avoidance technology.

144. Furthermore, the note stated "We are currently developing the policies for the Jet Zero Strategy, which could include proposals to tackle non-CO_2 impacts, subject to further policy development. Through this we will look to engage with all relevant stakeholders, including the Ministry of Defence, to exchange knowledge on non-CO_2 impacts[…] We will factor in potential activity on non-CO_2 impacts in designing a research programme for aviation decarbonisation".

145. In the ministerial submission dated 26 May 2022, non-CO_2 impacts were considered at Annex B, items 61 to 65. In the ministerial submission dated 27 June 2022, non-CO_2 impacts were considered in the Summary of Consultation Responses (see the Supplementary Hearing Bundle, Volume 3 pages 139, 143, 169, 170, 174, 175 and 176). This included the CCC's policy and the key points made in the consultation responses.

146. In *Global Feedback*, at [104] - [112], the Court of Appeal held that CCC advice was not a mandatory material consideration to which SSEFRA had to give significant weight. By analogy, the same principle applies to the Defendant.

147. The uncertainty over the climate change effects of non-CO_2 emissions and the absence of an agreed metric which could inform policy were held by the Supreme Court to be a rational basis for the Defendant to exclude consideration of non-CO_2 impacts in the Airports National Policy Statement, in *R (Friends of the Earth) v Heathrow Airport Ltd* [2021] 2 All ER 967, at [166].

148. In light of the above, the Defendant gave appropriate consideration to non-CO_2 emissions. Moreover, applying the test in *R (Friends of the Earth Ltd & Anor) v Secretary of State for Transport*, at [119], the effectiveness of DDM in reducing non-CO_2 emissions was not an obviously material consideration which the Defendant had to take into account.

149. For these reasons, Ground 5 of Possible Claim 1 does not succeed.

Possible Claim 1, Ground 6 (lack of reasons)

Possible's submissions

150. The Defendant was required to have rational reasons, and to state those reasons, for departing from the advice of his officials, in the ministerial submission dated 29 April 2021, that DDM measures should be included in the proposed strategy as a last resort (see *R (Hawes) v Tower Hamlets LBC* [2024] EWHC 3262 (Admin), at [8]). Those reasons had to allow for proper consideration of whether the Defendant was acting rationally in departing from the clear recommendation from officials (see *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin), at [32] – [34], [40]). It was not for the Court to fill in the gaps (see *R (Miller) v The Prime Minister* [2020] AC 373).

151. There was insufficient evidence upon which the Defendant could claim that "technology must and will provide the answers" because of the uncertainty surrounding these nascent technologies (see *R (Association of Independent Meat Suppliers) v Food Standards Agency* [2019] UKSC 36, at [8]).

152. The Defendant's decision ought to be justiciable because this was not a mere preparatory step, but a decision that had crucial consequences for the scope of the consultation and the content of the JZS.

Conclusions

Challenges to interim decisions

153. Possible challenges the lawfulness of the JZS which was adopted on 19 July 2022. The facts are set out at paragraphs 38 to 44 above. They demonstrate that the ministerial submission of 29 April 2021 and the Defendant's rejection of the recommendation made by his officials on 10 May 2021 were interim stages in a lengthy decision-making process which crystallised some 14 months later.

154. During the course of that process, there were other stages when important matters were considered and decided. On 1 July 2021, a ministerial submission was sent to the Defendant inviting him to agree the final content of the consultation document. It referred, at paragraph 3, to the fact that the draft document had been submitted to 10 Downing Street for comment. I agree with the Defendant's observation that No. 10 could have taken a different view on DDM.

155. Between 21 March and 25 April 2022, the technical consultation on the JZS took place.

156. Officials analysed the consultation responses, and the Defendant and his ministers were provided with a substantial amount of new material arising out of the consultations in a ministerial submission on 26 May 2022. Fuller and further material was then provided with a ministerial submission on 27 June 2022. These briefings included detailed analyses of the consultation responses, and the government responses to them, and proposed amendments to the draft JZS which the Defendant was asked to agree. On each occasion, it was open to the Defendant to amend the JZS to add references to DDM.

157. I agree with the Defendant's submission that it is wrong in principle to seek to challenge by way of judicial review an interim decision in the development of policy when it is possible that changes will occur before the policy is finalised. The decision in *Shrewsbury and Atcham BC v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148 lends support to this position, per Carnwath LJ at [32] – [36]:

> "32. Judicial review, generally, is concerned with actions or other events which have, or will have, substantive legal consequences: for example, by conferring new legal rights or powers, or by restricting existing legal rights or interests. Typically there is a process of initiation, consultation, and review, culminating in the formal action or event ("the

substantive event") which creates the new legal right or restriction. For example, the substantive event may be the grant of a planning permission, following a formal process of application, consultation and resolution by the determining authority. Although each step in the process may be subject to specific legal requirements, it is only at the stage of the formal grant of planning permission that a new legal right is created.

