Communities Against Gatwick Noise Emissions (CAGNE)

Gatwick Airport Northern Runway project DCO application

PINS Reference Number: TR020005

POST-HEARING SUBMISSIONS (ISH6) BY CAGNE

DEADLINE 4 (15 May 2024)

Introduction

1. These are CAGNE's post-hearing submissions following ISH6 on Climate Change.

2. Appended to these submissions and addressed below are:
   - Appendix ISH6-1 – Judgment in *R(Friends of the Earth) v SSESNZ* [2024] EWHC 995 (Admin) ("**the *CBDP* judgment")**
   - Appendix ISH6-2 – Judgment in *Stephenson v Secretary of State for Housing and Communities and Local Government* [2019] PTSR 2209

3. CAGNE's position is that it is clear that the Proposed Development – which would result in a larger increase in passengers and emissions than any airport expansion since the passing of the Net Zero legislation – would bring about a significant increase in greenhouse gas emissions. It would lead to a stark increase in passengers, resulting in a larger increase than the 11.8mppa assumed to be possible nationally under MBU. CAGNE agrees with the Local Partnership Authorities that it is important to interrogate the Applicant's information on the scale of greenhouse gas ("**GHG**") emsissions from this individual project to make an informed judgment on their sigificnace and materiality. Furthermore, in light of paragraphs 5.82 and 5.18 of the ANPS, CAGNE agrees that the Examining Authority is required to evaluate the extent to which the Applicant has provided the necessary information to measure whether the increase in GHG emissions is so significant as to have a material effect on achieving the obligaitons both in the national carbon budgets and in any other relevant trajectories and in-sector targets.

4. CAGNE agrees that, at present, it is at the very least unclear whether the Applicant has given sufficient information for the Examining Authority to be confident that it has the means to assess whether all emisisons have been brought into account and therefore whether it has the informaiotn necessary to make the judgments on significance and materialty. This is particularly so in light of the deficiencies in the Applicant's approach to the baseline and the limited degree of sensitivity testing. CAGNE agrees that the carbon assessment needs to take into account both of the increase from the project compared to future baseline and the total emissions of the project operating in the context of the existing airport.

5. CAGNE submits that, in light of the evidence from AEF, there is a firm basis for the Examining Authority determining that the increase in GHG emissions is so significant as to have a material effect on the ability to meet the carbon budgets and the legislated 2035 target.

Policy Approach

6. CAGNE welcomes the Applicant's clarification that the key part of MBU from a policy perspective is paragraph 1.25 headed "Policy Statement", which is up to date; other areas of the policy which are less up to date have less or no weight, but are helpful as an interpretative guide. CAGNE agrees.

7. CAGNE also welcomes the Applicant's clarification that the Jet Zero Strategy is not policy, nor is Jet Zero Strategy One Year On ("**Jet Zero OYO**"). They are strategies for how the Government may meet its objectives for aviaiotn and for carbon reduction. CAGNE agrees and considers that this is an important clarification. The Proposed Development cannot gain any policy support from either strategy.

8. Furthermore as set out below, very little to no weight can be now put on the Jet Zero Strategy and Jet Zero OYO as a material consideration in light of the outcome of the Carbon Budget Delivery Plan judicial review.

Weight to be Given to the Jet Zero Strategy and Jet Zero One Year On

9. The Applicant's view is that the examination is entitiled to rely fully on the Jet Zero Strategy because it is an up to date statement of the Government's strategy, reinforced

by other documents, which already identifies and addresses risk and concerns about meeting the relevant targets. which have re strategy is concerns govt already understands and are addressing.

10. There are two reasons that CAGNE disagrees and takes the position that very little to no weight can be now put on the Jet Zero Strategy and Jet Zero OYO as a material consideration:
    - The relevant science-based evidence before the examination; and
    - The outcome of the Carbon Budget Delivery Plan judicial review

Relevance of science-based evidence

11. As the Applicant acknowledged, the Jet Zero Strategy relies on the science to outline particular pathways for GHG reduction. However, it took the position that any science-based evidence to doubt the cogency or reliability of the pathways should be submitted to the Governemnt and is not a matter for the examination.

12. Even if the Jet Zero Strategy were a policy document (which it is not), the Applicant's position is incorrect, in light of the decision in *Stephenson v Secretary of State for Housing and Communities and Local Government* [2019] PTSR 2209, [2019] EWHC 519 (Admin) ("***Stephenson***").

13. The claim in *Stephenson* challenged the adoption by the Secretary of State of paragraph 209(a) of the Revised NPPF, published on 24 July 2018. It was contended that the Secretary of State unlawfully failed to take into account material considerations, namely scientific and technical evidence, which had been produced following the adoption of a Written Ministerial Statement ("**WMS**") in 2015. That evidence addressed the scientific underpinning of the 2015 WMS concerning shale gas and oil.

14. They key finding in *Stephenson* relevant to this examination is Mr Justice Dove's conclusion at §§71-72 that, in the context of individual decisions on applications, it would be open to decision-makers to depart from the in principle support for shale gas exploration in the 2015 WMS and other polices, on the basis of the requirements in (then) paragraphs 148 and 149 of the NPPF (now paragraphs 157-158) in light of scientific evidence about the greenhouse gas impact of shale gas extraction, given that

it is "very common" that the planning system had to resolve "planning policies within local or national policy documents…pulling in different directions".

15. The Applicant has accepted that the Jet Zero Strategy and Jet Zero OYO are not policies and are science-based. In light of that the finding in *Stephenson* makes the position even more clear-cut. It is plain that the Examining Authority can properly consider science-based evidence to assess the extent to which the Jet Zero Strategy and Jet Zero OYO support the Applicant's case. It is open to the Examining Authority to rely on the scientific evidence produced by AEF and others as to the GHG emission position.

16. The Applicant submitted that previous decision-makers have regarded it as reasonable not to doubt that there will be mechanisms in place to reduce GHG emissions in compliance with the legal duties under the Climate Change Act 2008 ("**CCA**") and it is reasonable to conclude that the regime for controlling GHG emissions will operate effectively. *Stephenson* shows that it is open to the Examining Authoirty to take a different approach, based on the scientific evidence before it showing that the Jet Zero Strategy and Jet Zero OYO are not reliable and how far the Government is off track and so how unlikely it is that the requisite emission reductions will be made within the next ten years to meet the 2035 legal obligation to reduce emissions by 78% compared to 1990 levels.

17. Finally, CAGNE agrees with AEF that there is a serious difference with regard to international aviation emissions under Carbon Budgets ("**CB**") 4 and 5, and CB6. Given the "headroom" approach of CB4 and 5, the actual performance of international aviation emissions would not make a difference. However, given these emissions are directly included with CB6, it makes a very material difference if those emissions are greater than those estimated in the trajectory necessary to meet CB6. Those emissions being off course would have a direct impact on meeting the budget and on how other sectors would need to react. If there is lack of confidence at this stage in the relevant policies and proposals, that translates into a real risk that CB6 will not be met.

<u>The CBDP Judgment</u>

18. In a judgment handed down on 3 May, Mr Justice Sheldon upheld the challenge by Friends of the Earth, ClientEarth and the Good Law Project to the lawfulness of the

Carbon Budget Delivery Plan ("**CBDP**"). It is notable that the Applicant relies extensively on the CBDP, of which the Jet Zero Strategy forms part. Policies 145-148 referred to in the CBDP expressly draw on the Jet Zero Strategy for quantified emission reductions from 2025, 2035, 2027 and 2036 respectively (pg 89).

19. The CBDP replaced the previous Net Zero Strategy after the High Court ruled in July 2022 that the Secretary of State had failed to comply with the obligation in section 13(1) CCA (requiring the Secretary of State to prepare such proposals and policies as she considers would enable the carbon budgets to be met) by failing to take obviously material considerations into account, including are the contributions policies were expected to make to meet the carbon budgets and the risks to delivery of the policies.

20. There were three different bases on which the claim succeeded, all of which are directly relevant to the weight to be given to the Jet Zero Strategy and Jet Zero OYO. First, Mr Justice Sheldon held that the Secretary of State had assumed, on the basis of the advice provided to him by his own officials, that all the planned policies and proposals in the CBDP would be delivered in full and that it was reasonable to expect that level of ambition, having regard to delivery risk and the wider context (§§119-125) . The Judge held at §127 that this was irrational, because there was an unexplained evidential gap or leap in reasoning failing to justify the conclusions reached by the decision maker. The true factual position, set out in §§63-64 and 126 and agreed by the Secretary of State, was that not all of the proposals and policies would be delivered in full.

21. Second, if the Secretary of State did not make the assumption, then his decision was unlawful under section 13 CCA because he was not provided with sufficient information as to the obviously material consideration of risk to the individual policies and proposals in the CBDP (§132). While there is no specific statutory requirement for risk information to be provided to the Secretary of State in particular ways (§117), the information provided to the Secretary of State did not give him any way of knowing which proposals and policies might not be delivered, or delivered in full. The Judge held that a vague and unquantified statement in the draft CBDP about over-delivery and under-delivery of policies did not provide a basis for the Secretary of State to make his own evaluation or assessment.

22. Third, the Judge turned to the requirement in section 13(3) CCA that "the proposals and policies, taken as a whole, must be such as to contribute to sustainable development". He held at §146 that "sustainable development" was an "uncontroversial concept", defined in *R (Spurrier) v Secretary of State for Transport* [2019] EW HC 1070 (Admin) at §635 "meeting the needs of the present without compromising the ability of future generations to meet their own needs." Section 13(3) CCA requires an evaluation or assessment by the Secretary of State (§149), but the wording of the provision means that the evaluative assessment is required to meet a degree of certainty that the particular outcome will eventuate (§§150-151). In finding the CBDP was "likely" to contribute to sustainable development, the Secretary of State's assessment had not met that level: on no reasonable view could it be said that "likely" means "must" (§152).

23. Accordingly, the Court accepted that evidence that the Secretary of State had not lawfully taken into account the risk that policies would not achieve the requirements to meet the Carbon Budgets; indeed, he was not provided with the requisite evidence on those risks. This is highly material to the Examining Authority's determination. The Applicant repeatedly relies on the Jet Zero Strategy and Jet Zero OYO as supporting the Proposed Applicant and emphasises that there is no reason to doubt that the measures will be in place to meet the carbon budgets. The CBDP judgment plainly gives that reason.

24. Despite the Jet Zero Strategy and Jet Zero OYO explicitly referring to risks – on which the Applicant again relies heavily – the correct position is that the Secretary of State was not provided with the requisite evidence on those risks to understand the extent to which the proposals and policies might not be delivered in full.

25. This is an obviously material consideration in the Examining Authority's determination. It shows that little or no weight can safely be given to the Jet Zero Strategy as "working" to address aviation emissions and less weight can be given to the ANPS assumption that the Government is on track. The evidence that emerged during the CBDP hearing and the Judge's acceptance of that evidence makes it more likely that large additional emissions from a development of the size and scale proposed in the instant application will imperil the meeting of the legal targets.

IEMA Guidance

26. The most recent IEMA Guidance makes it very clear that it is essential to provide context for the magnitude of GHG emissions in a way that aids the evaluation of the effects by the decision-maker and that comparison against local carbon budgets is one element of that contextualisation.

27. The Appellant cannot rely on *R(Bristol Airport Action Network Co-ordinating Committee) v SSLUHC* [2023] EWHC 171 (Admin) [2023] PTSR 853 ("***the Bristol Airport case***") to suggest that this is incorrect or that contextualisation against local carbon budgets should not be undertaken. The IEMA Guidance at issue in the *Bristol Airport* case was the previous iteration, which contained much weaker references to local carbon budgets providing a sense of scale for the project's emissions (§154). Moreover, the decision did not find that, in principle, contextualisation against local carbon budgets should not be undertaken. Instead, the *Bristol Airport* decision referred to *R (Goesa Ltd) v Eastleigh Borough Council* [2022] EWHC 1221 (Admin); [2022] PTSR 1473 and the finding at §122 of that judgment that the decision-maker can, in the exercise of its planning judgment, assess significance as against criteria it considers to be helpful, and that the IEMA guidance is relevant to that (albeit not detrminative of the lawfulness of the assessment) (§§163-164).

Exclusion of inbound flights

28. CAGNE submits that it is not correct that the GHG emission impact of inbound flights should be excluded from the assessment of the extent, significance and materiality of the GHG emissions which will be caused by the Proposed Development. The Applicant relies on, and asks the Examining Authority to take into account, the benefits of inbound tourism. As the Court of Appeal made clear in *R(Ashchurch Rural Parish Council) v Tewksbury Borough Council* [2023] EWCA Civ 101, in particular at §64, it is irrational to take accoung of a benefit of development as a material factor weighing in its favour, but to exclude from account any of the adverse impact that might arise from that aspect of the development, even if the disbenefits are only considered at a high level. Accordingly, the Applicant cannot invite the Examining Authority to take the inbound tourism benefits into account, but avoid any knowledge being given to the Examining Authority of the pollution cost in GHG emission terms.

29. Furthermore, in terms of assessment of environmental impact, upstream emissions are capable of amounting to indirect effects of a proposed development, particularly where there is a clear connection between the proposed development and the upstream emissions (as there is here): see, as persuasive authority on the point, *An Táisce – The National Trust for Ireland v An Bord Pleanála* [2022] IESC 8. This case related to a proposed major cheese factory in Kilkenny and whether indirect effects from the dairy farms which would supply the necessary milk for cheese production should be assessed. The inspector considered that the upstream GHG emissions from milk production were an indirect effect, but concluded on the facts that they were not significant (§§63 to 69); the Supreme Court of Ireland did not consider this to be an irrational conclusion.

Non CO_2 impacts

30. CAGNE supports the need for the Applicant to provide an indication of the extent of non-CO_2 emissions which the Propsoed Development may cause and that AEF's suggested multiplier of 0.7 is a conservative and sensible one which can lawfully be used to provide that assessment, given the need for a precautionary approach in light of the certainty that the Proposed Development will cause non-CO_2 emissions.

31. The Applicant cannot rely on the decision in the *Bristol Airport* case for suggesting that non-CO_2 emissions should be excluded. That decision did not conclude that, as a matter of principle, non-CO_2 emissions should be ignored by decision-makers considering airport expansion proposals. Rather, the Court held that, in light of the fact that only the BEIS 1.9 multiplier had been relied on in the inquiry and given the other technical evidence on non-CO_2 emissions before the inquiry, it was rational in those circumstances for the Panel to conclude as a matter of its judgment that it was not appropriate to apply the multiplier (see §§199-206). The circumstances in the instant examination are different. The multiplier suggested by AEF can lawfully and rationally be used to provided at least an indication of the scale of non-CO_2 emissions that would be caused by the Proposed Development and it would be lawful and rational for the Examining Authority to take that into account in its determination of the application.

Green Controlled Growth

32. One Action Point arose from ISH6 for CAGNE: to consider whether the Green Controlled Growth method may help reduce the GHG emissions/climate risks of the project. CAGNE's view is that any Green Controlled Growth approach needs to have teeth and be enforceable. At present, CAGNE has concerns that this is not the case. In particular, CAGNE is concerned that Green Controlled Growth does not address all GHG emissions, nor does it address non-CO_2 emissions.

33. Focusing on CO_2 emissions, there is a high risk that the Airport's target CO_2 reductions will not be achieved without binding annual emissions caps in line with the Government's own trajectory for aviation and for that to be effective, any such caps should include sufficient monitoring requirements, as per the suggested new requirement that CAGNE proposed at Deadline 2 [REP2-072].

15 May 2024

Appendix 1

Neutral Citation Number: [2024] EWHC 995 (Admin)

Case No: AC-2023-LON-001856
AC-2023-LON-002005
AC-2023-LON-002008

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2024

Before :

MR. JUSTICE SHELDON

- -

Between :

(1) FRIENDS OF THE EARTH **(2) CLIENTEARTH** **(3) GOOD LAW PROJECT**	**Claimants**
- and -	
SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO	**Defendant**

- -
- -

David Wolfe KC, Catherine Dobson, Nina Pindham (instructed by **Leigh Day**) for the **First Claimant**
Jessica Simor KC, Emma Foubister (instructed by **ClientEarth)** for the **Second Claimant**
Peter Lockley (instructed by **Good Law Practice**) for the **Third Claimant**
Jonathan Moffett KC, Christopher Badger, Robert Williams (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 20-22 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr. Justice Sheldon :

1. This case concerns the statutory process that Parliament has prescribed for the United Kingdom to achieve net zero greenhouse gas emissions by 2050. Under the Climate Change Act 2008 ("the CCA 2008"), the relevant Secretary of State (now the Secretary of State for Energy Security and Net Zero, and the Defendant to these proceedings) is required to set carbon budgets for the United Kingdom in relation to successive five-year periods.

2. In a judgment handed down on 18th July 2022 in the case of *R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2023] 1 WLR 225 ("*FoE (No.1)*"), Holgate J decided that decisions taken by the Secretary of State for Business, Energy and Industrial Strategy ("BEIS") (the Minister who previously had responsibility under the CCA 2008) in 2021 failed to comply with the Secretary of State's duty under section 13(1) of the CCA 2008 to prepare such proposals and policies as he considered would enable relevant carbon budgets up to and including the sixth carbon budget (relating to the period 2033-2037) ("CB6") to be achieved, and failed to fulfil the Secretary of State's obligation pursuant to section 14(1) of the CCA 2008 to set out for Parliament his proposals and policies for meeting the relevant carbon budgets.

3. Holgate J ordered the Secretary of State for BEIS to lay before Parliament a report which was compliant with section 14 of the CCA 2008 by no later than 31st March 2023. The Secretary of State for Energy Security and Net Zero reconsidered matters and purported to comply with sections 13 and 14 of the CCA 2008. On 31st March 2023, he laid before Parliament the Carbon Budget Delivery Plan ("the CBDP"). In these proceedings, the Claimants contend that the Secretary of State failed to comply with sections 13 and 14 of the CCA 2008.

4. The hearing before me was for permission to be followed by a substantive hearing if permission was granted: a "rolled up" hearing.

Background

5. The general background to the requirement for the setting of carbon budgets can be found in Holgate J's judgment in *FoE (No.1)* at paragraphs 2-12:

> "2. In 1992 the United Nations adopted the United Nations Framework Convention on Climate Change ("UNFCCC"). Following the 21st Conference of the parties to the Convention, the text of the Paris Agreement on Climate Change was agreed and adopted on 12 December 2015. The United Kingdom ratified the Agreement on 17 November 2016.
>
> 3. Article 2 of the Agreement seeks to strengthen the global response to climate change by holding the increase in global average temperature to 2°C above pre-industrial levels, and by pursuing efforts to limit that increase to 1.5°C. Article 4(1) lays down the objective of achieving "a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases ["GHGs"] in the second half of this century."

That objective forms the basis for what is often referred to as the "net zero target", which will be satisfied if the global level of any residual GHG emissions (after measures to reduce such emissions) is at least balanced by sinks, such as forests, which remove carbon from the atmosphere.

4. Article 4(2) requires each party "to prepare, communicate and maintain successive nationally determined contributions ["NDCs"] that it intends to achieve". Each party's NDC is to represent a progression beyond its current contribution and reflect its "highest possible ambition" reflecting inter alia "respective capabilities" and "different national characteristics" (article 4(3)).

5. The UK responded to the Paris Agreement in two ways. First, section 1 of the Climate Change Act 2008 ("CCA 2008") was amended so that it became the obligation of the Secretary of State for Business, Energy and Industrial Strategy to ensure that "the net UK carbon account" for 2050 is at least 100% lower than the baseline in 1990 for CO2 and other GHGs, in substitution for the 80% reduction originally enacted (see the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019 No.1056)). That change came into effect on 27 June 2019. Second, on 12 December 2020 the UK communicated its NDC to the UNFCCC to reduce national GHG emissions by 2030 by at least 68% compared to 1990 levels, replacing an earlier EU based figure of 53% for the same year.

6. According to the Net Zero Strategy ("NZS"), the UK currently accounts for less than 1% of global GHG emissions (p.54 para. 31).

7. Section 4 of the CCA 2008 imposes a duty on the Secretary of State to set an amount for the net UK carbon account, referred to as a carbon budget, for successive 5 year periods beginning with 2008 to 2012 ("CB1"). Each carbon budget must be set "with a view to meeting" the 2050 target in s.1. The ninth period, CB9, will cover the period 2048-2052 for which 2050 is the middle year. Section 4(1)(b) imposes a duty on the Secretary of State to ensure that the net UK carbon account for a budgetary period does not exceed the relevant carbon budget. Thus, the CCA 2008 has established a framework by which the UK may progress towards meeting its 2050 net zero target.

8. The net UK carbon account referred to in s.1 and s.4 relates to carbon dioxide and the other "targeted" GHGs listed in s.24 (methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride). GHG emissions are expressed for the purposes of the Act in tonnes of "carbon dioxide equivalent" (s.93(1)). That term refers to either a tonne of CO2 or an amount

of another GHG with "an equivalent global warming potential" ("GWP").

9. The Secretary of State has set the first 6 carbon budgets. Each has been the subject of affirmative resolution by Parliament. CB6 came into force on 24 June 2021 (The Carbon Budget Order 2021 – SI 2021 No. 750) and sets a carbon budget of 965 Mt CO_2e (million tonnes of carbon dioxide equivalent) for the period 2033 – 2037.

10. The six carbon budgets and their relationship to the 1990 baseline are summarised below:

Carbon budget	Period	Target emissions Mt CO_2 e	Percentage reduction from 1990 level
1	2008–2012	3,018	25%
2	2013–2017	2,782	31%
3	2018–2022	2,544	41%
4	2023–2027	1,950	55%
5	2028–2032	1,725	60%
6	2033–2037	965	78%

Sources: NZS: p. 306 para.5 and p. 310 Table 1; *R (Transport Action Network Ltd) v Secretary of State for Transport* [2022] PTSR 31 at [50].

11. The UK overachieved CB1 by 36 Mt CO_2e and CB2 by 384 Mt CO_2e. It is on track to meet CB3 (NZS p.306 para.5 and endnote 4).

12. CB6 is the first carbon budget to be based on the net zero target in the amended s.1 of the CCA 2008. The previous budgets were based on the former 80% target for 2050. CB6 is also the first carbon budget to include emissions from international aviation and shipping attributable to the UK. It is common ground that the target in CB6 is substantially more challenging than those previously set."

6. In accordance with the statutory framework under the CCA 2008, in October 2021 the Secretary of State for BEIS approved proposals and policies which he considered would enable CB6 to be achieved, and on 19th October 2021 he laid before Parliament a report setting out those proposals and policies: the Net Zero Strategy ("the NZS").

7. In *FoE (No.1)*, the Claimants (who are the same parties as are before the Court in the present proceedings) challenged the NZS, and the decision to approve proposals and policies. Holgate J upheld the challenge, deciding that the Secretary of State for BEIS

had acted unlawfully with respect to his duties under both sections 13 and 14 of the CCA 2008. Holgate J made the following declarations:

> "3. In determining that the proposals and policies set out in the Net Zero Strategy will enable carbon budgets set under the Climate Change Act 2008 ('the Act') to be met, the Defendant failed to comply with section 13(1) of the Act by failing to consider
>
> (i) the quantitative contributions that individual proposals and policies (or interrelated group of proposals and policies) were expected to make to meeting those carbon budgets;
>
> (ii) how the identified c.5% shortfall for meeting the sixth carbon budget would be made up, including the matters set out at [216] of the judgment and
>
> (iii) the implications of these matters for risk to delivery of policies in the NSZ and the sixth carbon budget.
>
> 4. The Net Zero Strategy of 19 October 2021 failed to comply with the obligation in section 14(1) of the Act to set out proposals and policies for meeting the carbon budgets for the current and future budgetary periods
>
> (i) by failing to include information on the quantitative contributions that individual proposals and policies (or interrelated group of proposals and policies) were expected to make to meeting those carbon budgets and
>
> (ii) by failing to address the matters identified in [253] of the judgment."

8. Following Holgate J's Order, the Secretary of State looked again at the policies and proposals and produced the CBDP. As part of this process, it was necessary to identify the emissions savings that needed to be made in each of the periods for the fourth, fifth and sixth carbon budget periods: 2023-2027, 2028-2032 and 2033-2037. Essentially, the emissions limit for each of the budgetary periods was compared to a projection of net emissions for the relevant period, referred to as a "baseline". The difference between the "baseline" and the emissions limit represented the volume of additional emissions savings that needed to be made in order to meet the relevant carbon budget.

9. The projection of net emissions was based on the Government's Energy and Emissions Projections 2021-2040 ("the EEP"). This was published in October 2022, and set out a projection of future greenhouse gas emissions based on a variety of assumptions as to factors such as future economic growth, the prices of fossil fuels, the cost of electricity generation, and population growth. It also took account of policies that are likely to have an impact on greenhouse gas emissions, where those policies have already been implemented or are at a near final stage of design and funding for them has been agreed; the Government has a high degree of confidence that these policies will be delivered. This produced what is referred to as "the EEP baseline". The EEP baseline was adjusted

before the CBDP was finalised, as a result of various changes that were identified after its initial publication.

10. The adjusted EEP baseline was of 1,958 Mt CO_2e of greenhouse gas emissions across the five-year period of CB6. The emissions limit for CB6 is 965 Mt CO_2e. Accordingly, proposals and policies that would produce emissions savings of 993 Mt CO_2e (in addition to those projected to result from the EEP policies) needed to be identified by the Secretary of State to meet the budget for CB6.

11. A large number of civil servants were involved in the work that led up to the advice to the Secretary of State as to the proposals and policies for meeting the budget for CB6. These included officials referred to as "Sector Leads": policy officials within the Department for Energy Security and Net Zero ("DESNZ") with responsibility for specific sectors within which emissions savings are to be made (power, fuel supply, heat and buildings, transport, natural resources and waste, F-gases, and agriculture, forestry and other land use); and officials within "Sector Teams", who are teams of officials in different government departments who have primary responsibility for overseeing the decarbonisation of the sectors for which they are responsible and for devising, designing, implementing and maintaining the proposals and policies that result in emissions savings. In a witness statement for the present proceedings, Chris Thompson, the Director of the Net Zero Strategy Directorate in the Department for Energy Security and Net Zero, explained that the relevant Sector Teams and Sector Leads working together were well-placed to assess risk to delivery of a particular proposal or policy, and significant weight was placed on their judgments in making recommendations to the Secretary of State for his section 13 decision.

12. The Secretary of State who took the decisions that are in issue in these proceedings, the Rt Hon Grant Shapps MP, was appointed as Secretary of State for BEIS on 25th October 2022. On 8th November 2022, he was provided with an introductory brief for his new role in delivering net zero. He subsequently assumed the role of Secretary of State for Energy Security and Net Zero when that office was created on 7th February 2023.

