Claim No. CO/2003/2020

IN THE PLANNING COURT

BETWEEN:

TRANSPORT ACTION NETWORK LIMITED

Claimant

and

THE SECRETARY OF STATE FOR TRANSPORT

Defendant

and

HIGHWAYS ENGLAND COMPANY LIMITED

Interested Party

SKELETON ARGUMENT ON BEHALF OF THE CLAIMANT

For the oral renewal hearing on 29 October 2020

Page references below are to the pages of the renewal hearing bundle. They are expressed as [CB/x] and [SB/X] in relation to the Core Bundle and Supplementary Bundle respectively.

Time estimate for the hearing and pre-reading: *Hearing 1 hour; pre reading 2 hours*

List of essential documents: *Statement of Facts and Grounds [CB/9-42]; Reply the Summary Grounds of Resistance [CB/67-73], and Grounds for Renewing (in Part) the Application for Permission [CB/78-81]*

INTRODUCTION

1. By an Order dated 21 July 2020 [CB/74-76], Lieven J granted the Claimant permission to challenge the legality of the Defendant's Second Roads Investment Strategy ("RIS2") on Ground 1 of its claim: namely that the Defendant unlawfully failed to take account of the impact of RIS2 on achieving

specific climate change objectives, contrary to his duty, under section 3(5)(a) of the Infrastructure Act 2015 ("**the IA 2015**"), to have regard to the effect of the RIS2 on the environment when setting the RIS2: SFG, 61-73¶ **[CB/31-35];** Reply, 2-10¶ [**CB/67-70**].

2. This is the Claimant's skeleton argument in respect of its renewed application for permission on the basis that it is also arguable that (i) in further breach of section 3(5) of the IA 2015, the Secretary of State unlawfully failed to take account of air quality impact of the RIS2, and to discharge the duties placed on him under the Air Quality Standards Regulations 2010 SI No 1001 ("**AQ Regulations**") (Ground 3), and (ii) the Defendant unlawfully failed to carry out Strategic Environmental Assessment ("SEA") of RIS2, contrary to the Environmental Assessment of Plans and Programmes Regulations 2004 ("**SEA Regulations**") (Ground 4).

3. Ground 2 is no longer pursued.

4. This skeleton argument should be read together with (a) the Claimant's Statement of Facts and Grounds ("**SFG**") [**CB/9-42**], (b) Reply to the Defendant's Summary Grounds of Resistance ("**Reply**") [**CB/67-74**], and (c) Grounds for Renewing (in Part) the Application for Permission ("**GR**") [**CB/78-81**] the contents of which are relied on but not repeated here.

BACKGROUND

RIS2

5. Section 3 of the IA 2015 empowers the Defendant to set a Road Investment Strategy ("**RIS**"), and indeed requires him to do so where there is not one in place (SFG, ¶28-29) **[CB/20-21].**

6. RIS2 was published by the Defendant on 11 March 2020 [CB/79-209]. It sets a five-year strategy for the management of, and investment in, the strategic road network in England from April 2020 to March 2025 (referred to as the Road Period 2 or ("RP2")).

7. RIS2 is a package of schemes for implementation across England. It is constituted by a structure of commitments that specifically expect projects to enter construction by 1 April 2025. An interactive map of the projects to which RIS2 commits was published alongside the policy document.[1] The progress of these projects will be monitored by the Department for Transport and the Office of Rail and Road ("ORR"), with regular updates presented to Parliament.

8. RIS2's key features are threefold [CB/87 para 7]:
    a. Strategic vision: it sets out the Defendant's objectives for the strategic road network in the long-term and the steps needed to achieve them [CB/89-128];
    b. Performance specification: it specifies the outcomes Highways England ("the IP") must meet, for instance how it must approach the prioritisation between reducing journey times and addressing environmental impacts [CB/129-152]; and
    c. Investment plan [CB/153-202]: it lists specific planned road enhancement schemes that the Defendant expects to be built; makes *'clear and accountable promises about which projects are expected to proceed and by when'* [CB/175]; and states the funding that will be available to meet those projects from the financial years 2020/21 to 2024/25. [CB/203-206].

