Neutral Citation Number: [2024] EWCA Civ 560

Case No: CA-2023-002096

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
THE HONOURABLE MR JUSTICE DOVE
CO/3572022

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 May 2024

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE LEWIS
and
LORD JUSTICE WARBY

- -

Between:

THE KING (on the application of JENNIFER DAWES)	**Appellant**
- and -	
(1) SECRETARY OF STATE FOR TRANSPORT	**Respondents**
(2) RIVEROAK STRATEGIC PARTNERS LIMITED	

- -
- -

Richard Harwood KC and Gethin Thomas (instructed by **Goodenough Ring Solicitors**) for the **Appellant**
Mark Westmoreland Smith KC and Mark O'Brien O'Reilly (instructed by **Government Legal Department**) for the **First Respondent**
Michael Humphries KC and Isabella Tafur (instructed by **BDB Pitmans)** for the **Second Respondent**

Hearing date: 24 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns the procedure by which the first respondent, the Secretary of State for Transport, considered an application for a development consent order permitting the re-opening of Manston Airport in Kent to operate as a dedicated air freight facility ("the development"). The application was made by the second respondent, Riveroak Strategic Partners Ltd ("Riveroak").

2. The application had been considered by an Examining Authority, which recommended refusal of the application. One of its conclusions leading to that recommendation was its view that Riveroak had failed to demonstrate sufficient need for the development which was additional to or different from the need which was met by existing airports. In that regard, Riveroak had submitted a report by Azimuth Associates based on interviews conducted with 24 persons that they considered to be experts in the aviation industry, together with information from other sources. The transcripts of the interviews were not submitted to the Examining Authority as they were considered to be confidential and to contain commercially sensitive information. The Examining Authority placed little weight on the Azimuth report because the transcripts of the interviews had not been provided.

3. The first respondent considered the application and the report and the recommendation of the Examining Authority. Initially, he disagreed with the recommendation and decided to grant the application. That decision was quashed and the matter remitted to the first respondent to reconsider. He therefore undertook two consultation exercises. During the course of the second consultation, a report by an entity called the International Bureau of Aviation ("the IBA report") was submitted on behalf of Riveroak. The other interested parties at the inquiry, including the appellant, were not specifically invited to comment upon that report.

4. The first respondent decided to grant the application for a development consent order. A claim for judicial review of that decision was dismissed by Dove J. ("the judge"). Amongst the conclusions that the judge reached were the following. First, the fact that the appellant had not been provided with copies of the interviews on which the Azimuth report was based was not procedurally unfair. Secondly, he concluded that rule 19(3)(b) of the Infrastructure Planning (Examination Procedure) Rules 2010 ("the 2010 Rules") did not apply to the decision-making process where a decision had been quashed and the matter was being reconsidered by the first respondent. Consequently, the first respondent was not required to give the parties an opportunity to comment on the IBA report. Further, and in any event, the IBA report was not the reason why the first respondent disagreed with the recommendation of the Examining Authority and so the requirements of 19(3)(b) would not have been satisfied even if that rule had been applicable. Finally, he considered that the first respondent had not been given incorrect advice to the effect that he could not take into account the potential for airport capacity to expand at other locations.

5. The appellant has permission to appeal on the following grounds, namely that the judge erred:

(1) in regarding the withholding of the evidence underlying the Azimuth report as a question of weight for the decision-maker; procedural fairness was a matter for the court to determine and, given the significance of the Azimuth report and the importance of the underlying evidence, the matter could not be dealt with fairly without that evidence being available for scrutiny;

(2) in concluding that rule 19 of the 2010 Rules did not apply to proceedings after an initial decision had been quashed;

(3) in concluding that rule 19 would only apply if the new evidence was the reason rather than a reason for being disposed to disagree with the recommendation and in treating the IBA report as not making a difference to the first respondent's conclusions;

(4) in concluding that the process was in any event procedurally fair as parties could put in comments on new evidence after the consultation exercise had concluded; and

(5) in concluding that the ministerial briefing to the first respondent which advised him that future capacity was not material to the decision did not render the decision unlawful.

THE LEGAL FRAMEWORK

6. Development consent is required under section 31 of the Planning Act 2008 ("the 2008 Act") for development which forms part of a nationally significant infrastructure project. The proposed development at Manston Airport would constitute such a project and requires development consent: see sections 14 and 23(5)(b) of the 2008 Act. An Examining Authority comprising a panel of four people was appointed under section 61 and 65 of the 2008 Act to examine the application. There are statutory provisions governing that examination. In particular, section 90 of the 2008 Act provides that the examination is to take the form of consideration of written representations about the application. Interested parties are defined in section 102 and include those who have made relevant representations (i.e. representations made in time to the Secretary of State about the application). The Examining Authority may also hold oral hearings about specific issues: see section 91. The Examining Authority's functions include making a report setting out (a) its findings and conclusions and (b) its recommendation as to the decision to be made on the application: see section 74(2) of the 2008 Act. The Secretary of State has the function of deciding an application for order for development consent: see section 103 of the 2008 Act.

7. Further detailed provision governing the examination is contained in the 2010 Rules. The 2010 Rules also deal with the procedure to be followed by the Secretary of State after the completion of the Examination by the Examining Authority. Rule 19 provides:

> "**19. Procedure after completion of examination**
>
> (1) After completion of the examination, the Examining authority must make a written report to the Secretary of State.

(2) The report must include the Examining authority's -

(a) findings and conclusions in respect of the application; and

(b) any recommendation as to the decision to be made on the application.

(3) If after the completion of the Examining authority's examination, the Secretary of State -

(a) differs from the Examining authority on any matter of fact mentioned in, or appearing to the Secretary of State to be material to, a conclusion reached by the Examining authority; or

(b) takes into consideration any new evidence or new matter of fact,

and is for that reason disposed to disagree with a recommendation made by the Examining authority, the Secretary of State shall not come to a decision which is at variance with that recommendation without –

(i) notifying all interested parties of the Secretary of State's disagreement and the reasons for it; and

(ii) giving them an opportunity of making representations in writing to the Secretary of State in respect of any new evidence or new matter of fact."

8. There is also provision dealing with the procedure to be followed if the Secretary of State takes a decision on the application and that decision is then quashed in legal proceedings. Rule 20 of the 2010 Rules provides:

"**20. Procedure following quashing of decision**

(2) Where a decision of the Secretary of State in respect of an application is quashed in proceedings before any court, the Secretary of State –

(a) shall send to all interested parties a written statement of the matters with respect to which further representations in writing are invited for the purposes of the Secretary of State's further consideration of the application;

(b) shall give all interested parties the opportunity of making representations in writing to the Secretary of State in respect of those matters."

THE FACTUAL BACKGROUND

Manston Airport

9. The facts are fully set out in the judgment below. For the purposes of this appeal, the material facts are as follows. Manston Airport is located on the Isle of Thanet in Kent. It has been used for aviation since the First World War. It became a joint military and civil airfield in 1958. During the 1960s, it was used for passenger services for chartered air travel. The ownership of the airport passed to the private sector in 1999. The airport handled freight alongside passenger flights until its closure in 2013.

The Application and its Examination

10. On 17 July 2028, Riveroak applied under section 37 of the 2008 Act for a development consent order with a view to the re-opening of Manston Airport as a dedicated freight facility. The proposed order would permit the upgrading of the runway and the development of infrastructure and facilities. The application was accepted for examination and an Examining Authority appointed to examine the application. The examination process involved consideration of the written material forming the application and written representations from other persons. Hearings on specific issues were also held. The appellant is a local resident who made representations during the examination.