33. Judicial review proceedings may come after the substantive event, with a view to having it set aside or "quashed"; or in advance, when it is threatened or in preparation, with a view to having it stayed or "prohibited". In the latter case, the immediate challenge may be directed at decisions or actions which are no more than steps on the way to the substantive event. In the planning example, judicial review may be directed at a local authority resolution to grant permission while it is still conditional on, say, the completion of a highways agreement, even though the resolution can have no legal effect until the issue of the formal permission.

34. In the present case, the substantive event, if it occurs, will be the taking effect of the necessary orders under the 2007 Act, bringing about the creation of the new authorities and the abolition of the old. Decisions or actions taken in advance of that event, whether before or after the Act, were no more than preparatory steps to that end. There is the difference, however, that steps taken after the Act were on their face formal steps in a statutorily defined procedure, whereas those taken before the Act were not. It was of course open to the Boroughs to commence proceedings at the earlier stage, and to use the March and July decisions as the focus of that challenge. But that challenge had no purpose in itself, except as a means of pre-empting the possibility of formal steps leading to a substantive order under the Act in due course.

35. Once the Act has been passed and formal decisions have been taken, the focus of the challenge inevitably shifts. To put it another way, there would be no purpose in the court "setting aside" the pre-Act decisions, while leaving the post-Act decisions in place, since it is only the latter which provide the direct legal foundation for the making of the Parliamentary orders. At best, such an order by the court would create great uncertainty as to its practical consequences. In my view, therefore, it would have been wrong in principle to allow the challenge to proceed in the form proposed by Mr Arden…..

36. It follows that the only issue which ultimately matters is the legal effect of the December decisions, and the steps taken pursuant to them. This issue must be considered in the context of the statute under which they were purportedly made. Previous

> events are material only to the extent that they impinge on the legality of those actions…."

158. Therefore, I conclude that Possible's challenge should be directed to the exclusion of DDM in the final JZS. In case the claim proceeds further, I will go on to consider the other two limbs of this ground.

Duty to give reasons

159. It is well-established that there is no general common law duty on public bodies to give reasons for administrative decisions (see *R (CPRE Kent) v Dover DC* [2017] UKSC 79, per Lord Carnwath, at [51]). I agree with the Defendant's submission that procedural fairness did not require the preparation and publication of reasons for an internal decision such as this, which was no more than a preparatory step on the way to the substantive decision. If correct, this ground would require the Secretary of State to provide and publish reasons for all internal decisions taken during the formulation of a policy or consultation. I consider that this would impose an unacceptable burden on ministers and officials and make the everyday business of government unworkable.

Irrationality

160. As I have already stated, DDM is a controversial issue on which people hold conflicting views, and the Defendant was entitled to disagree with the advice given to him. The Defendant rationally believed there were effective technological alternatives, which were under consideration in 2021, and were subsequently set out in the JZS. It is clear that the Defendant and the Aviation Minister wished to maintain and develop the economic and social benefits of flying. Whilst Possible disagrees with the Defendant's strategy, in my view it cannot be characterised as irrational or otherwise unlawful.

161. For these reasons, Ground 6 of Possible Claim 1 does not succeed.

GALBA ground 2 (cost/benefit impact statement)

GALBA's submissions

162. GALBA submitted that the Defendant erred in law by failing to carry out a cost/benefit impact assessment to inform the JZS, in breach of the *Tameside* duty. The Defendant was required to take reasonable steps to acquaint himself with the relevant information in order to enable him to answer the question which he had to answer: *R (Campaign Against Arms Trade) v Secretary of State for International Trade and Others* [2019] 1 WLR 5765, at [58].

163. During a 2021 planning inquiry in respect of Bristol Airport Limited's application to expand annual passenger numbers, the local planning authority sent the Department for Transport a detailed set of questions about the Jet Zero Consultation, including asking for "any and all impact assessments of the costs and benefits of the options considered in the Consultation Paper which have been undertaken". The Department for Transport responded that an impact assessment "was not deemed appropriate or possible at this

stage given the consultation is on a broad strategy for achieving net zero aviation rather than setting out detailed policy proposals. Should they be required, the department will carry out impact assessments to accompany subsequent consultations on policy proposals to achieve the goals of this strategy."

164. The correspondence disclosed in that response showed that, in June 2021, the Aviation Decarbonisation Division was told the following:

> "Impact assessment requirement
>
> I'd recommend speaking to your analysts, some impact assessment may be useful to guide policy development.
>
> Whether you *need* one, is dependent on what stage of consultation this is. If this is more of a Green Paper/Call for Evidence (i.e. you will do a future consultation on the exact changes you want to make at a later date), then an impact assessment can be done at this stage. If this is the last time you'll consult before going ahead and making the changes, an impact assessment is important and should only not be done in very specific circumstances (it may delay implementation of the policy). It does also vary with exactly what you're doing, and who's impacted, generally they're only needed where there's requirements being placed on business."

