[2013] UKUT 0176 (TCC)

Appeal number: FTC/20/2012

AIR PASSENGER DUTY — connected flights exemption — FA 1994 ss 28, 31, 39, APD Regs 1994, reg 11, APD (Connected Flights) Order 1994, art 3 and Schedule — whether ticketing requirements represent discrete condition or are merely evidential — discrete requirement — whether satisfied by appellant during relevant period — no — appeal dismissed

JUDICIAL REVIEW — whether appellant treated less favourably than competing airlines — no — application dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

RYANAIR LIMITED

Claimant and Appellant

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Defendants and Respondents

Tribunal: Mr Justice Warren, Chamber President
Judge Colin Bishopp

Sitting in public in London on 17 to 20 December 2012

Paul Lasok QC and Eleanor Campbell, counsel, instructed by Enyo Law, solicitors, for the Claimant and Appellant

James Eadie QC and Simon Pritchard, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Defendants and Respondents

DECISION

Introduction

1. The issues in this appeal and application relate to the incidence of air passenger duty ("APD"). The principal question before us is whether Ryanair Limited ("Ryanair"), the well-known airline, was entitled to benefit from what is known as the connected flights exemption from APD in respect of some of the flights it sold to its customers during the period from 16 September 2007 to 31 May 2011 inclusive ("the relevant period"). The exemption relieves aircraft operators of the obligation to account for APD on flights which satisfy certain conditions, to which we shall come. The second question is whether, in interpreting and applying the legislation which prescribes the terms of the exemption, HM Revenue and Customs ("HMRC", a term we shall use to include their predecessor body, HM Customs and Excise) have treated Ryanair less favourably than other comparable airlines and if so whether they have acted in such a way that judicial intervention is warranted.

2. APD is a self-assessed duty of excise. With limited exceptions of no relevance here, it is payable by a commercial aircraft operator such as Ryanair in respect of each passenger travelling on a flight departing from a United Kingdom airport, save for those flights which come within the exemption. During the relevant period Ryanair believed that it was not possible for it to claim the benefit of the exemption, and it accounted for APD in respect of every passenger departing from a UK airport.

3. It now argues that it was mistaken, and that the statutory conditions on which the exemption depends were met in many cases. It has claimed a refund of the excess duty for which, it says, it should not have accounted during the relevant period, amounting to £10,230,613. The claim was made in accordance with s 137A of the Customs and Excise Management Act 1979 which, so far as material for present purposes, reads:

> "(1) Where a person pays to the Commissioners an amount by way of excise duty which is not due to them, the Commissioners are liable to repay that amount …
>
> (3) It is a defence to a claim for repayment that the repayment would unjustly enrich the claimant.
>
> (4) The Commissioners shall not be liable, on a claim made under this section, to repay any amount paid to them more than three years before the making of the claim.
>
> (5) Except as provided by this section the Commissioners are not liable to repay an amount paid to them by way of excise duty by reason of the fact that it was not due to them …."

4. HMRC, by letter of 7 April 2011 ("the decision letter"), have refused to make the claimed repayment primarily because, they say, Ryanair did not satisfy one of the conditions of the exemption. They have accepted that since 1 June 2011, when Ryanair changed certain of its procedures in a manner we shall

explain later, it does satisfy that condition and that some of its flights correspondingly fall within the exemption.

5. The dispute has reached us by two different routes. First, Ryanair made a statutory appeal against the refusal, in accordance with s 16 of the Finance Act 1994, to the First-tier Tribunal, which transferred two issues, set out at para 31 below, to this tribunal for determination, in accordance with rule 28 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Second, Ryanair sought judicial review of HMRC's treatment of it in the Administrative Court, which transferred that application to the Upper Tribunal. Permission was given by Judge Bishopp on 27 July 2012 in respect of the single issue set out at para 36 below. The appeal and the application were then joined in order that they could be determined at a single hearing.

6. Before us, Ryanair was represented by Mr Paul Lasok QC leading Ms Eleanor Campbell, and HMRC by Mr James Eadie QC leading Mr Simon Pritchard.

Air passenger duty and the connected flights exemption

7. APD was introduced in the United Kingdom by Part I, Chapter IV, of the Finance Act 1994. The care and management of the duty has at all times been the responsibility of HMRC. The principal charging section is s 28 which, so far as presently material, is in these terms:

> "(1) A duty to be known as air passenger duty shall be charged in accordance with this Chapter on the carriage on a chargeable aircraft of any chargeable passenger.
>
> (2) Subject to the provisions of this Chapter about accounting and payment, the duty in respect of any carriage on an aircraft of a chargeable passenger—
>
> (a) becomes due when the aircraft first takes off on the passenger's flight, and
>
> (b) shall be paid by the operator of the aircraft.
>
> (3) Subject to section 29 below, every aircraft designed or adapted to carry persons in addition to the flight crew is a chargeable aircraft for the purposes of this Chapter …
>
> (4) Subject to sections 31 and 32 below, every passenger on an aircraft is a chargeable passenger for the purposes of this Chapter if his flight begins at an airport in the United Kingdom.
>
> (5) In this Chapter, 'flight', in relation to any person, means his carriage on an aircraft; and for the purposes of this Chapter, a person's flight is to be treated as beginning when he first boards the aircraft and ending when he finally disembarks from the aircraft."

8. As the section makes clear, the duty is payable by the operator of a chargeable aircraft in respect of each chargeable passenger on a flight originating in the United Kingdom. In many cases the airline calculates the duty payable and adds the same amount to the cost of the ticket, and it is therefore ultimately the

passenger who pays it. In other cases the airline treats the duty as a cost which it absorbs. Ryanair's case is that it comes within the latter category.

9. It is common ground that Ryanair's aircraft are chargeable, and we do not need to deal further with s 29. Section 30 provides, by sub-ss (1) to (4A), that the rate of duty is determined by reference to the passenger's destination, and the class in which he travels. In essence, the longer the journey and the higher the class, the greater the duty payable. The rates of duty payable in any particular case are not in issue before us and we need say no more about them. Section 30 also provides, however, for the "connected flights exemption", which is at the core of the dispute between the parties. Subsections (5) to (8) are in these terms:

> "(5) Subject to subsection (6) below, the journey of a passenger whose agreement for carriage is evidenced by a ticket ends for the purposes of this section at his final place of destination.
>
> (6) Where in the case of such a passenger—
>
> (a) his journey includes two or more flights, and
>
> (b) any of those flights is not followed by a connected flight,
>
> his journey ends for those purposes where the first flight not followed by a connected flight ends.
>
> (7) The journey of any passenger whose agreement for carriage is not evidenced by a ticket ends for those purposes where his flight ends.
>
> (8) For the purposes of this Chapter, successive flights are connected if (and only if) they are treated under an order as connected."

10. The effect of those provisions and of the order to which sub-s (8) refers—the Air Passenger Duty (Connected Flights) Order 1994, SI 1994/1821 ("the Connected Flights Order" or "the CFO"), to which we shall come in more detail shortly—is that, for the purpose of determining the amount of duty for which it must account, an airline is required to ascertain the passenger's final destination. In the case of a journey involving a single flight that determination is simple, but it is less simple when the passenger is required to take two or more flights to complete his journey. A passenger who, for example, flies from Edinburgh to London and then, on a separate flight, to Hong Kong is treated for the purposes of APD as having made a single journey from Edinburgh to Hong Kong, provided the two flights are connected—that is to say, if the conditions of s 30(8) and the CFO are satisfied. The consequences, for the purpose of determining the duty, are that if the flights are connected the amount payable is that appropriate to a journey from the UK to Hong Kong; in effect, the fact that the passenger has had to change aircraft in London is disregarded. On the other hand, if the flights are not connected two separate payments are due: one for the domestic flight from Edinburgh to London, and another for the flight from the UK to Hong Kong. The rule is the same if the connection is in, say, Paris; if the flights are connected duty on a journey from the UK to Hong Kong is payable, whereas if they are not UK duty is due only on a flight from the UK to France, although any French equivalent of APD might be payable as well.

11. The same principle applies to return journeys. The onward flight to Edinburgh of a passenger arriving in London from Hong Kong does not attract

duty if the flights are connected within the meaning of the legislation, whereas it does attract duty if they are not so connected. That is made clear by s 31(3):

> "A passenger whose agreement for carriage is evidenced by a ticket is not a chargeable passenger in relation to a flight which is the second or a subsequent flight on his journey if—
>
> (a) the prescribed particulars of the flight are shown on the ticket, and
>
> (b) that flight and the previous flight are connected."

12. Section 32, which we do not need to set out, makes provision for the amendment of tickets when a booking is changed after it is made. The essence of the provision is that it is the amended ticket which must be considered for the purposes of determining both the amount of the duty which is payable, and whether the exemption applies, and the evident aim is to charge duty by reference to the flights actually taken and their correspondence with the amended tickets. The section also caters for unforeseen changes, for example those caused by adverse weather, so as to ensure that circumstances beyond the passenger's control do not give rise to a liability for duty greater than that which would be payable if the flights were taken as intended.

13. It is common ground that the primary purpose of the connected flights exemption is to avoid the economic damage to UK airports, and particularly Heathrow, which would result if passengers transiting through the UK were required (even if indirectly) to pay the duty. A passenger making a trip from (say) Toronto to Milan and required to change aircraft at some point in the journey might be persuaded to avoid a change in London, if his doing so led to the charging of duty, when he could instead change aircraft in Amsterdam and avoid the payment of any duty. In addition, it avoids penalising passengers who start their journey at a UK airport without a direct flight to their intended destination, and who are therefore compelled to change aircraft at some point and to make that change within the UK. Absent the exemption, they would be required to pay two amounts of duty, whereas passengers able to use an airport with a direct flight would pay only one.

14. The meanings of various terms used in the 1994 Act are to be found in s 43(1). Those relevant here are as follows:

> "'agreement for carriage', in relation to the carriage of any person, means the agreement or arrangement under which he is carried, whether the carriage is by a single carrier or successive carriers"
>
> "'document' includes information recorded in any form"
>
> "'ticket' means a document or documents evidencing an agreement (wherever made) for the carriage of any person."

15. Section 43(2) adds that

> "In this Chapter, in relation to a passenger whose agreement for carriage is evidenced by a ticket—
>
> 'journey' means the journey from his original place of departure to his final place of destination, and

> 'original place of departure' and 'final place of destination' mean the original place of departure and the final place of destination indicated on his ticket."

16. Further sections of the 1994 Act provide for, among other things, the registration of aircraft operators and accounting for the duty. Accounting methods, dealt with by s 39, have some importance in this case, and we shall return to this topic at para 27 below. Further detail of the legislative conditions is set out in the Air Passenger Duty Regulations 1994, SI 1994/1738 ("the Regulations"), little of which is material for present purposes. However, regulation 11(1) expands upon s 31(3):

> "For the purposes of section 31(3) of the Act the following particulars of a second or subsequent flight are prescribed—
>
> (a) the airport from which the passenger intends to depart;
>
> (b) the date and time of his intended departure; and
>
> (c) the airport at which he intends to arrive."

17. Those particulars, which might be regarded as the bare minimum for an air ticket, are reflected in the detailed conditions which must be satisfied if a flight is to be regarded as a connected flight. The Regulations do not, however, set out those conditions; for that one must turn to the CFO. Articles 2 and 3 read as follows:

> "2. The provisions of the Schedule to this Order, including the Notes next mentioned, shall be interpreted and applied in accordance with the notes contained therein.
>
> 3. The provisions of the Schedule to this Order shall be used, in respect of the transfer of a passenger as described therein, for determining whether successive flights are treated as connected for the purpose of section 30(6), or section 31(3), of the Finance Act 1994."

The Schedule, entitled "Rules for determining whether successive flights in question are connected flights for the purposes of air passenger duty", divides flights into two cases: Case A applies to transfers to a domestic flight, and Case B applies to transfers to international flights. It is immaterial whether the first flight is domestic or international. A "domestic flight" is defined by the Schedule as one "where the booked airport for the beginning and ending of the flight is in the United Kingdom", while "A passenger is carried internationally where his flight begins at an airport in one country and ends at an airport in another country; and for the purposes of this Note the United Kingdom … is a country". The words following the semi-colon are designed to make it clear that a flight from England to Scotland is treated as a domestic rather than an international flight, a point repeated by a later Note.

18. The Case A rule is as follows:

> "The passenger's previous flight ('Flight A'), and the next flight after it on his journey ('Flight B') on which he is carried domestically, are connected if the booked time of departure of Flight B is by or at the time or within the period in column 3 of the following Table specified opposite to the period of

time (specified in column 2 of that Table) into which the scheduled time of arrival of Flight A falls on the scheduled day of arrival."

19. This provision sets out what we shall call the "temporal condition". The table to which the rule refers provides for a reasonable interval between the arrival of Flight A and the departure of Flight B, longer at certain times of the day than at others (the range is from six to 17 hours) in order to reflect the pattern of flights. The aim is, self-evidently, to draw a line between true transfers, which qualify for the exemption, and "stopovers", which do not.

20. The Case B rule is:

> "The passenger's previous flight ('Flight A'), and the next flight after it on his journey ('Flight B') on which he is carried internationally, are connected if the booked time of departure of Flight B falls within the period of 24 hours starting at the scheduled time of arrival of Flight A."

The permitted interval between flights is, therefore, rather more generous in Case B than in Case A, but the difference between the temporal conditions is of no consequence in this case.

21. The Case A rule and the table to which it refers are followed by the Notes to which art 2 of the Connected Flights Order refers, which are entitled "Notes of interpretation for the Case A Rule and for these Notes" with seven separate sub-paragraphs. The same Notes are adopted in respect of Case B flights, with some minor modifications of no present significance.

22. The Notes of particular importance here read as follows:

> "(2) If the ticket does not specify correctly and expressly the time or the airport in question, having regard to the journey undertaken by the passenger which is constituted wholly or partly by flight A and Flight B (so that the flights in question are not connected), then those flights shall nevertheless be connected where the aircraft operator who would be liable, but for this Note, for the air passenger duty in question satisfies the Commissioners that, had the ticket in question been correctly and expressly specified with the time or the airport in question, the two Flights A and B in question would have been connected by virtue of this Rule …
>
> (5) Notwithstanding the effect of this Rule that, but for this Note, would result, Flight A and Flight B are not connected:-
>
> (a) where the booked airport of departure of Flight A is the same airport as the booked airport of arrival of Flight B; or
>
> (b) where the ticket for Flight A and the ticket for Flight B are not conjunction tickets.
>
> (6) For the purposes of paragraph (b) of Note (5) the two tickets in question are only conjunction tickets at the time of issue or when last amended:-
>
> (a) if those tickets are contained in one booklet of tickets; or
>
> (b) in the case of each of those tickets being contained in a separate booklet of tickets, if:-

(i) each of those booklets is referable to the other by virtue of a statement on each to the effect that each is to be read in conjunction with the other; or

(ii) each booklet or each ticket in question has as a part of it a summary of the flights of the passenger constituting his journey, which includes the flights in question.