[1] Available online here: http://maps.dft.gov.uk/road-investment-strategy-2/. A non-interactive version of the map is at RIS2, p 93 [**CB/181**]

9. RIS2 therefore sets and drives the overall strategic road infrastructure programme for England for the next five years.

10. Section 3(6) of the IA 2015 then specifically provides that:

> "The Secretary of State and the company must comply with the Road Investment Strategy."

11. RIS2 thereby contains elements of (and/or is akin to), and indeed is of even greater force than, planning policy, and has, among other things, the following planning implications:

    (i) The selection of schemes for support through RIS2 influences the grant of development consent by constraining the consideration of need, benefits, viability and alternatives, in a way that means it is appropriate to conduct an 'upstream' assessment of these options at an early planning stage (per Walton v Scottish Ministers [2012] UKSC 44 at ¶20-21);

    (ii) The Performance Specification constrains which schemes or alternative measures to manage the road network may be taken forward; and

    (iii) In any event, a number of schemes funded by RIS2, whether those explicitly listed in its Investment Plan or those to be delivered through Designated Funds, would fall within existing permitted development rights (and therefore would not engage the planning process at all).

12. Indeed, the significance of RIS2 is reflected in the Defendant's statutory duties to have regard, in particular, to the effect of the RIS on (a) the environment, and (b) the safety of users of highways when setting it (pursuant to section 3(5) of

the IA 2015). That duty accordingly requires the Defendant to consider the cumulative effect of RIS2 as a suite of schemes, including funding for the ongoing management of the existing network (the macro level), as well as in his assessment as to whether or not to include an individual project within RIS2 (the particular level).

13. RIS2 has been informed by forecasts of an increase in traffic on the strategic road network, ranging between a projected growth of 29% and 59% by 2050: RIS2, p 11 [CB/95] (even though the Defendant acknowledges that we will need to use our cars less to meet the Net Zero Target[2]). As a result, a significant number of projects that are specified for delivery in RP2, pursuant to RIS2, will increase the strategic road network capacity - that is the point of them.

14. Indeed, over half of the total funding committed in RIS2 (£14.1 billion out of £27.4 billion – see RIS2 p.11926 [CB/203]) relates to "capital enhancements"; that is, new roads and increasing the capacity of existing roads.

AIR POLLUTION AND AIR QUALITY

15. Road transport is an undisputed source of air pollution, and accounts for a high proportion of the serious impact of air pollution on human health, and the environment. It is a major source in absolute terms, and it is the source of air pollution that occurs nearest to human activity, being responsible for significant contributions to emissions of carbon dioxide, nitrogen oxides, particulate matter PM10 and PM2.5 [SB/104-110].

16. As explained by the Office for National Statistics [SB/203], data from the Department of Transport itself illustrate the undisputed severity of the

[2] p. 3 of the Ministerial Forward (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878642/decarbonising-transport-setting-the-challenge.pdf)

environmental and public health challenge posed by air pollution: (i) road traffic in Great Britain has increased by 29% from 1990 to 2018; and (ii) only 0.5% of licensed vehicles in the UK were ultra-low emission vehicles at the end of 2018. Not all ultra-low emission vehicles are fully electric, and in any case, even fully electric vehicles produce particulate matter as a result of road, tyre and brake wear [SB/139-143].

17. As explained by the Royal College of Physicians [SB/104/110], exposure to air pollution is the top environmental risk to human health in the UK, and increases the risk of cancer, asthma, stroke and heart disease, diabetes, obesity and dementia. Air pollution is hazardous for users of highways (drivers, commuters, and pedestrians), as well as individuals living near roads. Indeed, air pollution levels inside vehicles are frequently higher than those outside as a result of fans and air conditioning units venting exhaust fumes from tailpipes directly into the vehicle.

