Wheelabrator TECHNOLOGIES

Deadline 5: Applicant's Response to the Examining Authority's Further Written Questions (ExQ3)

Appendix A – Energy NPS Judicial Review Statement of Facts and Grounds

Wheelabrator Kemsley (K3 Generating Station) and Wheelabrator Kemsley North (WKN) Waste to Energy Facility Development Consent Order

PINS Ref: EN010083

Document 13.2

June 2020 – Deadline 5

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
PLANNING COURT

CO/ /2020

BETWEEN:

THE QUEEN
ON THE APPLICATION OF

(1) Dale Vince
(2) George Monbiot
(3) The Good Law Project Limited

Claimants

AND

SECRETARY OF STATE
FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY

Defendant

STATEMENT OF FACTS AND GROUNDS

References
[CB/Y/x] = Core Bundle, tab Y, page x
[AB/Y/x] = Authorities Bundle. tab Y, page x

Introduction

1. This is a claim for judicial review firstly of a decision by unnamed department officials not to review the National Policy Statements EN-1, EN-2, EN-3, EN-4, EN-5 and EN-6 on energy infrastructure ("**the Energy NPSs**")[1] **(**or any part of them) pursuant to section 6 of the Planning Act 2008 ("**PA 2008**"). Alternatively, the claim challenges the decisions of the Secretary of State to omit to think about and/or to decide whether it is appropriate to now review all or parts of the Energy NPSs, and/or whether it is appropriate to suspend the Energy NPSs (pursuant to section 11 PA 2008). Underlying this claim is that, since the suite of Energy NPSs were designated in 2011, there have been obviously material – indeed fundamental - changes of circumstance which were not considered in 2011 but which would have substantially affected the content of

[1] [AB/B5-B10/63-705].

energy policy if they had been. These changes of circumstance include an amendment to section 1 to the Climate Change Act 2008 so that the UK's net carbon account for the year 2050 is now required to be 100% lower than the 1990 baseline rather than 80% lower, the target on which the Energy NPSs were premised. This amendment, made on 27 June 2019, in turn reflected the latest scientific understanding as to the urgency and scale of action needed on climate change; the UK's revised international commitments to the global effort to reduce temperature rises under the Paris Agreement and the unanimous parliamentary declaration of a "climate emergency" on 1 May 2019. The government's policy framework governing how consent is granted for energy infrastructure is a key mechanism for securing compliance with the urgent imperatives of limiting global temperature rises. Yet one year after the declaration of emergency and nearly a year after the new statutory target was set, the Secretary of State's civil servants are refusing for at least a further year both to review the Energy NPSs, and even to refer to the Secretary of State the question whether the Energy NPSs should be reviewed. The Claimants submit that this inaction by civil servants and in turn by the Secretary of State in the face of the climate emergency is unlawful.

2. The Claimants are: (1) Dale Vince who is the Chief Executive Officer of Ecotricity, an electricity company relying on renewable energy; (2) George Monbiot who is a journalist and campaigner on the environment; and (3) the Good Law Project Limited which is a project supporting and bringing strategic litigation in relation to matters of public interest. Each Claimant sets out their standing to bring this claim in their witness statements.[2]

3. The Defendant is the Secretary of State. There is in constitutional law a single office of the Secretary of State. It is agreed between the parties that the Secretary of State for Business Energy and Industrial Strategy is the appropriate Defendant (the incumbent is the Rt Hon Alok Sharma MP).

4. The claim is within the scope of the Aarhus Convention. The parties have, however, agreed the terms of a consent order capping the costs liability of each party which the Court is respectfully asked to formalise.[3]

[2] [CB/A4-A6/47-61].
[3] [CB/A3/46].

Expedition

5. This claim is important: it seeks to enforce legal obligations relating to what the Paris Agreement calls "a common concern of humankind". It is also an urgent one seeking to enforce a response to what the UK Parliament has recognised is an emergency. The Claimants ask that, assuming permission is granted, a hearing be listed as soon as practicable allowing time for the Defendant to comply with its duty of candour and in any event no later than 8 October 2020 (the end of the second week of Michaelmas term). The need for this claim arises from the Defendant's official's position that no decisions will be taken for at least a year.[4]

The Decisions and Omissions Challenged and Summary of Grounds

(i) The Sir Humphrey Decision

6. By this claim, first, the Claimants challenge the failure of the Defendant's departmental officials to review the Energy NPSs now, or at any time before the second half of 2021. By the Defendant's pre-action letter dated 28th April 2020 ("**the April 2020 Letter**")[5] it was revealed that the Energy White Paper, which was expected in early 2019, is not now expected until earliest mid-2021 and that no decision will even be taken *whether* to review the Energy NPSs before then:

> "2. At paragraph 11 of your letter you ask a series of questions concerning the process of considering whether a review of the NPSs is appropriate. This is a process which, as we have already said, began before the *Plan B Earth* litigation commenced in July 2018. My client's position on the issues you have raised is as follows…
>
> 4. The E[nergy] W[hite] P[aper] will set out the Government's analysis of the strategic direction for tackling the long-run decarbonisation of energy, consistent with achieving net zero emissions by 2050. The NPSs need to reflect Government policy, so the EWP will be a significant factor in deciding whether a review of the NPS is appropriate. It is premature to decide whether to review the Energy NPSs until the EWP is published and although officials have been considering this issue, no decision has been sought from Ministers on whether such a review is appropriate.
>
> 5. Development of the EWP has involved a considerable amount of work and analysis but in the current circumstance, including the diversion of personnel to urgent Covid-19 duties there has been unavoidable delay. The Government's expectation is that it should be published within the next 12 months. When that EWP is published, the Secretary of State will make a decision under section 6(1) of the Planning Act 2008

[4] The grant of permission by the Supreme Court in *R (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 is not, for example, a sufficient basis for delay.
[5] [CB/B10/76-77].

whether a review of the NPSs is appropriate to ensure they reflect the analysis and policy contained in the EWP.

6. Once any such decision under section 6(1) has been made this will be published and/ or communicated to you in writing. Until this happens it would be premature for your clients to issue a claim. Any claim issued prematurely will be resisted in the strongest possible terms."

7. A decision that it is "premature to decide whether to review" amounts to the same outcome as a decision not to review the Energy NPSs now. The letter reflects a decision by un-named officials in the Department of Business Energy and Industrial Strategy that (in the terms of sections 6 and 13 of the Planning Act 2008) it is not appropriate to undertake a review of the NPSs now. As the Claimants do not know who made the decision, they shall refer to it hereunder by the sobriquet "**the Sir Humphrey decision**"[6].

8. By **ground 1**, the Claimants submit that the decision that it is not appropriate to review the NPSs (whether or not that is couched in terms of it being premature to think about reviewing) is, by section 6(1) of the PA 2008 a decision for the Secretary of State. The April 2020 Letter candidly admits that the Sir Humphrey decision has not been referred to the Secretary of State and rather a departmental official has decided that no review will be undertaken now or for at least a year. The decision is accordingly an unlawful one, without authority, usurping the role of the Secretary of State. Alternatively, it represents an unlawful abdication of responsibility by the Secretary of State.

9. By **ground 2**, the Claimants submit that the failure of the Secretary of State's departmental officials to refer the question to the Secretary of State whether to review and instead taking the Sir Humphrey decision not to review, constitutes an unlawful failure to secure the fulfilment of the Minister's duty to consider whether to exercise the power of review in section 6 of the PA 2008 and thwarted the purpose and objects of the PA 2008.

10. By **ground 3**, the Claimants submit that the Sir Humphrey decision was: (a) in any event taken without regard to matters to which, by section 6(3) of the PA 2008, the Secretary of State must have regard when deciding whether or not to review; and/or (b)

[6] This alludes to Sedley LJ's description of "the law according to Sir Humphrey Appleby" whereby the departmental adviser is covertly transmuted into the decision-maker in *R (National Association of Health Stores v Department of Health)* [2005] EWCA Civ 154 at §37.

was taken without regard to obviously material considerations; and/or (c) was *Wednesbury* unreasonable.

