APPEAL OF JET AIRWAYS (INDIA) LIMITED

UNDER THE AVIATION GREENHOUSE GAS EMISSIONS TRADING SCHEME REGULATIONS 2010

1. I have been appointed by the Secretary of State for Energy and Climate Change to determine this appeal by Jet Airways (India) Limited ("Jet"). Jet appeals against a notice of determination of emissions issued by the Environment Agency (EA) on 4 June 2014, pursuant to regulation 22(2)(c) of the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010. This notice relates to the 2012 scheme year and determined the aviation emissions of Jet in that year to be 150 tonnes of carbon dioxide. As will be explained, the emissions thus determined relate entirely to flights between EU/EEA airports in Belgium, Cyprus, Czech Republic, Iceland and Ireland. The notice of determination was served because Jet did not report its emissions for 2012 to the EA by 31 March 2013, as required by regulation 21 of the 2010 Regulations.

2. This appeal is made under regulation 52(3)(b) of the 2010 Regulations. The Secretary of State is the appropriate appellate authority, and has appointed me under regulation 53(2)(a) to determine this appeal on his behalf.

3. No point is taken by Jet as to the extent of its emissions as calculated by the EA. The point raised by Jet is one of principle. Given recent resolutions by the International Civil Aviation Organisation (ICAO), and given certain directions given by the Indian Government, acting by the Ministry of Civil Aviation, to Jet, was the EA bound to determine those emissions under regulation 22 in the light of Jet's non-compliance with the reporting obligation imposed by regulation 21?

4. The initial observations of the parties on this appeal were short and did not engage with each other, or indeed with the recent and highly relevant important decision of

the Court of Justice of the European Union, C-366/10 *Air Transport.* This decision concerned the compatibility of the aviation element of the EU Emissions Trading Scheme with various international aviation provisions. I therefore directed that the parties file further submissions sequentially, and I am grateful for both parties complying with these directions, and providing considerably more material to help me with my decision. Those further submissions are (i) Jet's letter of 5 January 2015; (ii) the EA's amended response of 16 February 2016, and (iii) Jet's reply letter of 2 March 2015.

5. At all stages, the parties have been content for me to proceed with my determination this appeal without an oral hearing, and I am content to do so, given that the matter has now been fully argued out on the papers.

The history

6. The starting point for Jet's case is ICAO resolution A38-18 arrived at in Montreal in September/October 2013. However, it is necessary to set this resolution in context.

7. The Convention on Civil Aviation signed in Chicago in 1944 has been ratified by all the member states of the European Union, as well as the Government of India, though the European Union is not a party thereto. The Chicago Convention established ICAO. ICAO has had the status of a specialised agency of the United Nations since 1947.

8. There are three resolutions by ICAO of potential relevance, from the 36th, 37th, and 38 Assemblies. I shall consider them chronologically, together with the various EU legislative and judicial steps of significance.

9. The resolutions of the 36th and 37th ICAO Assemblies are summarised and discussed by Advocate-General Kokott at [191]-[193] of her opinion in C-366/10 *Air Transport*.

10. The 36th assembly in September/October 2007 requested that the Council undertake work to develop a market for market-based measures (MBMs), and urged states to engage in constructive bilateral and/or multilateral consultations and negotiations with other states to reach agreement. However, all 27 EU member states placed a reservation on this part of the resolution, as Advocate-General Kokott noted in [192] of her opinion. Hence, the EU member states were stating that they did not intend to be bound by this specific provision. The reason will be readily apparent, namely the imminent legislative provisions which the EU intended to enact in this sector.

11. Those proposed EU legislative provisions became EU Directive 2008/101/EC of 19 November 2008. Its text was inserted in, and hence amended, the original greenhouse gas emissions directive (2003/87/EC). It applied the EU ETS to the aviation sector, which had not previously been regulated by the 2003 directive. It is this amended directive which the Aviation Greenhouse Gas Trading Emissions Regulations 2010 transposed into UK law. Regulation 21 (the obligation on the operator to report emissions) is drawn from Article 14(3) of the Directive, providing that member states "*shall ensure that each operator…monitors and reports the emissions…to the competent authority*" which in England is the EA. It should be noted that the competent authority is obliged to enforce this obligation.

