

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

In the matter of a claim for judicial review

B E T W E E N:

MARTIN BARRAUD

Claimant

-and-

CIVIL AVIATION AUTHORITY

Defendant

-and-

(1) SECRETARY OF STATE FOR TRANSPORT

(2) GATWICK AIRPORT LIMITED

Interested Parties

STATEMENT OF FACTS AND GROUNDS

[References in square brackets are to page numbers in the claim bundle.]

A. Parties and Matters under Challenge

1. The Claimant lives in Penshurst, Kent, just over 15 miles as the crow flies from Gatwick Airport and within the arrivals swathe for flights approaching Gatwick. He is the Chair of Gatwick Obviously Not.org ("GON"), an umbrella group representing residents living in areas east of Gatwick Airport who are

affected by noise from overflying aircraft. He acts as a representative claimant pursuant to CPR r.19.6(1) on behalf of the many residents of Kent and East Sussex, particularly the High Weald area, who are affected by changes to westerly arrivals routes at Gatwick Airport, including the organisations which have sent letters of support of the claim [p.491].

2. The Civil Aviation Authority (“CAA”) is the regulator of civil aviation in the UK, pursuant to legislation including the Civil Aviation Acts 1982 and 2012 and the Transport Act 2000.
3. The matter being challenged is the CAA’s failure to ensure that public consultation takes place in respect of an Airspace Change or Changes in the routing of aircraft arriving at Gatwick Airport. The term “Airspace Change” is used in this Statement of Facts and Grounds to mean a “change to the design or to the provision of airspace arrangements, or to the use made of them... including changes to air traffic control procedures, or to the provision of navigational aids or the use made of them in air navigation”, as per paragraph 9 of the Civil Aviation Authority (Air Navigation) Directions 2001 (incorporating Variation Direction 2004) (the “**2001 Directions**”).
4. The relevant Airspace Change(s) for the purposes of this claim consist in revised vectoring practices in relation to aircraft arriving at Gatwick (“vectoring” is explained below). These revised practices had been trialled at Gatwick on a temporary basis but appear to have been adopted recently on a long-term or permanent basis, resulting in a narrowing of the swathe within which arriving aircraft are established on the approach to Gatwick, and accordingly a concentration of flights over affected areas and increased disturbance from noise. The CAA has adopted a definition of an Airspace Change (as explained in its response to the Claimant’s Pre-Action Protocol Letter (“**PAPL Response**”) [p.213]), which is wrong in law. It has therefore erroneously understood that its duties under the 2001 Directions do not arise in respect of the relevant changes (“the matters complained of engage no relevant function of the CAA that gives rise to any decision for it to take”: PAPL Response para.23).

5. The objectives of the Claim, in essence to require the CAA to ensure that lawful consultation takes place on the Airspace Change(s), are supported by a coalition of national, regional and local organisations having the same interest as the Claimant, including GON, the High Wield Councils Aviation Action Group (“HWCAAG”), Gatwick Area Conservation Campaign (“GACC”), AirportWatch, East Sussex Communities for Control of Air Noise (“ESCCAN”), Communities Against Gatwick Noise and Emissions (“CAGNE”), Communities Against Gatwick Noise and Emissions – East (“CAGNE – East”), and Tunbridge Wells Action Group (“TWAG”). Several other local action groups and many individual residents are also known to support its objectives. The councils that make up the HWCAAG have a total population in excess of 45,000.
6. The Claimant has identified the Secretary of State and Gatwick Airport Limited (“GAL”) (the operator of Gatwick Airport) as Interested Parties, and has therefore sent them copies of the pre-action correspondence between the Claimant and the CAA. In the PAPL Response, the CAA has suggested that GAL should not be an Interested Party and that instead NATS En-Route Limited (“NATS”) should be an Interested Party because it is responsible for terminal control functions including vectoring practices at Gatwick. This is not understood, since it is GAL rather than NATS which would be likely to be an Airspace Change Sponsor for the purposes of the Airspace Change Process described below, and it is understood that NATS operates under contract to GAL. However out of an abundance of caution this claim will be served on the Secretary of State, GAL and NATS so that they may consider whether they wish to participate in the proceedings, notwithstanding the fact that the issues are directed towards the CAA.

B. Background Facts

7. Changes to routing of aircraft, not just in respect of Gatwick but all major UK airports, are to be introduced as part of the CAA’s Future Airspace Strategy for the UK 2011-2030 (“FAS”), a strategy designed to modernise UK airspace. A

key building block of FAS is the London Airspace Management Programme (“LAMP”), which seeks to re-design the airspace around London including in relation to Gatwick. Some such changes have already been made at Gatwick, including a decision by the CAA in August 2013 to approve an Airspace Change relating to departure routes from Gatwick, which was promulgated in November 2013.