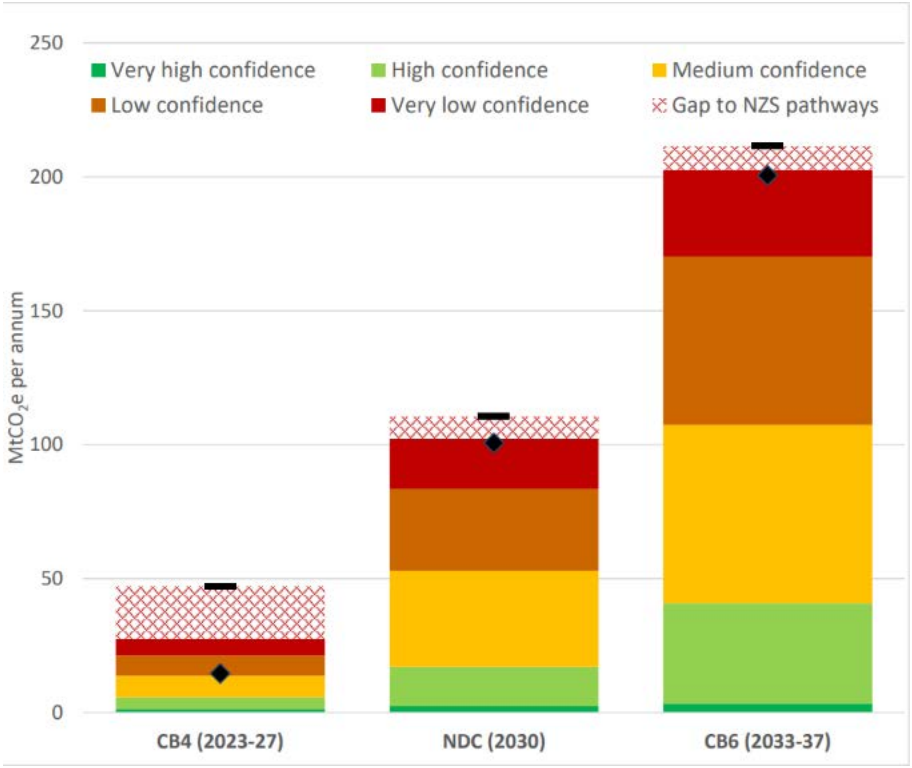
13. The introductory brief described the legally binding target to reduce greenhouse gas emissions to net zero by 2050. It explained that to ensure a phased and realistic transition towards that target, a system of carbon budgets in five-year blocks had been established. The Secretary of State was informed of his legal duties and was told about the outcome of the judicial review challenge: *FoE (No. 1)*. The Secretary of State was told that:

> "Last year the government published the Net Zero Strategy, which set out a detailed plan for achieving our emissions targets up to 2037, and a vision for a market-led, technology-driven transition with emphasis on growth, private investment, and going with the grain of consumer choice. Our most recent projections from August show **we have sufficient savings to meet carbon budgets and the NDC if all planned policies are delivered in full, but there are increasing delivery risks and little or no headroom to later targets** (Annex C). Further developments since August may have affected this position. We will provide further advice on the overall carbon picture."

(Emphasis in the original).

14. It was explained to the Secretary of State that the analysis on progress against carbon budgets had been subject to an assurance process. There were said to be "significant uncertainties" in the analysis. The Secretary of State was told that: "Policy design and delivery can affect savings, represented by 'delivery confidence' reflecting judgments of officials. Emission savings are also conditional on projections of GDP, population, fuel prices, and technology costs and availability."

15. At Annex C to the introductory brief, the Secretary of State was provided with a bar chart which showed the projected emissions savings from planned policies across all sectors of the economy, with carbon savings designated by level of delivery confidence, based on data as of August 2022. The bar chart related to quantified proposals and policies and did not take into account the effects of unquantified proposals and policies, or other factors that may improve or reduce the prospects of meeting the carbon budgets. The bar chart shows the following:



16. The bar chart - illustrated in colours: including red, amber and green - showed that just over 50% of the emissions savings that were required to meet CB6 were designated as "Very high confidence", "High confidence" or "Medium confidence". The remainder were rated as either "Low confidence" or "Very low confidence". The text accompanying the chart stated that "projected carbon savings would be sufficient to meet these carbon targets *if all planned policies were delivered in full*" (emphasis added).

17. A sectoral summary was also provided to the Secretary of State. This set out a description of the progress to date in each sector, as well as the key policies in development with the largest carbon impact. For the Industry sector, for example, it was stated that "Manufacturing and construction account for c.14% of UK emissions.

Government has increased ambition for over the 2030s, but we are starting to see slips in delivery which risk meeting those commitments in full."

18. A further submission was sent to the Secretary of State on 30th November 2022. This included the following advice:

> "There are also likely to be challenges in showing we are making sufficient emission savings towards our carbon budgets. Latest projections suggest you have sufficient savings to meet carbon budgets if all planned policies and proposals are delivered in full (Net Zero Strategy policies and subsequent policies changes such as BESS). But there are significant delivery risks and little or no headroom particularly for later carbon budgets. We also expect this position to worsen over the coming months with likely policy announcements that, while helpful in showing we are progressing on our plans, are not achieving the emission savings we originally expected, for example in CCUS, ZEV mandate and Environmental Land Management Schemes.
>
> At the time of the Net Zero Strategy, we had quantifiably secured 95% of the savings needed to reach carbon budget 6, which included many early-stage policies. We think this could slip closer to 85% due to anticipated changes in policy ambition, technical updates and delivery risk and delays. Whilst some of this is to be expected as we move from strategy to implementation, it highlights the dependencies on upcoming decisions. We will need to address the reduction in quantifiable savings in our response to the Court Order".

(Emphasis added).

19. The next briefing to the Secretary of State about the proposals and policies and the proposed CBDP was sent in early March 2023. In the meantime, officials had been reviewing the proposals and policies, assessing the risks to delivery and identifying the mitigating measures that could be put in place. The details of carbon savings by policy were collected through a mechanism known as a 'Policy Commission', which took place quarterly. For the March Policy Commission, officials were set a deadline to submit returns by 25th January 2023. They were asked to provide information on additional policies and proposals which could be 'quantified', as well as those which could be 'unquantified'. The former were to be preferred on the basis that "a greater reliance on unquantified policies carries increased legal risk".

20. With respect to delivery risks, it was explained that the judgment of Holgate J in *FoE (No. 1)* was clear that the Secretary of State "needs sufficient information on delivery risks to make an informed judgment about whether carbon budgets can be met. This must include qualitative explanation of risks and planned mitigations, in addition to Red Amber Green ratings, building on existing work on monitoring delivery risks."

21. Returns were to be provided on various templates. These needed to be cleared by members of the Senior Civil Service within the relevant government departments that were providing information. One of the tabs on the relevant template was to be used to

capture new information on policy-level milestones and RAG (that is, Red, Amber, Green) ratings to reflect progress against these. It was explained that "Collecting this information will allow the NZS Directorate to continue to track progress across the NZS policy portfolio and help identify where we can work across government to maintain ambition and mitigate risks". With respect to the RAG ratings, it was stated that:

> "This section captures a policy level assessment of the confidence of delivering the carbon savings to the same level of ambition and timelines assumed by the projected carbon savings. (n.b. if a policy does not have projected carbon savings then please provide the RAG rating on the basis of delivering the policy to the expected timelines assumed in your policy portfolio). Please refer to table 3 below for guidance on selecting RAG ratings.
>
> To meet the Court Judgment, we require **additional narrative detail** in this commission to support your carbon delivery confidence ratings at policy level. For all policies, this should:
>
> • Clearly set out any barriers to delivery i.e. technical, political, funding, resourcing, etc.
>
> • Provide an estimate of the impact these barriers have in the delivery of the projected savings, focusing on the impact on timing of delivery and effect on total carbon emissions delivered.
>
> **If your policy is rated Red, Amber/Red** or Amber this should also:
>
> • Explain why Ministers can still treat these projected savings as deliverable by setting out detail on a timebound 'return to Green plan' or mitigating actions and the expected impact on projected savings and delivery confidence. The lower the confidence rating and the higher the projected carbon savings the more detail is required.
>
> This is important because the Minister will need to have confidence that the package of policies and proposals will enable carbon budgets to be met, and how delivery risks will be mitigated."

(Emphasis added).

22. Examples were given as to how a Red, Amber-Red, or Amber Policy could be described:

> "Biomass (for illustrative purposes only, not accurate) Clearly set out the barriers to delivery: No funding was secured at SR21.

> Provide an estimate of the impact these barriers have in the delivery of the projected savings: This means that all savings have been pushed back, and the longer term for Biomass savings are more at risk. Delivering the projected savings is still possible and is dependent on future demand for domestically sourced biomass and the outcome of the Biomass Strategy.
>
> Explain why Ministers can still treat these projected savings as deliverable/set out a timebound 'return to green' plan: Continued engagement with BEIS through Biomass Strategy process required to obtain agreement on demand for biomass, and therefore the upscaling required. Further work is also required to test the feasibility of the biomass deployment metrics that underpin these figures. Provided these mitigations are delivered within X timeframe, delivery of these savings projections, although difficult remain possible to achieve".

23. The RAG ratings themselves were described as follows:

> "Green: Very high degree of confidence. Successful delivery of projected carbon emission savings . . . appears likely (**very high degree of confidence**) and there are no major outstanding issues that at this stage appear to threaten delivery of carbon targets.
>
> Amber/Green: High degree of confidence. Successful delivery of projected carbon emission savings . . . appears probable (**high degree of confidence**); however, there are potential risks. Continual monitoring required to ensure this does not materialise into wider issues threatening overall delivery of projected carbon savings.
>
> Amber: Medium degree of confidence. Successful delivery of projected carbon emission savings . . . appears feasible (**medium degree of confidence**) significant issues already exist, requiring attention. These appear resolvable at this stage and if addressed promptly, should not present … under-delivery of projected carbon savings.
>
> Amber: Low degree of confidence. Successful delivery of projected carbon emission savings is in doubt (**low degree of confidence**), with major risks or issues apparent, or the policy is at an early stage of development with a need for careful monitoring that we are achieving sufficient progress. Urgent action is needed to ensure these are addressed, but this may still result in under-delivery of carbon savings without mitigating actions.
>
> Red: Very low degree of confidence. Successful delivery of projected carbon emission savings appears potentially unachievable (**very low degree of confidence**). There are major issues, which do not currently appear manageable or resolvable,

> or the policy is at an early stage of development without clarity on how sufficient progress will be made. Significant action will be required to resolve these issues now or in the future, and without this there will be under-delivery of carbon savings, with a need for overall viability to be reassessed."

(Emphasis in original).

24. Responses were provided by various government departments. For the present proceedings the Secretary of State disclosed returns from one department: the Department for Environment, Food and Rural Affairs ("DEFRA"). This included a note dated January 2023, headed "Net Zero Pathway Commission Return". Reference was made in the note to the contribution from the Devolved Administrations (referred to as "DAs").

25. In the note, it was stated that the savings returned by DEFRA included a mix of UK-wide and England savings, and the distribution of savings had been calculated using "a range of bespoke scalers with no bespoke engagement with the DAs on whether and how they will be delivering their portions of the allotted savings." It was stated that the Devolved Administrations may choose to implement different policies across environment and farming sectors. It was stated that "Currently DEFRA is not resourced to track or monitor DAs' contributions to UK wide savings and thus the numbers provided should not be treated as either accurate or reliable. We welcome further guidance from BEIS on their strategy for assuring DA contributions across the whole economy."

26. The DEFRA return also stated that the department calculated a total gap of 13% between their Net Zero Strategy effort share (that is, the share of emissions which each relevant government department agreed that it would aim to contribute to the overall target) and the current quantified list for England in CB6, and a gap of 13% for the UK. 63% of the gap at UK level was accounted for by changes to their policy projections. DEFRA also stated that their emissions savings projections generally represented:

> "maximum feasible savings rather than a likely scenario. Delivery confidence is low for many of these emissions savings and scientific uncertainty limits precision. Key assumptions underpinning these numbers that are subject to high levels of uncertainty include land area that will be available for peatland restoration and afforestation; policy uptake rates by businesses, land managers and farmers; and sector-level economic growth projections."

27. In February 2023, Sector Leads were written to, asking them to provide a line-by-line delivery risk summary for the section 13 advice. It was explained that:

> "for the section 13 advice we need to explain the delivery risk of each individual policy in a way that most easily allows DESNZ SoS to understand the delivery risk of the package, at both a collective and individual policy level. This is necessary to ensure DESNZ SoS has the appropriate level of detail to make a rational

> decision on whether the package of policies and proposals is sufficient to enable carbon budgets to be met."

28. Sector Leads were commissioned, therefore, to draft this for their sector:

> "We need you to describe and explain the delivery risk for each individual policy and proposal, and then explain the mitigation we are taking to address this delivery risk and why that gives us the necessary confidence in delivery of our policies."

29. A guidance sheet was provided to assist with this process. The purpose of this guidance was explained as follows*:*

> "Describe and explain the delivery risk for each individual policy and proposal, and then explain the mitigation we are taking to address this delivery risk and why that gives us the necessary confidence in delivery of our policies. We are not seeking to 'categorise' policies in a uniform way. Instead we want to explain the delivery risk of each individual policy in a way that most easily allows DESNZ SoS to understand the delivery risk of the package at both a collective and individual policy level".

30. Sector Leads were given guidance as to how to set out the explanation for the delivery risks by a series of prompts. These would, it was hoped, enable the Secretary of State to understand the delivery risk when looking at the package of policies and proposals as a whole. The prompts were as follows:

> "For policies that are labelled green or green-amber in the commission returns, the new descriptions could start: 'We have high certainty in the delivery of this policy and confidence/certainty that the policy can be its associated carbon savings'. A single bespoke line should then be added to explain why.
>
> For policies that are labelled amber in the commission returns, please begin by describing the actual risks faced, with a couple of short lines. This could then be finished with a summary line such as 'These risks require attention, however appear resolvable based on the actions already underway.'
>
> For policies that are labelled amber-red or red in the commission returns, whose rating is not due to uncertainty, but real and present risks, please begin by describing the actual risks faced (with a couple of short lines) and then finishing with a summary sentence, such as: If not mitigated, these risks could materially affect the successful delivery of the savings in full associated with the policy.
>
> For policies that are labelled amber-red or red in the commission returns, whose rating is due to uncertainty, please begin by

> stating 'Uncertain delivery risk', and then list as many of the below reasons as applicable (and any others that may apply).
>
> a. Funding is subject to a future spending review round and therefore cannot be confirmed now, creating inevitable uncertainty.
>
> b. The policy has yet to be consulted on.
>
> c. The policy uses a technology that is nascent, creating inherent uncertainties and risk
>
> d. The policy relies on another part of the NZ system/another NZ policy that is also not completed
>
> e. The policy requires additional research to provide greater clarity on savings potential and to inform further policy development.
>
> f. The policy requires further appraisal of options"

31. With respect to "Delivery risks: mitigation", the guidance was as follows:

> "For green policies, leave blank
>
> For all amber and reds: please include short summaries of the Template 'route to green' data, with added line on why this gives us confidence/certainty that the policy can be delivered and deliver the associated carbon savings."

32. In his evidence, Mr Thompson stated that he was aware that one of the consequences of the requests for narrative text was that some specific risks that had been identified in the returns to the earlier December Commission might not be included in that text; this was a likely consequence of requesting that the information be presented in a more concise and digestible way. Mr Thompson explained that he did not consider that this was problematic, especially as not all of the risks identified in the returns to the December commission were material from a net zero perspective.

33. On 24th March 2023, a draft submission was sent by Mr Thompson to the Secretary of State on proposals and policies to enable the carbon budgets to be met. A further, slightly updated, version of the draft was sent on 27th March 2023.

34. The 27th March submission stated that it "sets out the current package of proposals and policies that, in our view, enable Carbon Budgets 4, 5 and 6 . . . to be met". The Secretary of State was told that he was required to make a judgment and be satisfied that this package will enable those Carbon Budgets to be met. He was also asked to approve the level of detail to be published in the CBDP, as well as a draft version of the CBDP.

35. The submission included the following:

> "Background

5. To meet the Court Order and fulfil your statutory duties under the Climate Change Act 2008, you have a duty to prepare a package of proposals and policies that you consider will enable Carbon Budgets to be met, with a view to meeting the 2050 net zero target.

6. When making this decision, you should consider the quantified and unquantified policies and proposals, particularly timescales and delivery risks (Table 2 of Annex B). As there is a gap between the total quantified emissions savings of our proposals and policies and what is required to meet Carbon Budget 6, you must also consider whether and how that shortfall will be made up (Annex B). Finally, you must take into account wider matters in connection with Carbon Budgets under section 10 of the CCA, the contribution of these proposals and policies to sustainable development . . .

Quantified savings to meet Carbon Budgets

7. Any emissions savings forecast contains inherent uncertainty due to the long-term nature of a 15 year transition and the complexity of the net zero system. Broader macroeconomic factors will determine the exact quantity of emissions savings required to meet Carbon Budgets meaning that we will continue to review and adapt the proposals and policies in this package, especially those at earlier stages of development.

8. Based on current projections, our view is that the package of proposals and policies that we can quantify will deliver sufficient quantified savings to meet CB4 and CB5, and 97% of CB6. This incorporates recent Budget announcements, comments from [redacted], and the response to Skidmore recommendations [this was a reference to the independent review of the Government's approach to delivering its net zero target, led by a former Minister for Energy and Clean Growth, which had reported its findings on 13th January 2023] . . .

9. The Technical Annex (Annex D) sets out the methodology for the quantification of policies and proposals. <u>You should note that this quantification relies on the package of proposals and Policies being delivered in full. Our advice is that it is reasonable to expect this level of ambition – having regard to delivery risk (see Annex B) and the wider context.</u>

Considerations in making up the shortfall (further detail in Annex B)

10.You must be satisfied that further, as yet, unquantified emissions savings can be made in CB6 to judge that the package will enable carbon budgets to be met. We are confident that further savings can be delivered through proposals and policies

> that will deliver emissions savings but cannot currently be quantified, e.g. by early-stage proposals and policies where the evidence is still being assessed. See Table 3 of Appendix B (Annex B).
>
> 11.The package is further strengthened through the inclusion of a range of cross-cutting proposals and policies which do not directly deliver emissions savings but enable and support our quantified proposals and policies – whether through leveraging the investment needed for technological growth or delivering the green jobs needed for the transition. This supports with de-risking delivery across the package. We can also expect that some of these areas could lead to additional carbon savings: for example our package of policies to drive innovation is likely to lead to new low-carbon technologies which may accelerate the transition.
>
> 12.Wider factors may also impact our ability to meet carbon budgets. Areas of uncertainty in our modelled projections could lead to delivery of emissions savings being faster or slower than expected. The package also does not fully reflect emissions savings from policies developed outside central government: such as in local councils and Devolved Administrations, nor does it reflect potential future shifts in consumer behaviour (see Annex B).
>
> Delivery risk and further considerations (further detail in Annex B)
>
> 13. To assess whether the proposals and policies are sufficient, you must consider the risks to delivery of the emissions savings that each of the proposals and policies carries, see Tables 2 and 3 of Appendix B (Annex B). We have included summaries of key delivery risks for each sector to aid your understanding in Appendix D (Annex B). A number of proposals and policies across sectors currently carry high delivery risk. This is expected given that many of these will be implemented over the next 15 years. We expect delivery confidence for many of these proposals and policies to improve as they are implemented (demonstrated by the high delivery confidence attached to significant savings already in delivery phase) and have suggested potential mitigations to improve delivery confidence outlined in Tables 2 and 3 of Appendix B (Annex B). …"

(Emphasis in original).

36. In his witness statement, Mr Thompson has sought to explain the underlined text at paragraph 9 of the submission. Mr Thompson stated that the underlined text was not intended to convey to the Secretary of State that he should conclude or assume, or otherwise proceed on the basis, that each and every proposal and policy would be delivered in full. Rather, the text was intended to make the point that the total volume

of quantified emissions savings (i.e. those projected to be achieved by the quantified proposals and policies) had been calculated on the basis that the package of proposals and policies would be delivered in full, i.e. the total figure represented the sum of all of the individual quantified emissions savings. Some of the proposals and policies might under-deliver, just as some might over-deliver and this was reflected in the overall sum.

37. In his witness statement, Mr Thompson also stated that quantifying and weighing risk for each and every policy, differentiating the relative risk of every policy proportionately, adjusting for the degree of systemic risk posed by each policy as well as each policy's upside potential that may deliver higher emission savings than planned, would be extraordinary in its complexity and in the additional resource that it would require.

38. A read-out of the Secretary of State's decision was sent on 28th March 2023. This stated the following:

> "He was content with the level of detail set out and, considering the legal advice, feels that it allows us to meet our obligations
>
> He feels he has sufficient confidence that the policies included in our energy and emissions projections are expected to deliver over 100% of the carbon savings needed for CB4 and >40% of the savings needed for CB6
>
> He has noted that quantified proposals would deliver 94% of the nationally determined contribution and 97% of CB6, and comments that this is very good to see
>
> He has considered the unquantified proposals and concludes that they should be capable of delivering significant further savings, with the usual understanding that potential and early stage proposals carry delivery risk
>
> He has further noted that the package does not fully reflect emissions savings from policies developed outside government, particularly local government
>
> He considered the other matters outlined in annexes A-F, including the equalities impact assessment and the risks explanations and mitigations
>
> Overall, he agreed with the advice that the package will enable carbon budgets 4-6 to be met".

39. A further submission was sent to the Secretary of State later on 28th March 2023. This contained some amendments, and asked the Secretary of State to confirm his earlier judgment that he was satisfied that the package of proposals and policies as a whole will enable carbon budgets through to CB6 to be met. The Secretary of State was also asked to approve the final version of the CBDP and associated Technical Annex to be laid before Parliament.

40. The further submission explained as part of the background that:

> "Since the submission of that advice, a number of changes have been incorporated into the package of proposals and policies following final analytical assurance and changes due to final cross government agreements. These are outlined at Annex C, alongside an assessment of their overall impact on the package of proposals and policies. These are largely naming changes and do not impact the quantified position against carbon budgets, nor, taking into account unquantified policies and wider factors, the ability to meet carbon budgets, as outlined in the advice of 27 March."

41. Under a heading "Confirming your decision", it was stated that:

> "We have continued to undertake analytical assurance across the full package of proposals and policies. We had prioritised your legal obligation under the CCA 2008 to prepare a package of proposals and policies that will enable carbon budgets through to CB6 to be met. This process has confirmed that the proposals and policies that we can quantify will deliver sufficient quantified savings to meet CB4 and CB5, and 97% of CB6, and therefore does not change our recommendation in the advice of 27 March."

42. With respect to the CBDP, the submission of 28th March 2023 stated as follows:

> "Level of detail included in the Carbon Budget Delivery Plan
>
> 9. We plan to lay the CBDP and Technical Annex before Parliament on 30 March. To meet the Court order and to fulfil your statutory duties under section 14 of the Climate Change Act 2008 (CCA), these documents set out:
>
> • The proposals and policies you have concluded enable carbon budgets to be met (see Tables 5 and 6 of the CBDP);
>
> • The timescales over which those proposals and policies are expected to take effect (see Tables 5 and 6 of the CBDP);
>
> • An explanation of how the proposals and policies set out in this report affect different sectors of the economy (see pp. 204-210 of the CBDP);
>
> • The implications of the proposals and policies as regards the crediting of carbon units to the net UK carbon account for each budgetary period covered by the report (see Section 1 of the Technical Annex).
>
> 10.The level of detail we recommend publishing in the CBDP reflects its function of promoting public transparency and

> enabling Parliamentary scrutiny of the Government's climate measures.
>
> 11.You agreed to publish sectoral summaries of delivery risk in the CBDP, rather than outlining delivery risks of each individual proposal or policy (see pp.190-200). This is because we do not consider it appropriate or necessary to set out information about specific delivery risks for each of the proposals and policies as we have for you in the advice of 27 March. That was to assist you to look at the contribution of each measure and associated delivery risk to make the judgement that the package of proposals and policies will enable carbon budgets 4, 5 and 6 (CB4, CB5 and CB6) to be met.
>
> . . .
>
> 13. The report relates to proposals and policies of Devolved Administrations and was prepared in consultation with those authorities as required by the CCA 2008. A copy of this report will be shared with those authorities following your approval of the CBDP."

43. Annex B to the Section 13 advice to the Secretary of State set out the various quantified and unquantified proposals and policies that would contribute towards the emissions savings required to meet the Carbon Budgets along with their delivery risks, as well as the consideration of factors under section 10 of the CCA 2008 and Sustainable Development factors.

44. Annex B stated that "Based on current projections, the package of proposals and policies that we can quantify will deliver sufficient quantified savings to meet CB4, significantly overperform for CB5 by 81Mt of savings, and we have quantified 97% of the emissions savings that will enable CB6 to be met". The conclusion set out in Annex B was that:

> "Our overall assessment, taking account of the uncertainty in wider trends and factors, is that the unquantified proposals and policies will enable Carbon Budget 6 to be met when considered alongside the quantified proposals and policies set out in Table 2, Appendix."

45. With respect to sustainable development, the submission contained a table which stated that "[t]here are both positive and negative capital impacts associated with emissions reductions policies but the overall contribution to sustainable development is likely positive". The table cross-referred the Secretary of State to the "natural capital" section of Appendix E to the section 13 advice and explained that other aspects of sustainable development were addressed in the sections of Appendix E addressing economic, fiscal and social factors. The introduction to that section stated that:

> "Sustainable development concerns the stability and prosperity of society, and its capacity to provide for future generations. Sustainable development also incorporates social, economic, and

> environmental dimensions of sustainability. The Climate Change Act requires that the proposals and policies we put in place to enable our carbon budgets to be met, taken as a whole, must be such as to contribute to sustainable development. The main outcomes of the proposals and policies in this report will have a positive impact on the UK's contribution to the global Sustainable Development Goals, in particular goal 7, targeting affordable and clean energy, and goal 13, targeting climate action. In this section, we set out how this package of policies and proposals will contribute to sustainable development. The social considerations section considers the impact on different social groups of climate policies and the net zero transition, and what mitigation the government is putting place, where necessary. The Natural Capital section considers the impact on the continuation and improvement of environmental functions, and stability and renewal of natural assets. This is most relevant to the Sustainable Development Goals 6, 14 and 15, which target protection of water and life on land and marine habitats."

