Claim No: CO / 642 / 2021

IN THE HIGH COURT
QUEEN'S BENCH DIVISION
PLANNING COURT
B E T W E E N:

R (ON THE APPLICATION OF MAIR BAIN)

Claimant

- and -

SECRETARY OF STATE FOR TRANSPORT

Defendant

- and -

HIGHWAYS ENGLAND

Interested Party

STATEMENT OF FACTS AND GROUNDS

[CB/P] is a reference to the Claim Bundle where P is a page number.

Essential pre-reading (estimated time 3.5 hours):

(i) Statement of Facts and Grounds;

(ii) Pre-action correspondence, including e-mail chain disclosed with the Defendant's PAP Response ***[CB/46-80]****;*

(iii) Examining Authority's Report of Findings and Conclusions and Recommendation to the Secretary of State for Transport on the A38 Derby Junctions, dated 8 October 2020, relevant extracts:

a. Section 1.5 ***[CB/86],*** *Sections 2 and 3* ***[CB/87-118]***
b. 4.5.47-4.6.17 ***[CB/119-122]***
c. Section 4.8 (on Air Quality) ***[CB/123-145]***
d. Section 4.15 (on Climate Change) ***[CB/146-169]***
e. 4.16.93 – 4.16.97 (on combined and cumulative effects) ***[CB/170-171]***
f. Section 6 (conclusions on the case for making a DCO) ***[CB/172-188]*** *and Section 9 (summary of conclusions and recommendations)* ***[CB/189-191]****;*

(iv) Secretary of State for Transport's decision letter on the Application for the Proposed A38 Derby Junctions Development Consent Order, dated 8 January 2021 ***[CB/192-216]****;*

(v) National Policy Statement for National Networks (relevant passages, as referred to in this Statement of Facts and Grounds) ***[CB/217-226]****;*

(vi) The Applicant's Environmental Statement, Chapter 14 (climate) ***[CB/243-275]****;*

(vii) The Applicant's Environmental Statement, Chapter 15 (cumulative effects) ***[CB/276-304]***

INTRODUCTION

1. The Claimant, Ms Bain, seeks permission from the Court to proceed with judicial review proceedings in respect of the decision taken by the Defendant, the Secretary of State for Transport, dated 8 January 2021 (the "Decision"), to make with modifications the A38 Derby Junctions Development Consent Order 2021 (the "Order").

2. The Order granted development consent for the construction, operation and maintenance of three replacement roundabouts on the A38 in Derby known as the Kingsway, Markeaton and Little Eaton junctions with road widening in either direction from two to three lanes between Kingsway junction and Kedleston Road junction (the "Development").

3. The Claimant seeks permission to proceed to review the Decision on the following grounds:

   (1) **Ground 1** In making the Decision, the Defendant breached the EIA Regulations[1] because:

      (i) The Defendant failed to consider cumulative climate change impacts as required under the EIA Regulations; and/or,

      (ii) The Defendant failed to provide an up-to-date reasoned conclusion as required under the EIA regulations.

   (2) **Ground 2** The Defendant failed to provide legally adequate reasons for the Decision.

   (3) **Ground 3** The Defendant reached an irrational conclusion regarding the Development's impact on meeting the Net Zero Target and/or in relation to the application of the NPSNN.

   (4) **Ground 4** The Defendant failed to consider the Net Zero Target and Declared Climate Emergency when considering GHG emissions as part of the section 104(7) balance.

   (5) **Ground 5** The Defendant unlawfully failed to consider and/or apply NPSNN policy on air quality impacts.

[1] Defined below.

4. This judicial review is made pursuant to section 118(1) of the Planning Act 2008.[2] To succeed on her application for permission to proceed with the review of the Decision, the Claimant must show only that the grounds are 'arguable'.

5. On the basis of any one of the grounds of challenge, the Claimant seeks an order from the Court quashing the Order, as well as any declaratory remedy and/or such other orders as the Court considers it appropriate to make. The Claimant will also seek an appropriate order for her costs.

FACTUAL BACKGROUND

6. On 8 January 2021, the Defendant decided to make the Order. The underlying application for the Order (the "Application"), had been the subject of a public examination between 8 October 2019 and 8 July 2020, which was conducted on the basis of written and oral submissions and a series of meetings.

The Development

7. As noted above, the Development primarily consists of the construction, operation and maintenance of three replacement roundabouts on the A38 in Derby – providing *inter alia* grade separation of the three existing junctions as the A38 passes to the west and north of Derby city centre, as well as road widening between two junctions.

8. The A38 is part of the "Strategic Road Network", providing a connection between Birmingham and the M1 at junction 28.

9. The Development was included in both the Department for Transport's Road Investment Strategy 1 ("RIS 1") (2015-2020) **[CB/227-234]** and the Road Investment

[2] This provides that:
(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 before the end of the period of 6 weeks beginning with the day after —
(i) the day on which the order is published, or
(ii) if later, the day on which the statement of reasons for making the order is published.

Strategy 2 ("RIS 2") (2020-2025) **[CB/305-312]** programmes which were required under section 3 of the Infrastructure Act 2015.

10. The Development is "EIA Development", such that it required an Environmental Impact Assessment pursuant to the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("EIA Regs").

The Examining Authority's recommendation to the Defendant on climate change impacts

The Net Zero Target and the Paris Agreement

11. In relation to climate change impacts (a key controversial issue during the examination), the Applicant provided an assessment in Chapter 14 of its Environmental Statement ("ES"), dated April 2019 **[CB/243-275]** which considered the significance levels for the expected GHG emission impacts *inter alia* by reference to the UK's Climate Change Act 2008 carbon budgets (as they were at the time of the assessment) (ExA Report 4.15.21 **[CB/148]**). For purposes of the assessment, the Development's lifespan was taken as 60 years (ExA Report 4.15.23 **[CB/148]**).

12. At the time of that assessment, section 1 of the Climate Change Act 2008 ("CCA 2008") specified a climate change target of an 80% reduction in carbon emissions, compared to 1990 levels, by 2050. Likewise, the carbon budgets that had (by then) been set, i.e. the budgets up to and including the fifth carbon budget (covering the period 2028-2032), were all set by reference to that 80% reduction target.

