



Costs Decision

Inquiry held between 20 July – 8 October 2021

Site visits made on 22 July, 25 - 26 August, 13 October 2021

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Inspectors appointed by the Secretary of State

Decision date: 8 June 2022

Costs application in relation to Appeal Ref: APP/D0121/W/20/3259234 Bristol Airport, North Side Road, Felton, Bristol BS48 3DY

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by North Somerset Council for a full award of costs¹ against Bristol Airport Limited.
 - The inquiry was in connection with an appeal against the refusal of planning permission for Outline planning application (with reserved matters details for some elements included and some elements reserved for subsequent approval) for the development of Bristol Airport to enable a throughput of 12 million terminal passengers in any 12 month calendar period, comprising: 2no. extensions to the terminal building and canopies over the forecourt of the main terminal building; erection of new east walkway and pier with vertical circulation cores and pre-board zones; 5m high acoustic timber fence; construction of a new service yard directly north of the western walkway; erection of a multi-storey car park north west of the terminal building with five levels providing approximately 2,150 spaces; enhancement to the internal road system including gyratory road with internal surface car parking and layout changes; enhancements to airside infrastructure including construction of new eastern taxiway link and taxiway widening (and fillets) to the southern edge of Taxiway GOLF; the year-round use of the existing Silver Zone car park extension (Phase 1) with associated permanent (fixed) lighting and CCTV; extension to the Silver Zone car park to provide approximately 2,700 spaces (Phase 2); the provision of on-site renewable energy generation; improvements to the A38; operating within a rolling annualised cap of 4,000 night flights between the hours of 23:30 and 06:00 with no seasonal restrictions; revision to the operation of Stands 38 and 39; and landscaping and associated works.
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Procedural matter

1. An application for costs by Bristol Airport Limited (BAL) against North Somerset Council (NSC) is the subject of a separate decision.

Decision

2. The application for an award of costs is refused.

The submissions for North Somerset Council

3. In accordance with an agreed timetable, the application for costs was made in writing after the close of the Inquiry. The crux of NSC's case is that BAL behaved unreasonably by not withdrawing the appeal on or after 20 April 2021

¹ NSC's application is for a full award of costs that it has incurred in dealing with the appeal since the 20 April 2021

- that being the date on which the Government announced it was adopting the Committee on Climate Change's recommendation related to the Sixth Carbon Budget (6CB) and the inclusion of international aviation emissions in the UK calculations when determining compliance with 6CB and Net Zero 2050 (Net Zero) targets.
4. After April 2021, it would have been unlawful to grant planning permission for the proposed development as this would breach the duties imposed on the Secretary of State (SoS) by sections 1 and 4 of the Climate Change Act 2008 (CCA). This is because there is no national assessment which demonstrates that the proposal, and others, could be accommodated whilst ensuring the attainment of the 6CB and Net Zero.
 5. Any reliance on the UK Emissions Trading Scheme and CORSIA is misplaced because, as Jet Zero recognises, they are part of the picture but cannot provide the whole solution. Their existence does not imply that airport growth can come forward consistent with 6CB and Net Zero.
 6. Therefore after 20 April 2021 the appeal had no reasonable prospect of success. It was unlawful to grant planning permission. Planning Practice Guidance (PPG) provides that an appellant is at risk of an award of costs if the appeal had no reasonable prospect of succeeding.
 7. BAL's decision to pursue the appeal has caused NSC to incur wasted costs in defending the appeal.

