The Sizewell C Project

9.80 Written Summaries of Oral Submissions made at Issue Specific Hearing 9: Policy and Need (26 August 2021)

Revision:	1.0
Applicable Regulation:	Regulation 5(2)(q)
PINS Reference Number:	EN010012

September 2021

Planning Act 2008
Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009

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CONTENTS

APPENDICES

1 ISSUE SPECIFIC HEARING 9: POLICY AND NEED

1.1 Introduction

1.1.1 This document contains the Applicant's written summaries of the oral submissions made at Issue Specific Hearing 9 (ISH9) on policy and need held on 26 August 2021.

1.1.2 In attendance at ISH9 on behalf of the Applicant was:

- Hereward Phillpot QC of Francis Taylor Building (HPQC);
- John Rhodes of Quod (Planning Manager (Strategic)); and
- Joseph Rippon (Sizewell C Financing Programme Manager).

1.1.3 Where further information was requested by the Examining Authority (ExA), this is contained separately in the Applicant's **Written Submissions Responding to Actions Arising from ISH9** (Doc Ref. 9.84).

1.2 Agenda Item 2: National policy and the assessment of the need for new nuclear power generation

a) The National Policy Statements (NPSs) EN-1 and EN-6

1.2.1 HPQC noted that the Applicant has set out its position on the approach to policy in this case extensively in writing. In response to comments from Aldeburgh Town Council, HPQC explained that paragraph 1.6.1 of EN-1 notes that the NPS will remain in force unless withdrawn or suspended in whole or in part by the Secretary of State and that this has not happened.

b) The applicability of EN-1 and EN-6 in the light of the Written Ministerial Statement on Energy Infrastructure (ref. HLWS316) (2017 Ministerial Statement)

1.2.2 HPQC referred to paragraph 3.3.8 of the **Planning Statement** [APP-590] and noted it is the Applicant's understanding of the Government's position that neither EN-1 nor EN-6 of the NPS have effect. HPQC confirmed that the Applicant has presented and prepared the application on the assumption that this is the way the Government will determine it. HPQC noted that the Applicant has been asked a written question on this (**ExQ2 G.2.17** [PD-032]), and that the Applicant's response will set out its understanding of the Government's position (Doc Ref. 9.71).

1.2.3 In summary, the Government's position as to the intention to determine an application such as this under section 105 only makes sense if neither EN-1 nor EN-6 of the NPS is considered to have effect. If either EN-1 and EN-6 did have effect, this would be a section 104 decision, not a section 105 decision. That is because section 104 applies if "a" NPS has effect, and therefore would apply even if only EN-1 had effect. HPQC noted that both the 2017 Ministerial Statement (see paragraph 1.23) and the 2018 Government response to consultation (see paragraph 3.11) set out that an application for development consent on a site listed under EN-6 but anticipated to be deployed after 2025 would be decided under section 105. The Government had said that in accordance with section 105(2)(c), the Secretary of State would be required to have to have regard to EN-1 and EN-6 as important and relevant.

1.2.4 HPQC responded to legal submissions made on behalf of Together Against Sizewell C (TASC). HPQC noted that TASC's submissions concluded in a suggestion that it is for the ExA and the Secretary of State to decide whether there is a need for new nuclear, and this suggestion relied on what was said in the 2017 Ministerial Statement about changes of circumstances. HPQC submitted that TASC was clearly wrong and that the Applicant had covered this point extensively in its responses to the first round of written questions (**ExQ1**) [REP2-100] and the **Planning Statement Update** [REP2-043]. It was noted that the submissions made on behalf of TASC simply did not grapple with the points that the Applicant had carefully explained in those documents.

1.2.5 HPQC submitted that the 2017 Ministerial Statement must be considered in light of the following three points which have followed the statement:

- Firstly, the 2018 response to consultation confirms the need for nuclear. HPQC referred to paragraph 2.129 which confirms that the focus is on sites who could deploy the soonest to meet the need for nuclear energy. The objective was said to be to meet the need for nuclear as soon as possible, and the Government had explained that having a capable of deployment date of 2035 helps focus on those sites that will meet the need for nuclear as soon as possible. Hence the role of the 2035 date is to serve the objective of deployment *'as soon as possible'* rather than being a target in itself. At paragraph 3.10, the response notes that the sites listed retain strong Government support and paragraph 3.11 repeats that EN-1 and EN-6 continue to be important to decisions under section 105.

- Secondly, HPQC referred to the Drax judgements and noted that TASC's submissions did not address this. HPQC noted that those judgements clarify that assessing whether changes in circumstances affect the weight to be attached to the NPS is not an appropriate exercise in determining individual applications, because it constitutes questioning the merits of Government policy. Section 6 of the Planning Act 2008 provides an exclusive means for considering such issues. TASC's reference to a section 6 review being in progress, does not mean that the development control decision-making progress for an individual application should be used (or could lawfully be used) as a parallel or substitute process for considering such issues. The courts have made it very clear in the Drax judgements that these are matters exclusively for the section 6 process to consider (see e.g. paragraph 108 of the Drax High Court judgement (*R (Client Earth) v Secretary of State for Business Energy and Industrial Strategy* [2020] EWHC 1303 (Admin)).

- Thirdly, HPQC referred to the Energy White Paper and noted that page 55 sets out that the need for the energy infrastructure set out in the Energy NPS remains. HPQC noted that this is a very clear statement of the Government's position on need, and that it effectively updates the statement made in the 2017 Ministerial Statement that the assessment of need carried out to support EN-1 remains valuable and relevant (etc.). The Energy White Paper states that while the review is undertaken, the current suite of national policy statements remain relevant Government policy and have effect for the purposes of the Planning Act 2008. The Government's policy is that the NPS continue to provide a proper basis of which the ExA can examine and the Secretary of State can make decisions on applications for development consent. Thus for TASC to make the submission that it is for ExA to make a judgment about need and the weight to apply to policy in light of changes of circumstances is very clearly wrong as a matter of law.

1.2.6 Mr Rhodes submitted that if the Government thought that there were changes in circumstances that undermine existing policy, it would not have said in the Energy White Paper that the NPS continues to be a proper basis for this examination. Mr Rhodes responded to the following points which TASC submitted were changes of circumstances:

- In response to TASC's submission that the scale of development in relation to the site was a changing circumstance, Mr Rhodes submitted that this is not a change. He referred to paragraph 2.2.3 of

EN-6 which notes that boundaries may vary as the NPS recognises that '*it is not reasonable to expect nominators to have established detailed layouts'* at that stage. NPS EN-6 at paragraph 2.3.4 notes that the Strategic Siting Assessment was carried out on the basis that DCO applications may include additional land, for instance for construction, as has happened here. Mr Rhodes noted there is a requirement for the key nuclear elements to be contained in the nominated boundary of site (paragraph 2.3.5 of EN-6) and that is the case here. Whilst there has been detailed design and development of the site boundary, this does not impact on the weight and appropriateness of the policy. EN-6 also makes it clear at paragraph 3.3.1 that the Government's Appraisal of Sustainability assessed twin reactors at Sizewell.

- Mr Rhodes responded to TASC's submission that climate change is a change in circumstance. He noted that there are two aspects to this:
  - Sea level rise which is being explored elsewhere and where the Applicant's position is that taking the most up to date forecast, the application meetings the policy tests.
  - Mr Rhodes noted that the urgency of addressing climate change has increased. This is not change in circumstances because the policy clearly directs itself to addressing the need to tackle climate change, but the increasing urgency reinforces the importance of policy.

1.2.7 One way in examining that this is the case is to look at the way in which the Government responded to the National Infrastructure Assessment in November 2020. Paragraph 2.1.20 of the **Planning Statement Update** [REP2-043] records the Government as noting that, since the National Infrastructure Commission had carried out an assessment, the Government has legislated for a target of net zero greenhouse gas emissions by 2050. The Government noted that this is likely to result in a significant increase in electricity demand. It is that recognition which has driven a number of statements which consistently recognise the increasing need for low carbon energy and the role of nuclear in that context. In summary, the suggested changes of circumstances are not matters which cause policy to be undermined. They either are already recognised within policy, or the urgency which sits behind the policy is reinforced.

- The implications of other relevant documents and publications issued since the submission of the application for the application of NPS policy including:

- Energy White Paper, Updated Energy and Emissions Projections 2019 (October 2020), The Ten Point Plan for a Green Industrial Revolution (November 2020), National Infrastructure Strategy (November 2020), Response to the National Infrastructure Assessment (November 2020), The Sixth Carbon Budget: The UK's path to Net Zero (December 2020)

1.2.8 HPQC began by making the general point that of the documents in this agenda item, the key document is the Energy White Paper as it is the most recent and comprehensive statement of Government policy and it takes account of other documents including the Government's most recent projections. HPQC responded to the following specific points:

- HPQC noted that there was no need to respond to the points raised by Mr Tait QC on behalf of ESC as the Applicant does not take issue with those points and considers them helpful.

- In response to the submissions of Aldeburgh Town Council about urgency, HPQC noted that the Government's identification of the urgency with which new nuclear is needed is not about the commercial position of Applicant. It derives from the urgency of taking action to decarbonise the electricity generation in this country and to meet our 2050 targets. It is an urgency in the public interest which increases with the passage of time.

- In response to points raised by Greenpeace, HPQC noted that the points raised could be made to the Government to take into account in its review under Section 6 of the Planning Act 2008, but they are not points for consideration in the Examination of whether to grant development consent for an individual project.

- HPQC referred the ExA to various statements in the Energy White Paper as he noted that a number of points made by other parties do not stand scrutiny in light of what is said in the document. HPQC referred to page 55 of the Energy White Paper under the heading *'A planning framework for energy infrastructure'* and noted what was said about the review of the NPS; it notes that it has been decided it is appropriate to review the NPS '*to ensure that they reflect the policies set out in this white paper and that we continue to have a planning policy framework which can deliver the investment required to build the infrastructure needed for the transition to net zero'*. The White Paper confirms the need for large scale new nuclear and so the purpose of the review needs to be understood with the contents of the

White Paper in mind. The suggestion that the fact of review calls into question need for new nuclear cannot withstand scrutiny. In this respect it was also relevant to note the statement that while the review is undertaken, the NPS remains Government policy and provides a proper basis to make decisions for development consent. HPQC submitted that this would not be said if it was thought there was something in the NPS that was significantly inconsistent with policies in the Energy White Paper. In fact, as noted by ESC, there is no material inconsistency between the documents.

