IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
PLANNING COURT

CO/1832/2020

BETWEEN:

THE QUEEN
ON THE APPLICATION OF

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

Claimants

AND

SECRETARY OF STATE
FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY

Defendant

AMENDED STATEMENT OF FACTS AND GROUNDS
AMENDED 29 JUNE 2020

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

1. By an Order dated 16 June 2020, following receipt of the Defendant's Summary Grounds of Resistance ("**SGR**") in this claim and disclosure of further evidence, Holgate J directed the Claimants to file an amended Statement of Facts and Grounds ("**SFG**"). This SFG fulfils that direction.

Introduction

2. This is a claim for judicial review of the Secretary of State's omission to consider and/or to decide whether it is appropriate to now review all or parts of the National Policy Statements EN-1, EN-2, EN-3, EN-4, EN-5 and EN-6 on energy infrastructure ("**the Energy NPSs**")[1] (or any part of them) pursuant to section 6 of the Planning Act 2008

[1] [AB/B5-B10/61-703].

("**PA 2008**") and/or whether it is appropriate to suspend the Energy NPSs (pursuant to section 11 PA 2008) (grounds 1-2). Additionally, the claim challenges a decision by unnamed department officials not to review/ not to consider whether to review and not to facilitate a ministerial decision whether to review (grounds 3-5).

3. Underlying this claim is the fact that, since the suite of Energy NPSs were designated in 2011, there have been obviously significant – indeed fundamental - changes of circumstance which are material to the basis on which the policy set out in the Energy NPSs were decided and which were not considered in 2011 but which would have substantially affected the content of energy policy if they had been. These changes of circumstance include an amendment to section 1 to the Climate Change Act 2008 so that the UK's net carbon account for the year 2050 is now required to be 100% lower than the 1990 baseline rather than 80% lower, the target on which the Energy NPSs were premised. This amendment, made on 27 June 2019, in turn reflected the latest scientific understanding as to the urgency and scale of action needed on climate change; the UK's revised international commitments to the global effort to reduce temperature rises under the Paris Agreement and the unanimous parliamentary declaration of a "climate emergency" on 1 May 2019. The government's policy framework governing how consent is granted for energy infrastructure is a key mechanism for securing compliance with the urgent imperatives of limiting global temperature rises. Yet one year after the declaration of emergency and nearly a year after the new statutory target was set, the Secretary of State is refusing for at least six months to a year to consider whether it is appropriate to review or suspend the Energy NPSs. The Claimants submit that this inaction by the Secretary of State, or alternatively by civil servants, in the face of the declared climate emergency and without regard to the statutory criteria and requirements, is unlawful.

4. The Claimants are: (1) Dale Vince who is the Chief Executive Officer of Ecotricity, an electricity company relying on renewable energy; (2) George Monbiot who is a journalist and campaigner on the environment; and (3) the Good Law Project Limited which is a project supporting and bringing strategic litigation in relation to matters of

public interest. Each Claimant sets out their standing to bring this claim in their witness statements[2] and there is no challenge by the Defendant to that standing.

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

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

Expedition

7. This claim is important: it seeks to enforce legal obligations relating to what the Paris Agreement calls "a common concern of humankind". It is also an urgent one seeking to enforce a response to what the UK parliament has recognised is an emergency. As these pleadings are being revised, the first ever temperature above 100 degrees Fahrenheit in the arctic circle has been recorded in Siberia[4]. The Claimants ask that a substantive hearing, alternatively a rolled-up hearing, be listed (with a time estimate of 1.5 days) as soon as practicable allowing time for the Defendant to comply with its duty of candour and in any event no later than 8 October 2020 (the end of the second week of Michaelmas term). The Claimants are content to proceed with the claim as a rolled-up hearing during this term if it can be accommodated by the Court. The need for this claim arises from the Defendant's official's position that no decisions will be taken at least during this year.[5]

The Decisions and Omissions Challenged

(i) The Secretary of State's Decisions

8. In the SGR the main thrust of the Defendant's defence to these claims is that the Secretary of State has personally decided not to consider whether to review the Energy

[2] [CB/A4-A6/47-61].
[3] [CB/A3/46].
[4] https://www.telegraph.co.uk/news/2020/06/21/highest-ever-temperature-recorded-arctic-circle/
[5] The grant of permission by the Supreme Court in *R (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 is not, for example, a sufficient basis for delay.