(7) 'Ticket', for the purposes of this Rule, means the ticket in the form of a coupon, or the coupon (as it is sometimes called in the airline industry), issued for the passenger in relation to his intended flight specifying the time of and the airport of departure for that flight."

23. Rule (5)(a) prevents flights which constitute a return journey, even if the interval between the two flights making it up is sufficiently short to satisfy the temporal condition, from qualifying as connected flights. The provision of greatest importance here, however, is Note (5)(b), which introduces the need for "conjunction tickets", on which Notes (6) and (7) expand. Together these provisions constitute what we shall refer to as the "ticketing condition".

24. The particular feature of the rules which is significant in the context of the present dispute is that they were written in the days when airlines, virtually without exception, issued tickets to their passengers in the form of paper booklets containing one or more coupons, one coupon for each flight. The first coupon was the "top copy", and the others, if any, in the booklet were carbon copies. The booklet also contained a final page, not constituting a coupon, which set out all of the times, dates and the airports of departure and arrival of the flights to which the preceding coupons related. Typically a booklet contained a maximum of four coupons; if more coupons were needed in order to cover the passenger's entire journey a separate but linked booklet was issued, as Note (6)(b)(i) indicates. A passenger with one or more booklets of coupons was required to hand over the appropriate coupon in exchange for a boarding pass for the flight to which the coupon related. If he was taking two or more flights in succession in order to reach his ultimate destination he would commonly, but not always, be able to check in for all of the flights at the point of initial departure, receiving a boarding pass for each flight in exchange for the applicable coupon.

25. Almost all airlines, including Ryanair, no longer issue paper tickets in any form, but require their passengers to make what are commonly referred to as "e-bookings", by which the details of their flights are recorded electronically, and accessed in the airline's computer system by means of a reference code known as a Passenger Name Reference ("PNR"). Each booking generates a unique PNR. It is common ground that some airlines make it possible for a customer to purchase, in a single booking, a sequence of flights making up a journey and generating a single PNR. Ryanair formerly issued paper tickets in the format described in the preceding paragraph but, as we shall explain in more detail shortly, following its abandonment of paper tickets each flight (or return flight if both legs are booked together) must be the subject of a separate booking, and each such booking has its own PNR.

26. Despite the change in ticketing practices the wording of the Rules to Cases A and B has remained substantially unchanged since the CFO was first enacted in

1994. How the Rules are to be interpreted and applied in the context of e-bookings is critical to the issues we must decide. We observe in passing that the definition of "ticket" in Rule (7) differs from that in s 43(1) of the 1994 Act, and may not always signify the same thing.

Accounting for APD

27. APD is charged on a flight-by-flight basis—that is, the aircraft operator is obliged to determine, in respect of each passenger, what is his final destination, the class in which he is carried, and whether or not any of two or more flights falls within the connected flights exemption, in order to calculate the duty for which it must account. As many airlines carry thousands of passengers each day that is plainly a considerable task. Section 39 of the 1994 Act, however, provides for simplification of accounting methods. The original version of the section was replaced with effect from 21 July 2009 (approximately the mid-point of the relevant period) by the Finance Act 2009, s 17(2) and Sch 5, paras 1 and 3, but the changes from the earlier version are not material for present purposes. The wording, as so replaced, is as follows:

> "(1) This section applies if the Commissioners consider that, having regard to difficulties encountered or expected to be encountered by any registered operator in obtaining and recording information about passengers and their journeys, it is appropriate for this Chapter to have effect in relation to the registered operator in accordance with a special accounting scheme.
>
> (2) The Commissioners may agree with the registered operator that this Chapter is to have effect in relation to the registered operator in accordance with a special accounting scheme agreed between the Commissioners and the registered operator (but subject to subsection (4)).
>
> (3) A special accounting scheme is a scheme which makes provision for methods of calculating—
>
> (a) how many persons are to be regarded for the purposes of this Chapter as chargeable passengers carried by chargeable aircraft operated by a registered operator, and
>
> (b) how many of those are to be so regarded as having been so carried on journeys in respect of which duty is chargeable at any particular rate.
>
> (4) The Commissioners may publish a notice specifying terms and conditions subject to which special accounting schemes are to have effect.
>
> (5) Where the Commissioners and a registered operator have agreed that this Chapter is to have effect in relation to the registered operator in accordance with a special accounting scheme, this Chapter has effect in relation to the registered operator in accordance with the scheme (and with any notice under subsection (4) which has been published by the Commissioners and not withdrawn) for the period agreed by the Commissioners and the registered operator.
>
> (6) The Commissioners and the registered operator may at any time agree to vary the special accounting scheme for the future.

(7) The Commissioners may at any time terminate the operation of the special accounting scheme—

(a) on the application of the registered operator, or

(b) where they have reasonable grounds for doing so, by giving notice to the registered operator."

28. It is common ground that HMRC have exercised the powers conferred on them by s 39 ever since APD was introduced, and have agreed to the use by many airlines of a special accounting scheme ("SAS"), which enables the airline to account for APD, and to take advantage of exemptions from it including the connected flights exemption, not by physically counting tickets but by using information obtained from other appropriate sources as a proxy. The relevant Public Notice, 551, deals with the detail of HMRC's approach to the agreement of an SAS. The following description appears at para 2.1 of the version of the Notice published in January 2003:

> "A special accounting scheme is a method of estimating the level of exemptions from APD that may be claimed. A special scheme is an alternative to working on a transaction basis where every flight coupon is considered separately. Special schemes allow you to make use of additional information not shown on flight coupons or to use statistical sampling and/or passenger surveys to help calculate your exemptions. You must not use a special accounting scheme without our approval."

29. The Notice was re-issued in October 2010 (part way through the relevant period), expressly in order to cater for the increased use of electronic tickets. Paragraph 2.1 appears in an amended form in the later version, though its sense is unchanged. Two particular features emerge from perusal of the Public Notice, in both the earlier and later versions. First, although ultimately it is for HMRC to decide whether an SAS is acceptable, it is expected that it will be the product of a process in which both the airline and HMRC are involved. Second, HMRC recognise the difficulty which airlines may encounter in analysing every ticket or coupon individually, and the aim of an SAS is to devise a method which, though almost by definition not precisely accurate, arrives at a fair representation of the exemptions from the duty which the airline may legitimately claim.

30. It is common ground that Ryanair has not proposed, and HMRC have not suggested to it, that it should use an SAS, and none has ever been agreed between HMRC and Ryanair.

The issues between the parties

31. As we have said, the dispute between the parties has reached us by two routes. The issues transferred from the First-tier Tribunal for determination are:

(1) In relation to a claim for an exemption for air passenger duty for connected flights, what is the proper construction of the requirements set out in the applicable provisions of the Finance Act 1994, the Air Passenger Duty Regulations SI 1994/1738 and the Air Passenger Duty (Connected Flights) Order SI 1994/1821? ("the construction issue").

(2) Was the appellant entitled to claim an exemption from air passenger duty for connected flights in accordance with the proper construction

> of the applicable provisions, as referred to above, putting aside whether or not the appellant, as a matter of fact, satisfied any temporal requirements? ("the entitlement issue").

32. The essence of Ryanair's case in respect of these issues is that the purpose of the ticketing condition was and is to provide the evidence that the temporal condition is satisfied, that the ticketing condition is to be interpreted in accordance with the "always speaking" principles to which we come at para 103 below, and that it is enough that Ryanair is able to demonstrate, in respect of certain flights, by means other than strict compliance with an outdated requirement with which no airline does or can now comply, that the temporal condition is satisfied as a matter of fact. HMRC's response, in summary, is that compliant ticketing is not merely evidential, but represents a free-standing requirement. Even allowing for an "always speaking" interpretation, Ryanair did not meet that requirement during the relevant period, and it was not open to Ryanair to disregard the ticketing condition or to HMRC to waive it.

33. We are not required to determine the issues arising from the other grounds on which HMRC have relied in resisting Ryanair's claim. These are, in summary, whether, as a matter of fact, any particular passenger's flight was a connected flight within the meaning of the legislation as we interpret it; the amount, if any, repayable in principle to Ryanair; whether, if any sum is repayable, the "unjust enrichment" defence of s 137A(3) is engaged; and whether any part of the claim is precluded by operation of the time bar in sub-s (4). These issues remain in the First-tier Tribunal.

34. The claim made in the judicial review application in respect of which permission has been granted is for a quashing order in respect of HMRC's refusal to make the claimed repayment, and for remission of the matter to HMRC for reconsideration in accordance with the tribunal's decision; Ryanair does not ask us to re-make the decision ourselves, although it is possible our decision might in a practical sense amount to the same thing. The claim arises, of course, only if we decide the construction and entitlement issues in favour of HMRC. The application stems from the statement in the decision letter that

> "it would clearly be unfair to other businesses were HMRC to disregard secondary legislation and retrospectively confer the benefits of a particular tax treatment on one trader who has not complied with the requirements of the legislation."

35. Ryanair argues that, by necessary implication, HMRC were thereby contending that only those airlines which complied with the ticketing condition were benefiting from the connected flights exemption; but the statement was unclear because HMRC did not specify what was meant by "complied with the requirements of the legislation" and, in addition, there were grounds for believing that HMRC had adopted a more generous approach to other airlines than they had to Ryanair since (as recorded above) Ryanair contends that no modern airline is able to comply fully with the ticketing condition.

36. The thrust of its case is encapsulated in the pleaded ground on which permission has been given:

> "To the extent that HMRC has permitted other airlines to claim the Connected Flights Exemption where they can prove that flights are connected by means other than producing coupons/tickets, or booklets of tickets for the connected flights, Ryanair will argue that HMRC should also permit it to do so.
>
> The refusal to allow its claim where other airlines have been permitted to claim an exemption from APD for flights without conjunction tickets is substantively unfair and/or inconsistent with those other decisions."

37. We shall refer to this as "the unfairness issue".

38. It is accepted that there is a considerable degree of overlap between the three issues, and that much of the relevant evidence is common to them. It is for those reasons that it was directed that those parts of the statutory appeal transferred to this tribunal and that part of the application for judicial review in respect of which permission has been given should be heard together.

39. Two other airlines, British Airways and easyJet, were identified as comparators (that is, as airlines which have been allowed to claim the benefit of the exemption in respect of certain flights) for the purpose of the application for judicial review. We should record that, although we heard evidence from a former employee of British Airways, and from HMRC officers who had been required to examine the APD accounting methods adopted by British Airways and easyJet and were very familiar with them, neither of the comparator airlines was joined to the application as an interested party, and we had no evidence or representations from them.

The facts

40. We were provided with a statement of agreed facts, from which we have drawn extensively in the introductory passages set out above. We also had the statements, and heard the oral evidence of, several witnesses:

- Mr Howard Millar, Ryanair's chief financial officer;
- Mr Neil Sorahan, Ryanair's finance director;
- Ms Sandra Crowley, Ryanair's revenue accounts manager;
- Mr Edward Hylton, British Airways' indirect taxes manager from 1984 to 2010;
- Mr Khalid Siddique, a partner in Ernst & Young LLP, specialising in indirect taxes including APD, and an adviser to Ryanair;
- Mr Ian Berry, an officer of HMRC; and
- Ms Wing Edmundson, also an officer of HMRC.

In addition we had the statements of four further witnesses who did not give oral evidence: Ms Elaine Kirwan, a business systems analyst in Ryanair's IT department, Mr David McGregor and Mr Anthony d'Annunzio, who are or were HMRC officers, whose evidence was not challenged, and Ms Ruth Tupper, a further HMRC officer, who was unfortunately unwell and unable to attend. Her evidence was not agreed but we were asked to read it, and have done so.

41. We deal with the evidence, so far as possible, by subject-matter and chronologically, rather than by reciting what the witnesses told us one by one, and we include in the narrative which follows those of the agreed facts which we have not already set out. Unless otherwise stated what follows represents our findings.

42. Ryanair is a subsidiary of an Irish parent, Ryanair Holdings plc. The group operates what, by its own account, is the largest European airline measured by passenger numbers, operating over 1,500 flights a day across 28 countries from 51 bases. Its headquarters are in Dublin, and its main UK operational and administrative base is at Stansted airport.

43. HMRC's APD Central Assurance Team has been based at their offices in Uxbridge since the introduction of the duty in 1994. It was and is a small team, consisting of between three and six officers, all familiar with the airline industry and the relevant legislation. Mr Berry has been a member of the team since 1994, and Ms Tupper since 2005. HMRC's client relationship manager for Ryanair was Mr McGregor, who worked at HMRC's Large Business Transport Sector office in Nottingham until his retirement in 2012; he was not an APD specialist. Ms Edmundson has been a policy adviser in HMRC's Transport Taxes team since 2007.

44. The following were agreed features of Ryanair's business model throughout the relevant period:

- It operated flights on a point-to-point basis—that is to say, a customer wishing to travel by Ryanair flights from point A to point B, a journey for which no direct flight was available, was required himself to identify a suitable connecting airport, C, and book two discrete flights, from A to C and from C to B. Each booking generated a separate PNR, and the customer received a separate booking confirmation for each flight. The customer might instead book a Ryanair flight for one part of his journey, and a flight with a different airline for the other part. Those flights, too, would be discrete, and with separate PNRs. We need to describe some aspects of the evolution of Ryanair's booking system, and do so in the next section of this decision.
- A passenger booking such flights—whether both Ryanair or one Ryanair and the other a different airline—was required to check in separately for each flight (see the more detailed explanation at para 49 below).
- The price charged per Ryanair flight was not affected by whether it was required to account for APD in respect of that flight; its prices were determined according to passenger demand using a "dynamic pricing model"—a method designed to reflect demand so as to ensure so far as possible that every seat on an aircraft was sold, and at the optimum price.
- The fares charged by Ryanair were charged per flight, and there was no reduction in the price charged to the customer where two flights met the temporal condition of the CFO.
- Ryanair had no reciprocal arrangements with other airlines, and its booking system was not integrated, even indirectly, with that of any

other airline. It could not, therefore, identify those of its flights which met the temporal condition of the CFO where the preceding or subsequent flight in the journey was not a Ryanair flight.

45. From 1994 to 1999 Ryanair claimed the benefit of the connected flights exemption in appropriate circumstances, but it stopped doing so in respect of paying customers in January 2000, when it ceased to issue paper tickets. It did so, it says, because it believed that the changes to its booking and ticketing systems it implemented at that time, and particularly its abandonment of paper tickets, meant that the exemption could no longer be claimed. It continued to allocate a single PNR to journeys comprising more than one flight undertaken by its staff, and to claim the benefit of the exemption when those flights met the conditions of the CFO, until April 2005. It then decided that claiming the exemption for staff flights was too complicated administratively, and it stopped doing so altogether.