11. One of the issues that was considered by the Examining Authority was the question of the need for the development. Riveroak submitted information with its application which it contended established that there was significant unmet need for local air cargo capacity. The information included a report prepared by Azimuth Associates, dated 18 July 2018, which sought to forecast freight and passenger volumes for the first 20 years of the operation of the proposed development. The report was in four volumes. Volume 1 contained an analysis of demand within the south-east of England and addressed the extent to which that demand could be met at Manston Airport. It concluded that Manston Airport could "play a vital role in helping Britain's connectedness and trade with the rest of the world, and of making a substantial contribution to the future economic and social well-being of the UK". In volume 2, Azimuth Associates went on to carry out what they described as a qualitative study of potential demand. They explained that they considered that the use of econometric models for forecasting was not appropriate in this case as Manston Airport had been closed for many years and had lacked investment for longer. They adopted instead what they described as a qualitative approach which aimed to predict demand based on the opinions of industry experts. To that end they carried out interviews with 24 people. The names of the people, and the companies or organisations for which they worked, were provided. The questions asked were set out. Transcripts of the interviews were not submitted to the Examining Authority (and were not provided subsequently to the first respondent). At paragraph 3.4.2, the authors explain that:

> "3.4.2 Transcripts have not been made available as part of this report due the confidentiality of the interviews and the commercial sensitivity of the data collected. Responses have been incorporated into the findings in Section 4."

12. A summary of the responses to the various questions are then set out in section 4. As the judge explained at paragraphs 7 and 8 of his judgment:

> "7…..Derived from the contents of the interviews, Azimuth then arrived at recommendations, firstly, in relation to the opportunities for Manston Airport to attract aircraft movements including those arising from the lack of available slots … [at] other airports in the South East of England and the bumping of freight from passenger aircraft (so called "belly hold" carriage), security issues associated with outsized cargo and the speed of turnaround. They also recommended a number of markets which were identified through the research for which Manston Airport could be suitable. These included outsized freight, Formula 1 and luxury cars, live animals, perishable products, and time sensitive items, for instance for the aircraft industry and the oil and gas industry.
>
> 8. The recommendations contained in volume 2 of the report, following the qualitative analysis which Azimuth Associates considered the most reliable methodology, was then converted into a quantitative assessment of the volumes of freight and passenger traffic which could be expected for the first 20 years of operation at Manston Airport. Whilst it is not set out in detail within the report, in answers provided by the interested party to questions on need posed during the examination more detailed breakdowns were provided in respect of, for instance, particular market sectors and the assumptions which had been built into the forecast as to the number of aircraft movements and volumes of freight which were forecast to be moved from Manston Airport. The demand forecasts showed that the volume of freight movements in Manston Airport would increase over the course of time to a forecast of 17,000 freight movements in year 20. In addition, the forecasts evidenced around 1.4 million passengers using the airport by year 20 of its operation."

13. Others who made representations disagreed with the forecasts made by Azimuth Associates. A report was submitted prepared by York Aviation LLP which made submissions explaining why they considered that the case for the development of Manston Airport had not been made out and why the proposed development was not commercially viable.

The Examining Authority's Conclusions and Recommendation

14. The Examining Authority submitted its report to the first respondent. That report contained its conclusions on particular issues. In section 5, it considered the need for the proposed development. It considered the material submitted and said this in relation to the Azimuth Report:

> "5.6.57 While potentially useful and interesting, the fact that the transcripts have not been made available as part of the Azimuth Report due to the confidentiality of the interviews and the commercial sensitivity of the data collected limits the weight that can be given to them. Many of the interviewees also

> appeared to be local businesses of limited size or pro- business organisations for Kent.
>
> …
>
> 5.6.59 Such as it is, and on the basis of the evidence provided, the ExA cannot conclude that that academic and industry experts have validated the approach of the Azimuth Report. While noting the statement that further evidence was commercially confidential, without access to such evidence the ExA is unable to take this into account."

15. The Examining Authority then considered another report, referred to as the Northpoint Report, which adopted what was described as a scenario-based analysis and which was said to verify the Azimuth Report. It also considered the York Aviation Report. It analysed governmental and industry forecasts.

16. The Examining Authority then set out its conclusions on the issue of need at sections 5.7.1 to 5.7.28. That section also included its conclusions on Riveroak's evidence in relation to demand forecasting and the need for the proposed development in view of the availability of capacity at other airports. The conclusions were expressed in the following terms (references omitted):

> "5.7.13 The Applicant's Azimuth Report is a comprehensive document but the weight that the ExA can place on its forecasts is reduced by the lack of interview transcripts available, and of the size and sample frame of many of the interviewees, when considering the size of the forecasts that are generated and there is little evidence that academic and industry experts have validated the approach of the Azimuth Report. Furthermore, there is little evidence that capacity available elsewhere such as at EMA, or the impact of the proposed Northwest Runway at Heathrow have been taken into account in the production of the forecasts.
>
> 5.7.14 The Northpoint Report provides a valuable alternative source to 'back up' the Azimuth Report. However, the limitations identified within its model, particularly those considering the scope for migrating between types of carrier and the impact of price (particularly when considering differences between bellyhold and pure freight, and trucking) appear to the ExA to be substantial limitations in the case of the Proposed Development and a more detailed model assessing such variables was not available to the ExA.
>
> …..
>
> 5.7.23 The ExA is not convinced that there is a substantial gap between capacity and demand for general air freight within the South East at present. Capacity is available or could be available at other airports within the South East or at other

> airports within reach of the South East should the demand exist, and such capacity could largely be achieved relatively simply through permitted development rights or existing facilities.
>
> 5.7.24 The ExA is of the opinion that general air freight would continue to be well served in the UK with spare capacity at Stansted in the short term (to 2030) and the proposed Northwest Runway at Heathrow in the longer term, and that new integrators are more likely to wish to be sited in a more central location. If constructed and operated then the Proposed Development could carry out a role within the market focused on perishables and oversized niche freight as previously but it seems unlikely that tonnage achieved will be significantly more than previously handled. Without the proposed Northwest Runway at Heathrow more demand may be available but the ExA's conclusions relating to new integrators, that is that they would be more likely to base themselves in a more central location to their other logistical operations, remain valid."

17. Its ultimate conclusion on this issue was that (emphasis in the original):

> "Given all the above evidence, **the ExA concludes that the levels of freight that the Proposed Development could expect to handle are modest and could be catered for at existing airports (Heathrow, Stansted, EMA, and others if the demand existed). The ExA considers that Manston appears to offer no obvious advantages to outweigh the strong competition that such airports offer. The ExA therefore concludes that the Applicant has failed to demonstrate sufficient need for the Proposed Development, additional to (or different from) the need which is met by the provision of existing airports.**"

18. The Examining Authority then set out its findings and conclusions on other issues including, at section 8 of the report, its conclusion on the case for development consent. The conclusion was that the Examining Authority "concludes that the failure to demonstrate sufficient need weighs substantially against the case for development consent being given" and concluded ultimately "that the case for development consent has not been demonstrated" (see paragraphs 8.2.6 and 8.3.5). At chapter 11.2 it set out a summary of its findings and conclusions. At 11.3.1, it set out its recommendation in the following terms (emphasis in the original):

> "**11.3. RECOMMENDATION**
>
> 11.3.1 For all of the above reasons and in the light of its findings and conclusions on important and relevant matters set out in this report, **the ExA, under the procedures set down in the PA2008, recommended that the SoS should not grant development consent.**"

The First Decision of the First Respondent

19. The first respondent disagreed with the recommendation of the Examining Authority. By letter dated 9 July 2020, he granted the application for development consent. By a consent order approved and sealed on 15 February 2021, that decision was quashed on the grounds that the first respondent had failed to give adequate reasons for the decision.

The Reconsideration

20. The first respondent then began the process of further consideration of the application for development consent. The decision was taken by the relevant minister rather than the Secretary of State for Transport personally as the Secretary of State had recused himself. On 11 June 2021, the first consultation process began. An official in the Department of Transport wrote to all interested parties pursuant to rule 20(2) of the 2010 Rules inviting further representations on the following matters:

> "the extent to which current national or local policies (including any changes since 9 July 2020 such as, but not limited to, the re-instatement of the ANPS) inform the level of need for the services that the Development would provide and the benefits that would be achieved from the Development;
>
> whether the quantitative need for the Development has been affected by any changes since 9 July 2019, and if so, a description of any such changes and the impacts on the level of need from those changes (such as, but not limited to, changes in demand for air freight, changes of capacity at other airports, locational requirements for air freight and the effects of Brexit and/or Covid);
>
> the extent to which the Secretary of State should, in his re-determination of the application, have regard to the sixth carbon budget (covering the years between 2033 – 2037) which will include emissions from international aviation; and
>
> any other matters arising since 9 July 2019 which Interested Parties consider are material for the Secretary of State to take into account in his re-determination of the application."

