



Neutral citation [2025] CAT 73

Case No: 1740/12/13/25

IN THE COMPETITION
APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

BETWEEN:

BRISTOL AIRPORT LIMITED

Appellant/Applicant

- v -

WELSH MINISTERS

Respondent

ORDER

UPON reading the Notice of Appeal pursuant to section 70 of the Subsidy Control Act 2022 dated 20 June 2025 (the “Notice of Appeal”) and the Respondent’s Defence dated 26 September 2025

AND UPON the Chair having given directions to trial in the Order made and drawn on 18 July 2025 (the “Order”)

AND UPON reading the Appellant’s application for permission to amend the Notice of Appeal dated 31 October 2025 (the “Amendment Application”) alongside the Appellant’s draft amended notice of appeal (the “Draft Amended Notice of Appeal”)

AND UPON reading the Appellant’s application for permission to rely on expert evidence alongside the enclosed draft expert report of Mr Jonathan Naylor (the “Expert Evidence Application”)

AND UPON reading the response of the Respondent to both the Amendment Application and the Expert Evidence Application dated 7 November 2025

AND HAVING REGARD TO the Order and the parties' submissions that both the Expert Evidence Application and the Amendment Application should be decided on the papers

IT IS ORDERED THAT:

(1) THE AMENDMENT APPLICATION

1. The Appellant has permission to amend its Notice of Appeal in the form of the Draft Amended Notice of Appeal. The Amended Notice of Appeal shall be filed and served by 4pm on 14 November 2025.
2. The Respondent has permission to file and serve an amended Defence by 4pm on 19 December 2025.
3. The costs of the Amendment Application are reserved.

(2) THE EXPERT EVIDENCE APPLICATION

4. The Expert Evidence Application is refused.
5. The Appellant has permission to file and serve a witness statement of fact by 4pm on 17 November 2025. The witness statement shall be confined to factual matters and shall not contain opinion evidence of any kind. If the Respondent wishes to file any further evidence in reply, it shall do so by 4pm on 3 December 2025.
6. The Appellant shall file and serve any written submissions relevant to the Respondent's claim for costs in relation to the Expert Evidence Application by 4pm on 14 November 2025. These submissions shall also cover the treatment of costs following and consequent to the Amendment Application. The Respondent may, if so advised, file submissions in reply by 4pm on 19 November 2025.
7. Liberty to apply.

REASONS

1. The Appellant ("Bristol Airport") seeks permission to amend its Notice of Appeal and to rely on the expert evidence of Mr Jonathan Naylor, who has experience in the

aviation industry. Mr Naylor's report has been served in draft along with the proposed amended Notice of Appeal.

2. The Respondent ("the Welsh Ministers") do not oppose the application insofar as it concerns the proposed amendment of the Notice of Appeal. Bristol Airport submits that the amendments do not involve a substantial change to its case, but rather reflect the provision of further information disclosed with the Defence and the complication that confidentiality restrictions have required consultation with external advisors rather than Bristol Airport's own staff. On that basis, I will allow the application to amend the Notice of Appeal in the form of the proposed draft. The Welsh Ministers have permission to file and serve an amended Defence by 4pm on 19 December 2025.
3. In relation to the application to rely on Mr Naylor's expert evidence, Bristol Airport says that this is necessary in order to introduce factual material about route development programmes in other regions and also to assist the Tribunal with technical issues such as passenger forecasts and the use of route development funds.
4. The Welsh Ministers oppose this part of the application on the basis that it does not fall within any of the "gateways" identified in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) ("*Law Society*"), it is not reasonably required (as evidenced by the fact of Bristol Airport's expressed intention to amend the Notice of Appeal in the same form, regardless of whether it was permitted to rely on the expert report) and it involves the expression of opinions which stray into a challenge of the subsidy decision on its merits, rather than a judicial review. The Welsh Ministers note that Mr Naylor's opinions were not before them when they made their subsidy decision and they rely on the Tribunal's recent decision in *The New Lottery Company Limited and others v Gambling Commission* [2025] CAT 54; [2025] 9 WLUK 593 which drew that distinction in disallowing expert evidence in a subsidy challenge.
5. The application addresses the *Law Society* case only briefly, saying that the draft expert report falls within a category envisaged by that case, on the basis that these proceedings do not involve a challenge made by an expert regulator and do not concern a matter within the Tribunal's expertise, and the evidence is therefore said to be necessary.

6. That however does not correspond with the test set out in the *Law Society* decision, which restricts expert evidence in judicial review proceedings to those which fall within an identified category. Between [37] and [40] of the *Law Society*, Carr J (as she then was) explained the position as follows:

“37. The classic statement of the extent to which evidence other than evidence of the decision under challenge is admissible in judicial review proceedings is that of Dunn LJ in *R v Secretary of State for the Environment, Ex p Powis* [1981] 1 WLR 584, 595. The categories identified in that case can be summarised as follows:

- (a) evidence showing what material was before or available to the decision-maker;
- (b) evidence relevant to the determination of a question of fact on which the jurisdiction of the decisionmaker depended;
- (c) evidence relevant in determining whether a proper procedure was followed; and
- (d) evidence relied on to prove an allegation of bias or other misconduct on the part of the decision-maker.