12. Recitals (8) and (9) to Directive 2008/10/EC are important, in that they summarise why the EU pursued these legislative measures separately from the concurrent ICAO processes. Having recognised in recital (8) that the Kyoto Protocol to the UNFCCC required developed countries to pursue limitation and reduction of emissions "*working through*" ICAO, recital (9) noted that all EU Member States are Contracting Parties to the Chicago Convention and members of the ICAO, and continued:

"Member States continue to support work with other States in the ICAO on the development of measures, including market-based instruments, to address the climate change impacts of aviation. At the sixth meeting of the ICAO Committee on Aviation Environmental Protection in 2004, it was agreed that an aviation-specific emissions trading system based on a new legal instrument under ICAO auspices seemed sufficiently unattractive that it should not then be pursued further. Consequently,

Resolution A35-5 of the ICAO's 35th Assembly held in September 2004 did not propose a new legal instrument but instead endorsed open emissions trading and the possibility for States to incorporate emissions from international aviation into their emissions trading schemes. Appendix L to Resolution A36-22 of the ICAO's 36th Assembly held in September 2007 urges Contracting States not to implement an emissions trading system on other Contracting States' aircraft operators except on the basis of mutual agreement between those States. Recalling that the Chicago Convention recognises expressly the right of each Contracting Party to apply on a non-discriminatory basis its own air laws and regulations to the aircraft of all States, the Member States of the European Community and fifteen other European States placed a reservation on this resolution and reserved the right under the Chicago Convention to enact and apply market-based measures on a non-discriminatory basis to all aircraft operators of all States providing services to, from or within their territory."

13. So, as my underlining makes clear, the EU was recording that

    (a) ICAO deliberations did not seem to be leading in the direction of any action through ICAO;

    (b) the Chicago Convention in any event allows a member state's laws to apply to the aircraft of other states, and hence

    (c) the EU member states reserved their ability to apply market-based measures other than through ICAO.

14. The 37th ICAO Assembly took place in September and October 2010, so after the coming into force of the 2008 Directive. Resolution 37-19 (at 13) requests the Council to undertake work to develop a framework for MBMs. Other paragraphs (e.g. 14) acknowledge the role played by existing MBMs, but urge that these be assessed against the guiding principles in the annex to the resolution; EU state reservations are noted as against this paragraph. There is nothing inconsistent between this resolution and the maintenance of the EU ETS system now applicable to aviation.

15. The Advocate-General delivered her opinion in the *Air Transport* case in October 2011, and the Court of Justice of the European Union gave judgment on 21 December 2011.

16. Decision 377/2013/EU, of the European Parliament and of the Council, known as the Stop the Clock Decision, contains a derogation in respect of certain 2012 aviation

emissions. In substance, it directed member states not to take action against airline operators in respect of activity to and from airports outside the EU or EEA, where either operators had not been issued allowances in respect of those flights, or if they had been issued allowance, had then returned those allowances. The decision, as its recitals explain, was intended to facilitate progress being made in ICAO towards agreement on a global MBM.

17. This derogation applied to Jet in respect of most of its allowances. Jet had been allocated free allowances in respect of 2012, 1,043,213 in all, of which only 36 related to intra-EEA flights. Because it had not opened an Aircraft Operator Holding account, it had not been issued with its allocation of those allowances, and hence Jet fell within the scope of the derogation in respect of the flights involving airports outside the EEA.

18. The current determination of emissions solely relates to the intra-EEA flights. Those flights do not fall within the scope of the derogation in Decision 377/2013/EU.

19. The 38th Assembly, in autumn 2013, repeated the 2010 call for bilateral and/or multilateral consultations, aimed at reaching a global MBM scheme, in paragraph 16. I note however, from page 101 of resolution A38-18 (as with its predecessor in 2010), that a reservation was entered to in respect of paragraph 16 by Lithuania acting on behalf of, inter alia, the 28 EU member states.

20. EU Regulation 421/2014 of 16 April 2014 amended Directive 2003/87/EC further, by limiting the ambit of the latter to intra-EEA airports for the 2013 to 2016 scheme years. The purpose, as recital (3) tells us, was to sustain the momentum reached at the 38th ICAO Assembly pending the 39th ICAO assembly in 2016, but without affecting the enforceability of the legal requirements in the Directive applicable to intra-EEA flights.

Jet's directions from the Indian Government

21. These are various. On 25 November 2011, the Government of India (in the light of discussions meeting of non-EU member states of ICAO in September 2011) decided that "*there was no need for Indian Carriers to submit any data to European Union under EU-ETS.*" On 10 January 2012, the Government of India told carriers that they should not correspond with the EU, but that if this proved absolutely necessary this should be done with prior consent. On 9 April 2012, carriers were prohibited formally from participating in the EU-ETS. On 5 May 2014, in the light of the ICAO 38th Assembly, carriers were not to share EU-ETS data or information with any EU countries. On 19 June 2014, the Indian Government confirmed its position in a letter to the EU Commission, which is in line with the position adopted by Jet in this appeal; to very similar effect is the letter of 22 August 2014 to EA. All these directions came from the Indian Ministry of Aviation.