(ii) The Secretary of State

11. Further or alternatively, if the Sir Humphrey decision was not unlawful or does not have the character of a decision not to review the NPSs or any part of any of them, the Claimants challenge, in grounds 4 and 5, the following:

    a. The failure (now admitted by the April 2020 Letter) of the Secretary of State to consider whether it is appropriate to now review all or part of the Energy NPSs;

    b. The Secretary of State's failure to draw the conclusion, it being the only rational conclusion, that it is now appropriate to review all or parts of the Energy NPSs, and/or;

    c. The Secretary of State's maintenance of and reliance on the existing suite of Energy NPSs in default of consideration or decision whether to suspend all or part of them.

12. By **ground 4**, the Claimants submit that the Secretary of State's omissions, in circumstances where the section 6(3) PA 2008 criteria are satisfied such that a review "must" be undertaken, is an unlawful failure to comply with the duty to consider the discretion and an unlawful frustration of the objects and purpose of the statutory scheme.

13. By **ground 5**, the Claimants submit that the Secretary of State's omissions are unlawful in that they: (a) fail to have regard to matters to which, by section 6(3) of the PA 2008, the Secretary of State must have regard when deciding whether or not to review; and/or (b) were taken without regard to obviously material considerations; and/or (c) were and are *Wednesbury* unreasonable.

Summary of Remedies

14. The Claimants ask the Court to make the following orders:

a. A declaration that the Secretary of State and not his officials must consider and promulgate a decision pursuant to section 6(1) of the PA 2008 whether he thinks it appropriate to review each of the Energy NPSs.

b. A declaration that the Secretary of State must consider and promulgate a decision pursuant to section 11 of the PA 2008 whether he thinks it appropriate to suspend each of the Energy NPSs until a review has been completed.

And further or in the alternative:

c. A declaration that the only rational decision for the Secretary of State to take is that it is appropriate to review the Energy NPSs now.

d. A direction that the Energy NPSs shall have no legal effect until review of them is complete pursuant to section 6 of the PA 2008 (equivalent relief having been granted by the Court of Appeal in *R (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214).

Statement of Facts

Relevant Background

(i) The Planning Act 2008

15. The PA 2008[7] is summarised at paragraphs 20 – 40 of *R (on the application of Spurrier v Secretary of State for Transport)* [2019] EWHC 1070 (Admin),[8] which concerned a challenge to the Secretary of State for Transport's Airports National Policy Statement.[9] In particular, paragraphs 20 – 25 in *Spurrier* explain the background to the statute:

> 21. The PA 2008 established a new unified "development consent" procedure for "nationally significant infrastructure projects" defined to include certain "airport-related development" including the construction or alteration of an airport that is expected to be capable of providing air passenger services for at least 10m passengers per year (sections 14 and 23). Originally, many of the primary functions under the Act were to be exercised by the Infrastructure Planning Commission, established under

[7] [AB/A2/5-32].
[8] [AB/C15/821-841].
[9] *Spurrier* was successfully appealed in the Court of Appeal, however the summary of the law in Spurrier remains good.

section 1. However, those functions were transferred to the Secretary of State by the Localism Act 2011.

…

24. The 2007 White Paper proposed that National Policy Statements ("NPSs") would set the policy framework for decisions on the development of national infrastructure.

"They would integrate the Government's objectives for infrastructure capacity and development with its wider economic, environmental and social policy objectives, including climate change goals and targets, in order to deliver sustainable development."

The role of Ministers would be to set policy, in particular the national need for infrastructure development (paragraph 3.4).

25. Paragraph 3.11 envisaged that any public inquiry dealing with individual applications for development consent would not have to consider issues such as whether there is a case for infrastructure development, or the types of development most likely to meet the need for additional capacity, since such matters would already have been addressed in the NPS. It was said that NPSs should have more weight than other statements of policy, whether at a national or local level: they should be the primary consideration in the determination of an application for a "Development Consent Order" ("DCO") (paragraph 3.12), although other relevant considerations should also be taken into account (paragraph 3.13). To provide democratic accountability, it was said that NPSs should be subject to Parliamentary scrutiny before being adopted (paragraph 3.27).

16. Section 5 of the PA 2008 governs the contents of a NPS. This includes the requirement in section 5(7) that a NPS "must give reasons for the policy set out in the statement", and the requirement in section 5(8) that these "reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change."

17. Section 6 sets out the provisions in relation to review of a NPS:

6 Review

(1) The Secretary of State must review each national policy statement whenever the Secretary of State thinks it appropriate to do so.

(2) A review may relate to all or part of a national policy statement.

(3) In deciding when to review a national policy statement the Secretary of State must consider whether—

(a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,

(b) the change was not anticipated at that time, and

(c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different.

(4) In deciding when to review part of a national policy statement ("the relevant part") the Secretary of State must consider whether—

(a) since the time when the relevant part was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the relevant part was decided,

(b) the change was not anticipated at that time, and

(c) if the change had been anticipated at that time, any of the policy set out in the relevant part would have been materially different.

(5) After completing a review of all or part of a national policy statement the Secretary of State must do one of the following—

(a) amend the statement;

(b) withdraw the statement's designation as a national policy statement;

(c) leave the statement as it is.

(6) Before amending a national policy statement the Secretary of State must carry out an appraisal of the sustainability of the policy set out in the proposed amendment.

(7) The Secretary of State may amend a national policy statement only if the consultation and publicity requirements set out in section 7, and the parliamentary requirements set out in section 9, have been complied with in relation to the proposed amendment and—

(a) the consideration period for the amendment has expired without the House of Commons resolving during that period that the amendment should not be proceeded with, or

(b) the amendment has been approved by resolution of the House of Commons—

(i) after being laid before Parliament under section 9(8), and

(ii) before the end of the consideration period.

(7A) In subsection (7) "the consideration period" , in relation to an amendment, means the period of 21 sitting days beginning with the first sitting day after the day on which the amendment is laid before Parliament under section 9(8), and here "sitting day" means a day on which the House of Commons sits.

(8) Subsections (6) [to (7A)]3 do not apply if the Secretary of State thinks that the proposed amendment (taken with any other proposed amendments) does not materially affect the policy as set out in the national policy statement.

(9) If the Secretary of State amends a national policy statement, the Secretary of State must—

(a) arrange for the amendment, or the statement as amended, to be published, and

(b) lay the amendment, or the statement as amended, before Parliament.

18. Section 10 of the PA 2008 states that in exercising functions under sections 5 and 6, the Secretary of State must "do so with the objective of contributing to the achievement of sustainable development." This includes that the "Secretary of State must (in particular) have regard to the desirability of…mitigating, and adapting to, climate change" (see section 10(3)(a)).

19. Section 11 provides for a power of suspension where the Secretary of State considers that certain conditions (which parallel those in section 6) are met:

11 Suspension pending review

(1) This section applies if the Secretary of State thinks that the condition in subsection (2) or (3) is met.

(2) The condition is that—

(a) since the time when a national policy statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,

(b) the change was not anticipated at that time, and

(c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different.

(3) The condition is that—

(a) since the time when part of a national policy statement ("the relevant part") was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the relevant part was decided,

(b) the change was not anticipated at that time, and

(c) if the change had been anticipated at that time, any of the policy set out in the relevant part would have been materially different.

(4) The Secretary of State may suspend the operation of all or any part of the national policy statement until a review of the statement or the relevant part has been completed.

(5) If the Secretary of State does so, the designation as a national policy statement of the statement or (as the case may be) the part of the statement that has been suspended

is treated as having been withdrawn until the day on which the Secretary of State complies with section 6(5) in relation to the review.