- HPQC referred to page 9 of the Energy White Paper which stresses the importance in achieving objectives of policy by providing investors with long term certainty. This emphasis on long term stability of policy as a means of encouraging investment is reflected in both the NPS and the Energy White Paper. To deliver objectives, it is important to have stability. HPQC noted that:

  - Page 9 of the Energy White Paper states that decarbonising the energy system over the next 30 years means replacing as far as it's possible to do so with fossil fuels with clean energy technologies such as nuclear.
  - Page 12 of the Energy White Paper refers to nuclear power being a reliable source of low carbon electricity.
  - Page 16 of the Energy White Paper sets out a list of key commitments and notes that the Government is aiming to bring at least one large nuclear project to the point of final investment decision by the end of this Parliament subject to relevant approvals. HPQC noted that it is not the task of this process to consider whether the project provides value for money as value for money is not a development control test.
  - Page 48 of the Energy White Paper under the heading 'Nuclear' notes the key commitment, and by reference to the retiring of the existing nuclear fleet, explains that additional nuclear beyond Hinkley Point C will be needed. It states that in addition to the key commitment the Government is open to further projects. These points are all set alongside the clear statement that the policy does not set limits or targets for any individual technology.

1.2.9 Mr Rhodes noted that it is not for the Applicant to justify policy, but he thought it was helpful that the documents set out an explanation of the reasons for the Government's policy.

1.2.10 Dealing first with the suggestion that the Climate Change Committee's Sixth Carbon Budget contains scenarios which don't rely on Sizewell C, Mr Rhodes noted that this is addressed in the **Planning Statement Update** [REP2-043] in Section 2 which reports that, whilst there were alternatives explored, there was a central Balance Net Zero Pathway, which includes 10GW of nuclear capacity by 2035. Whilst the Sixth Carbon Budget does not set out direct recommendations as to what the mix should be, it explains that the Balance Net Zero Pathway is stated on page 24 of the CCC document as being '*a good indication of what should be done'*.

1.2.11 Similarly, the modelling undertaken by BEIS featured two different balanced technology mixes, both of which were said to be within the lowest system cost options and both required 10 GW of new nuclear generation by 2035. Mr Rhodes stated that the significance of those can be seen from the modelling and because it was those scenarios which the Government chose to illustrate at Figure 3.4 of the Energy White Paper.

1.2.12 Mr Rhodes noted that on page 43 of the White Paper, the Government explained its thinking that, 'whilst we are not planning any specific technology solutions, we can discern some key characteristics of the future generation mix. A low cost net zero consistent system is likely to be comprised of predominantly wind and solar energy. But ensuring the mix is also reliable means that investment in renewables needs to be complemented by technologies which provide power or reduce demand when the wind is not blowing or the sun does not shine. Today this includes nuclear…'

1.2.13 Part of the explanation is also due to the work the Government has done into the likely cost of energy mixes, as addressed in the **Planning Statement Update** [REP2-043] at paragraph A.1.20.

1.2.14 This is the detailed BEIS modelling of more than 3000 different low carbon deployment mixes that the Government undertook from a number of perspectives, including cost. As set out there, relying solely on renewables would significantly *'limit the amount of decarbonisation that could be achieved and increase the system costs'*. Mr Rhodes noted that the Government had satisfied itself that in order to optimise the use of renewable energy, it was necessary to have a reliable form of low carbon energy generation and that relying solely on renewables would be more expensive than a mix which includes new nuclear.

1.2.15 Mr Rhodes noted that understanding the reasoning behind Government policy helps to understand that consistency apparent throughout the documents identified in this agenda item. This starts with the 2019 report

from the Climate Change Committee which led to the adoption of net zero (**Planning Statement** at paragraph 3.6.8 [APP-590]) and the consequent Climate Change Act Amendment Order 2019 that committed the Government to a 100% reduction in emissions compared to 1990 levels (the net zero commitment). This led to a series of policy and reports, including the Government's response to the Climate Change Committee in 2020 (**Planning Statement Update** at paragraph 2.1.5 [REP2-043]) that identified three things:

- a fourfold increase in demand for low carbon energy;
- a very important role for renewables in the energy mix;
- the need for a reliable low carbon energy mix including nuclear.

1.2.16 Mr Rhodes noted that the Government has explained that nuclear has a clear role to play in decarbonising the energy sector and the wider economy. The policy documents identify the vital contribution that new nuclear makes to the necessary energy mix.

c) The scale and urgency of the need in the light of national energy policies overall

1.2.17 HPQC noted that this agenda item is concerned with what national energy policies say about scale and urgency of need, but that most submissions made by those opposed to the application instead addressed the question of what they thought the national energy policy should say about the need for nuclear. For example, Ms Pilkington discussed whether nuclear is needed, but this is not up for debate because policy has said that nuclear is needed. As had been explained, this is quite clearly not a matter which the ExA or the Secretary of State could be expected to determine in response to an individual application for development consent.

1.2.18 HPQC noted that the process of identifying what is needed by way of new nationally significant energy infrastructure is for the Government through its policy making process. Where there is an existing policy, these factors only come into play in a review process. It is neither appropriate nor realistic to expect those matters to be dealt within response to individual applications for development consent. It is not for the Examination to consider the different ways to address the need for decarbonisation; this is a matter for the Government and policy to consider. Similarly, it is not for Examination to consider the least cost option and whether it represents value for money.

1.2.19 HPQC noted that pages 42 – 43 of the Energy White Paper state the Government is not targeting a particular generation mix. The Government's role is to ensure a market framework which promotes effective competition and delivers an affordable, secure and reliable system consistent with net zero emissions by 2050. HPQC noted that the Government has consistently stressed that is has other means of delivering that.

1.2.20 In response to a suggestion that the Examining Authority should conclude there was no need for new nuclear because of work undertaken by National Grid, HPQC noted that National Grid was not a policy making body. HPQC submitted that National Grid does not provide policy and its job is not to identify how best to meet identified need for new low carbon energy generation in the national interest.

1.2.21 In response to a question raised by an Interested Party as to whether Sizewell C is *'new nuclear'* in the sense that term is used within the Government's policies, HPQC noted there is no doubt about this. Even just looking at EN-6, it explains that it has effect in relation to proposals for nuclear power generation with a capacity of more than 50 MW on a site listed within the NPS: setting to one side the issue of deployment date, this characterisation of the type of infrastructure covered clearly includes the development proposed at Sizewell C.

1.2.22 HPQC noted that a response to the extension of Sizewell B will be provided in writing in response to **ExQ2 G.2.10** (Doc Ref. 9.71).

1.2.23 HPQC commented on the point made on behalf of ESC regarding paragraph 3.2.3 of EN-1 and the weight to be given to considerations of need in the context of the overall balance that must be struck. He submitted that in applying this part of the policy it is important to understand what the Court of Appeal was saying about this in the Court of Appeal Drax judgement (*R (Client Earth) v Secretary of State for Business Energy and Industrial Strategy* [2021] EWCA Civ 43) by looking not only at paragraph 65 of the judgement but also at the paragraphs of EN-1 to which it refers, namely paragraphs 3.1.4 and 3.2.3. Paragraph 65 said this:

"The meaning of the final two sentences of paragraph 3.2.3 was controversial between the parties. But when those two sentences are read as continuing the thrust of the previous three, and in the wider context of the policies on need taken together, their sense is clear. The penultimate sentence looks back to what has just been said, with the connecting word "therefore". It makes plain that matters referred to in the first three sentences are the reasons why, in decision-making, "substantial weight" should be given to "considerations of need". And this is wholly consistent

with what has already been said in paragraphs 3.1.1 to 4.1.4 – in particular, paragraph 3.1.4."

1.2.24 Paragraph 3.1.4 to which the Court of Appeal referred states:

"The IPC should give substantial weight to the contribution which projects would make towards satisfying this need when considering applications for development consent under the Planning Act 2008".

1.2.25 The first three sentences of paragraph 3.2.3 to which the Court of Appeal referred state:

"This Part of the NPS explains why the Government considers that, without significant amounts of new large-scale energy infrastructure, the objectives of its energy and climate strategy cannot be fulfilled. However, as noted in Section 1.7, it will not be possible to develop the necessary amounts of such infrastructure without some significant residual adverse impacts. This Part also shows why the Government considers that the need for such infrastructure will often be urgent."

1.2.26 That is why the Government reached the conclusion that substantial weight should be given to considerations of need, and it is essential to understand that when undertaking the planning balance in this case.

1.2.27 Mr Rhodes submitted that the issues raised by interested parties do not represent reasons to change the Government's position, but instead reinforce the Government's position. Mr Rhodes covered the following points:

- In relation to the Hydrogen Strategy published last week, Mr Rhodes noted that it sets out an aim to achieve 5 GW of low carbon hydrogen by 2030. Mr Rhodes noted this is the same aim as that set out in the Energy White Paper and is also reported in the Government's Ten Point Plan. The Hydrogen Strategy itself is not a change, but instead it is part of a consistent approach to recognising the need for a whole suite of different contributions in order to achieve net zero by 2050. Mr Rhodes noted that the detail of the Hydrogen Strategy explains the role of nuclear. Mr Rhodes said this could be set out in more detail in written submission following the hearing if required but it was relevant that the Hydrogen Strategy refers to the White Paper commitments to renewables and nuclear generation and that '*this low carbon electricity generation will be the primary route to decarbonisation for many part of the energy system, and will also support electrolytic production of hydrogen'* (page 10 of the Hydrogen Strategy). Understood properly,

the Hydrogen Strategy is part of a strategy which reinforces the importance of nuclear as part of the overall suite of energy solutions that are necessary.

- Mr Rhodes noted that the position in relation to Sizewell B does not represent a kind as it has been known for some time that there may be potential to extend the life of Sizewell B beyond 2025 and potentially beyond 2035. The Applicant will respond to the ExA's second round question on this (**ExQ2 G.2.10** (Doc Ref. 9.71), but the modelling identifies a need for 10 GW of nuclear electricity by 2035 and this cannot be achieved (even with HPC and SZC) unless Sizewell B continues to generate electricity.

- In response to the submission by two parties that small nuclear reactors have a promising role in forming energy mix, Mr Rhodes noted this is not news and that it is supported by the Energy White Paper.

- Equally, the idea that it may be possible for the energy sector to decarbonise by 2035 without Sizewell C is not news. Mr Rhodes noted that there are alternatives in which that may be achieved, but it is not just the energy sector that needs to decarbonise, it is every sector of the economy. That is why the Energy White Paper reports that decarbonisation of the energy sector is not sufficient - there is a need for a fourfold increase in low carbon energy in order to help decarbonise other sectors in the economy.

- The funding arrangements for the Project together with any associated consequences for the timing of the project, and hence its capability of meeting an urgent need for new generating capacity.

1.2.28 Firstly, HPQC made some general observations. He noted that a number of interested parties had set out their views as to the perceived difficulties with the RAB model and the steps that would need to be overcome to put the model into effect in terms of legislation of other matters. He noted that parties referred to the Thames Tideway Tunnel project and the works done to facilitate the funding of that project. HPQC submitted that these are matters for the Government to consider, because it is best placed to make a judgment. The work being done on the RAB model is, after all, being done by the Government and it will have a view on how long it is likely to take and matters of that sort.