Jet's submissions

22. Jet's central point ([14] of its submissions of 5 January 2015) is that unilateral action (in this case by the EU and its member states enacting the 2008 amendment to the original ETS directive, without reference to ICAO processes) does not accord with the global consensus as evidenced in ICAO. There should be bilateral discussions between the EU and states including India, and "*in the absence of crystallization and conclusion of this, apparently the decision made in CJEU may not be enforced upon*":

23. Jet says it is also constrained by directives from the Government of India prohibiting compliance with the terms of the EU scheme. Jet also relies upon the necessity for fair and equitable justice. Finally, Jet relies upon recital (5) of EU Regulation 421/2014, which says that the derogations in the regulation take into account the results of bilateral and multilateral contacts with third countries to promote MBMs, which will be pursued on behalf of the EU Commission.

The EA's submissions

24. The EA contends in summary that
    (i) the resolution in ICAO A-38-18 is not legally binding as a matter of international law;

(ii) even if it were in principle binding, it does not bind the European institutions who made the directive;

(iii) the directions of the Indian Government are not legally binding on the EU or UK;

(iv) national courts (let alone decision-makers such as myself) do not have the power to declare acts of the EU institutions invalid;

(v) in any event, because member states and the EU have competence over their airspace and all states have freedom to fly over the High Seas, the EU ETS Directive is valid insofar as it applies to flights arriving at or departing from an EEA airport, and that this includes the flights in issue in this case which both departed from and arrived at an EEA airport.

The issues and my conclusions

25. The starting point is that there is a EU directive in force, properly transposed and implemented by the UK in the 2010 Regulations, which is applicable to the intra-EEA flights in issue.

26. I should also make a general point in the light of the submission by Jet that the decision of the CJEU in the *Air Transport* case "*may not be enforced upon*". The difficulty with this submission is that the judgment of the Court, and the guidance given by the Advocate-General are of direct relevance to the issues as to whether Jet is right in saying that the EU directive is unenforceable because of various ICAO provisions. I must follow the judgment of the CJEU, and I should regard the Advocate-General's guidance as highly persuasive, if its contents are applicable to the current arguments by Jet.

27. I agree with the EA's submission (not dissented from by Jet) which I have summarised as (v) above, namely EU competence is established in respect of the emissions relevant to this case, namely to Jet's intra-EEA flights. This is established by [101] of the CJEU's judgment in the *Air Transport* case.

28. Therefore, and subject to the challenges to the directive and UK transposing regulations, the EA is empowered to determine Jet's emissions as it did.

29. Logically, the first question is whether I have the jurisdiction to accept a challenge to the validity to the directive on the grounds that it is incompatible with the international developments within ICAO, or indeed with the directions of the Indian Government.

30. The short answer to this is that I have no such jurisdiction. Only the CJEU may decide whether an act of the EU institutions is invalid, not a national court or tribunal: see the CJEU's judgment in *Air Transport* at [47], with the authorities listed at [48] of which *Foto-Frost* [1987] ECR 4199 is the best-known. The rationale is given there. Article 267 of the Treaty on the Functioning of the European Union confers jurisdiction on the CJEU in order to apply EU law uniformly. Different decisions of different EU national courts would be liable to jeopardise the unity of the EU legal order.

31. On that ground alone, I am bound to dismiss this appeal, because I could only properly allow it if I were to conclude that the 2008 Directive was invalid.

32. But there are a number of other issues upon which I should express my view, and which would lead me to dismiss the appeal, irrespective of my conclusion that I lack the jurisdiction to declare the directive invalid.

33. The first is my interpretation of the ICAO material, and in particular A38-18 of the 38th Assembly in 2013 upon which Jet relies. I consider that this is not inconsistent with the EU initiative to make aviation subject to the EU ETS, and hence none of it would potentially invalidate the results of that initiative. The intent within ICAO to come up with a global MBM is not inconsistent with a group of ICAO members deciding that they will resolve upon a sectoral MBM whilst ICAO members as a whole decide upon the terms of a global solution. This conclusion about A38-18 is very similar to the CJEU's analysis in [149] of the *Air Transport* case, in which it concluded that that ICAO A37-19, concerning the design and implementations of

MBMs, "*did not indicate that MBMs, such as the European Union allowance trading scheme, would be contrary to the aviation environmental standards adopted by the ICAO*."

34. For this reason, there are no grounds for challenging the EU directive.

35. The second reason is that Jet's reliance on the ICAO material is undercut by the fact that the EU member states imposed reservations in respect of the specific resolutions upon which Jet (and the Indian Government) seek to rely. Jet assumes a binding consensus within ICAO, but that is not what the resolution as a whole says. Even if the resolution were capable of being binding, it cannot bind the EU member states which entered a reservation in respect of it. A similar point was made by the Advocate-General at [192] of her Opinion, in respect of the reservations entered by the EU member states in respect of the 36th Assembly in September 2007. The CJEU did not address this point, but there is nothing in its judgment which is inconsistent with this part of the Opinion.