8. Separately from the FAS, a decision was made by Gatwick air traffic control (“ATC”) (i.e. by NATS, according to the CAA’s PAPL Response) to trial revised vectoring practices in order to be able to increase the frequency of flights arriving at the airport. “Vectoring” refers to directions given by ATC to aircraft to navigate in a particular pattern, and vectoring is used to separate aircraft by a specified distance and to stabilise them on their final approach to land at an airport. At Gatwick, aircraft were previously stabilised on the final approach, at an altitude below 7,000 feet, within a “swathe” of between 7 and 12 nautical miles from the airport. The trials involved stabilising aircraft on the final approach within a narrowed “swathe” of between 10 and 12 nautical miles from the airport (a 60% reduction in the horizontal use of the airspace).
9. The trials were not publicly announced. However the effect was to concentrate flights arriving at Gatwick, meaning that residents within the narrowed swathe experienced a significant increase in the number of planes overflying them and a corresponding increase in noise impact. To illustrate the significant impact of the trial, complaints about aircraft noise at Gatwick rose from around 3,000 in 2013 to over 20,000 in 2014.

Letter of Andrew Haines sent on 8 December 2014

10. On 8 December 2014, a letter dated 5 December 2014 from Andrew Haines (Chief Executive of the CAA) was emailed to Councillor RG Streatfeild (Chair of HWCAAG) in response to an email sent by Cllr Streatfeild to the Secretary of State and other recipients, including the CAA, concerning airspace issues at Gatwick. The Claimant was cc’d into the email. Mr Haines for the first time admitted that Gatwick ATC had “tried out revised vectoring practices between the hold and landing at Gatwick”. However he denied that these changes

amounted to an "airspace change":

"A trial, in the context of UK airspace, aims to provide evidence about the characteristics of a particular mode of operations which can e.g. inform whether or not to propose a permanent airspace change. I can confirm that there is currently no trial on-going in the airspace in the vicinity of Gatwick airport.

An airspace change is a change to the mandatory or notified airspace classification or procedures which are published in the UK Aeronautical Information Publication or (UK AIP)...

I can confirm that there has been no airspace change, as defined above, relating to Gatwick arrival procedures and I understand it is aircraft arriving at Gatwick that are the subject of your letter.

...

The aircraft movements you have been experiencing and the airspace change process.

Certain characteristics of airspace in certain places are notified and must be complied with. For example, airspace is divided into blocks of controlled airspace and the classification of the airspace (A-G) determines features such as the minimum equipment of the aircraft that fly into it. Other notified and therefore mandatory characteristics of airspace include arrival and departure routes at some airports and holding patterns for aircraft before they enter the final approach and land at some airports. Before changing these notified and therefore mandatory characteristics of UK airspace, the proposer of the change, must follow the airspace change process to which you refer in your letter and submit a request for a change to the CAA for a decision.

As you also point out in your letter, in some cases, before the CAA can promulgate that airspace change decision, it must first consult the Secretary of State (e.g. where a proposed change might have a significant effect on the level or distribution of noise).

Other than in respect of notified airspace classification or procedures, air traffic controllers have few restrictions on how they direct aircraft through the airspace, between the mandatory notified points. This airspace is designed to allow air traffic controllers to safely and efficiently sequence aircraft that are approaching from many directions into a safe and orderly queue, on approach to an airport. Were this freedom not allowed, then there would be much more holding of aircraft, a consequent increase in pollution and possible implications for safety. In the case of arrivals into Gatwick, aircraft follow Standard Arrival Routes (STARs) to the nominated hold. Neither the STAR procedure, nor the holds have changed for Gatwick for many decades. Had they done so this would have constituted an airspace change as set out above. As explained above, there are no mandatory flight paths between the holds and the final approach (except for the thankfully rare instances of radar or radio communication failure). Air traffic control has the remit, within a block of established controlled airspace, to vector aircraft, as required from the holds, depending upon the prevailing situation e.g. levels of air traffic, the weather etc. This vectoring is done within an extant, long established block

of airspace specifically designed for this purpose called a Radar Manoeuvring Area (RMA).

Within that RMA, the controllers at the relevant area control centre, near Southampton, used to aim to establish aircraft on the final approach somewhere between 7 to 12 nautical miles. To reduce instances of unstable approach, (where the pilot has been unable to effectively manage the energy of the aircraft if the approach is too short or too rushed; leading to a deep landing or a go-around) the tactical point that controllers started to aim for became somewhere between 10 to 12 nautical miles (still within the RMA). This was more in line with the radar vectoring practices at Heathrow Airport and has had the impact of reducing the number of 'go-arounds' due to unstable approach and this also reduces the requirement for aircraft to be vectored around for a further approach. It should be noted that this practice mirrors night-time noise abatement procedures applied in 1999 that alleviate low-level aircraft noise impact on congested areas closer to the airport.