NPSs until after the Energy White Paper ("**the EWP**") is published: see SGR §18 ("the decision was clearly taken by the Secretary of State himself"), §19 ("not taken by a Departmental official but by the Secretary of State"), §22 ("the decision to defer consideration of whether to review the Energy NPSs… was one the Secretary of State himself took"), and §34 ("[i]t is plain that the decision to consider whether to review the Energy NPSs after the publication of the EWP was taken by the Secretary of State himself"). Thus, it is argued that no decision has been taken under section 6 of the PA 2008 and therefore there was no requirement for the Defendant to take account of the section 6 review considerations. The EWP was originally announced in 2018 for completion in early 2019, but is now said by the Defendant to be expected in six to twelve months.

9. By letter dated 22 June 2020 the Defendant has confirmed that there is no evidence of the claimed decision by the Secretary of State not to consider whether to review (other than his bare approval to a response to a pre-action letter in this claim). At the same time, the letter re-iterates the stance in the pre-action letters in April 2020 that "as previously explained, whilst officials have been considering the question of whether to review the Energy NPSs, no decision has been sought from Ministers on whether such a review is appropriate".

10. It has now been confirmed in the letter from the Defendant dated 26 June 2020,[6] the Defendant's position is that:

    a. Departmental officials have for at least two years been considering whether to review the Energy NPSs, but they have never asked the Secretary of State to decide whether it is appropriate to review the Energy NPSs (per letter of 28 April 2020). No evidence of the said departmental consideration has been disclosed (see pre-action letters).

    b. The Secretary of State has decided for himself not to consider whether it is appropriate to review the Energy NPSs until after the EWP (SGR paras 18, 19, 22 and 34), but it is to be noted that:

[6] [SB/B5/10-12].

i. There is no minute or evidence of this claimed Ministerial decision other than the bare sign off of the pre-action letter of 28 April 2020 (this is confirmed in the 22 June 2020 letter).

ii. In taking the decision not to consider whether to review until after the EWP the Secretary of State was not advised of, and had no regard to the factors set out in section 6 of the PA 2008 (SGR para 40).

11. In light of the pleaded case for the Secretary of State as clarified through the correspondence described above the Claimants challenge the following omissions and acts, firstly of the Secretary of State:

a. The failure of the Secretary of State to consider whether it is appropriate to now review or suspend all or part of the Energy NPSs, and/or;

b. The Secretary of State's decision not to review or suspend the Energy NPSs now (whether or not that is couched in the Defendant's terms of the Secretary of State deciding to *not consider whether to* review the Energy NPSs now), and/or;

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

d. The Secretary of State's maintenance of and reliance on the existing suite of Energy NPSs in default of consideration or decision pursuant to section 11 PA 2008 whether to suspend all or part of them.

12. Additionally, the Claimants challenge the decisions of departmental officials as revealed through the Defendant's pre-action letters dated 28 April 2020 ("**the April 2020 Letter**")[7], 22 June 2020[8] and 26 June 2020[9] not to refer to the Secretary of State a decision whether it is appropriate to review or to suspend the Energy NPSs and not to advise him to enable him to make that decision on the basis of the statutory criteria.

[7] [CB/B10/76-77].
[8] [SB/B3/6-7].
[9] [SB/B5/10-12].

13. By **ground 1**, the Claimants submit that the Secretary of State's failure to consider whether it is appropriate to now review and/or to suspend all or part of the Energy NPSs and/or the failure to perform the duty to review them and/or the failure to consider suspension of the existing Energy NPSs unlawfully frustrate the objects and purpose of the statutory scheme.

14. By **ground 2**, the Claimants submit that the Secretary of State's omissions/decisions are unlawful in that:

    (a) The Secretary of State's decision not to consider whether to review carries with it a decision not to review the Energy NPSs now and that is a decision as to "when to review a national policy statement" which, by section 6(3) PA 2008 must be made having regard to the factors set out in section 6(3), yet it is common ground that no regard was had to those factors.

    (b) The decision not to consider whether it is appropriate to review and the failure to consider whether to suspend were taken without regard to obviously material considerations; and/or

    (c) The omission/decision to consider whether to review or to suspend was and is *Wednesbury* unreasonable.