18. That matters here because section 3(5) of the IA 2015 provides that:

> "In setting or varying a Road Investment Strategy, the Secretary of State must have regard, in particular, to the effect of the Strategy on—
>
> (a) the environment, and
>
> (b) the safety of users of highways." [underlining added]

19. That must be done, *when setting the RIS*. This obligation is not deferrable to some later stage.

20. In addition, obligations are imposed on the Defendant by the Air Quality Standards Regulations 2010 (SI:2010/1001) ("the AQ Regulations") [SB/31-37], which implement Directive 2008/50/EC ("the AQ Directive") [SB/30].

21. The AQ Directive and AQ Regulations aim to ensure that air pollution is reduced 'to levels which minimise harmful effects on human health' (AQ Directive, Recital 1). The AQ Regulations establish 'limit values' for the air pollutants listed in Schedule 2 to the AQ regulations. The AQ Regulations provide, among other things:

    a. Duty in relation to limit values: The Secretary of State (i.e. the Defendant to this claim) must ensure that levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and particulate matter do not exceed the limit values. In zones where levels of those pollutants are below the limit values, the Defendant must ensure that levels are maintained below those limit values and must endeavour to maintain the best ambient air quality compatible with sustainable development. (Regulation 17)

    a. Air quality plans: where the levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and PM10 in ambient air exceed any of the limit values, then the Secretary of State must draw up and implement an air quality plan so as to achieve that limit value or target value. The air quality plan must include measures intended to ensure compliance with any relevant limit value *within the shortest possible time*. The courts have repeatedly emphasised that the requirement to reduce human exposure to air pollution as quickly as possible consists of three limbs. The Secretary of State must: (a) aim to achieve compliance by the soonest date possible, (b) choose a route to that objective which reduces exposure as quickly as possible, and (c) take steps which mean meeting the value limits is not

just possible, but likely (this being implicit in the strict obligation "to ensure").[3] (Regulation 26)

22. Since 2010, air quality in the UK has exceeded the limit values at a large number of monitoring sites, including numerous roadside sites.[4] The UK Government published their latest figures on air pollution data in early October 2020, and 75% of reporting zones still have illegal levels of air pollution [SB/227-231]. The UK Government has produced a series of Air Quality Plans pursuant to Regulation 26, and the courts have intervened on three occasions to them, on the basis that in each case they did not achieve compliance 'within the shortest possible time' as required by Regulation 26(2).[5]

23. Increases in road capacity, and therefore road traffic, generally worsen air pollution. However, RIS2 contains no analysis of the extent, location or timing of the impacts on air quality of the road schemes to which it commits, whether individually or cumulatively.

24. Although RIS2 imposes a requirement on HE to eliminate exceedances on the strategic road network in the shortest time possible [CB/146-157], this is simply repeating the non-delegable statutory duty which the Defendant is under pursuant to the AQ Regulations (namely regulation 26(2) [SB/32]), which plainly does not discharge the Defendant from having to comply with that obligation.[6]

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[3] See, in particular, **R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs (No.3)** [2018] EWHC 315 (Admin), para 73; **ClientEarth v Secretary of State for the Environment, Food and Rural Affairs** [2016] EWHC 2740 (Admin), paras 52 to 54.

[4] https://airqualitynews.com/2019/11/07/exclusive-highways-england-failing-to-spend-75m-air-pollutionfund/; https://airqualitynews.com/2020/10/08/75-of-air-quality-zones-are-in-breach-of-the-legal-limits/;

[5] **R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs (No.3)** [2018] EWHC 315 (Admin); **ClientEarth v Secretary of State for the Environment, Food and Rural Affairs** [2016] EWHC 2740 (Admin); **R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs** [2015] UKSC 28.

[6] See the Defendant's Summary Grounds of Resistance, para 50 [**CB/61**]

25. Whilst 61 English local authorities have been formally directed by the Department of Environment, Food and Rural Affairs ("DEFRA") to come up with plans to address exceedances, no equivalent direction has been issued to the HE. Consequently, HE is no operating under a time-bound obligation to devise a plan to tackle exceedances.