Ryanair's flight booking practices

46. Mr Millar explained that from the beginning of its operation in 1985 until late 1999 Ryanair issued paper tickets in booklets, in the format we have already described. It also accepted bookings from travel agents, who used a central booking and ticketing system which maintained a record of all Ryanair bookings. In 1996 about 70% of bookings were made by travel agents, and the remainder by customers telephoning Ryanair's own sales office, or making purchases at airports. When a customer bought more than one flight to make up a journey, the tickets, or coupons, for all the flights were supplied to him in the booklet, and Ryanair's computer system treated the flights as making up a single journey. We were told that the computer system could also identify which of the flights so booked satisfied the temporal condition, and it was able to calculate the duty due, allowing for the exemption. Nevertheless Ryanair relied on the tickets (rather than on an SAS) when preparing its APD returns, and we were told that no problems in accounting were identified when the returns were audited by HMRC. The evidence was that at this time about 6% of Ryanair's flights satisfied the requirements of the exemption.

47. In 1996 Ryanair decided to begin the process of phasing out paper tickets, and to reduce, with a view to eliminating, bookings by travel agents, in order to save itself the cost of the agents' commission, and to move to an internet-based booking system. The changes were introduced over the next few years. In January 2000 Ryanair launched a new online booking system. Customers were encouraged to use the system by a policy of offering the lowest fares only to internet customers. Travel agents ceased to be able to book Ryanair flights on behalf of passengers and, by 2006, 99.9% of all Ryanair sales were made via the internet, with the balance being made through its own call centres or at airport sales desks.

48. As we have explained, a customer booking a Ryanair flight using the internet can book only one flight at a time, with the single exception of a return flight; in this case the outward and return flights can be booked together. A customer wishing to book two flights, to use the example we have already given of A to C followed by C to B, has to book and pay for the flight from A to C, and then begin the booking progress again in order to purchase the flight from C to B. Flights for more than one passenger can be booked simultaneously, provided of

course they are all travelling on the same flight (or flights, in the case of return journeys). Once a flight has been booked, the customer receives an email setting out a PNR unique to the booking, the destination, flight number (or flight numbers, if there is a return flight), the date and time of the flight or flights, the name or names of the passenger and any companions, the terms and conditions of carriage, and the total cost of the flight or flights. After booking the first flight the customer may click on the "search new flight" button on Ryanair's website, which takes him back to the beginning of the booking process, but save for that shortcut, two or more bookings must be made and are treated as separate bookings, individually paid for and generating their own PNRs and email confirmations. The use of the "search new flight" button does not link them, in Ryanair's computer system or in any other way.

49. The absence of any link between flights is further demonstrated by the manner in which passengers are required to check in for their flights. A customer travelling with hand baggage only can check in for his flights, himself, using the internet, though he must check in for the flights one by one. There is no need for him to check in again at any of the airports from which his flights depart. A customer travelling from A to B via C with hold baggage, however, has to check in at airport A for his flight to C, collect his baggage at airport C, and then check it in again for the flight to B. A passenger making the same journey but booking one of the flights with Ryanair and the other with a different airline would be in the same position.

50. In all of those respects Ryanair's booking systems during the relevant period and now are identical. When the new, internet-based, system was introduced in 2000, it was assumed by Ryanair that the absence of paper tickets made it impossible to claim the benefit of the connected flights exemption. Ms Crowley offered the following explanation in her witness statement:

> "As Ryanair.com did not facilitate connected flights to be created in one booking, we were unable to avail [*sic*] of the Connected Flights Exemption at source. Revenue passengers intending to travel via the UK were required to create 2 separate bookings on Ryanair.com which resulted in APD being paid to HMRC on each UK departing sector. Ryanair were not aware at this time that the Connected Flights Exemption could be claimed if 2 separate bookings were made. We believed that connecting flights were required to be created in one booking in order to satisfy the criteria under the Connected Flights Order. Consequently the Connected Flights Exemption was not claimed for Revenue Passengers from January 2000 until Ryanair became aware in June 2010 that we could claim the Connected Flights Exemption."

51. The difference between the relevant period and the present time which has persuaded HMRC that Ryanair may now claim the benefit of the exemption lies in the change to the website which was implemented on 1 June 2011, and with which we deal at para 65 below.

The claim for reimbursement

52. Mr Millar told us that Ryanair's calculations showed that in 2010 about 3% of its passengers, or around 2.3 million each year, were on connected flights (or, at least, flights which satisfied the temporal condition) and the annual cost to it of

paying APD on those flights was in the region of £3 million. This was a significant sum and, prompted by information they received from an employee who joined Ryanair from another airline which was claiming the benefit of the exemption, by means of an SAS, despite its not using paper tickets, he and his team decided, in the summer of 2010, to seek advice from Mr Siddique and his assistance in persuading HMRC that Ryanair was entitled to the exemption in respect of qualifying flights.

53. Mr Siddique told us (and we accept) that he has extensive experience of advising and representing airlines with respect to their APD liabilities, of claiming the benefit of the connected flights exemption on their behalf, and of negotiating SAS agreements. In his witness statement he said

> "An SAS is a methodology for the computation of APD agreed between the airline taxpayer and HMRC where the statutory basis of computation of the tax due is either impossible (for example, when coupons are no longer used) or just impractical (for example, because the taxpayer's systems configuration does not provide the correct data or cannot manipulate that data as required). HMRC can accept estimated tax liabilities based on statistical 'sampling' techniques or 'averaging' techniques or a composite of different methods and data sources. During the process of agreeing SAS's, HMRC has proposed and agreed alternatives to coupon data as a means of satisfying evidential requirements by using the outputs from revenue accounting systems or other such airline systems."

54. In his experience, he said, HMRC's approach to negotiating an SAS reflected a pragmatic attempt to "bridge the gap between a strict interpretation of the legislation and advances in technology that have rendered the old statutory methodology redundant". The aim was not to discriminate between airlines by pedantic interpretation of the Rules or because of differences in their IT systems, but to apply the legislation fairly in order that, as far as possible, airlines were treated alike. He also relied, in reaching his conclusion that Ryanair had been mistaken in its belief that it could not claim the benefit of the exemption, on what is set out on the subject in the Tenth Report of the House of Commons Select Committee on Statutory Instruments, dated 18 October 1994, in which (among others) the CFO is considered. The part of that report on which Mr Siddique particularly relied is at paras 4.6 and 4.7 of Appendix III, which reproduces a Treasury Memorandum about the CFO. It reads as follows:

> "4.6 *Tickets*
>
> Flight A and Flight B (under either of the rules) can only be connected, and relief can only arise, if amongst other things, the passenger is covered by a ticket (for which see Notes (1) and (7) to the Case A Rule: these apply also to the Case B Rule by virtue of its Note (1)).
>
> In practice each passenger carried by the airline industry operator will be covered by a ticket. The reason for requiring a ticket (which will have a counterfoil) is to enable the carrying airline (ie operator), which is accountable for the duty, to have some evidence in the form of the counterfoil, or other related record in support of the subsequent claim for connected flights relief when the APD return is rendered to the Commissioners.…

> 4.7 *Conjunction tickets*
>
> The tickets for Flight A and Flight B must be conjunction tickets …
>
> Conjunction tickets are a present practice of the airline industry.
>
> The reason for this requirement of the relief is to enable the airline industry operator, and in particular his ticket issuing agent when issuing the ticket, to determine his liability for APD and any associated relief arising by virtue of this order, in respect of the passenger in question, from not only the top copy of the tickets when issued, but also the counterfoils of the tickets which he retains for the purpose of making a return after the passenger has flown."

55. Mr Siddique emphasised the reason given in the second paragraph of section 4.6 which, he said, made it clear to him that the ticketing condition was no more than evidential. Thus if Ryanair could show by adequate evidence other than paper tickets that the flights were connected (that is, they satisfied the temporal condition and formed part of a single journey) it was immaterial that it did not issue conjunction tickets within the strict letter of the Notes to the Rules.

56. We interpose that we were also referred to a second memorandum issued by the Treasury and annexed to the Select Committee Report, in which it is said:

> "As regards Note (5): this is intended to tell the reader that even though the flights in question appear to come within the Case A Rule (ie the flights in question appear to be connected) the flights are not to be treated as connected where the circumstances described in paragraph (a) or (b) apply."

In other words, the intention was that flights should not be treated as connected if they are return flights (para (a)) or their respective tickets are not conjunction tickets (para (b)).

57. Once he had considered Ryanair's position, Mr Siddique made an approach to HMRC, with a view to recovering for it the APD which, he thought, it had overpaid. His approach led to a meeting at the offices of Ernst & Young, attended by Mr Siddique, Mr Sorahan, Ms Kirwan, Mr McGregor and Mr Berry, on 16 September 2010. The topic of discussion relevant for present purposes was Ryanair's proposed "data mining" method of extracting information which, it said, would support its claim that certain of its flights were within the connected flights exemption. During the course of the meeting a presentation was made to the HMRC officers, by way of demonstration of the manner in which Ryanair proposed to identify connected flights. Mr Berry told us that he had attended a similar presentation, made by easyJet, in the course of negotiation of the SAS which easyJet uses, to which Mr Siddique (who also advised easyJet) had contributed. There was, he said, a difference between the presentations in that the ticketing condition was addressed by easyJet, though not by Ryanair.

58. It is apparent from the manner in which the claim was made that Ryanair could, and intended to, identify only those of its own flights which met the temporal condition; it was not attempting to link any of its flights with those of other carriers (although it had done so in the days of paper tickets). Ryanair recognised that it did not meet the letter of the ticketing condition—its case was and is that no airline using modern practices can—but, as Mr Siddique had concluded, that it could produce evidence that the temporal condition was met,

and that its ability to do so was enough. Both Mr Sorahan and Mr Siddique recalled that Mr McGregor had commented at the meeting that it would be a "nonsense" if Ryanair was unable to benefit from the exemption, merely because of a technical failure to meet the ticketing condition, when the temporal condition was satisfied. HMRC do not argue that Mr McGregor made no remark similar to that recalled by Mr Sorahan and Mr Siddique, although the note made by the HMRC officers of the meeting does not include a reference to it or anything similar. It does however contain the observation that "the ticketing requirements of the order appear not to be met", without qualification.

59. The comment made by Mr McGregor was the subject of some dispute, and it is perhaps unfortunate in those circumstances that he did not give oral evidence. Mr Siddique and Mr Sorahan told us they took it to refer to Ryanair's historical claim, and to amount to an acceptance by HMRC that any technical obstacle to its being met should be easily overcome; Mr Berry thought Mr McGregor intended to refer only to the future, and to the ability of Ryanair to change its practices so that it could satisfy the ticketing condition. In his witness statement, Mr McGregor emphasised that, as he was not an APD expert, he was reliant on advice given to him by other officers, including Mr Berry. He recalled the remark, but said that it was qualified by his simultaneously making the point that he was seeking advice.

60. Whatever Mr McGregor meant, the comment cannot be taken, in our judgment, as a considered opinion of HMRC on which Ryanair can rely. It was, we find, no more than an incidental remark made in the course of a discussion and was not intended to be, nor could it reasonably be taken as, an assurance or ruling. It is clear from the notes that the officers recognised that the ticketing condition presented a difficulty, and Mr Berry plainly knew that it was important. It is not credible that he would have failed to correct a remark made by Mr McGregor, who was not an APD expert and who, we are sure, would defer to Mr Berry on technicalities, if he thought it wrong, or even doubtful. It is, however, entirely understandable that Mr McGregor might comment that it should be possible to overcome such difficulty as there was in order that Ryanair might benefit from the exemption in the future. We accordingly find as a fact that Mr McGregor did not offer any assurance to Ryanair, in the course of that meeting, that its claim for the past would be met.

61. It is plain from subsequent events that the HMRC officers present at the meeting did not reach an immediate conclusion about Ryanair's proposed approach, and instead decided to discuss the position with their policy colleagues. On 27 September 2010, following that discussion, Mr McGregor sent an email to Mr Sorahan in which he indicated that HMRC accepted that Ryanair appeared to be able to show, by data mining, when the temporal condition was satisfied (although HMRC would want to audit the process). His email then went on to say, in a passage which reinforces Mr Berry's evidence that his comment referred to the future:

> "However, we did mention that there may be problems around the definition of 'conjunction ticket' for APD purposes … We accept that Ryanair and indeed most airlines today do not issue paper tickets. So we consider that emails or other electronic communications that are issued in lieu of tickets are acceptable. You explained that Ryanair passengers receive separate and

> individual emails for each flight booked. Unfortunately we do not consider that sending two separate emails/confirmations relating to the two flights in question is sufficient to meet the definition of conjunction tickets in the legislation, unless each email/confirmation refers in some way to the other, or each includes an itinerary showing all connected flights. Neither does the fact that customers may possibly be able to request a summary of their bookings get you over this hurdle.
>
> I think the way forward is to think about how you might make the changes necessary so that you satisfy the ticket conditions to allow you to claim the exemptions that your systems can verify."

62. Further correspondence, including letters particularising the value of Ryanair's claim, followed. That correspondence led in turn to the decision letter, written on 7 April 2011 by Mr Berry to Ryanair's solicitors, who had taken up the argument on its behalf. The core of his reasons for rejecting the claim is contained in the following passage:

> "Whilst it appeared that the data mining process demonstrated to David McGregor and me on 16 September 2010 enabled your client to identify where a passenger had taken two flights within the specified time limits, the ticketing requirements were not met since none of the tickets for the purported connecting flights were, at the time of issue or when last amended, either referable to each other or included a summary of the flights in question.
>
> This is a statutory requirement which must be satisfied by anyone claiming the exemption. It has not been satisfied, and HMRC do not consider that it can simply be disregarded in the present case."

63. The letter went on, in the extract set out at para 34 above, to allude to the unfairness to other airlines which, as HMRC perceived the matter, would result from their acceding to the claim.

The changes to Ryanair's website

64. Though it did not agree that any changes were necessary, Ryanair nevertheless set about devising amendments to its website in order that it might begin to claim the benefit of the exemption. Hitherto, from about 2004, Ryanair's customers could access the details of their flights online through a "Manage my Booking" facility, which permitted them to see, on a browser screen, the details of the flight or flights they had booked. At that time the screen could show only the details of one flight (or return flight if both legs were booked at the same time), but it was possible for a customer who had booked more than one flight to access details of both at the same time by opening two browser windows and accessing the Manage My Booking facility separately in respect of each flight. Mr Millar made the point that a customer who wished to do so could print out the details of each flight he had booked, and staple the printed sheets together; that, he said, was the modern equivalent of the booklet to which the CFO refers.

65. On 1 June 2011 changes to the Manage my Booking facility were implemented. It now allows customers to access the details of all the Ryanair bookings they have made through a single browser window. The customer identifies himself by the combination of his email address, name and date of birth,

which together make up a unique passenger identification which is linked to each booking. The flights retain their individual PNRs, however, and remain separate in Ryanair's own systems; they are linked only by virtue of the fact that the passenger identification is common to them. That link is present whether or not the flights are connected, in the sense that they meet the temporal condition. It is, however, possible to print out a single sheet of paper on which all the flights are shown, and a customer printing out only those flights making up a single journey and which satisfy the temporal condition is able, by this means, to produce something which HMRC accept satisfies the ticketing condition.