20. Section 13 suspends legal proceedings questioning a NPS or anything done in the course of preparation of such a statement or any decision not to carry out a review:

13 Legal challenges relating to national policy statements

(1) A court may entertain proceedings for questioning a national policy statement or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if—

(a) the proceedings are brought by a claim for judicial review, and

(b) the claim form is filed before the end of 1 the period of 6 weeks beginning with the day after —

(i) the day on which the statement is designated as a national policy statement for the purposes of this Act, or

(ii) (if later) the day on which the statement is published.

(2) A court may entertain proceedings for questioning a decision of the Secretary of State not to carry out a review of all or part of a national policy statement only if—

(a) the proceedings are brought by a claim for judicial review, and

(b) the claim form is filed before the end of the period of 6 weeks beginning with the day after the day of the decision not to carry out the review.

(3) A court may entertain proceedings for questioning a decision of the Secretary of State to carry out a review of all or part of a national policy statement only if—

(a) the proceedings are brought by a claim for judicial review, and

(b) the claim form is filed before the end of the period of 6 weeks beginning with [the day after the day on which the Secretary of State complies with section 6(5) in relation to the review concerned.

(4) A court may entertain proceedings for questioning anything done, or omitted to be done, by the Secretary of State in the course of carrying out a review of all or part of a national policy statement only if—

(a) the proceedings are brought by a claim for judicial review, and

(b) the claim form is filed [before the end of the period of 6 weeks beginning with the day after the day on which the Secretary of State complies with section 6(5) in relation to the review concerned.

(5) A court may entertain proceedings for questioning anything done by the Secretary of State under section 6(5) after completing a review of all or part of a national policy statement only if—

(a) the proceedings are brought by a claim for judicial review, and

(b) the claim form is filed [before the end of the period of 6 weeks beginning with [the day after the day on which the thing concerned is done.

(6) A court may entertain proceedings for questioning a decision of the Secretary of State as to whether or not to suspend the operation of all or part of a national policy statement under section 11 only if—

(a) the proceedings are brought by a claim for judicial review, and Planning Act 2008 Page 12

(b) the claim form is filed before the end of the period of 6 weeks beginning with the after the day of the decision.

21. Section 13(2) precludes any challenge to a decision of the Secretary of State not to carry out a review of a NPS other than within six weeks of that decision. It follows that a decision not to carry out a review is a formal decision which attracts a right of challenge. In the present case, either the claim is brought within the six-week period following the April 2020 letter (if the Sir Humphrey decision constitutes a decision not to review) or, as the Defendant concedes in the April 2020 Letter, this claim is not suspended.

22. Section 104(3) provides that the Secretary of State must decide an application for a development consent order in accordance with any relevant NPS except to the extent that one or more of subsections 104(4)-(8) applies.

23. Section 104 is complemented by section 106 which, under the heading "Matters which may be disregarded when determining an application", provides that in deciding an application for an order granting development consent the Secretary of State may disregard representations if the Secretary of State considers that the representations "relate to the merits of policy set out in a national policy statement" (see section 106(1)(b)).

24. This is also reflected in sections 87(3) and 94(8), under which the Examining Authority may disregard representations (including evidence) or refuse to allow representations to be made at a hearing if it considers that they "relate to the merits of the policy set out in [an NPS]…"

(ii) The Energy National Policy Statements

25. Pursuant to the regime set out in the PA 2008, the Secretary of State published a suite of six Energy NPSs in July 2011.[10] The first, the Overarching National Policy Statement for Energy (EN-1), sets out the Government's policy for delivery of major energy infrastructure. A further five technology-specific NPSs for the energy sector cover: fossil fuel electricity generation (EN-2); renewable electricity generation (both onshore and offshore) (EN-3); gas supply infrastructure and gas and oil pipelines (EN-4); the electricity transmission and distribution network (EN-5); and nuclear electricity generation (EN-6). The following extracts from EN-1 give a summary of what the suite of NPSs provides:

    a. Paragraph 1.4.1 of EN-1 explains that it is part of a suite of NPSs "issued by the Secretary of State for Energy and Climate Change. It sets out the Government policy for delivery of major energy infrastructure."

    b. Paragraph 1.7.5 explains that as required by the Strategic Environmental Assessment Directive, reasonable alternatives to the NPS studied included placing more emphasis on securing low cost energy; more emphasis on reducing greenhouse gas emissions (Alternative A3) and more emphasis on reducing environmental impacts of energy infrastructure development. Summarising the evaluation of Alternative A3 paragraph 1.7.9 states:

> "However it is not clear that it would be possible to give practical effect to such an alternative through the planning system in the next ten years or so without risking negative impacts on security of supply… Accordingly Alternative A3 [which was in essence to place more emphasis on reduction in greenhouse gases[11]] has not been preferred to EN-1 at this stage but Government is actively considering other ways in which to encourage industry to accelerate progress towards a low carbon economy."

    c. At paragraphs 2.2.5-2.2.6 of EN-1 the NPS explains "The UK economy is reliant on fossil fuels, and they are likely to play a significant role for some time to come…. However, the UK needs to wean itself off such a high carbon energy mix to reduce greenhouse gas emissions, and to improve the security,

[10] [AB/B5-B10/63-705].
[11] *Appraisal of Sustainability for the revised draft Overarching National Policy Statement for Energy (EN-1): Main Report* at §3.5.4 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/47784/1930-aos-for-en1-main-report.pdf

availability and affordability of energy through diversification. Under some of the illustrative 2050 pathways, electricity generation would need to be virtually emission-free, given that we would expect some emissions from industrial and agricultural processes, transport and waste to persist".

d. At paragraph 2.2.8 of EN-1 the NPS sets out that it is based on the (pre-Paris Agreement) scientific assessment of a need to keep global average temperatures to no more than 2°C and that:

> "To drive the transition needed the Government has put in place the world's first ever legally binding framework to cut emissions by at least 80% by 2050 that will deliver emissions reductions through a system of five year carbon budgets that will set a trajectory to 2050".

e. At EN-1, paragraph 2.2.12 the NPS explains:

> "the EU Emissions Trading System (EU/ETS) forms the cornerstone of UK action to reduce greenhouse gas emissions from the power sector."

The NPS then proceeds to set out the details of Phase III of the scheme which runs until 2020.

f. At EN-1, paragraph 2.2.23 it is explained that:

> "… some fossil fuels will still be needed during the transition to a low carbon economy"

That message is reiterated at paragraph 3.6.1 of EN-1 where it is said that fossil fuel power stations will continue to play an important role and in sections 3.8 and 3.9 (the need for nationally significant gas infrastructure and oil infrastructure).

g. At paragraph 3.1.1 of EN1 it provides that in taking decisions on energy infrastructure, the policy is that the UK needs all types of energy infrastructure covered by the NPS.

h. Paragraphs 3.4.1-3.4.2 of EN-1 explain a commitment to sourcing 15% of the UK's total energy from renewable energy by 2020 and cites support from the Committee on Climate Change ("**the CCC**") in 2010 to that target. It states that the Government is committed to meeting that 2020 target and has "further ambitions for renewables post-2020" but does not spell those out.

i. Paragraph 5.2.2 of EN-1 states that "Government has determined that CO2 emissions are not reasons to prohibit the consenting of projects which use these technologies or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs… the IPC does not, therefore need to assess individual applications in terms of carbon emissions against carbon budgets…"

26. The Energy NPSs have never been reviewed under section 6 of the PA 2008, and it is self-evident that the events on climate change detailed below which have taken place since July 2011 were not taken into account at the time the Energy NPSs were made.