26. Moreover, RIS2 does not analyse whether the schemes which it commits HE to delivering will either help or hinder the achievement of this objective, nor consider alternatives that would have enabled meeting this objective in the shortest time possible, and so it fails to take any steps towards meeting this duty in any event.

STRATEGIC ENVIRONMENTAL ASSESSMENT

27. The SEA Regulations implement Directive 2001/42/EC ("the SEA Directive"), the primary purpose of which is (as set out in Article 1) to:

> "provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

28. Insofar as is material, the SEA Regulations provide as follows:

    a. Environmental assessment for plans or programmes: Under regulation 5(1), an SEA shall be carried out for all plans and programmes (before their adoption or submission to the legislative procedure) that are: (a)

prepared for transport; and (b) set the framework for future development consent of projects listed in Annex I or II to Directive 2011/92/EU (including the construction of motorways and express roads (Annex I, para 7(B)).

b. Definition of plan or programme: Regulation 2(1) of the 2004 Regulations defines the plans and programmes that require SEA as those which: (a) are subject to preparation or adoption by an authority at national, regional or local level; or (b) are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and, in either case (c) are required by legislative, regulatory or administrative provisions. A plan or programme is to be regarded as "required" by legislative provisions where legislation regulates the procedure for its adoption, by determining the competent authority and the procedures for preparing it: (C-567/10 **Inter- Environnement Bruxelles ASBL v Région de Bruxelles-Capitale** at ¶31).

c. Content of SEA: regulation 12(2) requires that an environmental report is produced that identifies, describes and evaluates the likely significant effects on the environment of both: (a) implementing the plan and programme; and (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme. The requirement to assess "reasonable alternatives" is more stringent than the obligation under the EIA Regulations 2017, which only require an environmental statement to include a "description" of the "reasonable alternatives studied by the developer".

d. Exemptions to the scope of the SEA obligation: regulation 5(5) prescribes a limited number of exemptions to the requirement to the carrying out

of an SEA, including (a) a plan or programme the sole purpose of which is to serve national defence or civil emergency; and (b) a financial or budget plan or programme.

29. The following well-established principles apply to the SEA Regulations:

a. A purposive approach must be taken to the interpretation of the SEA Directive (C-567/10 **Inter- Environnement Bruxelles ASBL v Région de Bruxelles-Capitale**, at [20] to [32]; and the **Opinion of AG Kokott in Case C-105/09 Terre Wallone ASBL v Region Wallonne**, at [29] to [35]; **Walton v Scottish Ministers** [2012] UKSC 44; [2013] PTSR 51, at [20] - [21]).

b. The SEA and EIA Directives play complementary roles: (i) the SEA is 'upstream' and identifies the options at an early planning stage, and (ii) the EIA is 'downstream' and refers to the projects that are coming through at a later stage (**Walton**, at 14).

c. Exceptions to, or limitations of, the scope of the SEA Directive must be interpreted strictly, and conversely, those provisions which set out the definitions of the measures envisaged by the Directive must be interpreted broadly (Case C-473/14 **Dimos Kropias Attikis v Ipourgos Perivallontos, Energias kai Klimatikis Allagis**, at [50]).

RENEWED GROUNDS OF CLAIM

GROUND 3: AIR QUALITY[7]

30. In addition to failing to have due regard to the impact of RIS2 on achieving specific climate change objectives contrary to his duty under section 3(5) of the IA 2015 (as argued under Ground 1), the Defendant has also breached that duty by failing to take account of the impact of RIS2 on air quality:

    a. First, section 3(5) of the IA 2015 specifically directs the Defendant to have due regard to the effect of RIS2 on (a) the environment, and (b) the safety of highway users. Air pollution was plainly an obviously material (and therefore mandatory) consideration in any assessment of the effect of RIS2 on both the environment, as well as the safety of highway users. It has an indisputable environmental impact, and is seriously hazardous to the health of road users.