13. The Examining Authority ("ExA") noted that after the Applicant's assessments had been carried out, the 80% target had been revised to a 100% reduction in carbon emissions compared to 1990 levels, by 2050 (the "Net Zero Target") (ExA Report 4.15.115 **[CB/166]**). This took place on 27 June 2019.[3] It followed advice from the statutory Committee on Climate Change ("CCC") that the Net Zero Target would help to deliver on the UK's obligations under the Paris Agreement.[4]

[3] Climate Change Act 2008 (2050 Target Amendment) Order 2019, Art. 2(2).
[4] Net Zero – The UK's contribution to stopping global warming, CCC, May 2019

14. On the basis of the ES, the ExA was content *"that the GHG emissions impact of the Proposed Development on its own would be unlikely to have a material impact on the UK Government meeting the carbon reduction targets in place at the time of the assessment."* (ExA Report 4.15.114[5] **[CB/166]**).

15. However, the ExA made absolutely clear that, from the evidence before it, it could not reach a view on whether the Development would affect the ability of the Government to meet the Net Zero Target; noting in particular that the relevant interim carbon budgets had not yet been published for the operational year assessment (ExA Report 4.15.115 **[CB/166]**). It therefore left this key matter to the Defendant to evaluate and conclude on.

16. Similarly, in relation to the Paris Agreement 2015 – and whether the Development would be compatible with its wider requirements (an issue that had been raised by a number of interested parties) – the ExA concluded (at 4.15.110 **[CB/165]**):

> *We consider that not enough robust evidence was presented to the Examination for us to reach a view as to whether the Proposed Development, or the RIS1 or RIS2 programmes of which it is a part, would be consistent with the Paris Agreement 2015. In these circumstances we are unable to conclude whether the Proposed Development would cause the UK to be in breach of its international obligations. The SoST will need to satisfy themself on this matter before making their decision.*

17. For those purposes, the Applicant had sought to rely on (i) a quotation from Hansard by the Parliamentary Under-Secretary of State for Transport (which was essentially a one-word answer to a question about whether the "roads programme" complies with the Paris Agreement 2015, and which did not refer to any substantiating evidence) and (ii) evidence relating to the M4 Junctions 3-12 smart motorway NSIP (details of which were not provided to the ExA for this Development) (ExA Report 4.15.108-109 **[CB/165]**). Neither of these satisfied the ExA, and (again) the matter was left to the Defendant to conclude on (4.15.110 **[CB/165]**).

[5] Emphasis in underline added throughout, unless otherwise stated.

Cumulative climate emissions

18. As noted by the ExA, the Applicant was "*not able to provide an assessment of cumulative impacts of the Proposed Development with other highways developments, particularly given its approach of assessing the proposal against UK carbon budgets."* (ExA Report 4.15.116 **[CB/166]**)

19. The ExA was, therefore, "*…not convinced that the Applicant's approach sufficiently considers cumulative effects with other projects or programmes."* (ExA Report 4.15.117 **[CB/166-167]**) In the ExA's view, *"an appropriate assessment should, as is normal practice for the assessment of cumulative effects for other matters, adopt a reasonably consistent geographical scale"* and suggested the RIS1 or RIS2 programmes (of which the Development is a part) as an example of this (ibid). As no such assessment had been provided to the ExA, they were not able to conclude on "*cumulative climate change effects*", and again left this matter to the Defendant to conclude on (ExA Report 4.15.117-118 **[CB/166-167]**).

ExA's overall recommendation in relation to Climate Change impacts

20. As a result of all of this, the ExA only made a <u>qualified</u> (and incomplete) recommendation to the Defendant. It recommended that the Order be made but subject to the Defendant "*satisfying*" himself on a number of points, including *inter alia* (ExA Report at 4.15.126 and 9.3.1 **[CB/168 & 191]**):

    - *whether the Proposed Development would lead to the UK being in breach of the Paris Agreement 2015. Whilst there was no evidence that there would be a breach (as per s104(4) of the PA2008) we are unable to confirm there would not be a breach on the evidence submitted;*

    - *consideration of the cumulative effects of carbon emissions from the Proposed Development with those from other developments on a consistent geographical scale, for example by assessing the cumulative RIS1 or RIS2 programmes (of which the Proposed Development is part) against the relevant UK carbon budget;*

    - *whether the Proposed Development would affect the ability of the Government to meet the target of the revised net zero carbon by 2050 that was set (in July 2019) after the application was submitted;*

21. Overall, therefore, the Defendant needed to (himself) assess the Development's cumulative climate change impacts and he needed to do so by reference to both the Paris Agreement and the Net Zero Target (which implemented one aspect of the Paris Agreement).

The Defendant's conclusions on climate change impacts

22. The Defendant sought to deal with "climate change" at paragraphs 68-72 of his decision letter ("DL") **[CB/208-209]**.

23. However, the Defendant incorrectly stated, at DL71 **[CB/208-209]**, that:

> *The Secretary of State agrees with the ExA and is satisfied that the greenhouse gas emissions impact of the Proposed Development on its own would be unlikely to have a material impact on the Government meeting the carbon reduction targets (ER 4.15.114). (…)*

24. That was incorrect because, as above, the ExA specifically did not reach a conclusion on whether the Development would – on its own – be unlikely to have a material impact on the Government meeting the applicable (i.e. current) "*carbon reduction targets*" in a general sense; it only concluded that there would be no such material impact on the carbon reduction targets which were "*in place at the time of the [Applicant's environmental] assessment*" (ExA Report 4.15.114 **[CB/166]**).

25. Further, and in any event, the Defendant continued at DL72 **[CB/209]** to simply state as follows:

> "*The Secretary of State notes that the ExA has recommended that further consideration should be given to the cumulative effects of carbon emissions from the Proposed Development and proposed that this should be undertaken in relation to consideration of the cumulative effects of the Road Investment Strategy ("RIS") 1 and 2. The Secretary of State is satisfied that appropriate consideration was taken of the carbon impacts of the RIS programmes during their development and that any impact is not incompatible with the national wide carbon targets and commitments of the Government. The Secretary of State considers that the cumulative assessment of the RIS is a matter for national consideration and as mentioned above, is satisfied that appropriate consideration was given during the RIS's development. The Secretary of State*

is content with the assessment undertaken by the Applicant and that it is in accordance with paragraphs 5.17 and 5.18 of NPSNN. The Secretary of State is satisfied that any increase in carbon emissions that would result from the Development is not so significant that it would have a material impact on the ability of the Government to meet its carbon reduction targets and that having regard to s104(4) of the PA2008 would not result in a breach of international obligations."