1.2.29 HPQC noted that as the Government is not a party to this Examination, it is necessary to look at what the Government has said in public statements

and policy documents. HPQC noted that in that context, none of the points made on behalf of Interested Parties as to the need for legislation etc. could be said to be 'news' and the Government would be well aware of all of these points given its ongoing work on the matter. In the light of all of those considerations, the Government has included in the Energy White Paper a commitment to bring one large scale to point the point of FID by the end of this Parliament subject to relevant approvals being obtained. The Government must regard this timing as being consistent with the urgency of the need, and the likely timing of decisions about funding. This statement must also be understood in light of what is said at page 49 of the Energy White Paper, namely that having consulted on a RAB model in 2019 the Government has indicated that a RAB model remains credible for funding large-scale nuclear projects. It explains the Government will continue to explore the RAB model alongside a range of financing options with the developer of the next large scale projects in the pipeline, and other relevant stakeholders.

1.2.30 In response to Stop Sizewell C's point regarding how the progress of the RAB model and how this sits with applicant's timetable, Mr Rippon stated he was confident that the RAB model can happen in a timeline consistent with the project timeline. HPQC clarified that it was not the Applicant's position that it anticipated the Government's decision on the RAB model would be made by the end of the examination on 14 October 2021, but stated that this would be clarified in the Applicant's **Written Summaries of the oral submissions for CAH1 Part 1** (Doc Ref. 9.74), where it was acknowledged that Mr Rippon had mistakenly stated that to be his understanding.

1.2.31 Mr Rhodes noted that from a planning policy perspective, the debate takes place against the apparent assumption by some that if for any reason the project is delayed, suddenly it is not supported. Mr Rhodes submitted that this is not the case. The NPS contains a number of references to providing nuclear '*as soon as possible'*. It is the urgency which is important, not the precise date. Whilst NPS EN-6 urges deployment by 2025, it explains at paragraph 2.2.3 that a failure to deploy by the end of 2025 would increase the risk of the UK being locked into a high carbon energy mix for a longer period of time. Therefore, the Government wants to encourage new nuclear to come forward as quickly as possible, rather than providing a cut-off date for 2025. Equally, the Government's Response to Consultation on Siting Criteria in 2018 at paragraph 2.129 explained that setting a deployment date of 2035 would help to focus on those sites which will meet the need for new nuclear as soon as possible. Mr Rhodes noted that we do not know what new date a new NPS will set and that it may be 2035. What we do

know is that new nuclear is needed as soon as possible. The modelling work that the Government has done reinforces this. It does not suggest the need for nuclear stops after 2035. In fact, Figure 3.4 in the Energy White Paper shows an increasing need for nuclear after 2035. The earliest date is desirable because of the benefits early deployment achieves but it is not a time limited policy. Looking at the passage of time from the NPS in 2011, the need has increased in time partly because it hasn't been met.

1.2.32 HPQC noted that the Applicant is preparing written responses on this point in response to ExQ2s G.2.0 and G.2.1 (Doc Ref. 9.71).

1.2.33 HPQC confirmed the Applicant would address the following points in its written response:

- Stop Sizewell C – Stop Sizewell C asked the Applicant to confirm the reason for asking for asking for additional funding up to FID and the total cost of the project. The Applicant was requested to explain why it has asked the Government for additional funding up to FID. Also, in relation to the Applicant's point that the total cost of the project is commercially sensitive, Stop Sizewell C submitted that there are not a lot of developers planning large scale nuclear reactors and given the nature of the route model requires a contribution from consumers to contribute to the financing costs, it is important for transparency on that topic; and

- Aldeburgh Town Council – Aldeburgh Town Council submitted that if a timeline cannot be secured of delivery by 2025 and a finance decision is not in place now, the project is not fulfilling Government requirements and cannot be supported in Government policy. Aldeburgh Council submitted that funding is imperative and is not underpinned by what the Applicant is offering and therefore cannot support the Government's policy of having an amount of electricity on the grid by a certain timeframe at a price affordable to the consumer.

1.2.34 A response to Stop Sizewell C and Aldeburgh Town Council is contained in the **Written Submissions responding to Actions Arising from ISH9** (Doc Ref. 9.84).

1.3 Agenda Item 3: The application of national policy and the correct approach to decision making:

a) The Drax High Court (May 2020) and Court of Appeal (January 2021) judgements

1.3.1 HPQC noted that the Applicant was in agreement with the five-point summary of the judgement provided on behalf ESC.

1.3.2 SCC also endorsed ESC's approach and added one additional point noting that the Court had endorsed that there is no requirement for quantitative assessment. In response to this, HPQC noted that this point comes up in agenda item 4 and stated that there is no issue of law between the parties as the Applicant's position is also that there is no requirement for a qualitative assessment.

1.3.3 HPQC responded to TASC's submission that the Drax judgement is not applicable as this is a decision under section 105 rather than section 104. HPQC submitted that this is wrong and involves a highly superficial reading of the judgement and does not get to grips with the rationale of the judgement.

1.3.4 HPQC stated that it is clear when reading the judgement that the matters that are relied to justify the key findings apply equally to decision-making under section 105 as they do under section 104 (see the High Court's Judgment at paragraphs 41-42 and 105-108, and the Court of Appeal's Judgment at paragraph 105). These points had been explained clearly in writing in response to **ExQ1 G.1.5** [REP2-100].

1.3.5 The key provisions relied upon (sections 6, 87(3), 94(8) and 106(1)) and the rationale for the previous decisions supporting this approach (see paragraph 107 of the High Court's Judgment for the relevant references) were all equally applicable in section 105 cases.

1.3.6 The judgements provide a complete answer to those who seek to argue that you as the ExA and the Secretary of State should use this decision making process to consider whether the NPS is up to date and or should be given less weight in light of changes of circumstance.

1.3.7 They make it clear that it is an essential feature of the Planning Act 2008 that such changes may only be taken into account under section 6 of the Planning Act 2008 through the statutory process of review. HPQC referred to Mr Justice Holgate's judgement at paragraphs 31 and 38. HPQC summarised these passages, which set out the object of the policies and

noted that they would not be open to challenge through subsequent consenting procedures. The judgement notes that the 2008 Act proceeds on the legal principle that significant changes in circumstances affecting the basis for or content of a policy may only be taken into account through the statutory process of review under section 6 of the Planning Act 2008.

1.3.8 HPQC referred to paragraph 106 of the judgement which notes that the merits of policy set out in a national policy statement are not open to challenge in the Examination process, or in the determination of an application for DCO. That was the object of sections 87(3), 94(8) and 106(1). HPQC noted that the Applicant has explained this in its response to the first round of questions at **ExQ1 G.1.5** [REP2-100].

1.3.9 HPQC noted that the absurdity of TASC's position could be seen by considering the position if there were two examinations taking place, one under section 104, and one under section 105. In one of those examinations, the ExA and Secretary of State would be entitled to call into question the merits of a policy such as NPS EN-1, decide it is not up to date and that less weight should be attached to it. In the other examination, all of those matters would be out of bounds. That would lead to absurd and inconsistent results. HPQC submitted this is clearly not the intention of the Planning Act 2008 and that therefore it is unsurprising that the relevant statutory provisions are of equal applicability. HPQC noted that the Planning Act 2008 sets out a framework under which there is a clear and exclusive procedure for reviewing the merits of policy, and it is of general application.

1.3.10 In response to Mr Scott's submissions regarding IROPI and whether the Government's position on that would raise different considerations, HPQC submitted that the Government does not agree with Mr Scott that matters have moved on to the extent he suggests, so that the policy in the NPS is out of date and does not apply, as is made clear in the Energy White Paper. HPQC stated that in any event it is not possible to get around the essential framework of the Planning Act 2008 by reference to the need to consider IROPI. In considering IROPI the Government was entitled to have regard to its current policy and the statutory context in which that policy is made and reviewed.

1.3.11 HPQC responded to Mr Scott's emphasis on the word "may" in the provisions of the Planning Act 2008 referred to in the Drax Judgments, and his suggestion that both the High Court and the Court of Appeal 'missed a trick' and reached their judgments unaware of the wording of the legislation. HPQC submitted that this is implausible (having regard to the identity of the counsel and judges involved on both occasions) and plainly wrong. It is

clear from paragraphs 106 and 108 of the High Court judgement that Mr Justice Holgate's characterisation of the implication of these provisions in paragraph 108 fairly reflect and are consistent with the exclusivity of the section 6 process as a means to address such matters. In other words, the meaning and implications of sections 87(3), 94(8) and 106(1) must be considered in their wider statutory context, and in particular alongside the exclusive procedure established by section 6. In this context HPQC referred to the Thames Blue Green Economy judgements where the same conclusions were reached by the High Court (Mr Justice Ouseley) and Court of Appeal (Lord Justice Sullivan). A copy of these judgements are included as part of this oral summary at **Appendices A and B**.

1.3.12 The Government's guidance for the Examination of applications for development consent at paragraph 22 notes that "a representation is not relevant to the extent (but only to the extent) that it contains material about compensation for compulsory acquisition of land … material about the merits of policy set out on national policy statement; or material that is vexatious or frivolous." This formulation reflects the language of section 87(3). The nature and implications of these provisions can also be seen by looking at what else 'may' be disregarded. For example, if one looks at section 94(8) which is concerned with hearings, the examining authority 'may' refuse to allow representations to be made at a hearing which are irrelevant. It can't be the case that because the provision uses the word 'may' in that context irrelevant considerations can be taken into account, and they can properly influence the decision making. Similarly, the provisions in section 87(3) and 106(1) that the examining authority and Secretary of State may disregard representations that are vexatious or frivolous make clear that doing so does not involve failing to take account of a material consideration. Importantly, when considering the provision for disregarding representations about the merits of Government policy, these provisions need to be interpreted and applied having regard to the exclusivity of the section 6 procedure as a means of dealing with such matters. Overall, the courts have made it very clear that the ExA may not choose to examine the merits of Government policy or the weight that should attach to it, having regard to whether it considers that circumstances have changed.

b) The Wylfa Newydd Nuclear Power Station Panel Recommendation Report (July 2019), and the approach taken by that ExA to the reference to "relevant change of circumstances" in the 2017 Ministerial Statement

1.3.13 HQPC responded to a point raised by SCC as to whether the statement on page 55 of the Energy White Paper was to be understood as a reversal of the Government's position in the 2017 Ministerial Statement as to a decision on an application such as this being made under section 105. The statement in question was that *'While the review is undertaken, the current suite of NPS remain relevant government policy and have effect for the purposes of the Planning Act 2008'*.

1.3.14 HPQC submitted that the question of whether or not an NPS *'has effect'* in relation to a particular proposed development for the purposes of section 104 is a question partly of law but also of fact. The question of law concerns the proper interpretation of the NPS in question, which will identify within it the types of development for which it has effect. Having correctly identified and understood what the NPS says on this matter, it is then necessary to consider whether the proposed development does or does not fall within the scope of that description. That is a question of fact. The question of whether or not the NPS *'has effect'* for particular developments must therefore be determined on a case-by-case basis.