165. The JZS is stated to be the set of policy proposals that will achieve net zero in UK aviation by 2050. It provides a strategic framework with a suite of policies. It will place a large number of requirements on businesses to rapidly develop and scale up a number of different technologies, including specific policies such as having "at least five UK SAF plants under construction" by 2025. Given the stated nature and purpose of the JZS, both on its face and in the Net Zero Strategy, no reasonable Secretary of State could have considered that his enquiries were sufficient without a cost/benefit impact assessment.

Conclusions

166. Ms Greig addressed this issue in Greig 1/120-127. I accept her evidence.

167. The Better Regulation Framework ("BRF") guidance for government departments that was published at the time the JZS was being developed stated that "[a] Regulatory Impact Assessment …. should be prepared for all significant regulatory provisions" and that a Regulatory Impact Assessment "uses cost-benefit analysis, as set out in the Green Book". The Green Book defines its function as providing "approved thinking models and methods to support the provision of advice to clarify the social – or public – welfare costs, benefits, and trade-offs of alternative implementation options for the delivery of policy objectives." As set out in the BRF, a regulatory impact assessment should be prepared when the proposed measures are classed as a "regulatory provision" under section 22 of the Small Business, Enterprise and Employment Act 2015. Whether a proposed measure is a regulatory provision depends on if the measure:

i) imposes or amends requirements, restrictions, or conditions, or sets or amends standards or gives or amends guidance, in relation to the activity, or

ii) relates to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards, or guidance which relate to the activity.

168. A cost/benefit analysis was not undertaken because the JZS does not include any relevant regulatory or policy requirements that will significantly impact on business. In addition, it is not usual practice to conduct a cost-benefit analysis for an overarching strategy (as opposed to during the development of an individual policy or regulatory requirement). Any future new regulatory requirements or policies that would have a significant impact on businesses will be considered as necessary.

169. Department for Transport officials sought advice on 3 June 2021 as to whether an impact assessment was required. The Better Regulation Unit ("BRU") recommended "speaking to your analysts as it depends on the nature of the consultation" and "[i]t does also vary with exactly what you're doing, and who's impacted, generally they're only needed where there's requirements being placed on business".

170. The officials followed the recommendation to speak to their analysts on the same day. The response from the Aviation Decarbonisation and Market Analysis team was in these terms:

> "Given this is a consultation on a strategy rather than specific policy proposals, we don't think there is any requirement for an impact assessment. We've actually already consulted [*a person whose name was redacted*] on our evidence and analysis doc and he seemed fine with that and it not being an impact assessment so I think we're covered."

171. The essence of the advice correctly reflected the BRF guidance set out above.

172. I have considered the policy measures in the JZS (see Supplementary Bundle 1 at page 136), including the proposed five sustainable aviation fuel plants. As Ms Greig explains, in so far as they impose requirements, they are requirements on the Government to provide funding for system efficiencies, development of sustainable aviation fuels, and zero emission flight. They do not impose requirements on business which would require a cost/benefit analysis, applying government guidance. By way of comparison, Ms Greig also sets out the circumstances in which cost/benefit analyses have been prepared, in particular, for the Sustainable Aviation Fuel Mandate Consultation (setting obligations on fuel suppliers to reduce greenhouse gas emissions on aviation fuel), in March 2023 and 2024 (see Greig 1/124).

173. In the light of the enquiries made by officials, and the accurate specialist advice that was given to them, I conclude that the Defendant (through his officials) took reasonable steps to inform himself, and the *Tameside* duty was properly discharged.

174. For these reasons, Ground 2 of the GALBA claim does not succeed.

GALBA, ground 3 (airport expansion)

GALBA'S submissions

175. GALBA submitted that the Defendant failed to take into account an obviously material consideration, namely, planning decisions on airport expansion schemes.

176. GALBA submitted that the JZS relies on the planning system to address environmental impacts of airport development, but the Defendant did not consider the approach taken by planning inspectors (e.g. in respect of Stansted Airport and Bristol Airport), to the effect that the carbon effects of aviation are matters for national Government to address. If he had done so, he would have recognised that the JZS created a lacuna in addressing the climate change impacts of airport expansion.

Conclusions

177. Ms Greig addressed this issue at Greig 1/128 – 139. I accept her evidence.

178. The JZS recognises that:

> "airport expansion has a role to play in realising benefits for the UK through boosting our global connectivity and levelling up. The framework is clear that we continue to be supportive of airport growth where it is justified, and our existing policy frameworks for airport planning provide a robust and balanced framework for airports to grow sustainably within our strict environmental criteria. We have also been clear expansion of any airport in England must meet our climate change obligations to be able to proceed."

179. The JZS considers the impact of airport expansion on achieving net zero emissions by 2050, at 3.57. The JZS sets out the information that an applicant would need to provide as part of a planning application (at 3.62) and makes it clear that a range of policies should be considered at 3.61:

> "The Government's existing planning policy frameworks, along with the Jet Zero Strategy and the Flightpath to the Future strategic framework for aviation, have full effect and are material considerations in the statutory planning process for proposed airport development."