NPSNN

26. The National Policy Statement for National Networks ("NPSNN") was a relevant national policy statement which the Application needed to be decided in accordance with, unless one of the statutory exceptions applied (see below, Planning Act 2008, section 104(3)).

27. The NPSNN was designated in December 2014, both before the Paris Agreement and the introduction of the Net Zero Target (as well as before the publication or setting of the fourth, fifth and sixth carbon budgets).

28. Further relevant facts will be referred to, as necessary, in relation to the grounds below.

OVERARCHING LEGISLATIVE FRAMEWORK

Planning Act 2008

29. Specific legislative provisions and authorities will be referred to, where relevant, in relation to each ground. However, the following is provided as the overarching legal framework that applied to the Decision.

30. The Application was for a development consent order ("DCO") to be granted under section 114 the Planning Act 2008. Section 114 provides that when the Secretary of State has decided an application for an order granting development consent, he must either (a) make an order granting development consent or (b) refuse development consent. Section 116 requires a statement of reasons to be given for a decision made under section 114.

31. Section 104 of the Planning Act 2008 specifies how decisions on DCO applications should be determined where a NPS has effect in relation to development of the description to which the application relates. It states as follows:

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

(a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement")

…

(c) any matters prescribed in relation to development of the description to which the application relates, and

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

(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.

(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.

(5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.

(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.

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

(8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.

(9) For the avoidance of doubt, the fact that any relevant national policy statement identifies a location as suitable (or potentially suitable) for a particular description of development does not prevent one or more of subsections (4) to (8) from applying.

32. In relation to the section 104(7) "balance", the Court of Appeal has recently confirmed that the purpose of this balancing exercise is to establish whether an exception should be made to the requirement in section 104(3) that an application for development consent must be decided *"in accordance with any relevant national policy statement*" and that the "*exercise involves a straightforward balance, setting "adverse impact" against "benefits*"" (**R (oao ClientEarth) v SSBEIS** [2021] EWCA Civ 43 at [104]).

Legal principles on policy interpretation

33. The law on policy interpretation is well-settled and the Court will be familiar with it. In short, the interpretation of policy is a matter of law, reviewable in the courts (**Tesco Stores Ltd v Dundee City Council** [2012] UKSC 13 per Lord Reed at [17]-[19]; **Suffolk Coastal District Council v Hopkins Homes** [2017] UKSC 37 per Lord Carnwath at [22]-[26]). These general principles apply equally to the interpretation of national policy statements as they do to other planning policies (**ClientEarth** per Lindblom LJ at [56]).

Legal principles on adequacy of reasons

34. The House of Lords in **South Bucks DC and anr v Porter** [2004] UKHL 33 articulated the correct general approach to determining whether a decision's reasoning is adequate, at para 36:

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

satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

35. The same approach applies in the DCO context (**R (oao Jones) v SSBEIS et ors** [2017] EWHC 11 (Admin) at [47]; **R (oao ClientEarth) v SSBEIS** [2020] EWHC 1303 (Admin) per Holgate J at [98]).

36. The adequacy of reasons will depend on the particular circumstances. When the decision-maker is disagreeing with a considered and reasoned recommendation (such as where the Secretary of State is disagreeing with the recommendations of an Examining Authority), the adequacy requirements are heightened so that fuller reasons are required (**Horada v SSCLG** [2016] EWCA Civ 169 at [36]-[40]). The Secretary of State will, in these circumstances, need to explain why he rejects the recommender's view (**Horada** at [40]) and he cannot simply rely on bald assertions (**Horada** at [54]).

37. Likewise, where the Secretary of State is not simply agreeing with the ExA but is seeking to address a point which the ExA specifically could not reach a conclusion on (as in this case, see below), the **Horada** principles must equally apply.

38. Furthermore, as clarified by the Supreme Court in **R (CPRE Kent) v Dover DC** [2017] UKSC 79 at [39], the requirement in relevant EIA Regs to provide the "main" reasons does not in any way materially limit the ordinary duty to give reasons in such cases and the guidance in **South Bucks** is equally relevant in the EIA context.

Infrastructure Planning (Environmental Impact Assessment) Regulations 2017

39. As noted above, the Development is EIA development and the decision-making process, therefore, needed to comply with the EIA Regs.[6] The EIA Regs implement into UK law, Article 2(1) of EIA Directive 2011/92/EU, as amended by EIA Directive 2014/52/EU, which requires Member States to adopt all measures necessary to

[6] Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.

ensure that, before consent is given, projects likely to have a significant effect on the environment are made subject to an assessment of their effects.

40. Reg 4(2) prohibits the granting of development consent for EIA development "unless an EIA has been carried out in respect of that application". The EIA is defined in Reg 5 as (with emphasis added):

> *(1) The environmental impact assessment ("the EIA") is a process consisting of—*
> *(a) the preparation of an environmental statement or updated environmental statement, as appropriate, by the applicant;*
> *(b) the carrying out of any consultation, publication and notification as required under these Regulations or, as necessary, any other enactment in respect of EIA development; and*
> *(c) the steps that are required to be undertaken by the Secretary of State under regulation 21 or by the relevant authority under regulation 25, as appropriate.*
> *(2) The EIA must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on the following factors—*
> *(a) population and human health;*
> *(b) biodiversity, with particular attention to species and habitats protected under any law that implemented Directive 92/43/EEC and Directive 2009/147/EC;*
> *(c) land, soil, water, air and climate;*
> *(d) material assets, cultural heritage and the landscape;*
> *(e) the interaction between the factors referred to in sub-paragraphs (a) to (d).*
> *(3) The effects referred to in paragraph (2) on the factors set out in that paragraph must include the operational effects of the proposed development, where the proposed development will have operational effects.*
> *(…)*

41. Furthermore, Reg 21 of the EIA Regs provides, in relevant part:

> *(1) When deciding whether to make an order granting development consent for EIA development the Secretary of State must—*
> *(a) examine the environmental information;*
> *(b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary;*
> *(c) integrate that conclusion into the decision as to whether an order is to be granted; and*
> *(d) if an order is to be made, consider whether it is appropriate to impose monitoring measures.*

(2) The reasoned conclusion referred to in paragraph (1)(b) must be up to date at the time that the decision as to whether the order is to be granted is taken, and that conclusion shall be taken to be up to date if in the opinion of the Secretary of State it addresses the significant effects of the proposed development on the environment that are likely to arise as a result of the development described in the application.
(…)

42. In terms of the "environmental information" that must be examined, this refers to *"the environmental statement (or in the case of a subsequent application, the updated environmental statement), including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations and any representations duly made by any other person about the environmental effects of the development and of any associated development*" (EIA Regs, Reg 3).