1.3.15 Against that background, HPQC submitted that the Applicant's understanding of that language is not that it seeks to make a decision about whether policy has effect for any particular individual proposal, but instead it is simply making clear that when one is applying the provisions of the Planning Act, the NPS remains current Government policy.

1.3.16 HPQC noted that the Wylfa ExAR was concerned with a section 105 case, and although there is no Secretary of State decision (which is relevant to weight), the Examining Authority report is nevertheless a relevant consideration. HPQC noted that it is not a binding precedent, and the main point of reference for these purposes is now the Judgments in the Drax case. HPQC noted that the report also predates the Energy White Paper, and thus the ExA in that case did not have the benefit of that more recent and clear statement of the Government's policy position on that matter.

1.3.17 HPQC submitted that the ExA statement at 5.5.9 nevertheless remains a fair and reasonable recognition of the appropriate limitations of its role, and to that extent is consistent with what was subsequently said by the courts. The ExA correctly recognised that it was not its role to make policy, but instead to make recommendations within the context of existing policy.

c) The implications of the above for the application of NPS policy and the appropriate process to accommodate changes of circumstance after the designation of an NPS

1.3.18 In response to Mr Scott, HPQC explained that both EN-1 and EN-6 deal with alternatives in the context of new nuclear and the Government statement in the Energy White Paper about the ongoing suitability of the NPS for dealing with applications does not discriminate between different parts of it and includes those parts of the policy. Secondly, HPQC noted that the Heathrow case (*R (Friends of the Earth Ltd.) v. Heathrow Airport Ltd* [2020] EWCA Civ 214) to which Mr Scott referred was included in the Applicant's written submissions (**ExQ1 G.1.5** [REP2-100]) and what it said is consistent with the Drax judgements. There is a long line of authority which makes the same points.

1.4 Agenda Item 4: The contribution of the Sizewell C Project to meeting the need for new nuclear generating capacity

a) The updated energy and emissions projections 2019 (BEIS) (October 2020)

1.4.1 HPQC noted that a number of the submissions raised were not focussed on the agenda item which is looking not at the merits of the modelling and whether it supported the Government policy position on need, but rather the contribution this project could make to meeting the need for new nuclear generating capacity having regard to that modelling. HPQC submitted that challenges to the merits of modelling is not on point. HPQC noted that the way the Applicant has made reference to the modelling in **Appendix A** to the **Planning Statement Update** [REP2-043, electronic page 26] is in the context of attempting to provide a quantitative assessment of this matter using the material available.

1.4.2 In terms of how the Applicant used modelling, HPQC explained that there is no obligation on the Examining Authority or the Secretary of State to undertake a quantitative assessment, but recognising that the Court of Appeal has said neither is precluded from doing so, the Applicant considered it helpful to include information to assist in such an assessment so far as is possible in the absence of numerical targets or limits.

1.4.3 Paragraph A.1.14 of the **Planning Statement Update** [REP2-043] recognises that the scenarios used are not Government targets or policy, but that they do illustrate the scale of new low carbon generation required for the power system to meet net zero. The Applicant recognises that

neither the NPS nor the Energy White Paper set targets or limits, and that the Energy White Paper make it explicit that nothing it says should be interpreted as introducing such a limit. Having regard to that context, the Applicant has used the two scenarios that the most recent Government policy itself chooses to illustrate the position.

1.4.4 From a qualitative perspective, the key commitment that has been identified in the Energy White Paper to bring at least one large scale new nuclear project to FID by the end of this Parliament would be relevant when considering, on a qualitative basis, the weight that would be proportionate to the actual contribution that Sizewell C would make.

1.4.5 HPQC submitted that in considering the issue by reference to the provision of additional generating capacity (an approach considered appropriate by ESC, SCC and the Applicant), broadly speaking, the greater the contribution, the greater the weight that should be attached. There is a spectrum from the smallest nationally significant generating station which just exceeds the 50MW threshold at one extreme, all the way to the very largest at the other. This is a project at the very far end of that spectrum, and that must be reflected in the weight that its attached to the contribution it would make to meeting the urgent need.

1.4.6 Thus a quantitative assessment is not necessary here, but if the ExA thinks such an assessment is helpful, the Applicant has provided such information as it can to assist in that task.

1.4.7 Mr Rhodes explained the role of the assessment in the **Planning Statement Update** [REP2-043]. He noted that the Applicant's case does not rely on modelling, rather it relies on policy. However, the modelling helps to explain the development of the policy and helps to quantify the scale of the Applicant's contribution. Mr Rhodes noted that the Government itself does not rely on the outcome of modelling to fix a particular energy mix, but the modelling is helpful in identifying the necessary scale of the overall energy sector. Mr Rhodes noted that the important outcome is what the policy says. Mr Rhodes submitted that detailed points about modelling are points to take up with the Government. The Applicant considers it helpful and relevant to have up to date modelling, but the important thing is what the policy concludes.

b) The anticipated extent of the Project's contribution to satisfying need for infrastructure of this type and the weight that should be given to that contribution

1.4.8 In response to the first of the three matters covered by ESC's submissions HPQC noted that this was addressed by the submissions already made by the Applicant about the spectrum of weight by reference to different levels of electricity generating capacity. He submitted that in view of the capacity that would be created by Sizewell C, it was difficult to see how anything other than substantial weight should be given to the benefit of the additional low carbon generating capacity. HPQC noted ESC's conclusion was that substantial weight should attached to this benefit, and that there was no dispute as to the ultimate need to weigh the benefits against harms in the context of EN-1 and EN-6.

1.4.9 Secondly, in response to SCC's novel approach to measuring the benefits by somehow looking at the new generating capacity by reference to local electricity consumption , HPQC noted the Applicant would need to see this novel approach set out and explained in writing so as to understand and respond to the point. The precise nature of the oral submissions being made on behalf of SCC was difficult to follow, and so a more detailed response would need to await written clarification. By way of overview, however, HPQC noted that when looking at the Energy White Paper, the Government provides a summary of the contribution of Hinkley Point C, namely that it will power 6 million homes and 7% of the country's electricity. HPQC noted that this way of looking at the significance of the contribution that is made evidently commended itself to the Government. HPQC noted this is also consistent with the Applicant's submissions about the outcome of a qualitative assessment of benefit in this case, because Sizewell C would have a slightly greater generating capacity than Hinkley Point C. In due course, Mr Rhodes would explain how the Secretary of State had dealt with this matter when making a decision on the Hinkley Point C application.

1.4.10 HPQC also noted that whilst SCC made various additional comments, none of these seemed ultimately to lead it to a different conclusion to that reached by ESC (i.e. that substantial weight should be attached to the benefits). This was the second of ESC's three matters, which SCC endorsed. It can be noted that SCC did not demur from this suggestion in the ISH. So far as SCC's specific comments were concerned, HPQC noted that it is inevitable that with a project of national significance, many of the benefits tend to register at a national scale, but many of the adverse impacts tend to be localised. There is nothing unique to Sizewell C or unusual about this essential equation. HPQC noted that this is why such projects are dealt with

under the Planning Act, as it recognises that the balancing of such considerations is best undertaken on a national level by a democratically elected Secretary of State, with the local authorities providing important input into the process in relation to the local impacts that are expected. HPQC submitted that there is nothing unusual about this case in that respect.

1.4.11 Mr Rhodes noted that a wide range of points had been raised which in essence relate to the weight to be attached to the proposal, balanced against other issues. Mr Rhodes suggested that it is helpful in this context to look at paragraph 3.2.3 of EN-1, which notes that the Government considers that without new large scale energy infrastructure, the objectives of energy and climate change policy cannot be fulfilled, and that it will not be possible to deliver such infrastructure without some significant adverse impacts. Therefore, the NPS explains that the IPC should give substantial weight to need in the recognition that there will be adverse impacts. Mr Rhodes noted that this is not to say that the Applicant is not working hard to limit impacts through site selection, design and mitigation.

1.4.12 Mr Rhodes noted that when determining the weight to be applied to SZC, it is necessary to look not just at electricity output, but at all benefits. Government policy is clear, for instance, that investment in new nuclear will generate important economic benefits nationally and locally.

1.4.13 Mr Rhodes noted that this is national infrastructure, and the NPS does not invite the Applicant to draw a balanced list in relation to Suffolk, but if the Applicant did, it would be important to have regard to both the local benefits and negative impacts. Mr Rhodes noted that there are very significant local benefits and regional which the applicant has set out in its application documents and which it would be fair to recognise.

1.4.14 Mr Rhodes noted that the benefits are nationally important and of a very significant scale: any project which powers 20% of homes with low carbon energy is clearly very important. The project responds directly to a specific, up to date policy commitment to deliver a large scale new nuclear power station requirement and responds to a need which the government has emphasized is urgent. Mr Rhodes submitted that any project making a contribution with these characteristics attracts very substantial weight.

1.4.15 Mr Rhodes noted that every project is different and has its own unique issues. However, some indication of an appropriate approach could be gained by referring to the Secretary of State's decision letter on Hinkley Point C. At paragraph 6.6 the Hinkley decision letter, the Secretary of State recognised that there were residual impacts to which he gave substantial

weight, but noted they were '*significantly outweighed by the HPC project's potential to bring local benefits and the vital contribution it would make to the achievement of energy and climate change policy objectives, which are of crucial national importance'.*

1.4.16 Mr Rhodes concluded that each project needs to be considered on its own merits, but the scale of this project is similar to Hinkley and the urgency of meeting the need is potentially now greater.

1.5 Agenda Item 5: Local Plan and other policies

a) The relative weight to be afforded to Local Plan and NPS policies

b) Whether there is any conflict between Local Plan and NPS policies?

1.5.1 HPQC noted that the Applicant has provided a response to this issue in response to the first round of written questions at **ExQ1 G.1.12** [REP2-100], and the Applicant will also provide a response at the next deadline to the related question **ExQ2 G.2.14** (Doc Ref. 9.71). It was submitted that the rationale set out in G.1.12 is compelling, and it was noted that there had been no significant attempt by any Interested Party to rebut it. In summary, the national policy statements are intended to set development control tests to be used in decision making for NSIPs. They are prepared, assessed and consulted upon with that in mind, and debated and voted upon by democratically elected MPs. Decisions on their designation and review are made by the Secretary of State, answerable to Parliament. HPQC noted that none of that is true for local plan policies, which are neither prepared nor assessed, nor tested for soundness through Examination with that purpose in mind. HPQC submitted that for those reasons the approach set out in response to question ExQ1 G.1.12 is the only reasonable and rational approach to adopt.

1.5.2 HPQC also noted that was consistent with the Energy White Paper's statement of the Government's position as to the suitability of the NPS for the purpose of ongoing decision-making.