The air traffic controllers tried out revised vectoring practices between the hold and landing at Gatwick to see if this would reduce the number of aircraft that had to fly go-arounds, and it did.

This did not constitute an airspace trial within the meaning set out above, as it was not trialling a classification, process or procedure which would (if successful) need to be notified and become mandatory and then only after completion of the airspace change process and a decision by the CAA (in consultation with the Secretary of State where applicable). Air traffic controllers were trialling, or trying out, some new vectoring choices to see what effect they would have.

...

As set out above, mandatory or notified flight paths you describe do not exist and cannot therefore have been removed. What has changed, are the choices made by air traffic controllers in respect of the decisions they are free to make between the mandatory holds and landing. As set out above, there was no trial within the meaning of an airspace trial referred to in the Secretary of State's Guidance to the CAA. The 25% reduction in spacing variation identified by NATS in its communications is a reference to the reduction in the amount of variation from the minimum allowable gap between aircraft arriving at Gatwick overall, referred to as the separation between aircraft on final approach, not the utilisation of airspace. In other words, since trying out these revised vectoring practices in 2013, the air traffic controllers are now more consistently able to sequence aircraft on final approach at the minimum separation distance."

Letter of Dame Deirdre Hutton dated 14 January 2015

11. It appears that at an unspecified time it was unilaterally, without public consultation, decided by GAL and/or Gatwick ATC to make the changes "tried out" by Gatwick ATC permanent.
12. Mr Haines's letter was followed by a letter dated 14 January 2015 sent by

email from Dame Deirdre Hutton (Chair of the CAA) to Steve Haysom, a resident of Chiddingstone, Kent. The Claimant was cc'd into the email.

Whereas Mr Haines accepted that testing by Gatwick ATC had taken place but stated that it was not ongoing as at the date of his letter, Dame Deirdre appeared to refer to the narrowing of the swathe as still being in effect: "we have never denied that traffic has increased into Gatwick airport, or that there has been a narrowing of the 'swathe'...".

13. In a reply email sent on 27 January 2015 to a response by Mr Haysom, Dame Deirdre reiterated the points made by Mr Haines in his letter of 5 December 2014.
14. Despite the apparent acknowledgement by Dame Deirdre Hutton that the revised vectoring practices "tried out" by Gatwick ATC had become long-term or permanent, the CAA has refused to treat the changes as an Airspace Change or Changes, and to ensure public consultation in accordance with its duties pursuant to the 2001 Directions and guidance issued by the Secretary of State (as set out below).
15. It has maintained its denial that the changes in question constitute an Airspace Change in the PAPL Response [p.213].

C. Relevant Law

Legislative framework

16. The 2001 Directions are given to the CAA by the Secretary of State pursuant to section 66(1) of the Transport Act 2000. They apply to all airspace in the UK. The CAA's "air navigation functions" are defined as "the functions which the CAA is to perform in pursuance of directions under section 66(1)": s.72(2).
17. Section 66(2) provides that "[n]o action is to lie in respect of a failure by the CAA to perform a duty imposed on it by a direction under subsection (1); but that does not affect a right of action in respect of an act or omission which takes place in the course of performing the CAA's air navigation functions."

This is not preclusive of judicial review of the CAA's decision-making.

18. Section 68 makes provision as to the content of directions under s.66(1):

“68 Directions: further provision

- (1) Directions under section 66(1) may include provision as to the manner in which the CAA is to exercise its air navigation functions.
- (2) The provision may include—
 - (a) provision requiring consultation with specified persons or specified descriptions of persons in relation to specified matters;
 - (b) provision requiring the CAA to seek the approval of the Secretary of State in relation to specified matters;
 - (c) provision requiring the CAA in specified circumstances to refer specified matters to the Secretary of State.
- (3) If a matter is referred to the Secretary of State by virtue of subsection (2)(b) or (c) he may give such directions to the CAA as he thinks fit.”

19. Section 70 provides that the CAA is to exercise its air navigation functions having regard to specified objectives, which include taking into account the interests of any person (s.70(2)(c)) and guidance on environmental objectives given by the Secretary of State (s.70(2)(d)):

“70 General duty

- (1) The CAA must exercise its air navigation functions so as to maintain a high standard of safety in the provision of air traffic services; and that duty is to have priority over the application of subsections (2) and (3).
- (2) The CAA must exercise its air navigation functions in the manner it thinks best calculated—
 - (a) to secure the most efficient use of airspace consistent with the safe operation of aircraft and the expeditious flow of air traffic;
 - (b) to satisfy the requirements of operators and owners of all classes of aircraft;
 - (c) to take account of the interests of any person (other than an operator or owner of an aircraft) in relation to the use of any particular airspace or the use of airspace generally;

- (d) to take account of any guidance on environmental objectives given to the CAA by the Secretary of State after the coming into force of this section;
- (e) to facilitate the integrated operation of air traffic services provided by or on behalf of the armed forces of the Crown and other air traffic services;
- (f) to take account of the interests of national security;
- (g) to take account of any international obligations of the United Kingdom notified to the CAA by the Secretary of State (whatever the time or purpose of the notification).