180. Accordingly, the JZS affirms the need in future for the environmental impacts associated with individual applications properly to be considered by "communities and planning decision-makers" (at 3.62). Applicants for planning permission have to provide details of the environmental impacts of an airport expansion scheme as part of a planning application. It is right that an applicant is responsible for setting out its own assessment of the proposed scheme's environmental impact, including carbon emissions. It is for a decision maker then to determine the materiality of these carbon emissions, taking into account relevant Government policies e.g. the JZS, the Airports National Policy Statement ("ANPS") and the MBU.

181. The JZS supports sustainable airport growth (page 10) but does not take any definitive position in specific cases of airport expansion which are matters for subsequent planning decisions. The Jet Zero modelling framework dated March 2022 explains at 3.17:

> "The capacity assumptions required by the model do not pre-judge the outcome of any future planning applications, including decisions taken by Ministers. The capacity assumptions do not represent any proposal for limits on future capacity growth at specific airports, nor do they indicate maximum appropriate levels of capacity growth at specific airports for the purpose of planning decision-making. However, specific assumptions must be made on several inputs, including about the future runway capacity of the main airports in the UK, for NAPAM to operate. In line with a precautionary approach to the level of future carbon emissions, and to reflect the uncertainty around future developments in this area, we have assumed capacities that are consistent with current planning applications, including proposals on which airports have consulted the public (e.g., statutory pre-application consultation). Increasing capacity limits in this way allows the analysis to focus on testing the potential of abatement technologies to meet the challenge of net zero, without capacity constraints imposing an extra demand restriction or simply causing emissions to be exported to competing overseas airports."

182. This modelling was utilised to form the four illustrative scenarios in the JZS. Passenger demand and capacity remained consistent across each of the four illustrative scenarios. However, the High Ambition scenario offered significant carbon emission savings compared to 2019 levels. Ms Greig states, at Greig 1/133, that "[t]his modelling demonstrated that we could achieve our net zero targets with knock-on economic and social benefits, without directly limiting demand".

183. In the light of the matters set out above, I agree with the Defendant that GALBA's submission that the JZS creates a lacuna is misconceived, and the Defendant's approach to airport expansion, which did not expressly consider specific planning decisions, was not irrational, applying the test in *R (Friends of the Earth Ltd & Anor) v Secretary of State for Transport*, at [119]. The specific planning decisions were not obviously material considerations.

184. For these reasons, Ground 3 of the GALBA claim does not succeed.

GALBA, ground 4 (PSED)

Legal framework

185. Section 149 EA 2010 provides:

> "149. Public sector equality duty

> (1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (2) […]
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low."

186. The relevant protected characteristics are: age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation: section 149(7) EA 2010.

187. The PSED is a duty to have regard to the specified matters. It neither dictates a substantive outcome (*Baker v Secretary of State for Communities and Local Government* [2009] PTSR 809, per Dyson LJ at [31]), nor prescribes any particular procedure for the discharge of the duty (*R (Brown) v Secretary of State for Work and Pensions* [2009] PTSR 1506, at [89]). What amounts to "due regard" is highly sensitive to facts and context, and when there are further decision-making stages, the level of assessment required to qualify as "due regard" is likely to be less demanding: *R (Sheakh) v Lambeth London Borough Council* [2022] PTSR 1315, at [16] and [56]. It is for the public body, and not the Court, to decide on the manner and intensity of any enquiry, including when discharging the PSED. The relevant test for whether or not a particular enquiry is made is rationality: see *R (Khatun) v Newham LBC* [2005] QB 37 at [33] to [35] per Laws LJ, and *R (Hollow) v Surrey CC* [2019] PTSR 1871 at [83] per Sharpe LJ.

188. GALBA relied in particular upon the following principles in the leading case of *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [25]:

i) The duty is upon the Minister personally; what matters is what he or she took into account and what he or she knew. The minister "cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice", at [25(3]);

ii) The decision maker must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy, and not merely as a "rearguard action" following a concluded decision, at [25(4)];

iii) The duty must be exercised "in substance, with rigour, and with an open mind", at [25(5)(iii)];

iv) General regard to issues of equality is not the same as having "specific regard, by way of conscious approach to the statutory criteria", at [25(6)].

Standing

189. The Defendant submitted that GALBA did not have a sufficient interest in the PSED (and any remedy) to pursue this ground, for the purposes of section 31(3) of the SCA 1981. PSED issues were not raised in its consultation response, and they are not part of its aims, as set out in its constitution. The Defendant relied upon *R (Good Law Project Limited) v The Prime Minister* [2022] EWHC 298 (Admin), where the Divisional Court held that the Good Law Project had no standing to bring a claim relating to the PSED, in circumstances in which the Articles of Association of the Good Law Project included only general statements regarding its objects, none of which was concerned specifically with the PSED (see also the analysis of this decision in *R (Good Law Project Limited) v The Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC) at [539]).