(iii) Climate change and the international and UK response

27. Paragraphs 558-583 of *Spurrier* set out the scientific and legislative background to climate change and the international and UK legislative response at the time of the Divisional Court's judgment. Paragraphs 563-8 explain that in 2003 the Government White Paper "Our Energy Our Future*"* committed to reducing CO2 emissions by 60% by 2050. However, with the enactment of section 1 of the Climate Change Act 2008 ("**the CCA 2008**"), that was adjusted to a duty on the Secretary of State to ensure that the net carbon account for the year 2050 is at least 80% lower than the 1990 baseline.[12] The reasons for the more stringent target were (as explained in *Spurrier* at [563]) that:

> "by 2005 there was scientific evidence that restricting emissions to 550 ppm would be unlikely to be effective in keeping the rise to 2 degrees C and only stabilising emissions to something below 450 ppm would be likely to achieve that result."

Although the target is expressed as a target to reduce carbon emission levels, that is not the end-goal, it is rather the mechanism by which the CCA 2008 seeks to achieve the ultimate objective of restricting temperature rises (see *Spurrier* at [566]).

28. Under section 2(1) of the CCA 2008, the Secretary of State has the power to amend the percentage in section 1, but only:

> i) if it appears to him that there have been significant developments in scientific knowledge about climate change since the passing of the Act, or developments in European or international law or policy (section 2(2) and (3)): the Explanatory Note

[12] [AB/A1/3-4].

to the Act says, as must be the case, that "this power might be used in the event of a new international treaty on climate change";

ii) after obtaining, and taking into account, advice from the C[ommitee on] C[limate] C[hange] (section 3(1)); and

iii) subject to Parliamentary affirmative resolution procedure (section 2(6)).

29. On 12 December 2015, after growing international concern on climate change, the Paris Agreement,[13] an agreement within the United Nations Framework Convention on Climate Change ("**the UNFCC**") was adopted by consensus of 197 parties following the 21st Conference of the Parties of the UNFCCC. The Paris Agreement seeks to further the objective of the UNFCCC which is set out in article 2:

> The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner

30. The UK ratified the Paris Agreement on 17 November 2016. The Paris Agreement was made in pursuit of the objective of the UNFCCC. To that end, the Parties committed by article 2 as follows:

> 1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by
>
> > (a) Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change…
>
> 2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities in the light of different national circumstances

31. In so providing, the Paris Agreement revised the targets established at the United Nations Climate Change Conference 2010 which had first set a commitment to limiting global warming below 2.0 degrees Celsius above the 1990 level.

[13] [AB/A3/33-59].

32. By article 4(1) of the Paris Agreement, the Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognising that peaking will take longer for developing country Parties, and aim to undertake rapid reductions thereafter in accordance with the best available science. By article 4(2) it further required each party to determine its own contribution to the article 2 target (*Spurrier* at [580]).

33. In October 2016, the CCC, which was established as an independent advisory committee by section 32 of the CCA 2008 (with further provisions in schedule 1), published a report on the implications of the Paris Agreement and recommendations for action by the UK in "UK climate action following the Paris Agreement"[14] (*Spurrier* at [581-583]). This acknowledged that the Paris Agreement described a higher level of global ambition than the one that formed the basis of the UK's existing emissions reduction targets: the reduction by 80% by 2050 reflected a global emissions path aimed at keeping global average temperature to around 2 degrees above pre-industrial levels. The CCC at that time recommended that the UK should not change the CCA 2008 target but rather focus on meeting the existing target because, as it explained at section 4:

> "Current policy in the UK is not enough to deliver the existing carbon budgets that Parliament has set…
>
> However, we recommend the Government does not alter the level of existing carbon budgets or the 2050 target now. They are already stretching…"

The CCC went on to note that there would be other moments to revisit the target, including following the report of the Intergovernmental Panel on Climate Change ("**the IPCC**") in 2018 and the CCC's own report on carbon budgets in 2020.

34. At [586] of *Spurrier,* the Divisional Court explained that by letter dated 27 November 2018 the Secretary of State had refused a request by Plan B Earth to review the Airports NPS and that that refusal decision was judicially reviewable (though no judicial review was pursued). The decision by contrast with the approach in this case constituted a straightforward refusal to review the NPS on the basis that allegedly there had been no material change of circumstance.

[14] [CB/C11/78-85].

35. In October 2017, the Government published its "Clean Growth Strategy", which was submitted to the UN as the UK's "long-term low greenhouse gas emission development strategy" pursuant to article 4, paragraph 19 of the Paris Agreement.

36. In January 2018, the CCC published a report, "An independent assessment of the UK's Clean Growth Strategy". Having referred to the statutory targets set out in the CCA 2008, it stated, at pp 21–22 (*Spurrier* at [588]):

> In our advice on 'UK Climate Action Following the Paris Agreement', the Committee recommended that the Government wait to set more ambitious long-term targets until it had strong policies in place for meeting existing budgets and the evidence base is firmer on the appropriate level of such targets. The [IPCC] will produce a special report on the implications of the Paris Agreement's 1·5°C ambition in 2018. At that point, the Government should request further advice from the Committee on the implications of the Paris Agreement for the UK's long-term emissions targets."

37. On 16 April 2018 the Government published a new Clean Growth Strategy containing measures across all sectors, but including a commitment to phase out the unabated use of coal to produce electricity by 2025; deliver new nuclear power and take measures to encourage off-shore wind. [15]

38. On 8 October 2018 the IPCC published their special report on the impacts of global warming of 1.5 degrees above pre-industrial levels. This report deepens the scientific evidence base on the implications of pursuing efforts to limit global warming to 1.5 degrees above pre-industrial levels, as set out in the Paris Agreement. As summarised at [590] of *Spurrier*:

> The report concludes that limiting global warming to 1·5°C above pre-industrial levels, as opposed to 2°C, would significantly reduce the risks of "challenging impacts" on ecosystems and human health and well-being; and that meeting a 1·5°C target is possible but would require "deep emissions reductions" and "rapid, far reaching and unprecedented changes in all aspects of society". For global warming to be limited to 1·5°C, global net emissions of CO2 would need to fall by about 45% from 2010 levels by 2030, reaching zero by 2050.

39. On 15 October 2018 the UK, Welsh and Scottish governments wrote to the Chairman of the CCC to request, pursuant to sections 3(1) and s7(1) of the CCA 2008, an update to the advice the Committee provided in October 2016, as part of that committee's report on UK climate action following the Paris Agreement. The UK, Welsh and Scottish governments requested options for the date by which the UK should achieve a

[15] [CB/C14/117-132].

net zero greenhouse gas target and/or a net zero carbon target in order to contribute to the global ambitions set out in the Paris Agreement.

40. In May 2019 the CCC produced a report entitled "Net Zero – the UK's contribution to stopping global warming recommending a net-zero GHG target for 2050",[16] which stated that:

> "The net-zero challenge must be embedded and integrated across all departments, at all levels of Government and in all major decisions that impact on emissions.
>
> […]
>
> Reaching net-zero emissions will require development or enhancement of shared infrastructure such as electricity networks, hydrogen production and distribution and CO2 transport and storage. Government, in partnership with the National Infrastructure Commission, should give urgent consideration to how such infrastructure might best be identified, financed and delivered."

41. On 1 May 2019 the UK Parliament unanimously declared an environment and climate emergency. The terms of the motion passed were:

> "That this House declares an environment and climate emergency following the finding of the Inter-governmental Panel on Climate Change that to avoid a more than 1.5°C rise in global warming, global emissions would need to fall by around 45 per cent from 2010 levels by 2030, reaching net zero by around 2050;
>
> recognises the devastating impact that volatile and extreme weather will have on UK food production, water availability, public health and through flooding and wildfire damage…
>
> calls on the Government to increase the ambition of the UK's climate change targets under the Climate Change Act 2008 to achieve net zero emissions before 2050, to increase support for and set ambitious, short-term targets for the roll-out of renewable and low carbon energy and transport, and to move swiftly to capture economic opportunities and green jobs in the low carbon economy while managing risks for workers and communities currently reliant on carbon intensive sectors…"

42. On 27 June 2019, the Climate Change Act 2008 (2050 Target Amendment) Order 2019/1056 ("**the 2019 Order**") was made; whereby the Secretary of State used the power in section 2(1) of the CCA 2008 to amend the percentage target in section 1 of the CCA 2008.[17] The preamble to the 2019 Order established that the conditions in section 2(1) of the CCA 2008 were considered to be satisfied:

[16] [CB/C19/148-175].
[17] [AB/A4/60-62].