(3) If in a particular case there is a conflict in the application of the provisions of subsection (2), in relation to that case the CAA must apply them in the manner it thinks is reasonable having regard to them as a whole.

(4) The CAA must exercise its air navigation functions so as to impose on providers of air traffic services the minimum restrictions which are consistent with the exercise of those functions.”

The 2001 Directions

20. The 2001 Directions came into force on 1 April 2001.

21. Paragraph 8 of the Directions immediately follows the sub-heading “Environmental impact of air operations” and provides that:

“8. Subject to section 70 of the Act the CAA shall perform its air navigation functions in the manner it thinks best calculated to take into account:

- a. the Guidance given by the Secretary of State on the Government’s policies both on sustainable development and on reducing, controlling and mitigating the impacts of civil aviation on the environment, and the planning policy guidance it has given to local planning authorities;
- b. the need to reduce, control and mitigate as far as possible the environmental impacts of civil aircraft operations, and in particular the annoyance and disturbance caused to the general public arising from aircraft noise and vibration, and emissions from aircraft engines;

- c. at the local, national and international levels, the need for environmental impacts to be considered from the earliest possible stages of planning and designing, and revising, airspace procedures and arrangements...”

22. Paragraph 9 directs that:

“9. Where changes to the design or to the provision of airspace arrangements, or to the use made of them, are proposed, including changes to air traffic control procedures, or to the provision of navigational aids or the use made of them in air navigation, the CAA shall:

- a. where such changes might have a significantly detrimental effect on the environment, advise the Secretary of State for Transport of the likely impact and of plans to keep that impact to a minimum;
- b. where such changes might have a significant effect on the level or distribution of noise and emissions in the vicinity of a civil aerodrome, ensure that the manager of the aerodrome, users of it, any local authority in the neighbourhood of the aerodrome and any other organisation representing the interests of persons in the locality, have been consulted (which might be undertaken through the consultative committee for the aerodrome where one exists);
- c. where such changes might have a significant effect on the level or distribution of noise and emissions under the arrival tracks and departure routes followed by aircraft using a civil aerodrome but not in its immediate vicinity, or under a holding area set aside for aircraft waiting to land at a civil aerodrome, ensure that the manager of the aerodrome and each local authority in the areas likely to be significantly affected by the proposed changes, have been consulted;

and where such changes might have one or more of the effects specified in paragraphs 9 (a), (b) and (c) of this Direction, the Civil Aviation Authority shall refrain from promulgating the change without first securing the approval of the Secretary of State.”

23. Consultation pursuant to paragraph 9(b) and/or (c) must be lawful consultation in accordance with well-established public law principles and the Cabinet Office's 'Code of Practice on Consultation' (January 2004). As the Court of Appeal held in R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213 at [108]:

"To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

24. These principles were recently affirmed by the Supreme Court in R (Moseley) v Haringey London Borough Council [2014] UKSC 56, [2015] 1 All ER 495 at [23]-[28].

Guidance on Environmental Objectives

25. The Secretary of State for Transport has issued guidance to the CAA pursuant to s.70(2)(d), most recently the 'Guidance to the Civil Aviation Authority on Environmental Objectives Relating to the Exercise of its Air Navigation Functions' (January 2014) ("**Guidance**"). Paragraph 1.3 of the Guidance states that:

"Underpinning this new Guidance are two key objectives. The first is the recognition that the UK needs to improve the efficiency of our UK airspace network and that includes mitigating the environmental impact of aviation. Secondly, is [*sic*] a reaffirmation of the need to consult local communities near airports when airspace changes are being considered in the vicinity of these airports. The Government recognises that it is not an easy task to always balance the interests of local communities and relevant stakeholders with those of the aviation industry, but we are confident that the CAA will continue to play an active role in ensuring that an appropriate balance is maintained in the future."