43. The environmental statement, is further defined in Reg 14 (with emphasis added):

(1) An application for an order granting development consent for EIA development must be accompanied by an environmental statement.

(2) An environmental statement is a statement which includes at least—

(a) a description of the proposed development comprising information on the site, design, size and other relevant features of the development;
(b) a description of the likely significant effects of the proposed development on the environment;
(c) a description of any features of the proposed development, or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;
(d) a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment;
(e) a non-technical summary of the information referred to in sub-paragraphs (a) to (d); and
(f) any additional information specified in Schedule 4 relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected.

44. Schedule 4 of the EIA Regs then sets out in more detail the information to be included in environmental statements. This includes, *inter alia* (with emphasis added):

> ***Para 1:***
> *A description of the development, including in particular—*
> *… (d) an estimate, by type and quantity, of expected residues and emissions (such as water, air, soil and subsoil pollution, noise, vibration, light, heat, radiation and quantities and types of waste produced during the construction and operation phases.*
>
> ***Para 4:***
> *A description of the factors specified in regulation 5(2) likely to be significantly affected by the development: population, human health, biodiversity (for example fauna and flora), land (for example land take), soil (for example organic matter, erosion, compaction, sealing), water (for example hydromorphological changes, quantity and quality), air, climate (for example greenhouse gas emissions, impacts relevant to adaptation), material assets, cultural heritage, including architectural and archaeological aspects, and landscape.*
>
> ***Para 5***
> *A description of the likely significant effects of the development on the environment resulting from, inter alia—*
> *(a) the construction and existence of the development, including, where relevant, demolition works;*
> *(b) the use of natural resources, in particular land, soil, water and biodiversity, considering as far as possible the sustainable availability of these resources;*
> *(c) the emission of pollutants, noise, vibration, light, heat and radiation, the creation of nuisances, and the disposal and recovery of waste;*
> *(d) the risks to human health, cultural heritage or the environment (for example due to accidents or disasters);*
> *(e) the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources;*
> *(f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change;*
> *(g) the technologies and the substances used.*
>
> *The description of the likely significant effects on the factors specified in regulation 5(2) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the development. This description should take into account the environmental protection objectives established at Union level (as they had effect immediately before*

exit day) or United Kingdom level which are relevant to the project, including in particular those established under [the law of any part of the United Kingdom that implemented Council Directive 92/43/EEC and Directive 2009/147/EC.

45. The courts have held that the existence and nature of "indirect", "secondary" or "cumulative" effects will depend on the particular facts and circumstances of the project under consideration (see **Preston New Road Action Group v SSCLG** [2018] Env LR 18, per Lindblom LJ at [67]).

46. Finally, Regulation 30 requires that when a decision is made to approve an application for an order granting development consent for EIA development, the Secretary of State must include in the decision notice, the "reasoned conclusion" of the Secretary of State on the significant effects of the development on the environment, taking into account the results of the examination of the environmental information required under the EIA Regulations.

GROUNDS OF CHALLENGE

47. Permission in judicial review is a low threshold: "to prevent the time of the Court being wasted by busybodies with misguided or trivial complaints of administrative error …" (see **IRC v National Federation of Self-Employed and Small Businesses** [1982] AC 617 per Lord Diplock at 642).

48. Further, the present case raises important points of EU law. The Court should not shut out allegations of breaches of EU law unless there is a very clear reason so to do (see e.g. **R (Boggis) v Natural England** (Court of Appeal, transcript, 29 February 2008)).

Ground 1: Breach of EIA Regs

(i) Failure to consider cumulative climate change impacts

49. The EIA Regs required that the Development's climate and cumulative impacts be assessed as part of the ES (Reg 14(2), Sch 4, para 5(e)-(f) **[CB/329-357]**).

50. Furthermore, according to Reg 5(2), the entire "process" of the EIA (which includes not only the ES but also the further consultation and publicity processes with the public) must "*identify, describe and assess in an appropriate manner"* the direct and indirect significant effects of the proposed development on, among other things, "*air and climate*". That description must cover "*the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the development*", taking into account the "*environmental protection objectives*" established both at EU or UK level which are relevant to the project (Sch 4, para 5). The latter would of course, in this case, include the relevant climate change targets set in the CCA 2008.

51. Overall, therefore, the EIA Regs clearly establish that the cumulative climate change impacts of a development need to be assessed as part of the EIA process, and that that assessment should take into account any UK set targets.

52. It is to be recalled, in this context, that the EIA Directive was designed to ensure a process by which the public is given an opportunity to express their opinion on environmental matters (see e.g. Lord Hoffmann in **Berkeley v SSE [2001] 2 AC 603** (section 8 of his speech); **Commission of the European Communities v Federal Republic of Germany (Case C-431/92)** Advocate General Elmer's opinion at [35]; see also **CPRE Kent** per Lord Carnwath at [33] and [48], reiterating how the Aarhus Convention (which is expressly referred to the EIA Directive) also protects effective public participation in environmental matters).

53. Moreover, the NPSNN, which the Application needed to be decided in accordance with (Planning Act 2008, s104(3)), also expressly required that cumulative environmental effects be considered (at 4.3 and at 4.16-4.17 **[CB/222-223]**, with emphasis added):

> *4.3 In considering any proposed development, and in particular, when weighing its adverse impacts against its benefits, the Examining Authority and the Secretary of State should take into account:*

- *its potential benefits, including the facilitation of economic development, including job creation, housing and environmental improvement, and any long-term or wider benefits;*
- *its potential adverse impacts, including any longer-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts.*

…

4.16 When considering significant cumulative effects, any environmental statement should provide information on how the effects of the applicant's proposal would combine and interact with the effects of other development (including projects for which consent has been granted, as well as those already in existence). The Examining Authority may also have other evidence before it, for example from a Transport Business Case, appraisals of sustainability of relevant NPSs or development plans, on such effects and potential interactions. Any such information may assist the Secretary of State in reaching decisions on proposals and on mitigation measures that may be required.

4.17 The Examining Authority should consider how significant cumulative effects and the interrelationship between effects might as a whole affect the environment, even though they may be acceptable when considered on an individual basis with mitigation measures in place.