46. Under the heading "social considerations", there was reference to energy prices, the transition from fossil fuels, energy consumption and fuel poverty. Under the heading "natural capital", the text explained that natural capital refers to "those elements of the natural environment which provide valuable goods and services to people". The text cautioned that further assessment of the implications for natural capital of proposals and policies would be required, but summarised the position as follows:

> "This package of proposals and policies is expected to have a significant net benefit to natural capital and thus sustainable development. Moving away from i) fossil fuels towards a greater share of renewable energy, ii) petrol and diesel cars towards lower-emissions alternatives such as electric vehicles iii) gas boilers to lower carbon heating sources and iv) high carbon land uses towards afforestation and other land-based carbon dioxide removals, are just a few examples that will provide significant benefits. However, some negative impacts to some natural capital stocks are likely to arise and impacts will likely be specific and localised. The impact from the significant land use change required to deliver proposals in this report and meet net zero will depend on how and where this change is enacted, with a systemic and spatial approach more likely to deliver on net zero while providing natural capital benefits. Further in-depth appraisal of the natural capital impacts of specific policies and policy mixes will need to be undertaken as proposals are developed following this report. This will be done through the normal channels of Impact Assessments and Business Cases, to ensure trade-offs are managed and impacts mitigated."

The text went on to address specific issues such as air quality, recreation, biodiversity, floods, the availability of water and water quality, raw materials, rare metals, and land use.

47. Annex B contained three tables: Table 1 (Policies captured in the Energy and Emissions Projections); Table 2 (Quantified proposals and policies); Table 3 (Unquantified proposals and policies). In Table 2, the Power sector proposals and policies were grouped together.

48. During the course of oral argument, I was referred to a number of specific proposals and policies by the parties. One example was number 159 in Table 2 of Annex B. The policy name was "Analyse manure prior to application to match crop requirements". The policy description was:

> "Analysing the nitrogen content of slurry, prior to application on crops and grassland, can improve nutrient management, ensuring nitrogen applications do not exceed crop requirements to minimise emissions of nitrous oxide (N2O). Increasing industry adoption is expected as part of a market-led take up of precision farming that is already occurring. Government will work with industry to identify the most appropriate mechanisms for change. We expect the Sustainable Farming Incentive (nutrient management standard) to contribute indirectly to this outcome."

The average annualised savings in CB6 was stated to be 0.00096 Mt CO_2e, and the timescale from which the policy takes effect was 2022. The delivery risks were explained as:

> "Delivery risk uncertain. Requires further analysis of actions under SFI [Sustainable Farming Incentive] to help deliver this".

49. The delivery risks mitigation was described as:

> "Identify whether the actions encouraged under the SFI (particular advisor visits) will partly mitigate delivery risks".

50. On 29th March 2023, a read-out from the Secretary of State's private office confirmed that the Secretary of State had fully considered the documents in considerable detail and was happy to confirm his decision.

51. In his witness statement, Mr Thompson discusses RAG ratings, and has sought to explain why they were not provided to the Secretary of State in the March submissions. Mr Wolfe KC, for Friends of the Earth, contended that Mr Thompson's explanation was not admissible as it amounts to *ex post facto* evidence, contrary to the principle in *R*(*United Trade Action Group Ltd) v Transport for London* [2021] EWCA Civ 1197, at §125. It was argued that Mr Thompson's evidence is not consistent with the contemporaneous evidence, and could be self-serving. I disagree.

52. It seems to me what Mr Thompson was seeking to do in his witness statement was to explain why he did not consider it appropriate to provide RAG ratings to the Secretary of State in advance of the March 2023 decision. This was not an *ex post facto* attempt to elaborate upon or elucidate reasons for a decision that was under challenge, which is generally impermissible as the Court of Appeal pointed out in *United Trade Action Group Ltd.* Rather, Mr Thompson was seeking to explain why he took a particular step in circumstances where that approach has been called into question in these

proceedings; he was not seeking to expand or elaborate upon his reasons for a public law decision that was under challenge. Furthermore, it does not seem to me that the explanation given by Mr Thompson is inconsistent with the contemporaneous evidence. Indeed, there is no contemporaneous evidence making it clear that the Secretary of State would be provided with RAG ratings. The contemporaneous evidence shows that RAG ratings were provided to the Secretary of State in November 2022, and at a later point Mr Thompson requested that a narrative explanation of risk should be provided. The contemporaneous evidence does not provide any clues for why the shift was made. To understand why that shift was made, it is entirely appropriate for Mr Thompson to seek to explain the factors involved.

53. In his witness statement, Mr Thompson explained that RAG ratings are a useful tool to convey information to a Secretary of State who is new to a brief or has little or no prior knowledge of the policy area and the complexities and challenges involved. In his view, they are not a useful way of conveying information to a Minister who is more experienced in the area and has a greater grasp of the complexities and challenges. As a result, Mr Thompson explained that it was his view (and that of other senior colleagues within the department) that RAG ratings were not an effective tool for the Secretary of State to have available to him when making an assessment as to whether a package of proposals and policies will enable the carbon budgets to be met, and could be misleading. Mr Thompson stated that:

> "RAG ratings necessarily group types of risks that are dissimilar in nature: a policy may be categorised as "red" for a range of reasons, such as because it is at an early stage of development, it relies on public funding in future Spending Reviews, it relies on further research and development, it requires consultation, or it relies on the adoption of a new technology. The Secretary of State might decide, however, that these different types of risk pose very different levels of risk.
>
> The RAG ratings do not take into account of the systemic relationships between different proposals and policies. The RAG ratings provided by Sector Teams do not differentiate between the risk attached to delivery of a specific policy and the wider risk posed to the delivery of emissions savings more generally.
>
> The proposals and policies vary significantly in their scope and complexity. Risk assessments of major infrastructure programmes will usually be a composite of tens of individual risks or more, and aggregating those risks into one summary category of risk is challenging. Other policies may be discrete and are either less complex or involve different types of risk.
>
> The fact that a particular proposal or policy might be given a "red" RAG rating by a Sector Team does not mean that it will not be delivered, or that it will not deliver the emissions savings attributed to it."

54. Mr Thompson also pointed out that by its very nature a RAG rating (or its equivalent) focuses on the potential negatives relating to a proposal or policy and does not account

for potential positives. In his view, it was important that Ministers consider a package of proposals as a whole, and that includes potential upsides as well as potential downsides. Instead of RAG ratings, Mr Thompson considered that the Secretary of State should be provided with narrative descriptions of delivery risk, together with sectoral summaries of risk.

55. With respect to the contents of the CBDP, Mr Thompson explained that the decision as to the contents of the plan was for the Secretary of State to take. The broad consensus amongst senior officials was to recommend to the Secretary of State that the narrative descriptions of risk to individual policies and proposals should not be included in the CBDP. The reasons for this recommendation were that (i) section 14 of the CCA of 2008 did not impose a legal requirement that descriptions of risk to individual policies and proposals should be included; (ii) to publish assessments of risk to delivery of such a varied range of proposals and policies, particularly those at an early stage of development, may compromise the space that is required to ensure that policy is developed (and risk is identified and addressed) to an appropriate level before it is subjected to public scrutiny. Mr Thompson expressed the view that there was a real risk that Sector Teams would be more guarded in their assessments of risk if they knew that they would be published; publication of an assessment of risk could itself create risk; and the Secretary of State is familiar with the context and will have background information that would not be available to, for example, a member of the public; and (iii) summaries of risk at a sectoral level were a more meaningful and helpful way of conveying risk, as they enable the identification of cross-cutting risks that potentially pose material risks to the emissions savings that the package of proposals and policies are intended to deliver.

56. In his witness statement, Mr Thompson also discussed the Devolved Administrations. In certain areas, in particular agriculture, land use, waste and building sectors, he explained that policy is devolved to the administrations in Wales, Scotland and Northern Ireland. Each of the Devolved Administrations has committed to achieving net zero, and their proposals and policies can contribute to the United Kingdom's emissions savings.

57. The Scottish Government has committed to achieving net zero by 2045 and has set interim binding targets of reductions in emissions of 75% by 2030 and 90% by 2040. The Scottish Government published its latest Climate Change Plan, which covers the period 2018 to 2032, in 2020. This plan covers all sectors of the economy, mirroring those set out in the CBDP, and outlines actions that the Scottish Government intends to take in order to make to meet its targets. They include actions to improve energy efficiency and introduce low carbon heating to buildings, and to restore peatlands, support afforestation and reduce emissions in agriculture.

58. The Welsh Government has committed to achieving net zero by 2050 and to achieving reductions in emissions of 63% by 2030 and of 89% by 2040. It has published *Net Zero Wales*, which is the emissions reduction plan for Wales for CB2, covering the period 2021 to 2025. The plan is cross-economy, and includes actions for the electricity and heat generation sectors, transport, residential buildings, industry, business and agriculture.

59. The Northern Irish Executive has committed to achieving net zero by 2050, with an interim target of at least a 48% net reduction in emissions by 2030. Sectoral targets

have also been set, including targets for 2030 of obtaining at least 80% of electricity consumption from renewable sources. The draft Green Growth Strategy sets out the Northern Ireland's vision for 2050, and a Climate Action Plan is being developed.

60. The specific information provided by the Devolved Administrations was limited. The Welsh Government shared what had already been published in *Net Zero Wales*. The Welsh Government was due to begin work to develop proposals and policies for the period 2025 to 2030. The Northern Irish Department of Agriculture provided information relating to 48 different proposals and policies, with a brief description of each of these and further information on the relevant sector and implementation status. The Scottish Government provided information relating to 228 "key emissions-reducing policies".

61. Mr Thompson acknowledged that the responses provided by the Devolved Administrations did not provide much detail. There was no quantification of projected emissions savings attributable to their proposals or policies. This was not unexpected as there was much less data of that kind available at the devolved level. Nevertheless, as the Devolved Administrations had committed to taking action to achieve net zero, it was considered that they would need to take further action to meet their commitments. It was decided that the best way of taking this into account was to "scale up" the emissions savings that would be delivered in the relevant areas. Mr Thompson considered that it was reasonable to use this approach, based on the assumption that the proposals and policies would have similar effects to those adopted by the United Kingdom government, that similar levels of uptake would be achieved and the emissions savings results would be similar. In total, 58 proposals and policies were scaled to provide an estimate for United Kingdom-wide emissions savings: about 5% of the total emissions savings. Mr Thompson considered that this was a conservative approach, as there were some sectors where no scaling was undertaken, and also the Devolved Administrations might also take action which achieves greater emissions savings than reflected in the scaling. In the final presentation of materials to the Secretary of State, the scaled contributions in the agriculture and land use, land use change and forestry sector and the waste sector were presented separately as quantified proposals and policies.

62. In a witness statement for the present proceedings, Paul Bailey, the Deputy Director for Strategic Energy and Climate Analysis in the Department for Energy Security and Net Zero has sought to explain the modelling process that was undertaken. He states that the modelled emissions savings represent their "best estimate" of the real-world outcomes and associated emissions savings that would be achieved by the proposals and policies. Where policies are in development, or still to be developed, modelling shows the emission savings that could be achieved with suitable policy action. Mr Bailey explained the reasons why proposals and policies – of which there were 143 – were unquantified: they may deliver indirect emission savings, via changes in social behaviour or technology uptake; analysis has not been completed in time and so could not be modelled; the evidence-base is not strong enough to estimate resulting emission savings robustly; and they include measures that do not lead to individual abatement but are integral to the delivery of quantified proposals and policies(referred to as "enablers").

63. Friends of the Earth, one of the Claimants, has produced for these proceedings an analysis of the risk tables that had been provided to the Secretary of State as an annex

to the submission (this is set out in the witness statement of Michael Childs, the Head of Science, Policy and Research). It is pointed out that 60 of the 191 quantified proposals and policies are expressed to be "uncertain"; and this represents at least 766 Mt CO_2e, or 47% of the total CB4-6 savings. For 65 of the 191 quantified proposals and policies, whilst information is included on delivery risks, contingencies, dependencies, barriers or similar, no information is included on either the degree of delivery risk (high/low) or on the confidence of the assessment (certain/uncertain). This represents at least 683 Mt CO_2e, or 42% of the total CB4-6 savings. For 25 of the 191 quantified proposals and policies, no information is included on either what the delivery risks there may be, or on the degree of delivery risk. This represents 27 Mt CO_2e, 2% of the total CB4-6 savings.

64. The delivery risks for 6 of the 191 policies are expressed as being significant, high or challenging. Total CB4-6 savings from these policies are calculated at to be least 18 Mt CO_2e (approximately 1% of the total). For the remaining 35 of the 191 policies, the delivery risks are expressed in terms of having high confidence or certainty. Total CB4-6 savings from these policies are calculated to be at least 135 Mt CO_2e (approximately 8% of the total).

65. Lord Deben, a former Secretary of State for the Environment, and the Chairman of the Climate Change Committee ("the CCC") from 2012 to 2023, has provided a witness statement on behalf of Friends of the Earth. Lord Deben explained that the CCC's Progress Report to Parliament was published on 28th June 2023. This report concluded that the CCC was even less convinced that the Government had a programme that would enable net zero to be achieved by 2050 than it had been previously. Whereas previously it had been possible for the CCC to give certain plans and proposals in the Net Zero Strategy the benefit of the doubt, this could not be done for the CBDP. The greater detail of the CBDP had removed possibilities that more general language had included.

66. Lord Deben explained that the government's programme for achieving net zero depends on assumptions, none of which can ever be 100% safe. However, the first assumption in the CBDP is that everything will go exactly as planned, and no contingency had been built in. The CBDP depends upon significant improvements in technology being realised, and yet it is not right to assume that such improvements will always be achieved within the necessary timeframe for achieving net zero targets or indeed achieved at all. Lord Deben also pointed out that there is also very little said about the timing for the delivery of policies, or how they will be achieved. This is important because there has been a history of significant delays in delivery.

67. Lord Deben commented on the absence of RAG ratings for each proposal and policy. He said that this was "surprising to me. Had the Secretary of State been provided with this information it is quite clear to me that he could not have formed a view that the policies and proposals will enable the statutory targets to be met when that depended on all policies and proposals being delivered in full - it being clear that the DEFRA itself had no confidence in that conclusion."

68. On 30th March 2023, the Secretary of State laid the CBDP before Parliament. The CBDP stated that it was being published to inform Parliament and the public of the Government's proposals and policies to enable carbon budgets to be met. The CBDP set out the policies captured in the EEP; it listed the various 'Quantified proposals and policies', and identified the emissions savings that they were each predicted to make,

and the timescale from which the policy would take effect; and it also set out the 'Unquantified proposals and policies' that were expected to deliver further emissions savings. The CBDP also provided "Sectoral summaries of delivery confidence": this set out the "Risks and mitigation" for each of the sectors. The CBDP was accompanied by a Technical Annex, which provided an overview of the methodological approach taken to the analysis in the CBDP.

The Climate Change Act 2008

69. The statutory framework is set out in considerable detail in *FoE (No. 1)* at §§28-55, and I agree with Holgate J's lucid exposition of the structure of the legislation. In the instant case, of especial relevance are sections 13 and 14 of the CCA 2008, which I set out in full.

70. Section 13 of the CCA provides that:

> "(1) The Secretary of State must prepare such proposals and policies as the Secretary of State considers will enable the carbon budgets that have been set under this Act to be met.
>
> (2) The proposals and policies must be prepared with a view to meeting—
>
> (a) the target in section 1 (the target for 2050), and
>
> (b) any target set under section 5(1)(c) (power to set targets for later years).
>
> (3) The proposals and policies, taken as a whole, must be such as to contribute to sustainable development.
>
> (4) In preparing the proposals and policies, the Secretary of State may take into account the proposals and policies the Secretary of State considers may be prepared by other national authorities."

Section 14 provides that:

> "(1) As soon as is reasonably practicable after making an order setting the carbon budget for a budgetary period, the Secretary of State must lay before Parliament a report setting out proposals and policies for meeting the carbon budgets for the current and future budgetary periods up to and including that period.
>
> (2) The report must, in particular, set out—
>
> (a) the Secretary of State's current proposals and policies under section 13, and
>
> (b) the time-scales over which those proposals and policies are expected to take effect.

> (3) The report must explain how the proposals and policies set out in the report affect different sectors of the economy.
>
> (4) The report must outline the implications of the proposals and policies as regards the crediting of carbon units to the net UK carbon account for each budgetary period covered by the report.
>
> (5) So far as the report relates to proposals and policies of the Scottish Ministers, the Welsh Ministers or a Northern Ireland department, it must be prepared in consultation with that authority.
>
> (6) The Secretary of State must send a copy of the report to those authorities."

71. It is also important for the present proceedings to note that the role of the CCC is set out at Part 2 of the CCA 2008. This includes laying before Parliament an annual report setting out its views on the progress made towards meeting carbon budgets, and whether these budgets and target are likely to be met: section 36(2). The Secretary of State is obliged to respond to the CCC's report annually: section 37.

The case law

72. Of considerable relevance to these proceedings is Holgate J's judgment in *FoE (No. 1)*. Both the Claimants and the Defendant relied on aspects of Holgate J's judgment to support their arguments. It is therefore necessary for me to set out Holgate J's analysis in some detail.

73. The case involved a challenge to the way in which the Secretary of State exercised his functions under sections 13 and 14 of the CCA 2008. It was contended that (i) the Secretary of State was not entitled to conclude under section 13 that the proposals and policies in the NZS would enable the carbon budget for CB6 (2033-37) to be met where the quantified effects of those policies were estimated to deliver only 95% of the emissions reductions required to meet that budget; (ii) the Secretary of State had failed to take into account relevant considerations which were obviously material to his decision under section 13, namely the risk to the delivery of individual proposals and policies and to the achievement of the carbon budgets; (iii) the Secretary of State had failed to include in the NZS the information legally required to discharge his reporting obligations under section 14, and it was not sufficient for him to merely tell Parliament what the proposals and policies were. Holgate J agreed with the Claimants on points (ii) and (iii), but rejected point (i).

74. With respect to point (i), Holgate J held at §§177 and 193 that section 13(1) of the CCA 2008 did not require the Secretary of State to be satisfied that the quantifiable effects of his proposals and policies will enable the whole of the emissions reductions required by the carbon budgets to be met; the shortfall could be made up by unquantified policies. The first Claimant in these proceedings takes issue with this holding, and reserves the right to argue the point on another occasion.

75. In arriving at his finding on point (i) Holgate J made some important observations about the obligation under section 13. Holgate J noted a number of matters that were agreed

between the parties, including (at §167) that it was a matter of judgment for the Secretary of State to decide on the proposals and policies which should be prepared, and whether they will enable the carbon budgets to be met. Holgate J noted at §178 that the targets are quantitative in nature, and that section 13(1) involved the Secretary of State "making a predictive assessment many years into the future. Such predictions inevitably involve significant uncertainty, for example, in relation to future circumstances falling within section 10(2). There are uncertainties about economic growth, energy, prices, population growth, the impact of investment in technological innovation and the implementation of proposals. Even predictions expressed in quantitative terms involve subjective judgment". At §180, Holgate J explained that the exercise to be carried out "involves predictions of future conditions over many years in a changing socio-economic, environmental and technological landscape and therefore a good deal of uncertainty. The consideration of matters such as these depends upon the use of judgment, whether the analysis is quantitative or qualitative".

76. Holgate J acknowledged at §181 that to carry out "predictive, quantitative analysis", the Secretary of State's officials had to use a number of mathematical models, and the Courts had accepted that the use of such models involves expert judgment, and "decisions based on scientific, technical and predictive assessments should be afforded an enhanced margin of appreciation in judicial review", referring to *R (Mott) v Environment Agency* [2016] 1 WLR 4338, *Spurrier* [2020] PTSR 240 at §§176-[179; and *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 at §68 and §177.

77. Holgate J stated at §183 that the Secretary of State's decisions under section 13(1) on the preparation of proposals and policies were matters of judgment, which will be informed, but not circumscribed, by the quantitative analysis carried out. At §185, Holgate J commented that the greater the shortfall between the quantified effects and the emissions target, the more cogent the qualitative analysis would need to be.

78. With respect to point (ii), the legal sufficiency of the briefing to the Secretary of State, Holgate J stated at §195 that the nature and extent of the work that needed to be carried out to make the predictive assessment was a matter of judgment for the Secretary of State and his officials, subject to *Wednesbury* review. The approach that should be taken by the Court in carrying out that review needed to bear in mind a number of propositions:

> "198 A minister only takes into account matters of which he has personal knowledge or which are drawn to his attention in briefing material. He is not deemed to know everything of which his officials are aware. But a minister cannot be expected to read for himself all the material in his department relevant to the matter. It is reasonable for him to rely upon briefing material. Part of the function of officials is to prepare an analysis, evaluation and precis of material to which the minister is either legally obliged to have regard, or to which he may wish to have regard.
>
> 199 But it is only if the briefing omits something which a minister was legally obliged to take into account, and which was not insignificant, that he will have failed to take it into account a

> material consideration, so that his decision was unlawful. The test is whether the legislation mandated, expressly or by implication, that the consideration be taken into account, or whether the consideration was so "obviously material" that it was irrational not to have taken it into account. . . . In this regard, it is necessary to consider the nature, scope and purpose of the legislation in question".

79. Holgate J analysed the legislation at §202:

> "(i) Section 1 of the CCA 2008 was amended to incorporate the net zero target because of the recognition internationally and in the UK of the need for action to be taken to reduce GHG emissions more urgently;
>
> (ii) The UK's contribution to addressing the global temperature target in the Paris Agreement depends critically on meeting the net zero target for 2050 set by the CCA 2008 through the carbon budgets;
>
> (iii) The Secretary of State is responsible for setting the carbon budgets:
>
> (iv) The CCA 2008 imposes the obligation to ensure that the net UK carbon account meets those targets solely on the Secretary of State;
>
> (v) Under the CCA 2008 the preparation of proposals and policies under s.13 (and if necessary under s.19(1)) is critical to achieving those targets;
>
> (vi) The Act imposes solely on the Secretary of State the obligations to prepare such measures and to be satisfied that they will enable the carbon budgets to be met. There is no requirement for Parliament or the public to be consulted on those proposals and policies or for Parliament to approve them;
>
> (vii) The Secretary of State cannot properly and rationally be satisfied that his proposals and policies will enable the carbon budgets to be met without quantitative analysis to predict the effects of those proposals and policies in reducing GHG emissions ([176] above);
>
> (viii) The predictive quantitative assessment and any qualitative assessment put before the Secretary of State are essential to his decision on whether his proposals and policies will enable targets to be met which are expressed solely in numerical terms;
>
> (ix) Although a quantitative assessment does not have to show that quantifiable policies can deliver the whole of the emissions reductions required by the targets, any qualitative judgment or

> assessment to address that shortfall will have to demonstrate to the Secretary of State how the quantitative targets can be met;
>
> (x) The carbon budgets and the 2050 target relate to the whole of the UK economy and society and not to sectors. Achievement of those targets requires a multiplicity of policy measures addressing the UK as a whole, individual sectors, and factors falling within s.10(2). Those measures will be operative at different points in time. Some will apply in isolation and others in combination. Whether an overall strategy will enable the statutory targets to be met depends upon the contribution which each policy (or interrelated groups of policies) is predicted to make to the cumulative achievement of those targets;
>
> (xi) The merits of individual measures, their contributions and their deliverability, together with the deliverability of the reductions in GHG emissions required by s.1(1) and s.4(1), are all essential considerations for the Secretary of State, or the Minister in his place".

80. At §204, Holgate J found that "one obviously material consideration which the Secretary of State must take into account is risk to the delivery of individual proposals and policies and to the achievement of the carbon budgets and the 2050 net zero target. This is necessarily implicit in the statutory scheme. In turn, this must depend upon the relative contributions made by individual measures to achieving those targets". That had not been provided to the Secretary of State, even though it was available within the Department.

81. The same point was also made at §211:

> "Viewed in the context of the statutory scheme, I have no doubt that the quantification of the effect of individual policies was an obviously material consideration on which, as a matter of law, information had to be provided to the minister, so that he could discharge his functions under section 13 lawfully by taking it into account. The defendant's role in approving a package of policies so as to enable the statutory targets to be met is critical to the operation of the CCA 2008. Risk to the delivery of individual policies and of the targets is "obviously material"".

82. Holgate J held at §213 that "without information on the contributions by individual policies to the 95% assessment, the minister could not rationally decide for himself how much weight to give to those matters and to the quantitative assessment in order to discharge his obligation under section 13(1)". This was explained in more detail at §214*:*

> "The briefing to the minister did not enable him to appreciate the extent to which individual policies, which might be subject to significant uncertainty in terms of content, timing or effect, were nonetheless assumed to contribute to the 95% cumulative figure. This concern is all the more serious because the minister was told

> that that the assessment by BEIS was based upon the assumption that the quantified policies would be "delivered in full". The information which ought to have been provided to the defendant would have influenced his assessment of the merits of particular measures. It was crucial so that he could question whether, for example, the strategy he was being advised to adopt was overly dependent on particular policies, or whether further work needed to be carried out to address uncertainty, or whether the overall figure of 95% was robust or too high. If it was too high, then that would affect the size of the shortfall and his qualitative judgment as to whether unquantified policies could be relied upon to make up that gap with what he would judge to be an appropriate level of confidence. Information on the numerical contribution made by individual policies was therefore legally essential to enable the defendant to discharge his obligation under section 13(1) by considering the all important issue of risk to delivery. These were matters for the Secretary of State and not simply his officials."

83. Holgate J went on to find that there was further information about the 5% shortfall which should have been provided to the Secretary of State by his officials, as this was "obviously material" (§§216-7). As for the claimants' contention about information relating to the time scales over which the proposals and policies were expected to take effect, Holgate J held at §218 that it was a matter of judgment as to how much of this material needed to be included in the ministerial submission.

84. With respect to point (iii), whether or not the section 14 duty was complied with, Holgate J rejected the Secretary of State's submission that the duty to "set out" his proposals and policies amounted to little more than a requirement to publish those measures. Holgate J held at §233 that the Secretary of State was required "to explain the thinking behind the proposals and how they will enable the carbon budgets to be met". This requires a "quantitative explanation" being provided to Parliament (§235), although the Court accepted the Secretary of State's contention that "the legislation does not require the department's detailed workings or the modelling to be provided to Parliament".

85. Holgate J's reasoning was based in part on the "statutory objective of transparency". At §241, Holgate J explained:

> "Because the reports under sections 14, 19, 36 and 37 are required to be laid before Parliament, they will be published. The requirement is not simply to provide unpublished reports to, for example, a regulatory body. The statutory objective of transparency in how the targets are to be met extends beyond Parliament, to local authorities and other statutory authorities, NGOs, businesses and the general public. That transparency requires reports under section 14 to contain explanation and quantification. The purpose of a such a report is not limited to telling Parliament what the Secretary of State's proposals and policies are".