26. The Guidance reiterates the CAA's duties to ensure consultation is carried out pursuant to paragraph 9(b) and (c) and that the Secretary of State's approval secured in relevant cases (see paragraphs 5.11-5.12, 6.2-6.9).
27. Changes that do not merely replicate or redesign existing Standard Instrument Departure ("SID") routes¹ using Performance Based Navigation ("PBN"),² without creating a net significant detrimental noise impact (para.5.11), must be approved by the Secretary of State according to the procedure set out in paragraphs 6.2-6.5. In particular, the CAA must "at the end of the assessment process recommend to the Secretary of State whether it considers the application should be approved or not. This recommendation must include an appropriate noise impact statement setting out clearly the expected number of people who may benefit or be affected by the airspace change, as well as providing detailed information on the purpose of the application and the reasons underpinning the CAA's recommendation": para.6.3(d).
28. Changes which might have a significantly detrimental impact on the environment are to be approved by the Secretary of State in a similar way pursuant to paragraphs 6.6-6.9, including requiring the submission by the CAA of an appropriate noise impact statement: para.6.7(d).
29. Paragraph 7.8 of the Guidance notes that, whilst the Government's policy in general is in favour of concentration rather than dispersal of flights, "the Government recognises that there may be local circumstances where the advantage lies in dispersing traffic, such as for the purposes of providing noise respite over areas which may be considered to be particularly noise sensitive... This local context may become apparent through appropriate consultation with the local community." Para.7.12 notes that "it is important that decisions about respite should always be made after considering the specific local circumstances and through engagement with the local community."
30. Section 9 of the Guidance makes further provision as to consultation,

¹ i.e. standard departure routes designated by ATC.

² PBN is a concept essentially involving the modernisation of aircraft navigation by moving away from traditional navigation by ground-based beacons towards a system more reliant on airborne technologies and global navigation satellite systems.

emphasising that it is required “[w]here changes, other than temporary arrangements or short-duration trials, are proposed to the design or use of controlled airspace”: para.9.1. The CAA must either ensure that the promoter of the change or changes undertakes the consultation, or undertake the consultation itself. In exceptional circumstances, the Secretary of State may himself wish to be involved in the consultation or might even take the lead.

31. Those consulted should include, among others, “organisations and individuals (if any) who may represent the interests of people living in the immediate vicinity of the aerodrome or directly underneath flight paths up to 7,000 feet (amsl) to which the proposed airspace change relates”: para.9.2(d). The CAA must ensure the consultation “is robust and sufficient in order to enable it to make an independent assessment of the proposal”: para.9.4.

32. Para.9.5 provides that:

“Where the proposed changes may have a significant detrimental effect on the level or distribution of noise in the vicinity of an aerodrome, or would be expected to significantly alter the size or shape of the standard daytime noise contours in use at the aerodrome, or the shape of noise footprints of the noisiest aircraft operating there at night, the consultation should include assessments of those effects based on both the traffic levels expected at the time of implementation and forecast traffic levels for future periods where these are considered appropriate.”

33. Temporary airspace changes are ordinarily changes which last for no more than 90 days (paras 9.6-9.7), and operational airspace trials, which require the approval of the CAA, must have a confirmed start and end date (paras 9.8-9.9). Wherever a temporary change or operational trial results in a proposal for a permanent or long-term airspace change, the full airspace change process must be followed, including consultation (paras 9.10-9.11). If the temporary arrangements are (in the CAA’s discretion) extended while the airspace change process is being undertaken, and it becomes apparent that the airspace change process requirements cannot be met, action must be taken swiftly to revert the airspace concerned to its original state (para.9.11).

CAA Guidance

34. The CAA has published guidance on the “Airspace Change Process”: i.e. the process by which an Airspace Change is proposed by a “Change Sponsor” (for example by an airport operator), consulted upon in accordance with the 2001 Directions and the Guidance, approved by the Secretary of State and/or the CAA as appropriate, and promulgated by the CAA. The CAA’s guidance is contained in a note on ‘The Airspace Change Process’ published by the CAA’s Directorate of Airspace Policy, and in Civil Aviation Publication (CAP) 724 (‘The Airspace Charter’) (in which the Airspace Change Process was first published in 1996), and CAP 725 (‘CAA Guidance on the Application of the Airspace Change Process’) (which now contains the most detailed guidance).

35. CAP 725 emphasises the importance of consultation in respect of Airspace Changes of any scale. As set out in the Introduction at para.iv:

“A change to the use or classification of airspace in the UK can take many forms and may be simple and straightforward to implement with little noticeable operational or environmental impact. Conversely, a change may be complex and involve significant alterations to existing airspace arrangements that impact upon the various airspace user groups and the general public. All airspace changes are unique and, regardless of scale, will require some form of consultation. In pursuit of efficiency, changes to airspace arrangements, which fall within the scope of this document as set out in ‘Application of the Airspace Change Process’, should be made after consultation, **only** where it is clear that an overall environmental benefit will accrue **or** where airspace management considerations and the overriding need for safety allow for no practical alternative. The level of consultation will be determined by the ‘impact’ that the change will have on others and not the ‘size’ of the change itself.”