36. The third reason is closely related. The EU is not a party to ICAO. But it is EU's measure which is being challenged in this case by reference to ICAO resolutions. The CJEU in *Air Transport* considered at some length whether the EU was bound by the Chicago Convention and decided that it was not, because the powers previously exercised by member states had not been assumed in their entirety by the EU: [71], in the light of [57]-[70]. I agree with this analysis, and therefore conclude for similar reasons that ICAO resolutions cannot bind the EU when it entered into the directive under challenge.

37. The fourth point is the status of the ICAO resolutions, even assuming that that they were not subject to the reservations entered by the EU member states, and assuming that they could affect the status of the EU measure. A very similar issue was considered by Advocate-General Kokott in *Air Transport.* She described the intent of

the 36th ICAO Assembly as amounting to "*simply a non-binding political declaration by the Contracting States at the ICAO Assembly*": [191]. She described the resolutions of the 37th ICAO Assembly as equally non-binding: [193]. I see nothing about the resolutions within the 38th Assembly which would lead me to a different conclusion. The EA also refers me to Article 38 of the Statute of the International Court of Justice, which does not list resolutions of international organisations as part of the sources which the ICJ is to follow. This supports Advocate-General Kokott's point.

38. For these four reasons, I would not have decided that the EU Directive was invalid on the grounds of alleged incompatibility with ICAO processes, even if I had the jurisdiction to declare this.

39. The final issue is the status of the various directions by the Indian Government. I note that all these directions proceed on the basis that the ICAO resolutions are inconsistent with the EU ETS. In addition, the views of the Indian Government do not purport to be laws binding Jet; they are plainly political views based upon that Government's view as to the state of negotiations between the EU member states and the rest of ICAO who appear to have wanted to negotiate globally. Had they been binding laws, whether primary or secondary legislation, I am sure that this would have been identified somewhere in the various letters from the Ministry of Aviation, and the EA's request for clarification of the legal status of these directions (2.14) went unanswered.

40. I consider that these directions do not assist Jet's case. The underlying issue is whether there is a binding international norm which is capable of trumping the EU directive, such that Jet do not have to comply with the latter. If I am right in my conclusion that there is not, then the Indian Government was wrong in its conclusion that there was, and its political direction to Jet based upon its erroneous view cannot assist Jet on its appeal. The rule of law requires that the executive cannot override the law simply by its say-so. Equally, if I were wrong in my conclusion as to the

underlying nature of the ICAO provisions, and therefore they were binding on the EU and trumped the 2008 Directive, it would be unnecessary for Jet to rely upon what the Government of India had said about those provisions.

41. I would add that I see nothing in the directions which I have been shown which suggest that the directions of the Government of Indian are binding in law on Jet, even though I quite understand why politically Jet may wish to adhere to them if it can. But that point is not the one which arises in this appeal, which is whether as a matter of EU and UK law Jet is entitled not to adhere to the terms of the directive which, as amended, binds all other airlines when they conduct intra-EEA flights.

42. As noted above, Jet also relies upon EU Regulation 421/2014, and recital (5), recognising that its derogations take into account the results of bilateral and multilateral contacts with third countries to promote MBMs; those contacts will be pursued on behalf of the EU Commission.

43. As the EA points out, the latter half of recital (3) to the Regulation states that

> *"…the Union emphasises that the legal requirements can be applied in respect of flights to and from aerodromes located in States of the EEA, in the same manner as legal requirements can be applied in respect of the emissions from flights between such aerodromes*."

44. Read in context, the 2014 Regulation is entirely consistent with a decision to continue to enforce in respect of intra-EEA flights, but with derogations in Article 1 designed to hold the position in terms of other flights pending ICAO developments. Article 8 of the Regulation enjoins the Commission to follow ICAO developments and to report back to the other EU institutions on the proposals to have a global MBM from 2020.

45. Finally, Jet refers to the need to apply fair and equitable justice in the present case. If I am right in my interpretation of the directive, and that it is unaffected by the ICAO resolutions relied upon by Jet, then there is no room for the operation of these

doctrines. The EA is expressly stated by regulation 22 of the 2010 Regulations to be under a duty to determine emissions in the present circumstances, and I can see no grounds in any event for saying that in the particular circumstances the EA was wrong to determine emissions as they did.

46. For all these reasons I dismiss Jet's appeal. Given that Jet had not reported its own emissions within the timescale provided for in regulation 21, the EA was obliged to determine those emissions under regulation 22. The ICAO resolutions cannot affect that obligation, nor can the directions from the Government of India.

47. The EA's notice of determination of emissions of 4 June 2014 thus stands.

DAVID HART Q.C.

27th March 2015