21. The deadline for responses was 9 July 2021. The letter also said that an independent aviation assessor had been appointed to advise the first respondent on matters relating to need and to prepare a report on his findings on those issues. An opportunity to comment on the report was to be given to Riveroak and the interested parties. The letter also said that where any interested parties had submitted any comments in correspondence between 9 July 2020 and the date of the letter and wished to have them treated as a formal representation in the re-determination process, the parties should re-submit that correspondence as a formal representation.

22. The Independent Assessor's draft report was published on 21 October 2021. In essence, the conclusion he reached was that there had been no significant or material change to policy or the quantitative need for the proposed development that would

lead to a different conclusion from that which had been reached by the Examining Authority.

23. By letter dated 21 October 2021, a second round of consultation began. The letter invited (1) representations on the draft report of the independent aviation assessor and (2) any submissions on the representations received in the first round of consultation. The deadline for responses was 19 November 2021 although that was subsequently extended to 3 December 2021. The letter also indicated that correspondence had been received between the end of the first consultation on 9 July 2021 and the start of the second consultation on 21 October 2021. Again, the letter indicated that any party who wished that correspondence to be treated as a formal consultation representation was to re-submit that correspondence by the end of the second consultation process.

24. Riveroak made extensive representations during the second consultation. Included as an annex to those representations was the IBA report. The subject matter of that report was whether any additional freight capacity was required in the south-east of England. In essence, having considered a number of factors, it concluded that between 13,000 and 35,000 additional extra flights by freight aircraft were likely to be required by 2030. It considered Heathrow airport was full and Stansted would only be able to accommodate 6,000 of the additional flights that it considered would be required. It saw "a real risk of a lack of air cargo capacity by 2030, especially in the London Area". It is fair to note that the appellant also submitted a further report prepared by York Aviation LLP. There was a third consultation exercise which was limited to consideration of specific matters.

25. There were no arrangements put in place to enable any person to make representations on material submitted during the second consultation process. As it happens, one entity did make submissions on the IBA report.

The Submission to the Minister

26. In the light of ground 5 of the appeal, it is necessary to refer to the process by which the first respondent was invited to reach a decision on the application. On 14 July 2022, a submission was sent to the minister. Paragraph 5 indicated that there were a number of areas where the civil servants advising the minister disagreed with the Examining Authority and the Independent Assessor. They included questions of capacity. The submission said this:

> "Capacity: the ExA and IAA took into account capacity at other airports that could be made available through in future [sic]. Such capacity is not material to this decision as there is no certainty such capacity will come forward in future."

27. The submissions were accompanied by a draft decision letter. At paragraph 97 of the draft, it said that the Secretary of State "is only able to attach very little weight to capacity through applications that have yet to come forward. This is because there is no certainty that such potential capacity will be delivered". At paragraph 101, the draft said that "the Secretary of State is unable to take into account capacity that airport operators have not indicated that they intend to and are able to create through permitted development rights". At paragraph 102, the draft said in relation to potential

capacity that "As set out above, such capacity is not material to the Secretary of State's decision on this application".

28. A cover sheet was sent with the ministerial submission. That contained a note to the private secretary, paragraph 5 of which said that the civil servants thought that the approach taken by the Examining Authority and the Independent Assessor had resulted in them taking into account matters that were not relevant to the decision.

The Decision

29. By letter dated 18 August 2022, the first respondent notified the parties that he had decided to grant the application and make a development consent order for the development at Manston Airport. The decision letter is a lengthy document and should be read fairly and in its entirety. At paragraph 34, the decision letter begins consideration of the question of the need for the proposed development. It considered relevant policies between paragraphs 39 and 59 and set out the first respondent's conclusions on those issues at paragraphs 60 to 78. At paragraph 79, the decision letter starts to consider the issue of "Air Freight Demand & Forecast". The decision letter considers the Azimuth report at paragraphs 80 to 82 and the IBA report at 84, noting that the first respondent "is of the view that this data demonstrates a sustained growth in air freight demand". At paragraph 85, the decision letter considers another report and "other similar news and industry articles and reports highlighting the increase in air freight generally". At paragraph 89 and onwards, the decision letter sets out the first respondent's conclusion on this issue in these terms (references omitted):

> "<u>The Secretary of State's Conclusion on Demand & Forecast Assessments</u>
>
> 89. The Secretary of State accepts that there will always be a level of uncertainty in any demand forecast and agrees with the author of the Azimuth Report that assessing demand for freight is no easy matter. The Secretary of State notes that the approach taken by the Applicant relies on an in-depth understanding of the changes that are taking place within the sector in a way that does not miss any currently unmet demand. The Examining Authority concluded that the Applicant's forecasts seem ambitious in light of the historical performance of the airport. The Secretary of State considers that, given the circumstances noted in paragraphs 81 - 82 above, the qualitative approach taken in the Azimuth Report is preferable to the other forecasts considered by the Examining Authority. Given the dynamic changes that are currently taking place in the aviation sector as a result of the challenges and opportunities from the COVID-19 pandemic, the opportunities from the UK's emergence as a sovereign trading nation and the age of the available data allied with historic under investment, the Secretary of State, contrary to the Examining Authority and the Independent Assessor, places little weight on forecasts that rely on historic data and performance to determine what share of the market the Development might capture.

90. The Secretary of State notes that while the Examining Authority found the Applicant's Azimuth Report potentially useful and interesting, it gave it limited weight because the transcripts of interviews and other commercially sensitive or confidential information had not been made available. The Secretary of State notes that the Independent Assessor observed the reduced weight that the Examining Authority gave the Azimuth Report and made no further comment. While the Secretary of State agrees with the Examining Authority that the Azimuth Report is a comprehensive document, he disagrees with the Examining Authority that the lack of access to the information withheld by the Applicant reduces the weight that can be placed on it. The Secretary of State is of the view that withholding commercially and other sensitive information from the planning process is justified. The Secretary of State notes that Table 3 in Volume II of the Azimuth Report provides a list of the organisations and key market players it interviewed. A forecast of demand is included in Table 1 in Volume III of the Azimuth Report and a more detailed forecast was included in Appendix 3.3 of the Applicant's Environmental Statement. The Application was publicised and examined in the normal way and all Application documents and representations submitted during the examination were made publicly available such that there was opportunity for anyone not notified to also submit comments. The Secretary of State did not receive any representations that persuaded him that the conclusions of the Azimuth Report are incorrect.

91. The Secretary of State is aware that his Department's UK Aviation Forecasts 2017 does not model air freight in detail and therefore labelled it as an assumption. However, he is satisfied that the Azimuth Report, which is supported by the Northpoint Report and provides a top-down view of the air freight market and employs a 'scenario-based' analysis, demonstrates that there is demand for the air freight capacity that the Development seeks to provide. The Secretary of State has therefore afforded the Azimuth Report substantial weight in the planning balance.

92. The Secretary of State agrees that industry and other news reports submitted during the re-determination process support the view that e-commerce and air freight demand is increasing, and that these news reports are consistent and support some of the assumptions made in the Azimuth Report. However, the Secretary of State is only able to attach little weight to such reports because they have not been assessed for whether they represent a balanced view of material that is in the wider press.

93. The Secretary of State accepts that there is uncertainty in how the aviation sector may look post-Brexit or post-Covid,

> and agrees with the Independent Assessor's that even the most up-to-date data cannot be said to fully reflect how the sector may look going forward. However, it is because of this uncertainty that the Secretary of State places significant weight on the reopening and development of the site for aviation purposes, rather than losing the site and existing aviation infrastructure to other redevelopment.
>
> 94. Finally, the Secretary of State places substantial weight on the fact that there is a private investor who has concluded that the traffic forecasted at the Development could be captured at a price that would make the Development viable, and is willing to invest in redeveloping the site on that basis."