36. An Airspace Change is said in CAP 725 normally to be characterised by one or more of the following (Introduction para.vii):

“a) Changes to the International Civil Aviation Organization (ICAO) airspace classification either through the creation of a higher classification than

currently exists, or through the removal of existing controlled airspace of Classes A, C, D1 or E;

- b) Changes to the lateral or vertical dimensions of existing Controlled Airspace (CAS);
- c) The introduction of, or changes to, Standard Instrument Departure routes (SIDs), Standard Arrival Routes (STARs) or Noise Preferential Routes (NPRs) within controlled airspace. Standard Departure Routes (SDRs) and NPRs where they exist outside controlled airspace are not covered by this Process. However, aerodrome operators are strongly recommended to adopt the same principles when considering the need for new or amended SDRs and NPRs under these circumstances;
- d) Introduction of, or significant changes to existing, Holding Patterns;
- e) Changes to Area Control Centre (ACC) arrangements resulting in modifications to the existing published ATS route structure. Changes to ACC sector boundaries that have no additional environmental impact over that currently experienced are not normally subject to the Airspace Change Process, unless one of the characteristics described here occurs as a direct consequence of the revised arrangements;
- f) Delegation of ATS to an adjacent State;
- g) Changes to the lateral or vertical dimensions of Danger Areas, Restricted or Prohibited Airspace, Temporary Reserved Areas or significant changes in their operational use, other than emergency situations or matters of National Security;
- h) Changes to existing published terminal patterns and procedures where the net effect results in changes to the lateral dispersion or lowering in altitude of traffic within controlled airspace; and
- i) Significant changes to the hours of operation of existing airspace structures.”

37. Detailed guidance on consultation is set out in paras 14-40 of CAP 725, and Appendices C and D.

38. Guidance on environmental assessment and the level of environmental information to be provided for the purposes of public consultation on Airspace Change Proposals is set out in Appendix B of CAP 725.

D. Grounds of Claim

39. The CAA has adopted a narrow definition of an Airspace Change, namely that it must constitute (as asserted in Mr Haines's letter): "a change to the mandatory or notified airspace classification or procedures which are published in the UK Aeronautical Information Publication or (UK AIP)". In the PAPL Response [p.213] the CAA maintains its narrow definition, albeit framed slightly differently: "the obligation to ensure consultation arises only where the CAA has some identifiable function under the legislative scheme in relation to the change in question" (para.6). The only functions identified in the PAPL Response in this connection are its functions of (a) notifying matters in the UK AIP or a UK NOTAM (Notice to Airmen) (para.9) and (b) prosecuting breaches of notified matters (para.10). The CAA equates "promulgating" a change for the purposes of para.9 of the 2001 Directions with notifying it in the UK AIP or a UK NOTAM (PAPL Response, para.9).

40. The CAA's interpretation is wrong in law. As a result, the CAA has wrongly concluded that the changes that are the subject of this claim are not Airspace Changes. On the basis of that mistaken assumption it has failed to fulfil its duties under the 2001 Directions to consult publicly and to advise the Secretary of State and obtain his approval of the changes, pursuant to the full Airspace Change Process.

41. What are referred to in this claim as "Airspace Changes"³ are not defined in the 2001 Directions. The meaning of an "Airspace Change" must therefore be understood and derived from the context of the 2001 Directions when read as a whole. The CAA's definition erroneously confines the concept of an Airspace Change exclusively to a particular subset of Airspace Changes, namely those that must be notified in the UK AIP. The AIP is part of the UK Aeronautical Information Service published on behalf of the CAA by NATS pursuant to the Air Navigation Order 2009 ("ANO") in accordance with international

³ i.e. "Changes to the design or to the provision of airspace arrangements, or to the use made of them... including changes to air traffic control procedures, or to the provision of navigational aids or the use made of them in air navigation".

obligations of the UK under (inter alia) Annex 15 to the Chicago Convention on International Civil Aviation, providing specified aeronautical information required for operational use by international civil aviation. (As article 255 of the ANO provides, “‘Notified’ means set out with the authority of the CAA in a document published by or under an arrangement entered into with the CAA and entitled ‘United Kingdom Notam’ or ‘United Kingdom Aeronautical Information Publication’ and for the time being in force”.)