    b. Secondly, section 3(5) requires that due regard is had at the stage of '*setting*' RIS2 (and when varying it). The effect of RIS2 must therefore be grappled with by the Defendant as part of the process of devising the RIS, and not deferred until some later point in time. Indeed, the duty cannot be discharged unless it is carried out when RIS2 is set.

    c. Thirdly, and in any event, it is a duty personally imposed on the Defendant, and therefore is not simply to be delegated to or left to another body (such as HE, the planning inspectorate or a local planning authority, for example). Indeed, the Defendant's imposition of obligations on HE pursuant to RIS2 as above demonstrates the centrality of those matters to consideration of highway schemes (but with the vice that its

[7] SFG, ¶78-85 [**CB/36-39**]; Reply, ¶12-15 [**CB/71-72**]; GR, ¶3-7 [**CB/79-80**].

evaluation is then being left to consideration by HE on a scheme by scheme basis at a point where HE is under an obligation to give effect to the overall requirements of RIS2).

31. The legal problem for the Defendant arises from the fact that the requirement imposed by section 3(5) of the IA 2015 requires the consideration of the effect of RIS is undertaken *when it is being set*. It also corroborates that the legal duties on the Defendant to actively drive down levels of air pollution under the AQ Regulations must also be complied with *at that stage*.

32. As above that itself arises in the context of the Defendant's statutory duties to reduce human exposure to air pollution to as quickly as possible, including by choosing a route to that objective which reduces exposure as quickly as possible, and taking steps which mean meeting the value limits is not just possible, but likely. The setting of the RIS2, in and of itself, had a clear bearing on the Defendant's ability to meet his AQ duties.

33. Accordingly, because the Defendant failed (i) to assess the cumulative impact of the suite of measures (e.g. listed schemes, Designated Funds and KPIs) endorsed by the RIS2, on the macro or strategic level, and (ii) to consider the extent to which individual projects were likely to comply with his air quality obligations, on the particular level, *when setting the RIS2*, he also failed to grapple lawfully with his obligations under section 3(5) of the IA 2015, and the AQ Regulations.

34. Had the Defendant properly turned his mind to these considerations, he might (which is all that is necessary for the purposes of this judicial review challenge) have supported a different mix of projects, or some other package of measures that might have achieved compliance (in non-compliant zones) by a sooner date. Equally, the Defendant may have concluded that particular individual projects

were non-compliant, and so should be excluded from the RIS2, or replaced by alternative (less polluting) schemes.

35. The Defendant has avoided undertaking the necessary strategic, overarching assessment of the cumulative package of measures prescribed by the RIS2 programme. If the impact of the RIS2 on air quality is not assessed when it is set, as required by section 3(5), then the overall impact of RIS2 is simply not assessed at all.

36. Finally, the Defendant's contention that complying with the Air Quality Regulations can be left to the stage of development consent for individual projects (see thus SGR, ¶49 [CB/61]) is fallacious. This is because:
    a. not all of the schemes will require development consent, as some schemes fall within the scope of permitted development rights (thereby escaping any assessment that would accord with the AQ Regulations);
    b. it ignores the significance of RIS2's influence on the grant of development consent by its constraining the consideration of, for example, need, benefits, and viability;
    c. moreover, and in any event, by the time of the determination of development consent on an individual project, air quality impacts present a simple 'pass/fail' indicator which may or may not determine whether the individual development proceeds. It does not enable a comparative analysis of alternative schemes to meet, for example, an identified need;
    d. it ignores the role of RIS2 in ongoing management of the existing strategic road network; and
    e. finally, as set out above, it avoids completely the assessment of the RIS2 itself, as a cumulative suite of projects and ongoing management.

37. Therefore, it is, at the very least, plainly arguable that the Defendant failed to discharge his obligations in respect of air quality (whether under section 3(5) of the IA 2015 or the AQ Regulations), and accordingly the Claimant should be granted permission for judicial review on Ground 3.