86. In considering whether the Secretary of State had complied with section 14 of the CCA 2008, Holgate J held at §245 that the adequacy of the report should not be "materially lower than that of a report issued for public consultation . . . In both instances, the legal object of the reports is to enable its readers to understand and assess the adequacy of the Government's policy proposals and their effects. Furthermore, a report under section 14 is also required in the interests of public transparency". This position was supported by the reasoning of the Supreme Court of Ireland in *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49, where the Court considered the obligation of the Irish Government under section 4 of the Climate Action and Low Carbon Development Act 2015.

87. Holgate J held that the NZS was not compliant with section 14 of the CCA 2008 because it did not look at the contributions to emissions reductions made by individual policies, or interacting policies, where these were assessed as quantifiable (§252). Other matters which were "obviously material" to the critical issue of risk to the delivery of the statutory targets, and which the Secretary of State was obliged to inform Parliament under section 14 were explanations:

> "(i) that the quantitative analysis carried out by BEIS (which related solely to quantifiable policies with a direct effect on emissions) predicted that those policies would achieve 95%, not 100%, of the reductions required for CB6, and had assumed "delivery in full" of those policies; "
>
> (ii) how it was judged that that 5% shortfall would be made up (see also para 216 above), including the judgment based upon comparing the 95% result with the projections of the implied performance of the delivery pathway;
>
> (iii) that tables 6—8 did not present the outcome of the department's quantitative analysis of emissions reductions predicted to result from NZS polices;
>
> (iv) how that quantitative analysis differed from the modelling of the delivery pathway".

(§§253-4).

88. At §256, Holgate J stated that it was the responsibility of the Secretary of State, and not his officials, to lay the report before Parliament; and the adequacy of the report was a matter for him, acting on the advice of his officials and with legally sufficient briefing. At §257, Holgate J concluded that:

> "A clearly presented report would not lead a reader to misunderstand predictions of the effects of each policy as "targets", or to fail to appreciate the uncertainties involved. Similarly, there is no reason why it could not be made clear to a reader that policies are at various stages of development and that current predictions should not be taken to undermine the need for future flexibility to respond to changes in circumstance. Indeed, these points are clearly explained in the NZS. Problems

> in publishing details of quantitative analysis of the effects of policies yet to be "fully developed" may raise matters of judgment for the defendant as to how much detail should be included in a report. But that cannot affect the legal principle that contributions from individual policies which are properly quantifiable must be addressed in the report. Here, they were not at all."

89. Holgate J's exposition of the section 13 duty was approved by the Court of Appeal in *R (Global Feedback Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWCA Civ 1549 at §79. The Court of Appeal also held that section 13 involved a "strategic" and a "whole-economy", or "economy-wide", judgment to be applied by the Secretary of State. It was also a "continuing" duty.

90. The Court of Appeal explained at §83 that the Secretary of State for Energy Security and Net Zero was "uniquely well placed to discharge the duty in section 13. He has an overview of the whole economy, is conscious of the likely levels of greenhouse gas emissions in all sectors of it for the budgetary period or periods in question, and is able to judge the potential for appropriate action to ensure the meeting of carbon budgets".

91. In *Global Feedback*, the Court of Appeal considered the relationship between the Secretary of State and the CCC, and in particular the extent to which the Secretary of State had to have regard to the advice of the CCC in relation to diet and climate change, as part of his section 13 obligations. The Court of Appeal held at §112 that in exercising his functions under section 13 of the CCA 2008, the Secretary of State was not under a duty to take the CCC's advice into account, let alone give it significant weight or to follow it unless there are cogent reasons for departing from it. In reaching this conclusion, the Court of Appeal observed at §114 that it was "telling" that Parliament had chosen not to impose an express duty on the Secretary of State to obtain or take into account the CCC's advice.

Grounds of Challenge

92. A compendious summary of the Grounds of Claim was described by the Secretary of State in his skeleton argument for these proceedings as follows:

93. Ground 1: The Secretary of State failed to take into account mandatory material considerations when purporting to comply with section 13 of the CCA 2008;

Ground 2: The Secretary of State proceeded on the basis of an assumption that all of the quantified proposals and policies would be delivered in full, and this assumption was not supported by the information as to risk to delivery with which the Secretary of State was provided;

Ground 3: The Secretary of State's conclusion that the proposals and policies will enable the carbon budgets to be met was irrational;

Ground 4: The Secretary of State applied the wrong legal test to section 13(3) of the CCA 2008 ("sustainable development");

Ground 5: The Secretary of State failed to include in the CBDP information that he was required to include.

94. In oral argument, the Claimants argued grounds 2 and 3 together on the basis that there was considerable overlap between the two. As the arguments were presented to me, it seemed to me that there was considerable overlap with ground 1 as well. In this judgment, therefore, I shall set out the arguments with respect to ground 1, and then grounds 2 and 3, and then set out my judgment with respect to the three grounds. I will then set out the arguments on ground 4, followed by my judgment on that ground; and finally, will set out the arguments on ground 5, followed by my judgment on that ground.

Ground 1: *The failure to take into account mandatory material considerations when purporting to comply with section 13 of the CCA 2008*

The parties' arguments

95. Mr Wolfe KC and Ms Simor KC contend that the Secretary of State was not provided with, and so failed to take into account, key materials on the risk to the delivery of individual policies and proposals set out in the CBDP. They also argue that the officials within the Department for Energy, Security and Net Zero misrepresented the extent of these risks in the briefing materials they provided to the Secretary of State.

96. Mr Wolfe KC's essential contention was that the Secretary of State should have been provided with RAG ratings for each of the proposals and policies, or something which faithfully reflected the information that the RAG ratings would have contained. He makes three main arguments. First, he contends that the Risk Narratives that were provided to the Secretary of State did not provide him with mandatory material about the risk to delivery of each policy. As a result, the Secretary of State failed to consider this mandatory material about the delivery risk associated with each policy when approving the CBDP. Second, he submits that the information about the delivery risks in the Risk Narratives provided to the Secretary of State did not fairly and accurately summarise the information about delivery risks provided by other departments. Third, he argues that the briefing to the Secretary of State was deficient because it provided "no information" about the delivery risk to the Devolved Administration's policies and proposals as part of his briefing for CB6.

97. The focus of Ms Simor KC's arguments was that the Secretary of State was not provided with mandatory information *quantifying* the delivery risk for CB6, either on an individual policy level or taking CB6 as a whole. She makes five key arguments. First, that the quantification of emissions reductions forecast in CB6 should have been adjusted to reflect that some of these policies were unlikely to be delivered or achieved in full. This would have allowed the Secretary of State to appreciate the (significant) uncertainty associated with certain policies. Second, that the Secretary of State should have been provided with material summarising the cumulative risk to delivery across the policies and proposals. Without this information, he could not have reasonably understood the very significant extent of that risk. Third, that the Secretary of State was not given sufficient information in the Risk Narratives (or otherwise) about the risk to delivery in relation to individual policies and proposals that were described as having "uncertain delivery risk" but that had been rated as "low" or "very low" confidence in the RAG ratings. Fourth, that there were quantification errors in modelling the projected

emission reductions from 'non-EEP' policies and proposals. Fifth, that the Department erred by including some of the EEP policies and proposals in the high confidence CBDP baseline, when these policies and proposals had in fact been identified as having low delivery confidence. These errors meant the Secretary of State's understanding was that he could be confident in delivering the emissions reductions needed to meet CB6, which was wrong.

98. For the Secretary of State, Mr Moffett KC contended that the Claimants are operating under the false premise that the RAG ratings are the reliable, definitive description of delivery risks for each policy. He argued that the Risk Narratives, and not the RAG ratings, should be treated as the most reliable description of risks. He emphasises that the Risk Narratives were produced with input from the Sector Leads, who are those best equipped to assess the delivery risk associated with each policy: the RAG ratings were produced by the Sector Teams and not the Sector Leads. Mr Moffett KC submits that the RAG ratings do not always include an accurate description of the delivery risk for each policy. It is the Risk Narratives which summarise the delivery risks fairly and accurately, and it was justifiable (and not misleading) that the Secretary of State was presented with these narratives and not the RAG ratings in his March 2023 briefing materials.

99. Addressing Mr Wolfe KC's argument that the Secretary of State was not provided with mandatory material about risk to delivery from each of the departments, Mr Moffett KC submits that this argument must fail because Friends of the Earth have failed to show: (i) that officials took an irrational approach to the information provided to the Secretary of State; Mr Thompson's witness statement shows that the approach taken was rational; (ii) that the Secretary of State could not make a strategic and whole economy judgment in relation to the CBDP on the basis of the information that was available to him.

100. In response to Mr Wolfe KC's argument that Secretary of State was not provided with information on delivery risks for policies from the Devolved Administrations, Mr Moffett KC acknowledges that there was a lack of information about the policies and proposals pursued by the Devolved Administrations generally. Nevertheless, the Department proceeded on the basis that the Devolved Administrations would prepare policies and proposals that were materially similar to those pursued in England (an approach the Claimants do not challenge). Given this approach, it was realistic to assume that the substantive risks to delivery of the policies and proposals were similar for the Devolved Administrations as for England. There were no deficiencies in the information provided to the Secretary of State, who was informed that:

> "[The Department's] understanding of DA-specific risks is limited. However we understand that many of the risks to delivery of emissions savings will be common across all four Nations."

101. Responding to Ms Simor KC's first and second arguments that adjustments should have been made to the quantification of emissions savings for each policy to reflect delivery risk and that the Secretary of State should have been presented with cumulative delivery risk, Mr Moffett KC says that this is no more than a disagreement about how information was presented to the Secretary of State. He submits that ClientEarth have

failed to show that the Department acted irrationally by not presenting the information as Ms Simor KC proposes.

102. Mr Moffett KC also argues that there is no evidence to support ClientEarth's submission that red or red-amber RAG ratings for delivery were inaccurately described as policies for which delivery was "uncertain" in the Risk Narratives. Central to his arguments on this issue is his submission that RAG ratings should not be treated as the definitive assessment of risk. Mr Moffett KC also argues that the central question for the Court is rationality: in his submission, the Court cannot find that the approach of allowing the Sector Leads to draft the Risk Narratives is irrational.

103. As to ClientEarth's argument that the Department's modelling of emissions savings for each non-EEP policy or proposal was deficient as it was based on maximum technical potential, Mr Moffett KC submits that this is not a complaint about the information provided to the Secretary of State about the delivery risk but instead a complaint about the Department's modelling choices. He identifies that Holgate J's prior judgment found there was "*nothing objectionable*" in modelling based on theoretical potential (§77).

104. As to ClientEarth's argument that the Secretary of State was not notified that certain EEP policies had low delivery confidence, Mr Moffett KC submits that such uncertainties were taken into account when modelling the EEP baseline. Reference is specifically made to the explanation of the modelling approach in the Technical Annex to the CBDP, which explains: "*In our approach to modelling the assumptions we need to make, we have taken, on balance, a conservative approach to err on the side of caution, with the effect of either increasing the size of emissions savings required (as discussed above on the baseline) or of reducing the potential effectiveness of policies (for example by assuming slower take-up of technologies than recent evidence suggests)*".

Ground 2: *When taking the Decision under section 13(1), the Secretary of State proceeded on the basis of an assumption that all of the quantified proposals and policies would be delivered in full, and this assumption was not supported by the information as risk to delivery with which the Secretary of State was provided.*

Ground 3: *The Secretary of State's conclusion that the proposals and policies will enable the carbon budgets to be met was irrational.*

The parties' arguments

105. Mr Wolfe KC and Ms Simor KC argued that the Secretary of State expressly approved the CBDP on the assumption that all of the quantified policies and proposals relating to emissions savings would be delivered in full. They highlight the following paragraph which was included at paragraph 26 of the CBDP:

> "26. The calculated savings assume the package of proposals and policies are delivered in full. We consider it is reasonable to expect this level of ambition – having regard to delivery risks and the wider context, which give rise to both downside and upside risks (see further information on delivery risks below)."

106. Friends of the Earth and ClientEarth say that it was not open to the Secretary of State to make this assumption when approving the CBDP, based on the information available to the Secretary of State about the delivery risk.

107. Ms Simor KC seeks to rely on evidence from Mr Eames which shows that 90% of the emissions savings attributable to quantified policies were described in the Risk Narratives available to the Secretary of State as having "uncertain" or "high" delivery risk. Mr Wolfe KC highlights that the Department had available further information which highlighted the substantial risk to the delivery of individual policies, including:

    i) advice from DEFRA that the emissions savings projections it had provided "*by and large represent maximum feasible savings rather than a likely scenario*";

    ii) the fact that in November 2022 there was a concern that emissions savings achievable from quantifiable policies and proposals could slip to 85% of those required to reach CB6, but that the CBDP was signed off in March 2023 on the basis that the emissions savings it could achieve would be 97% of those required to reach CB6, despite there being no evidence for the increase in confidence in delivery; and

    iii) broader criticism from Lord Deben over a plan as significant as the CBDP being made on the basis of everything going smoothly, which Lord Deben describes as an "unsatisfactory" assumption.

108. In Mr Wolfe KC's submission, in the light of the degree of delivery risk associated with the policies and proposals relied upon to enable the carbon budgets to be met, the information provided to the Secretary of State did not provide a proper basis to conclude that all proposals and policies would be delivered in full. It was irrational for the Secretary of State to approve the plan based on this assumption.

109. If, in the alternative, the Secretary of State was not advised to assume that all policies and proposals would be delivered in full, Mr Wolfe KC submits that there would have been an even greater shortfall in the quantified effects of the proposed policies and a sufficiently cogent analysis would be required to demonstrate how this shortfall would be met. Nothing in the advice provided to the Secretary of State explained the basis on which he could conclude that the proposals and policies will enable the carbon budgets to be met if the proposals and policies are not delivered in full.

110. Ms Simor KC submits that that the conclusion that the policies and proposals would be delivered in full was not reasonably open to the Secretary of State having regard to (i) the level of risk and uncertainty assessed by her own officials; (ii) the expert analysis of the CCC in relation to CB6 and the NZS 2022; (iii) the scale and nature of the challenge of meeting CB6; and (iv) the levels of emissions savings to be delivered by EEP ready policies and proposals, compared to previous plans, and the fact that these too involved risks.

111. Ms Simor KC additionally identifies that the Secretary of State (through his Department) was presented with material stating that he could be confident that at best only 10% of the emissions reductions projected to derive from the non-EEP policies would be delivered. This showed a real risk of the CBDP under delivering in terms of emission reduction requirements. In these circumstances there was, in Ms Simor KC's

submission, no rational basis for the Secretary of State's conclusion that the "package of proposals and policies" would be "delivered in full".

112. As to the intensity of review that would be appropriate, Friends of the Earth and ClientEarth submit that it would be appropriate for the Court to scrutinise the Secretary of State's decision closely on the basis that climate change affects us all and requires us all to take action. It was noted that there was no precedent for the application of a higher degree of scrutiny in climate change cases. However, it was submitted that this was due to the relatively limited climate change litigation to date, and not because an enhanced standard of review should not apply.

113. Mr Moffett KC does not dispute that the Secretary of State (and his Department) could not assume that each and every policy and proposal would be delivered in full. However, relying on evidence from Mr Thompson, he argues that this is not the meaning of the text at paragraph 26 of the CBDP. He explains that this wording was intended to "*make the point that the total volume of quantified emissions savings (i.e. those projected to be achieved by the quantified P&Ps) had been calculated on the basis that the package of proposals and policies would be delivered in full, i.e. the total figure represented the sum of all of the individual quantified emissions savings*". Mr Moffett KC argues that this explanation is consistent with advice given to the Secretary of State, which expressly and repeatedly reiterated that delivery of individual policies and proposals carried risk. For example, he highlights that paragraph 15 of the CBDP explains: "*it is very likely that some proposals or policies will outperform expectations…Meanwhile, some other policies or proposals will under deliver compared to expectations*". Mr Moffett KC argues that these materials show that the Secretary of State cannot have based his decision on an assumption that every policy and proposal is delivered in full, and that this element of the case of Friends of the Earth and ClientEarth should fall away.

114. Mr Moffett KC argues that the Secretary of State did not act irrationally by assuming that the package of policies and proposals was sufficient to meet CB6. Mr Moffett KC submits that the Court cannot rely on Mr Eames' witness statement to make findings of fact because: (i) Mr Eames is an in-house solicitor who works for ClientEarth, and the statement should be treated as an assertion of his subjective opinion; and (ii) Mr Eames has adopted a narrow approach to assessing risk by reference to only some of the briefing materials that were before the Secretary of State.

115. Mr Moffett KC further argues that, even if the Court were to proceed on the basis that Mr Eames' statement was fact, that is insufficient to make out irrationality. Friends of the Earth and ClientEarth would need to meet an extremely high hurdle to show that the decision was irrational: given the decision involves a predictive judgment, on a strategic, whole economy issue reaching many years into the future that involves an assessment based on expert advice of social, economic and environmental and technological factors. Mr Moffett KC did not consider it appropriate for the Court to apply a different standard of review because the case relates to climate change: this is, in his submission, a classic example of a case in which the Court should apply only a low intensity of review.

Discussion

Grounds 1-3: *The Secretary of State's decision pursuant to section 13(1) of the CCA 2008*

116. It was common ground between the parties that, as Holgate J had held at §204 of his judgment in *FoE (No. 1)*, "one obviously material consideration which the Secretary of State must take into account is risk to the delivery of individual proposals and policies and to the achievement of the carbon budgets and the 2050 net zero target." Much of the argument (in writing through the skeleton arguments, and orally in the hearing before me) involved consideration of the way in which risk material was presented and the extent to which it was, or was not, sufficient for the Secretary of State to take a lawful decision under section 13.

117. There is no statutorily prescribed way in which the information about risk needs to be provided to the Secretary of State. There is also no free-standing obligation in public law that information about risk has to be presented in a particular way. Officials were not obliged, therefore, to provide the Secretary of State with information about risk by using RAG ratings, or by some other illustrative form. How the risk information should have been presented to the Secretary of State was plainly a matter for the officials, and could only be impugned by this Court if the content of what was provided to the Secretary of State did not enable him to carry out the statutory evaluation exercise lawfully. That would have been the case if, for instance, the information was misleading in that it did not reflect the real risk that officials had identified with respect to a specific proposal or policy, or if the information was incomplete in a material way.

118. The information about risk was presented to the Secretary of State in the narrative of the March 2023 submissions, with the detail of the risk to individual proposals and policies as well as at a sectoral level contained in Annex B to the submissions. In the submissions, the Secretary of State was told with respect to the "Quantified savings to meet Carbon Budgets" that "Based on current projections, our view is that the package of proposals and policies that we can quantify will deliver sufficient quantified savings to meet . . . 97% of CB6. . . . The Technical Annex (Annex D) sets out the methodology for the quantification of policies and proposals. You should note that this quantification relies on the package of proposals and Policies being delivered in full. Our advice is that it is reasonable to expect this level of ambition – having regard to delivery risk (see Annex B) and the wider context."

    (Emphasis in the original).

119. There is a dispute between the parties as to what the underlined text meant and, therefore, what the Secretary of State was being told by his officials. Mr Moffett KC argued that the Secretary of State could not assume from this statement that each and every policy and proposal would be delivered in full. This argument was supported by the evidence of Mr Thompson, who has explained in his witness statement that that was not the intention of those drafting the submissions. On the other hand, the Claimants contend that this construction does not reflect the wording used in the submissions and the reasonable understanding that the Secretary of State would have had. I agree with the Claimants.

120. It seems to me that the reasonable interpretation of the underlined text, and therefore what the Secretary of State was being told by his officials, was that **each** of the

individual proposals and policies that form the package of measures would be delivered in full. There was no evidence before the Court to indicate that the Secretary of State interpreted the underlined text in the way suggested by Mr Thompson rather than on the basis of the reasonable interpretation of the meaning of the underlined text.

121. If it was intended for the underlined text to mean that not all of the proposals and policies would be delivered in full, then the sentence does not make sense: the package is made up of the sum of its parts, and so if the package was expected to be delivered in full, this would necessarily mean that each of the package's constituent parts would be delivered in full. There is no indication from the first sentence of the underlined text that some of the proposals and policies might not happen at all or would not deliver the full amount of the contribution to the budget assigned to them.

122. The second sentence of the underlined text deals with the ambition required to achieve this, and advises that this is "reasonable" having regard to delivery risk (Annex B) and the "wider context". Later in the submission (at paragraph 13), it is stated under the heading "Delivery risk and further considerations (further detail in Annex B)" that "To assess whether the proposals and policies are sufficient, you must consider the risks to delivery of the emissions savings that **each of the proposals and policies carries**". Annex B does not contain any reference to proposals and policies within the package not being delivered at all, or in full. The "wider context" cannot mean that either. The reference to Annex B and to the "wider context" reads as the explanation for why the Secretary of State can assume that each of the proposals and policies will be delivered in full: that is, there are delivery risks, but they can be overcome, especially when one considers the wider context.

123. This interpretation is also supported by the language used in the earlier submissions to the Secretary of State, where the underlying assumption was that all of the proposals and policies would be delivered in full. In the introductory brief submitted on November 8th 2022, the Secretary of State was told that "Our most recent projections from August show we have sufficient savings to meet carbon budgets and the NDC **if all planned policies are delivered in full**" (emphasis added). Similarly, in the submission made to the Secretary of State on 30th November 2022, it was stated that "Latest projections suggest you have sufficient savings to meet carbon budgets **if all planned policies and proposals are delivered in full**" (emphasis added).

124. It was suggested by Mr Moffett KC that the Secretary of State could not have understood the underlined text as meaning that each of the individual proposals and policies would be delivered in full as there was material in the Technical Annex that stated otherwise. Reference was made to the explanation in the Technical Annex that a conservative approach had been taken to modelling; and that "all else equal, there is likely to be more upside than downside risk, which could support meeting carbon budgets". That, however, is not an indication that individual proposals or policies might not be delivered in full.

125. It was also suggested by Mr Moffett KC that there was material in the CBDP, a draft of which was provided to the Secretary of State along with the March submissions, which would support the contrary interpretation. In the CBDP it was stated that "…it is very likely that some proposals or policies will out-perform expectations… some other proposals or policies will under deliver compared to expectations." However, the Secretary of State did not have his attention drawn to this provision in connection with

the underlined text in the submission, so it is difficult to see how the Secretary of State could have had this passage in mind when he was reading the underlined text.

126. If, as I have found, the Secretary of State did make his decision on the assumption that each of the proposals and policies would be delivered in full, then the Secretary of State's decision was taken on the basis of a mistaken understanding of the true factual position. Indeed, this is the Secretary of State's own case to this Court: Mr Moffett KC acknowledged that not all of the proposals and policies would be delivered in full.

127. As a matter of law, therefore, in making this assumption the Secretary of State made an irrational decision in the sense explained by Saini J in *R(Wells) v Parole Board* [2019] EWHC 2710 (Admin) at §33. In *Wells*, Saini J held that *Wednesbury* unreasonableness may be made out where there was an unexplained evidential gap or leap in reasoning which fails to justify the conclusion reached by the public law decision-maker. The Secretary of State's decision under section 13 was based on reasoning which was simply not justified by the evidence.

128. This otherwise irrational decision could only be saved if it could be established that the Secretary of State would have been highly likely to reach the same decision even if he had not made that assumption (section 31(2A) of the Senior Courts Act 1981). That proposition was not made on behalf of the Secretary of State at the oral hearing before me. Looking at the matter myself, I cannot see how the very high threshold set out at section 31(2A) could have been met.

129. In the first instance, the counterfactual that I am required to consider under section 31(2A) of the Senior Courts Act 1981 presupposes that the information available to the Secretary of State would have enabled him to reach the conclusion that the 97% emissions savings would be met by the quantified proposals and policies even if not all of the individual proposals and policies would be achieved in full. It is not possible for the Court to find that this was highly likely to have been the case, as the Secretary of State did not have sufficient information to enable him to make that decision. It is not possible to ascertain from the materials presented to the Secretary of State which of the proposals and policies would not be delivered at all, or in full. It was not possible, therefore, for the Secretary of State to have evaluated for himself the contribution to the overall quantification that each of the proposals and policies was likely to make, bearing in mind that this evaluation had to be made by the Secretary of State personally: he could not simply rely on the opinions of his officials. The section 13 decision was one for him to make.

130. None of the commentary – or the narrative risk – provided to the Secretary of State reads as if the policy will not happen at all, or in full. From the material provided, the Secretary of State could not work out, therefore, whether and which of the quantified policies were likely to miss the target by a small or a large amount, and he could not evaluate for himself whether, and if so the extent to which, any shortfall from the policies that under-delivered would be compensated for by those policies that over-delivered. To take the example of proposal number 159 from Table 2 to Annex B (slurry: see paragraph 47 above), it is simply not possible for the Secretary of State to have evaluated from himself whether this proposal would miss the target, and if so by how much.

131. The material in the draft CBDP that there would be over-delivery and under-delivery was vague and unquantified, and so did not provide the Secretary of State with sufficient information to make his own evaluation or assessment. Furthermore, although there was reference in the submissions (and in the "read out" of the Secretary of State's decision) to the fact that the package does not fully reflect emissions savings from policies developed outside government, particularly local government, there is no information available to the Secretary of State from which he could evaluate what level of savings those additional policies might be able to generate within the relevant time-frame. The Secretary of State would not have been able to determine therefore, whether those additional policies would offset the shortfall from the quantified policies that did not meet their targets in full.

132. If I am wrong about the assumption made by the Secretary of State, and he did not consider that each of the proposals and policies would be delivered in full, then his decision under section 13 of the CCA 2008 is flawed and would therefore have been unlawful because he was not provided with sufficient information as to the obviously material consideration of risk to the individual proposals and policies. As already explained, the Secretary of State had no way of knowing which proposals and policies might not be delivered, or delivered in full; he could not calculate therefore what "over-delivery" was required from the other quantified proposals and policies, and whether those other quantified proposals and policies would meet the shortfall.

133. In reaching the latter (alternative) decision, I do not consider that it was necessary for the commentary or narrative risk provided to use the same language as used in the descriptors from the RAG ratings – "low confidence" or "very low confidence". It was appropriate for the officials to use a proxy for this, such as "uncertain delivery risk" accompanied by a narrative description of the risk and the proposed mitigations.