42. The CAA’s interpretation is not open to it on the face of the 2001 Directions:

42.1. Firstly, the CAA’s restrictive interpretation is at odds with the broad and open-textured language of paragraph 9 of the 2001 Directions, which sets out broad categories of changes that may trigger the CAA’s duties to advise, consult and seek the approval of the Secretary of State (subject to meeting the threshold tests of having significant detrimental environmental/noise effects):

- a. Changes to the design of airspace arrangements; and/or
- b. Provision of airspace arrangements; and/or
- c. Changes to the use made of such arrangements (including changes to ATC procedures); and/or
- d. Changes to the provision of navigational aids; and/or
- e. Changes to the use made of navigational aids in air navigation;

42.2. Secondly, the 2001 Directions have within their ambit those affected on the ground by the impacts of an Airspace Change, including residents and those who have no involvement with or knowledge of aeronautical matters, as well as effects on the environment generally. Such effects may result from an amendment to the AIP, which is used by pilots of aircraft to navigate using published procedures, but this does not have to be the case, for example when pilots of aircraft are required by ATC controllers to use

a procedure used as standard by them but which is not published in the AIP.

42.3. Thirdly, the regime for notification under the ANO is nowhere imported or incorporated into the regime for Airspace Changes. Nor is there any other requirement in the 2001 Directions that an Airspace Change must relate to mandatory airspace classification or to procedures notified in the UK AIP. “Notification” or more particularly “notified” is a term of art used in various parts of the statutory framework for aviation regulation (including in the Rules of the Air Regulations 2007 and the regimes under the ANO for licensing civil aerodromes and notifying government aerodromes as available for the take-off and landing of civil aircraft (art.210) and it is expressly defined in the ANO (art 255). The words “notification” or “notified” are nowhere to be found in the 2001 Directions, and equally “promulgation” or “promulgate” are nowhere used in the ANO (apart from in one limited sense in relation to information published by a licensed aerodrome in its aerodrome manual: art.211(7) and Sch.12). The CAA is wrong to seek to equate notification with promulgation for the purposes of the Directions: if the Secretary of State had meant to refer to “notifying” with the meaning given to it in the ANO and other Regulations, he would have used that word rather than “promulgating”.

42.4. Fourthly, in any event, the last clause of para.9 of the 2001 Directions is merely prohibitive in effect, rather than forming any part of the definition of an Airspace Change. It requires the CAA to refrain from promulgating an Airspace Change without the approval of the Secretary of State, but it does specify that there can be no Aircraft Change unless such a change is capable of being promulgated by the CAA (i.e., in the CAA’s view, “notified”);

42.5. Fifthly, a restrictive interpretation of paragraph 9 is inconsistent with the objectives of the 2001 Directions under the sub-heading “Environmental impact of air operations”, and also of the Guidance:

namely to secure high standards of environmental protection in relation to airports through public consultation on significant changes. The CAA's definition is unduly formalistic, depending on the procedural classification of a change (i.e. whether it requires notification in the AIP), rather than on the environmental/societal effects of a change on the ground, which are plainly what this section of the 2001 Directions is concerned with. The AIP, by contrast with the 2001 Directions, is primarily of practical benefit to pilots and operators for use in navigation and the planning of operations (see the two charts extracted from the AIP in relation to Gatwick at [p.316]); it is not directed at the effects that may be experienced on the ground.

43. The arguments to contrary effect made in the PAPL Response by the CAA disclose a series of additional errors:

43.1. Firstly, the CAA asserts that consultation under para.9 of the 2001 Directions is not itself a function of the CAA (PAPL Response paras 16-17). This is patently incorrect. The CAA's functions are defined in s.72(2) as "the functions which the CAA is to perform in pursuance of directions under section 66(1)". This includes consultation so as better to inform the Secretary of State. Furthermore, s.20(1)(a) of the Civil Aviation Act 1982 provides that the CAA has power "to do anything which is calculated to facilitate, or is conducive or incidental to, the performance of any of its functions". Accordingly its functions include all its functions and duties under the 2001 Directions, as is consistent with the broad meaning of the word "functions" as used ordinarily in public law (see for example Hazell v Hammersmith and Fulham London Borough Council [1992] 2 A.C. 1, 29 per Lord Templeman, in the context of s.111 of the Local Government Act 1972: "the word 'functions' embraces all the duties and powers of a local authority; the sum total of activities Parliament has entrusted to it");

43.2. Secondly, the CAA suggests there is no control mechanism available to it over changes in the way that Gatwick ATC (i.e. NATS) chooses routes for aircraft, so long as aircraft observe the notified rules, because

the CAA is not able to refuse to approve or promulgate such a change (PAPL Response paras 11-12). This is a surprising assertion. The CAA has a whole suite of mechanisms open to it to control the way in which ATC services are provided, including powers under ANO art.173(4) to direct that ATC services are provided in a particular manner, and under art.211(2) to impose conditions on the licence of the aerodrome itself;

43.3. Thirdly, the PAPL Response simply omits to address a substantial part of the Airspace Change concept as relied on by the Claimant. The CAA seeks to summarise the Claimant's case in para.5 as follows: "You say that the alteration in vectoring practices on the westerly approach to Gatwick amounts to 'changes to the design or to the provision of airspace arrangements' and/or 'to the use made of them'...". This neglects the further parts of the concept of an Airspace Change as set out in paragraph 9 of the 2001 Directions, namely: "changes to air traffic control procedures, or to the provision of navigational aids or the use made of them in air navigation". These categories of Airspace Change (at the very least) do not fit within the CAA's artificially-drawn distinction between changes which require notification and those which do not.