(ii) The Sir Humphrey Decision

15. By **ground 3**, the Claimants submit that the decision that it is not appropriate to review or suspend the Energy NPSs (whether or not that is couched in terms of it being premature to think about reviewing) is, by section 6(1) of the PA 2008 a decision for the Secretary of State. The Defendant's case is that officials have considered whether to review for themselves, but have decided not to refer the decision to the Secretary of State. A departmental official has consequently in effect decided that no review or suspension will be undertaken now or until after the EWP. That decision is without authority, usurping the role of the Secretary of State. Alternatively, it represents an unlawful abdication of responsibility by the Secretary of State.

16. By **ground 4**, the Claimants submit that the failure of the Secretary of State's departmental officials to refer the question to the Secretary of State whether to review

or suspend, constitutes an unlawful failure to secure the fulfilment of the Minister's duty to consider whether to exercise the power of review in section 6 of the PA 2008 and thwarted the purpose and objects of the PA 2008.

17. By **ground 5**, the Claimants submit that the Sir Humphrey decision was: (a) in any event taken without regard to matters to which, by section 6(3) of the PA 2008, the Secretary of State must have regard when deciding whether or not to review; and/or (b) was taken without regard to obviously material considerations; and/or (c) was *Wednesbury* unreasonable.

Amendment of Grounds in June 2020

18. In the original SFG, grounds 1 – 3 were premised on the Defendant's contention in its pre-action letter that although departmental officials have been considering whether to review the Energy NPSs:

> "no decision has been sought from Ministers on whether such a review is appropriate"[10]

The Claimant's reading of that letter was that departmental officials had not sought a decision from the Minister on whether it was appropriate to review the Energy NPSs and grounds 1 – 3 of the claim as drafted were premised on that understanding. However, in its signed statement of case (and confirmed in the letter of 26 June 2020) the Defendant now asserts unequivocally at SGR §§18, 22, 34 that a decision *has* been taken by the Secretary of State himself "not to consider whether to review the NPSs until the E[energy] W[hite] P[aper] is published". The SGR claimed that this meant that the original grounds 1 – 3 were premised on an incorrect factual basis (albeit grounds 4 and 5 by which the Claimant prudently in the alternative raised a challenge on the hypothesis that the Secretary of State had taken the decision were, it has transpired, correctly targeted). Holgate J helpfully directed that the SFG should be amended to reflect the position taken by the Defendant in the SGR.

19. The Claimants now file this amended SFG, whereby the challenges to the asserted decisions/omissions of the Secretary of State rather than his officials (i.e. original grounds 4 and 5) now form the primary challenge. However, the Claimants further or

[10] See the April 2020 Letter at [CB/B10/76-77].

alternatively maintain a challenge to the departmental officials' acts that "no decision has been sought from Ministers on whether such a review is appropriate" (i.e. original grounds 1 – 3). In practical terms this now means that grounds 4 and 5 in the original SFG are now grounds 1 and 2 in this amended SFG, and grounds 1 – 3 in the original SFG are now grounds 3 – 5 in this amended SFG.[11]

Summary of Remedies

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

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

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

And further or in the alternative:

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

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

[11] Please also note that these amendments have necessitated changes in the wording of these challenges (e.g. in the original SFG grounds 4 and 5 needed to be read together with original grounds 2 and 3 in order to avoid repetition; but this is now no longer the case with new grounds 1 and 2).

Statement of Facts

Relevant Background

(i) The Planning Act 2008

21. The PA 2008[12] is summarised at paragraphs 20 – 40 of *R (on the application of Spurrier v Secretary of State for Transport)* [2019] EWHC 1070 (Admin),[13] which concerned a challenge to the Secretary of State for Transport's Airports National Policy Statement.[14] In particular, paragraphs 20 – 25 in *Spurrier* explain the background to the statute:

> 21. The PA 2008 established a new unified "development consent" procedure for "nationally significant infrastructure projects" defined to include certain "airport-related development" including the construction or alteration of an airport that is expected to be capable of providing air passenger services for at least 10m passengers per year (sections 14 and 23). Originally, many of the primary functions under the Act were to be exercised by the Infrastructure Planning Commission, established under section 1. However, those functions were transferred to the Secretary of State by the Localism Act 2011.
>
> …
>
> 24. The 2007 White Paper proposed that National Policy Statements ("NPSs") would set the policy framework for decisions on the development of national infrastructure.
>
> "They would integrate the Government's objectives for infrastructure capacity and development with its wider economic, environmental and social policy objectives, including climate change goals and targets, in order to deliver sustainable development."
>
> The role of Ministers would be to set policy, in particular the national need for infrastructure development (paragraph 3.4).
>
> 25. Paragraph 3.11 envisaged that any public inquiry dealing with individual applications for development consent would not have to consider issues such as whether there is a case for infrastructure development, or the types of development most likely to meet the need for additional capacity, since such matters would already have been addressed in the NPS. It was said that NPSs should have more weight than other statements of policy, whether at a national or local level: they should be the primary consideration in the determination of an application for a "Development Consent Order" ("DCO") (paragraph 3.12), although other relevant considerations should also be taken into account (paragraph 3.13). To provide democratic accountability, it was said that NPSs should be subject to Parliamentary scrutiny before being adopted (paragraph 3.27).

[12] [AB/A2/3-30].
[13] [AB/C15/819-839].
[14] *Spurrier* was successfully appealed in the Court of Appeal, however the summary of the law in Spurrier remains good.

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

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

> **6 Review**
>
> (1) The Secretary of State must review each national policy statement whenever the Secretary of State thinks it appropriate to do so.
>
> (2) A review may relate to all or part of a national policy statement.
>
> (3) In deciding when to review a national policy statement the Secretary of State must consider whether—
>
> (a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,
>
> (b) the change was not anticipated at that time, and
>
> (c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different.
>
> (4) In deciding when to review part of a national policy statement ("the relevant part") the Secretary of State must consider whether—
>
> (a) since the time when the relevant part was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the relevant part was decided,
>
> (b) the change was not anticipated at that time, and
>
> (c) if the change had been anticipated at that time, any of the policy set out in the relevant part would have been materially different.
>
> (5) After completing a review of all or part of a national policy statement the Secretary of State must do one of the following—
>
> (a) amend the statement;
>
> (b) withdraw the statement's designation as a national policy statement;
>
> (c) leave the statement as it is.

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

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

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

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

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

(ii) before the end of the consideration period.

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

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

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

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

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

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

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

11 Suspension pending review

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

(2) The condition is that—

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

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

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

(3) The condition is that—

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

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

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

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

(5) If the Secretary of State does so, the designation as a national policy statement of the statement or (as the case may be) the part of the statement that has been suspended is treated as having been withdrawn until the day on which the Secretary of State complies with section 6(5) in relation to the review.

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

13 Legal challenges relating to national policy statements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. Section 13(2) precludes any challenge to a decision of the Secretary of State not to carry out a review of a NPS other than within six weeks of that decision. It follows that a decision not to carry out a review is a formal decision which attracts a right of challenge. In the present case, either the claim is brought within the six-week period following the April 2020 letter (if the decision(s) revealed by the letter constitute a decision not to

review) or, as the Defendant concedes in the April 2020 Letter, this claim is not suspended.

28. Section 104(3) of the PA 2008 provides that the Secretary of State must decide an application for a development consent order in accordance with any relevant NPS except to the extent that one or more of subsections 104(4)-(8) applies.

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

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

(ii) The Energy National Policy Statements

31. Pursuant to the regime set out in the PA 2008, the Secretary of State published a suite of six Energy NPSs in July 2011.[15] The first, the Overarching National Policy Statement for Energy (EN-1), sets out the Government's policy for delivery of major energy infrastructure. A further five technology-specific NPSs for the energy sector cover: fossil fuel electricity generation (EN-2); renewable electricity generation (both onshore and offshore) (EN-3); gas supply infrastructure and gas and oil pipelines (EN-4); the electricity transmission and distribution network (EN-5); and nuclear electricity generation (EN-6). The following extracts from EN-1 give a summary of what the suite of NPSs provides:

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

[15] [AB/B5-B10/61-703].