134. I also do not consider that the information provided to the Secretary of State was, as Mr Wolfe KC put it, "Panglossian"[1], or that it was provided on the basis of letting the Secretary of State know what the officials thought he wanted to hear. I also do not consider that the information was misleading. A clear description was provided to the Secretary of State about the risks involved with a particular proposal and policy and the kinds of mitigation measures that would or could be applied. However, the information provided was incomplete. It was necessary to say more if the Secretary of State was to work out for himself whether the proposal or policy was likely to miss the target by a small or large amount and if so by how much.

135. I do not consider that, as a matter of principle, it was necessary for the Secretary of State to be provided with advice or information as to the cumulative risk affecting the various proposals and policies, so long as he had sufficient information to work this out for himself. Nevertheless, the failure to identify which, and by how much, individual proposals and policies were likely to miss their targets, meant that the Secretary of State could not work this out for himself.

136. In his witness statement, Mr Thompson set out the difficulties in quantifying and weighing risk for each and every policy, stating that to do so would be extraordinary in its complexity and would require additional resource. I do not underestimate the

[1] An allusion to the fictional character, Pangloss, the tutor of Candide in Voltaire's novel bearing the latter's name.

difficulties that may be involved in carrying out this exercise for each and every policy. However, that does not seem to be the task that the officials would have been required to carry out. It is clear from the officials' own assessments that many of the proposals and policies are most likely to be delivered. If so, then further estimation would not have been required for these. It is only those proposals and policies which were at most risk of not being achieved that would have needed further analysis. Mr Thompson's evidence did not address that.

137. Moreover, even if there were difficulties in providing the latter analysis, the material could have been presented in the way suggested by Ms Simor KC: that is, the quantification of emissions reductions forecast in CB6 could have been adjusted to reflect that some of the policies were unlikely to be delivered or achieved in full. This could have been accompanied by a further forecast reflecting the possibility that there would be "over-delivery" of some of the proposals and policies. The Secretary of State could then have compared the different forecasts, and made his own evaluation of what was likely to transpire.

138. I do not consider that the information presented to the Secretary of State about the Devolved Administrations was insufficient for him to make the section 13(1) decision. It is accepted that the information provided about the Devolved Administrations was limited. Further information was simply not available as to what would happen in each of the nations for the entire CB6 budget period. Rather than leave a gap in the analysis for what might happen in the nations outside of England, the officials adopted the approach of scaling up from the English experience where that was appropriate. This enabled the Secretary of State to make an assessment as to what contribution the Devolved Administrations would be likely to make to meeting the carbon budgets, including CB6. That assessment was not obviously irrational.

139. I also do not consider that the Secretary of State needed to be told specifically that certain EEP policies had low delivery confidence. As Mr Moffett KC has explained, such uncertainties were taken into account when modelling the EEP baseline. In this regard, I have in mind the explanation of the modelling approach in the Technical Annex to the CBDP, which states:

> "In our approach to modelling the assumptions we need to make, we have taken, on balance, a conservative approach to err on the side of caution, with the effect of either increasing the size of emissions savings required (as discussed above on the baseline) or of reducing the potential effectiveness of policies (for example by assuming slower take-up of technologies than recent evidence suggests)".

140. The Claimants made a number of other points challenging the rationality of the Secretary of State's decision under section 13(1) of the CCA 2008. These include that: (i) the Secretary of State's own officials, and those in DEFRA, had assessed some risk and uncertainty; (ii) the CCC had produced its own expert analysis in relation to CB6; (iii) the scale and nature of the challenge of meeting CB6 was considerable given that most of the "easy wins" or "low hanging fruit" had been picked; and (iv) the EEP-ready policies and proposals also involved risks. These points were powerfully made, but would not in my judgment come close to satisfying the threshold of irrationality had the error identified above not been made by the Secretary of State.

141. I agree with Mr Moffett KC that the Court should apply a low intensity of review to the section 13(1) assessment made by the Secretary of State. The Secretary of State's decision involved an evaluative, predictive judgment as to what may transpire up to 14 years into the future, based on a range of complex social, economic, environmental and technological assessments, themselves involving judgments (including predictive judgments), operating in a polycentric context. These are not matters in respect of which the Court has any real expertise or competence, whereas the Secretary of State will be able to rely on officials with considerable expertise across the various domains (social, economic, environmental and technological), and the Secretary of State will himself have an experience of what is practicable within the governmental and wider political context.

142. This is not to say that the subject matter of the Secretary of State's decision under section 13 of the CCA 2008 is not of considerable importance. It plainly is. Nevertheless, it is clear from the statutory framework that Parliament itself is the proper forum in which scrutiny and interrogation of the Secretary of State's proposals and policies is properly to take place, aided by the expert contributions made by the CCC: including through the CCC's annual reports under section 36 of the CCA 2008. Given the clear role for the CCC and Parliament set out in the legislation, there is no indication that Parliament intended the Court to do anything other than apply the ordinary - and not enhanced - supervisory jurisdiction of judicial review.

Ground 4: *The Secretary of State applied the wrong legal test to section 13(3) of the CCA 2008 ("sustainable development")*

Arguments

143. Section 13(3) of the Act states:

> "The proposals and policies, taken as a whole, must be such as to contribute to sustainable development."

144. Mr Wolfe KC argues that this provision imposed a mandatory statutory requirement on the Secretary of State to reach the conclusion that the proposals and policies for meeting CB6, taken as a whole, will contribute to sustainable development. He argues that the Secretary of State has failed to meet this requirement, because in the CBDP he states in relation to sustainable development only that:

> "*There are both positive and negative natural capital impacts associated with these proposals and polices but the overall contribution to sustainable development is likely to be positive.*"

(Emphasis added). Mr Wolfe KC submitted that a finding that the impact of the proposals is "*likely to be positive*" is clearly not the same as a finding that it *will* be positive.

145. On behalf of the Secretary of State, Mr Badger replies that section 13(3) of the Act does not impose a threshold of certainty. First, because such an approach would result in section 13(3) imposing a higher standard than the section 13(1) duty, despite the fact that it is plainly ancillary to the section 13(1) duty. Second, because it cannot be realistic that the statute imposes such a duty, in circumstances where there is inherent

uncertainty involving a predictive judgment. Third, Mr Badger argues that the use of "must" in section 13(3) is not intended to connote a threshold of certainty, but instead to identify that the Secretary of State is under a duty to conduct an evaluative assessment that the proposals are expected to contribute to sustainable development.

Discussion

146. The term "sustainable development" is not defined in the CCA 2008. The Divisional Court in *R (Spurrier) v Secretary of State for Transport* [2019] EW HC 1070 (Admin) at §635 held that it was an "uncontroversial concept" which had been defined in the planning context as "meeting the needs of the present without compromising the ability of future generations to meet their own needs."

147. During the course of argument, I raised with Mr Badger the proposition that on its face section 13(3) did not appear to require an assessment or evaluation at all by the Secretary of State. Rather, that the statutory language was suggestive of a factual assessment: that is, whether in fact the proposals and policies contribute to sustainable development or not. This would not be a matter for the Secretary of State to determine, but would be a matter for the Courts if there is a challenge to the adequacy of the proposals and policies in contributing to sustainable development.

148. On its face, there is no reference within section 13(3) to the Secretary of State making an assessment, or considering anything, at all. This is in clear contrast with subsections (1) and (4) which refer specifically to the Secretary of State and what he may or must consider. Section 13(3) can also be contrasted with subsection (2). The latter subsection does not expressly refer to the Secretary of State, but it does state that "The proposals and policies must be prepared with a view to meeting" certain targets, and so it is implicit in this subsection that the Secretary of State's thought process is involved.

149. Mr Badger pushed back against this reading of the legislation, and argued that the whole structure of section 13 involved an evaluation by the Secretary of State. I agree. Section 13(3) needs to be read as forming part of the same evaluation or assessment as the Secretary of State is carrying out at subsection (1): will the proposals and policies enable the carbon budgets to be met. To decide otherwise would involve the Court engaging in a process for which it is not equipped, and for which it would have to rely on expert evidence. It would be surprising if Parliament had intended for the Court to have such a role.

150. As for what the term specifically means in the context of an evaluative assessment by the Secretary of State under section 13(3), I consider it connotes a degree of certainty that a particular outcome will eventuate. The term "must" is used elsewhere in section 13 (subsections (1) and (2)), and in both of those instances it is understood to mean that the Secretary of State has to carry out a particular exercise. He is obliged to do so. There is no obvious reason why the draftsman would have used the same term at subsection (3) if it was to bear a very different meaning.

151. As for Mr Badger's suggestion that section 13(3) is merely ancillary to subsection (1) and so could not impose a greater obligation on the Secretary of State, this does not necessarily follow. The two subsections are dealing with different targets or outcomes, and the assessment as to whether they will be achieved may require different thresholds. In section 13(1) the focus is on actually meeting the carbon budgets; the outcome or

target is absolute. In those circumstances, given that one is dealing with a predictive assessment, with so many imponderables, an evaluative assessment based on the likelihood that the outcome or target will be enabled makes sense. The focus of subsection (3) is on "sustainable development" and whether the proposals and policies will "contribute" to that target or outcome, not that there will actually be "sustainable development". As the target or outcome – to contribute – is lower, there is no reason why Parliament could not have intended for a greater degree of certainty that it would be achieved.

152. As for whether the Secretary of State's assessment did reach the required threshold under subsection (3), it was stated in the CBDP that the proposals and policies are "likely" to make that contribution. I understand that to mean that the Secretary of State considers that there is a greater than evens chance of the contribution being made, but not higher. The Secretary of State does not qualify the term with "highly" or "very", which would connote a higher degree of certainty. In the circumstances, I do not consider that the Secretary of State's assessment comes near to the much higher threshold that is mandated by section 13(3). On no reasonable view, could it be said that "likely" means "must".

153. In my judgment, therefore, the Secretary of State erred in making his decision under section 13(3) of the CCA 2008.

Ground 5: *did the Secretary of State fail to comply with s 14 of the Act because he failed to include in the CBDP information that he was required to include?*

Arguments

154. Mr Wolfe KC for Friends of the Earth, and Mr Lockley for the Good Law Project, argue that information on delivery risks qualifies as information "*obviously material to the critical issue of risk to the delivery of statutory targets*" and that, following Holgate J at §254, this should have been published under section 14 of the Act. They argue that the information on delivery risk included in the CBDP was insufficient, because it was limited to:

    i) A high level summary of the delivery risk to the packages of proposals and policies: which notes that policies and proposals in the EEP baseline "have high delivery confidence" but non-EEP policies and proposals "*vary in their delivery confidence …as we move towards Carbon Budget 6, a greater number of proposals and policies that are currently at an earlier stage of development will move into implementation and form part of the EEP baseline, giving higher delivery confidence.*"

    ii) Sectoral summaries of the delivery risk picture included in Appendix D of the CBDP entitled "*sectoral summaries of delivery confidence*".

155. Neither of the above addresses the delivery risk associated with each individual policy. Mr Wolfe KC and Mr Lockley argue that individual delivery risk was a mandatory material consideration in the Secretary of State's decision-making process. They both argue that the Risk Narratives, or equivalent information, should have been published in order to comply with section 14 of the Act. Mr Wolfe also argues that the RAG tables, or equivalent information, should have been published.

156. Mr Wolfe KC relies on §245 of Holgate J's judgment which explained that the "*legal adequacy*" of a section 14 report is to be assessed by reference to its legal object, which is "*to enable its readers to understand and assess the adequacy of the Government's policy proposals and their effects*" and "*in the interests of public transparency*". Holgate J emphasised that this was important to the democratic process and the constitution as a whole. Mr Wolfe KC argues that, as a result of the failure to publish information on the risks to individual policies, neither Parliament nor the public was given the information necessary to form a judgment on the CBDP. Relatedly, Mr Wolfe KC submits, that the failure to publish this information impacted on the CCC's statutory function of providing independent scrutiny of the Secretary of State's plan as set out in a section 14 report.

157. Mr Lockley submits that it is mandatory under section 14 to publish information on anything that is a mandatory material consideration for the purposes of section 13 of the Act. He highlights paragraphs 202(xi); 204, 211, 214 of Holgate J's judgment, which support the case that information on individual risk is a mandatory material consideration for section 13 purposes. As to the interrelationship between section 13 and section 14: Mr Lockley identifies commentary at §77 of the *Feedback* case, which supports that section 13 and section 14 are twin duties. He also highlights examples from the planning law context which support the need for the Secretary of State to address, in his decision, the mandatory material considerations that were taken into account when reaching that decision.

158. In the alternative, Mr Lockley submits that even if the Secretary of State is not required to publish every section 13 mandatory material consideration in the section 14 report, he is required to publish details of individual risk because this information will always be central to the Secretary of State's conclusion that her policies and proposals will allow the carbon budgets to be met. He relies on §233 and 241 of Holgate J's judgment, which establish that the section 14 report must go beyond merely setting out policies and proposals, it must explain them and on §246-247 and 250 which establish the need to provide Parliament, the CCC and the public with information necessary to scrutinise the adequacy and realism of the proposals.

159. In the further alternative, Mr Lockley submits that the section 14 duty requires the Department to publish the Risk Narratives (or equivalent information pertaining to individual risk), in the particular circumstances of the CBDP. This is because the Secretary of State clearly based her overall section 13 conclusion – that the CBDP policies and proposals would be met – on the assumptions that quantified policies would deliver 97% of the reductions required to meet CB6 and this, in turn, rested on the assumption that the "package of policies and proposals are delivered in full". Even accepting the Secretary of State's position that by this, he meant that the net emissions reduction would be the same as if all policies and proposals were delivered in full, Mr Lockley submits that this was a very significant and optimistic assumption which required detailed justification in the CBDP.

160. Mr Moffett KC, for the Secretary of State, submits that the legal test against which the Claimants arguments must be assessed is: does the Plan set out an explanation as to why the Secretary of State reached the overarching judgement that the overall package of policies and proposals would enable the carbon budgets to be met? Mr Moffett submits that the CBDP and its Technical Annex do include information sufficient for this purpose. The granular information that the Claimants suggest should have been

published was not relevant to his decision. He submits that Friends of the Earth's contention that the RAG ratings should have been published is baseless. It is common ground that the Secretary of State did not have regard to these RAG ratings when making his section 13 decision, and he cannot be required to publish material to which he did not have regard.

Discussion

161. In my judgment, the material contained in the CBDP complied with the Secretary of State's duty under section 14 of the CCA 2008. The CBDP told Parliament how the Secretary of State proposes to meet the carbon budgets by explaining his thinking behind the proposals and how they will enable the carbon budgets to be met: this included a description of each of the proposals and policies, as well as the contribution that the quantified policies were expected to make to the emission savings, and how it was judged that the shortfall to be made up from unquantified policies would be met. This is precisely the information that Holgate J held should have been provided in the NZS, which was subject to challenge in *FoE (No. 1)*. I do not consider that it is possible to read Holgate J's judgment as supporting an obligation on the Secretary of State to provide risk data, however expressed or portrayed, as part of the section 14 report to Parliament.

162. The section 14 report that is subject to challenge in these proceedings did include summaries of risk at the sectoral level. It does not seem to me that that was required by the statutory language. In any event, I do not consider that section 14 required the Secretary of State to provide further risk information as to the specific policies, whether via the RAG table format or through a narrative description, and how the risks would be overcome. Requiring the Secretary of State to provide information about risk would unduly strain the statutory language of section 14.

163. The express statutory language does not call for any explanation or discussion of the risk factors and how they will be overcome. Nor is it implied or implicit. Holgate J rightly in my judgment held that the statutory language implicitly or impliedly requires the Secretary of State to explain "how" the proposals and the policies will enable the carbon budgets to be met, and that this calls for a description of the proposals and policies and the contribution that they will make to achieving the objective. What the risk factors are and how they are expected to be overcome or mitigated does not explain or describe the proposal or policy, but addresses the operational (whether by way of funding, legislation or otherwise) means by which the proposal or policy might be achieved.

164. The principle of transparency that is inherent in the legislation does not, in my judgment, call for that to be explained. Indeed, as a factual matter, it is clear that in June 2023 the CCC was able to fulfil its statutory role in commenting on the CBDP without having sight of the Secretary of State's risk analysis, or the analysis that was provided to him by officials.

165. As for the contention that the risk information needed to be provided in the CBDP because that information was "obviously material" to the Secretary of State's decision and so had to be included in the CBDP, I disagree. Holgate J's analysis of the statutory obligation did not depend on this. Holgate J's analysis of section 14 from §§ 231 to 241 makes no mention of "obviously material" information. At §249, where Holgate J uses

the term "obviously material [to the risk of delivery]", this is descriptive of "the contributions made by a multiplicity of proposals and policies adopted by the Secretary of State". Similarly, at §254, where Holgate J uses the term "obviously material [to the critical issue of risk to the delivery of the statutory targets]", this is descriptive of the various factors set out at §253 (see paragraph 87 above). I do not consider, therefore, that Holgate J was intending to say that any and all information that was "obviously material" to the decision-making of the Secretary of State under section 13 had to be published by means of the section 14 document.

166. I also reject the argument, made by Mr Lockley, that the CBDP needed to include all obviously material information by analogy with the duty to give reasons. Mr Lockley relied on *South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953, where Lord Brown summarised the authorities governing the proper approach to a reasons challenge in the planning context. At §36, Lord Brown stated that:

> "The reasons for a decision must be intelligible and they must be adequate. **They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved**. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. **The reasons need refer only to the main issues in the dispute, not to every material consideration.** They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

(Emphasis added).

167. It does not seem to me that the analogy to a decision in the planning context, or more generally to a decision in any form of litigation, is apt. The planning cases, or litigation, involve disputes between parties on issues of fact and/or law. It is necessary for the decision-maker to resolve those disputes and only fair for the parties, or litigants, to understand why they have won or lost, which involves some intelligible explanation for the conclusion reached. The CBDP is plainly not a matter of litigation; there is no dispute between parties. There are no sides which need to know why they have won or lost. Rather, the CBDP is a plan which explains to Parliament (and to wider

stakeholders) *how* the carbon budget is going to be met, and it is only right that Parliament (and wider stakeholders) understand those matters.

168. The risk information would not be required to be included by the Secretary of State if he had consulted on the CBDP before laying it before Parliament. The *Gunning* principles (see *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168), approved by the Supreme Court in *R (Stirling) v Haringey London Borough Council* [2014] 1 WLR 3947), require a consulting party to give consultees sufficient explanation and information to enable intelligent consideration and responses by the latter. As Holgate J. explained at §245 that would require sufficient information "to understand and assess the adequacy of the Government's policy proposals and their effects". That could be done without supplying the Government's risk analysis.

169. The risk information is not required to be included in the section 14 report on the basis that it is necessary to inform the annual report that the CCC has to make to Parliament under section 36 of the CCA 2008. The annual report must include the CCC's views on whether the carbon budgets are "likely to be met". It was contended that if detailed risk information is not provided in the section 14 report, the CCC cannot scrutinise the Secretary of State's proposals and policies, and so cannot meet their section 36 duties. This argument is misconceived. There is no explicit textual connection between sections 14 and 36 of the CCA 2008. Rather, the connection within the statute is the other way round: pursuant to section 37 of the CCA, the Secretary of State is required to respond to the CCC's annual report. If Parliament had intended the CCC's report under section 36 to respond specifically to the section 14 report, the direct linkage could have been made in the statutory text. Furthermore, the argument presupposes that the CCC does not have its own expertise to consider risk independently of the Secretary of State's evaluation. The CCC is an expert body, with their own ability to consider the question of risk. Indeed, that is what happened on the facts here.

170. It was suggested in oral argument that this reading of section 14 of CCA 2008 may mean that there is no right of the public to see the risk information. I am not asked to consider the impact here of the Freedom of Information Act 2000. However, I do note that Parliament may be able to call for the risk information, given that the report was provided to Parliament. Indeed, this was commented upon by Holgate J. at §242 "Parliament is well able to call for more information to be provided where it wishes to do so".

171. In the circumstances, therefore, this ground of challenge fails.

Conclusion

172. I consider that each of the grounds of challenge were arguable, and so permission is granted on each of the grounds. As a matter of substance, the application for judicial review is allowed on Grounds 1, 2, 3 and 4. Ground 5 is dismissed. I shall invite the parties to make submissions on the terms of the order that I should make.

Appendix 2

A Queen's Bench Division

Regina (Stephenson) *v* Secretary of State for Housing, Communities and Local Government

B **[2019] EWHC 519 (Admin)**

2018 Dec 19, 20; 2019 March 6

Dove J

Planning — Development — Environmental assessment — Secretary of State publishing revised national planning policy document — Whether policy document unlawful — Whether "plan or programme" required by legislative, regulatory or administrative provisions and setting framework for future development consent of projects so as to require strategic environmental assessment prior to adoption — Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) — Parliament and Council Directive 2001/42/EC, arts 2(a), 3.2(a)

D

Planning — Development — National planning policy — Secretary of State revising national planning policy document following consultation — Whether provisions on oil, coal and gas exploration and extraction unlawful for lack of fair consultation — Whether Secretary of State failing to take material considerations into account — National Planning Policy Framework (2018), para 209(a)

E

In March 2012 the defendant published the National Planning Policy Framework ("NPPF") which replaced the large number of national planning policy documents with a single document setting out national planning policy in a shorter and simpler form. The defendant subsequently carried out a consultation on proposed revisions to the NPPF including a proposed paragraph on oil, gas and coal exploration and extraction, which read: "Minerals planning authorities should: (a) recognise the benefits of onshore oil and gas development, including unconventional hydrocarbons, for the security of energy supplies and supporting the transition to a low-carbon economy; and put in place policies to facilitate their exploration and extraction." That text reflected the contents of an earlier written ministerial statement on the exploration of shale gas and oil resources issued by the Secretary of State for Energy and Climate Change and the defendant on 16 September 2015. It subsequently became paragraph 209(a) of the revised version of the Framework published on 24 July 2018[1]. The claimant, on behalf of an organisation which campaigned on the perceived dangers of hydraulic fracturing for shale gas exploration and extraction ("fracking") and hosted a forum for informed debate on fracking and unconventional energy extraction, sought judicial review challenging the lawfulness of paragraph 209(a) on the grounds, inter alia, that: (i) there had been a lack of lawful consultation in relation to paragraph 209(a); (ii) the defendant had unlawfully failed to take into account material considerations, namely scientific and technical evidence produced since the adoption of the 2015 written ministerial statement, as described in the response to consultation submitted by the claimant's organisation; and (iii) paragraph 209(a) ought not to have been adopted without first carrying

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[1] National Planning Policy Framework (2018), para 209(a): see post, para 2.

out a strategic environmental assessment pursuant to Parliament and Council Directive 2001/42/EC[2], as transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004, the revised NPPF being a plan or programme that was "required by legislative, regulatory or administrative provisions", within article 2(a) of the Directive, and which "set the framework for future development consent of projects", within article 3(2)(a).

On the claim—

Held, allowing the claim in part, (1) that, while there were no express statutory provisions setting out specifically identified considerations as being material to the production of national planning policy, in order to arrive at a lawful policy the defendant had to take into account any considerations which were obviously material; that where a public authority, either as consequence of a statutory requirement or voluntarily, undertook a consultation exercise in order to identify the "obviously material" considerations, it had to comply with the common law duty of procedural fairness, which required it to carry out the consultation at a time when proposals were still at a formative stage, give sufficient reasons for any proposal to permit of intelligent consideration and response, give adequate time for consideration and response and, finally, conscientiously take the product of consultation into account in finalising any statutory proposals; that the consultation documents on the amendments to the NPPF, read from the standpoint of a reasonable member of the public or reasonable reader at whom the consultation was directed, by asking what they would understand the words to mean when read in context, presented a clear and consistent message that the substance and merits of the proposed paragraph 209(a) were matters within the scope of the consultation and about which the defendant was interested in hearing responses; that since, on the evidence, there had been no interest in reviewing or re-evaluating the substance of the policy of the 2015 written ministerial statement, or listening to any consultation engaged with the merits of the policy or the evidential and scientific issues associated with it, the consultation exercise carried out by the defendant was unlawful in that, by contrast with what the reasonable reader would have discerned from the publicly available material, he had a closed mind as to the content of the policy and was not undertaking the consultation at a formative stage (post, paras 33–35, 44, 51–62).

R (Stirling) v Haringey London Borough Council [2014] PTSR 1317, SC(E) applied.

(2) That the material submitted by the claimant's organisation, and in particular scientific evidence as described in its consultation response, had been capable of having a direct bearing upon a key element of the evidence base for the proposed policy and its relationship to climate change effects and had thus been obviously material to the defendant's decision on the proposed revision to the NPPF; and that, the defendant having failed to take that material into account, despite it being relevant to the decision which had been advertised including the substance and merits of the policy in paragraph 209(a), his decision was unlawful by reason of a failure to take into account obviously material considerations relevant to the decision which he had led the public to believe he was taking (post, paras 67–69).

[2] Parliament and Council Directive 2001/42/EC, art 2: "For the purposes of this Directive: (a) 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them … which are required by legislative, regulatory or administrative provisions …"

Art 3: " … 2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes, (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC …"

A (3) But that the NPPF was not a plan or programme which was "required by legislative, regulatory or administrative provisions" within the meaning of article 2(a) of Parliament and Council Directive 2001/42/EC and thus did not attract the requirement for strategic environmental assessment under article 3 (post, paras 3, 74).

R (Friends of the Earth Ltd) v Secretary of State for Housing, Communities and Local Government [2019] PTSR 1540 applied.