66. Mr Millar told us he found it surprising that such a small amendment had led to HMRC's agreeing that Ryanair could now benefit from the exemption in respect of flights which satisfied the temporal condition and could be displayed in this way on the customer's computer screen. Had Ryanair known that so simple a change would make it possible to claim the benefit of the exemption, he said, it would have made the change long before it did. Mr Siddique, too, thought the change merely cosmetic, particularly since HMRC had not required Ryanair to enter into an SAS, but were content to allow it to rely on the data mining process which had been demonstrated at the meeting in September 2010.

67. Mr Berry told us (to quote from his witness statement) that "HMRC decided that this change was acceptable because the passenger at least had something to show the flights that they had booked (i.e. satisfying the requirements for 'conjunction tickets')." What Ryanair's website made possible before the change, they considered, did not satisfy that condition as they interpreted it, because there was nothing linking the bookings; the flights may have satisfied the temporal condition but the printed screenshots did not and could not amount to conjunction tickets. Mr Berry said that HMRC had adopted a "broad" interpretation of the ticketing condition in order to accommodate Ryanair and it was in that spirit that they had agreed that the change to the website was enough. We will return to the differences between Mr Millar and Mr Berry on this point at para 132 below.

68. Before leaving the topic of website bookings we should mention that Mr Siddique also drew our attention to an amendment to HMRC's Public Notice 550. At para 4.4, the Notice details the requirements of the connected flights exemption, as HMRC understand them. In the edition of the Notice published in August 2010, one of those requirements is said to be that "where the tickets are purchased online, they are purchased at the same time through the same portal". This condition is absent from the version of the Notice issued in April 2012 and its omission is, Mr Siddique said, an indication that HMRC themselves had, perhaps, recognised an inconsistency between their practice and the legislative purpose, and a demonstration of their own lack of understanding of that purpose.

69. Ms Edmundson explained that the removal of the paragraph did not reflect a change in HMRC's interpretation of the legislation, nor was it to be regarded as an acceptance that their earlier interpretation was inconsistent with its purpose. Rather, it reflected the fact that HMRC recognised that the conditions on which the exemption depended were those specified in the CFO, including the ticketing condition, and not in the Notice. HMRC therefore decided to remove the paragraph because it could have been construed as an indication that there was a

further requirement, additional to those set out in the CFO, although the paragraph generally reflected modern electronic ticketing methods. We are satisfied that nothing of significance can properly be read into either the presence or the removal of this passage, which merely demonstrate the evolution of HMRC's attempts to provide practical guidance.

The incidence of duty

70. The consequence of Ryanair's booking practices, before 1 June 2011, followed the incidence of the duty explained at para 10 above. If a passenger flew on Ryanair flights from, say, Edinburgh to Stansted and from Stansted to Marrakech, Ryanair accounted for two amounts of APD. In addition, it accounted for duty on the passenger's return flight from Stansted to Edinburgh although, if that flight had satisfied the requirements of the connected flights exemption, no duty would be payable in respect of it (nor in respect of the flight from Marrakech, as that originated outside the UK). From 1 June 2011, however, and as long as the flights meet the temporal condition, the only duty payable is for a flight from the UK to Marrakech—in other words, the practical consequence is that the flights from Edinburgh to Stansted and from Stansted to Edinburgh attract no additional duty.

71. Conversely if, before 1 June 2011, the passenger travelled on Ryanair flights from, say, Edinburgh to Amsterdam and then on to Marrakech, Ryanair accounted for only one amount of duty, at the rate applicable to a flight to Amsterdam, as Amsterdam, rather than Marrakech, was treated as the customer's final destination. If the passenger returned by the same route no APD would be due, whether or not the flights were connected, as they both originated outside the UK. Now, the duty payable in respect of the outward journey is the same as if the connection were made at Stansted, in other words in this example Ryanair pays the duty chargeable on the outward leg to Marrakech, while the return journey still attracts no APD, and for the same reason.

Contacts between HMRC and Ryanair

72. Ryanair's systems and processes for reporting and paying APD were audited by HMRC in 1995, 1999 and 2006. It is common ground that Ryanair did not ask the visiting officers whether it could claim the benefit of the connected flights exemption or whether it could account for APD by using an SAS, and that the officers did not suggest that it should or might either utilise the exemption or use an SAS, even though they knew that other airlines were doing so. Part of Ryanair's case is that it was entitled to expect the visiting officers to enquire more deeply into its practices, and to point out that it was failing to claim the benefit of the exemption when, had the officers made those enquiries, they would have realised that Ryanair could do so; and had the officers addressed the matter properly they would have realised that Ryanair could benefit from the use of an SAS. Ms Crowley, in particular, was firmly of the view that HMRC had a duty to advise her, as the Ryanair representative whom they saw, of the possibility of using an SAS in order to claim the benefit of the exemption. She referred us to internal (though publicly available) HMRC guidance, identified as "APD6400 – Auditing APD traders: Educational visits" in which one of a visiting officer's

tasks is described as "Judge airline capacity to meet duty requirements and need or potential for a special accounting scheme". It emerged, however, that the document dated only from 2008, and that it related to visits to aircraft operators which had recently registered, or were about to register, for APD. A similar contention, made by Mr Sorahan, that HMRC should have respected their own Customer Charter, likewise does not help Ryanair, since the Charter was not published until 2009. Moreover, as Mr Sorahan accepted, Ryanair had not relied on it and Mr Sorahan had not even seen it until very recently.

73. Ms Crowley also made the point that Ryanair had claimed the benefit of the exemption in respect of paying passengers until 2000 and had ceased doing so only because of its incorrect (as she now thinks it to be) belief that its change in ticketing practices no longer made it possible to do so; but the officers, she maintained, could and should have realised that Ryanair was still selling connected flights yet not claiming the exemption. She rather reluctantly accepted, however, that the terms of the CFO were not difficult to understand, that she was familiar with them, and that HMRC's published guidance included a section dealing with the agreement of an SAS.

74. As we have indicated above, the main sources of the published guidance are the two relevant Public Notices, number 550 dealing with APD generally and to which Mr Siddique referred (see para 68), and 551, which relates to the agreement of an SAS (see para 28). Each of them sets out, as do all such Public Notices, HMRC's understanding of the law, but they also provide information explaining how affected airlines may seek further help. Although Ms Crowley accepted that she had copies of the Notices, there was no evidence that she or any other member of Ryanair's staff had sought advice from HMRC about the exemption or the possible agreement of an SAS.

75. Ms Tupper's evidence dealt also with a meeting at Ryanair's head office in Dublin on 10 June 2002. One of the HMRC officers attending was Ms Julie Hopton, an APD auditor, who was also the visiting officer when the 2006 audit was carried out. We did not have any evidence from Ms Hopton, but were provided with copies of her notes of the 2002 meeting. They include the comment "Very few exemptions claimed – no connecting flights." The fact that Ryanair did not claim the benefit of the exemption did not attract any particular attention within HMRC, according to Ms Tupper's witness statement, as it was known (and indeed Ryanair's website made clear) that it was a "point to point" airline, and not all airlines made claims, often because their systems did not enable them to identify connecting flights. Ryanair had claimed the exemption in the past—and was still doing so until 2004 or 2005—and it was reasonable, Ms Tupper thought, to assume that its staff understood the terms of the CFO and were capable of deciding for themselves whether it was available. The note of a further meeting in February 2005, when Ms Tupper saw some Ryanair personnel with APD responsibilities, though not Mr Sorahan or Ms Crowley, contains the remarks "no connecting flights" and "connecting flights well looked at not viable".

76. Mr Lasok drew our attention to a further meeting between Mr D'Annunzio, who appears to have shared the role of Ryanair's customer relationship manager with Mr McGregor, and various Ryanair personnel, including Ms Crowley, in

Dublin in November 2006. In his witness statement Mr D'Annunzio explained that his responsibility as a customer relationship manager was to "manage the relationship" with a view to "developing a more in-depth knowledge of the customer's business ...", and "to enhance engagement between the parties in an open and transparent way". Before the meeting, he undertook some research into Ryanair's business, as a result of which he was able to demonstrate that Ryanair was underpaying APD. His statement does not say anything about the connected flights exemption, or the possibility that Ryanair might enter into an SAS, and (as he did not give oral evidence) we must assume, with Mr Lasok, that they are topics which he did not explore although there was evidence, in the form of an earlier internal HMRC email exchange copied to Mr D'Annunzio, that HMRC were aware that Ryanair claimed the benefit of the exemption only in respect of some staff flights, and that an SAS might be in contemplation. Mr D'Annunzio mentioned in his statement that he was not himself an APD expert—he attended the meeting to discuss a number of matters—and that he satisfied himself that the Ryanair staff were familiar with the Public Notice and were aware that they could seek advice from the APD unit at Uxbridge.

HMRC's practical approach to the exemption

77. Ms Edmundson explained that the policy rationale for the ticketing condition, as HMRC viewed it, is to allow airlines, and HMRC when carrying out an audit, to see a passenger's whole journey to ensure that the correct tax is declared and the correct exemption, if one is available, is claimed. It has, in addition, an accounting function: when connections are made between different airlines, the only way to ensure that each airline pays the correct amount of APD (and the total fare is shared correctly between them) is to make the whole itinerary "visible" to both airlines. Appropriate cross-referencing of all the tickets in the chain is the means by which visibility is established and represents the mechanism by which correct decisions are made about which airline is liable to the tax and which may claim exemption. The critical administrative feature of the scheme is not the physical form of the documentation generated by the airlines, whether it is in paper or electronic form; it is, rather, the fact that the documentation must ensure the necessary visibility. Thus in HMRC's view the tickets to which the CFO refer have a greater purpose than merely showing that the temporal condition is met.

78. As the legislation has not been amended to keep pace with changes in ticketing practices, HMRC have had to modify their application of the Rules and, particularly, the Notes. In her first witness statement Ms Tupper described HMRC's usual current approach:

> "When considering whether the requirements of the Connected Flights Order have been satisfied by an airline and in particular the requirements of 'conjunction tickets', taking into account the widespread use of electronically booked tickets, HMRC will consider the airline's electronic booking system and the electronic equivalent of tickets received by passengers. In particular, systems that offer connected flights will allow all flights to be booked at the same time and will record the flights in a way that shows the passenger's whole journey. There will normally only be one

check-in and one booking reference for the entire journey. Beyond these features, HMRC look for the following:

- A system that demonstrates that the whole of a passenger's journey is visible to all carriers involved.
- System downloads, or extracts, that show the whole journey of any connecting passenger(s), including the class of travel, and the departure and arrival times.
- A system with reporting that identifies where passengers actually flew on previous booked flight.
- A single summary issued by the ticketing airline to the passenger that displays all connected flights to be taken evidencing the passenger's intent to travel to their final destination. Passengers can see and print details of all flights booked under the single booking reference, and flights are normally displayed in the order they are to be taken.
- The sharing of connecting flight details between airlines, operated by way of a Global Distribution System ('GDS'), i.e. central reservation systems that book and sell tickets for multiple airlines and which are viewable by the conventional interlining airlines and by travel agents. This enables these flights to be connected and booked and visible to all airlines involved in carrying the passenger to their final destination.
- All airlines involved can, using the GDS, locate all the details for a journey using the Passenger Name Record ('PNR') and the GDS calculates and assigns fares, taxes and other charges to those airlines. This is how you pay one 'fare' for a journey even where that journey involves more than one airline."

79. We will consider later whether or not that approach is warranted by the legislation.

Comparator airlines

80. Part of Ryanair's case, as we have explained, is that it has been treated less favourably than other airlines. In essence, it says, HMRC have applied a literal interpretation of the CFO to its case, but have been more liberal, or flexible, in its interpretation in the case of other airlines. We take the following summary, verbatim, from the statement of agreed facts:

"*British Airways*

Since 1994, British Airways' computer systems have always held a complete record of a passenger's journey. This has been obtained from the records of [the] global distribution system ('GDS') operated by the International Air Transport Association ('IATA'). This is a central reservation system, through which tickets for multiple airlines can be booked. This system allocates a single PNR per passenger per journey, even where the journey consists of more than one flight, and even where the flights are flown with different airlines (so long as flights with the other airline are also booked through the IATA system).

The IATA booking system prices fares according to the itinerary, date, class of travel and ticket tax due.

> When APD was introduced British Airways worked closely with the Commissioners. An SAS was agreed under which the reports from British Airways' computer systems were to be used to prepare returns and maintain British Airways' accounting records, and this was adopted in 1995.
>
> *easyJet*
>
> easyJet's online booking system has, throughout the Claim Period [*ie* the relevant period], offered passengers an 'add another flight' option. This allows passengers to book more than one flight in a single booking session. If certain flights made in a single booking session meet the temporal requirements in the Connected Flights Order, easyJet claims the Connected Flights Exemption.
>
> If flights are booked in separate booking sessions, they are allocated different PNRs. Where this occurs, the Connected Flights Exemption is not claimed by easyJet, even if the flights meet the temporal requirements in the Connected Flights Order."

81. We had a good deal of evidence, from Mr Hylton and Mr Berry, about British Airways' practices, both in the days of paper and more recently, and some additional evidence about easyJet, including some sample screenshots taken from its website which were illustrative of the agreed facts, and further comments from Mr Berry, which are set out at para 94. In the course of the hearing we also heard some evidence about a Canadian airline, Zoom, to which we come at para 97.

82. Mr Hylton's evidence was that he had been British Airways' indirect taxes manager from 1984 until he retired in 2010. He had been responsible for all of British Airways' transaction taxes, including APD after its introduction in 1994, and we accept that he was not only closely acquainted with, but also played a part in shaping, the legislation and its application in practice. He had, in particular, considerable familiarity with the connected flights exemption, and had successfully lobbied, on behalf of British Airways and other airlines, for the granting of the exemption, which had not been included in the original APD proposals put forward by the government. The exemption was of considerable importance to British Airways: at the time of his retirement, Mr Hylton said, about 30% of all British Airways departures were within the CFO. During the years between 1994 and 2010 he also had extensive contact with HMRC's APD assurance team, and in particular Mr Berry.

83. British Airways negotiated an SAS with HMRC in 1994. In his first witness statement Mr Hylton described it in this way:

> "British Airways never evidenced connected flights by reference to tickets, but by reference to passengers' PNRs, and … this method was accepted as evidence of connected flights by HMRC.… We relied on the flight details taken at booking which were updated by details taken at check-in so as to ensure that we knew that a passenger had departed on his or her journey and, where applicable, the Connected Flights Exemption could be claimed. This method provided evidence that precisely mirrored the actual intention of each passenger taking connected flights. This evidence was much more accurate than that provided by paper tickets, however carefully completed the paper tickets may have been. In agreeing the SAS with British Airways by reference to a passenger's PNR, HMRC did not seek to impose any

> requirement or condition as to the nature and scope of the information which a passenger received regarding his or her journey in order for the Connected Flights Exemption to be claimed. There was no requirement or condition imposed that a passenger must receive a summary of the flights or that the flights be set out so that they were referable one to another."