> The Secretary of State considers that since the Act was passed, there have been significant developments in scientific knowledge about climate change that make it appropriate to amend the percentage specified in section 1(1) of the Act.

43. Section 1(1) of the CCA 2008, as amended by the 2019 Order, now provides that:

> It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline. [i.e. "**Net Zero**"]

44. On 28 November 2019 the European Parliament declared a climate emergency.

45. On 2 November 2019, HM Treasury published the terms of reference of its review into funding the transition to a Net Zero greenhouse gas economy. That review is due to conclude in autumn 2020.

46. In the Conservative Party Manifesto, a vision was set out to ensure that Britain has the world's most ambitious environmental programme and the Queen's Speech 2019 reaffirmed the UK's statutory commitment to Net Zero by 2050.[18]

47. On 18 December 2019 the CCC wrote to the (new) Prime Minister stating that Government actions in the coming year will define the UK response to the climate crisis and that "in this Parliament, the UK *must* get on track to delivering Net Zero emissions". In his letter of response to the CCC dated 28 January 2020, the Prime Minister affirmed that "2020 is a crucial year for action on climate change" and that "The Government has been elected with an unambiguous commitment to net zero, which we will deliver… this requires action across the economy. This year we will be bringing forward plans… from buildings to power generation…" Obviously, none of this is consistent with the departmental timetable announced in the April 2020 Letter.

48. On 31 January 2020 the UK left the European Union. Consequently the UK will, among many other changes: (i) be revisiting its relationship to the EU emissions trading scheme and the EU ETS Directive (described in EN-1, paragraph 2.2.13 as "the cornerstone of UK action to reduce greenhouse gas emissions") at the end of the transition period; and (ii) will be able to revisit the role of and targets set by the Industrial Emissions Directive.

[18] [CB/C17/146].

49. On 27 February 2020, the Court of Appeal in *R (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 allowed an appeal against the Divisional Court's judgment in *Spurrier*.[19] The Court of Appeal held that the Government's commitment to adhering to the Paris Agreement to limit the rise in global temperature to well below 2ºC and to pursue efforts to limit it to 1.5ºC constituted government policy on climate change which, pursuant to section 5(8) of the PA 2008, the Secretary of State had to take into account in his designation decision. His failure to do so was enough to vitiate his designation of the Airports NPS; the Paris Agreement was so obviously material to the designation decision that it was irrational not to have taken it into account. The Court of Appeal made a declaration that the designation decision was unlawful and prevented the Airports NPS from having legal effect until it was reviewed in accordance with the legislation.

50. Permission to appeal the Court of Appeal's decision to the Supreme Court was granted to the Appellants (Heathrow Airport Ltd and Arora Holdings Ltd) on 6 May 2020.

Statement of Grounds

The Sir Humphrey decision

(i) Ground 1

51. If, properly reading the April 2020 Letter, it either constitutes or reflects a decision by an un-named official in the Department of Business Energy and Industrial Strategy to the effect that it is not appropriate to undertake a review of the Energy NPSs at this time, then that decision was unlawful in not being authorised by the Secretary of State. The April 2020 Letter candidly admits that the Sir Humphrey decision not to review the NPSs now or at any time until after the Energy White Paper (not currently expected for at least 12 months) has not been referred to the Secretary of State. Yet in substance, it decides not to review now, a decision which is, by section 6(1) (and indeed by section 13(2) of the PA 2008) a formal decision for the Secretary of State. It thereby unlawfully usurps the decision-making function of the Secretary of State and is unlawful.

[19] [AB/C16/842-924].

52. Section 12(2) of the Interpretation Act 1978 provides that:

> (2) Where an Act confers a power or imposes a duty on the holder of an office as such, it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, by the holder for the time being of the office.

53. Lord Greene MR held in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 that civil servants acted not on behalf of, but in the name of their ministers. In *R v Adams* [2020] UKSC 19 Lord Kerr giving the judgment of the Supreme Court found that the internment of Mr Adams had been unlawful because it had not been authorised by the Minister. He held that while generally a power conferred on the Minister could be exercised by his officials, there was no presumption that that was the case and the question should be approached as a matter of textual analysis (§26) examining the framework of the pertinent provisions and the importance of the subject matter, that is to say, the gravity of the consequences flowing from the exercise of the power. Further, as explained in *(National Association of Health Stores v Department of Health* [2005] EWCA Civ 154 at [24] "*Carltona*, however, establishes only that the act of a ***duly authorised*** civil servant is in law the act of his or her minister". In this case:

    a. The statutory framework is one governing high-level policy decisions which are quintessentially for, or to be authorised by, the Secretary of State.

    b. The language of the statute such as the repetition of "Secretary of State" in section 6(1) emphasises that the duty is that a decision whether to review should be taken at ministerial level.

    c. The importance of the UK's energy supply and of combating climate change and the gravity of the consequences of decisions on those matters do not require exegesis: they are clearly matters for the Minister.

    d. There is no dispute that the decision whether to review or not to review is one for the Secretary of State: the very correspondence by which it was revealed that the Sir Humphrey decision had been taken accepts that *once* the Energy White Paper is published, it will be for the Secretary of State to take a decision on whether to review the Energy NPSs.

e. There is no evidence that an official was authorised to take the Sir Humphrey decision. The Secretary of State's officials do not contend in the April 2020 Letter that the Sir Humphrey decision was made in the name of the Secretary of State: on the contrary the correspondence is clear that no reference to the Secretary of State to consider whether to review has been made since at least July 2018. The informal manner in which the decision has been promulgated suggests that in truth the officials have not appreciated that by them (rather than the Secretary of State) thinking about whether to review since at least July 2018 and now deciding not to ask the Secretary of State his view for a further 12 months, they have usurped a statutory function of the Secretary of State.

f. To illustrate the point, when declining to review the Airports NPS on 27 November 2018,[20] the Secretary of State was advised on the decision and took the decision (after reflection) not to review the Airports NPS. It was confirmed in *Spurrier* at paragraph 586 that that was a judicially reviewable decision within the contemplated statutory framework (though no such claim was brought).

54. This assumption of authority by the Department of Business Energy and Industrial Strategy was therefore unlawful and moreover has been going on for a long time: it is admitted and averred in the pre-action correspondence that the department has been thinking about whether to refer a decision to review since before July 2018 and that the officials intend to maintain this extra-statutory consideration process for another 12 months. It is therefore right that the Court intervene and grant the remedies sought.

55. If, contrary to the above, the Sir Humphrey decision (that it is not now appropriate to review the Energy NPSs) was taken by an official authorised to do so on behalf of the Secretary of State, then the decision was in any event unlawful because it has not been promulgated in a lawful fashion. At the very least the April 2020 Letter should have explained that it was a decision that can be challenged: see *R (Anufrijeva) v SSHD* [2004] 1 A.C. 604 at §26.

[20] [CB/C16/144-145].

(ii) ***Ground 2***

56. The Secretary of State's departmental officials, in failing to refer the question to the Secretary of State whether to review and instead taking the Sir Humphrey decision not to review the NPSs, are thwarting the policy and objects of the PA 2008 (see *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030 B – D;[21] and *R. v Secretary of State for the Home Department Ex p. Fire Brigades Union* [1995] 2 A.C. 513) at p.575 – 577).[22]

The nature of the decision

57. The April 2020 Letter makes plain that not only will the duty to review the Energy NPSs under section 6 of the PA 2008 (and implicitly also the power to suspend the Energy NPSs under section 11 of the PA 2008) not be exercised for at least a further 12 months, until after the Energy White Paper, but further that it has now been decided that consideration as to whether to perform the section 6 duty will be suspended in that period.