B The following cases are referred to in the judgment:

Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] UKSC 37; [2017] PTSR 623; [2017] 1 WLR 1865; [2017] 4 All ER 938, SC(E)

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; 66 ALR 299

Preston New Road Action Group v Secretary of State for Communities and Local C *Government* [2017] EWHC 808 (Admin); [2017] Env LR 33

R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168

R (Buckinghamshire County Council) v Secretary of State for Transport [2013] EWHC 481 (Admin); [2013] PTSR D25

R (Friends of the Earth Ltd) v Secretary of State for Housing, Communities and Local Government [2019] EWHC 518 (Admin); [2019] PTSR 1540

R (Jayes) v Flintshire County Council [2018] EWCA Civ 1089; [2018] ELR 416, CA

D *R (Kohler) v Mayor's Office for Policing and Crime* [2018] EWHC 1881 (Admin); [2018] ACD 102, DC

R (National Association of Health Stores) v Secretary of State for Health [2003] EWHC 3133 (Admin); [2005] EWCA Civ 154; The Times, 9 March 2005, CA

R (Stirling) v Haringey London Borough Council [2014] UKSC 56; [2014] PTSR 1317; [2014] 1 WLR 3947; [2015] 1 All ER 495; [2014] LGR 823, SC(E)

R (West Berkshire District Council) v Secretary of State for Communities and Local E *Government* [2016] EWCA Civ 441; [2016] PTSR 982; [2016] 1 WLR 3923, CA

Stichting Natuur en Milieu v European Commission (Case T-338/08) EU:T:2012:300, ECJ

Trump International Golf Club Scotland Ltd v Scottish Ministers [2015] UKSC 74; [2016] 1 WLR 85; [2017] 1 All ER 307, SC(Sc)

The following additional cases were cited in argument or referred to in the skeleton arguments:

F

A v Secretary of State for the Home Department (No 2) [2005] UKHL 71; [2006] 2 AC 221; [2005] 3 WLR 1249; [2006] 1 All ER 575, HL(E)

Dyer v Watson [2002] UKPC D1; [2004] 1 AC 379; [2002] 3 WLR 1488; [2002] 4 All ER 1, PC

Hotak v Southwark London Borough Council [2015] UKSC 30; [2015] PTSR 1189; [2016] AC 811; [2015] 2 WLR 1341; [2015] 3 All ER 1053, SC(E)

G *R v Lyons (Isidore)* [2002] UKHL 44; [2003] 1 AC 976; [2002] 3 WLR 1562; [2002] 4 All ER 1028; [2003] 1 Cr App R 359, HL(E)

R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213; [2000] 2 WLR 622; [2000] 3 All ER 850; [1999] LGR 703, CA

R (Bracking) v Secretary of State for Work and Pensions [2013] EWCA Civ 1345; [2014] Eq LR 60, CA

R (JS) v Secretary of State for Work and Pensions (Child Poverty Action Group H *intervening)* [2015] UKSC 16; [2015] PTSR 471; [2015] 1 WLR 1449; [2015] 4 All ER 939, SC(E)

R (K) v Parole Board [2006] EWHC 2413 (Admin); [2007] Prison LR 103

R (Khatun) v Newham London Borough Council [2004] EWCA Civ 55; [2005] QB 37; [2004] 3 WLR 417; [2004] LGR 696, CA

R (Peters) v Haringey London Borough Council [2018] EWHC 192 (Admin); [2018] PTSR 1359

Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014; [1976] 3 WLR 641; [1976] 3 All ER 665; 75 LGR 190, CA and HL(E)
Rantzen v Mirror Group Newspapers (1986) Ltd [1994] QB 670; [1993] 3 WLR 953; [1993] 4 All ER 975, CA

CLAIM for judicial review

By a claim form the claimant, Claire Stephenson, on behalf of an organisation, Talk Fracking, which campaigned on the perceived dangers of hydraulic fracturing for shale gas exploration and extraction ("fracking") and hosted a forum for informed debate on fracking and unconventional energy extraction, sought judicial review challenging the lawfulness of the decision of the defendant, the Secretary of State for Housing, Communities and Local Government, to adopt paragraph 209(a) of the National Planning Policy Framework ("NPPF"), dealing with oil, gas and coal exploration and extraction, as part of the amendments introduced into the NPPF on 24 July 2018. On 22 October 2018 Holgate J ordered that the issue of permission to proceed be decided at the same time as the substantive claim. The grounds of claim were, inter alia, that there had been a lack of lawful consultation on paragraph 209(a), that the defendant had unlawfully failed to take into account material considerations, namely scientific and technical evidence produced since the adoption of a written ministerial statement by the Secretary of State for Energy and Climate Change and the defendant on 16 September 2015, as described in the response to consultation submitted by the claimant's organisation, and that paragraph 209(a) ought not to have been adopted without first carrying out a strategic environmental assessment.

The facts are stated in the judgment, post, paras 6–24.

David Wolfe QC, *Peter Lockley* and *Jennifer Robinson* (instructed by *Leigh Day*) for the claimant.

Rupert Warren QC and *Heather Sargent* (instructed by *Treasury Solicitor*) for the defendant.

The court took time for consideration.

6 March 2019. **DOVE J** handed down the following judgment.

Introduction

1 The claimant brings this claim on behalf of an organisation known as Talk Fracking. She does so as a supporter of that organisation's objectives. Talk Fracking is involved in campaigning on the dangers it considers the fracking industry poses to the environment, and also operates as a means of hosting a forum for informed debate on fracking and unconventional energy extraction. The nature of the technique involved in fracking, or hydraulic fracturing, is well known: for those unfamiliar with that technology it is described in *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2017] Env LR 33, paras 8 and 9. Talk Fracking has been active in relation to these issues for around five years.

2 By this application for judicial review the claimant seeks to challenge the adoption by the defendant of paragraph 209(a) of the National Planning

Policy Framework ("the Framework") on 24 July 2018. Under the heading "Oil, gas and coal exploration and extraction", paragraph 209(a) provides:

> "Minerals planning authorities should: (a) recognise the benefits of onshore oil and gas development, including unconventional hydrocarbons, for the security of energy supplies and supporting the transition to a low-carbon economy; and put in place policies to facilitate their exploration and extraction."

3 This matter was directed to be heard as a "rolled-up" hearing by Holgate J on 22 October 2018. The claimant advances four grounds of challenge. Whilst these are dealt with in greater detail below, in order to introduce the issues the four grounds are as follows. Firstly, ground 1 is the contention that the defendant unlawfully failed to take into account material considerations, namely scientific and technical evidence, which had been produced following the adoption of a written ministerial statement by the Secretary of State for Energy and Climate Change and the defendant on 16 September 2015 ("the 2015 WMS"). Ground 2 is the claimant's argument that the defendant failed, in publishing the policy in paragraph 209(a) of the Framework, to give effect to the Government's long-established policy in relation to the obligation to reduce greenhouse gas emissions under the Climate Change Act 2008. Ground 3 is the contention that in adopting paragraph 209(a) the defendant unlawfully failed to carry out a strategic environmental assessment. The issues raised in relation to this ground of challenge are essentially identical to those being addressed in *R (Friends of the Earth Ltd) v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 1540 and the claimant in the present case accepts that, given the arguments are parallel, ground 3 will be resolved by the conclusions reached in relation to the arguments raised in the *Friends of the Earth* case. Finally, by way of ground 4, the claimant contends that the defendant failed to carry out a lawful consultation exercise in relation to the revisions to the Framework which were published on 24 July 2018.

4 This judgment is structured as follows. Firstly, the factual background to the publications of the revisions to the Framework will be set out chronologically, together with the accompanying evidence furnished as part of the litigation for the purposes of the hearing. Secondly, the relevant legal principles will be set out. Thirdly, the claimant's grounds will be examined and evaluated. In accordance with the way in which the claimant presented her case at the hearing that consideration starts with ground 4 and ground 1 (which the claimant identified closely interact) before proceeding to grounds 2 and 3.

5 I wish to place on record my thanks to counsel and the solicitors instructed in this case for their invaluable contribution to the preparation of the case for the hearing, and for the careful and focused submissions which I have received which have greatly assisted me in my task.

The facts

6 On 16 September 2015 the Secretary of State for Energy and Climate Change along with the defendant published the 2015 WMS in Parliament entitled "Shale Gas and Oil Policy". The statement was to "be taken into

account in planning decisions and plan-making". The 2015 WMS went on to observe:

> "*The national need to explore our shale gas and oil resources*
>
> "Exploring and developing our shale gas and oil resources could potentially bring substantial benefits and help meet our objectives for secure energy supplies, economic growth and lower carbon emissions.
>
> "Having access to clean, safe and secure supplies of natural gas for years to come is a key requirement if the UK is to successfully transition in the longer term to a low-carbon economy. The Government remains fully committed to the development and deployment of renewable technologies for heat and electricity generation and to driving up energy efficiency, but we need gas—the cleanest of all fossil fuels—to support our climate change target by providing flexibility while we do that and help us to reduce the use of high-carbon coal.
>
> "Natural gas is absolutely vital to the economy. It provides around one third of our energy supply."
>
> "Meanwhile events around the world show us how dangerous it can be to assume that we will always be able to rely on existing sources of supply. Developing home-grown shale resources could reduce our (and wider European) dependency on imports and improve our energy resilience.
>
> "There are also potential economic benefits in building a new industry for the country and for communities."
>
> "We do not yet know the full scale of the UK's shale resources nor how much can be extracted technically or economically."
>
> "Shale gas can create a bridge while we develop renewable energy, improve energy efficiency and build new nuclear generating capacity. Studies have shown that the carbon footprint of electricity from UK shale gas would be likely to be significantly less than unabated coal and also lower than imported Liquefied Natural Gas [footnote 9].
>
> "The Government therefore considers that there is a clear need to seize the opportunity now to explore and test our shale potential."

7 The reference in footnote 9 related to the carbon footprint of shale gas-generated electricity and it provided a cross-reference to research which had been commissioned by the Department for Energy and Climate Change from Professor David MacKay and Dr Timothy Stone ("the Mackay and Stone Report"). The MacKay and Stone Report, which is dated 9 September 2013, is entitled *Potential Greenhouse Gas Emissions associated with Shale Gas Extraction and Use*. The purpose of the study was to address concerns about the likely potential greenhouse gas emissions from the production of shale gas, and the compatibility of the use of shale gas (in the light of the available evidence) with the United Kingdom's climate change target. The conclusion which the Mackay and Stone Report reached, at para 4, was that greenhouse gas emissions associated with shale gas exploration and production should represent "only a small proportion of the total carbon footprint of shale gas, which is likely to be dominated by carbon dioxide emissions associated with its combustion". The overall calculations of the carbon footprint for production and use of shale gas was compared favourably by the Mackay and Stone Report to the carbon footprint of coal, and comparable to gas

A extracted from conventional sources whilst lower than the carbon footprint of liquefied natural gas. This report therefore provided the support for the implicit conclusions in the 2015 WMS that the use of shale gas would be consistent with the Government's targets for climate change and greenhouse gas emissions, and would perform significantly better than other alternative choices in the form of coal or liquefied natural gas. Shale gas therefore provided a potential source of energy to bridge the transition from the present B to a future supported by renewable energy, it being recognised that it would take some time for renewable energy sources to come fully on stream.

8 On 12 December 2015 the Paris Agreement on Climate Change was agreed. At around this time concern was intensifying in relation to whether or not the data which had been used to model greenhouse gas emissions from shale gas extractions was reliable, or was in fact seriously underestimating C the emissions from extraction activities.

9 Under the provisions of the Infrastructure Act 2015 the Committee on Climate Change ("the CCC") has been given a duty to report to the Government and advise on issues associated with meeting the UK's carbon budget and 2050 emissions reduction target related to the Climate Change Act 2008. In March 2016 the CCC specifically reported on the compatibility of exploitation of UK onshore shale gas with meeting the UK's carbon D budget. This March 2016 report recorded a summary of the conclusions of the CCC:

> "The implications for greenhouse gas emissions of shale gas exploitation are subject to considerable uncertainties, both regarding the size of any future industry and the emissions footprint of production. E This uncertainty alone calls for close monitoring of developments. The Committee will report back earlier than its next statutory deadline five years from now should this be necessary.
>
> "The UK regulatory regime has the potential to be world-leading but this is not yet assured. The current regime includes important roles for the Health and Safety Executive and the relevant environmental F regulators (eg the Environment Agency in England), which will need to be managed seamlessly. Onshore petroleum exploitation at scale would have unique characteristics in the UK. This may ultimately necessitate the establishment of a dedicated regulatory body. It certainly requires that a strong regulatory framework is put in place now.
>
> "Our assessment is that exploiting shale gas by fracking on a G significant scale is not compatible with UK climate targets unless three tests are met:
>
> "Test 1: Well development, production and decommissioning emissions must be strictly limited. Emissions must be tightly regulated and closely monitored in order to ensure rapid action to address leaks."
>
> "Test 2: Consumption—gas consumption must remain in line with carbon budgets requirements. UK unabated fossil energy consumption H must be reduced over time within levels we have previously advised to be consistent with the carbon budgets. This means that UK shale gas production must displace imported gas rather than increasing domestic consumption.
>
> "Test 3: Accommodating shale gas production emissions within carbon budgets. Additional production emissions from shale gas wells

> will need to be offset through reductions elsewhere in the UK economy, such that overall effort to reduce emissions is sufficient to meet carbon budgets."

10 In July 2016 the Government provided a response to the CCC report. In that response the Government reiterated the commitment to the use of shale gas as a bridge whilst old coal generation technology was phased out and renewable and nuclear energy developed alongside increased energy efficiency. The response engaged with the three tests which had been set out in the CCC's report. So far as meeting test 1 was concerned, the CCC's test was accepted and the Government expressed itself confident that the existing regulatory regime would ensure that the test was met. In respect of test 2, the test requiring gas consumption to remain in line with carbon budget requirements, the Government specifically referenced the Mackay and Stone Report as a basis for concluding that life cycle emissions from UK shale gas would be comparable to conventional sources or natural gas, and thus the test would be met. In relation to test 3, again the Government was confident that this test could be met for the production stage of shale gas development.

11 Prior to the Government's response to the CCC report a public inquiry opened on 9 February 2016 in relation to four appeals under section 78 of the Town and Country Planning Act 1990, as amended, pertaining to proposals for exploratory fracking and the monitoring of gas production at two sites in Lancashire. For ease of reference these appeals are referred to hereafter as the Preston New Road appeals. The promoters of the development which was the subject matter of the appeal relied upon the provisions of the 2015 WMS in support of their development. This was on the basis that the WMS expressly indicated that it was to be taken into account in development control decisions, and it was supportive of shale gas exploration proposals. Objectors to the proposals, and in particular Friends of the Earth, contended that substantially less weight should be given to the 2015 WMS. Two events were relied upon to support that contention: firstly, the fact that in a recent autumn statement the Chancellor of the Exchequer had abandoned investment in carbon capture storage ("CCS") technology and, secondly, the signing of the Paris Agreement, which Friends of the Earth contended brought with it tougher targets for bearing down on climate change, leading to the inevitable conclusion that the WMS should carry less weight.

12 In her report to the defendant dated 4 July 2016 the inspector concluded:

> "12.50 None the less, there has been no correction to the WMS issued by the Government in the light of the Chancellor's announcement in relation to the CCS. Neither has there been any statement from the Government since the Paris Agreement to suggest that its position in relation to shale gas, as stated in the WMS, has changed. It seems to me that the way in which the Government chooses to respond and adapt its various energy policies in the light of these two events is a matter to be considered by it and, if thought to be necessary, addressed through policy development. It is inappropriate and unhelpful in the context of these planning appeals to speculate as to what the eventual outcome of such national policy development might be in the future. There is nothing from the Government to indicate that the WMS no longer represents its position in relation to the need for shale gas exploration.

I have given careful consideration to the evidence of Professor Anderson on behalf of [Friends of the Earth ('FoE')] as to the weight to be given to the Government's view as set out in the WMS. However, I do not consider that the factors identified by FoE undermine or materially reduce the weight to be attributed to the WMS."

Furthermore, in the inspector's assessment of the submissions made in particular by Friends of the Earth through their witness Professor Anderson the inspector concluded:

"12.677 I have already given consideration to the weight to be attached to the WMS in the light of the Paris Agreement and the Chancellor's announcement in relation to CCS. As indicated above, I consider that the way in which the Government chooses to respond and adapt its various energy policies in the light of these two events is a matter it would need to consider and, if thought necessary, addressed through policy development. At present, the WMS represents the Government's position in relation to the need for shale gas exploration and the need for gas to support its climate change target. I agree with the appellants that the issues raised by Professor Anderson as to how shale gas relates to the obligations such as those set out in the Paris Agreement, and the Intergovernmental Panel on Climate Change ('IPCC') carbon budgets, are the matter for future national policy and not for these appeals."

13 The inspector recommended to the defendant that three of the appeals should be allowed and one dismissed. On 6 October 2016 the defendant, having considered the inspector's report, reached a decision in relation to the appeals. In respect of the points raised in relation to national policy, and in particular the 2015 WMS, the defendant reached the following conclusions:

"28. The Secretary of State has considered the weight that should be attached to the need for shale gas exploration and the WMS. For the reasons given at paras IR12.34–IR12.52, he agrees with the inspector at IR12.50 that the factors identified by Friends of the Earth do not undermine or materially reduce the weight to be attributed to the WMS. He further agrees that the need for shale gas exploration is a material consideration of great weight in these appeals, but that there is no such Government support for shale gas development that would be unsafe and unsustainable: para IR12.52. The Secretary of State also considers that the need for shale gas exploration set out in the WMS reflects, among other things, one of the Government's objectives in the WMS, in that it could help achieve secure energy supplies.

"29. How the Government may choose to adapt its energy polices is a matter for possible future consideration. If thought necessary, this could be addressed through future national policy. These are not matters that fall to be considered in these appeals."

14 In February 2017 a report by Paul Mobbs, which had been commissioned by Talk Fracking, was published entitled "Whitehall's 'Fracking' Science Failure" ("the Mobbs Report"). In the report a number

of detailed criticisms are made of the science underpinning the Government's conclusions on the impacts on climate change of the development of shale gas, and the opportunity which it provided for the creation of a bridge between the present time and a low carbon economy supported by the development of renewable and nuclear energy. A key element of the Mobbs Report is its contention that there had been a significant change in the methods by which gas emissions from shale gas operations could be measured and monitored. In the light of these changes in the techniques available, including the ability to equip aircraft to undertake gas monitoring from the air, rather than relying upon the measurement of emissions from ground level, a conclusion emerged that earlier data gathered on the basis of ground level emissions had significantly understated the extent of emissions occurring at shale gas extraction facilities. The Mobbs Report went on to contend that this had significant implications for the Mackay and Stone Report which underpinned the Government's conclusions as to the likely implications for climate change of the development of a shale gas industry. In summary, the Mobbs Report concluded that whilst the methodology of the Mackay and Stone Report was not necessarily unsound, the data upon which it relied for fugitive emissions was a significant underestimate of the emissions from shale gas extraction operations which had now been measured in more recent studies. The Mobbs Report called for the Mackay and Stone Report to be withdrawn, and for there to be a moratorium on any fracking operations until the implications for fracking and climate change were properly understood.

15 In October 2017 the Department for Business, Energy and Industrial Strategy ("BEIS") published *The Clean Growth Strategy*. Whilst *The Clean Growth Strategy* covered policy in relation to power generation it made no reference to shale gas in its proposals.

16 By the summer of 2017 work had commenced on a review of the text of the Framework, and the potential need to publish and adopt amendments to several parts of the text of that document to reflect matters which had emerged since the Framework was originally published in March 2012. In a witness statement on behalf of the defendant from Dr Michael Bingham it is clear that amongst the types of issue to which consideration was given in terms of amending the Framework were "amendments or policy emphases that had come about through written ministerial statements, where these remained relevant".

17 In March 2018 the defendant published consultation proposals in relation to changes to the Framework. A draft text of the entirety of the proposed revised version of the Framework was published to accompany the consultation process. In particular, at paragraph 204(a) of that consultation draft the following text appeared:

> "Minerals planning authorities should: (a) recognise the benefits of onshore oil and gas development, including unconventional hydrocarbons, for the security of energy supplies and supporting the transition to a low-carbon economy; and put in place policies to facilitate their exploration and extraction."

18 The proposed text of the revised Framework was accompanied by further a document entitled "National Planning Policy Framework: consultation proposals" ("the Consultation Proposals Document"). That

document explained that the consultation was "open to everyone". The scope of the consultation was described in the following terms:

> "Topic of this consultation: This consultation seeks views on the draft text of the National Planning Policy Framework. The text has been revised to implement policy changes …"
>
> "Scope of the consultation: The Ministry of Housing, Communities and Local Government is consulting on the draft text of the National Planning Policy Framework. It also seeks views on new policy proposals."

The introduction to the document went on to describe the process:

> "The draft new Framework implements the Government's reforms to planning policy. Subject to this consultation, the Government intends to publish a final Framework before the summer. In developing the draft Framework the Government has incorporated:
>
> • proposals from the previous consultations listed at the start of this document, taking into account the views raised in response to them;
>
> • changes to planning policy implemented through written ministerial statements since publication of the first Framework in 2012 (Annex A);
>
> • the effect of case law on the interpretation of planning policy since 2012; and
>
> • improvements to the text to increase coherence and reduce duplication."
>
> "The Government welcomes comments on the ways in which the draft Framework implements changes to planning policy on which the Government has previously consulted, and on the merits of the new policy proposals that it includes. It now challenges developers, local authorities, communities, councillors and professionals to work together to ensure that great developments in line with the Framework are brought forward and to enable more people to meet their aspiration for a home of their own."

19 In relation to paragraph 204 of the consultation draft of the Framework the Consultation Proposals Document provided the following, including a sequence of questions to be addressed by consultees:

> "Chapter 17 *Facilitating the sustainable use of minerals*
>
> "The revised text proposes these policy changes:
>
> "This chapter has been shortened slightly, the intention being to incorporate the deleted text in guidance. Additional text on onshore oil and gas development is included at paragraph 204, which builds on the written ministerial statement of 16 September 2015 to provide clear policy on the issues to be taken into account in planning for and making decisions on this form of development.
>
> "As planning for minerals is the responsibility of minerals planning authorities, the Government is interested in views on whether the revised planning policy for minerals that we are consulting on would sit better in a separate document, alongside the Government's planning policy for waste. In addition, we would welcome views on whether the use

of national and sub-national guidelines on future aggregates provision remains a relevant approach in establishing the supply of aggregates to be planned for locally.

"Q37 Do you have any comments on the changes of policy in Chapter 17, or on any other aspects of the text of this chapter?

"Q38 Do you think that planning policy on minerals would be better contained in a separate document?

"Q39 Do you have any views on the utility of national and sub-national guidelines on future aggregates provision?"

20 Talk Fracking provided a consultation response in particular to question 37 in the Consultation Proposals Document. The summary of its contentions was set out in para 3:

"Talk Fracking considers that it is inappropriate and irrational to include within the [Framework] policies previously in the WMS, and if anything to give them greater status in relation to planning applications in England, given material developments since the adoption of the WMS, including:

"3.1 Scientific developments suggest that the climate impact of fracking was underestimated at the time of the WMS.

"3.2 Wales, Northern Ireland and Scotland have implemented bans on fracking or a presumption against it.

"3.3 The Government has failed to show that the WMS is compatible with its existing domestic obligations to reduce greenhouse gas emissions ('GHG') under the Climate Change Act 2008.

"3.4 Specifically, it has failed to demonstrate whether and how it can meet the three tests that the Committee on Climate Change ('CCC') consider must be met if fracking is to compatible with meeting the targets under the 2008 Act."

"3.5 The Government has recently asked the CCC to review whether the existing commitments under the 2008 Act are consistent with the level of ambition of the Paris Agreement: a process that is all but certain to lead to a tightening of the UK's current GHG reduction targets (as the CCC has already made clear)."

"Since there is no evidence that fracking is compatible even with existing targets, it would be deeply irresponsible to pursue it at a time when targets are being tightened."

21 The Talk Fracking consultation response developed the point raised in relation to changes in the state of scientific knowledge about the impact from fracking on climate change in the following terms:

"*Developments in the science*

"10. Since 2015 there have been significant and material developments in the understanding of the GHG emissions arising from fracking (summarised in a report commissioned by Talk Fracking by Paul Mobbs, 'How The Government Has Misled Parliament And The Public On The Climate Change Impacts Of Shale Oil And Gas Development In Britain', May 2017 'Mobbs Report') for example:

"10.1 Methodological improvements in measuring emissions: The ability to measure the emissions from oil and gas infrastructure has

A been limited by the accuracy and reliability of mobile gas monitoring equipment. As a result, two general forms of environmental sampling have arisen in order to produce an estimate of emissions from the industry: 'bottom-up' or 'inventory' analysis; and 'top-down' or 'instrumental' analysis. As set out in the Mobbs Report, the debate on fugitive emissions 'has tended to be over the numerical results of individual studies, not the difference in numerical results which is the B inevitable consequence of using two different analytical methods. Thus the 'quality' or 'accuracy' of each approach is ignored' (Mobbs Report, p 9). The WMS is based upon a 2013 report by Professor David MacKay and Dr Tim Stone, commissioned by the Department of Energy and Climate Change (DECC) ('MacKay/Stone report'). The MacKay/Stone report was based primarily on inventory analysis and relied upon data C from another report ('the Allen report'), which has since been shown to have been inaccurate, with growing concern about the accuracy of this method and its tendency to underestimate emissions (see Mobbs Report, para 49).

"10.2 Global warming potential and methane: The Mackay/Stone report assumes that methane is 25 times more potent a greenhouse gas than carbon dioxide over a 100-year period (abbreviated, 'GWP100'). D This is not the approach taken within Howarth's calculations, which considers both 20-year ('GWP20') and 100-year 'global warming potentials' ('GWPs'). Methane is more significant in the short term because is exacerbates the progress of climate change towards tipping points, meaning limiting the release of methane is essential. In 2014, Howarth later updated his earlier papers and outlined how the case for E higher methane emissions had become more certain as a result of further 'top-down' environmental sampling and considered research released in the interim from the Intergovernmental Panel on Climate Change ('IPCC') which had made the case that studies should use the GWP20 in assessments, as well as GWP100, to reflect the time-sensitive impact of emissions (Mobbs Report, paras 56–59)."

F In a footnote to para 10.1 of the consultation response a link was provided to the Mobbs Report.

22 The consultation response from Talk Fracking went on to observe, firstly, that the inclusion of the 2015 WMS was not merely a tidying-up exercise but would give the 2015 WMS "formal status as a material consideration in planning applications". Secondly, observations were made G by Talk Fracking in relation to consultation in relation to the points which it raised. It observed:

"34. Given the importance of the issues set out above, it is unacceptable that the Government is seeking to reinforce existing policy on fracking without carrying out any meaningful consultation.

"35. This failure is particularly stark given that—astonishingly— H there has never been any public consultation in England about the benefits and disbenefits of fracking. The WMS was not the product of any form of consultation."