84. Mr Hylton told us that booklets of coupons were adopted, for the purposes of the CFO, as the evidence of the connection between flights since at the time there was nothing else which could be used. However, although a passenger on British Airways' flights normally received a booklet of coupons in the form contemplated by the CFO, it was not a condition of British Airways' SAS that he should do so, and it was not until 2004, when British Airways fully implemented its internet booking system, that a passenger could view a summary of his flights on one screen. That change to British Airways' website did not lead to any change in the SAS, which still identified connected flights by reference to the PNR. Mr Hylton told us that he knew, from his discussions with his counterparts in other airlines, that they were also using schemes which identified connected flights by reference to PNRs rather than tickets. Moreover, the tickets, or booklets of coupons, issued to passengers were not always accurate (in many cases they were completed, by hand, by authorised travel agents) and it could not be guaranteed that they would always be a reliable indicator of whether or not the exemption applied. It was principally for that reason, and not because of the burden of checking large numbers of coupons, that British Airways was keen to use a system which identified connected flights by reference to PNRs rather than coupons.

85. Mr Berry's evidence about the agreement by HMRC of British Airways' SAS, at about the time the duty was introduced, was a little different. His recollection was that British Airways had persuaded HMRC that counting coupons (which was the only acceptable method of calculating the duty due without a SAS) would be too onerous a task, and that it would also lead to error because of the sheer quantity of coupons: it would have been necessary for British Airways to examine each coupon in order to identify a connection and thus determine the number of exempt passengers. The reason they were not required to do so was that HMRC were satisfied that British Airways had shown that by using the PNR they could obtain the same information electronically, and correspondingly more quickly, simply and accurately. He accepted, too, that paper tickets were not always correctly completed.

86. It was not, he said, a feature of the SAS that it eliminated the need for flights to be connected in accordance with the legislation; British Airways still had to be able to show that the flights satisfied both the temporal and the ticketing conditions. As he put it in his witness statement, the SAS "did not eliminate the need for flights to be connected or the need for the booklet of tickets to be issued – it was merely a means of accounting for the duty in a simpler way." It was, he added, the very visibility of the booking on the GDS which made it possible to see that the flights were connected and that the ticketing condition was satisfied.

87. Mr Hylton told us of an occasion in late 2000 when British Airways refunded some APD to a New York travel agency, and in consequence amended its APD declarations. The travel agent had made bookings, and issued tickets, to

groups of passengers flying from New York to London on flights operated by British Airways or Continental Airlines. The passengers were booked to fly on from London to Tel Aviv, using a UK charter airline, Monarch Airways. The return flights were a simple reversal of the outward flights. Each passenger had been charged APD of £20 for their London to Tel Aviv flights, and a further £20 for their return London to New York flights, as the connections from the preceding flights had not been identified in the airlines' booking systems. The travel agent spotted the mistake (as he believed it to be) and approached HMRC, who advised him that it was possible for APD refunds to be made even if the flight had already taken place. The agent then contacted Mr Hylton, who examined the list of passengers booked on the Monarch Airways flight, matched them to the British Airways PNRs that the travel agent provided, checked that the temporal condition was satisfied, and retrospectively claimed the benefit of the exemption for the return flight from London to New York. Mr Hylton said he checked with Mr Berry that what he was doing was in order before adjusting British Airways' next APD return in order to make the claim. He gave this episode as an example of what he told us he perceived to be HMRC's relaxed approach to the ticketing condition.

88. Mr Berry, however, did not accept that he had authorised the adjustment, or that he had even been asked to do so. He had written to the New York travel agent in response to an enquiry, but had merely identified the requirements of the exemption, pointing out both the ticketing and the temporal conditions. The description given by Mr Hylton showed that the flights were not connected within the meaning of the CFO, since the tickets issued respectively by British Airways and Monarch were not conjunction tickets and, had Mr Berry been asked, he would have said that the exemption was not available. Moreover, there was no evidence that British Airways' returns had in fact been adjusted as Mr Hylton claimed. We will come to our conclusions about this and other matters of dispute later.

89. Mr Hylton's oral evidence dealt also with various other adjustments which were made to British Airways' APD payments. Some were made in the early days of APD and were attributable to errors as the new system bedded down, and we did not find this part of his evidence of lasting relevance. More important was the identification, in 2006, of a problem caused by a number of tour operators booking flights which, although they satisfied the temporal condition, were not intended to be connected flights.

90. From time to time, we were told, airlines offer special prices for simple return flights, but charge more for the same flights if they connect to others, whether or not operated by the same airline. The tour operators in this example booked return domestic flights with British Airways, and separately booked long haul flights with other airlines, intending that the flights should not be connected since the saving on the cost of the domestic flight if it was booked in this way exceeded the additional APD which was payable. However, the flights were entered into the common booking system in a way which led the relevant airlines to account for APD as if the flights were connected. Thus, to take the example Mr Hylton gave, if British Airways sold a domestic return flight from Edinburgh to London, and South African Airways ("SAA") sold an onward return flight to

Cape Town, British Airways accounted for APD (at the time, £20) on the entire outward journey, though nothing on the return flight from London to Edinburgh, assuming in each case that conjunction tickets had been issued, and SAA accounted for no duty. If the passenger did not have conjunction tickets, British Airways was liable to account for APD of £5 on each of the domestic flights, and SAA for £20 on the flight from London to Cape Town. The result of the incorrect treatment was an overall underpayment of duty of £10, and at the same time British Airways paid £20 though it collected only £10 from the passenger, while SAA paid nothing despite collecting £20 from the passenger.

91. As we understood Mr Hylton's evidence, this error too was intended to demonstrate that ticketing was of secondary importance, since British Airways accounted for APD not by reference to the ticket but by reference to the connection demonstrated by the PNR which attached to a journey even if it was made up of two or more connected flights.

92. We were referred by Mr Lasok to the note of a meeting which took place in October 1995 between Mr Hylton, Mr Berry and two other British Airways personnel. The principal topic of discussion was the replacement of the current SAS, which was due to expire at the end of the month, by a revised version. At that time, British Airways used a system known as PUMA. The note included the following passage:

> "PUMA has proved reliable in identification of the passenger itineraries for about 95% of journeys, however the remaining 5% … are not identified by PUMA as they have no matching record. These are mainly on the Shuttle and Standby products and are mainly due to passengers who hold open return tickets which do not match the PNR as a new PNR is often created for that journey. However, the original ticket can be inspected and used to prove the whole itinerary and so prove the entitlement to … [the exemption]."

93. We do not consider that either the episode described by Mr Hylton or the PUMA deficiency assists Ryanair. The former is plainly the consequence of a mistake made, not by HMRC, but by the airlines or the travel agents. The latter is no more than an example of a difficulty which came to light in the early days of the duty. Indeed, it seems to us to demonstrate, if it demonstrates anything at all, that it was the ticket which was determinative of entitlement to the exemption.

94. We had much less information about easyJet's SAS, and its practices generally, but we can take HMRC's perception from Mr Berry's first witness statement:

> "The easyJet system attempts to determine whether a passenger's booked destination is the final intended destination by offering the option to book an additional flight. If this option is taken then it assumes that any flight meeting the connected flight time criteria is the passenger's intended final destination and applies the exemption. Where these three components of the test (booking reference/passenger name/flight time) are not met then no exemption is applied. The electronic record created identifies booking references where more than one flight has been booked. This record is then further interrogated and where flights for the same passenger names meet the connected flight time criteria an exemption is applied."

95. In short, two easyJet flights which have been booked together so as to share a PNR and which satisfy the temporal condition are treated as connected for the purposes of the CFO, but any other flights are not.

96. Mr Lasok pointed out that easyJet had been allowed to make a retrospective claim for the benefit of the exemption despite its not issuing tickets—an example, he said, of HMRC's differential treatment of Ryanair, which was being refused a similar retrospective claim. Mr Berry's response was that once he was satisfied that easyJet's system could identify accurately the flights which met the conditions of the CFO interpreted in the manner described above, he was willing to allow easyJet to make a claim; what he had not done was to allow it to make a claim in respect of flights which had been booked in a different way.

97. Ryanair produced evidence that in 2007 HMRC allowed Zoom, which was a transatlantic carrier and which was advised at the time by Mr Siddique, to make a retrospective claim for a refund of overpaid APD on connected flights, by setting the claim off against underpayments of duty in respect of premium class passengers. The evidence of the connection which was produced to HMRC consisted of emails from a sample of the relevant passengers, confirming they had taken a connected flight. Mr Siddique told us that all Mr Berry, who dealt with the matter for HMRC, had required was evidence of the passengers' intentions; the flights in issue were not demonstrated by GDS material, nor were they flights which could be displayed, together, on a single browser screen, and Mr Berry had not even mentioned the need for conjunction tickets. Ryanair relies on this incident as a further example of HMRC's accepting a claim for the recovery of APD despite the fact that the airline's systems did not have the features HMRC says were required.

98. Mr Berry did not dispute the fact that the claim was met and that HMRC allowed it even though the airline could not produce conjunction tickets. He explained that he needed to find a pragmatic solution to a difficult problem. It was evident that Zoom had paid too little APD because it had accounted for it at the reduced rate on all its flights even though it offered two classes of travel, one attracting the standard rate of duty. It was, however, impossible for HMRC to determine by how much it had underpaid because the airline's own records were incomplete, and in order to recover some duty, even if not the precisely correct amount, Mr Berry (as he put in his witness statement) "allowed the airline some leeway in determining both standard rate and exempt passengers based on whatever records they had and extrapolating back for the assessment period. This seemed to me a reasonable approach given that, whilst HMRC were aware there was something wrong … we had no means of quantifying the amount without the cooperation of the airline." Thus a concession was made in respect of the exemption in order to recover duty which, Mr Berry believed, would otherwise not have been collected. He pointed out that the underpayment was in the order of a million pounds, whereas the value of the claimed exemption amounted to tens of thousands of pounds.

Findings in respect of disputed facts

99. We are satisfied that the approach described by Ms Tupper in the extract from her witness statement set out at para 78 above fairly represents HMRC's

practice since 1994, although some of the features she mentions are not relevant in every case—for example, some of it has no application to airlines such as easyJet and Ryanair which have no sharing arrangements with other airlines. Whether the approach is correct is a matter we address in the next section of this decision. We do not accept Mr Hylton's view that British Airways' SAS demonstrates that HMRC abandoned the ticketing condition; rather, we think Mr Berry is right that the use of the PNR is an acceptable and accurate proxy which respects the requirements of the ticketing condition as he believed them to be. It is impossible for us to be sure whether or not British Airways' APD returns were adjusted as Mr Hylton said following the episode involving the New York travel agency which he related, but we accept Mr Berry's evidence that he would not have accepted a claim for the exemption had he been aware that one had been made. It is in our view implausible that he would have agreed to allow the exemption in a situation in which it so plainly was not available. We are also satisfied that the settlement in respect of Zoom was driven by practicality, and that it cannot be taken as an indication of HMRC's normal treatment of other airlines.

The construction issue

100. It is common ground that the ticketing condition cannot be construed and applied, in the context of e-booking, by reference to the words actually used in the CFO, and that a construction which respects its purpose must be adopted. The principal difference between the parties, and the starting point for the examination of that difference, lies in their disagreement about what that purpose is.

101. Ryanair argues that the ticketing condition fulfils no more than an evidential function, in that it is imposed as a means of enabling HMRC to verify that the temporal condition is satisfied and the flights in question are connected in that sense, and that it has no other role. It accepts that "visibility" of the passenger's journey is necessary for the proper accounting for APD, including determination of the applicability of the exemption, and that it may well be that when paper tickets were in use, strict compliance with the ticketing condition was mandatory. But, it says, once tickets ceased to be used, any other reliable evidence of connection must be sufficient since it would be impossible otherwise for any airline to claim the benefit of the exemption, and that cannot have been Parliament's intention (nor is it HMRC's case). Although its contentions in this respect fall more properly within the fairness issue, Ryanair also argues that HMRC's treatment of other airlines is consistent with the proposition that the ticketing condition is merely evidential since those airlines cannot, and do not, comply with it literally but are nevertheless allowed to benefit from the exemption (and to do so by means of an SAS) by showing no more than that certain flights satisfy the temporal condition. In other words, it says, HMRC effectively disregard the ticketing condition if satisfaction of the temporal condition can be demonstrated by other means.

102. HMRC's argument is that the ticketing condition is a substantive requirement, additional to and separate from the temporal condition, and that although it does perform an evidential function, it has in addition the separate purpose of showing that the flights are connected, not merely temporally, but as constituent parts of a single journey. That, they say, is why it is not enough that

the tickets show that the interval between the scheduled time of arrival of one flight and the scheduled departure of the next does not exceed the permitted length but (taking the provisions of Note (6) as they stand) the tickets are themselves linked so as to provide the evidence that the passenger is making a single journey. They say that, having recognised that the wording of Note (5) cannot be applied literally to electronic tickets, they have not so applied it, but have adopted a pragmatic approach so that the exemption is available when the substance of both of the conditions is met. That, they say, is that there should be a single record showing not only that the flights in question satisfy the temporal condition, but that together they make up one journey; and only if a modern electronic record is capable of demonstrating both does it satisfy the legislative requirements.

103. The parties agree that legislation which has not kept pace with technological change must be construed in accordance with "always speaking" principles—that is, it is necessary to ascertain what it is that Parliament intended and apply the words used, in a manner which respects that intention, to (in this case) a technique for documenting the right to take a flight not contemplated by Parliament in 1994, albeit, as s 43(1) shows, a "document" and, correspondingly, a "ticket" need not consist of paper.

104. The move from paper to electronic tickets is only one example of such an unforeseen change; another is the scientific advance in human genetics which was the subject-matter of *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687. The correct approach was described by Lord Bingham of Cornhill in this way:

> "[8] The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possible arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.
>
> [9] There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking.…"

105. He then went on to cite what he described as the authoritative observation of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 at 822:

> "In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made."

106. A further example of the application of legislation to changed technology, mentioned by Lord Steyn in *Quintavalle*, is *Attorney General v Edison Telephone Co of London Ltd* (1880) 6 QBD 244. At [22] Lord Steyn said:

> "The Telegraph Act 1869 gave the Postmaster-General an exclusive right of transmitting telegrams. Telegrams were defined as messages transmitted by telegraph. A telegraph was defined to include 'any apparatus for transmitting messages or other communications by means of electric signals'. When the Act was passed the only such means of communication was the process of interrupting and re-establishing electric current, thereby causing a series of clicks which conveyed information by Morse code. Then the telephone was invented. It conveyed the human voice by wire by means of a new process. It was argued that because this process was unknown when the Act was passed, it could not apply to it. The court held, at p 255, that 'absurd consequences would follow if the nature and extent of those powers and duties [under the Act] were made dependent upon the means employed for the purpose of giving the information'."