The legal duties

58. The following legal principles are relevant here:

    a. Where Parliament confers a power or a duty on a Minister in an Act, the exercise of that power or duty must be to promote the policy and objects of the Act; the policy and objects of the Act being determined by construing the Act as a whole *Padfield* p.1030 B – D. A failure to exercise the power will also be unlawful if it is contrary to the policy and objects of the Act: *M v Scottish Ministers* [2012] UKSC 58 at [47].

    b. Section 12(1) of the Interpretation Act 1978 provides that where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires.

[21] [AB/C11/706-743].
[22] [AB/C12/744-790].

c. In section 6 of the PA 2008 there is a specific and express statutory duty to review the NPSs where the Secretary of State takes the view it is appropriate to do so. It is accordingly implicit that the Secretary of State must, at a level of generality, from time to time as the occasion requires, *consider whether it is appropriate to do so.* The "occasion" is naturally to be read in the context of the conditions set out in section 6; all of which the Secretary of State would have to accept are met if he considered the issue (see further below).

d. The general obligation is illustrated by p.575-577 of *Fire Brigades Union*, where Lord Nicholls described the duty to consider in the context of a power conferred on the Secretary of State to bring a statutory instrument into force as follows:

> *"Nevertheless, although he is not under a legal duty to appoint a commencement day, the Secretary of State is under a legal duty to consider whether or not to exercise the power and appoint a day. That is inherent in the power Parliament has entrusted to him. He is under a duty to consider, in good faith, whether he should exercise the power. Further, and this is the next step, if the Secretary of State considers the matter and decides not to exercise the power, that does not end his duty. The statutory commencement day power continues to exist. The minister cannot abrogate it. The power, and the concomitant duty to consider whether to exercise it, will continue to exist despite any change in the holders of the office of Secretary of State. The power is exercisable, and the duty is to be performed, by the holder for the time being of the office of one of Her Majesty's Principal Secretaries of State: see the Interpretation Act 1978, sections 5 and 12(2) and Schedule 1. So although he has decided not to appoint a commencement day for sections 108 to 117, the Secretary of State remains under an obligation to keep the matter under review. This obligation will cease only when the power is exercised or Parliament repeals the legislation. Until then the duty to keep under review will continue.*
>
> *This statutory duty is not devoid of practical consequence. By definition, the continuing existence of this duty has an impact on the Secretary of State's freedom of action. Since the legislature has imposed this duty on him, it necessarily follows that the executive cannot exercise the prerogative in a manner, or for a purpose, inconsistent with the Secretary of State continuing to perform this duty. The executive cannot exercise the prerogative power in a way which would derogate from the due fulfilment of a statutory duty. To that extent, the exercise of the prerogative power is curtailed so long as the statutory duty continues to exist. Any exercise of the prerogative power in an inconsistent manner, or for an inconsistent purpose, would be an abuse of power and subject to the remedies afforded by judicial review."*

See also Lord Browne-Wilkinson at 551D:

The Policy and Objects of the Acts in Question

59. The policy and objects of the PA 2008 as a whole include the mitigation of and adaptation to climate change:

    a. Section 10(3)(a) of the PA 2008 particularly requires that in exercising the power of review under section 6, the Secretary of State "must (in particular) have regard to the desirability of…mitigating, and adapting to, climate change."

    b. Section 5(8) of the PA 2008 requires that in designating a NPS the reasons for that decision must in particular include an explanation of how the policy takes account of Government policy relating to the mitigation of, and adaptation to, climate change and necessarily implies that the Secretary of State must take Government policy relating to the mitigation of, and adaptation to, climate change into account in a NPS. This obvious point is put beyond doubt by the Court of Appeal at [223] of *Plan B Earth*.

    c. The Secretary of State's submission to the Divisional Court, accepted by the Court at [644] of its decision in *Spurrier*, was summarised as follows:

> "644. We consider the two Acts [the PA and CCA 2008] have to be looked at together, as Mr Maurici submitted. They were passed on the same day (26 November 2008), and are clearly to be read together. Subsection (3) of section 10 of the PA 2008 is a subset of subsection (2): "For the purposes of subsection (2) the Secretary of State must (*in particular*) have regard to …" (emphasis added). It too concerns sustainability. Its specific reference to "the desirability of … mitigating, and adapting to, climate change" appears clearly to chime with the CCA 2008. The CCA 2008 was obviously passed because of the perceived desirability of mitigating, and adapting to, climate change. As the Summary of the Explanatory Notes to the CCA 2008 states: "The Act sets up a framework for the UK to achieve its long-term goals of reducing greenhouse gas emissions and to ensure steps are taken towards adapting to the impact of climate change."

    It follows from both the judgments of the Court of Appeal and Divisional Court that achieving "at least" the Net Zero target in section 1 of the CCA 2008 is a key component of the policy and objects of the Act.[23]

[23] The Court in *R v Palmer* (1784) 168 ER 279 at p.355 similarly explained the principle that "If there are several Acts upon the same subject, they are to be taken together as forming one system, and as interpreting and enforcing each other."

The Secretary of State's duties and their frustration

60. In the present case, the Secretary of State is, firstly, under an express statutory duty in section 6 of the PA 2008 to review the NPSs when he considers it is, by reference to the criteria in section 6, appropriate to do so. Secondly, per *Fire Brigades Union* above he is under a duty, inherent in section 6, to consider in good faith whether it is appropriate to review the Energy NPSs. This duty is inherent in the section, but if need be section 12 of the Interpretation Act 1978 provides that the duty to consider whether to review is a duty to do so from time to time as the occasion arises. Finally, *Padfield* confirms that the Secretary of State must not perform his duties or exercise his powers, or indeed fail to exercise his powers, in a way that frustrates the policy and objects of the Act.

61. The Secretary of State cannot lawfully escape these duties by declining to consider whether to review – or in terms of the practical reality – by his departmental servants failing to put the question to him. The continuing nature of the duty to consider whether to exercise the power is, in the present statutory and factual context, stronger than it was in the case of the statutory provision at issue in the *Fire Brigades Union* case.

62. Whether the occasion for review arises is measured against the demands of the statute, not by civil servants' views as to an extrinsic concern about sequencing with a long-postponed Energy White Paper. Indeed, as Lord Browne-Wilkinson observed in the *Fire Brigades Union* case at p.551H, the Secretary of State cannot frustrate the purpose of his powers and duties by his own acts, still less may his officials kick the question into the long grass. By failing to advise or ask the Minister to consider whether to carry out a review under section 6, and further by failing to advise or ask him to consider whether to suspend the NPSs pursuant to section 11, so that the existing NPSs persist in default of a decision to review or not to review, departmental officials are unlawfully failing to secure the fulfilment of the Minister's duties and indeed frustrating the objects of the Act.

63. Further, or alternatively, the Claimants submit that on any view the conditions in section 6(3) of the PA 2008 upon which the duty to review arises are met (discussed further below). *A fortiori*, in those circumstances the decision of the Department of Business Energy and Industrial Strategy not to review, or the Secretary of State's failure to

consider whether to review unlawfully frustrates the objects and purpose of the statutory scheme of the PA 2008 and the CCA 2008 to mitigate and adapt to climate change, and to reach the target for the year 2050 of Net Zero.

Ground 3

64. The Sir Humphrey decision that it is not appropriate to review, or even consider whether to review, the Energy NPSs now, is in any event unlawful in that: (a) it was taken without regard to matters to which, by section 6(3) of the PA 2008, the Secretary of State must have regard when deciding whether or not to review (ground 3a); and/or (b) was taken without regard to obviously material considerations (ground 3b); and/or (c) was *Wednesbury* unreasonable (ground 3c).

a) Ground 3a

65. Sections 6(1) and 6(2) of the PA 2008 provide that the Secretary of State must review all or parts of the NPSs whenever the Secretary of State considers it appropriate to do so. The conclusion of the Sir Humphrey decision is that it is not appropriate to consider this now (because it is alleged in the April 2020 Letter that such a review would be "premature").