54. Paragraph 4.4 of the NPSNN also stated (following on from paragraph 4.3) that **[CB/222]** (with emphasis added):

> *In this context, environmental, safety, social and economic benefits and adverse impacts, should be considered at national, regional and local levels. These may be identified in this NPS, or elsewhere.*

55. As has been noted above, the ExA made clear that it did not have sufficient information on the cumulative climate impacts of the Development. Nor did it have sufficient information on how the Development's climate effects (whether cumulative or otherwise) impacted on the up-to-date climate change targets (in particular, the Net Zero target).

56. The focus then is what the Defendant did in relation to those matters. Importantly, the Defendant's statements at DL 72 **[CB/209]** do not satisfy the EIA Regs. The Defendant says that "*appropriate consideration was taken of the carbon impacts of the RIS programmes during their development and that any impact is not incompatible with the national wide carbon targets and commitments of the Government*"; in other words, according to the Defendant, the matter of cumulative climate impacts of this

scheme taken with other sources of climate change impacts (and their compatibility with the relevant carbon targets) was addressed by the Government when considering the RIS (seemingly both RIS1 and RIS2, although we note as a matter of fact that RIS1 was published in December 2014 and so could not have been assessed by reference to the Paris Agreement,[7] the fifth carbon budget[8] or the Net Zero Target[9]).

57. This approach is fundamentally flawed:

(i) There is no evidence whatsoever that the cumulative climate effects of either RIS programme (let alone in a manner referable to this scheme) have been assessed; certainly there is no evidence that either programme's combined emission impacts have been assessed by reference to the Paris Agreement and/or the Net Zero Target. Neither RIS was subject to a Strategic Environmental Assessment. Indeed, we note that there is currently pending a judicial review of RIS2 on the basis that, *inter alia*, the Government failed to consider the Paris Agreement and/or the UK carbon budgets and/or the Net Zero Target, and which has permission to proceed to a full hearing on that ground.[10]

(ii) Even if the Defendant's conclusion here about the assessment of the RIS programmes' overall carbon impacts was (hypothetically) correct (and we do not accept that it is), all of that information – on the RIS programmes' cumulative impacts and the RIS programmes' impacts on the relevant climate targets – needed to be (but was not) included in the EIA for this Development. It was not covered (even by reference) in the ES. Nor was it addressed through the Examination process (we know the ExA was unable to conclude on this point). The public have, at no point prior to the DL being published, had the opportunity to consider any environmental assessment of the Development's

[7] Which the UK ratified in November 2016
[8] Which was set in July 2016
[9] See above, this came into force in June 2019
[10] R (oao Transport Action Network Limited) v SST [CO/2003/2020]

cumulative climate impacts. Nor does the DL provide them with any details to support the Defendant's bald statements on the RIS programmes.

Pre-action Protocol Responses

58. In his PAP Response, and in relation to this ground of claim, the Defendant seeks to emphasise that his view on whether the carbon impacts of the Development together with other RIS schemes were "incompatible" with the Government's national wide carbon targets and commitments (including the Net Zero target) was a "matter of judgment" (see Defendant's PAP Response, paras 3.6 and 3.10 **[CB/59]**).

59. The Defendant has also provided the Claimant with an internal e-mail exchange entitled "*RE: RIS 1 + 2 strategies / [redacted]"* dated 18 December 2020 within the Department for Transport **[CB/64-67]**, which includes a statement by Mr Andrews to similar effect: "*Government is content that the appropriate consideration was taken of the carbon impacts of the RIS programme when setting the RIS, and that impact is not incompatible with economy wide carbon targets and commitments the Government has."*

60. It is clear from the Defendant's response here that he misses the point of this ground. The EIA Regs required that cumulative climate impacts be properly assessed and considered as part of the EIA process for this Development and that needed to be done publicly through the EIA procedures. The Defendant's (or his Department's) (unexplained and unsubstantiated) "judgment" elsewhere that the Development's cumulative climate impacts are not incompatible with carbon targets/commitments fails entirely to meet the requirements of the EIA Regs. At the very least, the Defendant needed to provide publicly any environmental information (if any existed) on which that judgment was made.

61. What is more, the EIA Regs are focussed simply on assessing a Development's significant impacts on the environment. Significant impacts on the environment are not limited to whether a Development's impacts would be "incompatible" with national targets or long-term commitments. The Defendant reached no conclusion as

to whether the cumulative climate impacts of the Development are significant environmental effects (as he was required to do under the EIA Regs, see **Raymond Stephen Pearce v SSBEIS et anr** [2021] EWHC 326 (Admin) at [108] and [120]). It is quite possible that the Development's cumulative climate impacts were a significant environmental effect even if the Development would not (in itself) result in incompatibility with any long-term UK-wide target (especially where incompatibility with the target in question can only properly be adjudged at the target's end-date and may depend on whether effective compensatory/off-setting measures are taken elsewhere in the market before that end-date).

62. So the Defendant's reliance on his unsubstantiated "judgment" that there would not be incompatibility with the Government's climate change commitments in no way absolves the Defendant from needing to comply properly with the EIA Regs.

63. It is further noted that the e-mail from Mr Andrews dated 18 December 2020 at 12:00 in the internal e-mail chain **[CB/64]** also raises real questions as to whether any cumulative assessment of the RIS2 climate impacts was in fact ever carried out and/or what any "carbon assessment" of RIS2 amounted to.

64. Finally, in its PAP Response, Highways England ("HE") states, under the heading "EIA Caselaw", at paragraph 31 **[CB/52]**:

> *Thus, in the context of the consideration of cumulative effects upon climate change, a cumulative impact assessment within an Environmental Statement which considered the impacts of the A38 scheme only alongside other road schemes would not have accorded with the approach required by the EIA Regulations/Directive; rather, what was required was an assessment of the cumulative impact of the A38 scheme in the context of U.K. emissions as a whole in order to assess whether the emissions associated with the Scheme were likely to be significant. They could only be significant if they were likely to have a material impact on the ability of the Government to meet its carbon reduction targets.*

65. This is simply wrong in law. The EIA regime is designed to ensure that any and all significant environmental effects of a proposed development are assessed. Cumulative effects need to be considered as part of that process because a development may not result in significant effects on its own, but may do so when

considered cumulatively with other schemes (and obviously also a development's significant environmental effects may be further exacerbated when cumulative effects are considered).