38. Lieven J refused permission on this ground on the basis that [CB/74 para 4]:

> "Any scheme which comes forward under RIS2 will have to conform with the relevant Air Quality Regulations. The legal duty to comply with the Regulations arises at that stage. This accords with the practical effect because it is only at stage of project development that the air quality impacts can be assessed in a way that accords with the Regulations. Plainly the obligation to comply with the Regulations will be a relevant consideration at the development consent stage.
>
> Further the Defendant has had regard to the Air Quality Plan in broad terms, and that is all that could be legally required at this stage."

39. The learned judge was wrong to do so because, as set out above: (i) section 3(5) of the IA 2015 imposes an obligation to consider the effect of RIS2 *when it is being set*, and (ii) assessing only an individual project in the development consent process (where indeed, that process applies to a RIS2 project), rather than the cumulative macro effect of RIS2 as a strategic infrastructure programme, is not adequate to lawfully meet the full breadth of the Defendant's air quality duties.

GROUND 4: UNLAWFUL FAILURE TO CARRY OUT SEA

40. The Defendant accepts that no SEA was carried out (SGR, ¶52-62 [CB/62-65]). The question is whether one was required: see SFG, ¶86-88 [CB/39-41]; Reply, ¶16-19 [CB/72-73]; GR, ¶8-11 [CB/80-81].

41. The Defendant put forward two reasons why that was not the case (SGR, ¶54-60 [CB/62-64]): (1) because RIS2 is 'in the nature of a financial or budget plan or programme' and (2) because it does not set the framework for future development consent. Lieven J accepted these two arguments, and refused permission on those grounds. However, it is plainly arguable that both of those reasons are wrong, and therefore that SEA was required.

42. As for (1), the issue arises because SEA is not required for something which is merely a 'financial or budget plan or programme' (pursuant to regulation 5(5)(b)).

43. However, the RIS2 is different in character to a mere financial plan or budget, that sets out financing arrangements for a particular sector (for example), or indeed, a multi-faceted budget set by an authority at a local or regional level. Nor is it a financial plan without any commitment to a particular development (such as, for example, a local authority budget to deliver more affordable housing without committing to any particular developments.) Rather, it is a programme of specific projects (first and foremost), to which funding is allocated at particular levels for the purpose of delivering those particular projects.

44. Moreover, and in any event, the RIS2 concerns far more than mere financing or budgeting. The large bulk of the document is concerned with the substance of the 'objectives, activities, results and standards' applicable to HE, which in turn promotes the road schemes supported by and stipulated in RIS2. Accordingly,

even if it contains some financial or budgetary planning, that does not render it a mere financial or budget plan. On the Defendant's approach, a document which would otherwise trigger SEA could escape that obligation simply by including an element of financial plan or budgeting. That is plainly incorrect.

45. As for (2), the legal issue arises because whether the plan or programme in question sets the framework for future development consents is a key factor in determining whether an SEA is required (see, for example, **Friends of the Earth v Secretary of State for Housing, Communities and Local Government** [2019] EWHC 518 (Admin), ¶20-21 per Dove J).

46. However, the relevant framework may be set through the way that resources are allocated, for the purposes of the SEA Regulations. The RIS2 prescribes a particular future course of action, and limits the types of solution which might be available, by committing to a particular suite of projects and outcomes though the Performance Specification. See thus EU Commission, SEA Guidance, paras 3.24-3.25 and 3.63 [**SB/50-51**]:

> "3.23. The words 'sets a framework for projects and other activities' are used in Annex II with illustrations of how such a framework may be set (location, nature, size or operating conditions of projects and the allocation of resources). These illustrations are indicative and not exhaustive.
>
> 3.25. As Annex II states, one way of 'setting the framework' may be through the way resources are allocated but the exemptions in Article 3(8) should be borne in mind. The Directive does not define the meaning of 'resources' and in principle they may be financial or natural (or possibly even human). A generalised allocation of financial resources would not appear to be sufficient to 'set the framework', for example a broad allocation across an entire activity (such as the whole resource allocation

for a country's housing programme). It would be necessary for the resource allocation to condition in a specific, identifiable way how consent was to be granted (e.g. by setting out a future course of action (as above) or by limiting the types of solution which might be available).