107. We were referred, too, to observations of Lord Millett in *Quintavalle*:

> "[38] The question is one of statutory construction. In construing a statute the task of the court is to ascertain the intention of Parliament as expressed in the words it has chosen. The Parliamentary intention is to be derived from the terms of the Act as a whole read in its context. Once it has been ascertained, the court must give effect to it so far as the legislative text permits.
>
> [39] The search in every case is for what Parliament did intend, not what it would have intended had it foreseen later developments. In the present case the question is not whether Parliament positively intended to cover embryos produced by a process such as [cell nuclear replacement] which does not involve the use of a fertilised egg; it plainly did not, for it did not foresee the possibility. The question is whether Parliament intended to legislate only for embryos created by a process which does involve the use of a fertilised egg or whether it intended to legislate for embryos by whatever process they are created."

108. In summary, the construction issue must be broken down into two stages. First, it is necessary to ascertain, so far as it is possible to do so from the wording of the legislation, whether it was Parliament's intention that two distinct conditions, the temporal condition and the ticketing condition, must both be satisfied, and as free-standing conditions, if the connected flights exemption is to apply, which is HMRC's position; or whether, as Ryanair contend, the aim was to

ensure that the temporal condition was satisfied, and the ticketing condition was no more than the means by which the aircraft operator was obliged to demonstrate that satisfaction. Second, we must determine, on whichever of those alternative bases we find to be correct, how the wording used in the legislation is to be applied to electronic tickets.

Ryanair's submissions

109. Mr Lasok began by offering a re-written version of s 31(3) of the 1994 Act. After adding in the definitions to be found in s 43(1) and the prescribed particulars set out in reg 11(1) of the Regulations, he said, it would read:

> "A passenger whose agreement or arrangement under which he is carried is evidenced by one or more documents is not a chargeable passenger in relation to a flight which is the second or subsequent flight on his journey from his original place of departure to his final place of destination indicated on the document or documents evidencing the agreement or arrangement under which he is carried if—
>
> (a) the document or documents evidencing the agreement or arrangement under which he is carried show the airport from which the passenger intends to depart on the second or subsequent flight, the date and time of his intended departure on that flight and the airport at which he intends to arrive; and
>
> (b) that flight and the previous flight are connected."

110. Although s 30(8) provides that what constitutes connected flights is to be defined in an order, it is trite law, he added, that the exercise of a discretionary power is not open-ended; any delegated power must be exercised reasonably and in a manner which is consistent with the primary legislation. Hence the CFO, when made, could not contain requirements that were unreasonable or which introduced something not contemplated by the primary legislation; they must be related to, and respect, Parliament's purpose. Parliament made provision for ticketing requirements in s 31(3)(a). Thus the power conferred by s 30(8) to make an order by which flights are to be treated as connected is properly to be construed as one directed, as the wording indicates, at identifying the required connection between flights, rather than connections between something else, such as tickets. Section 31(3), re-written as he proposed, demonstrated that what mattered was the connection between the flights, demonstrating the continuation of a journey, and nothing else.

111. The argument that the ticketing condition serves only an evidential purpose is supported by the extract from the Treasury memorandum appended to the report of the House of Commons Select Committee, to which Mr Siddique had referred (see para 54 above). It shows that the Treasury itself took the view that the ticketing condition served only an evidential purpose, and that the definition of conjunction tickets adopted by the CFO merely reflected what was then the industry practice. There is nothing in the memorandum which identifies any free-standing, additional, purpose which conjunction tickets might serve. The emphasis in the memorandum is on, first, the need to demonstrate the connection and, second, on the ability of two or more airlines which have provided the flights making up a passenger's journey to account correctly between themselves for the

price and to HMRC for the duty. In a case such as this, where the only connection to be identified is between flights provided by the same airline, the second of those aims falls away and one is left only with the need to show the relevant connection between the flights, that is that the temporal condition is satisfied.

112. Note (2) (dealing with cases in which the details shown on the ticket do not correspond exactly with the flight to which it refers) makes it clear that conjunction tickets are not conclusive evidence because, when that Note is engaged, the airline is allowed to satisfy HMRC by reference to other sources of evidence that the flights are in fact connected. Indeed, Note (2) amounts to a recognition that conjunction tickets, as they were in use in 1994, were not a perfect mechanism for evidencing the passenger's journey. As Mr Hylton had explained, and the Treasury memorandum indicated, they were used because they were what the industry had at the time the CFO came into existence. In addition, conjunction tickets of that kind did not enable an airline to determine its APD liability in every case at the time the ticket was issued. As Note (6) shows, a ticket when first issued might not be a conjunction ticket, but could become one when "last amended", and conversely could be a conjunction ticket when issued but cease to be one if the passenger decided to cancel or amend one of the flights. The critical point was not when the ticket was issued, but when the flight took off, as that was the moment when APD was chargeable: see s 28(2)(a).

113. HMRC's contention that the only form of evidence capable of replacing paper conjunction tickets is some form that slavishly reproduces their characteristics, even if some of those characteristics have no relevance to the purpose served by the ticketing condition, is misconceived. If HMRC were right, the court in *AG v Edison Telephone* would have determined that a telephone communication fell within the scope of the Telegraph Act 1869 only if it replicated as closely as possible a telegram message, by consisting of a monologue during which the speaker said "stop" every time he came to the end of a sentence. That approach exhibited the "undue concentration on the minutiae of the enactment" which Lord Bingham criticised in *Quintavalle*.

114. The paper coupon had two essential functions. The first was that, as between the passenger and the airline, it evidenced the contract of carriage and the passenger's right to board the flight. The second was that it provided the airline with a record of the information it needed in order to complete its APD return, and was available to HMRC if they chose to audit the return and verify any claims that flights qualified for the exemption. It was only the second function which was ever relevant to the CFO. In the absence of paper tickets that function could be, and must be, performed in a different way; and HMRC themselves accepted that it could be performed in a different way.

115. A modern itinerary such as that provided to a passenger by British Airways, setting out the details of flights sharing a common PNR, is regarded by HMRC as sufficient to satisfy the ticketing condition. It is not, however, a ticket within the meaning of Note (7), because it is not, and does not have the form of, the coupon that airlines formerly issued. It is not even an electronic version of the coupon because it does not serve the function that the coupon served: that of being issued to the passenger as the evidence of his contractual entitlement to take the flight,

and which he tendered to the airline in exchange for a boarding pass. The itinerary serves as the passenger's record of the flights for which he has paid, but does not enable him to board those flights. British Airways does not have a counterfoil such as was used in 1994, but relies only on its electronic record; and HMRC accept that the electronic record is sufficient. In other words, as long as the airline's systems enable it to show the passenger's journey and compliance with the temporal rules in Cases A and B, that is enough.

116. It is plain from Notes (2) and (6) that, even in 1994, tickets or coupons had the purpose only of providing the evidence of connection but were not determinative of it. If, as both parties accept, the focus of the CFO is on a passenger's complete journey it followed, Mr Lasok said, that compliant ticketing was not an aim in itself and, moreover, HMRC's practice with other airlines and, now, Ryanair itself shows that they accept that exactly compliant ticketing is impossible and practical alternatives must be used.

117. Accordingly the answer to the first of the questions referred by the First-tier Tribunal, relating to the proper construction of the legislation, should be that the connection between flights may be demonstrated "by such evidence as shows that the second or subsequent flight is a continuation of a journey commenced by the passenger at the beginning of a preceding flight."

HMRC's submissions

118. Mr Eadie began by emphasising that although the court had made it clear in *Quintavalle* that the updating approach to interpretation permits the literal meaning of the words used to be stretched to accommodate the new circumstances, no more stretching is permitted than is necessary, and the resulting interpretation should conform as closely as possible to the literal language of the legislation as enacted. Thus the "paper world" ticketing condition should be replicated to the maximum extent possible in the "e-world", and it is not permissible to ignore or override the words actually used: see *MacDonald v Advocate General for Scotland, Pearce v Governing Body of Mayfield School* [2003] UKHL 34 at [107], where Lord Hobhouse of Woodborough said that "proper regard must be had in construing an Act of Parliament to the words actually used. It is they which define the effect of the legislation." Ryanair's approach, he said, represented an attempt to disregard the words used.

119. In interpreting the legislation one must bear in mind the clear words of s 30(8) of the 1994 Act that "successive flights are connected if (and only if) they are treated under an order as connected". It followed that one cannot simply disregard those parts of the order which are perceived to be inconvenient; it has to be applied in full, stretched only so far as necessary to make it applicable to changed circumstances. The words of Note (5), namely "Notwithstanding the effect of this Rule that, but for this Note, would result, Flight A and Flight B are not connected … where the ticket for Flight A and the ticket for Flight B are not conjunction tickets", make it clear that satisfaction of the temporal condition (with which, alone, the Rule deals) is not enough: that the related tickets must be conjunction tickets is inconsistent with the proposition that they merely provide the evidence that the temporal condition is satisfied. Had it been Parliament's intention that, in the context of determining whether the exemption was available,

the tickets performed no more than an evidential function it would have been simple to say so and, moreover, to provide for alternative acceptable forms of evidence, but the legislation does neither.

120. The House of Commons Committee, to whose report was annexed the Treasury memorandum on which Mr Siddique had relied (see para 54 above), in expressing the view, at page 5 of the report, that the relevant parts of the CFO were "defectively drafted", made this observation:

> "Notes (2) and (5) to the Case A Rule in the Schedule, far from providing interpretation of the Case A Rule or qualification of other Notes to the Case A Rule, make substantive provision and, accordingly, their content should have been incorporated in the Case A Rule itself rather than constituting Notes thereto.… Similarly, Note (1) to the Case B Rule, insofar as it applies Notes (2) and (5) to the Case A Rule … make[s] substantive provision….
>
> The effect of Note 5(b) is to disapply the relevant temporal rule if the tickets, or coupons, for the two flights in question are not 'conjunction tickets'".

121. The criticism was not that the Notes were inconsistent with the purpose of the legislation, but that the "substantive provision" of the ticketing condition had been introduced in a Note rather than as a Rule. Despite the terms of the Treasury memorandum on which Mr Siddique had relied, there was nothing in this observation to support the argument that the only requirement which must be satisfied if the exemption is to apply is the temporal condition, while the ticketing condition is to be interpreted as nothing more than one way of providing the evidence that the temporal condition is met.

122. Whether or not the drafting is defective, it is plain from the mandatory language used in the Note that the draftsman intended to impose two separate and distinct requirements. Even in the days of paper tickets flights which met the temporal condition would not be connected, unless the tickets also conformed to the ticketing condition. At that time, there would be no other permissible way of satisfying the requirements of the CFO. It would be quite possible for two passengers to travel on precisely the same multi-flight journey, on the same date, on flights satisfying the temporal condition, and for the flights to be connected in the case of one passenger, in possession of conjunction tickets, but not in the case of the other, in possession of two separate tickets that did not cross-refer. There is no reason or justification for departing from that core purpose in the electronic age, and *Quintavalle* and *MacDonald v Advocate General* show that it would be impermissible to do so. Thus, even if Mr Siddique was right to think that the Treasury memorandum indicated that any form of evidence that the flights were connected was sufficient, such a memorandum could not prevail over the express words of the CFO, whether in the paper world or now.

123. Section 43(1) of the 1994 Act (defining "ticket" as "a document or documents evidencing an agreement (wherever made) for the carriage of any person") does not preclude the possibility that a "ticket" might be evidenced in electronic documents. The CFO does assume a paper ticket of the kind in common use in 1994, but it is possible to give it a modern interpretation that is compatible with both s 43(1) and the world of ticketless airlines by construing "ticket" as "ticket (or electronic equivalent)". The "booklet" requirement can be satisfied by

the electronic equivalent of the tickets being attached to a single e-mail from the airline, or viewable in a single browser window readily accessible by the passenger. Either would satisfy the requirement that conjunction tickets must refer to each other, or the tickets must have a flight summary detailing the passenger's entire journey.

124. It is not, Mr Eadie said, necessary to seek to discern what may have been the underlying rationale for the ticketing condition, because the legislative purpose is clear from the words used. But one reason, identified in the evidence, was the visibility which would be impossible if Ryanair was right. He repeated the example of a passenger wishing to travel from Edinburgh to Johannesburg, which he might do by taking a British Airways flight to Heathrow and then a South African Airways flight to Johannesburg. The two flights might satisfy the temporal requirement; but if both British Airways and SAA were to know whether the flights are connected for APD purposes they would need a record showing whether the flights have been connected in the terms of the CFO, and that record must take the form of conjunction tickets. As Mr Berry had explained, there may be good reasons why a passenger might prefer not to take connected flights even if they satisfied the temporal condition. Ryanair's approach would make that impossible. Mr Hylton, too, gave evidence about the need for full visibility and the manner in which it was provided by compliant tickets. The temporal condition alone does not provide that visibility.

125. Ryanair's proposed interpretation of the CFO in the context of e-tickets effectively disregards the ticketing condition entirely. All that is needed, if that interpretation is right, is proof, by whatever form, that the passenger took two flights within the time limits set by the temporal condition. It requires Notes (5) and (6) to be ignored, despite the mandatory language adopted by the draftsman; and it fails to give effect to the clearly expressed requirement of a record that the flight is to be treated as connected for duty purposes. All that is required, if Ryanair is right, is that the airline should be able to search its electronic records to find out whether a passenger took a second flight after his first flight, within the time permitted by the temporal condition. But if that is the case a similar approach could have been used in the days of paper tickets: airlines could have been permitted to search their files for tickets demonstrating that a passenger had flown two flights in sufficiently close succession. If that was not enough in the paper ticketing era, and it plainly was not, it could not be enough now.

Discussion

126. Some support for Ryanair's position that the ticketing condition serves only an evidential purpose may, at first sight, be derived from the fact, as the House of Commons Committee observed, that the Case A and Case B rules in the Schedule to the CFO themselves deal only with the temporal conditions, and it is not until one comes to the Notes that the ticketing condition appears. If the manner in which that part of the legislative framework has been drafted were the only guide to Parliamentary intention there might be some force in Mr Lasok's argument that his suggested re-writing of s 31(3) (see para 109 above) reflects what Parliament intended.

127. However, that is not a conclusion which is supported by the overall structure of the legislation. Section 31(3), as enacted rather than as re-written by Mr Lasok, does not impose the requirement of a ticket which contains the evidence of the connection, but of a ticket which contains prescribed particulars. Those particulars are of the departure and destination airports, and of the date and time of departure. They do not, alone, identify the connection, since they relate only to the second flight; indeed, there is no corresponding prescription of the particulars which must appear on the ticket relating to the first flight although, in practice, the same details almost always would do so. Thus in the days of paper a passenger might have in his possession tickets relating to two flights, one arriving at a particular airport and the other departing from the same airport within a sufficiently short interval to satisfy the Case A or Case B (as appropriate) temporal condition, but we agree with Mr Eadie that that is not enough, and that if it had been Parliament's intention that the mere possession of two such tickets, without more, was enough to give rise to the exemption, it could easily have said so.