23 The consultation period had closed on 10 May 2018. On 17 May 2018 a written ministerial statement was made by BEIS jointly with the defendant

in relation to energy policy ("the 2018 WMS"). The 2018 WMS, so far as relevant to these proceedings, provides: A

> "My Rt Hon Friend James Brokenshire, the Secretary of State for Housing, Communities and Local Government, and I wish to reiterate the Government's view that there are potentially substantial benefits from the safe and sustainable exploration and development of our onshore shale gas resources and to set out in this statement to Parliament the actions we are taking to support our position. This joint statement should be considered in planning decisions and plan-making England." B
>
> "*Planning policy and guidance*
>
> "This statement is a material consideration in plan-making and decision-taking, alongside relevant policies of the existing National Planning Policy Framework (2012), in particular those on mineral planning (including conventional and unconventional hydrocarbons). C
>
> "Shale gas development is of national importance. The Government expects mineral planning authorities to give great weight to the benefits of mineral extraction, including to the economy. This includes shale gas exploration and extraction.
>
> "Mineral plans should reflect that mineral resources can only be worked where they are found, and applications must be assessed on a site by site basis and having regard to their context. Plans should not set restrictions or thresholds across their plan area that limit shale development without proper justification. We expect mineral planning authorities to recognise the fact that Parliament has set out in statute the relevant definitions of hydrocarbon, natural gas and associated hydraulic fracturing. In addition, these matters are described in Planning Practice Guidance, which plans must have due regard to. Consistent with this Planning Practice Guidance, policies should avoid undue sterilisation of mineral resources (including shale gas). D E
>
> "The Government has consulted on a draft revised National Planning Policy Framework ('NPPF'). The consultation closed on 10 May 2018. In due course the revised National Planning Policy Framework will sit alongside the written ministerial statement." F

24 As set out above, in July 2018 the final version of the revised Framework was published. Alongside its publication the defendant published a document entitled "Government response to the draft revised National Planning Policy Framework consultation: a summary of consultation responses and the Government's view on the way forward". In the Foreword to the document it was noted that "all responses have been considered carefully". In respect of question 37 the document recorded the following in relation to the consultation response and the Government's reaction to it: G

> "There were 975 responses to this open question. Points raised include: H
>
> • Respondents from most sectors supported the need to facilitate security of supplies, but there were concerns about the dropping of the word 'essential' to describe minerals. They highlighted the need to safeguard not only minerals reserves, but also the infrastructure needed to distribute them, and sought amendments to wording on land banks.

A • Individuals and some environmental organisations considered that more emphasis should be placed on renewables.

• Individuals and some interest groups disagreed with policies relating to oil and gas development, including unconventional hydrocarbons. These groups considered that these polices should be omitted due to disagreement with the principle of fossil fuels, shale development, and fracking.

B • Some individuals considered policy to be unbalanced towards the economic benefits of mineral development and stated that equal weight should be given to economic, social and environmental considerations. There were some calls to provide a clear position on coal.

• There were calls for references to underground exploration and extraction operations to be omitted from paragraph 205, as ensuring C their integrity and safety was the remit of the regulators, principally the Health and Safety Executive, rather than mineral planning authorities.

"*Government response*

"There was limited support for the inclusion in the Framework of policies for the exploration and extraction of oil, gas and unconventional hydrocarbons (which includes shale), with most responses objecting to potential shale development as a matter of D principle. However, shale gas, which plays a key role in ensuring energy security, is of national importance. The Government is committed to explore and develop our shale gas resources in a safe and sustainable way. We have therefore carried forward this policy in the Framework, which would apply having regard to the policies of the Framework as a whole."

E

As set out above the final text of the policy, which reflected the policy text of the consultation draft, was contained in paragraph 209(a) of the final version of the Framework.

25 What has been set out above (perhaps with the exception of the contents of the Talk Fracking Consultation Response) presents that which F was in the public domain in relation to the consultation exercise for the revision of the Framework. Dr Bingham provides some further information in relation to the thinking and the processes which were occurring behind the scenes and within the defendant's department at the time of the revisions to the Framework. Firstly, he provides the following commentary on the genesis of the text in paragraph 204(a) of the draft revised Framework:

G

"22. This text was drafted in discussion with the shale policy team in the department to reflect the high-level policy in the 2015 written ministerial statement, and beyond this do no more than carry it forward into a consequential (and logical) expectation that authorities should develop their own policies to facilitate exploration and extraction. In doing so, authorities would, as explained above, need to take into H account all relevant aspects of the revised NPPF, including its chapter on meeting the challenge of climate change and various environmental safeguards set out elsewhere in the minerals chapter (at paragraphs 200 and 201 of the draft revised NPPF). As with the original NPPF, the draft policy referred to onshore oil and gas development as a whole, including unconventional hydrocarbons, as the considerations that it sets out were

felt to be equally applicable to other (non-shale) forms of onshore oil and gas development.

"23. Because paragraph 204(a) of the draft revised NPPF reiterated, at a high level, an important and long-established policy position (the relevance of which had been reaffirmed in the manifesto for the incoming Government), I understand that officials in the department's shale policy team did not review detailed evidence relating to the merits of shale gas development as part of its drafting, as they felt that this was unnecessary.

"24. More generally, in the context of revising the NPPF as a whole, detailed reviews of evidence relating to the policies that are led elsewhere in government would have been inappropriate as well as impractical. For example, the Department for Business, Energy and Industry Strategy ('BEIS') has led responsibly for national policy on shale, while the range of matters covered by the revised NPPF means that it would not have been feasible for all of the evidence behind wider government policies to be explored afresh as part of the NPPF's drafting. Close contact was, however, maintained with officials in other Government departments as drafting progressed to ensure that its content reflected wider government policy positions where it was appropriate to do so, such as *The Clean Growth Strategy* published by BEIS in October 2017. This took place both through bilateral conversations between relevant policy leads and a series of roundtable discussions with other departments as the drafting progressed."

26 In relation to the consideration of consultation responses, and in particular the consultation response provided by Talk Fracking, Dr Bingham provides:

35. The claimant's representations on the draft revised NPPF asserted that a number of reports produced since the 2015 written ministerial statement showed that the climate change impacts of shale gas development had been underestimated, and for this reason (and others) it was not appropriate to reflect the written ministerial statement in the revised NPPF. The representations placed particular emphasis on the report that Talk Fracking had itself commissioned from Paul Mobbs (the Mobbs Report). I understand that the team in the department with shale gas policy had not been aware of the Mobbs Report when preparing the draft revised NPPF, nor of the other detailed research studies cited in the claimant's representations as having been referred to the Mobbs Report. This is unsurprising: as noted in para 24 above, in revising the NPPF it would have been both impractical and inappropriate to review detailed evidence relating to policy priorities established elsewhere in Government.

"36. Due to the volume of responses to the consultation, officials from across the planning directorate logged consultation responses and converted those not sent via the website using the 'Survey Monkey' platform into the same format. This enabled the analysts to view the information in one platform, and for the quantitative analysis to be completed digitally rather than manually. The lead for the logging process delivered training to all staff, including the need to include all information. Unfortunately, as with all manual processes there is the potential for human error. The person logging the Talk Fracking

response did not include the footnote containing the link to the Mobbs Report when transferring information to the Survey Monkey format.

"37. In considering the representations, I understand that the shale policy team in the department considered that the references to the Mobbs Report had limited bearing on the high-level policy contained in paragraph 204(a). It was clear from the representations that it dealt with a contested area of science, and was taking a view based on various detailed academic studies. It was not feasible for the team to assess the veracity of the range of work referred to or the conclusions drawn, but nor was it necessary given the limited purpose of paragraph 204(a) —ie to carry forward existing policy at a high level, as a framework for plans and decisions at the local level (which would, necessarily, have to take into account any other material considerations identified as appropriate). I understand that in the context of this limited purpose of paragraph 204(a), it was also considered unnecessary to revisit the Government's previous assessment of three tests set by the Committee on Climate Change, in the light of the representations received."

27 Through his evidence Dr Bingham introduces the consultation response analysis summaries which were presented to ministers in relation to question 37, in so far as it related to shale gas extraction. It is unnecessary to include for the purposes of this judgment the summary relating to local authorities, neighbourhood planning bodies or private sector organisations. Those relating to other types of consultee were set out in the following terms together with the concluding summary in respect of all responses:

"*Trade Associations/Interest Groups/Voluntary or Charitable Organisations*

"There were 62 comments, of which one was no comment. There is minimal support for the changes. The majority of disagreement was from interest groups who cited concerns to the policy on environmental and climate change grounds. In general, respondents indicated that the text should be omitted, stating that the NPPF should instead presume against the extraction of fossil fuels or should be revised to include further regulations to prevent perceived local impacts of developments. It was explained by some trade associations that further clarification was needed to make clear the role of regulators when dealing with the technical aspects concerning subsurface issues.

"*Others*

"There were 30 comments from others. There is minimal support from others, which included campaign and local resident groups. The majority of disagreement to changes to the policy is on environmental and climate change grounds. Many believe that text should not be included to NPPF should instead presume against any extraction of fossil fuels. About a third of respondents believed that emphasis should instead be placed on the prioritisation of renewable energy.

"*Individuals*

"There were 414 comments. There is minimal support on the changes made in the oil, gas and coal exploration and extraction section of Chapter 17. The majority of disagreement to changes to policy is on environmental and climate change grounds. Many believe that text should not be included to support the planning

for or extraction of oil, gas and coal. Many also believed that the NPPF should instead presume against any extraction of fossil fuels. About a third of respondents believed that emphasis should instead be placed on the prioritisation of renewable energy. Comments were also made highlighting views that technology for underground gas and carbon storage were not appropriate and possibly dangerous, therefore mineral planning authorities should not encourage this activity. It was commonly suggested that when planning for onshore oil and gas development, clearly distinguish between, and positively for, the full life cycle of well site rather than the three phases of development suggested.

"*Concluding summary*

"975 responses were received to Q37, of which 433 related to aggregated and industrial minerals; and 569 comments related to the oil, gas and coal exploration and extraction section in Chapter 17.

• Most sectors supported the need to facilitate security of supplies; more objected to the dropping of the word 'essential' to describe minerals; most highlighted the need to safeguard not only minerals reserves but also the infrastructure needed to distribute; and sought amendments to wording on land banks.

• Individuals and some environmental organisations felt more emphasis should be placed on renewables.

• Individuals and some interest grounds disagreed with policies relating to oil and gas development, including unconventional hydrocarbons. These groups believed that these policies should be omitted due to disagreement with the principle of fossil fuels, shale development and fracking.

• Some individuals considered policy to be unbalanced towards the economic benefits of mineral development; equal weight should be given to economic, social and environmental considerations.

• References to underground exploration and extraction operations should be omitted from paragraph 205, as ensuring their integrity and safety was the remit of the regulators, principally the Health and Safety Executive, rather than mineral planning authorities."

It was against the background of these summaries presented to ministers that the decision to approve the revised Framework was made.

The law

28 The system of regulation that controls the development and use of land, the planning system, is a comprehensive statutory code. Within that statutory regime there are two key processes. The first is the formulation of plans containing policies and proposals to guide decision-making in respect of future development. The second is the decision-making process on applications for development made to the relevant planning authority or, on appeal to the defendant. When made and available, national planning policy of the kind represented by the Framework plays a role in these two key processes. Section 19 of the Planning and Compulsory Purchase Act 2004, as amended, makes provision for the preparation of local development documents. In particular at section 19(2) (as amended by section 180(5)(b) of the Planning Act 2008) it provides: "In preparing a development plan

document or any other local development document the local planning authority must have regard to— (a) national policies and advice contained in guidance issued by the Secretary of State".

29 Within Schedule 4B to the Town and Country Planning Act 1990, as inserted, provisions are made in relation to the "basic conditions" required to be met by a neighbourhood development order or a neighbourhood plan before it can proceed to referendum. These "basic conditions" include as a test the question of whether or not it is appropriate to make the instrument having regard to national policies and advice issued by the defendant. Provisions of this kind led Lord Carnwath JSC to the conclusion in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623, para 19 that the power to issue national planning policy is derived either expressly or by implication from the statutory framework itself.

30 The provisions pertaining to the testing of a development plan document are contained within section 20 of the 2004 Act. This section (as amended by section 110(3) of the Localism Act 2011) requires a development plan document to be subject to independent examination and identifies the purpose of that independent examination:

> "(5) The purpose of an independent examination is to determine in respect of the development plan document— (a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents; (b) whether it is sound; and (c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation."

31 There is no definition within the statutory framework as to the yardstick for whether or not a development plan document is "sound". The defendant has chosen to include that test within paragraph 35 of the Framework, which provides:

> "Local plans and spatial development strategies are examined to assess whether they have been prepared in accordance with legal and procedural requirements, and whether they are sound. Plans are 'sound' if they are: (a) positively prepared—providing a strategy which, as a minimum, seeks to meet the area's objectively assessed needs; and is informed by agreements with other authorities, so that unmet need from neighbouring areas is accommodated where it is practical to do so and is consistent with achieving sustainable development; (b) justified—an appropriate strategy, taking into account the reasonable alternatives, and based on proportionate evidence; (c) effective—deliverable over the plan period, and based on effective joint working on cross-boundary strategic matters that have been dealt with rather than deferred, as evidenced by the statement of common ground; and (d) consistent with national policy—enabling the delivery of sustainable development in accordance with the policies in this Framework."

32 Submissions were made by both parties in relation to the legal requirement placed upon policy-makers in respect of the material

considerations to be taken into account in policy-making, and the scope of inquiry required by a policy-maker when formulating policy. This question was considered by the Court of Appeal in *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] PTSR 982. That case concerned a challenge to a written ministerial statement made in respect of planning obligations for affordable housing and social infrastructure contributions. Part of the challenge was a failure to take into account material considerations when the written ministerial statement was being formulated. In addressing that question Laws and Treacy LJJ observed the following as to the scope of any duty to take account of material considerations when formulating policy:

> "33. As we have said, in making planning policy the Secretary of State is exercising power given to the Crown not by statute but by the common law. In *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697 Lord Sumption JSC said, at para 83: 'A common law power is a mere power. It does not confer a discretion in the same sense that a statutory power confers a discretion. A statutory discretionary power carries with it a duty to exercise the discretion one way or the other and in doing so to take account of all relevant matters having regard to its scope. Ministers have common law powers to do many things, and if they choose to exercise such a power they must do so in accordance with ordinary public law principles, ie fairly, rationally and on a correct appreciation of the law. But there is no duty to exercise the power at all. There is no identifiable class of potential beneficiaries of the common law powers of the Crown in general, other than the public at large. There are no legal criteria analogous to those to be derived from an empowering Act, by which the decision whether to exercise a common law power or not can be assessed. It is up to ministers to decide whether to exercise them, and if so to what extent. It follows that the mere existence of a common law power to do something cannot give rise to any right to be considered, on the part of someone who might hypothetically benefit by it. Such a right must arise, if at all, in other ways, usually by virtue of a legitimate expectation arising from the actual exercise of the power …'
>
> "34. [Counsel for the Secretary of State] relies upon this reasoning for the proposition that in exercising his common law power to make planning policy the Secretary of State was not obliged to have regard to this or that consideration, as he would be if his power were derived from a statute which told him what to consider; if he chose to make new policy he was bound, of course, by the core values of reason, fairness and good faith, but beyond that his choice of policy content was very much for him to decide.
>
> "35. [Counsel for the local planning authorities'] response is to insist that while the source of the Secretary of State's power is the common law, the context in which it is being exercised is a carefully drawn statutory regime; so that, for proper planning purposes, the considerations which the judge held were left out of account were indeed 'obviously material'.
>
> "36. We would certainly accept that the statutory planning context to some extent constrains the Secretary of State. It prohibits him from making policy which, as we have put it in dealing with the

A principal issue in the case, would countermand or frustrate the effective operation of section 38(6) or section 70(2). It would also prevent him from introducing into planning policy matters which were not proper planning considerations at all. Subject to that, his policy choices are for him. He may decide to cover a small, or a larger, part of the territory potentially in question. He may address few or many issues. The planning legislation establishes a framework for the making of B planning decisions; it does not lay down merits criteria for planning policy, or establish what the policy-maker should or should not regard as relevant to the exercise of policy-making."

33 In the course of his submissions Mr David Wolfe QC, who appeared on behalf of the claimant, submitted that it was important to appreciate C that the observations offered by the Court of Appeal in the *West Berkshire* case were in the context of the court considering that the defendant was exercising prerogative powers when making this planning policy and not a power under statute. By contrast, since that judgment was handed down Lord Carnwath JSC has clarified that when making national planning policy the defendant is not exercising a prerogative power, but rather exercising an D express or implied power under planning legislation: see the *Hopkins Homes* case [2017] PTSR 623, paras 19–20. In the light of Lord Carnwath JSC's conclusion Mr Wolfe submitted that "obviously material" considerations would need to be taken into account if a policy was to be lawfully arrived at. On behalf of the defendant, Mr Rupert Warren QC observed that whilst the Framework was produced pursuant to implied or express statutory powers under the statutory framework for planning, there were no specifically E identified considerations by means of any express statutory provisions related to the production of national planning policy to explain what considerations were specifically material. Nevertheless, Mr Warren accepted that in order to arrive at a lawful policy it would be necessary for the defendant to take into account "obviously material" considerations when establishing national planning policy.

F **34** This approach then raises the question of the nature of the inquiry required by the decision-maker in order to identify the "obviously material" considerations so as to lawfully arrive at the policy. The nature of that duty was recently examined by the Court of Appeal in *R (Jayes) v Flintshire County Council* [2018] ELR 416 in which Hickinbottom LJ made the following observations in relation to the duty to take all reasonable steps in relation to achieving a properly informed decision, at para 14:

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"Although any administrative decision-maker is under a duty to take all reasonable steps to acquaint himself with information relevant to the decision he is making in order to be able to make a properly informed decision (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1997] AC 1014), the scope and content H of that duty is context specific; and it is for the decision-maker (and not the court) to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor: *R (Khatun) v Newham London Borough Council* [2005] QB 37, para 35). That applies to planning decision-making as much as any other (see, eg, *R (Hayes) v Wychavon District Council* [2015] JPL 62, para 31 per Lang J and *R (Plant) v*

Lambeth London Borough Council [2017] PTSR 453, paras 69–70 per Holgate J). Therefore, a decision by a local planning authority as to the extent to which it considers it necessary to investigate relevant matters is challengeable only on conventional public law grounds."

35 The next legal issue which needs to be examined is the requirements to be satisfied by a lawful consultation exercise. When a public authority has either as consequence of a statutory requirement or voluntarily undertaken a consultation exercise there are parameters which need to be observed in order to ensure that the consultation is one which is lawful. The justification for this approach, and the content of the legal requirements, were set out by Lord Wilson JSC in a judgment (with which the majority in the Supreme Court agreed) in *R (Stirling) v Haringey London Borough Council* [2014] PTSR 1317, paras 23–25:

"23. A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.

"24. Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R (Osborn) v Parole Board* [2014] AC 1115, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed JSC in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement 'is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested': para 67. Second, it avoids 'the sense of injustice which the person who is the subject of the decision will otherwise feel': para 68. Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not 'Yes or no, should we close this particular care home, this particular school etc?' It was 'Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?'

"25. In *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said, at p 189: 'Mr Sedley submits

A that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.'

B "Clearly Hodgson J accepted [counsel for the claimant] Mr Stephen Sedley QC's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly endorsed them, first in *Ex p Baker* [1995] 1 All ER 73, cited above (see pp 91 and 87), and then in *R v North and East Devon Health*
C *Authority, Ex p Coughlan* [2001] QB 213, para 108. In *Ex p Coughlan*, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated, at para 112: 'It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice.
D Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.'

"The time has come for this court also to endorse the Sedley criteria. They are, as the Court of Appeal said in *R (Royal Brompton and*
E *Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* (2012) 126 BMLR 134, para 9, 'a prescription for fairness'."

36 Some subsidiary points in relation to the content of the legal duties arising in a consultation exercise were alluded to in the course of submissions. Firstly, Mr Wolfe made submissions in relation to the quality and coverage of the material which was placed before the defendant. In essence he contended
F that the material which the defendant was presented with by his officials did not adequately reflect the response provided by Talk Fracking. The legal principles relating to the knowledge of a minister reaching a decision and the correct approach to examining whether or not there has been a legal flaw in the process are to be derived from a sequence of authorities. These authorities start with the Australian case of *Minister for Aboriginal Affairs*
G *v Peko-Wallsend Ltd* (1986) 66 ALR 299.

37 The case concerned an application made by Aboriginal groups in respect of land claims and an allegation that the minister making the decision in relation to whether or not to make the grant of land did not have before him all of the relevant material that had been provided by those objecting to the application. In his judgment, Brennan J examined the principles in relation to both the significance of a matter which would need lawfully to
H be taken into account, and also the approach to be taken in respect of a decision-making minister's knowledge, at para 18:

> "(ii) Significant to a matter required to be taken into account
>
> "18. A decision-maker who is bound to have regard to a particular matter is not bound to bring to mind all the minutiae within his

knowledge relating to the matter. The facts to be brought to mind are the salient facts which give shape and substance to the matter: the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered." A

"*The department and the minister's knowledge*

"27. The department does not have to draw the minister's attention to every communication it receives and to every fact its officers know. Part of a department's function is to undertake an analysis, evaluation and precis of material to which the minister is bound to have regard or to which the minister may wish to have regard in making decisions. The press of ministerial business necessitates efficient performance of that departmental function. The consequence of supplying a departmental analysis, evaluation and precis is, of course, that the minister's appreciation of a case depends to a great extent upon the appreciation made by his department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function. A minister may retain his power to make a decision while relying on his department to draw his attention to the salient facts. But if his department fails to do so, and the validity of the minister's decision depends upon his having regard to the salient facts, his ignorance of the facts does not protect the decision. The Parliament can be taken to intend that the minister will retain control of the process of decision-making while being assisted to make the decision by departmental analysis, evaluation and precis of the material relevant to that decision. B C D

"28. Although the minister is the repository of the power conferred by section 11(1) of the Act and although he may not delegate that power to his departmental officers, the minister cannot be regarded in his exercise of power as unaware of information possessed by his department. As Lord Diplock said in *Bushell v Secretary of State for the Environment* [1981] AC 75, 95: 'To treat the minister in his decision-making capacity as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone in constitutional theory is accountable to Parliament is to ignore not only practical realities but also Parliament's intention. Ministers come and go; departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise.'" E F G

38 This issue arose again in *R (National Association of Health Stores) v Secretary of State for Health* [2003] EWHC 3133 (Admin). In that case Crane J at first instance had acceded to a submission made on behalf of the defendant that "information available to officials involved in advising a minister is information that can properly be said to be information taken into account by the minster". In giving the leading judgment in the Court of H

Appeal [2005] EWCA Civ 154 Sedley LJ had regard to the decision of the Australian High Court in the *Peko-Wallsend* case 66 ALR 299 and reached the following conclusions as to what would be necessary to ensure that a minister had legally adequate knowledge in order to reach a lawful decision in respect of the exercise of the discretion. In particular he disagreed with the conclusions which Crane J had reached and expressed his conclusions, at paras 26–27 and 37–38:

"26. In my judgment, and with great respect to Crane J, this part of his decision is unfounded in authority and unsound in law. It is also, in my respectful view, antithetical to good government. It would be an embarrassment both for government and for the courts if we were to hold that a minister or a civil servant could lawfully take a decision on a matter he or she knew nothing about because one or more officials in the department knew all about it. The proposition becomes worse, not better, when it is qualified, as Crane J qualified it and as [counsel for the defendant] now seeks to qualify it, by requiring that the civil servants with the relevant knowledge must have taken part in briefing or advising the minister. To do this is to substitute for the [doctrine in *Carltona Ltd v Comrs of Works* [1943] 2 All ER 560] of ordered devolution to appropriate civil servants of decision-making authority (to adopt the lexicon used by Lord Griffiths in [*R v Secretary of State for the Home Department, Ex p Oladehinde*] [1991] 1 AC 254) either a de facto abdication by the lawful decision-maker in favour of his or her adviser, or a division of labour in which the person with knowledge decides nothing and the decision is taken by a person without knowledge.

"27. In contrast to *Carltona*, where this court gave legal authority to the practical reality of modern government in relation to the devolution of departmental functions, the doctrine for which [counsel for the defendant] contends does not, certainly to my knowledge, reflect the reality of modern departmental government. The reality, subject no doubt to occasional lapses, is that ministers (or authorised civil servants) are properly briefed about the decisions they have to take; that in the briefings evidence is distinguished from advice; and that ministers take some trouble to understand the evidence before deciding whether to accept the advice. I will come later in this judgment to the critical question of how much of the evidence the minster needs to know; but I cannot believe that anybody, either in government or among the electorate, would thank this court for deciding that it was unnecessary for a decision-maker to know anything material before reaching a decision."

"37. The serious practical implication of the argument is that, contrary to what the decided English cases take for granted, ministers need know nothing before reaching a decision so long as those advising them know the facts. This is the law according to Sir Humphrey Appleby. It would covertly transmute the adviser into the decision-maker. And by doing so it would incidentally deprive the adviser of an important shield against criticism where the decision turns out to have been a mistake.

"38. The only authority [counsel for the defendant] was able to produce which appeared to chime with his argument was a decision

of Lord Clyde, sitting in the Outer House of the Court of Session, in *Air 2000 Ltd v Secretary of State for Transport (No 2)* 1990 SLT 335. Advice from the Civil Aviation Authority which by statute the Secretary of State was required to consider had been seen not by him but by an interdepartmental working party which advised him. Lord Clyde cited *Carltona* for the uncontroversial proposition that 'what is done by his responsible official is done by [the minister]'. However, while rejecting as 'too extreme' a submission that the mere physical delivery of the advice to the department was sufficient, Lord Clyde accepted that 'if it is given to an official who has responsibility for the matter in question, that should suffice'. If by this Lord Clyde meant that such receipt would amount in law to consideration by the Secretary of State, I would respectfully disagree. For the reasons I have given, it would be incumbent on such an official to ensure that either the advice or a suitable precis of it was included in the submission to the minister whose decision it was to be."

39 The practical implications of these principles were before this court in *R (Buckinghamshire County Council) v Secretary of State for Transport* [2013] EWHC 481 (Admin); [2013] PTSR D25 when Ouseley J, considering this litigation at first instance, had to deal with an allegation that consultation responses provided by HS2 Action Alliance Ltd had not been placed before the minister, in particular in respect of contentions in relation to the blight and compensation scheme which was proposed in respect of the HS2 project. As Ouseley J identified, the point at issue when an allegation of this kind is made is whether or not the minister has given conscientious consideration to the response to consultation. Having examined the material which was available to him in respect of that which was placed before the minister he concluded, at para 841, that the decision which had been reached in the Review of Property Issues decision had been arrived at following a consultation process in which HS2 Action Alliance's detailed response had in reality been "just brushed aside". The consultation process had thus been so unfair as to be unlawful.