66. What HE appears to be arguing (although it is not entirely clear), is that cumulative assessments (and in this case, they suggest a UK-wide cumulative assessment, which we note does not align with either the suggested approach of the ExA or the apparent approach taken by the Defendant[11]) are used to establish a ballpark/marker against which a development's individual effects are to be measured in order to determine if that individual development's contribution to environmental effects is "significant". Clearly that completely confuses how the EIA regime is intended to work. It makes the cumulative assessment a means by which to determine if an individual project's environmental effects are "significant" rather than (as is supposed to be the case) the cumulative assessment feeding into the environmental effects that are to be (cumulatively) assessed and considered for their significance.

67. Finally, we note HE's conclusion above (again, under the heading "EIA Caselaw") that a development's emissions "*could only be significant if they were likely to have a material impact on the ability of the Government to meet its carbon reduction targets*". That conflates the policy test in NPSNN at 5.18 (see below) with the EIA regime, and there is no basis to narrow the scope of the EIA regime's concept of "significant" environmental effect in this way.

68. Overall, the EIA Regs required that cumulative climate impacts be assessed as part of the EIA process but they were not. There has, therefore, been a breach of the EIA Regs.

[11] Both of which appear to agree that any cumulative assessment of carbon emissions should be by reference to the RIS2 schemes.

(ii) <u>Failure to provide an up-to-date "reasoned conclusion"</u>

69. Further, and in any event, Regulation 21 of the EIA Regs required the Defendant to reach a "reasoned conclusion" on the significant effects of the proposed Development on the environment, taking into account his examination of the environmental information and any supplementary examination. Regulation 30 then required that reasoned conclusion to be included in the decision notice. While the DL purports to provide that information (DL 8), nowhere in the DL does the Defendant provide any reasoned conclusion (let alone an up to date conclusion) on the Development's cumulative climate impacts and/or how they may affect the relevant climate change targets; nor did he claim it contained such a conclusion or assessment.

70. In particular, the Defendant nowhere explains on what basis the RIS programmes' impact is considered to be "*not incompatible with the national wide carbon targets and commitments of the Government"* (DL 72 **[CB/209]**). Nor does the Defendant explain how he can be "*satisfied that any increase in carbon emissions that would result from the Development*" would not be "*so significant that it would have a material impact on the ability of the Government to meet its carbon reduction targets*" (DL 72 **[CB/209]**) when the Applicant's environmental assessment had only considered the (now out-of-date) 80% reduction target and the carbon budgets (up to the fifth carbon budget) that were set by reference to it.

71. Here it must be noted that Regulation 21(2) specifically requires that the "*reasoned conclusion"* be "*<u>up to date</u> at the time that the decision as to whether the order is to be granted is taken*". The Defendant nowhere recognises in the DL that the Applicant's assessment of climate impacts was out of date (as it is premised on the 80% reduction target). Nor does he recognise that the Applicant was unable to provide any assessment of the Development's impact on carbon budgets from 2033 onwards (i.e. beyond the fifth carbon budget) including from 2039 (the future design year). The Defendant mentions the CCC's Sixth Carbon Budget Report (published on 9 December 2020), but goes on to state that the recommended target had *"not formally been approved by Parliament*" (DL 70) and he then makes no more mention of it.

72. In short, the EIA for this Development did not provide an "up to date" and "reasoned" conclusion on the Development's carbon impacts (whether cumulative or otherwise) and the decision based on it was in breach of Regulation 21 for this reason also.

Ground 2: Failure to provide legally adequate reasons

73. Further and in the alternative, the Defendant failed to provide adequate reasons for the Decision. The NPSNN states at 5.18 **[CB/226]** that:

> *"The Government has an overarching national carbon reduction strategy (as set out in the Carbon Plan 2011) which is a credible plan for meeting carbon budgets. It includes a range of non-planning policies which will, subject to the occurrence of the very unlikely event described above, ensure that any carbon increases from road development do not compromise its overall carbon reduction commitments. The Government is legally required to meet this plan. Therefore, any increase in carbon emissions is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the proposed scheme are so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets."*

74. As stated above, the ExA could only reach a conclusion as to the Development's individual impact on the Government's ability to meet those carbon reduction targets that were "*in place at the time of the [Applicant's assessment]"*. It could not conclude on how the Development's impacts (cumulative, or otherwise) would affect current carbon reduction targets, nor whether the grant of consent would comply with the Paris Agreement. The ExA was unable to, and therefore did not, reach any conclusion as to whether the carbon emissions resulting from the proposed scheme were "*so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets"* (as required by NPSNN at 5.18 **[CB/226]**).

75. There are a number of reasons why that was so (further and in addition to the fact that there was no assessment of cumulative impacts):

    (i) As stated above, the carbon budgets "*in place at the time"* of the Applicant's assessment had been set by reference to the previous 80% reduction target. Since then, the CCC made clear that the more stringent Net Zero Target is needed to achieve the UK's commitments under the Paris Agreement, but the carbon budges have not been updated. The CCC has even now concluded that the fifth carbon budget, as set, is not on track to achieve Net Zero by 2050.[12]

    (ii) The Government has not yet set carbon budgets for the period 2032-2050, so (as the ExA noted at 4.15.115 **[CB/166]**) it is simply not possible to test, by reference to carbon budgets, whether the Development would affect the ability of the Government to meet the Net Zero Target in 2050.

76. Notwithstanding all of this, the Defendant simply stated in the DL that he was *"satisfied that appropriate consideration was taken of the carbon impacts of the RIS programmes during their development and that any impact is not incompatible with the national wide carbon targets and commitments of the Government"* (DL 72 **[CB/209]**). Yet, he in no way explains on what basis he reaches this conclusion on incompatibility.

77. Likewise, he simply states that he is satisfied that any increase in carbon emissions would not be so significant that they would have a material impact on the Government's ability to meet its carbon reduction targets, without explaining <u>why</u>. We note here that a development could well have a material impact on reaching a target (by making it substantially harder to meet), even if that target can still technically be met (through compensatory action taken elsewhere).

78. Specifically, in relation to the Paris Agreement, the UK has agreed to hold the global average temperature to "*well below 2^{o}C above pre-industrial levels*" and to pursue

[12] The Sixth Carbon Budget – The UK's path to Net Zero, CCC, December 2020 p. 433.

efforts to limit the temperature increase to 1.5°C above such levels (Art 2.1). The Agreement also requires parties to aim to reach global peaking of emissions as soon as possible, and to thereafter undertake rapid reductions in accordance with best available science, in the context of achieving net zero global emission in the second half of the century (i.e. from 2050) (Art 4(1)). Paris, therefore, does not just embody a 2050 target point, but also requires action on emissions levels up to that point.