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

> "However it is not clear that it would be possible to give practical effect to such an alternative through the planning system in the next ten years or so without risking negative impacts on security of supply… Accordingly Alternative A3 [which was in essence to place more emphasis on reduction in greenhouse gases[16]] has not been preferred to EN-1 at this stage but Government is actively considering other ways in which to encourage industry to accelerate progress towards a low carbon economy."

c. At paragraphs 2.2.5-2.2.6 of EN-1 the NPS explains "The UK economy is reliant on fossil fuels, and they are likely to play a significant role for some time to come…. However, the UK needs to wean itself off such a high carbon energy mix to reduce greenhouse gas emissions, and to improve the security, availability and affordability of energy through diversification. Under some of the illustrative 2050 pathways, electricity generation would need to be virtually emission-free, given that we would expect some emissions from industrial and agricultural processes, transport and waste to persist".

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Climate change and the international and UK response

33. Paragraphs 558-583 of *Spurrier* set out the scientific and legislative background to climate change and the international and UK legislative response at the time of the

Divisional Court's judgment. Paragraphs 563-8 explain that in 2003 the Government White Paper "Our Energy Our Future" committed to reducing CO2 emissions by 60% by 2050. However, with the enactment of section 1 of the Climate Change Act 2008 ("**the CCA 2008**"), that was adjusted to a duty on the Secretary of State to ensure that the net carbon account for the year 2050 is at least 80% lower than the 1990 baseline.[17] The reasons for the more stringent target were (as explained in *Spurrier* at [563]) that:

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

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

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

> i) if it appears to him that there have been significant developments in scientific knowledge about climate change since the passing of the Act, or developments in European or international law or policy (section 2(2) and (3)): the Explanatory Note to the Act says, as must be the case, that "this power might be used in the event of a new international treaty on climate change";
>
> ii) after obtaining, and taking into account, advice from the C[ommitee on] C[limate] C[hange] (section 3(1)); and
>
> iii) subject to Parliamentary affirmative resolution procedure (section 2(6)).

35. On 12 December 2015, after growing international concern on climate change, the Paris Agreement,[18] an agreement within the United Nations Framework Convention on Climate Change ("**the UNFCCC**") was adopted by consensus of 197 parties following the 21st Conference of the Parties of the UNFCCC. The Paris Agreement seeks to further the objective of the UNFCCC which is set out in article 2:

> The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production

[17] [AB/A1/1-2].
[18] [AB/A3/31-57].

> is not threatened and to enable economic development to proceed in a sustainable manner

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

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

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

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

39. In October 2016, the CCC, which was established as an independent advisory committee by section 32 of the CCA 2008 (with further provisions in schedule 1), published a report on the implications of the Paris Agreement and recommendations for action by the UK in "UK climate action following the Paris Agreement"[19] (*Spurrier* at [581-583]). This acknowledged that the Paris Agreement described a higher level of global ambition than the one that formed the basis of the UK's existing emissions reduction targets: the reduction by 80% by 2050 reflected a global emissions path aimed at keeping global average temperature to around 2 degrees above pre-industrial levels.

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

The CCC at that time recommended that the UK should not change the CCA 2008 target but rather focus on meeting the existing target because, as it explained at section 4:

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

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

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

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

42. In December 2017 the Government consulted on the nuclear NPS EN-6 with a view to designating a new NPS facilitating nuclear power stations capable of deployment from 2026 to 2035[20].

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

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

[20] [SB/C6/13-51].

44. On 16 April 2018 the Government published a new Clean Growth Strategy containing measures across all sectors, but including a commitment to phase out the unabated use of coal to produce electricity by 2025; deliver new nuclear power and take measures to encourage off shore wind.[21] As the CCC has noted in its 25 June 2020 report [SB/11/121], this strategy is itself premised on the 80% target and requires review.

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

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

46. On 15 October 2018 the UK, Welsh and Scottish governments wrote to the Chairman of the CCC to request, pursuant to sections 3(1) and s7(1) of the CCA 2008, an update to the advice the Committee provided in October 2016, as part of that committee's report on UK climate action following the Paris Agreement. The UK, Welsh and Scottish governments requested options for the date by which the UK should achieve a net zero greenhouse gas target and/or a net zero carbon target in order to contribute to the global ambitions set out in the Paris Agreement.