66. Section 6(3) provides that, in deciding when to review a NPS, the Secretary of State must consider whether:

> *(a) since the time when the National Policy Statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the National Policy Statement was decided;*
>
> *(b) the change was not anticipated at the time; and*
>
> *(c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different.*

67. There is no evidence, indeed no suggestion from the Defendant that in taking the decision not to review the NPSs now or not to consider whether to review the NPSs now, the departmental official responsible considered the questions mandated by section 6(3) of the PA 2008. The decision not to review now has been taken – it can be inferred – without regard to matters which were mandated by statute to be taken into account. That is a patent error of law: see *R (Packham) v SST* [2020] EWHC 829 (Admin) at [51]; *Plan B Earth* at [237].

b) Ground 3b

68. Further, in deciding that to review the Energy NPSs now would not be appropriate because to do so would be premature, the un-named officials made another error of law in that they failed to take account of considerations which were obviously material to the decision whether to review the Energy NPSs now, given the terms of section 6(3) of the PA 2008. It is relevant to look at each of the conditions in section 6(3), and then at a recent decision of the Secretary of State on a Development Consent Order ("**DCO**") application to illustrate the problem.

i) Section 6(3)(a)

69. Since July 2011 when the Energy NPSs were published, the principal significant change in any circumstances on the basis of which the NPSs were decided are summarised as follows:[24]

    a. In 2011 when the Energy NPSs were introduced, the CCA 2008 committed the UK to reducing greenhouse gas emissions by at least 80 per cent by 2050 when compared to 1990 levels. However, on 27 June 2019 the Secretary of State made the 2019 Order by which section 1 of the CCA 2008 was amended so as to ensure that the net UK carbon account for the year 2050 is at least 100% below the 1990 baseline, i.e. Net Zero.

    b. As shown by the preamble to the 2019 Order the Secretary of State's own view is that there have been significant developments in scientific knowledge not anticipated in 2008 and which merit changes in government policy (the very tests under section 6(3) for a review);

    c. The background to these changes includes that in December 2015 the Paris Agreement was concluded to bring about a strong international commitment to mitigating climate change. In particular, article 2 establishes not only a firm commitment to restrict the increase in the global average temperature to "well below 2 degrees Celsius above pre-industrial levels", but also to "pursue efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels" and an aspiration to achieve Net Zero greenhouse gas

[24] Also set out in the Relevant Background section above.

emissions during the second half of the 21st century. On 22 April 2016, the UK signed the Paris Agreement and then ratified it on 18 November 2016. The Paris Agreement was accompanied by pledges of action to 2030. These international commitments were not made in 2011.

d. In *Plan B Earth* the Court of Appeal confirmed that the Government's expressly stated policy is that it is now committed to adhering to the temperature limit in the Paris Agreement. The Court of Appeal recognised that this was not inconsistent with the "*at least…*" target in section 1 of the CCA 2008, and that the CCC has found that to stay close to 1.5˚C, CO_2 emissions would need to reach Net Zero by the 2040s (see *Plan B Earth* at [207], [216], [225]). These commitments, and the effect of any further delay in reaching these commitments,[25] are further significant changes in circumstance since 2011.

e. On 8 October 2018 the IPCC published their special report on the impacts of global warming of 1.5 degrees above pre-industrial levels. This report deepens the scientific evidence base on the implications of pursuing efforts to limit global warming to 1.5 degrees above pre-industrial levels, as set out in the Paris Agreement.

f. On 13 October 2016 the CCC published "UK climate action following the Paris Agreement", and in May 2019 the Committee on Climate Change produced a report entitled "Net Zero- the UK's contribution to stopping global warming recommending a net-zero GHG target for 2050".

g. On 18 December 2019 the CCC wrote to the (new) Prime Minister stating that Government actions in the coming year will define the UK response to the climate crisis and that "in this Parliament, the UK *must* get on track to delivering Net Zero emissions". On 28 January 2020, the Prime Minister affirmed that "2020 is a crucial year for action on climate change" and that "The Government has been elected with an unambiguous commitment to net zero, which we will deliver… this requires action across the economy. This year we will be bringing forward plans… from buildings to power

[25] For example, delaying until at least mid-2021 for the Energy White Paper to be published.

generation…" (obviously, none of this is consistent with the departmental timetable announced in the Sir Humphrey letter).

h. On 1 May 2019 the UK Parliament declared a climate emergency, and on 28 November 2019 the European Parliament declared a climate emergency.

i. On 2 November 2019, HM Treasury published the terms of reference of its review into funding the transition to a net zero greenhouse gas economy. That review is due to conclude in autumn 2020.

j. In the Conservative Party Manifesto, a vision was set out to ensure that Britain has the world's most ambitious environmental programme and the Queen's Speech 2019 reaffirmed the UK's statutory commitment to net-zero by 2050.

k. On 31 January 2020 the UK left the European Union. Consequently the UK will, among many other changes: (i) be revisiting its relationship to the EU emissions trading scheme and the EU ETS Directive (described in EN-1 para 2.2.13 as "the cornerstone of UK action to reduce greenhouse gas emissions") at the end of the transition period; and (ii) will be able to revisit the role of and targets set by the Industrial Emissions Directive.

l. In the nine years since the Energy NPSs were passed, a substantial body of new fossil fuel generating capacity has been consented and developed.[26]

70. None of these obviously material considerations, relevant to the criteria in section 6(3)(a) of the PA 2008, have been taken into account in the Sir Humphrey decision.

ii) *Section 6(3)(b)*

71. It is self-evident that the Paris Agreement and the other matters outlined above leading up to and beyond the recent change to net UK carbon account for the year 2050 to at least 100% below the 1990 baseline were not anticipated when the UK adopted the Energy NPSs in 2011. The Energy NPSs are expressly premised upon the former 80%

[26] *Drax Power Station Re-power Project Examining Authority's Report of Findings and Conclusions 4 July 2019 paragraph 11.1.1*

statutory target. For example, EN-1 at 2.2.8; 3.3.1, fn17; 3.3.14; 3.4.1 rely on the July 2010 Pathways Analysis[27] that also sets a route to an 80% reduction by 2050.

72. Nor was it anticipated in 2011 that the UK would leave the European Union on 31 January 2020 requiring it to reorganise its participation in the EU emissions trading scheme and its relationship to EU law concerning climate change.

73. Again, none of these obviously material considerations, relevant to the criteria in section 6(3)(b), have been taken into account.

iii) *Section 6(3)(c)*

74. In relation to section 6(3)(c), the Energy NPSs would have been materially different if these changes had been anticipated in 2011. The Energy NPSs make express reference throughout to the premise of an 80% target. For example, EN-1 states at paragraph 2.2.1 "We are committed to meeting our legally binding target to cut greenhouse gas emissions by at least 80% by 2050 compared to 1990 levels".

75. When designating the Energy NPSs, the Secretary of State regarded that 80% target as material to the framework for policy related to energy infrastructure. The position now is that, nine years into the planned window for achieving the cut, the target has been set at a materially more ambitious level. It is obvious that if it had been anticipated in 2011 that the 80% target would be increased to a 100% target in 2019, then the Energy NPSs would not have been premised upon the 80% target throughout the lifespan of the plan.