128. Section 30(8) of the 1994 Act makes it clear beyond doubt, by its use of the words "and only if", that there must be strict compliance with the order the subsection contemplates if successive flights are to be treated as connected. One may agree or disagree with the House of Commons Committee about the quality of the drafting of the CFO, but one cannot escape the fact that Note (5)(b) states, without qualification, that flights are not connected (for the purposes of the Order) "where the tickets for Flight A and the ticket for Flight B are not conjunction tickets". There is nothing in the Note to suggest that anything less than conjunction tickets will suffice, for example (to adopt the wording used in some contexts) such other evidence as HMRC may accept whether generally or in a particular case. In our judgment HMRC are right to argue that the stipulation of conjunction tickets is consistent only with the conclusion that the condition amounts to a free-standing requirement.

129. One can arrive at the same conclusion by a different route. We can accept that Mr Lasok is right to argue that conjunction tickets do have an evidential purpose, even if that is not their only purpose. In speaking of an agreement for carriage s 31(3) of the 1994 Act uses the phrase "evidenced by a ticket" and as we have said requires certain, prescribed, particulars (airports of departure and arrival, and date and time of flight) to be recorded on that ticket, plainly as the evidence of the flight to which it relates. However, the structure of s 31(3) itself is revealing. The ticket is dealt with in paragraph (a), which is connected by the word "and" to paragraph (b): "that [*ie* the second or subsequent] flight and the previous flight are connected". That formulation, in our view, is consistent only with the proposition that, evidential though the ticket may be, it was not Parliament's intention that it should be limited to that purpose.

130. We have already made the point that the definitions of "ticket" in s 43(1) and in Rule (7) differ, and that they may not signify the same thing. In fact, we think the two definitions serve different purposes: the former relates to the distinction between the passenger with and the passenger without a ticket which is drawn by sub-ss 30(5) and (7), whereas the latter, which begins with the words "for the purposes of this Rule", is plainly specific to that Rule. Moreover, it is plain from a reading of sub-ss 30(5) and (7) that a flight for which a ticket has not

been issued can never come within the CFO; thus a ticket (or modern-day equivalent) is an essential requirement in itself.

131. It is not, we think, difficult to discern a rationale for the imposition of two distinct requirements. The evident purpose of the CFO is not to apply the exemption to flights merely because the interval between the arrival of the first and the departure of the second is reasonably short, but to apply it to flights which both satisfy that requirement and also can be shown, by the manner in which the tickets were issued (in the days of paper), to make up a single journey: so much can be derived from the repeated use of the word "journey" in s 30, and from the drafting of Rule (6)(b)(ii). In addition, the adjective used in respect of qualifying flights making up a journey is "connected", and not "proximate" or even "temporally connected". Other means of demonstrating a single journey were not enough: there had to be conjunction tickets.

132. It is also relevant, in our view, that the Rule (7) definition of a ticket refers to a coupon "issued for the passenger", which implies that the ticket is issued by the airline or, perhaps, a travel agent but not by the passenger himself. The descriptions we had of British Airways' and easyJet's websites indicated that the entry by the customer of the relevant PNR leads to the display on the screen of all the flights associated with that PNR; the display is generated by the airline's system. The customer can then print what is displayed on a single sheet of paper; thus his entire itinerary is capable of display on one screen, and of being printed on one sheet. Until 1 June 2011 nothing similar was possible for a customer using Ryanair's website; it was the customer himself who had to access the separate flights using their individual PNRs, and then print out each flight separately. It may be, as Mr Millar said, that he could then staple the printed sheets together; but we disagree with him that his doing so is, or could be, enough. Rule (6) offers two possibilities: a single booklet, or two or more linked booklets. We are unable to agree with him that two pieces of paper stapled together by the customer (rather than issued to him by the airline in that form) could constitute a "booklet" within the contemplation of the draftsman. Moreover, Ryanair had no means of showing that its customers had taken the trouble to staple the sheets together. We do not accept that the condition can legitimately be applied in so casual a fashion. If instead each sheet of paper amounted to a "booklet" the requirements of Rule (6)(b) were not satisfied, since neither sheet referred to the other, and neither contained a summary of all the flights constituting the journey. Whether HMRC are right to allow the benefit of the exemption to Ryanair following the changes to its website is not a matter which arises for decision on the present appeal, and we say no more about it.

133. We are satisfied that the CFO imposes two discrete conditions which must be met if the exemption is to apply. The purpose of the second, the ticketing condition, is to prescribe the method by which it is to be demonstrated that the two (or more) flights said to be connected make up a single journey. Accordingly we answer the first of the questions transferred to us from the First-tier Tribunal as follows:

> Properly construed, the relevant legislative provisions stipulate that two flights are connected for the purposes of the application of the

> connected flights exemption only if (a) the interval between the flights satisfies the relevant temporal condition and (b) the customer has, or can readily access, a ticket or tickets, or their electronic equivalents, which provide all of the prescribed particulars of each flight sufficient to show, by their referring to each other or by means of a shared PNR or in a similar manner, that together they constitute a single journey.

134. We add that in our view HMRC's current practice as it was described by Ms Tupper (see para 78 above) is an approach which reflects that conclusion.

The entitlement issue

135. We can deal with this issue very shortly. Once it is accepted that conjunction tickets perform a function which is more than that of merely demonstrating satisfaction of the temporal condition, it becomes obvious that Ryanair did not meet the terms of the CFO during the relevant period, in that it did not, and could not, satisfy the ticketing condition, and Mr Lasok did not contend otherwise if we decided the construction issue as we have done. We accordingly answer the second of the transferred questions as follows:

> Ryanair was not entitled, during the relevant period, to claim an exemption from air passenger duty in respect of those of its flights which met the relevant temporal condition of the Connected Flights Order as the electronic substitutes for tickets which it provided to its passengers did not satisfy the ticketing condition of the same Order.

136. We therefore determine those parts of the statutory appeal which are before us in favour of HMRC.

The unfairness issue

137. Ryanair puts its claim in the judicial review proceedings on two bases: the obligation on HMRC to act fairly, and the obligation it contends HMRC has to publish appropriate guidance and be open and forthcoming. HMRC argue, in summary, that they have treated Ryanair as they have treated other airlines and that there has been no unfairness on their part; and that their published guidance was appropriate and complete, and as readily available to Ryanair as to anyone else.

138. It is common ground, and now long established, that HMRC should treat taxpayers, within the law, in an even-handed manner. As Lord Scarman put it in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 651,

> "... I am persuaded that the modern case law recognises a legal duty owed by the Revenue to the general body of the taxpayers to treat taxpayers fairly, to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise, to ensure that there are no favourites and no sacrificial victims."

139. That statement does not, however, mean that a court or tribunal exercising a judicial review function can intervene whenever it perceives some element of unfairness. As Lord Templeman put it in *Preston v IRC* [1985] AC 835 at 864,

> "The court can only intervene by judicial review … if the court is satisfied that 'the unfairness' of which the taxpayer complains renders the insistence by the commissioners on performing their duties or exercising their powers an abuse of power by the commissioners."

140. Those broad principles were examined in some detail by Elias J in *R (British Sky Broadcasting Group plc) v Customs and Excise Commissioners* [2001] STC 437, a case with some similarities to this and to which both parties referred us. It is convenient to deal with it before coming to the parties' arguments.

141. The essence of the applicant's argument in that case was that HMRC had required British Sky Broadcasting Group ("BSkyB") to account for VAT on supplies of programme listing magazines while at the same time they "deliberately decided not to make other cable companies pay VAT on the magazine supply notwithstanding that they recognised that they were in no materially different position to BSkyB" (see [6]). HMRC denied that they had done as BSkyB alleged, while conceding that, had they done so, their conduct would be unfair. It was accepted that the companies concerned had been treated differently as a matter of fact because, when applying the relevant law, different HMRC officers had come to different conclusions: they were applying the same legal criteria but perceived there to be factual differences, which were later found to lack legal relevance.

142. In the course of his judgment Elias J referred to the comment of Simon Brown LJ in *R v IRC, ex p Unilever plc* [1996] STC 681 at 695, that "'Unfairness amounting to an abuse of power' as envisaged in *Preston* and the other Revenue cases is unlawful ... because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power" and to his contrast, at 697, between "... on the one hand mere unfairness—conduct which may be characterised as 'a bit rich' but nevertheless understandable—and on the other hand a decision so outrageously unfair that it should not be allowed to stand." Elias J then went on to say, at [10]:

> "Ultimately, as the Court of Appeal observed in *R v North and East Devon Health Authority, ex p Coughlan* [2000] 2 WLR 622, it is for the court to determine whether there is an abuse of power. But the passages to which I have made reference are a strong reminder that the threshold of unfairness amounting to an abuse of power is a high one, and that the court must be careful not to interfere simply because a decision can be justifiably subject to some criticism."

143. He then dealt with what had been referred to as the "identical in law" argument, and said:

> "[15] … The basis of this argument is that the court can now see … that BSkyB and the two cable companies ought to have been treated similarly in 1998. Accordingly, it is said that the commissioners acted unfairly in treating them differently.

> [16] In my judgment this way of putting the case is wrong in principle and is a recipe for chaos in practice. Judicial review is about testing the legality of administrative action; save in exceptional cases, such as if jurisdiction is in issue, that can only properly be judged in the light of the factors which were known or ought to have been known by the administrator when the decision was taken. Of course, it may be necessary for an administrator to reconsider the decision if new facts emerge, but the legality of his action is not to be judged by material of which he was not, and could not be expected to have been, aware. [BSkyB's] argument amounts to saying that a body will be at risk of acting unfairly if it makes a rational and defensible decision as to the effect of the law in a particular situation and a court subsequently holds that the legal analysis was wrong. In my view that cannot be right. The argument equates a lack of fairness with an erroneous analysis of the law, at least where that mistaken analysis has led to the different treatment of persons in a legally identical position. In my judgment that expands the concept of fairness well beyond its established or legitimate limit."

144. The second argument advanced by BSkyB was referred to as the "identical in perception" argument. At [18] and [19] Elias J recorded the acceptance by BSkyB that it needed to show "that the commissioners perceived the position of BSkyB to be in all material respects precisely the same as the cable companies", and the response of HMRC that "the evidence makes it plain beyond doubt that the commissioners considered that there were material differences". He then embarked on an analysis of the available evidence before disposing of the matter succinctly, at [30]:

> "It follows that in my judgment this application must fail because the precondition to the duty to act fairly—namely that cable companies were perceived by the commissioners as being in a materially identical position to BSkyB—has not been made out."

145. It follows from what Elias J said that if we are satisfied that HMRC believed that there was no material difference between Ryanair's ticketing systems and those used by other airlines, yet treated Ryanair differently, we may intervene if, to use the words of Simon Brown LJ, their conduct was "outrageously unfair"; but nothing less will suffice.

Ryanair's submissions

146. Mr Lasok began by distinguishing the circumstances in which the differential treatment in *BSkyB* arose. There, he said, the two officers were attempting to apply the same law to what they perceived to be different facts. Here, a small team which should have applied the same legal requirements to all cases was, or appeared to be, applying different legal requirements to different airlines on an *ad hoc* basis. He emphasised the following passage from Ms Tupper's witness statement:

> "When considering whether the requirements of the Connected Flights Order have been satisfied by an airline and in particular the requirements of 'conjunction tickets', taking into account the widespread use of electronically booked tickets, HMRC will consider the airline's electronic booking system and the electronic equivalent of tickets received by passengers. In particular, systems that offer connected flights will allow

> flights to be booked at the same time and will record the flights in a way that shows the passenger's whole journey. There will normally only be one check-in and one booking reference for the entire journey."

147. That assertion, he said, was the supposed justification for HMRC's treatment of Ryanair, but it did not reflect what had in fact been HMRC's approach to the application of the CFO, as the evidence of, in particular, Mr Berry showed. They had instead adopted an approach which differed according to the system used by each airline. Other airlines had an SAS which enabled them to claim the benefit of the exemption without their having to provide anything resembling the conjunction ticket prescribed by the CFO while Ryanair, despite its being able to show by the data mining method it had demonstrated to Mr McGregor and Mr Berry that the relevant flights were connected, was denied that benefit.

148. Even if there was a technical difference between Ryanair's booking and ticketing system and those used by other airlines which, contrary to his principal argument, did justify the refusal of HMRC to allow it to benefit from the exemption, that difference could, and would, have been easily addressed had HMRC brought to Ryanair's attention the possibility that it might make the minor change to its website it had in fact made, and if necessary (or as an alternative) use an SAS to calculate its net liability. As it was, HMRC had audited Ryanair's records to ensure that it was accounting correctly for duty on flights departing from UK airports but had made little or no attempt to ascertain whether any of those flights were connected flights, had not suggested to Ryanair that a small change to its system would enable it to benefit from the exemption, and had made no suggestion of an SAS, even though the relevant officers knew very well that other airlines in materially the same position were claiming the exemption and doing so by means of an SAS despite the fact that they too were not complying with the ticketing condition.

149. In *R v Secretary of State for Work and Pensions* [2005] 1 WLR 3796, Sedley LJ, with whom Buxton LJ and Sir Martin Nourse agreed, said (at [43]):

> "It is axiomatic in modern government that a lawful policy is necessary if an executive discretion of the significance of the one now under consideration is to be exercised, as public law requires it to be exercised, consistently from case to case but adaptably to the facts of individual cases. If—as seems to be the situation here—such a policy has been formulated and is regularly used by officials, it is the antithesis of good government to keep it in a departmental drawer."

150. That, said Mr Lasok, was what HMRC had done in this case: if they had a policy, or practice, they had not made it known to Ryanair which, in consequence, had failed to claim the benefit of the exemption to which, as HMRC should have known, it was entitled. The evidence shows that HMRC have treated other airlines much more generously, by allowing the exemption to be claimed whenever the airline in question could prove, by means which do not satisfy the ticketing condition, that flights satisfy the temporal requirements of the CFO. It should have adopted the same approach in relation to Ryanair, but instead left it in ignorance.

151. HMRC's note of the meeting in June 2002, to which we referred at para 75 above, includes the words "no connecting flights". The note does not seem to have been sent to Ryanair for agreement. The remark is odd, said Mr Lasok, since at that time Ryanair was claiming the benefit of the exemption in respect of connected flights taken by its staff. The note could only mean that Ryanair was not claiming the exemption for other passengers (which was correct because, as Ryanair's evidence showed, it believed at the time that it could not prove that their flights were connected). Ms Tupper's evidence that Ryanair's failure to claim the exemption did not lead HMRC to enquire further because it was a point-to-point airline is, he argued, lacking in credibility particularly in view of the fact that until quite recently before that meeting it had been doing so in respect of paying customers' flights and still did claim the exemption for qualifying staff flights. HMRC should have been well aware that Ryanair was operating connected flights, yet they failed to explore the matter at that meeting or at any other time.

152. Similarly, although Mr D'Annunzio was able, apparently without difficulty, to discover in advance of the November 2006 meeting to which we referred at para 76 above that Ryanair was underpaying APD, it did not occur to him that being "open and transparent" with Ryanair might also require him to inform Ryanair about HMRC's practice regarding the exemption, or to discuss the possible use of an SAS. This failure too, Mr Lasok argued, was symptomatic of HMRC's apparent view that their role is entirely passive and reactive. But HMRC's duty with regard to the care and management of APD includes the responsibility to ensure that the CFO is applied correctly, as Ms Edmundson had agreed when she gave evidence. In other words, it is part of HMRC's duty to ensure that the exemption is claimed when it applies, and that duty cannot be discharged by leaving airlines to their own devices.