The response by Bristol Airport Limited

8. BAL's response to the costs application was made in writing.
9. NSC's suggestion that the appeal should have been withdrawn in April 2021 was made for the first time in its application for costs. That is surprising as NSC wrote to the Planning Inspectorate in respect of the 6CB announcement at that time but did not suggest then that the appeal should be withdrawn. None of the expert witnesses called by NSC during the Inquiry made that suggestion. It is surprising that, after eight weeks of evidence and extensive opening and closing submissions, that this allegation of unreasonable behaviour was made for the first time in the costs application.
10. NSC's position in respect of the 6CB is confused. On the one hand it argues that the 20 April 2021 announcement was a significant turning point whilst NSC's Statement of Case states that the grant of planning permission would be contrary to sections 1 and 4 of the CCA – at a time before 6CB. If it was considered unlawful to grant planning permission before April 2021, that could not have been because of 6CB. In these circumstances 20 April 2021 is not significant.
11. NSC's position related to the duties in section 1 and 4 is wrong in law. The correct approach is set out in BAL's closing submissions which set out the correct international and national legal context for the determination of the appeal. Sections 1 and 4 of the CCA impose duties on the SoS, not on individual planning Inspectors (or local planning authorities). Inspectors do not '*stand in the shoes*' of the SoS in this regard. The duties on Inspectors determining planning appeals are provided by the Town and Country Planning Act 1990 and related legislation.

12. NSC considers that there should be a national assessment, followed by a government decision on sector allocations, before planning permission can be granted for the proposal. If NSC's interpretation were correct the implications would be profound. No appellant could demonstrate to an Inspector that granting a particular application would 'ensure' the attainment of 6CB and Net Zero. Inspectors must take into account the proposed emissions and consider them in the light of the relevant legal and policy framework – which includes the duties under the CCA and the fact that aviation is a traded sector.
13. The suggestion of a national assessment is not supported by policy, and is inconsistent with other appeal decisions - including the grant of planning permission for the expansion of Stansted Airport and the SoS's decision not to call in this appeal. NSC's approach would be tantamount to a moratorium on all aviation development - or for that matter any development in a sector that could not demonstrate that central government had carried out such an assessment. That is not what is envisaged in national aviation policy - as accepted by NSC's witness, who expressly agreed in cross-examination that there was no moratorium on airport development, temporary or otherwise.
14. Had the Government intended to adopt such a radical position it would have made that position clear - but there is no legal justification or policy statement to that effect. In fact the government has restated its policy support for runways outside Heathrow making best use of their existing infrastructure.
15. It was agreed at the inquiry that the appropriate test of significance related to carbon emissions is whether they would be so significant as to have a material impact on the Government's ability to meet its carbon reduction targets. That test is distorted or abandoned by NSC in its costs application. The alternative tests advanced by NSC are entirely wrong and not supported by evidence.
16. NSC's arguments were, in substance, considered and rejected by Lang J in the context of the application for permission for statutory review of an appeal permission at Stansted Airport. North Somerset Council was an interested party to the Stansted claim and argued in the absence of any adopted sectoral target for aviation within the 6CB target, the Inspectors could not determine whether the grant of planning permission for the development would be consistent with the duty in s. 13 CCA 2008. The argument was essentially the same as in the current costs claim.
17. Lang J, considering the application for permission, found that it was correct to find that carbon emissions policies are addressed at a national level in the MBU, and are not a matter for local planning decision-makers. As such, NSC's argument has already been considered and rejected by the High Court. An attempt to re-run the argument by framing it in terms of the section 1 and section 4 duties should be rejected.
18. In light of the above NSC's application for costs should be refused.

Reasons

19. The PPG advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. The PPG gives examples of unreasonable by appellants.