30. The decision letter then begins a consideration of the issue of capacity at paragraphs 95 and 96. The material part of his conclusions are at paragraphs 97 and 100 to 102 which are in the following terms (references omitted):

> "Secretary of State's Conclusions on Capacity
>
> 97. On the matter of capacity being made available at airports elsewhere, the Secretary of State accepts that there is potential for all existing airports to expand in future to increase capacity. However, the Secretary of State is of the view that in considering whether there is a demand for the capacity the Development aims to provide, he is not able to attach weight to applications that have yet to come forward. This is because there is no certainty that capacity from such applications will be delivered. For example, aspiration plans setting out future growth may be modified or changed, or they may not come forward at all. Where planning permission is required, both the ANPS and the MBU policies are clear that they do not prejudge the decision of the relevant planning authority responsible for decision-making on any planning applications. Such applications are subject to the relevant planning process and may not ultimately be granted consent by the decision-maker. In addition, the aviation sector in the UK is largely privatised and operates in a competitive international market, and the decision to invest in airport expansion is therefore a commercial decision to be taken by the airport operator. This means that while increase in demand for air freight services could potentially be met by expansion at other airports, those airport operators may not decide to invest in changes to their infrastructure to meet that demand. It is therefore not possible to say with any certainty whether indicative capacity set out in growth plans will result in actual future capacity.
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> …
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> 100. The Secretary of State also received representations that referenced the Loadstar article dated 8 November 2021,

International Air Transport Association ("IATA") data from 2019 and commentary on the inability of Heathrow to accommodate rising freight demand. The Secretary of State also notes that the IBA report also contends that reliance should not be made on capacity at Heathrow. Using 2019 and 2021 data, the IBA forecasts a return to pre-pandemic belly hold freight levels at Heathrow by 2023, and that 2019 data shows that belly hold capacity is dominant at Heathrow for meeting freight demand.

101. The Secretary of State disagrees with the reliance the Examining Authority places on capacity could largely be achieved through permitted development rights or existing airport facilities. As set out by the Examining Authority, permitted development rights for the extension or construction of a runway or passenger terminal is not permitted above a certain level, and should an Environmental Impact Assessment be required then permitted development rights would not apply. An airport operator is also required to consult the relevant Local Planning Authority(s) before carrying out any extension or construction works under permitted development rights. As with aspirational growth plans for expansion, the decision to increase capacity through general permitted development or existing facilities is a commercial decision to be taken by the airport operator, and the Secretary of State's in unable to place weight on capacity that airport operators have not indicated they intend to and are able to create through permitted development rights.

102. The Secretary of State notes that the Examining Authority and the Independent Assessor consider that there is spare capacity at other airports. It appears that in concluding this, the Examining Authority and the Independent Assessor are relying in part on aspirational growth plans and the potential for growth at other airports. Such capacity is not required to be taken into account by policy, and it is not in the Secretary of State's view otherwise obviously material to the Secretary of State's decision on this Application for the reasons set out above, principally the lack of any certainty that such potential capacity will ever come forward. To the extent that possible capacity is legally material, the Secretary of State gives no significant weight to it for the same reasons. The Secretary of State accepts that there may currently be existing capacity at other airports such as Stansted and East Midlands Airport. However, the Secretary of State's focus is on the long-term capacity gap identified in relevant aviation policy and forecasted to occur by 2030 in the South East of England. Even if the impacts from the COVID-19 pandemic and other recent events result in short-term fluctuations in demand as suggested by the Independent Assessor (and other Interested Parties, by their

> nature such short-term impacts would not give rise to certainty over the long-term demand forecast."

31. The first respondent's overall conclusion and decision comes at paragraph 268 which says that:

> "For all the reasons given in this letter, the Secretary of State is satisfied that there is a clear justification for authorising the Development. He has therefore decided to grant the Manston Airport Development Consent Order Application…."

32. The Manston Airport Development Consent Order 2022 ("the Order") was made on 18 August 2022 and came into force on 8 September 2022.

The Judgment

33. The appellant brought a claim for judicial review of the decision to make the development consent order in accordance with the provisions of section 118 of the 2008 Act. There were a number of grounds of claim all of which were dismissed by the judge. This judgement only deals with those matters relevant to the grounds of appeal to this Court.

34. At paragraph 61 and following, the judge considered the argument that it was procedurally unfair for the first respondent to rely so heavily upon the Azimuth report without providing the underlying evidence or permitting the scrutiny of that evidence by interested parties. The judge recorded the contrary submission made by the first respondent and Riveroak that there was no requirement to provide the transcripts of the interview or other commercially sensitive and confidential information underpinning the Azimuth report in order for it to be relied upon and play a part in the decision-making process. The report was said to be a material consideration and the weight to be attached to the report was a matter for the decision-maker. The judge concluded that:

> "64. Having considered the rival submissions which have been made in relation to this aspect of the claimant's case I am unable to accept that there was any breach of the requirements of fairness in the context of this particular case by reason of the failure to provide the interview transcripts or other material underpinning the Azimuth Report. There was in my judgment nothing to prevent the interested party placing reliance on the Azimuth report without the disclosure of the information upon which it was based, and which was commercially confidential.
>
> 65. The Azimuth report was capable of amounting to a material consideration in the decision-making process, particularly given that it was pertinent to an important issue in the case namely the question of demand and need. There is nothing to preclude expert evidence being provided in a decision-making process of this kind in which some of the underlying data or evidence is not disclosed on the grounds that it is commercially confidential and cannot be put into the public domain. There

> are no provisions which could require the defendant to insist upon production of that underlying material; by the same token it is not contended by the claimant that in the absence of that material the Azimuth report should be treated as irrelevant. The essential issue which arises when an expert report of this kind is submitted, and underlying evidence is withheld on the basis of confidentiality, is the question of the weight which can be attached to such a report in the absence of the material which underpins some of the judgments and conclusions which have been reached. It was the question of the weight which could be given to the report in these circumstances upon which the ExA focused. In his turn, the defendant also focused upon what weight could be attached to the Azimuth report in the absence of the underlying evidence. The defendant engaged with the impact of the material which had been omitted and reached the conclusion that it did not in his judgment affect the weight which he proposed to afford the report. The defendant provided reasons for that conclusion.
>
> 66. Ultimately, it was for the defendant to conclude what weight could be attached to the Azimuth report and in the light of the observations which he reached it is clear he concluded that significant weight could be attached to the Azimuth report's analysis. He concluded that the withholding of the commercially sensitive material from the planning process had been justified and that details of those organisations and market players who had been interviewed had been identified. The Azimuth report had been submitted and available for scrutiny along with the other material comprised in the application. In the circumstances fairness did not require additional disclosure of the kind suggested by the claimant to have been required. I am not satisfied, therefore, that fairness required the provision of this material."

35. The judge next considered the question of whether rule 19 applied to the further consideration of the application following the quashing of the original decision on the application. He concluded that it did not for the following reasons:

> "71. Dealing firstly with the contentions in relation to the 2010 rules, I accept the submissions made by the defendant and the interested party that a distinction needs to be drawn between rule 19 and rule 20, in particular in the light of the headings of the two rules in question. On the basis of the headings and the provisions of the rules it is clear that rule 19 applies after completion of the examination and the submission of the ExA's report to the defendant prior to decision making. By contrast rule 20 is specific to addressing the procedure following the quashing of a decision. It is self-evidently the case that in present circumstances the defendant was addressing a

> redetermination procedure following his decision having been quashed.
>
> 72. The rules address two quite separate processes which arise in two quite separate factual contexts. In the situation governed by rule 19 the parties would be unaware of the ExA report's contents and recommendations, and will have only had an opportunity to comment upon the issues and matters arising within the context of the exchange of submissions and materials orchestrated by the examination process. That will not have featured the views of the defendant or, alternatively, new evidence or facts which were not part of the examination process, but which have the potential to lead the defendant to a disagreement with the ExA's recommendation. In those circumstances it is clear why rule 19 would provide the opportunity for those matters to be put in the public domain and for the parties to have a chance to comment upon them. By contrast the situation addressed by rule 20 is one in which the ExA's report will be in the public domain, and the process which is envisaged under rule 20(2) is one which is focused on particular issues about which the defendant requires further information. Thus, in my judgment rule 19 is not of application at the stage of proceedings after an initial decision has been the subject of a quashing order. The reference in paragraph 265 of the decision to rule 19 is an error, but not one which in my judgment was material so as to justify the grant of relief to the claimant."