1.5.3 In response to SCC's position that where there is a conflict between the two, the local plan may be the more important policy in some circumstances, HPQC said that this was wrong and not accepted by the Applicant. HPQC submitted that where there are differences between the NPS and the local plan, it is essential to understand that the policy in the NPS has been designed to cater for the particular circumstances that arise in the development of NSIPs. By way of example, HPQC referred to the policy tests applying to major development in the AONB issue. This had

been considered in the ISH on landscape matters, and the Applicant had drawn attention to the important and deliberate differences between the wording of the NPPF development control test and the equivalent policy test in the NPS EN-1. HPQC noted that this deliberate policy difference needed to be understood in the context that EN-1 was part of a suite of NPS including EN-6, which was site specific and included an identification of Sizewell as a potentially suitable site for a new nuclear power station notwithstanding an acknowledgment that the site was within an AONB. Although the submissions made on behalf of SCC seemed to suggest that paragraph C.8.126 of Annex C of EN-6 directed the decision-maker to look to local policy in respect of such issues, that was not correct as a matter of fact. Indeed, even though this was the only paragraph upon which SCC had relied in support of its submission it did not even mention local development plan policies.

1.5.4 Mr Rhodes submitted that it is important to recognise the two policy documents are prepared for different reasons. The NPPF does not set policies for NSIPs and it must follow that local plans do not do that either. Mr Rhodes noted that the local plan inspector recommended modifications to the local plan to make it clear that this local plan is not setting policy tests for NSIPs. This is set out in the **Planning Statement Update** in **Appendix B** [REP2-043, electronic page 35]. Mr Rhodes noted that policy 3.4 is set out in **the Local Impact Report** [REP1-045] and that paragraph 4.2 of the LIR explains that the policy is intended to inform pre-application and early engagement discussions with promoters. It is not intended to replace the NPS or Government guidance. In other words, it is a policy which informs the Council in its role as a consultee, not a policy which sets tests for the application.

1.5.5 Mr Rhodes noted that there was a particular change reported on in the **Planning Statement Update** at **Appendix B** [REP2-043, electronic page 35] where the draft policy had set out a requirement for the Applicant to respond with compensation and the Local Planning Inspector said (1) it is not for local plan to set a test, (2) and a requirement for compensation would be inconsistent with the NPS which does not require this, as the NPS requires mitigation.

1.5.6 Mr Rhodes noted that the reference to "local assessment" in the NPS does not mean applying local policies, it means looking at local impacts within framework of NPS.

1.5.7 In light of this agenda question, the Applicant has done an analysis of the terms of local plan policies against the terms of the NPS that this will be set

it out in the record for this hearing. Mr Rhodes noted that there are significant differences for a number of policies. For example:

- at policy 10.1, there is a different emphasis placed on impacts on local designations which result in a presumption against in the local plan but not in the NPS;
- that policy also states a short presumption against development impacting on a SSSI, whereas the equivalent NPS policy goes on to explain the circumstances in which consent may be granted;
- as the Examination has previously heard, the policy (10.4) for development in AoNBs is significantly different in the NPS, providing direct importance to the need for new energy NSIPs set out in the NPS and to the NPS policies on alternatives;
- policy 9.5 on flood risk is very different in the NPS, which sets out an exemptions to the Exceptions Test.

1.5.8 [Analysis of the Local Plan and NPS policies is contained in the **Written Submissions responding to Actions Arising from ISH9** (Doc Ref. 9.84).]

1.5.9 In response to ESC's clarification that they did not say there is no conflict between the proposals and the local plan, and instead said ESC is not aware of any conflict between the NPS policies and local plan, Mr Rhodes noted that his position is that he is not aware of any direct conflict with local plan policies.

c) Other planning policy considerations – the revised National Planning Policy Framework (NPPF)

1.5.10 In response to SCC's suggestion that the change in the NPPF in terms of emphasis in design should somehow increase the weight that is given to design relative to other factors, HPQC submitted that the Applicant does not accept that analysis is sound. It is not appropriate to seek to mix and match the NPS and NPPF in this way. The NPS offers design policy guidance which is specifically tailored to the circumstances that arise when dealing with large scale energy infrastructure projects, which the NPPF does not. It would not be appropriate to assume that the new NPS when it emerges will say the same as the NPPF, rather than reflecting what is set out in the existing NPS. HPQC explained that this is not to say that design is in any way unimportant, but it would not be right to one say that more weight should attach to that consideration because of something said in the

NPPF, when that policy is for use in a different statutory regime and does not purport to set policy for decision-making on NSIPs.

APPENDIX A: R (THAMES BLUE ECONOMY LTD) V SSCLG [2015] EWHC 727 (ADMIN)

Judgments

QBD, ADMINISTRATIVE COURT

Neutral Citation Number: [2015] EWHC 727 (Admin)

CO/4916/2014

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

Royal Courts of Justice

Strand

London WC2A 2LL

Friday 16 January 2015

B e f o r e:

MR JUSTICE OUSELEY

Between:

QUEEN ON APPLICATION OF THAMES BLUE GREEN ECONOMY LIMITED

Claimant

v

SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT

Defendant

&

SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

Defendant

THAMES WATER UTILITIES LIMITED

Interested Party

Computer-Aided Transcript of the Stenograph Notes of

WordWave International Limited

A Merrill Communications Company

165 Fleet Street London EC4A 2DY

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(Official Shorthand Writers to the Court)

J U D G M E N T

(As Approved by the Court)

1. MR JUSTICE OUSELEY: This is an application for permission to apply for judicial review following its adjournment to court by Mr Justice Lewis. The basis upon which permission is sought goes rather beyond the grounds which he considered. I shall return to them in the light of the way the argument has developed towards the end of this judgment.

2. The facts upon which the further arguments deployed by Mr Parkinson on behalf of the claimant rely were canvassed in the Statement of Facts and Grounds but no legal ground was put forward in consequence of those facts. I have however heard full argument from Mr Parkinson on those points although not the full merits response which, with greater notice, the interested party in particular might have put forward. The relevant skeleton argument from the claimant and the associated witness statement of the witness Lady Berkeley are dated 9 January.

3. The contest turns upon the arguability of provisions in the Planning Act 2008. Very briefly, the Government drafted a National Policy Statement (NPS) concerned with waste water. That draft was to lead to an NPS being designated, following its being laid before Parliament. It was accepted that this NPS would constitute a plan or programme for the purposes of the Strategic Environmental Assessment Directive. For the purposes of compliance with that Directive - and there is no dispute about compliance with that Directive - it was necessary for the Government, as part of its strategic environmental assessment, to consider alternatives to the plan which it was contemplating, namely the Thames Tideway Tunnel.

4. The Thames Tideway Tunnel had as its purposes dealing with a problem which was sufficiently severe to have led to infraction proceedings in Brussels against the United Kingdom. The problem was related to the capacity of the combined sewerage system in London to cope with the demands that were and were expected to be placed on it to cope with sewage from the existing and growing population as well as surface water. Putting it shortly for these purposes, the sewerage system could not cope and its overload, particularly in storm conditions, led to untreated sewage being discharged into the Thames with the associated problems which that would create. The Bazalgette system had not been intended for the situation as it was now found to be.

5. The Strategic Environmental Assessment was required by the Directive to cover "reasonable alternatives, taking into account the objectives and the geographical scope of the plan or programme".

These had to be identified, described and evaluated. An outline of the reasons for selecting those alternatives had to be provided. The Strategic Environmental Assessment of Plans and Programmes Regulations, SI 2004/1633, give effect to that Directive.

6. The NPS describes what conclusions were reached in relation to the alternatives which it considered. The NPS describes the need for new waste water infrastructure after it has considered a number of alternatives to new waste water infrastructure. In Section 2.4 these include reducing demand for waste water, sustainable drainage systems, separating retrospectively the various sewer systems, decentralising waste water treatment infrastructure and then reaching general conclusions on alternatives to new large waste water infrastructure, coming to the conclusion that although demand reduction and decentralised treatment may help, the need for new waste water infrastructure remains.

7. The NPS then considers in relation to the infrastructure project with which I am concerned - now known as the Thames Tideway Tunnel - what the drivers for demand behind that particular tunnel are in Section 2.6.14 onward. The drivers include the ageing infrastructure, the consequent overflow from sewerage systems into the Thames (particularly after storms), with a reduction of biodiversity and the implications for the attractiveness of the environment. It refers to the Water Framework Directive and the Urban Waste Water Treatment Directive as the initial drivers of the Thames Tunnel. It refers to climate change and population and then turns to the development of a preferred solution.

8. A number of alternatives are again considered at this stage. These are: what is called the non-intervention strategy, then preventing rain water from entering the sewerage system by sustainable drainage system, providing extra capacity within the existing sewerage system or, alternatively, separating out the existing combined system. The alternative which develops into the Thames Tideway Tunnel is intercepting the combined sewers at their point of discharge into the River and conveying what otherwise would be discharged to a suitable site for treatment. It concludes that it was not appropriate to do nothing. The Government had considered that detailed investigations had confirmed the case for a Thames tunnel as the preferred solution. Paragraph 2.6.34 stated:

"2.6.34 The examining authority and the decision maker should undertake any assessment of an application for the development of the Thames Tunnel on the basis that the national need for this infrastructure has been demonstrated. The appropriate strategic alternatives to a tunnel have been considered and it has been concluded that it is the only option to address the problem of discharging unacceptable levels of untreated sewage into the River Thames within a reasonable time at a reasonable cost. It would be for Thames Water to justify in its application the specific design and route of the project that it is proposing, including any other options it has considered and ruled out."

9. Under the heading of "Alternatives" it says:

"3.4.1 Part 2 of this NPS provides an overview of the strategic alternatives both to the general nationally significant need for waste water infrastructure and to the project-specific need for the Thames Tunnel ..... These strategic alternatives do not need to be assessed by the examining authority or the decision maker."

It points out that -

"This NPS has not considered the detail of specific sites, routes, designs, layout, construction programmes or operational processes for these particular projects, which are the responsibility of the applicant [Thames Water Utilities Ltd] to determine, in conjunction with the [relevant regulators]."

10. A number of further relevant points are made with regard to impacts. For present purposes it only needs to be noted that the Thames Tunnel was considered to be an infrastructure scheme of national significance because it was essential to meet water quality objectives, reduce human health impacts, reduce aesthetic impacts and meet statutory requirements.

11. The next stage in the process was that an Environmental Impact Assessment was carried out of the project, to which the Environmental Impact Assessment Directive relates. The project was that for which the development consent would be sought by means of an order under the Planning Act 2008. That was for the Thames Tideway Tunnel.

12. The application then came to be considered pursuant to the Special Provisions of the 2008 Act. I emphasise these are Special Provisions. They dealt particularly with national infrastructure projects and are designed to ensure that they are dealt with under a procedural regime and a staged process that is different from that which would be applicable to a normal planning application and is different from that which applied in days of yore to nationally important infrastructure projects which were otherwise dealt with through the planning system. It is important in understanding the way in which the 2008 Act works to recognise both those aspects.