…

3.63. Budgetary plans and programmes would include the annual budgets of authorities at national, regional or local level. Financial plans and programmes could include ones which describe how some project or activity should be financed, or how grants or subsidies should be distributed. ”

47. RIS2 states that *‘[w]hereas historic infrastructure programmes have promised action at an unspecified point in the future, RIS2 is built around a structure of commitments that expect projects to enter construction by 1 April 2025*.’ [CB/175] The RIS2 lists a specific series of projects by region which are committed for RP2, and therefore expected to begin construction by 1 April 2025 [CB/178-189].

48. As such, the RIS2 will result in particular projects being brought forward and into the development consent process in the first place, where they may well not have been otherwise, either as proposed or at all, and as set out above, it will then have an overbearing influence on critical planning considerations – need, benefits, and viability – and in turn, on the grant of development consent.

49. In respect of both of these disputed limbs, it is a well-established principle (see thus, for example: Case C-473/14 Dimos Kropias Attikis v Ipourgos Perivallontos, Energias kai Klimatikis Allagis, at ¶50) that the exemptions to the scope of the SEA Regulations must be construed strictly. It is, at the very least, arguable that on a narrow interpretation of a ‘*financial or budget plan or programme’*, the exemption would not apply to the RIS2.

50. Finally, it is appropriate to conduct an 'upstream' assessment of these options at an early planning stage (per Walton, ¶20-21). The process of setting the RIS2 is the only stage at which reasonable alternatives to the committed projects, both individually and cumulatively, could realistically be considered. Once the RIS2 is approved, it fixes those commitments, and will be overwhelmingly likely to result in a particular suite of projects progressing within a specified time frame.

51. Although RIS2 itself does not alter the normal planning consent process, it constitutes, in substance, government policy directly in support of particular projects. It thereby has significant influence on the granting of development consent, and significant weight will be accorded to it in the planning balance. Indeed, RIS2 states that its projects are expressly expected to enter construction by 1 April 2025. In that sense, RIS2 goes beyond the NN NPS, and provides more than a broad and general criteria or framework – it selects particular infrastructure projects itself.

52. Furthermore, it sets out detailed 'objectives' and 'activities' for the IP. Since the primary activity of the IP is bringing forward road schemes for development consent, the objectives and activities of the IP, which are established by RIS2, amount to detailed rules and criteria that influence the grant of development consent. As summarised in the introductory explanation of RIS2, the projects listed in RIS2, and as shown in the interactive map published alongside it, are '*planned enhancement schemes [the government] expect to be built.'* [CB/87] RIS2 obliges the IP to commit to each of the listed schemes:

> "As well as demonstrating financial efficiency, we want to ensure that the investment plan schemes are delivered in a timely manner. The RIS2 investment plan sets out which enhancement schemes are expected to

start construction (start of works), and which schemes are expected to open for traffic during RP2. Highways England will set out commitment dates in its Delivery Plan for each scheme and for ORR will monitor adherence to these dates within its enhancement scheme and investment programme monitoring processes." [CB/151]

53. Moreover, carrying out an SEA would have helped the Defendant to discharge his duty under section 3(5)(a) of the IA 2015 to have due regard to the impact of the RIS on the environment, when setting it. If properly discharged, the SEA duty would have required that due consideration be given to relevant environmental impacts and objectives, including those relating to air quality and climate change, as well as alternatives that could have potentially had less of an environmental impact.

54. For these reasons, it is (at least) plainly arguable that SEA was required by regulation 12 of the SEA Regulations, and accordingly permission should be granted on Ground 4.

CONCLUSION

55. For the reasons above, the SofS failed to discharge his duties under section 3(5) of the IA 2015, and regulation 12 of the SEA Regulations.

56. The Claimant therefore seeks permission to include within its existing judicial review challenge to the legality of RIS2 additional Grounds 3 and 4, as both grounds plainly meet the (low) threshold of arguability.

DAVID WOLFE QC

PETER LOCKLEY

GETHIN THOMAS

19 October 2020