36. The judge nevertheless considered whether the first respondent would have had to give persons the opportunity to make written representations on the IBA report if rule 19(3) did apply. He concluded that he would not as:

> "73. Even were I wrong in relation to that conclusion, I am nonetheless satisfied that the submissions made by the defendant and the interested party on the application of rule 19(3) are correct. Even were one to construe rule 19 as applying to this stage of the process, as it was after the completion of the ExA's examination, what is clear on the face of the defendant's conclusions is that it is the weight which he attached to the Azimuth report which has led to him rejecting the ExA's recommendation. Whilst reference is made in the decision to the IBA report, when the defendant's conclusions are scrutinised it is clear that the reason he was disposed to disagree with the ExA's recommendation was not any new evidence or new facts but rather his appraisal of the weight to be attached to the Azimuth report."

37. The judge further considered that there was no procedural unfairness in any event as there was nothing to prevent the appellant or any other person from making submissions on the IBA report after it had been published at the end of the second consultation. Finally he rejected the claim that the Minister had incorrectly been

advised that he could not take account of issues of capacity in reaching his decision. He said:

> "91. In my judgment, when the briefing document and the draft letter are read as whole it is clear that the recommendation of the defendant's officials, which he adopted, was that the potential for airport capacity expansion elsewhere was something to which very little weight could be attached, and was not obviously material to the decision for the reasons relating to the uncertainties and contingencies upon which any expansion depended. It follows that I am not satisfied that the claimant has established that the defendant was advised he could not take additional airport capacity into account and it was irrelevant. Rather the briefing and draft decision presented to him, and which he accepted, set out that very little weight could be attached to capacity through applications which had yet to be brought forward on the basis that there was no certainty that any of them would materialise. That was a conclusion which was open to the defendant on the basis that it acknowledged and considered the question of capacity at other airports, but concluded for the reasons that the defendant gave that very little weight could be attached to it. In those circumstances I am unable to accept that there was any illegality in the approach presented to the defendant and adopted by him in the ministerial briefing and the accompanying draft decision letter."

THE FIRST GROUND OF APPEAL – THE AZIMUTH REPORT

38. Mr Harwood KC, with Mr Thomas, for the appellant, submitted that it was a breach of the common law principles of procedural fairness for the Secretary of State to take account of the Azimuth report without the transcripts of the interviews on which it was based being disclosed to the parties to enable them to comment. He submitted that it was a matter for the court to determine whether there had been procedural unfairness and the judge had erred in treating the matter as a question of weight for the first respondent. Mr Harwood accepted that there was no obligation under the 2010 Rules to provide copies of the transcripts of the interviews underlying the Azimuth report and that the essence of his submission was that if the transcripts were not provided voluntarily, it would be procedurally unfair, and therefore unlawful, for the first respondent to consider the Azimuth report. The only course of action in those circumstances, therefore, would be to exclude the Azimuth report from consideration.

39. Mr Westmoreland Smith KC, with Mr O'Brien O'Reilly, for the first respondent, submitted that the Azimuth report was a four volume report. The interviews were referred to in volume 2 of the report. The identities of the interviewees were disclosed and the substance of their responses were incorporated into the text in volume 2. That material was then converted into a quantitative analysis which was dealt with in volume 3. The common law principles of procedural fairness did not require that the underlying interviews be disclosed. Further, the judge had correctly understood that the ground of challenge was as to the fairness of the procedure (not a rationality challenge) and that fairness was a matter for him to decide. He decided it was not

procedurally unfair for the transcripts of interviews not to be disclosed. Thereafter, the weight to be given to the Azimuth report was a matter for the first respondent.

40. Mr Humphries KC, with Ms Tafur, for the second respondent, submitted first that there was no requirement under the statutory provisions for the underlying interviews to be disclosed. Secondly procedural fairness was dealt with by the judge and he was correct to conclude that the procedure was not unfair. In that regard, the material was not available to anyone. It was not a case where the first respondent, or some of the persons making representations, had the underlying interviews but not the appellant. Further, the role of the 24 interviews should not be overstated. The report included other matters, such as the forecasts in volume 3 of the report, which were not challenged.

Discussion and Conclusion

41. The judge did consider and decide for himself what the principles of procedural fairness required. He decided that procedural fairness did not require the provision of the underlying transcripts (see the last sentence of paragraph 66 of his judgment). He decided that there was no breach of procedural fairness and there was nothing to prevent reliance on the Azimuth report (see paragraph 64 of his judgment). The judge was entitled, and in my judgment correct, to reach that conclusion.

42. The requirements of procedural fairness depend upon a number of factors including the facts, the nature of the decision-making process and the statutory framework: see generally the observations of Lord Mustill in *R v Secretary of State for the Home Department ex p. Doody* [1994] 1 AC 531 at 560D-H, and of Lord Bridge in *Lloyd v McMahon* [1987] AC 625 at page 702. In another context, the Court of Appeal has observed that a process of consultation may require that those who have a potential interest in the subject matter are told enough about the proposal to enable them to make an intelligent response but "consultation is not litigation" and the consulting authority is not obliged to reveal every submission it receives: see *R v North and East Devon Health Authority ex p. Coughlan* [2001] QB 213 at paragraph 112.

43. In the present case, the statutory framework involves consideration of an application for a development consent order for a nationally significant infrastructure project. The statute provides for an examination of the application by way of written representations by an examining authority and then consideration of the application and the report of the examining authority by the minister. There are obligations imposed by the 2008 Act and the 2010 Rules to ensure fairness. Those provisions do not require the disclosure of confidential or commercially sensitive information relied upon in preparing a report in support of the application for a development consent order. Nor does any wider principle of common law procedural fairness require the provision of such information in the present case. Those interested in the application, such as the appellant who was resident in the area, had access to the application for development consent order and to the supporting material, including the Azimuth report. That report identified the methodology used, the names of those interviewed, and summarised their responses. Those interested were able to (and the appellant did) make submissions on the Azimuth report, including on its adequacy and reliability. The appellant was not engaged in litigation and was not entitled either under the statutory provisions or the common law to be provided with the transcripts of the interviews. Neither the statutory provisions nor any principle of common law

procedural fairness prevented Riveroak from relying on the report in support of its application. They did not require the first respondent to exclude the Azimuth report from his consideration of the application because the interview transcripts had not been disclosed.

44. In those circumstances, therefore, as the judge found at paragraph 65 of his judgment, the decision-maker was entitled to have regard to the Azimuth report. Thereafter, the weight, or reliance, that the decision-maker placed on the report was a matter for the decision-maker unless it was irrational for him to do so (and that is not alleged in this case). Ground 1 therefore fails.

THE SECOND ISSUE – THE APPLICABILITY OF RULE 19(3) TO THE FURTHER CONSIDERATION OF THE APPLICATION

45. It is convenient to take grounds 2, 3 and 4 together. Grounds 2 and 3 concern whether rule 19 applies to the process of further consideration of the application following the quashing of the initial decision and, if so, whether rule 19(3)(b) required the first respondent to give interested parties the opportunity of making written representations about the IBA report. Ground 4 concerns the further alternative conclusion of the judge that, if rule 19 applied, then its requirements were satisfied by reason of the fact that it was open to the appellant to have made representations about the IBA report after the end of the consultation process.