13. I turn therefore to the way in which that Act is drafted. Part 2 (in Section 5) deals with national policy statements and affirms in Section 5 (5) (a) that the policy in that statement may set out, in relation to a specified description of development, the amount, type, size of development appropriate nationally or for a specific area. There are various procedural provisions with which I need not be concerned at this stage but they include of course environmental appraisals, sustainability appraisal and public and parliamentary procedures. Section 13 permits the court to hear a challenge by way of judicial review to a national policy statement. No such challenge was brought and the time for doing so has long expired.

14. The way in which an application for a Development Consent Order is dealt with is set out in Chapter 2 - a panel, if I can put it that way, of inspectors is set up to deal with the applications. They report, having dealt with written and oral submissions, with a recommendation to the Secretaries of State. The examination is constrained by Section 87, a section which was at the heart of Mr Parkinson's submissions on behalf of the claimant. Section 87 provides that -

"87 (1) It is for the Examining authority to decide how to examine the application.

(2) [that] in making any decision about [that it must] —

(a) comply with —

(i) the following provisions of this Chapter .....

..... "

Crucially, by sub-section (3), it is provided:

"(3) The Examining authority may in examining the application disregard representations if the Examining authority considers that the representations —

(a) are vexatious or frivolous,

(b) relate to the merits of policy set out in a national policy statement, or

(c) relate to compensation for compulsory acquisition of land or of an interest in or right over land."

15. I should note that there is a similar provision in Section 106 of the 2008 Act which applies to the Secretary of State when he, too, considers representations.

16. The other provision significant for these purposes is Section 104. Section 104 (3) provides:

"(3) The Secretary of State must decide the application [for an order granting development consent] in accordance with any relevant national policy statement, except to the extent that one or more of sub-sections (4) to (8) applies."

Sub-sections (4) to (6) are immaterial but deal with decisions that would be unlawful for various reasons. Sub-section (7) provides:

"(7) This sub-section applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits."

I also note sub-section (2) which states:

"(2) In deciding the application the Secretary of State must have regard to —

(a) any national policy statement .....

(b) any local impact report .....

..... and

(d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision."

17. What happened on the facts was this. The panel held a preliminary meeting. At that preliminary meeting Thamesbank, the precursor to Thames Blue-Green Economy, appeared and raised issues concerning alternatives to the tunnel to deal with the problem of sewage discharged into the Thames. Lady Berkeley's witness statement set out what it was that her witnesses - witnesses like her, being part of Thamesbank - asked the examining authority to consider. This is a statement which has been produced

nearly a month after Mr Justice Lewis refused permission. She said that in consequence of what she regarded as new evidence emerging after publication of the NPS, Professor Ashley had stated that the terms of reference for a study that had been relied upon by Thames Water were too narrow and could not be relied upon to justify the Thames Tideway Tunnel. It had not been able to consider infiltration sustainable drainage systems.

18. Professor Binnie, chairman of Thames Tideway Strategic Study Group, wished to question some of the Thames Water Utilities Ltd basic assumptions, including that interim measures along the lines of the sustainable drainage systems of Blue-Green infrastructure should be studied fully. Sir Ian Byatt, a former Director-General of OFWAT, published a report criticising the Thames Tunnel, concluding that the tunnel-only project "could be more expensive to both customers and taxpayers than the adoption of a combination of smaller and more flexible solutions". There was also evidence that Thames Tideway Tunnel's costs were rising and would exceed the costs and lead to fewer benefits.

19. The panel reached a preliminary decision. They did so in a way which meant that the representatives of Thamesbank, although participating at various stages at which their representations were (to them) relevant did not, as I understand it, produce the full material which they would have wished to deploy. This was because the points they wished to make, if accepted, would show only that no tunnel should be built and that a completely different solution from a tunnel should be provided. This would have been a solution - and they make no bones about it - which would not be in accord with the NPS.

20. In the procedural decision the examining authority set out what it had decided at the preliminary meeting. It dealt with alternatives, saying that the NPS set out Government policy for the provision of major waste water infrastructure, referring to paragraph 2.6.34 and paragraph 3.4.1 and 2 of the NPS, to which I have already referred. It then says:

"The Ex A confirms that the starting position for the examination will be as set out in the NPS. Accordingly, the scope of the examination will include the specific design, size, routes and operational processes proposed in the application."

This was taken, and was intended to be taken, as a decision that the examining authority would not consider evidence relating to a non-tunnel alternative or, indeed, for that matter, to any other alternative which was not in accordance with the NPS.

21. Mr Parkinson contends that it is that decision which is arguably unlawful.

22. The examining authority set out in 100-odd pages matters including its understanding of the NPS. It dealt with alternatives put forward by Thamesbank, considering the principle and need for development against passages of the NPS to which I have already referred. It dealt with issues raised by Thamesbank and alternatives in Section 16 under the heading "Other Matters". It referred to the ES as providing a high-level summary of the proposed development and information on the project alternatives considered.

23. It then turned to Consideration of Alternatives and said that Part 2 of the NPS -

"16.13 ..... provides an overview of the strategic alternatives both of general nationally significant need for waste water infrastructure and to the project-specific need for the Thames Tideway Tunnel. These strategic alternatives do not need to be assessed by the Ex A or the decision maker."

The ES included an outline of the main alternatives studied by the applicant and an indication of the main reasons for the choice made.

24. It then turned to the issues raised during the course of the examination at paragraph 16.25 in this way:

"16.25 Thamesbank and the Blue Green Independent Expert Group maintained the case throughout the examination that the principle of the Thames Tideway Tunnel scheme had not been proven and that there exist equally effective and less environmentally harmful and less costly alternatives. This position runs counter to the strategic assessment of alternatives carried out at a national level and reflected in the NPS and the Panel made clear that it could not engage in that debate as part of the examination as it is beyond its remit."

25. Mr Parkinson put considerable weight on the terminology of the last sentence to suggest that the panel had not in fact exercised any discretion at all under Section 87 but had merely concluded that it had no jurisdiction to consider the material which it put forward. There is a footnote reference to the procedural decision to which I have already referred.

26. It is convenient at this stage to indicate that at paragraph 18.66 (and following) the panel draws together its conclusions on the case for the development, setting out matters that weigh significantly in favour of the Development Consent Order, which include that it would deliver a nationally significant infrastructure project, the need for which has been demonstrated as a matter of policy. It then sets out matters raised significantly in favour of it before turning to those which weighed against it.

27. The balance of issues was as follows:

"18.76 The national need for this infrastructure is a powerful factor weighing in favour of making the DCO. This is reflected in the presumption in favour of granting consent to applications for waste water NSIPs set out in the NPS. Even so, in this case we find the issues to be finely balanced."

28. Having set out the matters of greatest concern to it, which were almost all related to construction effect, it concludes (at 18.82) that on balance -

"18.82 ..... the matters weighing in favour of making the DCO outweigh the matters weighing against. We therefore find that the case for development is made out and we recommend accordingly in chapter 21."

In chapter 21 they repeat that point, repeating in relation to Section 104 of the Act (at 21.6) that the application when considered against the NPS as a whole can be said to accord with it although not all the aims would have been met.

29. The Secretaries of States' decision follows the same pattern and at paragraph 138 (and following) deals with the advantages and disadvantages of the project. At paragraph 146 they say that the following matters are important and relevant and should be accorded significant weight in favour of granting consent. These include benefits to ecology, provision of new public realm, socio-economic benefits, improved river recreational opportunities and the contributions this would make towards meeting the Urban Waste Water Treatment Directive and the Water Framework Directive during the operational phase of the project.

30. At paragraph 149 they conclude that -

" ..... on balance there is a good case for making an Order granting development consent for the proposed development and that this case is not outweighed by the likely adverse impacts of the development as mitigated ..... "

They confirmed that they had regard to all relevant matters, including to the NPS.

31. I turn to the submission which initially focussed on Section 87 (3) but needs, in reality, to focus on Section 104 (7) as well. It was not disputed but that Section 87 (3) created a discretion through the use of the word "may" in contrast with the use of the word "must" in Section 87 (2) for the examining authority to have regard to representations falling within either (a) or (b) or (c), that is to say vexatious ones, ones relating to the merits of policy and those relating to the compensation for compulsory acquisition. The gravamen of Mr Parkinson's submissions was that the procedural decision and the elaboration in the examining authority's report, its reasoning not being dissented from by the Secretary of State and stated to be his reasoning as well, showed that in reality no discretion had been exercised at all. The panel had considered itself obliged to ignore the representations which Thamesbank wished to put forward. That, submitted Mr Parkinson, is the only conclusion which should be drawn or at least was a conclusion which arguably could be drawn in the last sentence of paragraph 16.25 of their report.

32. In my judgment it is perfectly obvious that the panel considered what Thamesbank asked them to consider and reached a decision that they would disregard it under Section 87 (3) (b) as it was judged by them to relate to the merits of policy set out in a NPS. Indeed, that conclusion is inevitable. That is exactly what the purpose of the representations was. It was to persuade the examining authority to recommend and the Secretary of State then to accept a recommendation that the tunnel scheme should be refused in favour of an unspecified but preferable project for an alternative strategy for dealing with the problems.

33. The gravamen, as the case was analysed, was whether this was a lawful approach having regard to Section 104 (7). It is clear to my mind that that is where the focus of the argument has to lie. It was not disputed by Mr Parkinson that because the Secretaries of State were obliged by Section 104 (3) to decide the development consent application in accordance with any relevant national policy statement, unless an exception applied, the material which Thamesbank had disregarded could only be relevant to the decision and hence to the examining authority's consideration if it fell within one of the exceptions to Section 104 (3), in this case if it fell within Section 104 (7). There was absolutely no point - and this is really what the panel are saying - in exercising their discretion to admit material which is irrelevant. And there can be no complaint about a discretion being exercised to refuse to admit irrelevant material, and it is material that would be irrelevant because it would fall outside the scope of any decision which the Secretary of State would make.

34. That of course does not remove all scope from Section 87 (3) for a discretion which might be exercised. As Mr Humphries QC, for Thames Water Utilities Ltd, points out, the words "relate to the merits of policy" are wider than those which might lawfully require a decision under Section 104 (3) which was not in accordance with the relevant NPS. I am satisfied that it is clear beyond argument that there is no breach of Section 87 (3) unless the evidence could be admitted lawfully to reach a decision not in accordance with the NPS by virtue of Section 104 (7).

35. Mr Parkinson submits that it is arguably relevant to that. He says that weighing adverse impact of a proposed development against the benefits of the proposed development permit evidence of alternative

possibilities, including those which do not accord with the NPS such as a non-tunnel solution, to be adduced in order to show that there is an equal or better in-the-balance scheme. If that submission is correct arguably then it is at least arguably correct that the discretion was not properly considered by the panel.