190. In response, GALBA relied upon the case of *R (Kides) v South Cambridgeshire DC* [2003] 1 P&CR 19 where Jonathan Parker LJ held that a litigant who has "a real and genuine interest in challenging an administrative decision must be entitled to present his challenge on all available grounds".

191. The Defendant does not dispute that GALBA has a real and genuine interest in challenging the JZS, on grounds other than the PSED, on the basis that its aims (as set out in its constitution), include opposition to any extension of Leeds Bradford airport because of its likely consequences for the environment and for local residents. In my view, these aims also provide it with a sufficient interest to challenge the PSED. It is possible that there would be potential PSED impacts arising from an expansion of Leeds Bradford airport, and GALBA would be entitled to raise such impacts, on behalf of members and local residents, for example, at a planning inquiry. PSED impacts can be subtle, so the fact that GALBA did not identify them in its consultation response does not mean that they do not exist. In my view, it was not necessary for the PSED to be expressly included in GALBA's aims for the "sufficient interest" test to be satisfied. I

accept GALBA's submission that this case is distinguishable from the *Good Law Project* cases.

192. Therefore I conclude that GALBA has standing to bring this ground of challenge.

GALBA's submission on the substantive challenge

193. GALBA submitted that the Defendant failed to discharge the PSED, relying upon the duty to "advance equality of opportunity" in sub-paragraph (b) of section 149(1) EA 2010.

194. GALBA referred to the published Summary of Consultation Responses which did not find any impacts in relation to the protected characteristic of race. However, there is well-documented research addressing the differential impacts of CO_2 and NO_x emissions on racial and ethnic minority groups, as well as socio-economically disadvantaged groups. The Department for Transport appears to be aware of this research as some of it is referred to in an equality analysis concerning zero-emission road transport. But it was not considered in the equality analysis, and it is a significant omission.

195. GALBA acknowledged that the June 2022 EqA, undertaken for the JZS, did identify impacts in relation to race but it doubted whether that was taken into account in preparing the JZS.

196. Furthermore, there was conflicting information before ministers as to the impact of the JZS on race, as the May 2022 EqA differed from the June 2022 EqA as it concluded there were no impacts in relation to race. These differences were not explained to the Defendant.

Conclusions on the substantive challenge

197. Consideration of the PSED in the preparation of the JZS was addressed by Ms Greig, at Greig 1/140 – 148. I accept her account.

198. The May 2022 EqA was placed before the Defendant with the ministerial submission on 26 May 2022. The Defendant was expressly advised that he was required to have due regard to the PSED when agreeing the policies for the JZS. He was also advised that the EqA would be reviewed and updated as the JZS was finalised.

199. In the May 2022 EqA, it was concluded that the JZS would not result in any impacts on those sharing a protected characteristic of race. However, it did identify potential additional costs which could affect equality of opportunity for those on low incomes, and as groups with protected characteristics have higher rates of poverty, they could be disproportionately affected.

200. The EqA was duly revised and updated for the ministerial submission on 27 June 2022. The Defendant was again advised to consider the EqA alongside the draft JZS, and was told that the EqA would continue to be reviewed and updated as required.

201. The June 2022 EqA identified a number of potential impacts upon those sharing the protected characteristic of race:

> "Although socio-economic background is not a protected characteristic under the Equality Act 2010, numerous comments were received on the possible impact on families with low incomes, for example, arguing that any rises in fuel costs resulting from policies or new technologies could make it too costly for them to fly. Data from the Joseph Rowntree Foundation suggests that this could indirectly have a greater impact on people from ethnic minorities or disabled people, who have a higher rate of poverty than the white ethnic group or non-disabled people." (emphasis added) (page 4).
>
> "Increasing the uptake of SAF could result in increased fuel costs, which in turn could see increased costs being passed on to the consumer. Increased costs could result in indirect discrimination between consumers, as they may disproportionately affect people or groups with a protected characteristic who are statistically more likely to be in a lower income bracket, such as disabled people or people of a minority ethnic background. As individual Jet Zero policies are developed, the Government will consider the best means to ensure any increased costs are not passed onto consumers in a way that disproportionately affects those with protected characteristics." (emphasis added) (page 6)
>
> "Infrastructure changes at airports (to enable zero emission flight) could also lead to disruption in surrounding areas. This could have a greater effect, in terms of noise and local disruption, on persons living in the vicinity of an airport, thereby disadvantaging some groups more than others. Groups with certain protected characteristics may be more likely to live in the vicinity of an airport, for example the Airports National Policy Statement (ANPS) equality assessment found that there was a higher proportional representation of some groups with protected characteristics compared with regional averages in the areas affected by the ANPS, and therefore each of the schemes described in the ANPS may have differential and disproportionate effects on groups with protected characteristics. As individual policies are developed and implemented to accelerate the development of zero emission flight, further evidence will be collected to assess the impact on groups with protected characteristics, including data on communities who live close to any airports which may be affected. In the longer term, reduced pollution from zero emission aircraft could advantage communities who live close to airports." (race was one of the protected groups in the ANPS assessment) (page 7).
>
> "In conclusion, the Department considers that there may be some indirect impacts to people or groups in relation to the protected

> characteristics of age, through the potential use of SAF and ZEF on PSO routes, and race and disability, in so far as the use of new technologies could increase the costs of flying and therefore have greater impact on people with these protected characteristics that are statistically more likely to be in a lower income bracket. Opportunities to increase the diversity of people working in green sectors have been identified which could have potentially positive impacts on people with protected characteristics such as race and sex. Specific impacts on people with protected characteristics will depend on the detail of individual policies and will therefore be considered and taken into account as individual policies are further developed." (emphasis added) (page 11).