47. In May 2019 the CCC produced a report entitled "Net Zero – the UK's contribution to stopping global warming recommending a net-zero GHG target for 2050",[22] which stated that:

> "The net-zero challenge must be embedded and integrated across all departments, at all levels of Government and in all major decisions that impact on emissions.
>
> […]
>
> Reaching net-zero emissions will require development or enhancement of shared infrastructure such as electricity networks, hydrogen production and distribution and

[21] [CB/C14/117-132].
[22] [CB/C19/148-175].

> CO2 transport and storage. Government, in partnership with the National Infrastructure Commission, should give urgent consideration to how such infrastructure might best be identified, financed and delivered."

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

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

49. On 27 June 2019, the Climate Change Act 2008 (2050 Target Amendment) Order 2019/1056 ("**the 2019 Order**") was made; whereby the Secretary of State used the power in section 2(1) of the CCA 2008 to amend the percentage target in section 1 of the CCA 2008.[23] The preamble to the 2019 Order established that the conditions in section 2(1) of the CCA 2008 were considered to be satisfied:

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

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

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

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

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

[23] [AB/A4/58-60].

53. In the Conservative Party Manifesto, a vision was set out to ensure that Britain has the world's most ambitious environmental programme and the Queen's Speech 2019 reaffirmed the UK's statutory commitment to Net Zero by 2050.[24]

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

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

56. On 27 February 2020, the Court of Appeal in *R (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 allowed an appeal against the Divisional Court's judgment in *Spurrier*.[25] The Court of Appeal held that the Government's commitment to adhering to the Paris Agreement to limit the rise in global temperature to well below 2ºC and to pursue efforts to limit it to 1.5ºC constituted government policy on climate change which, pursuant to section 5(8) of the PA 2008 Act, the Secretary of State had to take into account in his designation decision. His failure to do so was enough to vitiate his designation of the Airports NPS; the Paris Agreement was so obviously material to the designation decision that it was irrational not to have taken it into account. The Court of Appeal made a declaration that the

[24] [CB/C17/146].
[25] [AB/C16/840-922].

designation decision was unlawful and prevented the Airports NPS from having legal effect until it was reviewed in accordance with the legislation.

57. Permission to appeal the Court of Appeal's decision to the Supreme Court was granted to the Appellants (Heathrow Airport Ltd and Arora Holdings Ltd) on 6 May 2020 and a hearing has been listed in October 2020.

58. On 6 May 2020 the UK Oil and Gas Authority responsible for regulating and promoting the UK oil and gas industry announced its consultation on its new strategy "on its intention to refresh its core aim, including a requirement for industry to help the government achieve the target of net zero greenhouse gas emissions by 2050". The 12-week consultation runs until 29 July 2020[26].

59. On 25 June 2020 the CCC published the "Reducing UK emissions: 2020 Progress Report to Parliament",[27] which includes an assessment of progress in reducing UK emissions over the past year and new advice to the Government and advises in particular that government planning documents should be reviewed to check for their consistency against the UK's Net Zero target [SB/11/120].

Statement of Grounds

The Secretary of State's decisions and omissions: grounds 1 and 2

60. The following decisions/omissions of the Secretary of State are challenged:

    a. The failure of the Secretary of State to consider whether it is appropriate to now review or to suspend all or part of the Energy NPSs, and/or;

    b. The Secretary of State's decision not to review the Energy NPSs now (whether or not that is couched in terms of the Secretary of State deciding not to consider whether to review the Energy NPSs now), and or;

    c. The Secretary of State's failure (having thought about whether it is appropriate to now review all or part of the Energy NPSs) to draw the conclusion, it being

[26] [SB/C8/55].
[27] [SB/C11/97].

the only rational conclusion, that it is now appropriate to review all or parts of the Energy NPSs, and/or;

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

(i) <u>Ground 1</u>

61. The Secretary of State says that he has personally taken a decision not to consider whether to review the Energy NPSs (until after the EWP). This ground of claim takes that characterisation at face value. Given that the duty to review the Energy NPSs arises under section 6 PA 2008 upon condition of the Defendant forming the view that it is appropriate to review, the possibility of review is, on the face of the Defendant's claimed defence, frustrated. The Secretary of State says that a decision not to consider whether it is appropriate to review (so that no duty to review can arise) is different from a statutory decision not to review the Energy NPSs. The substantive outcome, though, is the same, namely that the *status quo ante* persists. The Claimants submit that:

    a. the Secretary of State's omission to consider whether it is appropriate to now review all or part of the Energy NPSs (pursuant to section 6 PA 2008) and/or

    b. the decision not to review the Energy NPSs now (if that is the true characterisation of the decision); and/or

    c. the Secretary of State's failure to consider whether to suspend the Energy NPSs (pursuant to section 11 PA 2008)

    unlawfully frustrate the objects and purpose of the statutory scheme (see *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030 B – D;[28] and *R. v Secretary of State for the Home Department Ex p. Fire Brigades Union* [1995] 2 A.C. 513) at p.575 – 577).[29]