36. Mr Harwood QC, for the Secretary of State, and Mr Humphries submit that the submission plainly misunderstands the purpose of Section 104 (7) and, on analysis, the position is plain beyond argument.

37. I am quite satisfied with the benefit of the argument which I have had that it is clear beyond reasonable argument that Mr Harwood and Mr Humphries are correct. Section 104 deals with the decision on a particular project for which a Development Consent Order has been applied for. Section 104 (3) requires the decision to be made in accordance with the NPS. No decision for a non-tunnel scheme, no decision rejecting a tunnel scheme on the grounds that a non-tunnel scheme might be better could possibly come within the scope of Section 104 (3). It is a forbidden decision. It is a forbidden decision unless it comes within an exception, and Section 104 (7) is the only provision. However it needs to be clear that the ability to reach a decision that is not in accordance with any relevant NPS only applies once the Secretary of State "is satisfied that the adverse impact of the proposed development would outweigh its benefits". It is not a provision which enables the Secretary of State to consider alternatives in order to reach a decision that the adverse impact of the proposed development would outweigh its benefits.

38. The natural meaning of the language of Section 104 (7) is that the adverse impact of the development proposed in the Development Consent Order must first be shown to outweigh the benefits of the project applied for in the development consent. It neither adds to the adverse impact nor detracts from it, nor does it add to or detract from its benefits that some different scheme might be thought to have greater benefits or lesser impact. It is clear that that does not mean that there is an obligation to grant a development consent regardless of the overall balance because one might outweigh the other and, indeed, particular features might be too objectionable to enable development consent to be granted or would require variation. But it is important that that conclusion be set in the context of this Act.

39. The question of strategic alternatives that are not in accordance with the NPS is decided first through the process of developing and then designating a NPS. That process involves strategic environmental assessment of the project, of its nature, Parliamentary consideration and public participation through those processes. It involves the conclusion through that that the tunnel is the correct solution and that no strategic alternative is better. That issue is not to be revisited.

40. It is perfectly clear that this is a conscious, deliberate two-stage way of dealing with the problem of public participation both in the policy and in the detail of development consent and avoiding the problem of deciding both detail and what government policy should be and what strategic alternatives need to be considered at the same time. It was well known by the time the 1998 Act was passed, particularly from the Heathrow Terminal 5 Inquiry, that leaving government policy and strategic alternatives and detail to be resolved all at the same time meant that infrastructure planning took a wholly inordinate length of time in the views of those who passed this Act. It was to come to a different way of dealing with, first, strategic policy considerations, what was government policy to be and then, with development consent process, adjusting the normal planning process that was required.

41. Mr Parkinson's submissions prayed in aid a conventional planning argument that where a proposal does harm it will be relevant to the consideration of its merits to consider whether or not there is an alternative way of achieving the same ends with a lesser impact somewhere else. That is a conventional planning approach which has become familiar over the years, never mind for the moment precisely what level of harm has to be shown before consideration of alternatives becomes permissible.

42. That is not the process which Parliament has set out in the 2008 Act for dealing with nationally significant infrastructure projects. The process is perfectly clear. First of all, the strategic nature of what is required to meet the needs is considered. It is considered with the benefit of the strategic environmental assessment, sustainability appraisal, public participation and Parliamentary designation. It is part of the procedure that those decisions are not then revisited. Section 87 (3), Section 106 and, more particularly, Section 107 (3) and (7) are designed to make a two-stage process effective. It is designed to avoid it being said by those who participate at the development consent stage that the examining authority and Secretaries of State are obliged to go back and consider what ought to have been the position in the NPS when it has already been through all the procedures through which it has been.

43. Accordingly, I am entirely satisfied that the Secretary of State could not, conformably with his duties, have taken account of the Thamesbank strategic tunnel development to reach a decision not in accordance with a NPS. It would have been irrelevant for the panel to have considered that material and it was entitled to refuse to do so, in my judgment, exercising its discretion in the only way it was possible for it rationally to be exercised.

44. Mr Parkinson's alternative ground, which was essentially the ground featured in the statement in the claim form, was that this approach, if correct, would not be consistent with the Environmental Impact Assessment Directive and in particular, with Articles 6.4 and 7.

45. Mr Justice Lewis dealt with this issue in paragraphs 3 and 4 of his decision, with which I agree. But I elaborate. Article 5 of Directive 2011/92 EU on the assessment of the effects on certain public and private projects on the environment reads:

"1 In the case of projects which ..... are to be made subject to an environmental impact assessment in accordance with this Article and Articles 6 to 10, Member States shall adopt the necessary measures to ensure that the ..... [appropriate information is supplied in the appropriate form]."

Article 6 deals with the content, including the way content of information is supplied and how it is made available to the public concerned. It says, amongst other matters:

"6.4 The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2 (2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken."

Article 8 provides:

"The results of consultations and the information gathered pursuant to Articles ..... 6 ..... shall be taken into consideration in the development consent procedure."

46. It is contended that Article 6.4 and in particular the reference to expressing opinions "when all options are open" means that the Secretaries of State were obliged to keep open non-strategic alternatives because they would be options within the meaning of Article 6.4. And if the interpretation which I have regarded as obviously correct is right, then that contravenes the Directive's provisions in Article 6.4. In my judgment that is completely misconceived. Article 6.4 with reference to options is not dealing with the entitlement to raise strategic alternatives in relation to project consent. The Directive usually deals expressly with those

alternatives which they require to be considered. "Options" does not mean alternatives.

47. What it is seeking to emphasise, particularly in the context of Article 6 read as a whole, is the stage in the decision-making process at which the environmental information has to be available for comment, that is to say it has to be made available when the decision to grant or refuse, and the conditions and terms of the grant or refusal, remain open, and are not closed.

48. The second point I make is that the Directive has to be understood in the context of the sort of decision with which it is concerned. It is concerned with Development Consent Orders amongst others. It is not requisite for the applicant to set out alternatives of a different nature to show that they had been considered. There is no such obligation in relation to project development consent. There is an obligation however to do that in relation to strategic environmental assessment. It cannot be the case that through the use of the word "options" the EIA was intending to impose a requirement to consider - by that side wind - that which expressly is not required in the content of the information for the benefit of the public or the decision-maker, but yet is expressly required in the consideration of a plan or programme.

49. The European Union must be taken to have understood that it had made a strategic environmental assessment directive to deal with plans or programmes which set the framework for decisions or would influence them as a matter of law in just the way that the NPS does. It cannot have envisaged that all that process would be undertaken again through the use of the word "options" in an environmental impact assessment directive.

50. It must be remembered that the Strategic Environmental Assessment Directive was introduced to deal with this mischief: by the time projects - which is what the EIA is concerned with - came to be considered, the pass would often have been sold by a prior plan or programme which could not be considered in the EIA. It was in recognition of that limitation that Strategic Environmental Assessment was introduced. It was not to take over the domestic decision-making process so long as that decision-making process has enabled both the plan and programme to be considered for SEA purposes and has enabled the project to be considered for EIA. Both those requirements are satisfied.

51. I have no doubt that that submission is wrong.

52. I would finally say in relation to Article 8 that it is clear that the environmental information to be taken into account is only that which is material to the decision to be made, and the possible existence of strategic alternatives which the environmental assessment itself has not covered, are entirely outwith its scope for these purposes.

53. Accordingly, I am satisfied upon the analysis which has been given to this claim that it is unarguable. Accordingly, I refuse permission.

54. MR HARWOOD: There are two matters briefly. When my Lord comes to look at the transcript, the order of Mr Justice Lewis was to adjourn the permission application.

55. MR JUSTICE OUSELEY: I said "refused". You are right.

56. MR HARWOOD: The other matter is in terms of costs. The Secretary of State seeks the costs of the acknowledgement of service. We served a schedule which was in the sum of £4,842; that is without VAT.

That was based on an estimated figure for counsel's fees which was actually on the high side. So the sum we are seeking is £4,403. That takes £439 off counsel's fees.

57. MR JUSTICE OUSELEY: We have an application for the substitution of Thames Blue Green Economy Limited as claimant in view of whatever person or persons Thames Blue Green Economy is. Do you have any objection?

58. MR HARWOOD: We do not have objection to that.

59. MR JUSTICE OUSELEY: I will make an order substituting "Limited" for Thames Blue Green Economy.

60. MR PARKINSON: There is not much I can say about the principle of costs. In terms of quantum, perhaps it is on the high side for a permission hearing. I do not have any detail of the hours spent.

61. MR JUSTICE OUSELEY: Have you seen the schedule?

62. MR PARKINSON: I have, yes. I have seen two schedules: one for the acknowledgement of service costs and one including costs for today.

63. MR JUSTICE OUSELEY: You do not need the costs schedule.

64. MR PARKINSON: No.

65. MR JUSTICE OUSELEY: There has been a longer than usual permission hearing. I am not sure how much more argument there would have been; nearly a full hearing so it would have been on the cheap.

66. MR PARKINSON: That is one way of looking at it. Except to say it is a little on the high side, I do not have any detailed points to make.

67. MR JUSTICE OUSELEY: Against the possibility that it is on the high side, I will make an order for £4,000.

APPENDIX B: R (THAMES BLUE GREEN ECONOMY LTD) V SSCLG [2015] EWCA CIV 876

C1/2015/0225/0340

Neutral Citation Number: [2015] EWCA Civ 876
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION, PLANNING COURT
(MR JUSTICE OUSELEY)

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 24 June 2015

B E F O R E:

LORD JUSTICE SALES

THE QUEEN ON THE APPLICATION OF THAMES BLUE GREEN ECONOMY LIMITED

First Claimant

-v-

THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

Defendant

THE QUEEN ON THE APPLICATION OF BLUE GREEN LONDON PLAN

Second Claimant

-v-

THE SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

Defendant

(Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
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Official Shorthand Writers to the Court)

Mr R McCracken QC and Mr A Parkinson (instructed by Environmental Law Foundation) appeared on behalf of the **First Claimant**
The Second Claimant, Mr Stevens, appeared in person
Mr R Harwood (instructed by the Government Law Department) appeared on behalf of the **Defendant**

J U D G M E N T
(Approved)

LORD JUSTICE SALES:

1. This is a renewed oral application for permission to appeal in relation to a decision of Ouseley J - [2015] EWHC 727 (Admin) - in which the judge refused to give permission to apply for judicial review in relation to the grant by the Secretary of State of a development consent order in relation to the major Thames Tideway Tunnel infrastructure project.

2. The background, put very shortly, is that the project was the subject of examination at a strategic level through the formation of a National Policy Statement under Part 2 of the Planning Act 2008. National Policy Statements developed under that Part are subject to obligations of publicity and consultation, including under section 7, and there is a power to mount legal challenges in relation to them: see section 13.

3. The structure of the Act is that national policy should be decided subject to those processes and formulated in a National Policy Statement which will then inform individual planning decisions which are brought forward in respect of it. In this case, an application was made to the Secretary of State for a development consent order and that was subject to examination by an Examining Authority in accordance with Chapter 4 of the Act.