46. Mr Harwood submitted that rule 19 applied to the process of redetermining an application following a quashing of an earlier determination. The redetermination fell within the express terms of the rule and its purpose. The rule applied to the procedure after the completion of the examination. That was the position here. The purpose of rule 19 was to provide an additional procedural safeguard where the minister was inclined to disagree with the recommendation of the Examining Authority because of new evidence or new factual material. That purpose applied as much to a redetermination of an application as the initial determination. Mr Harwood submitted that it was sufficient if the new evidence or material was likely to form the basis, in whole or in part, for the disagreement with the recommendation, relying on observations by Jay J. at paragraph 45 of *Gladman Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWHC 2448 (Admin), [2018] JPL 345. Mr Harwood further submitted that rule 19(3)(b) did apply in the present case. The Azimuth report relied on research in 2016. The IBA report assessed data up to 2021. The minister had regard to it and considered that it demonstrated a sustained growth in air freight demand. He also referred to the issue in relation to capacity at paragraph 100 of the decision letter and e-commerce at paragraphs 109 and 110. The assessment of need was the basis of the disagreement with the recommendation of the Examining Authority. The IBA report, therefore, formed a significant part of the reason the minister was disposed to disagree with the Examining Authority's recommendation and was part of the critical matrix of material on which the minister's reasons for disagreeing was based. Further, the IBA report was significant evidence produced for the first time in the second round of consultation. The minister had put in place and notified the parties of specific arrangements for submissions on representations received prior to the start of the second consultation but not for material submitted during the second consultation. No person could reasonably have expected in those circumstances that they would be able to comment on material produced during the second consultation.

47. Mr Westmoreland Smith submitted that there was a clear distinction between the circumstances in which rule 19 and rule 20 apply as is reflected in the wording and the structure of the 2010 Rules. He submitted that the judge was correct in concluding that the two rules addressed two separate processes which arose in two separate factual contexts. Rule 19 dealt with the period post-examination and the particular situation in which the minister intends to reach a different conclusion from the Examining Authority where none of the parties have seen the Examining Authority's report. In those circumstances, rule 19 requires the minister to inform participants if he is minded to disagree with the recommendation. Rule 20 applies at a different time in the process, i.e. when the minister's decision has been quashed and at a time when all participants have seen the report of the Examining Authority. At that stage, rule 20 provides that the minister should invite representations to assist in further consideration of the application. Mr Westmoreland Smith therefore submitted that the context, and the structure of the 2010 Rules, indicated that rule 19 applied post-examination and until a decision was taken whereas rule 20 applied when a decision had been quashed, the Examining Authority's report had been seen and what was necessary was to enable the participants to have an opportunity to make further representations.

48. Mr Westmoreland Smith submitted that, alternatively, even if rule 19 applied to the process of re-determination, it did not apply on the facts of this case as the IBA report was not a material reason as to why the first respondent was disposed to disagree with the Examining Authority's recommendation. The judge's conclusion at paragraph 74 of his judgment was a finding of fact and was correct. The difference between the first respondent and the Examining Authority was the result of the difference in approach to the Azimuth report. The decision letter referred to the IBA as demonstrating a growth in air traffic but that was not a controversial issue and was not a reason for the first respondent disagreeing with the Examining Authority. Finally, in any event, there was no procedural requirement that participants must be expressly invited to comment on new evidence. Any participant, including the appellant, could have commented on the IBA report when it was published at the end of the consultation period. One participant did so and its comments were considered.

49. Mr Humphries adopted the submissions of the first respondent on these three grounds of appeal. He submitted that the IBA report in any event simply demonstrated that there had been growth in air freight in the United Kingdom. The first respondent considered that that was the view of the Independent Assessor as appeared from paragraph 84 of the decision letter. The first respondent was not disagreeing with the assessment of demand because of the IBA report.

Discussion

50. The first question is whether rule 19 of the 2010 rules is applicable to the decision-making process in this case. In particular, where a decision on an application is quashed, and the Secretary of State has to undertake further consideration of the application, does rule 19 apply to the process of further consideration? That involves the proper interpretation of the wording of rule 19, read in its statutory context and having regard to the purpose underlying the rule.

Does Rule 19 Apply to Further Consideration of the Application?

51. The statutory context is one involving applications for development consent orders for nationally significant infrastructure projects. Those applications are to be examined by an Examining Authority which, after it completes its examination, must make a written report to the Secretary of state setting out its findings and conclusions and its recommendations as to the decision to be made: see rule 19(1) and (2). Rule 19(3) then deals with the role of the Secretary of State "after the completion of the Examining authority's examination" if (a) he differs from the Examining Authority on any matter of fact which is material to a conclusion reached by the Examining Authority or (b) takes into consideration any new evidence or new matter of fact. If for that reason the Secretary of State is disposed to disagree with a recommendation of the Examining Authority, he "shall not come to a decision" without (i) notifying all interested parties of the disagreement and the reason for it and (ii) giving them an opportunity of making representations in writing in respect of any new evidence or new matter of fact.

52. The first observation to be made is that the wording of the rule is clear. It imposes procedural requirements if certain circumstances arise "after the completion of the Examining Authority's examination". Those circumstances essentially involve a difference of view on facts which are material to a conclusion of the Examining Authority or the consideration of new evidence or new matters of fact. Then certain steps may need to be taken "before a decision which is at variance with the recommendation" is reached. There is nothing in the wording of rule 19 which limits its application to the period between the completion of the examination and the quashing of a legally flawed decision on the application. There is nothing to indicate that rule 19 cannot or does not apply to the process of further consideration of the application and the taking of a decision in such circumstances. On the ordinary and natural reading of the words in rule 19, the obligations imposed by that rule are still capable of applying at any time after the completion of the examination and before a decision on the application is reached if the circumstances specified in rule 19(3) arise.

53. Secondly, that interpretation reflects the purpose underlying the rule. The aim is to ensure procedural fairness if the Secretary of State differs on any fact material to a conclusion or if new evidence or new facts are taken into consideration by the Secretary of State and for that reason the Secretary of State is disposed to disagree with the recommendation of the Examining Authority. New evidence or new facts must mean in this context evidence or facts not considered by the Examining Authority. In those circumstances, the interested parties must be notified of the disagreement and the reasons for it and given an opportunity to make written representations on the new evidence or new facts. That purpose exists whether or not an initial decision on the application has been quashed. Put simply, the aim of ensuring procedural fairness applies whatever stage the process has reached. The aim applies as much to the process of further consideration (following the quashing of a legally flawed decision) as it does to earlier stages of considering the application. The applicability of rule 19 depends upon whether the circumstances set out in rule 19 apply not the stage that the process of determining the application has reached.

54. Furthermore, new facts or evidence may arise at any stage after the completion of the examination. They may, for example, arise after a legally flawed decision has been quashed and the Secretary of State is reconsidering the matter. That is what happened

in this case. New evidence (the IBA report) was provided during the consultation process undertaken after the quashing of the initial decision. That evidence was taken into consideration and, it is said, for that reason the Secretary of State was disposed to disagree with the Examining Authority's recommendation that the application be refused. If that were the true state of affairs, the purpose underlying rule 19 would call for the giving of an opportunity to make representations on matters that have arisen since the completion of the examination which cause the Secretary of State to disagree with the recommendation.

55. I do not consider that the existence of rule 20 suggests or requires a different interpretation of rule 19. Rule 20 applies in a particular situation, namely where a legally flawed decision has been quashed. The Secretary of State must send a written statement of the matters on which further representations are invited "for the purposes of the Secretary of State's further consideration of the application". That general obligation applies to how matters are to be dealt with following the quashing of a decision. It does not address the different, and more limited situation, where parties have to be given a specific opportunity to make written representations because, in particular, new evidence or new facts have been taken into consideration after the end of the examination which cause the Secretary of State to disagree with the recommendation of the Examining Authority. Rule 19 and 20, therefore, deal with different circumstances, and impose different procedural obligations reflecting those different circumstances. There is nothing inherent in the structure of the Rules to suggest that rule 19 applies for a limited period only, i.e. until a legally flawed decision is quashed and rule 20 applies.

56. Nor does the fact that the interested parties will have seen the report of the Examining Authority alter matters. The trigger for the obligation in rule 19(3) is that the Secretary of State takes a different view of facts material to the conclusions or has considered new evidence or facts and, for that reason, is disposed to disagree with a recommendation. It is that factor which triggers the operation of the procedural obligations and the need to give specific notice of the disagreement and the reasons and an opportunity to comment on the new evidence or new facts. It is the actions or views of the Secretary of State which triggers the need for specific notification.

57. In principle, therefore, rule 19 is capable of applying to the further consideration of the application following the quashing of the initial decision. Rule 19 of the 2010 Rules applies, therefore, to the process of further consideration of an application after an initial decision has been quashed. The judge was wrong, therefore, to conclude at paragraph 72 of his judgment that rule 19 did not apply.