40 These factors again arose in the recent Divisional Court decision in *R (Kohler) v Mayor's Office for Policing and Crime* [2018] EWHC 1881 (Admin). The case concerned a challenge to the defendant's decision to close a police station at Wimbledon (along with other police stations). The case was based upon, amongst other matters, the failure of the defendant to conscientiously consider responses which were made during a consultation process in respect of the closures. The claimant had responded to the consultation process on behalf of the Merton Liberal Democrats, and one of the points which was made in that consultation response was that it was premature to take a decision to close Wimbledon police station pending an evaluation on the impact of new technology. Having considered the evidence in the case Lindblom LJ and Lewis J concluded, as to the extent to which the Merton Liberal Democrats consultation response had been conscientiously considered in the decision-making process, at paras 67 and 68:

"67. We are also satisfied on the evidence, however, that there was one matter raised in the consultation responses relating to Merton that was not discussed or considered at the meeting. This was the proposal advanced by the Merton Liberal Democrats that it was premature to

take a decision to close Wimbledon police station, and that any decision to do so should be postponed pending an evaluation of the impact of new technology. That was a clear theme of the document, as appears from paras 2, 6 and 7. It undoubtedly fell within the scope of the consultation exercise, and it has not been suggested otherwise. The questions asked invited comments about the opportunities to contact the police as an alternative to via a front counter and asked about the extent to which those responding agreed with the proposed changes of location for five front counters.

"68. The summary of consultation responses did not refer to that proposal or suggestion. On the evidence, we cannot be satisfied that the deputy mayor herself read the Merton Liberal Democrats' submission. The three options relating to alternative sites were discussed at the meeting. Whilst there are general references to discussing the feedback, there is no evidence that this proposal was specifically discussed. This is in contrast to the options relating to alternative sites, where the evidence does establish that those matters were discussed. We conclude, therefore, that this aspect of the claimant's consultation response was not addressed by the deputy mayor in the course of making her decision. And we are in no doubt that it ought to have been. This amounts, in our view, to a clear error of law."

41 The second subsidiary matter related to consultation relied upon by Mr Wolfe was the contention that, because the subject matter of the decision was environmental in character there was a need, in addition to the common law principles pertaining to consultation, to incorporate into the analysis the principles of the Aarhus Convention in relation to access to information, public participation in decision-making and access to justice in environmental matters. Article 7 of the Aarhus Convention requires parties to the Convention to make appropriate practical and or other provisions for public participation in relation to plans and programmes relating to the environment. Article 6(8) provides: "Each party shall ensure that in the decision due account is taken of the outcome of the public participation."

42 Mr Wolfe submitted that this provision of the Aarhus Convention augmented the requirements of the common law. He submitted that it was of significance that in *Stichting Natuur en Milieu v European Commission* (Case T-338/08) EU:T:2012:300 the Court of Justice of the European Union had made reference to the Aarhus Convention Implementation Guide in its consideration of the application of the provisions of the convention. Moving to the provisions of the Aarhus Convention Implementation Guide pertinent to article 6(8), whilst the Guide notes that the Aarhus Convention does not specify what taking "due account" or public participation means in practice, Mr Wolfe drew attention to the observation in the guide that "the relevant authority is ultimately responsible for the decision based on all the information available to it, including all comments received, and should be able to show why a particular comment was rejected on substantive grounds". The guide goes on to observe that the requirement to take into account the outcome of public participation in the context of article 6 "requires something more than 'as far as possible'; rather, the paragraph should be strictly construed to require the establishment of definite substantive and procedural requirements."

Submissions and conclusions

43 Having considered the various submissions made across grounds 1, 2 and 4 of the claimant's case, in my view it is convenient to commence an examination of the merits of the case with an inquiry into ground 4. The reason for taking this approach is that at the heart of the dispute between the parties is the question of what the defendant was doing when incorporating paragraph 209(a) into the Framework or, more particularly in relation to ground 4, what a member of the public engaging in the consultation process and reading the publicly available material as a reasonable reader, would have concluded the defendant was doing.

44 Whilst the court's attention was not drawn to any authority bearing specifically on the correct approach to examining the meaning of documents produced within a decision-making process related to the creation of policy (and in particular the consultation process accompanying it), it appears to me to be obvious that the documentation must be read and examined in the spirit of the purpose for which it is produced. It must be read and considered from the standpoint of a reasonable member of the public or reasonable reader. Mr Warren drew attention to the observation of Lord Carnwath JSC in his judgment in *Trump International Golf Club Ltd v Scottish Ministers* [2016] 1 WLR 85, para 34 where, when considering the words of a condition on a planning permission, he indicated that the court would ask itself "what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole". He described that as an objective exercise in which the court would have regard to the natural and ordinary meaning of the words involved alongside the overall purpose of the consent and any other conditions, and that in doing so would apply common sense. Whilst the content of a condition on the planning consent is not the same as the content of material produced in the process of making a policy by some margin, in my view the same kind of approach is necessary bearing in mind the nature and purpose of the exercise which is taking place. In relation to a consultation process the purpose of the documentation is to secure the engagement of the public and their contribution to the decision-making process on the issues which they are to be led to consider are the subject matter of the decision-making process, that is to say the issues within the scope of the decision-making process.

45 Mr Warren, on behalf of the defendant, reliant upon the evidence provided by Dr Bingham, submitted that the exercise in relation to paragraph 209(a) was purely and simply an exercise of copying across, or cutting and pasting, the 2015 WMS into the Framework. Since all that was being done was that the 2015 WMS was being copied across to the Framework, without any intention to revisit or re-examine the validity of the policy, there was no purpose to be served by giving any consideration to any consultation responses bearing upon the merit of the policy or providing evidence in relation to it. Indeed, as Dr Bingham sets out in his evidence, responsibility for national policy on shale gas vested in BEIS and thus it was inappropriate and impractical for the defendant to undertake any examination of evidence relating to the merits of shale gas development. The only issue under consideration therefore was the question of whether or not

the 2015 WMS should be copied across into the provisions of the revised Framework, without any consideration of its substance.

46 As a result of this submission Mr Warren contends that the claimant's allegations in relation to, in particular, ground 4 are misconceived. Since all that was being undertaken was a cut and paste exercise, without any examination of the merits of the policy, there was no policy being formulated or revised and therefore the approach of the defendant was not in breach of the first of the Sedley principles that consultation should occur at a stage when a policy is being formulated. Secondly, there was no intention to in any way examine the content of the policy. There was no need for any of the substance of Talk Fracking's responses on the merits of the policy (let alone the detail they furnished in relation to the disputed scientific evidence) to be placed before the minister in order for him to reach a conclusion. The only decision that the minister needed to make was whether or not to copy the substance of the pre-existing policy in the 2015 WMS into the Framework.

47 Mr Warren submits that any reasonable reader considering the materials which have been set out above would have been clear that all that was occurring was a cut and paste exercise. The reasonable reader or member of the public would have been clear that the content or substance of the 2015 WMS was not open to consultation. As part of the context to examine that proposition Mr Warren drew attention to the fact that the 2015 WMS has been published without consultation when it was produced.

48 By contrast Mr Wolfe, as foreshadowed by the observations above, contends under ground 4 that the consultation exercise breached the first and fourth of the Sedley principles to be derived from *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168. So far as the first principle is concerned, Mr Wolfe submitted that it is clear from Dr Bingham's evidence that the consultation exercise was not being undertaken at a stage when the policy was being formulated. The defendant had a closed mind in relation to the substance of paragraph 209(a) and had no intention of entertaining any change to the policy.

49 Mr Wolfe accepted that it would have been perfectly lawful for the defendant to identify in the consultation material that the content or substance of paragraph 204(a) of the consultation draft of the revised Framework was excluded from the consultation process, and that the defendant had no interest in hearing any observations about the merits of that paragraph. The difficulty, he contended, was that there was simply no indication in the public documentation that such was the defendant's approach.

50 So far as the fourth principle was concerned Mr Wolfe contended that the summary of responses which was placed before the minister in respect of question 37 in the consultation, to inform the decision in respect of paragraph 209(a), did not contain any of the substance of the contentions raised by Talk Fracking in their consultation response. Akin to the *Buckinghamshire* case [2013] PTSR D25 and *Kohler's* case [2018] EWHC 1881, the key points raised by Talk Fracking in terms of the scientific developments which had occurred since the 2015 WMS and the compatibility of the proposed policy with obligations under the Climate Change Act 2008 are simply not reported. In effect all that the minister was told in relation to these responses was that there was an in principle objection to the exploitation and use of shale gas through fracking.

51 I have no difficulty in accepting, on the basis of Dr Bingham's evidence, that in fact there was no interest in reviewing or re-evaluating the substance of the policy of the 2015 WMS, or listening to any consultation engaged with the merits of the policy or the evidential and scientific issues associated with it. After all, the defendant jointly engaged in the promulgation of the 2018 WMS prior to examining or evaluating the consultation responses in relation to the revised Framework (albeit shortly after the consultation period had closed). However, as Mr Warren was bound to accept, the issues in relation to ground 4 and the consultation exercise cannot be disposed of by simply considering the defendant's private intentions. It is the public documentation associated with the consultation process and its context which have to be examined, and if, as Mr Warren submitted, the reasonable reader would have discerned the defendant's intention from that documentation then there would be substance in his submissions. However, as he accepted in the course of argument, if the reasonable reader would have concluded that the defendant was inviting and intending to consider and evaluate consultation responses on the substance of the policy, then his submissions could not succeed and the court would be bound to hold that the consultation was unlawful. As he accepted, ultimately it is the view to be taken of what the public were told they were engaging in when they took part in the consultation exercise which is the key consideration.

52 When the consultation materials, and the documentation generated at the time of decision-making, are examined I am unable to accept that a reasonable reader, or reasonable member of the public, would have been clear, or indeed have had any notion, that the substance or merits of the policy contained in paragraph 204(a) or the consultation draft of the Framework was outside the scope of the consultation, and that any observations they passed in respect of the merits of that policy were irrelevant to the exercise which the defendant was inviting them to participate in. I have reached that conclusion for the following reasons.

53 Starting with the Consultation Proposals Document there is no suggestion either generally, or in the specific section of that document related to paragraph 204(a), that the merits or substance of that policy is outwith the scope of the consultation. The introductory section of the document, as it says in terms, seeks views on the draft text of the Framework. Whilst Mr Warren drew attention to the introductory text focusing to some extent "on the merits of the new policy proposals" contained in the revised Framework, that observation needs to be seen in the context of the structure of the Consultation Proposals Document as a whole. Prior to setting out the sequence of questions which consultees were invited to address, the document made clear that "the sections below outline the main changes proposed to the Framework". Then, chapter by chapter the Consultation Proposals Document provided a commentary in respect of those main changes proposed to the Framework together with a sequence of specific questions addressing the changes. No doubt this was a sensible means of focusing consultees upon the particular revisions about which comments were being sought, thereby avoiding consultees engaging in responding to aspects of the Framework which were not being revised or reconsidered.

54 Against the background of that general approach, specific text and questions were provided under Chapter 17 as set out above. That specific text provides no suggestion that the substance of paragraph 204(a) is outside the

A scope of the consultation, or that commentary upon it would be irrelevant. Indeed the text suggest that paragraph 204(a) as drafted "builds on the written ministerial statement of the 16 September 2015 to provide clear policy on the issues to be taken into account in planning for and making decisions on this form of development". There is nothing in that to suggest that the defendant was entirely uninterested in considering the substance of paragraph 204(a) and its support in principle for exploration for and B exploitation of on shore shale oil and gas, or only interested in comments upon a cut and paste exercise.

55 This point is further reinforced, and perhaps critically so, by the text of question 37 itself which it will be recalled provided as follows: "Q37 —Do you have any comments on the changes of policy in Chapter 17, or in any other aspects of the text of this chapter?" The text of question 37 C itself makes clear that all aspects of paragraph 204(a) are within the scope of the consultation and matters about which the defendant wished to receive views in order to inform his proposals. I am unable to find any support for Mr Warren's proposition that the reasonable reader considering the Consultation Proposals Document would have been clear that the defendant had no interest in observations on the merits of paragraph 204(a) and all D that was being undertaken was an extremely narrow consultation solely on the question of whether or not the 2015 WMS should in substance be copied across into the Framework. Indeed, the report on the consultation exercise describes question 37 as "this open question".

56 The position is further reinforced when the ministerial summary of the consultation responses is examined. Again, nowhere is it suggested when evaluating those responses that those addressed to the substance or merits E of the policy, and a disagreement with support for on shore shale gas extraction and fracking in principle, were irrelevant and outside the scope of the consultation and therefore to be disregarded. Indeed, by contrast, all of those observations were reported to the minister as though they were valid responses to the consultation exercise which had been undertaken. Further illumination of the point can be obtained from the report on consultation F which was put into the public domain at the time of publishing the revised Framework. As set out above that document provided some analysis of the 975 consultation responses, but in doing so did not suggest that those engaging with the substance of the policy in paragraph 204(a) had done so as a result of a misconception as to the scope of the consultation exercise. Indeed, the Government response provided by the defendant, having noted that there were many objections to potential on shore shale gas development G as a matter of principle, went on to observe:

> "However, shale gas, which plays a key role in ensuring energy security, is of national importance. The Government is committed to explore and develop our shale gas resources in a safe and sustainable way. We have therefore carried forward this policy in the Framework, which would apply having regard to policies of the Framework as a H whole."

This response reads quite plainly as a response addressing the substance of the policy, as well as its incorporation into the Framework. It does not suggest that the arguments in principle in relation to shale gas development were not intended to be any part of the consultation process.

57 All of this documentation, in my view, presents a clear and consistent message to the reasonable reader, examining the documents as a member of the public at whom the consultation was directed, that the contents and substance of paragraph 204(a) of the draft revised Framework were matters which were within the scope of the consultation, and about which the defendant was interested in hearing responses. The documentation is inconsistent with the suggestion that the substance and merits of the policy were outside the scope of the consultation exercise, and a matter irrelevant to it and about which the defendant had no interest in entertaining responses. I am unable to accept Mr Warren's submission that the reasonable reader would have known that all that was being undertaken was a cut and paste exercise in which the merits of requiring minerals planning authorities to recognise the benefits of on shore oil and gas and consequentially put in place policies to facilitate their exploration and extraction, and that the substance of that in principle support was a matter that the defendant had no interest in hearing about.

58 It follows, as he accepted in his concession set out above, that if he was wrong about what the reasonable reader would have concluded from the publicly available documentation then the consultation exercise was legally flawed as contended by the claimant under ground 4. By contrast with what the reasonable reader would have discerned from the publicly available material, the defendant had a closed mind as to the content of the policy and was not undertaking the consultation at a formative stage. The defendant had no intention of changing his mind about the substance of the revised policy. Further, the defendant did not conscientiously consider the fruits of the consultation exercise in circumstances where he had no interest in examining observations or evidence pertaining to the merits of the policy. This had the effect of excluding from the material presented to the minister any detail of the observations or evidence which bore upon the merits of the policy. Given my conclusion as to what the reasonable reader would have concluded from the publicly available documentation the consultation exercise which was undertaken was one which involved breaches of common law requirements in respect of consultation and which was therefore unfair and unlawful. In the light of that conclusion in relation to the common law principles there is no need to examine the further subsidiary submissions made by Mr Wolfe related to the application of the requirements under the Aarhus Convention.

59 Before leaving these issues, it is necessary to address a number of additional points raised by Mr Warren, mainly in relation to the context of the consultation exercise. Firstly, he drew attention to the fact that the 2015 WMS had been issued without consultation and contended that this was part of the context and, as a consequence, the reasonable reader or member of the public could not have anticipated that consultation on the substance of the inclusion of the same policy within the revised Framework would occur. I do not consider that there is any force in this submission. The manner in which the 2015 WMS had been produced and promulgated did not fetter or constrain the way in which the defendant was producing the revisions to Framework. In my view the reasonable reader or member of the public would have had regard to the documentation produced in respect of the consultation on the revised Framework as being definitive in relation to that consultation process. In circumstances where, as I have found, the reasonable

A reader or member of the public would have been clearly of the view that the consultation process was open to receive observations on the merits of the substance of the policy there would be no reason for that person to conclude that the consultation was somehow by inference fettered or constrained by an earlier policy-making process.

60 Secondly, Mr Warren submitted that in the light of Dr Bingham's evidence that the lead ministry in respect of this policy was BEIS, the B reasonable reader or member of the public would conclude that it was obvious that the content of the policy was not part of the consultation process. Again, that is a submission which I am unable to accept given the clear terms of the Consultation Proposals Document and the other publicly available material. Whilst I have no reason to doubt Dr Bingham's contention that the lead ministry in producing the 2015 WMS was BEIS, nevertheless C on its face that document is a joint document from that department and also the defendant's department. Furthermore, in the Consultation Proposals Document it will be recalled that the explanation for paragraph 204(a) of the revised Framework is "to provide clear policy on the issues to be taken into account in planning for and making decisions on this form of development". This text does not suggest in any way that the policy which is D the subject of consultation is not the defendant's policy, or that the defendant simply lacked the technical expertise to deal with contentions about the substance or evidence base of the policy which the defendant is proposing to adopt. No mention is made of the internal division of labour between the ministries jointly producing the 2015 WMS, or that as a consequence of those arrangements the defendant is unable or ill-equipped to address objections to the substance of the policy.

E **61** Finally, Mr Warren draws attention to the observations made by Talk Fracking in their consultation response where at paras 34 and 35 they make complaint about the failure to carry out meaningful consultation in relation to fracking. This, he submits, makes clear that Talk Fracking themselves did not consider that the exercise in which they were engaging incorporated consultation about the merits of the substance of the policy. F In my view there are three reasons why this submission is of little avail to Mr Warren. Firstly, it is clear from the consultation response that these paragraphs and what follows after them are simply intended to emphasise the importance of consultation being engaged in relation to fracking. Secondly, the observations have, in any event, to be read in the light of the fact that the consultation response commences with a detailed engagement with the merits of the policy and why it is inappropriate and unjustified in G substance. Thirdly, it is clear from the report on the consultation responses generally that consultees clearly considered that it was within the scope of the consultation to express views on the merits of the policy itself and whether in principle the exploration and exploitation of unconventional carbons should be supported.

62 In summary, in relation to ground 4, in the light of the evidence which H I have set out above and having considered the various submissions raised I am satisfied that the consultation exercise involved breaches of the Sedley principles which are the requirements for a fair and lawful consultation exercise. I therefore grant permission in relation to ground 4 and accept the submission that the consultation on the draft revised Framework paragraph 204(a) was so flawed in its design and processes as to be unlawful.

63 Turning to ground 1 Mr Wolfe submits that the scientific material provided in the form of the Mobbs Report was an obviously material consideration which needed to be taken into account by the defendant in deciding whether or not to incorporate the substance of the 2015 WMS into the Framework. As is obvious from the history of the matter set out above the 2015 WMS, and in particular its reliance on transition theory being consistent with climate change, relied upon the conclusions of the Mackay and Stone Report to establish that the deployment of shale gas to bridge the gap in energy supply prior to a low carbon future would not prejudice the achievement of climate change goals. Mr Wolfe made a number of submissions in this connection. Firstly, even if all that the defendant was proposing in the light of Dr Bingham's evidence was the copying across of the 2015 WMS, it was still necessary for the defendant to consider whether the evidence base for the 2015 WMS remained valid. He submits that it is clear from the evidence that the defendant gave no consideration at all to the disputed scientific material, and therefore left out of account what was an obviously material consideration.

64 Secondly, Mr Wolfe relies upon the approach which was taken to scientific evidence disputing the in-principle support for shale gas extraction and its compatibility with climate change objectives in the decision on the Preston New Road appeals. He draws attention to the fact that when scientific evidence was placed before the inspector and the Secretary of State which disputed the support in principle for fracking, and it was contended that the use of fracking would imperil or breach the UK's obligations under the Paris Agreement or other legal instruments, the answer which was provided was that issues bearing upon these in principle objections to shale gas extraction were in reality a challenge to national policy itself and could only legitimately be scrutinised in the context of a review of national policy. Mr Wolfe contends that the revisions to the Framework were that review of national policy and thus provided the forum for consideration of those issues.

65 Mr Warren in his submissions relied upon the position described by Dr Bingham, namely that as set out above the only decision which was being made by the defendant was simply to carry over or cut and paste the 2015 WMS into the Framework. The defendant was not undertaking a decision to revise or review the policy. Since all that the defendant was seeking to do was in effect a tidying-up exercise which did not engage with any of the substance of the policy, the disputed scientific evidence was not material to the decision and there was no need for the defendant to take those matters into account bearing in mind the parameters of the decision which was being taken.

66 In my view ground 1 is very closely allied to ground 4. The starting point for seeking to resolve the issues is to identify the nature and scope of the decision which the defendant indicated to the public that he was taking in relation to paragraph 204(a) of the revised draft of the Framework. Having engaged in a consultation exercise, and assumed the responsibility for discharging the Sedley principles in relation to it, the defendant had, through that exercise, identified the nature and scope of the decision he was making and, therefore, the nature and scope of the considerations which would be obviously material to that decision. Dr Bingham states that all that it was intended to do was copy, or cut and paste, the 2015 WMS into national planning policy in the Framework. However, as I have already found, that was not the nature and scope of the decision which the public were led to

believe was being made for the reasons which have already been set out in full above. The public were engaged in the consultation on the basis that the merits of the policy itself was included in the subject matter of the consultation.

67 What appears clear on the evidence is that the material from Talk Fracking, and in particular their scientific evidence as described in their consultation response, was never in fact considered relevant or taken into account, although on the basis of my conclusions as to what the reasonable member of the public would have concluded as to the nature and scope of the consultation, this material was relevant to the decision which was advertised, which included the substance and merits of the policy. On this basis it clearly was obviously material on the basis that it was capable of having a direct bearing upon a key element of the evidence base for the proposed policy and its relationship to climate change effects. As is clear from what is set out above, on the particular facts of this case the Mackay and Stone Report was an important piece of evidence justifying the validity of the policy in the 2015 WMS, and the need to avoid adverse consequences for climate change were an important aspect of whether or not to adopt the policy. Indeed, Mr Warren did not contend to the contrary and indicated in his submissions that the defendant would be engaging with this scientific debate at a time when the substance of the policy in question was being considered.

68 The defendant's evidence makes clear that this material was not considered. In my view on the basis of the particular facts of this case ground 1 is made out. The defendant left out of account obviously material considerations relevant to the decision which he had led the public to believe he was taking. Bearing in mind how the nature and scope of the decision had been clearly communicated it was not then open to the defendant to take a different decision avoiding the need to take those considerations into account. This is related to the fourth Sedley principle, in that having conducted a consultation exercise in which the Talk Fracking material was clearly relevant to the questions posed and which that principle required the defendant to give conscientious consideration to, that consultation response must amount to a material consideration in the decision that is subsequently taken. Against the background of the nature and scope of the decision in respect of paragraph 204(a) of the draft revised Framework set out above and to be derived from the publicly available documentation it was unlawful to leave that material out of account. The fact that the defendant believed that he was taking a far more narrow and restricted decision from that which he had advertised to the public does not provide a basis for avoiding that conclusion.

69 It follows from the above that I am satisfied that ground 1 is properly arguable and, for the reasons I have given, made out.

70 I turn then to ground 2, by which the claimant contends that the defendant unlawfully failed to consider or explain the impact of the revision to the Framework through the incorporation of paragraph 209(a) on the Government's obligations under the 2008 Act in respect of greenhouse gas emissions. In relation to this ground Mr Wolfe submits that the defendant failed to revisit the question of compliance with the CCC's three tests at the time when the revisions to the Framework were adopted. He draws attention to the fact that the Framework goes beyond supporting exploratory works but seeks to support extraction at scale as well. There is no evidence from

any of the publicly available material or the material produced in the context of this litigation by the defendant that the defendant ever gave consideration to the question of whether or not the incorporation of this policy within the Framework would undermine the Government's ability to meet the three tests required by the CCC.

71 Mr Warren contends that the incorporation of paragraph 209(a) has no impact whatsoever on the pre-existing acceptance that the Government's obligation under the 2008 Act were to be mediated by the application of the CCC's three tests. The defendant remains committed to meeting those three tests and nothing in the revision to the Framework alters the commitment to the tests being met. Prior to large-scale extraction proceeding, he submitted, it would be necessary for those three tests to be passed. He further submitted that in the context of individual decisions by plan-makers or decision-takers it would be open to depart from the in principle support for fracking provided by paragraph 209(a) on the basis of the requirement, for instance in paragraphs 148 and 149 of the Framework in particular, for the planning system to take decisions which support reductions in greenhouse gas emissions and plan pro-actively for climate change. Thus, he submitted that in the context of individual decisions it would be open for the claimant and other participants to place before the decision-maker material like the Mobbs Report which supported the contention that shale gas extraction would have a deleterious impact on greenhouse gas emissions, and these could be weighed against the in principle support contained in paragraph 209(a) of the Framework.

72 In my view Mr Warren's submissions in connection with ground 2 are clearly correct. Indeed, I am not satisfied that ground 2 is properly arguable and in my view permission should be refused. Firstly, as Mr Warren points out, the revisions to the Framework have no bearing at all on the Government's commitment to satisfying the CCC's three tests. Those tests remain in place and will have to be passed in order for shale gas extraction to be consistent with the requirements of the 2008 Act. Nothing in the revisions to the Framework alters or diminishes the requirement to meet those tests and the Government's commitment to doing so.

73 As has been observed on many occasions, planning policies within local or national policy documents very commonly can be perceived to be pulling in different directions, often through recognising on the one hand the need for particular kinds of development to be met, and on the other the desirability of protecting the environment or safeguarding infrastructure capacity. The planning system exists to resolve those conflicts and seek to identify a decision best fitting the balance of considerations bearing in mind the interests that the planning system has to serve. I therefore accept Mr Warren's submission that in individual decisions on plans or applications the in principle support for unconventional hydrocarbon extraction, provided by paragraph 209(a) of the Framework, will have to be considered alongside any objections and evidence produced relating to the impact of shale gas extraction on climate change. These are conflicting issues which the decision-maker will have to resolve. There is, therefore, no substance to the complaints raised under ground 2.

74 So far as ground 3 is concerned as I set out above the arguments in connection with whether or not the revisions to the Framework should have been the subject of strategic environmental assessment have been addressed

in *R (Friends of the Earth Ltd) v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 1540. Whilst further discrete points were raised by Mr Wolfe in relation to the challenged paragraph 209(a) of the revised Framework I do not consider that any of the points raised take the arguments any further forward. Mr Wolfe drew attention to the support in principle for fracking contained in paragraph 209(a) as being a particular feature supporting the conclusion that strategic environmental assessment is required. None of those submissions disturb the principle conclusion of the *Friends of the Earth* case that strategic environmental assessment is not required on the basis that the Framework is not "required by law".

75 In the light of the conclusions which I have set out above in my judgment it would be prudent to permit the parties time to consider the implications of my conclusions and, if they cannot agree, to make further submissions in relation to the appropriate relief in the circumstances. I shall therefore afford the opportunity for this to take place.

Claim allowed in part.

SALLY DOBSON, Barrister