20. The refusal of planning permission in March 2020 predated the publication of 6CB and Net Zero in April 2021. However NSC's concerns over greenhouse gas emissions and climate change were a discrete reason for refusal, and it was clear from the time of the refusal that policy related to these matters would form a significant material consideration in dealing with the appeal. The policy matrix was then changed by the publication of 6CB and Net Zero, and these documents were accepted by all parties as important material considerations.
21. The issue in relation to NSC's costs claim is whether the publication of these documents rendered the pursuit of the appeal unreasonable and whether any grant of planning permission arising from the appeal would be unlawful.
22. An obvious, but important, initial point to make is that the s78 decision has been issued and permission has been granted for the development². It is clear that the Panel did not conclude that the appeal was unreasonable.
23. There is a statutory duty on the SoS to ensure the achievement of 6CB and Net Zero. That much is agreed between the parties. NSC's position is that this duty was also binding on the Panel and that BAL's decision to pursue the appeal was unreasonable for that reason.
24. It is clear that Inspectors stand 'in the shoes' of the Secretary of State in relation to the determination of appeals. That was the matter (leaving aside the allied Compulsory Purchase Order) that the Panel was appointed to deal with. This appointment was under the Town and Country Planning Act 1990, and there is nothing before the Panel to demonstrate that other duties of the SoS under other legislation were somehow transferred.
25. Inspectors routinely deal with planning appeals under the 1990 Act where there are legal duties under other legislation in play. These duties may fall on a Council, other statutory bodies or various Secretaries of State. That does not mean that an Inspector cannot deal with these matters, and they may well be material considerations. But the particular legal duties affecting other bodies are not binding on the outcome of a planning appeal.
26. The assertion, unsupported by precedent, that the Panel should have been bound by other duties on the SoS is not accepted. BAL did not act unreasonably in continuing to pursue the appeal in relation to this argument.
27. It is accepted that there may be difficulties for the SoS in meeting 6CB and Net Zero, and that there is uncertainty as to the way forward. It is also clear that the existing carbon trading schemes are not seen as providing the whole solution. Only the government can set out the pathway to these targets. This agreed position then leads to NSC's argument whilst policy is evolving planning permission should not be granted – and therefore for BAL to pursue the appeal was unreasonable. It is noted that NSC refers to such a pause affecting the aviation sector and airport expansions in the plural.
28. Only the government has the ability to undertake a national cumulative assessment. The question is whether, in the absence of such an assessment, there should be a pause/moratorium on airport expansions. The suggestion is that, in the absence of a national assessment, permissions should not be granted and that it was unreasonable for BAL to pursue the appeal. However there is no suggestion in policy of any such moratorium/pause and the current

² This has been challenged by a Rule 6 party, but not by NSC.

national position is that there is no policy of restraint. On that basis, it was not unreasonable for BAL to pursue the appeal.

29. BAL has referred to the outcome of the Stanstead challenge as part of the argument that it was not unreasonable to continue to pursue the appeal. Obviously this judgement relates to a different site, with different evidence, at a different time, and is therefore of limited assistance. Nevertheless Lang J, at the permission hearing, found that it was correct to find that carbon emissions policies should be addressed at the national level and were not a matter for local decision makers. This supports BAL's position that it was not unreasonable to pursue the appeal.
30. The quantum of emissions arising from the development are agreed between the parties, but obviously the implications of the emissions are not. The agreed test of significance is whether the carbon emissions arising from the proposal are so significant as to have a material effect on the government's ability to meet its carbon reduction targets. In NSC's costs claim there may be a suggestion of an alternative approach to the test – in which case BAL could be argued to have acted unreasonably in pursuing the appeal. However any such alternative approach was not given in evidence or tested, and is of very limited relevance.
31. Given the above, the debate in the costs papers as to whether or when NSC should have advised BAL to withdraw the appeal is not a matter on which this decision turns. Both parties were fully professionally advised, and it is not for one party to advise the other on their position.
32. Overall the fact that the government has adopted targets in advance of policy is a matter for the government to address in the light of the SoS's legal obligations. There is nothing in national policy to support a moratorium at this time on airport development and each proposal needs to be considered on its merits - as was done in the s78 decision. There is nothing to demonstrate that BAL behaved unreasonably in pursuing an appeal which had no reasonable chance of success after April 2021.
33. The Panel considers that unreasonable behaviour resulting in unnecessary expense, as described in the PPG, has not been demonstrated, and therefore concludes that an award of costs is not justified.

Formal Decision

34. The application for an award of costs is refused.

P. J. G. Ware
Lead Inspector

C. Searson
Inspector

D. M. Young
Inspector