The meaning of rule 19(3)(b)

58. The next question, therefore, is whether the criteria in rule 19(3)(b) were satisfied in this case. The Secretary of State did take into consideration new evidence, namely the IBA report. The question is whether the Secretary of State was "for that reason disposed to disagree with a recommendation made by the Examining authority". The recommendation in this case was the recommendation to refuse the application for a development consent order for Manston Airport (set out in paragraph 11.3.1 of the report). The first question concerns the meaning of rule 19(3)(b).

59. Reading the words of rule 19(3)(b) in context, the new evidence or new facts must be causative of the disagreement. It must be "for that reason" that the Secretary of State disagrees with the recommendation. It is common ground that the new evidence or new facts need not be the sole reason for the disagreement but it must be a reason for the Secretary of State disagreeing with the recommendation. In context, the Examining Authority will have considered the application and written representations (and held oral hearings on specific issues). It will have made a report setting out its findings, its conclusions and its recommendations. The provision in rule 19(3)(b) contemplates that there has been some new evidence or new facts (i.e. something not addressed at the examination) which causes the Secretary of State to disagree with the Examining Authority's recommendation.

60. Mr Harwood relied upon the decision of Jay J. in *Gladman* as indicating a low threshold. The decision concerns an analogous provision in rule 17(5) The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 ("the 2000 Rules") where, after the close of an inquiry, the Secretary of State takes into consideration any new evidence or new matter of fact and "is for that reason disposed to disagree with a recommendation by the inspector". Then the Secretary of State must notify the parties of the disagreement, the reasons for it and afford them the opportunity making representations or asking for the re-opening of the inquiry.

61. In *Gladman*, the inspector had recommended allowing an appeal and granting planning permission for up to 180 dwellings. One of the factors leading to that conclusion was the inspector's assessment that there was likely to be a shortfall of deliverable sites for housing over the next five years as the available sites were likely to be only 1,900 against a need of 2,544 sites, i.e. there was only likely to be enough supply of land for housing for 3.7 years. After receiving the inspector's report, the Secretary of State went on to the local planning authority's website and concluded that "matters have moved on", more sites were available and there was likely to be a supply of land for housing in the range of between 3.7 years and 5 years. The Secretary of State, therefore, disagreed with the recommendation of the inspector, dismissed the appeal and refused planning permission. In those circumstances, Jay J. considered that there had been a breach of rule 17(5) of the 2000 Procedure Rules (and I express no view on the correctness of that conclusion on the facts of that case). However, Jay J. expressed the position as follows:

> "45. Mr Kimblin [counsel for the appellant] pins his colours firmly to a breach of Rule 17(5) of the 2000 Procedure Rules, although on my understanding of his argument he discerned little if any material difference between the regulatory test and the common law. I agree. In my judgment, both sub-paragraphs (a) and (b) are applicable, although the principal focus should be on (b). The Secretary of State has differed from the Inspector on a matter of fact (a). The reason why he has done so is because he has taken into account new evidence (b). Mr Buley submitted that it has not been established – the burden being on the Claimant – that it was "for that reason [that the Secretary of State was] disposed to disagree with a recommendation made by the Inspector", but in my judgment he has misconstrued this clause. Rule 17(5) is not activated if

> the Secretary of State discovers new evidence but decides at that juncture not to take it into consideration (see the opening words of (b)), but in the evidence that he does, or is minded to, he must at that stage seek further representations from the parties if he considers that the new evidence is likely to form the basis, in whole or in part, for the ultimate recommendation reached. The Secretary of State does not have to be satisfied that the new evidence would constitute the sole reason for a different recommendation; it merely has to form part of the decision-making process. Furthermore, the Rule says "disposed to disagree" which to my mind imports a lower threshold. As I have said, Rule 17(5) would not apply if the Secretary of State has reached the firm and fixed conclusion that the new evidence will not be taken into account or is clearly immaterial; otherwise, however, it does apply."

62. First, the final sentence of that paragraph is, in my judgment, too broadly expressed. It is not the case that rule 17(5) applies unless the new evidence will not be taken into account or is immaterial. That sets too low a threshold for the applicability of rule 17(5). The new evidence must be a reason for the disagreement with the inspector's recommendation. The Secretary of State may have taken the new material into account. He may have regarded it as material. That, of itself, would not be sufficient to render rule 17(5) applicable. Secondly, the reference to the new evidence forming "part of the decision-making process" is apt to be open to misinterpretation. The new evidence may be part of the decision-making process in that the Secretary of State may have considered it and decided whether, and if so to what extent, it is relevant to his decision. That, however, would not result in the obligation in rule 17(5) being applicable. It is only where the new evidence is a reason for the disagreement with the inspector's recommendation that the obligation in rule 17(5) arises and generates an obligation on the inspector. Finally, I do not consider that the use of the words "disposed to disagree" indicates a lower threshold. Those words reflect the fact that the obligation to give an opportunity to comment on new evidence or new facts arises before a decision is reached (indeed, the Secretary of State cannot come to a decision until that opportunity is given). The words "disposed to disagree" refer to the stage which the decision-making process has reached. They do not define the circumstances in which the obligation arises and do not give any indication as to the appropriate threshold that is to be crossed before the obligation arises. That depends on whether the Secretary of State has considered new evidence or new facts and is for that reason (i.e. because of the new evidence or new facts) disposed, or minded, to disagree with the recommendation. For those reasons, I do not consider that the observations of Jay J. in paragraph 45 of the decision in *Gladman* assist in the proper interpretation of rule 19(3) of the 2020 Rules.

Did rule 19(3)(b) apply on the facts of this case?

63. I turn next to the question of whether, on the facts of this case, the obligation in rule 19(3)(b) arose. In my judgment, the judge's alternative conclusion at paragraph 73 of his judgment is correct. It was the weight that the Secretary of State placed on the Azimuth report which led him to reject the Examining Authority's recommendation,

not any new evidence or facts and not the IBA report. That emerges from a reading of the decision letter as a whole.

64. Before considering the overall planning balance, the decision letter considers a number of issues, and a number of conclusions or findings of fact by the Examining Authority. These included air freight demand and forecasting. It is in that context that the decision letter considers the Azimuth report at paragraphs 80 to 84, the forecasts in the IBA report (which were consistent with the Independent Assessor's view) and which the Secretary of State considered demonstrated a sustained growth in air freight demand, and other news and industry reports highlighting the increase in air freight. It was against that background that the Secretary of State reached his conclusion on demand and forecast at paragraphs 89 to 94. It is clear, on any fair reading, that the Secretary of State took a different view on this conclusion of the Examining Authority because of the weight he placed on the Azimuth report, that that was supported by news and other industry reports and the weight he placed on the fact that a private investor had concluded that there was sufficient demand to make the development viable. There is no reference (as Mr Harwood accepts) to the IBA's forecasts on air freight demand generally.

65. In relation to capacity, a fair reading of paragraph 97 to 102 of the decision letter indicates that the Secretary of State considered that reliance should not be placed on future expansion in capacity at other airports as that was not certain. In that regard, the Secretary of State noted (amongst other things) that the IBA forecasted a return to pre-pandemic freight levels at Heathrow by 2023. Finally, in assessing e-commerce, the decision letter refers to data from the IBA, amongst others, showing an increase in e-commerce (i.e., in essence, ordering goods online and having them delivered). In his conclusions on e-commerce at paragraphs 114 to 116, he considered that there would always be uncertainty as to the precise extent to which the data established a sustained increase in air freight demand from new e-commerce. He considered that "it is unlikely that e-commerce would not make some increased air freight capacity if such capacity were made available". The decision letter then considers other matters.

66. In the paragraph dealing with the Secretary of State's overall conclusion on the planning balance at paragraph 199, the Secretary of State "disagrees with the Examining Authority's conclusion on need and considers that there is a clear case of need for the Development". He concluded, therefore, that significant economic and socio-economic benefits would flow from the benefit and that should be given substantial weight in the planning balance. The Secretary of State's overall conclusion and decision was that, for all the reasons given in the letter, there was a clear justification for authorising the development. He therefore disagreed with the recommendation that the application should be refused and decided to grant the application for a development consent order.