38. Although these categories are a useful and well-established list, it would be wrong to treat them as if they were embodied in statute or as necessarily exhaustive. That is particularly so as public law has developed in ways which were not in contemplation when *Ex p Powis* was decided. In *R (Lynch) v General Dental Council* [2004] 1 All ER 1159, Collins J was prepared to allow some extension of the possibility of admitting expert evidence beyond the *Ex p Powis* categories in a case where a decision is challenged on the ground of irrationality. The judge accepted that, where an understanding of technical matters is needed to enable the court to understand the reasons relied on in making the decision in the context of a challenge to its rationality, expert evidence may be required to explain such technical matters.

39. We would extend this principle to a situation where - as in the present case - it is alleged that the decision under challenge was reached by a process of reasoning which involved a serious technical error. It would be glib to suppose that, if an error in reasoning requires expert evidence to explain it, a challenge to the decision on the ground of irrationality cannot succeed. In *R (Gibraltar Betting and Gaming Association Ltd) v Secretary of State for Culture, Media and Sport* [2015] 1 CMLR 28, para 100, in the context of a challenge to a measure under EU law as “manifestly inappropriate”, Green J said:

“An error which is far from being obvious or palpable may none the less prove to be fundamental. For instance, a decision or measure based upon a conclusion expressed mathematically might have been arrived at through a serious error of calculation. The fact that the calculation is complex and that only an accountant, econometrician or actuary might have exclaimed that it was an “obvious” error or a “howler”, and even then only once they had performed complex calculations, does not mean that the error is not manifest . . . An error will be manifest when (assuming it is proven) it goes to the heart of the impugned measure and would make a real difference to the outcome.”

40. The same point in principle applies, in our view, to a challenge based on irrationality. A decision may be irrational because the reasoning which led to it is vitiated by a technical error of a kind which is not obvious to an untutored lay person

(in which description we include a judge) but can be demonstrated by a person with relevant technical expertise. What matters for this purpose is not whether the alleged error is readily apparent but whether, once explained, it is incontrovertible.

41. The corollary of this is that, as was recognised in the *Lynch* case, para 18, if the alleged technical error is not incontrovertible but is a matter on which there is room for reasonable differences of expert opinion, an irrationality argument will not succeed. This places a substantial limit on the scope for expert evidence. In practice it means that, if an expert report relied on by the claimant to support an irrationality challenge of this kind is contradicted by a rational opinion expressed by another qualified expert, the justification for admitting any expert evidence will fall away.”

7. It does not seem to me that Bristol Airport has engaged with any precision with the gateways which are summarised in this passage. It is not suggested by Bristol Airport that any of the *Exp Powis* gateways apply, and in my view they clearly do not. It cannot be said that the evidence is necessary in order for the Tribunal to understand any technical matter needed to understand the reasons relied on in making the decision, as was the case in *Lynch*. Finally, Mr Naylor’s report does not on its face attempt to set out a “serious technical error”.
8. Instead, the opinion evidence in Mr Naylor’s report seems to be an attempt to mount a challenge to the merits of the subsidy decision, by identifying areas in which he might have reached a different view from the Welsh Ministers or their advisors. That is not an appropriate exercise for an expert in judicial review proceedings, and it is not evidence that is reasonably required to resolve the proceedings.
9. To the extent that Mr Naylor’s draft report identifies factual matters which might be useful by way of context in the proceedings, the Welsh Ministers have indicated that they would not oppose the filing by Bristol Airport of a short witness statement of fact which contained those factual matters. I agree that this is an appropriate alternative course for Bristol Airport to take. Accordingly, if Bristol Airport wishes to adduce further factual evidence of that sort, then it should do so by filing and serving a witness statement no later than 4 pm on Monday 17 November 2025. That statement should be restricted to factual matters and should not include opinion evidence of any kind.
10. If the Welsh Ministers wish to file any further evidence in reply to such a statement, then they should do so by 4 pm on Monday 3 December 2025.

11. The parties should in any event seek to agree a statement of the key facts in relation to the proceedings. The parties are invited to agree a timetable for that and for all other steps leading up to the hearing. This should be incorporated within the parties' pre-trial directions which are to be provided to the Tribunal by 4 pm on 21 November 2025 as ordered by the Order of the Chair dated 18 July 2025, as amended by the Order of the Chair dated 17 October 2025.
12. The Welsh Ministers seek their costs in the event that the application in relation to expert evidence is refused. Bristol Airport should provide any written submissions relevant to that question by 4 pm on Friday 14 November 2025. Bristol Airport should also, by the same deadline, provide written submissions regarding the question of costs following the application to amend the notice of appeal, with the Tribunal noting that the usual rule would be that applicant pays the respondent's costs of and consequent on the amendment. by. The Welsh Ministers may, if so advised, reply in writing by 4 pm on Wednesday 19 November 2025.

Ben Tidswell

Chair of the Competition Appeal Tribunal

Made: 11 November 2025

Drawn: 11 November 2025