202. Ms Greig addressed the point raised by GALBA about inconsistency with the zero-emission buses equality analysis at Greig 1/147 – 148, where she explained that it was specific to traffic and land transport-related air pollution exposure, and therefore not directly relevant to aviation.

203. The 2021 Consultation document referred to the PSED and invited comments on how the JZS could further achieve the objectives under section 149 EA 2010. The same text was included in the further technical consultation.

204. The first version of the Summary of Consultation Responses, which was presented to the Defendant with the ministerial submission on 26 May 2022 did not include the Government response, as it had not yet been finalised. It set out a summary of responses on the PSED. There were very few comments, and none directly about race.

205. The second version of the Summary of Consultation Responses, presented to the Defendant with the ministerial submission on 27 June 2022, did include the Government response. Unfortunately it erroneously included a summary of the superseded May 2022 EqA which stated that no impacts in relation to race had been found, whereas it should have referred to the findings of the June 2022 EqA which did find impacts in relation to race.

206. Ms Greig referred to this error at Greig 1/145, as follows:

> "I accept that the Government Consultation Response Document did not properly reflect the findings of the EA. This was simply the result of a drafting error. The Government consultation response was drafted alongside the development of the EA and reflects the conclusions from the version sent to Ministers on 26 May 2022, whereas the EA was updated and sent to Ministers again on 27 June 2022. However, the text in the Government consultation response itself was not updated in line with the updated EA conclusions."

207. I do not consider it is remotely plausible that the Defendant was misled by this error. The ministerial submission of 27 June 2022 clearly directed him to the June 2022 EqA, and I have no doubt that was the document to which he had regard when discharging the PSED, as that was clearly the primary source of the PSED analysis. In my

judgment, this administrative error by an official did not have the consequences which could elevate it into a justiciable public law error.

208. Furthermore, I do not consider that there is any risk that the Defendant was confused or misled by the fact that the May 2022 EqA was revised and replaced by the June 2022 EqA. He was expressly informed, in May and June 2022, that it would be reviewed and updated as required. As an experienced minister, he must have been accustomed to receiving revised and updated versions of documents from officials, and I have no doubt that he was sufficiently competent to distinguish between the two iterations of the EqA.

209. On the evidence before me, I am satisfied that the Defendant had due regard to the relevant impacts and there was no breach of the PSED.

210. For these reasons, ground 4 of GALBA's claim does not succeed.

Possible's grounds of challenge to the 2023 Review

Possible Claim 2, ground 2 (failure to consult on the 2023 Review)

Possible's submissions

211. Possible submitted that the Defendant was required to consult on the 2023 Review because there had been a material change of circumstances, namely, that officials had identified potential DDM policy options, following the responses to the 2021 Consultation. Given that the Defendant had previously consulted on the JZS in 2021 and 2022, a duty to consult further arose at common law (see *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), at [98(2)]).

212. Possible also pleaded in its Claim 2 (though not in its Claim 1) that there was an established practice of consultation; there was a legitimate expectation of consultation; and the failure to consult led to conspicuous unfairness as consultees did not have the benefit of responding to the DDM policy options.

Conclusions

213. The facts in relation to the 2023 Review by the new Secretary of State, Mark Harper MP, are set out at paragraphs 79 – 80, 83 – 85, and 87 above.

214. I refer to my earlier conclusions on the legal duty to consult at paragraphs 118 and 119 above. I add that there is no general requirement to re-consult on changes to policies that have previously been consulted on. Nor is there a general duty to consult on policies which have the same subject matter as policies that have previously been the subject of consultation, or where proposed changes to the policy have arisen out of the consultation.

215. In *R (Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin), Silber J. reviewed the authorities at [39] – [45], concluding that there should only be re-consultation if there is a fundamental difference between the proposals consulted on

and those which the consulted party subsequently wishes to adopt (at [45]). In that case, Silber J. found that:

> "57…. the March 2002 decision emerged from consultation and Keene J (as he then was) stated in *R v. London Borough of Islington ex parte East* ([1996] ELR 74 at 88) there was no duty "to consult further on [an] amended proposal which had itself emerged from the consultation process. It was a proposal reflecting the consultation process itself". As I will explain, that was the position here."

216. In *R (MP) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1634, Newby LJ observed that, unlike the *East Kent Hospital* case, there was no statutory duty or other independent duty to consult (at [32]). In *MP*, the topics under consideration were not variants or developments of proposals in the earlier consultation (at [38], [39]).