76. If the Energy NPSs had been drafted in anticipation of the more ambitious Net Zero target being set in 2019; in anticipation of the significant developments in scientific understanding, in anticipation of the Paris Agreement; in anticipation of the declarations of climate emergency (and the various other significant changes illustrated), then the following examples illustrate that the Energy NPSs would have been materially different:

(a) there would not now be a continuing applicable emphasis on the "significant role" of fossil fuels "for some time to come" (EN-1 at para 2.25);

[27] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/42562/216-2050-pathways-analysis-report.pdf

(b) there would not now be a continuing need for fossil fuels during the transition to a low carbon economy (EN-1 at para 2.2.23);

(c) the premise at EN-1 3.1.1 that the Infrastructure Planning Commission must assume that there is a need for all types of energy infrastructure would not apply with the same emphasis. Similarly, the presumption in favour of all types of energy supply at 3.1.1 would no longer apply;

(d) there would be a markedly different emphasis to the "vital role" of fossil fuel power stations and the "important role [of fossil fuel power] in our energy mix as the UK makes the transition" (EN-1 para 3.6.1);

(e) paragraph 5.2.2 of EN-1 would not provide that "Government has determined that CO2 emissions are not reasons to prohibit the consenting of projects…" because prohibiting the consent of projects on the grounds of CO2 emissions is precisely what the Netzero target, and fundamentally, the mitigation of the climate emergency now demands; and

(f) the pathways analysis underlying the Energy NPSs (referred to for instance at EN-1 paras 2.2.1; 2.2.6; 2.2.22; 3.3.14; 3.3.26) would not be premised on a range of plausible trajectories to an 80% reduction against the 1990 baseline.

77. Again, none of these obviously material considerations, relevant to the criteria in section 6(3)(c) of the PA 2008, have been taken into account.

iv) *Drax Decision: an illustration of the problems*

78. The Secretary of State's decision on the Drax Power (Generating Stations) Order[28] illustrates the contradictions that are now inherent between the statutory Net Zero target and the Paris Agreement on the one hand, and the Energy NPSs on the other. The Inspector in the Drax Decision recommended that the order be not confirmed,[29] but the Secretary of State, applying the Energy NPSs, overruled that recommendation. At paragraph 5.7 of the Secretary of State's decision, he accepted the importance and relevance of the Net Zero target, but decided at paragraph 5.9 that the move to Net Zero

[28] [AB/C14/807-820].
[29] [AB/C13/791-806].

is not in itself incompatible with the existing policy because there are – the Secretary of State asserted - potential pathways that will bring about a minimum 100% reduction in the UK's emissions. Yet that implicitly admits and highlights the obvious and unsurprising point that the Energy NPSs allow for pathways to 2050 which fail to achieve Net Zero. Those pathways are now obsolete, and accordingly there have been material changes in circumstance, directly relevant to the Energy NPSs, which if considered would have meant the policy was drafted differently: in short, the conditions or criteria for review in section 6(3) PA 2008 are satisfied.

c) Ground 3c

79. Further or alternatively, in light of the considerations that are statutorily required and/or obviously material as set out above, it is irrational for departmental officials to refuse a review of the Energy NPSs now, or to refuse to consider such a review until the Energy White Paper is published in at least mid-2021, under section 6 of the PA 2008 (and thus also a suspension pursuant to section 11 of the PA 2008). These considerations include particularly the UK's commitment to adhering to the temperature limit in the Paris Agreement, the Secretary of State's own view that there have been significant developments in scientific knowledge to change the target in section 1 of the CCA 2008, and the effect of further delay on reaching these targets.

80. If the department official were to rationally consider the factors in section 6(3), he would have to conclude that on any view there have been significant changes of circumstances on the basis of which the policies were decided which were not anticipated at the time and which if they had been anticipated, would have resulted in the policy being materially different, such that a review should be carried out now.

Grounds of Challenge: the Secretary of State

81. Further or alternatively, if the Sir Humphrey decision was not unlawful or does not have the character of a decision not to review the Energy NPSs or any part of any of them, the Claimants' challenge under grounds 4 and 5 the following:

    a. The failure (now admitted by the April 2020 Letter) of the Secretary of State to consider whether it is appropriate to now review all or part of the Energy NPSs;

b. The Secretary of State's failure (having thought about whether it is appropriate to now review all or part of the Energy NPSs) to draw the conclusion, it being the only rational conclusion, that it is now appropriate to review all or parts of the Energy NPSs, and/or;

c. The Secretary of State's maintenance of and reliance on the existing suite of Energy NPSs in default of consideration or decision whether to suspend all or part of them.

(iii) Ground 4

82. The Secretary of State's omissions, in circumstances where the section 6(3) criteria are satisfied such that a review "must" be undertaken, is an unlawful failure to comply with the duty to consider the discretion and an unlawful frustration of the objects and purpose of the statutory scheme.

83. As set out fully above in ground 2, the Secretary of State is under a legal duty to consider whether to exercise the power to review the Energy NPSs under section 6 of the PA 2008 Act, and to do so by reference to the criteria or conditions set out in section 6. The Secretary of State may not exercise or fail to exercise the power in a way which would derogate from this duty.

84. Further or alternatively, the Secretary of State cannot act in a way which thwarts or frustrates the policy and objects of the PA 2008 and CCA 2008 to mitigate and adapt to climate change, and work towards at least the Net Zero target and the Paris Agreement targets (see *Fire Brigades Union* and *Padfield* as set out in ground 2).

(iv) Ground 5

85. Finally, the Secretary of State's failure to consider whether it is appropriate to review and failure to decide that it is appropriate to review is unlawful in that it: (a) fails to have regard to matters to which, by section 6(3) of the PA 2008, the Secretary of State must have regard when deciding whether or not to review; and/or (b) was taken without regard to obviously material considerations; and/or (c) is *Wednesbury* unreasonable.

86. The Secretary of State has failed to have regard to the statutory tests in section 6(3) and failed to have regard to considerations which were obviously material given the

statutory tests. These are set out fully above, including particularly that the Secretary of State has already concluded that there have been significant developments in scientific understanding justifying the change to the "at least" Net Zero target in section 1 of the CCA 2008 and that it is now the Government's expressly stated policy that it is committed to adhering to the Paris Agreement temperature limit (see the full explanation in ground 3 above).

87. Further or alternatively, in light of the considerations that are statutorily required and/or obviously material as set out above, it is irrational for the Secretary of State to refuse a review of the Energy NPSs now, or to refuse to consider such a review until the Energy White Paper is published in at least mid-2021, under section 6 of the PA 2008 (and thus also a suspension pursuant to section 11 of the PA 2008). These considerations include particularly the UK's commitment to adhering to the temperature limit in the Paris Agreement, the Secretary of State's own view that there have been significant developments in scientific knowledge to change the target in section 1 of the CCA 2008, and the effect of further delay on reaching these targets. If the Secretary of State were to rationally consider the factors in section 6(3), he would have to conclude that on any view there have been significant changes of circumstances on the basis of which the policies were decided which were not anticipated at the time and which if they had been anticipated, would have resulted in the policy being materially different, such that a review should be carried out now (again see the full explanation in ground 3 above).

88. Alternatively the failure to review the Energy NPSs is irrational because the continuation of those policies is inconsistent with section 1 of the CCA 2008: a point that no more than reflects the submission recorded as made for the Secretary of State at [642] of the Divisional Court's judgment in *Spurrier,* that "of course, policy cannot be inconsistent with legislation, but as long as these other policies are not inconsistent with the statutory restrictions, they may equally be "Government policy".

Remedies

89. The Claimants ask the Court to make the following orders:

    a. A declaration that the Secretary of State and not his officials must consider and promulgate a decision pursuant to section 6(1) of the PA 2008 whether he thinks it appropriate to review each of the Energy NPSs.

b. A declaration that the Secretary of State must consider and promulgate a decision pursuant to section 11 of the PA 2008 whether he thinks it appropriate to suspend each of the Energy NPSs until a review has been completed.

And further, or in the alternative:

c. A declaration that it is appropriate to review the Energy NPSs now.

d. A direction that the Energy NPSs shall have no legal effect until review of them is complete pursuant to section 6 of the PA 2008 (equivalent relief having been granted by the Court of Appeal in *Plan B Earth*).

Alex Goodman

Anjoli Foster

Landmark Chambers

14 May 2020