44. Applying instead the plain and natural meaning of the language of paragraph 9, it is clear that the changes in vectoring practices adopted recently on an apparently long-term or permanent basis by Gatwick ATC constitute Airspace Changes, since they involve:

44.1. A significant change to the provision or use of airspace arrangements: the arrivals swathe for Gatwick has been modified from 7-12 nautical miles from the airport to 10-12 nautical miles from the airport, resulting in a reduction in the use of the relevant airspace by 60% and an increase of 150% in the use of the remaining narrow swathe; and

44.2. A significant change in ATC arrangements and in the navigational aids and/or the use made of them, including in terms of ILS, in order to establish aircraft on the final approach path within a narrower swathe and create smaller intervals between arrivals.

45. It would be irrational were the CAA, applying the correct test, to conclude otherwise (if and in so far the changes have in fact been adopted otherwise than on a short-term or temporary basis). In so far as the changes in question began as temporary airspace changes or as an operational airspace trial but were at some subsequent date implemented on a long-term or permanent basis, they became Airspace Changes at that date, and the full Airspace Change Process should have been conducted.
46. Furthermore there is a close similarity, if not identity, of effect between the Airspace Changes specified in CAP 725, para.vii and those that are challenged. This is a clear indicator of the fact that, on proper construction, the changes fall within the language of paragraph 9. However, even were that similarity not established, (a) para.vii of CAP 725 does not purport to be exclusive of the categories of Airspace Change for the purposes of paragraph 9, and (b) in any event statutory directions given to the CAA by the Secretary of State cannot be restricted or qualified by the interpretation of the CAA in its own guidance.
47. Alternatively, in so far as it could be said that interpretation of para.9 is a matter for the CAA, it would be perverse and contrary to the principle of consistency in exercising administrative law functions (R (Heather Moor & Edgecombe Ltd) v Financial Ombudsman Service [2008] EWCA Civ 642 at [49]) for the CAA not to treat as Airspace Changes other changes that, whilst not listed in CAP 725 para.vii, are of the same practical effect in terms of their impact on the environment and residents on the ground.
48. Once it is accepted that the changes are Airspace Changes, the duties of the CAA under the 2001 Directions and the Guidance to ensure public consultation and to advise and secure the approval of the Secretary of State are engaged, and, by reason of the CAA's erroneous understanding that its duties did not arise, they plainly have not been fulfilled. It cannot be said that the changes in question "might not" have had a "significantly detrimental effect on the environment" (para.9(a)), and/or a "significant effect on the level or distribution of noise and emissions" either in the vicinity of Gatwick

(para.9(b)) or under its arrival tracks and/or departure routes even if not in its immediate vicinity (para.9(c)).

49. The CAA's unlawful failure to fulfil its duties under para.9 of the 2001 Directions has deprived the Claimant and all others in the same position as him of their right to consultation on significant, long-lasting changes affecting them.

Remedy

50. The Claimant seeks:

- 50.1. A declaration that the changes in question constitute an Airspace Change or Changes;
- 50.2. Alternatively, a mandatory order requiring the CAA to make a lawful decision (in accordance with the Court's judgment on the legal principles to be applied) as to whether the changes in question are an Airspace Change or Changes;
- 50.3. In any event, a mandatory order requiring the CAA to:
 - a. Advise the Secretary of State pursuant to para.1(a) of the 2001 Directions;
 - b. Ensure that public consultation takes place pursuant to para.1(b) and (c) of the 2001 Directions and section 9 of the Guidance; and
 - c. Carry out the full Airspace Change process pursuant to the 2001 Directions and the Guidance;
- 50.4. An order prohibiting the CAA from promulgating the changes without having first secured the approval of the Secretary of State;
- 50.5. Further or other relief as the Court thinks fit;
- 50.6. Costs.

51. The Court is respectfully requested to grant the application for judicial review and grant the relief sought.

John Steel QC

James Potts

Statement of truth

The Claimant believes that the facts stated in this Statement of Facts and Grounds are true and I am authorised to sign this Statement of Truth on the Claimant's behalf.

Signed:



Date:

4 March 2015

Chad Sutton

Maples Teesdale LLP

Solicitor (acting on behalf of the Claimant)