62. In section 6 of the PA 2008 there is a specific and express statutory duty to review the NPSs where the Secretary of State takes the view it is appropriate to do so. It is

[28] [AB/C11/704-741].
[29] [AB/C12/742-788].

accordingly implicit that the Secretary of State must from time to time as the occasion requires, *consider whether it is appropriate to do so*. Whether the "occasion" arises is naturally to be read in *at least in part* in the context of the conditions set out in section 6; all of which the Secretary of State would have to accept are met if he considered the issue (see further below).

63. The April 2020 Letter and the Defendant's SGR make plain that the Secretary of State intends to avoid activating the section 6 duty to review the Energy NPSs and the power to suspend the Energy NPSs under section 11 of the PA 2008 by purporting to refuse to consider whether it is appropriate to review them until after the EWP is published. The EWP has been long-postponed. It was originally expected to be published in early 2019, however the April 2020 Letter says that it is now only expected within the next 12 months; the latter end of this estimate thus being mid-2021. The Secretary of State now says in the SGR that "his aspiration is that the EWP will be published before the end of 2020, if circumstances allow."[30] On this basis, the Secretary of State is foreseeing refusing to even consider reviewing the Energy NPS for at least 6 months to a year.

The legal duties

64. The following legal principles are relevant here:

    a. Where Parliament confers a power or a duty on a Minister in an Act, the exercise of that power or performance of that duty must promote the policy and objects of the Act; the policy and objects of the Act being determined by construing the Act as a whole and by the general scope and objects of the Act: *Padfield* p.1030 B – D. Persons aggrieved may seek a remedy from the Court if the Minister uses his discretion so as to thwart or run counter to the policy and objects of the Act (*ibid*). These principles are illustrated by *Padfield* itself in which the Minister declined to exercise a power to direct the committee to consider the complaint of milk Producers about the price paid by the Milk Marketing Board, and that was held by Lord Reid to be unlawful.

    b. Even where statute creates a discretionary power, a failure to exercise the power will be unlawful if it is contrary to the policy and objects of the Act: *M v Scottish*

[30] SGR14.

Ministers [2012] UKSC 58 at [47]. Where the intention of the Act is to bring about a result which is dependent on the exercise of the power, the Minister is under an obligation to exercise the power (*ibid*).

c. A power which is expressed to be to performed according to what the Secretary of State "considers appropriate" is not unfettered, but is to be exercised in accordance with parliament's intention, having regard *inter alia* to matters particularised in the statute *R (Palestine Solidarity Campaign Ltd and another) v Secretary of State for Housing Communities and Local Government* [2020] 1 W.L.R. 1774 at §23.

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

e. That there can be, inherent within a statutory power, a concomitant obligation to consider whether to exercise a power or (in this case whether the condition to the performance of the duty is satisfied) is illustrated by p.575-577 of *Fire Brigades Union*, where Lord Nicholls described the duty to consider in the context of a power conferred on the Secretary of State to bring a statutory instrument into force as follows:

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

cannot exercise the prerogative in a manner, or for a purpose, inconsistent with the Secretary of State continuing to perform this duty. The executive cannot exercise the prerogative power in a way which would derogate from the due fulfilment of a statutory duty. To that extent, the exercise of the prerogative power is curtailed so long as the statutory duty continues to exist. Any exercise of the prerogative power in an inconsistent manner, or for an inconsistent purpose, would be an abuse of power and subject to the remedies afforded by judicial review."

See also Lord Browne-Wilkinson at 551D.

f. Where the Secretary of State does consider whether to review under section 6, he must do so with the objective of contributing to the achievement of sustainable development (s.10(2) PA 2008), meaning in particular having regard to the desirability of mitigating and adapting to climate change (s. 10(3) PA 2008).