67. Reading the decision letter as a whole, the reason for disagreeing with the Examining Authority's recommendation was the Secretary of State's conclusions on the justification for the development and these were principally based on his assessment of the need for the development and, consequently, the benefits that would flow from it. The reason for reaching a different conclusion was, as the judge rightly identified, the different weight attached to the forecasts in the Azimuth Report. On a fair reading of the decision letter read as a whole, the new evidence (the IBA report) was not a reason for the disagreement with the recommendation. The IBA report, although

referred to at different points, did not on analysis have a causative effect resulting in the disagreement with the recommendation. The Secretary of State therefore was not obliged to give the interested parties an opportunity to make written representations on the IBA. There was no breach of rule 19(3)(b).

Were the requirements of rule 19(3)(b) satisfied in any event?

68. In the circumstances, ground 4 does not strictly arise. For completeness, and as the point was fully argued, I set out my conclusions briefly. I would not regard the fact that there was nothing to prevent interested parties making written submissions about any matter, including the IBA report, as sufficient to satisfy the requirements of rule 19(3)(b) if that obligation had arisen. That rule imposes a procedural obligation when new evidence or new facts are the reason for the disagreement with the recommendation. The obligation arises because new material (that is, material not taken into account during the examination) has a causative effect resulting in a difference between the recommendation made by the Examining Authority and the decision of the Secretary of State. The obligation is to notify the interested parties of the disagreement and the reasons for it, and give them an opportunity to make written representations on the new evidence or new facts. It is implicit that the obligation involves identifying that new evidence or new facts. The absence of any prohibition on interested parties making representations on any matter after the end of the consultation process is not an adequate substitute for, or means of discharging, the obligation in rule 19(3)(b) of the 2010 Rules.

69. In summary, therefore, whilst the appellant is correct that rule 19 applies to the process of further consideration if a decision has been quashed (ground 2) that would not lead to the appeal being allowed as the obligation did not arise in this case (and so ground 3 fails). It is not necessary to consider ground 4 but, if the appellant had been able to satisfy grounds 2 and 3, then she would have succeeded on ground 4.

THE THIRD ISSUE – THE ADVICE TO THE MINISTER

70. Mr Harwood submitted that future airport capacity was as a matter of law something that was relevant and capable of being taken into account by the minister when deciding whether to grant the application for development consent. He submitted that the minister had been incorrectly advised that future airport capacity was a factor that was not relevant and that it was legally impermissible for him to take that factor into account. Consequently, he submitted that the decision was legally flawed. In terms of establishing that the advice was legally flawed, he relied upon paragraph 5 of the ministerial submission which said that the Examining Authority took into account capacity at other airports but such capacity "is not material to this decision". That contrasted with the position on demand forecasting where the advice referred to "proper weight" being given to the Azimuth report (which showed that that factor had been considered relevant and the issue was the weight to be given to it). He also relied on paragraphs 101 and 102 of the draft decision which the minister had approved. That referred to the minister being "unable to take into account capacity" and "such capacity is not material" to the decision. Mr Harwood also referred to the cover sheet submitted with the submission and draft decision letter which referred to the Examining Authority taking into account matters that are not relevant. Of the references to capacity only one (in paragraph 97 of the draft decision letter) referred

to weight. All the other references referred to not taking the capacity into account or not being material. That, Mr Harwood, submitted was an error.

71. Mr Westmoreland Smith submitted that the judge was correct to conclude that the material before the minister was not that potential for growth at other airports was incapable of being a material consideration but, for the reasons given, it could only attract very little weight and was therefore not material to this case. Mr Humphries adopted the submissions of the first respondent.

Discussion and Conclusion

72. There is a danger in the present case of terminology rather than substance dictating the analysis. In general terms, public law regards certain considerations as being ones that a decision-maker may not take into account because such considerations are, as a matter of law, not relevant or material to the exercise of the particular decision-making power. Other considerations are capable of being relevant to the exercise of a decision-making power. These include ones usually described as mandatory considerations, that is ones that statute requires a decision-maker to take into account or which are so obviously relevant to the exercise of the particular decision-making power in issue that the decision maker must take them into account. Other considerations are capable of being relevant to the exercise of the particular decision-power and it is permissible for the decision-maker to take them into account. Where a consideration is material, the weight to be attached to such a consideration is a matter for the decision-maker (see *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 WLR 759 per Lord Hoffman at 780A-H).

73. In the present case, the criticism is that the minister was advised that a particular consideration, future capacity at other airports, was one that it was not legally permissible for him to take into account. That, it is said, was wrong as it was permissible for the minister to take it into account and that fact could have influenced the decision. The correctness of that criticism depends, in the first place, on what advice was actually given. That involves reading the advice fairly and as a whole and in context to determine what was being said. It is not appropriate to take words or phrases out of context and to measure those words in isolation against the terminology that the courts routinely use when discussing the topic of relevant and irrelevant considerations in public law.

74. Dealing first with the ministerial submission, paragraph 5 makes it clear that capacity at other airports "is not material to this decision as there is no certainty such capacity will come forward in future". That is not advice, in the abstract, that it is legally impermissible ever to take account of airport capacity. Read fairly, it is a statement that airport capacity is, to put it neutrally, not a matter that should influence the outcome of this decision because there was no certainty that such capacity would eventually be available (and, by implication, would affect the need for this particular development). That could be expressed in a number of ways: that the consideration is not material in this case, or that little or no weight should be given to it, or that it should not be taken into account – not because it is legally impermissible to do so, but because the uncertainty means that it is not, to put it neutrally, appropriate to ascribe any significance or relevance to that factor when considering the application.

75. That is how the draft decision letter deals with this matter. The central fact is the uncertainty that airport capacity will emerge in future and, given that uncertainty, the view that future possible expansion in airport capacity should not affect the decision in this case. That is put at paragraph 97 of the draft in terms of the minister being "only able to attach very little weight to capacity through applications that have yet to come forward" (and no objection is taken to that way of expressing matters). The same essential point is made in paragraph 101 of the draft where it is said that the minister "is unable to take into account capacity that airport operators have not indicated they intend to and are able to create through permitted development rights". The reason why the minister feels unable to take this into account is because of the lack of certainty that the airport capacity will materialise – not because it is legally impermissible to take airport capacity into account. The same is true of paragraph 102 of the draft decision letter which says that the Examining Authority took into account "future plans and the potential for growth" but for the "reasons set out above" (i.e. the uncertainty of such plans coming to fruition) such capacity "is not material to this application" (i.e. was not something that should weigh in or influence the decision in this case). It would no doubt have been preferable if the draft letter had been drafted more accurately so that its meaning in this respect was clear beyond argument but a document of this kind is not a statute or a contract. What matters is whether there is a proper basis for concluding that the decision-maker was misled about the approach that he was required to take, and it is not possible to reach that conclusion in this case.

76. For those reasons, the judge was correct in the present case when he concluded that the recommendation to the minister was that "the potential for airport capacity expansion elsewhere was something to which very little weight could be attached, and was not obviously material to the decision for the reasons relating to the uncertainties and contingencies upon which any expansion depended" (paragraph 91 of the judgment). I agree. I would dismiss ground 5 of the appeal.

CONCLUSION

77. Neither the 2010 Rules, not any common law principle of procedural fairness required the disclosure of the transcripts of the interviews underlying, in part, the Azimuth report. The applicant for the development consent order was entitled to rely on the Azimuth report, and the first respondent was entitled to take it into account, notwithstanding the fact that the transcripts of the interviews were not provided. Rule 19(3)(b) of the 2010 Rules do apply to a further consideration of the application for a development consent order following the quashing of an earlier decision on that application. In the present case, however, the new evidence, the IBA report, was not a reason for the disagreement with the Examining Authority's recommendation. Rule 19(3)(b) did not, on the facts of this case require the interested parties to be given an opportunity to make written submissions on the IBA report. The first respondent was not advised that it was legally impermissible to take future potential expansion at other airports into account.

78. For these reasons, I would dismiss the appeal.

LORD JUSTICE WARBY

79. I agree.

LORD JUSTICE PETER JACKSON

80. I also agree.