153. Ryanair relied on what was said at the meeting which took place on 16 September 2010, with which we dealt at paras 57 to 61 above, as a further example of HMRC's supposed unfair treatment of it, and their failure to apply the CFO even-handedly. In essence, it claims that the officers who attended took the view, correctly, that its ticketing practices did not impede its ability to claim the benefit of the connected flights exemption, but were then overruled, incorrectly, by their colleagues with the result that the claim for repayment was wrongly refused.

154. Mr Lasok also challenged HMRC's pleaded case that their perception was that Ryanair was different from, in particular, easyJet. In their statement of case in the statutory appeal, HMRC described Ryanair as follows:

> "Ryanair is a 'point-to-point' airline. It does not offer to customers connected flights. The bargain with the customer is simply to fly them from point to point by individual, separate flights. That reality is reflected in the fares. The fares charged by Ryanair were for two separate flights. There was no reduction in price, whether at the time of booking, or thereafter, to reflect the fact that the flights may be 'connected' and therefore the second leg exempt from APD."

155. That description, which is repeated even if in different words in HMRC's grounds of defence in the judicial review proceedings, is, Mr Lasok said, the

starting point for HMRC's explanation of why, as a matter of construction, Ryanair flights during the relevant period could never be connected. But, he argued, Ryanair's use of a "point-to-point" business model is irrelevant. First, the fact that an airline flies the same passenger from one point to another and then from the latter point to a third one by individual, separate, flights does not lead logically to the conclusion that the flights are not "connected". The CFO is expressly designed to cover journeys for which a passenger cannot get a direct flight from the first to the third points in the trajectory, as Ms Edmundson herself said in her witness statement, where she also made the point that the policy rationale for the ticketing condition was to "allow airlines (and HMRC if they carry out an audit) to see the passengers' whole journey". HMRC could not reasonably have thought that, in the case of a so-called "point-to-point" airline, the passenger's "whole journey" would necessarily end at the arrival airport of the first leg of the journey. Secondly, the evidence shows that HMRC have allowed easyJet, which uses the same point-to-point model as Ryanair, to claim the exemption. Moreover, HMRC agreed an SAS with easyJet, and then permitted it to make a retrospective claim for overpayments made over the previous three years, but has signally failed to adopt the same course in respect of Ryanair.

156. HMRC's case now is that easyJet can be distinguished from Ryanair on the ground that easyJet claims the exemption only in respect of flights which have been booked in the same session and which therefore share the same PNR, whereas the flights which are the subject of Ryanair's claim all have different PNRs. If this were the real reason for the distinction (and the distinction were a valid one), however, Ryanair would still not be able to claim that any of its flights are exempt. Its flights must still be booked separately and have always had different PNRs; it was no more than the change to its website in June 2011, allowing passengers to view all of their bookings on one screen, which led HMRC to permit it to claim the exemption. It is noteworthy that as long ago as 1995 HMRC were not concerned by the existence of different PNRs in the case of British Airways: that is apparent from the note of the meeting which we have set out at para 92 above. The only way in which easyJet truly differed from Ryanair is that it had agreed an SAS with HMRC. But that, said Mr Lasok, is not a relevant difference: it is not a requirement of the CFO that, in order to claim the benefit of the exemption, an airline must agree and use an SAS, and Ryanair has been permitted to claim the exemption since June 2011 even though it has no SAS.

157. It followed, he said, that there was a clear breach of HMRC's duty to act fairly, for which the remedy is to extend the more favourable treatment to the disfavoured class: see *BSkyB* at [35], where Elias J said

> "… on balance I prefer the argument of BSkyB. It says that the levy against it ought not to have been made at all if the commissioners thought it right not to impose the levy on the cable companies. To that extent it was unjust to impose the liability at all, even although it would have been lawfully imposed if the companies had all received equal treatment at that time. Moreover, if it is unable to recover the moneys paid, then there will be no effective remedy at all for the abuse of power; there will merely be a declaration that the breach of the duty to act fairly has occurred. I accept that the effect of this conclusion is that the commissioners will not be able to recover taxes which ought in law to have been collected. But that is equally

> so in cases such as *R v IRC, ex p Unilever plc* [1996] STC 681 when a taxpayer is led to believe by the conduct of the taxing authorities in its dealings with that taxpayer that the law will not be rigorously applied to him."

158. That is to say, fairness prevails over strict application of the law; and Ryanair's position was stronger than that of BSkyB. It was not asking to be relieved of the obligation to pay tax which was lawfully due, but to have repaid to it duty it should not have paid in the first place. Thus we should do as the claim in the judicial review proceedings proposes, namely quash HMRC's refusal to meet Ryanair's claim and direct them to reconsider in the light of our own findings.

HMRC's submissions

159. Mr Eadie did not demur from the proposition that HMRC were under a duty to treat taxpayers fairly and even-handedly, but argued that the evidence showed that that is what they had endeavoured to do, and that there was no evidence, despite what Mr Lasok had maintained, that HMRC had treated airlines with ticketing systems similar to Ryanair's in a different manner. They had, rather, pursued the legitimate policy of applying the CFO to all airlines consistently and fairly, and of allowing airlines to benefit from the exemption if, but only if, the conditions of the exemption were satisfied. Mr Berry's evidence made it clear beyond doubt that Ryanair had been refused the benefit of the exemption because, and only because, HMRC considered that it did not satisfy the relevant conditions. Even if we should find that HMRC were mistaken in thinking that Ryanair failed to do so while other materially similar airlines did, we should bear in mind what Sir Thomas Bingham MR said in *R v Inland Revenue Commissioners, ex p Unilever* [1996] STC 681 at 692, "The threshold of public law irrationality is notoriously high", as well as the similar comments of Elias J in *BSkyB* which we have already set out; thus we should not interfere unless we were to find that HMRC had treated Ryanair not merely differently from other airlines, but in a way which was unconscionably unfair.

160. Ryanair's argument that British Airlines was allowed to benefit from the exemption even though it did not comply with the terms of the CFO is simply not correct, and it is equally incorrect to say that British Airways' use of an SAS allowed it to circumvent the CFO. It was only because HMRC were satisfied that the PNR replicated the booklet of coupons that British Airways was allowed to use the PNR, and to adopt an SAS which calculated its liability to duty by that means. Mr Hylton was simply mistaken if he thought HMRC had waived the need to replicate a paper ticket, and he had not understood that s 39 made it possible for an SAS to be negotiated, not as a means of circumventing the ticketing condition, but as a means of accounting for APD by determining the numbers of chargeable passengers and the duty payable in respect of them; it was not, and could not be construed as, a means of overriding the conditions imposed by the CFO.

161. The difference between easyJet's and Ryanair's booking systems during the relevant period, in that easyJet allowed passengers to book a flight and then "add another flight" which was allocated to the same PNR, while Ryanair did not, was critical. As the evidence showed, HMRC considered (and they were right to do so) that flights booked in this way through easyJet's website created a record

similar to a booklet of paper coupons, and it was only in respect of flights which were booked in this way, that is at the same time and through the same web portal, and which satisfied the temporal condition that easyJet was permitted to claim the exemption. By contrast, if a passenger booked one flight and then, on another visit to easyJet's website or by some other means, booked a second flight he created two separate bookings with different PNRs and, whether or not the temporal connection was satisfied, and whether or not the two flights made up a single journey, easyJet's SAS did not permit it to claim the exemption. In respect of those flights, it was treated in exactly the same way as Ryanair.

162. Thus there was nothing in Ryanair's argument that HMRC perceived it to be in materially the same position as other airlines yet treated it differently since the evidence showed not merely that HMRC did not have any such perception but that Ryanair was in fact different. Thus there was nothing in *BSkyB* which assisted it. It was also untrue to say, as Ryanair did, that HMRC had allowed other airlines to make retrospective claims for exemption regardless of a failure to comply properly with the ticketing condition; as Mr Berry's evidence made clear, the claims were met because HMRC had concluded that the requirements of the CFO were satisfied. The difficulties which led to the making of retrospective claims lay not in meeting the conditions but in showing that they were met and in calculating the liability. The agreement with Zoom should be treated for what it was, an exceptional practical solution to a difficult problem and not a guide to HMRC's usual practice.

163. Ryanair did not plead in the judicial review claim that it had a legitimate expectation that it would be subject to a certain tax treatment, or that (as it was now arguing) HMRC should offer advice on how it might design its systems so as to benefit from the exemption. That argument appeared for the first time in Ryanair's skeleton argument, in which it is claimed that airlines (including itself) should have been informed of the criteria applied by HMRC when deciding whether or not a flight is exempt. The legal basis for that argument is not identified, and it cannot be identified since there is no such basis. But even if there were, Ryanair's claim is misconceived because HMRC did publish relevant and adequate guidance in the form of the Public Notices to which we have referred. Moreover, despite the supposed lack of published guidance the vast majority of airlines, including airlines such as EasyJet, adopting the same point-to-point business model as Ryanair, claimed the exemption. Indeed, in order to succeed in this argument Ryanair must go even further and show not merely that HMRC had a duty to advise on the application of the CFO, but that they had the further obligation to advise Ryanair how it could design its systems so as to comply with the statutory requirements. It is, said Mr Eadie, nonsensical to suggest that HMRC had a duty to offer such advice to a large airline with its own staff with taxation responsibilities.

164. The reality is that Ryanair is seeking to obtain the benefit of the exemption in circumstances where it did not, in fact or in law, satisfy the legislative requirements. If its claim were to succeed it would be treated more favourably than easyJet, which does not claim the benefit of the exemption in respect of flights booked in materially the same way as were Ryanair's.

Discussion

165. The questions which remain following our conclusions on the interpretation and entitlement issues are whether HMRC have allowed other airlines in a materially similar position to benefit from the exemption; whether, if so, it would be an abuse of power to refuse the same benefit to Ryanair; and whether HMRC have acted unfairly by failing to guide or advise it about an appropriate means of establishing its entitlement to the exemption. We observe that Ryanair does not have permission to seek judicial review on the last point but as we heard evidence and argument relating to it we have concluded that we should nevertheless deal with it.

166. In the event, we do not need to answer the second of the questions since it is plain to us that Ryanair has not established, as a matter of fact, that any other airline was permitted to benefit from the exemption despite its using a booking system which effectively ignores the ticketing condition, as Ryanair claims.

167. We recognise, with the parties, that no airline which has abandoned the use of paper tickets can comply with the ticketing condition, construed literally. It is, however, in our judgment clear from the evidence that in seeking a proxy for conjunction tickets in order that the CFO might be related to the world of electronic tickets HMRC were looking for a connection, beyond the temporal, between flights, which could be shown by the fact that the flights shared a PNR, had been booked together in a single visit to the airline's website, could readily be displayed on a computer screen or on paper as the components of a single journey, or by some combination of those features; on these points we accept the evidence of Mr Berry, Ms Tupper and Ms Edmundson and, in particular, the description offered in Ms Tupper's witness statement.

168. If we are right in our conclusion that the purpose of the ticketing condition is to demonstrate both satisfaction of the temporal condition and the fact that two or more flights make up a single journey, it is clear to us that the two comparator airlines, British Airways and easyJet, had systems which were able to meet those requirements. The difficulty facing Ryanair, here as elsewhere, is that during the relevant period its systems did not make any of those things possible: flights could only be booked separately, two flights (apart from return flights, which could not meet the requirements of the exemption for other reasons) never had the same PNR, and the details of two flights could not be viewed on a single screen or printed on a single sheet of paper. We had no evidence that any other airline whose systems lacked all of those features was permitted to benefit from the exemption during that period.

169. We are satisfied, as we have indicated above, that the SAS agreed with British Airways uses a proxy for the ticketing condition but does not displace it, that easyJet is able to benefit from the exemption by its use of a booking system which differs materially from Ryanair's (and, moreover, does not do so when its flights are booked in a manner comparable to that offered by Ryanair) and that the concession made to Zoom cannot be regarded as an indicator of HMRC's treatment of airlines generally. In short, we accept Mr Eadie's arguments. This part of Ryanair's judicial review claim fails.

170. It was said on Ryanair's behalf that its staff believed it was necessary to comply literally with the CFO, and in particular the ticketing condition, and that they were wholly unaware that other airlines were claiming the benefit of the exemption while nevertheless failing to comply with the condition because of their switch to ticketless booking systems. If that is true, it demonstrates what we can only regard as a surprising lack of curiosity. Ryanair's staff can scarcely have been ignorant of the fact that almost all airlines had abandoned paper tickets, and it did not claim that they were. They must have been aware, too, that the ticketing condition had not been amended—or, if they were not, they could easily have discovered that that was the case. Mr Hylton explained in his evidence, as we have related, that not only British Airways but also other airlines had been anxious to ensure that the exemption was introduced together with the duty; against that background it is difficult to understand why a major airline operating a very large number of flights from UK airports and thus affected to a significant extent by the incidence of APD, as by its own account Ryanair is, should simply assume that the exemption had fallen into disuse without protest by affected airlines, and should not at least enquire whether (as in fact happened) a pragmatic means of applying the condition had been found.

171. Moreover, the claim that Ryanair's staff believed that an airline which had abandoned paper tickets could not benefit from the exemption for that reason is not consistent with its own evidence. Ms Crowley, in the extract from her statement set out at para 50 above, said that "We believed that connecting flights were required to be created in one booking in order to satisfy the criteria under the Connected Flights Order." Ms Crowley has, in fact, identified the reason why (as we have already explained) Ryanair failed to satisfy the ticketing condition during the relevant period, which is not that it did not use paper but that it did not make any connection between bookings for separate flights.

172. It is conspicuous that, despite the lack of any such guidance as Mr Lasok maintained should have been published, British Airways, easyJet and (as Mr Siddique accepted) other airlines were able to discover for themselves that means of satisfying the ticketing condition were possible, and acceptable to HMRC, notwithstanding their abandonment of paper tickets. The claim that Ryanair, a major airline which had been accounting for APD ever since its inception, had claimed the benefit of the exemption in the past, and had access to the Public Notices as well as the legislation, needed special assistance in order to find out how it might continue to satisfy the ticketing condition and that HMRC's failure to offer such assistance is susceptible of remedy by way of judicial review is, in our view, to be rejected. But even if Ryanair was unable for some reason to discover for itself how it might benefit from the exemption, we do not consider that HMRC were under any duty to advise it about how it might change its systems so that it could do so.

Disposition

173. The two questions referred to us by the First-tier Tribunal in the statutory appeal are answered in the body of this decision, but shortly stated the answers are that the ticketing condition of the CFO is a free-standing requirement with which

Ryanair did not comply during the relevant period. The claim for judicial review of HMRC's refusal to meet Ryanair's claim for repayment fails.

Mr Justice Warren
Chamber President

Colin Bishopp
Upper Tribunal Judge

Release date: 10 April 2013