4. Section 87(3) provides as follows:

> "The Examining authority may in examining the application disregard representations if the Examining authority considers that the representations—
> ...
>
> (b)relate to the merits of policy set out in a national policy statement.
>
> ... "

5. In this case, the Examining Authority took a decision that it would not entertain representations designed to open up examination of strategic alternatives to the Thames Tideway Tunnel which the present claimant now wishes to advance, but which had not

been advanced at the time of the development of the National Policy Statement.

6. Under the scheme of the Act, decisions on individual applications are made by the Secretary of State (see section 103), having regard to the report and recommendations made to him by the Examining Authority. Section 104 of the Act governs in relation to decisions in cases where a National Policy Statement has effect. Under section 104(3), the Secretary of State must decide the application in accordance with any relevant National Policy Statement, except to the extent that one or more of subsections (4) to (8) applies.

Subsection (7) provides:

> "This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits."

7. The argument for the claimant is that section 104(7) is of such width that the Examining Authority and the Secretary of State were obliged in substance in this case to consider the new arguments regarding whether there was need for a Thames Tideway Tunnel at the strategic level or whether problems in relation to effluent in London could be dealt with satisfactorily by some other form of scheme.

8. The judge decided that section 104(7) did not bear the interpretation which the claimant sought to place upon it, which was to the effect that it authorised the Examining Authority and the Secretary of State to open up at the second stage of considering whether an individual development consent order should be made the prior question decided at the determination of the National Policy Statement stage, namely whether there was indeed a strategic need for having a Thames Tideway Tunnel at all (see paragraphs [32] and following of the judge's judgment).

9. The judge was examining the question whether permission should be granted for judicial review according to the relevant arguability threshold. He considered that the point of construction put forward by the claimant was not an arguable one in the context of the Act

and therefore refused permission.

10. An application was made to this court for permission to appeal on two grounds: the first in relation to the interpretation of section 104(7) of the 2008 Act; the second in relation to the effect of the EIA Directive and whether under that Directive again the Examining Authority and Secretary of State were obliged at the second, development consent order stage to reopen and examine the strategic merits of having the Thames Tideway Tunnel at all. The judge had dismissed those arguments as well.

11. On the application for permission to appeal, Sullivan LJ refused the application on the papers. So far as the first ground in relation to section 104(7) is concerned, he said this:

> "Even though this application is still at the arguability stage the appeal does not have a real prospect of success. The two stage process was introduced by the 2008 Act in order to avoid precisely the outcome which this appeal seeks to achieve: the reopening at the second (examination by the panel) stage of the process, of alternatives to the option (in this case the tunnel) which has been adopted by the Government in the first (NPS) stage of the process. The provisions of the 2008 Act must be interpreted with the underlying objective of having a two-stage process for NSIPs in mind. Although the Claimant focuses upon the terminology of the final sentence of paragraph 16.25 of the panel's report (paragraphs 24 and 25 of the judgment), there was, in reality, no other way in which the panel could reasonably have exercised its discretion under section 87(3) given the statutory objective - to settle strategic alternatives at the first stage - and the flagrant conflict between the 'no alternatives to the tunnel' policy set out in the NPS (paragraphs 8 and 9 of the judgment) and the 'alternatives to the tunnel' put forward by the Claimant."

12. I agree with the reasoning of the judge and the reasons of Sullivan LJ. I do not consider that the argument based on section 104(7) and section 87(3) of the Act has any real prospect of success.

13. Today, Mr McCracken QC has contended that there are two reasons why the point is in fact an arguable one. First, he says that if new material comes forward regarding the strategic merits of a project such as the tunnel, it must be at the section 104(7) stage that

those new arguments and possible changes of circumstances would need to be taken into account.

14. I do not agree. I do not consider that this gives rise to any arguable point unidentified by Sullivan LJ and Ouseley J. In my view, in a genuine case where new circumstances arise it would be open to a person to approach the Secretary of State to invite him to revisit the National Policy Statement. That would be the proper way in which such matters should be taken into account, since in revisiting the strategic need for a project the procedural protections which apply in relation to formation of a National Policy Statement would then again apply to ensure that proper consideration was given to the alleged change of circumstances and the impact they might have upon the National Policy Statement in question. There is no need to distort the interpretation of section 104(7) to take account of such a possibility: the statutory scheme allows for changes in circumstances to be catered for in a different and more appropriate way, as I have set out.

15. Secondly, Mr McCracken submitted that section 104(7) was in substance otiose on the interpretation given to it by Ouseley J since (as I understood the argument) any Secretary of State would simply have his hands tied by the determination of national need reflected in the National Policy Statement and so could never be satisfied that the adverse impact of the proposed development would outweigh its benefits. Accordingly, Mr McCracken submits that section 104(7) has to be given the wider interpretation for which he contends, or at least it is arguable that it must be.

16. Again, I do not agree. Section 104(7) allows the Secretary of State to bring into consideration the statement of national need, which appears from a National Policy Statement, as against particular detriments which may be identified in the process of examining the application for a specific development consent order in specific

circumstances and to weigh them against each other: it allows for the possibility that the local and particular detriments may be so great as to outweigh in the particular circumstances of a specific application a national need reflected in the National Policy Statement. Indeed, what happened on the examination in this case illustrates the possibility of that happening, since (as Mr McCracken emphasised) the Examining Authority in this case said that the issues were finely balanced and it plainly gave serious consideration to the possibility of recommending refusal of an order for development consent.

17. Also on this ground, Mr McCracken referred also to section 104(2)(d), which states that:

> "In deciding the application the Secretary of State must have regard to-
>
> ...
> (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision."

18. Mr McCracken submitted that this showed the width of the discretion which the Secretary of State would enjoy at the section 104 stage and hence to which the Examining Authority ought to have regard in conducting its examination.

19. In my view, however, this argument goes nowhere because of the terms of section 104(3), which requires the Secretary of State to decide the application in accordance with any relevant National Policy Statement unless one of the exceptions in subsections (4) to (8) applies. This simply takes us back to the argument on subsection (7) which I have already addressed.

20. Finally on this ground, Mr McCracken submits that the point is an important one and therefore even if there is no realistic prospect of success, this is a case in which permission ought to be granted. I do not agree with that. In my view, the legal provisions are clear, there is not an arguable case in favour of the claimant's interpretation of the 2008 Act and I do not consider that there is any other compelling reason why permission to appeal

should be granted on that ground.

21. I turn then to the second ground urged before me: that in relation to the effect of the EIA Directive. Here, again, I consider that permission to appeal should be refused, essentially for the same reasons given by Sullivan LJ when refusing permission on the papers.

Sullivan LJ said this:

> "The second ground of appeal ignores the role of the Strategic Environmental Impact Assessment Directive. The 'options' that are still open at the EIA stage may well have been narrowed by the consideration and rejection of alternatives to the project under an SEA. Ground 2 effectively argues that alternatives which have been rejected at the SEA stage must be reconsidered at the EIA stage because 'all options' must be left open. Construing those words in the EIA Directive in isolation and in a literal manner is not a sensible interpretation of the EIA Directive in a context which includes the SEA Directive. The two Directives are intended to compliment, not duplicate, each other."

22. The argument for the claimant on this issue essentially replicates the substance of the argument presented in the context of the domestic legislation by reference to the 2008 Act. The SEA Directive allows for a full assessment in terms of environmental acceptability of options at the strategic level. The EIA Directive allows for consideration of environmental impacts in relation to the application for particular planning consents taking as read the strategic options which have *ex hypothesi* already been subject to examination under the SEA Directive. There is no requirement that the EIA Directive should be given the expansive interpretation for which Mr McCracken contends and to do so would be contrary to the overall structure of European law in this area.

23. Again, therefore, I do not consider that the appeal has a real prospect of success on ground 2. Nor do I consider that there is any other compelling reason why permission to appeal should be granted. Accordingly, I refuse this application.

(Further submissions on the application by Mr Stevens for permission to appeal)

LORD JUSTICE SALES:

24. This is an application by Mr Stevens as a litigant in person seeking permission to appeal in relation to a decision of Ouseley J refusing Mr Stevens permission to apply for judicial review in respect of a development consent order granted by the relevant Secretaries of State in relation to the Thames Tideway Tunnel ([2015] EWHC 295 (Admin)). The basis on which Ouseley J refused permission was that he determined that Mr Stevens failed to satisfy the requirements of section 118 of the Planning Act 2008, which provides:

> "(1)A court may entertain proceedings for questioning an order granting development consent only if—
>
> (a)the proceedings are brought by a claim for judicial review, and
>
> (b)the claim form is filed during the period of 6 weeks beginning with—
>
> (i)the day on which the order is published."

25. The judge held that applying that statutory provision the last day for filing the claim was 23 October 2014. Mr Stevens filed his claim 1 day out of time, on the judge's interpretation, on 24 October 2014.

26. On the present application, I am prepared to extend the time required for Mr Stevens to put in his notice of appeal in relation to Ouseley J's judgment - should an extension of time be required for that - and I turn directly to consider the merits of the argument which Mr Stevens wishes to present.

27. So far as the judge's interpretation of section 118 is concerned (by which the judge determined that the 6-week period had to, as the statute says, be treated as commencing on the day on which the order was published, namely 12 September 2014), I do not consider

that Mr Stevens has any real prospect of success on appeal. In my view, as a matter of interpretation of the statute, the judge was plainly right in the interpretation that he gave to the Act.

28. Mr Stevens says, however, that he, arguably at least, ought to be granted permission to appeal and permission to apply for judicial review because the Secretary of State wrote a letter which referred to the 6 weeks as a period being from the date of the relevant order, which suggested that the last day for filing would indeed be 24 October.

29. Although it is undoubtedly regrettable that the Secretary of State wrote in those imprecise terms, I agree with the reasoning of Ouseley J, that this is not a matter which is capable of being brought into account so as to create jurisdiction for the court which, by reason of the provision of the relevant Act of Parliament, namely section 118 of the 2008 Act, it does not have. Nothing that the Secretary of State said or did was, in terms of law, capable of altering the operation of the statutory provision.

30. Mr Stevens also submits that the court, arguably at least, should have granted him permission to apply for judicial review by reference to principles of European law, in particular as demonstrated in the case of C-406/08 Uniplex (UK) Ltd at paragraphs 39 and 40, specifically the principles of legal certainty and effectiveness in European law.

31. However, in my view, this again gives rise to no arguable ground of appeal since it cannot be contended on the facts of this case that the 6-week period identified in section 118 is in conflict with the principle of effectiveness or with the requirements of legal certainty identified in paragraph 39 of that judgment. The law contained in the relevant provision of the Act of Parliament is clear and is clearly to the effect that Ouseley J found it to be.

32. For these reasons, I consider that permission to appeal should be refused in Mr Stevens' case as well. There is no other compelling reason why permission should be granted.