

**Case Name:** *Dawes, R (On the Application Of) v Secretary of State for the Transport Department* [2023] EWHC 2352 (Admin) (22 September 2023)

**Full case:** [Click Here](#)

**Commentary:** This was an unsuccessful claim by Jennifer Dawes (the “Claimant”) against the Secretary of State for Transport’s ( the “Defendant”) decision to grant the Interested Party a development consent order (“DCO”) which authorised the development and reopening of Manston Airport to operate as a dedicated air freight facility ( the “Development”).

## Background

In 2018, the Interested Party applied for a DCO for the Development and this was granted by the Secretary of State for Transport in 2020 (contrary to the recommendation of his planning inspectors) (the “2020 Decision”)

The 2020 Decision was however successfully challenged by way of judicial review in February 2021 and was subsequently sent back to the Planning Inspectorate for a fresh consideration. In 2022, the Secretary of State again granted consent for the development, again contrary to recommendation of his planning inspectors (the “2022 Decision”). The Claimant sought to challenge the grant of the DCO by way of judicial review.

## Grounds & Judgment

Ground 1: The first ground challenged the Defendant’s conclusions as to the need for the Development.

This ground was broken down by the Court into three strands as follows:

- 1) That it was procedurally unfair for the defendant to rely heavily on the Azimuth Report and its qualitative research methodology without the underlying evidence.

The Azimuth Report was a report produced by the applicant to support its arguments regarding the need case for the Development. The PINS Examining Authority placed little weight on the qualitative evidence in the Azimuth Report, however, the Defendant engaged with the impact of this material and reached the conclusion that the omitted material (such as transcripts and interview notes) did not affect the weight which he proposed to afford the Azimuth Report. He therefore awarded the Azimuth Report “substantial weight in the planning balance”.

The Court found that the essential issue which arises, when an expert report where underlying evidence is withheld on a confidential basis, is the question of

weight which can attach to it, and that there was nothing to preclude expert evidence were some underlying data or evidence is commercially confidential.

- 2) Fairness, and the 2010 Rules, required the Defendant to provide the opportunity for representations to be made upon the International Bureau of Aviation report, and it was irrational to make a decision on qualitative need, when the Statement of Matters invited representations on quantitative need.

The applicant had made extensive representations on need through a report prepared by the International Bureau of Aviation (the "IBA Report")

The Court held that there was nothing in the correspondence before the Court which precluded the Claimant from making any representations about the IBA Report and whilst the Court found the consultation process could have been made better, nothing had gone "clearly or radically wrong".

The Court did not agree with the argument by the Claimant that it was irrational for the Statement of Matters to invite representations on quantitative need, and then for the defendant to rely on qualitative need information in his decision. The Court found this did not preclude the defendant to rely on qualitative need information which had been produced through the examination process.

On the arguments regarding the Invitations for representations, the Court held that Rule 20 does not provide any limitation on what representations can be made, but simply allowed the Defendant to identify matters (which will not be determinative) on which representations can be invited and attention drawn towards. Those matters will not necessarily be determinative in the final decision.

- 3) The third strand was that the defendant was unlawfully advised that the potential for growth of freight traffic at other airports was not a material consideration in reaching his decision. Again, this argument failed and the conclusion that little weight could be given to freight traffic at other airports was open to the defendant on the basis of the briefing material.

Given the above, ground one was dismissed.

Ground 2: This ground related to how climate change had been addressed, and specifically that the defendant failed to 1) reach a conclusion on the sixth carbon budget and 2) relied upon policy documents – being the Decarbonising Transport Plan (DTP) and the Jet Zero Strategy (JZS) as the basis for concluding the development would have a neutral impact upon climate change.

The Court found the Climate Change Act 2008 includes tools and techniques to reduce

carbon emissions, and the additional policies, being the DTP and JZS are to reinforce the requirement of the 2008 Act. The Court found it was not legally inappropriate or incorrect for the Defendant to rely upon its own policies designed to enable achievement of carbon budgets by the aviation sector to reach the conclusion that impacts on climate change would be neutral. The Defendant relied on these policies, rather than the sixth carbon budget, and whilst the Court said that the policies were “aspirational and their success inherently uncertain”, this was ultimately disagreements with the merits of the approach the Defendant took. As such, ground two was also dismissed.

*Case summary prepared by Jack Curnow*