79. All of this means that the Defendant was incorrect to state (at DL 69) that *"[m]eeting the targets in the Climate Change Act 2008 (as amended) provides a route to compliance with the Paris Agreement, an international obligation"* because, whilst the Net Zero Target is currently considered to be compliant with the Paris Agreement, the carbon budgets (also set under the CCA 2008) do not currently provide a route to compliance with the Net Zero Target (as they were set by reference to the (non-Paris compliant) 80% reduction target).

80. The Defendant needed to grapple with all of the above and then reach a conclusion as to the compatibility of the Development's (cumulative) impacts with the Paris Agreement. His statement at DL 72 **[CB/209]** – that the Development would not result in a breach of international obligations – fails entirely to do so.

81. Overall, the Development's impacts (cumulative, or otherwise) and how they would affect current carbon reduction targets and/or whether the grant of consent would be compliant with the Paris Agreement were all "principal important controversial issues" at the Examination. They were matters that the ExA expressly left in the hands of the Defendant because it felt it did not have sufficient evidence before it on them. In that context, the Defendant's reasoning on these matters is wholly inadequate. It fails to meet the well-known test in **South Bucks DC** and lawful reasoning was necessary to an even greater extent in this case because the Defendant did not simply agree with the ExA (**Horada** at [36]-[40]) but instead needed to come to his own conclusions. The Defendant certainly cannot rely on bald assertions in those circumstances (**Horada** at [54]).

Ground 3: Irrational conclusion on the Development's impact on meeting the Net Zero Target and/or in relation to the application of the NPSNN

82. Further, and in the alternative, the Defendant reached an irrational conclusion as to the Development's impact on the Net Zero Target.

83. As set out above, paragraph 5.18 of the NPSNN requires the decision-maker to assess whether the development would have a "*material impact on the ability of Government to meet its carbon reduction targets*". Notably, it refers to whether the development at issue would have any "*material impact on the ability*" of Government to meet those targets, not whether the development would be "incompatible" with a target.

84. The Net Zero Target is clearly one of the Government's "*carbon reduction targets*" and it was treated as such by both the ExA and Defendant.

85. The Net Zero Target represented a step-change in the UK's efforts to address climate change. It requires that all additional emissions, as of 2050, be offset, or otherwise removed, so that there are no "net" emissions in the UK carbon account when compared to 1990 levels. This means that *any* additional emissions projected in 2050 will require commensurate offsetting to be introduced elsewhere.

86. Therefore, in truth, any expected additional emissions beyond 2050 will have a "material impact" on the ability of the Government to meet the Net Zero Target because they will need to be otherwise offset and/or balanced out by carbon sequestration and/or mitigation. That is not to say that they will necessarily preclude the target being met (i.e. that they are "incompatible" with it), but rather that they will make it that much harder for the Government to reach it.

87. In light of all of that, the Defendant could not rationally conclude on the basis of the evidence before him (and he certainly has not pointed to or explained a basis for any such decision) that the Development's emissions would not have any material impact on the Government's ability to meet its carbon reduction targets (DL 72 **[CB/209]**).

Certainly, not in light of the Development's cumulative impacts (which the Defendant allegedly considered by reference to the entire RIS programme).[13]

Ground 4: Failure to consider the Net Zero Target and Declared Climate Emergency when considering GHG emissions as part of the section 104(7) balance

88. According to section 104(3) and (7) of the Planning Act 2008, the Secretary of State does not need to decide the application in accordance with any relevant NPS if he/she is satisfied "*that the adverse impact of the proposed development would outweigh its benefits"*. As noted above, section 104(7) is a straightforward balancing exercise and the weight to be given to both a development's benefits and its adverse impact is a matter of planning judgment for the decision-maker, subject to the traditional principles of judicial review.

89. In relation to climate change impacts, the ExA concluded that, subject to the Defendant considering the three matters it had left outstanding, they considered that the Development would be "*unlikely to result in an increase in carbon emissions so significant that it would result in any significant effects in respect to climate change or carbon emissions*" and therefore they consider the climate change/carbon emission effects "*do not weight significantly for or against the DCO being made*" (ExA Report at 4.15.127-128 **[CB/168]**). In other words, the ExA concluded that – subject to the three matters outstanding – the Development's emissions would be neutral in the planning balance under section 104(7).

90. The Defendant then reached the conclusions he did at DL72 (quoted above) through which he sought to address the three outstanding matters left open by the ExA. As set out above, there are a number of legal flaws with the Defendant's conclusions in this regard. However, even assuming (and the Claimant does not accept this point) that the Defendant had addressed the three outstanding matters left open by the ExA,

[13] We note that the Defendant has emphasised in his PAP Response in relation to this ground, at paragraph 3.16, that the Development would result in negligible additional emissions of less than 0.01% to total carbon emissions. That statement ignores any cumulative emissions.

the Defendant gave no consideration whatsoever to what weight he should then give GHG emissions in the section 104(7) balance.

91. This was a matter which the Defendant needed to grapple with (and could not simply rely on the ExA's view as to weight) because (at best) only the Defendant had considered the Development's cumulative emission impacts.

92. In particular, in light of not only the introduction of the Net Zero target, but also the fact that the UK Parliament passed a motion to declare a climate "emergency" on 1 May 2019, as well as more generally the well-recognised "potentially catastrophic" effects associated with global warming (as recognised by this Court in **Spurrier and others v SST** [2019] EWHC 1070 (Admin) at [559]), the Defendant needed to consider whether greater weight should be given to the GHG emissions of the Development in the balancing exercise. Certainly, this was a consideration that was "so obviously material" to the Defendant's consideration under section 104(7) that it was irrational (and therefore unlawful) not to consider it (**Samuel Smith Old Brewery (Tadcaster) and another) v North Yorkshire County Council** [2020] UKSC 3). We note that in the Secretary of State for Business, Energy and Industrial Strategy's recent decision on the Drax power plant, she took account of the Government's policy and legislative framework for delivering a net zero economy by 2050 in relation to her consideration of the section 104(7) balancing exercise and the weight to be given to GHG emissions in that case (**ClientEarth** [2021] EWCA Civ 43 at [109]).