217. There was no statutory duty to consult on the 2023 Review, and no common law duty to consult arose either. I accept that there has not been a consistent practice of consulting: see Ms Greig's evidence at Greig 2/38 – 43. There was no evidence of an express, clear and unequivocal promise to re-consult on the JZS, or to consult on DDM proposals, so as to give rise to a legitimate expectation.

218. Furthermore, there was no fundamental change from the JZS consultation. In the 2023 Review, the initial decision was simply to decide whether policies on DDM should be further explored. The Defendant and his ministers concluded that the Department should "continue to pursue the approach set out in the Jet Zero Strategy" and "no further policy development on DDM was required at this time". Thus, policies on DDM were not explored further and there was no fundamental change to the JZS policy being proposed. The absence of consultation, when there was no change of circumstances, could not give rise to "conspicuous unfairness" to Possible and other campaigners.

219. Officials carried out a literature review to determine whether there were any relevant material changes since the JZS was adopted and concluded that there had not been any (as explained in Annex C to the ministerial submission). Possible disagrees with their assessment, but the literature review was carried out by experienced officials who reached a judgment that they had captured the relevant material, and the Defendant was entitled to rely on it.

220. For these reasons, ground 2 of Possible Claim 2 does not succeed.

Possible Claim 2, ground 4 (*Tameside*/maintaining the High Ambition scenario)

Possible's submissions

221. Possible submitted that, in undertaking the 2023 Review, the Defendant failed to discharge the *Tameside* duty to make sufficient inquiries into:

i) Delivery risks associated with the High Ambition scenario, given that the Analytical Annex was 18 months out-of-date; there were warnings from the

CCC that the approach was unduly optimistic about technological progress; and the Carbon Budget Delivery Plan was relying upon effective delivery of the High Ambition policies; and

ii) How much of the Department for Transport's 70% passenger growth projection was facilitated by already approved airport expansion schemes, which was key to whether airport capacity should be restricted.

Conclusions

222. I refer to the evidence of Ms Greig on this issue at Greig 2/56 – 67, which I accept.

223. As set out at paragraph 89 above, under the *Tameside* duty, a decision maker is only required to take such steps to inform himself as are reasonable, which is a matter for the decision-maker to decide. The Court will only intervene if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision.

224. The evidence shows that the Defendant was provided with detailed up-to-date advice on delivery risks at Annex C. Annex C of the ministerial submission contained a review of recent literature relevant to the modelling assumptions set out in the High Ambition Scenario, identified up-to-date information on delivery risks and provided an overall view from officials that:

> "As aviation decarbonisation technologies are still at an early stage of development, there continues to be substantial uncertainty surrounding their respective contributions to decarbonising the sector… The one area where evidence suggests our assumptions could potentially be too optimistic is relating to the expected efficiency improvement from next generation airframe and engine technology (under the system efficiencies measure), though inconsistencies in metrics make this difficult to say definitively. This is an area in which we plan to pursue further research. However, our overall annual average system efficiency assumptions are in line with those suggested by the literature."
>
> And:
>
> "The JZS analytical annex recognised that the High Ambition scenario was intentionally ambitious and that numerous barriers would need to be overcome for it to be realised. The literature published since the publication of the Jet Zero further technical consultation provides further evidence that the assumptions relating to the future development and uptake of aviation decarbonisation technologies are towards the upper end of what the literature suggests is feasible."

225. The CCC's advice was provided to the Defendant as part of the ministerial submission. At the same time, the Defendant was responsible for considering that advice and feeding

into the Government's response to it. In those circumstances, he must have been well aware of the CCC's different views on delivery risks.

226. Pursuant to the JZS, the Department for Transport was also monitoring delivery by five year reviews, together with annual reviews of progress against the emissions trajectory in the JZS, from 2025.

227. The Defendant was provided with up-to-date advice on airport expansion at Annex F. Under the heading "Restricting growth by reducing or stopping airport expansion", the Government's current position was summarised, together with indicative departmental analysis based on modelling. Expansion was addressed as follows:

> "Further analysis would need to be undertaken to assess how much of DfT's 70% passenger growth projection is facilitated by already approved airport expansion schemes and how much is from those that are at an earlier planning stage. However, we can assume that already approved schemes (e.g. Stansted, Bristol and Southampton) will likely only be a small proportion of the overall capacity increase as it is the major schemes (e.g. Heathrow and Gatwick) that are yet to receive planning consent that will have the biggest impact."

228. The ministerial submission of 6 July 2023 recommended, in the light of the material provided, that the Defendant:

> "**Agree** that based on the latest evidence, we should continue to pursue the approach set out in the JZS and **provide a steer** on whether officials should further develop policy options on DDM either as part of the regular JZS review process or sooner."

229. The Defendant and his ministers reviewed the submission, and the material annexed to it, and agreed that "based on the latest evidence, the Department should continue to pursue the approach set out in the Jet Zero Strategy" and that "no further policy development on DDM was required at this time".

230. In my judgment, it was reasonable for the Defendant to conduct this review on the basis of the material before him. He was entitled to decide upon the extent of the investigations required, and he was not under any duty to make the further inquiries suggested by the Claimant.

231. For these reasons ground 4 of Possible Claim 2 does not succeed.

Possible Claim 2, ground 6 (*Tameside*/investigation into DDM measures)

Possible's submissions

232. Possible submitted that the Defendant ruled out DDM measures without undertaking a proper inquiry into what those measures were, and what impact they might have on decarbonising aviation, in breach of the *Tameside* duty.

233. Possible listed the DDM measures considered by officials in Annex F, highlighting the areas in which officials stated that further work was required. Officials gave advice on estimated emissions reductions and impacts by 2035 and indicated that further work would be required to assess impacts up to 2050. Further analysis would be required to understand the relationship between current and planned airport capacity and passenger numbers. Officials also identified areas of further work required on the topics of Air Passenger Duty, Frequent Flyer Levy, a kerosene tax and VAT on tickets.

234. Possible submitted that the Defendant did not have sufficient information before him to understand properly whether it was safe to reject DDM measures (including whether planned airport expansions were consistent with the JZS passenger forecasts), and the pros and cons of DDM measures.

Conclusions

235. I agree with the Defendant that this ground of challenge misunderstands the nature of the 2023 Review. In the 6 July 2023 submission, the Defendant was asked to indicate if officials should further investigate and develop policy options on DDM measures. In Annex F, officials summarised the nature of potential further investigations into DDM measures, to be undertaken if the Defendant decided that he wished to include DDM measures in the JZS. However, the Defendant decided to continue with the existing strategy of achieving net zero aviation in accordance with the JZS, without any DDM measures being adopted. In those circumstances, it was reasonable for the Defendant not to embark upon a detailed investigation of all possible DDM measures and their impacts on carbon emissions.

236. In my judgment, it was reasonable for the Defendant to conclude that he could take the relatively limited decision required at that stage, on the basis of the information available to him. Therefore the Defendant did not act irrationally, in breach of the *Tameside* duty, which is set out at paragraph 89 above.

237. For these reasons, ground 4 of Possible Claim 2 does not succeed.

Possible Claim 2, ground 7 (Fettering of discretion and failure to consider consultation responses conscientiously)

Possible's submissions

238. Possible submitted that the 2023 Review was an attempt to render the consultation ground in Possible Claim 1 academic, and as such, it cannot have been a conscientious consideration of the consultation responses.

239. Possible relied on case law which referred to the risk that a decision-maker might be motivated by a wish to avoid the consequences of a judicial review: see *R (Carlton-Conway) v Harrow LBC* [2002] 3 PLR 77, per Pill LJ at [27]; *R (Banks) v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 416 (Admin), per Sullivan J., at [108]; *R (Patmore) v Brentwood Borough Council* [2012] EWHC 1244 (Admin), per HHJ Alice Robinson, sitting as a Judge of the High Court, at [50].

240. Furthermore, as the JZS had already been adopted, the consultation proposals were not being considered at a sufficiently formative stage to influence the policy proposals.

Conclusions

241. On my reading of the evidence, there were a number of reasons for the 2023 Review, including Possible Claim 1, among others. As Ms Greig stated at Greig 2/7 - 12, the newly-appointed Secretary of State was briefed in detail on the JZS following his appointment. Subsequently, against the backdrop of the CCC's 2023 Progress Report and the litigation, he "indicated that he would like to reconsider with an open mind DDM policy options …. in order to take a new decision on whether DDM should form part of our approach to decarbonising aviation" (Greig 2/21). In my view, all these factors played a part in the decision to review the matter. I also observe that there had been support among officials and others for inclusion of DDM measures as a back stop in 2021, which may have played a part as well. It does not seem to me to be significant whether the initiative for the review originated with the Defendant or his officials.

242. I am satisfied, on the evidence, that the Defendant was provided with the consultation responses and invited to consider them carefully. The Defendant, through his private office, confirmed that he and his ministers had considered them, when making the decision. I have no reason to doubt that they were conscientiously considered, whilst acknowledging that the starting point of any review is the decision that has already been made, which inevitably influences the decision-making process.

243. I accept the Defendant's submission that the consultation responses were considered at a formative stage of the relevant decision, namely, the question in the 2023 Review whether, in light of the material provided with the submission, the approach in the JZS should be pursued and/or whether further work should be carried out on DDM measures. The 2023 Review was carried out by a new Secretary of State in circumstances where the potential to revisit the JZS and/or adopt DDM was at a formative stage. The consultation responses were clearly capable of influencing the Defendant's decision-making in the 2023 Review.

244. For these reasons, ground 7 of Possible Claim 2 does not succeed.

Final conclusions

245. I grant permission to apply for judicial review on all grounds, and dismiss the claim for judicial review on all grounds, for the reasons set out above.