93. There is no indication whatsoever from the Defendant's decision letter that he had regard to this point and, in fact, there is not even any reference to the section 104(7) balancing exercise that needed to be carried out.

Ground 5: Failure to consider and/or apply NPSNN policy on air quality impacts

94. In terms of the assessment of air quality impacts, the NPSNN states at 5.12-5.13 **[CB/225]** (with emphasis added):

> *5.12 The Secretary of State must give air quality considerations substantial weight where, after taking into account mitigation, a project would lead to a*

significant air quality impact in relation to EIA and / or where they lead to a deterioration in air quality in a zone/agglomeration[14]*.*

5.13 The Secretary of State should refuse consent where, after taking into account mitigation, the air quality impacts of the scheme will:

- *result in a zone/agglomeration which is currently reported as being compliant with the Air Quality Directive becoming non-compliant; or*
- *affect the ability of a non-compliant area to achieve compliance within the most recent timescales reported to the European Commission at the time of the decision.*

95. The Development's air quality impacts were a key controversial issue at the Examination, particularly as the Development was recognised to have the potential to impact on air quality in Stafford Street, which is in the Derby Ring Roads AQMA and where exceedances of annual objectives and limit values are predicted even without the Development (ExA Report 4.8.13 **[CB/126]**; DL 25 **[CB/198]**).

96. The Decision stated at DL 27 **[CB/199]** that:

> *… the Secretary of State notes and agrees with the ExA that the Proposed Development would be unlikely to cause a delay in non-compliant areas becoming compliant, or cause any compliant areas to be non-complaint* (ER 4.8.129).

97. It further concluded that the Development *"would be unlikely to result in any significant effects in respect to air quality"* and that the *"Secretary of State agrees with the ExA that the proposals are compliant with the NPSNN and that air quality does not weigh significantly for or against the DCO being made (ER 4.8.132)"* (DL 29 **[CB/199]**).

98. This reflects the ExA's conclusion at 4.8.132 **[CB/145]** that (with emphasis added):

> *Based on the above, we are satisfied that appropriate consideration has been given to relevant policy for the Proposed Development and find that that, subject to the provisions of the rDCO (Appendix D), it would be unlikely to result in any significant effects in respect to air quality. Therefore, our view is that air quality does not weigh significantly for or against the DCO being made.*

[14] The United Kingdom is split into 43 zones and agglomerations for the purpose of reporting air quality within those zones to the European Commission under the Air Quality Directive.

99. The ExA had further specified, at 4.8.129 **[CB/145]** of its report (with emphasis added):

> *We have paid particular attention to the AQD and to the relevant provisions in the NPSNN, including paragraphs 5.9 and 5.13. We note that the SoSEFRA has the sole responsibility for determining compliance against the AQD. However, from the evidence presented to us, our view is that the Proposed Development would be unlikely to cause any delays in non-compliant areas becoming compliant, or to cause any compliant areas to become non-compliant.*

100. While the Claimant does not agree with such conclusions, she does not challenge the Defendant's conclusions that the Development would be unlikely to (i) cause any compliant area to become non-compliant or (ii) cause a delay in non-compliant areas becoming compliant. As such, for the purposes of this claim, the Claimant accepts that it was open to the Defendant to conclude that paragraph 5.13 of the NPSNN was not engaged – and the Defendant was not thereby directed to refuse content.

101. Nor does the Claimant challenge the legality of the Defendant's conclusion that the Development would be unlikely to result in any "significant" effects in relation to air quality. That was a matter of planning judgment based on the evidence. However, again, it should be noted that the Claimant does not herself agree with the Defendant's planning judgment.

102. However, NPSNN paragraph 5.12 does not just refer to whether a project would lead to a "*significant air quality impact in relation to EIA*", but also to whether a project would "*lead to a deterioration in air quality in a zone/agglomeration*". If a project would lead to such a deterioration, then that is a matter which "*must*" be given "*substantial weight*" according to the NPSNN. The Claimant can see no indication that the Defendant had any regard to this issue.

103. We note that the Applicant's air quality assessment had concluded *inter alia* that:

(i) Changes in annual mean NO_2 concentrations during the construction phase were predicted to range from -4.4 to +5.0 µg/m^3, recognised as large changes according to the significance criteria used (ExA Report 4.8.23 **[CB/127]**);

(ii) Changes in annual PM_{10} concentrations during construction ranged from -0.5 to +1.4 µg/m^3, seen as small changes according to the significance criteria (ExA Report 4.8.27 **[CB/128]**);

(iii) Overall, during the construction phase, there would be a "*slight deterioration in local air quality at properties within the study area"* (ExA Report 4.8.30 **[CB/128]**). The study area covered key sensitive receptors within 200m of the works (ExA Report 4.8.14 **[CB/126]**).

(iv) In terms of the operational phase, regional emissions of NO_x, PM_{10} and CO_2 were expected to increase with the Development, due to an increase in vehicle kilometres travelled (albeit it was considered that much of this increase would be on roads outside densely populated areas) (ExA Report 4.8.38 **[CB/129]**).

104. On the face of it, therefore, the evidence shows that the Development would lead to a deterioration in air quality in the relevant zone. At the very least, there was a real risk of such a deterioration in the short-term (and certainly the Defendant did not claim otherwise). The Defendant needed to grapple with this distinct question, as set out in the NPSNN, but he failed to do so.

OVERALL

105. Each of those grounds is plainly arguable.

AARHUS CONVENTION CLAIM

106. This is agreed to be an Aarhus Convention claim for purposes of CPR 45.41 and 45.43.

107. The Claimant is acting as an individual and so the default costs cap of £5,000 should apply. A schedule of financial resources has been submitted along with this claim.

SIGNIFICANT PLANNING COURT CLAIM

108. The Claimant considers that the claim is "significant" for the purposes of 54E PD 3.1 and 3.2 because it raises important points of law, including the correct approach to assessing the cumulative climate change impacts of development consent proposals and because of the significant amount of public interest in the examination process for the Development. The Claimant notes that the Interested Party also considers that the claim is a significant planning court claim (see HE's PAP Response at paragraph 6 **[CB/47]**).

CONCLUSION

109. For the reasons given above, the Decision is unlawful and must be quashed. The above grounds are at least arguable and the Claimant respectfully requests permission from the Court to bring a claim for judicial review on this basis.

DAVID WOLFE QC

MERROW GOLDEN

19 FEBRUARY 2021

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