The Policy and Objects of the Acts in Question

65. The purpose of the review duty in section 6 is evidently to ensure that the Secretary of State updates the Energy NPSs in the circumstances set out in section 6(3): significant changes of circumstance have occurred since they were designated which were not envisaged at the time, but which would have been likely to have affected the substance of those policies. Section 10(3)(a) of the PA 2008 shows that significant changes related to climate change are in particular contemplated and requires that the Secretary of State in the performance of the duty to review under section 6 "must (in particular) have regard to the desirability of…mitigating, and adapting to, climate change."

66. Further, section 5(8) of the PA 2008 requires that in designating a NPS the reasons for that decision must in particular include an explanation of how the policy takes account of Government policy relating to the mitigation of, and adaptation to, climate change and necessarily implies that the Secretary of State must take Government policy relating to the mitigation of, and adaptation to, climate change into account in a NPS. This obvious point is put beyond doubt by the Court of Appeal at [223] of *Plan B Earth*. The Secretary of State's submission to the Divisional Court, accepted by the Court at [644] of its decision in *Spurrier*, was summarised as follows:

"644. We consider the two Acts [the PA and CCA 2008] have to be looked at together, as Mr Maurici submitted. They were passed on the same day (26 November 2008), and are clearly to be read together. Subsection (3) of section 10 of the PA 2008 is a subset of subsection (2): "For the purposes of subsection (2) the Secretary of State must (*in*

> *particular*) have regard to …" (emphasis added). It too concerns sustainability. Its specific reference to "the desirability of … mitigating, and adapting to, climate change" appears clearly to chime with the CCA 2008. The CCA 2008 was obviously passed because of the perceived desirability of mitigating, and adapting to, climate change. As the Summary of the Explanatory Notes to the CCA 2008 states: "The Act sets up a framework for the UK to achieve its long-term goals of reducing greenhouse gas emissions and to ensure steps are taken towards adapting to the impact of climate change."

It follows from both the judgments of the Court of Appeal and Divisional Court that achieving "at least" the Net Zero target in section 1 of the CCA 2008 is a key component of the policy and objects of the Act.[31]

The Secretary of State's duties and their frustration

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

68. It follows that the Secretary of State cannot lawfully decline to consider whether *it is appropriate* to review where circumstances which would justify a review (or which would arguably justify a review) have arisen (namely that pursuant to section 6(3) there have been significant changes of circumstance since designation etc.). That is particularly so where the changes in question relate to the mitigation of and adaptation to climate change, given that the statute places particular emphasis on having regard to those factors (section 10(3)) in the performance of functions under section 6 PA 2008.

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

That there is now a duty to consider whether it is appropriate to review is in the present statutory and factual context, more obvious than it was in the case of the statutory provision at issue in the *Fire Brigades Union* case.

69. Whether the occasion has arisen to consider whether it is appropriate to review is to be measured primarily against the need to fulfil the objects of the statute (having regard particularly to the factors prescribed in section 6(3) and section 10(3)(a)), not by views as to an extrinsic concern about sequencing with a long-postponed EWP. Indeed, as Lord Browne-Wilkinson observed in the *Fire Brigades Union* case at p.551H, the Secretary of State cannot frustrate the purpose of his statutory powers (here, in summary, to ensure the Energy NPSs are updated when it is appropriate to do so) by his own acts (here, deciding to await completion of his own long-delayed White Paper). By failing to consider whether it is appropriate to carry out a review under section 6, and further by failing to consider whether to suspend the Energy NPSs pursuant to section 11, so that the existing Energy NPSs persist in default of a decision to review or not to review, the Secretary of State is abrogating his legal duties.

70. It is to be recalled that the Secretary of State has not made a statutory decision that it is not appropriate to review because he wants to await the outcome of the EWP (any such decision would be required by section 10(3) to have regard to mitigation of and adaptation to climate change), he has decided *not to consider whether* it is appropriate to review. He is avoiding – frustrating- the making of the decision envisaged by statute altogether.

71. Further, or alternatively, the Claimants submit that on any view the conditions in section 6(3) of the PA 2008 upon which the duty to review arises are met (discussed further in ground 2 below). *A fortiori*, in those circumstances the decision of the Secretary of State not to review, or the failure to consider whether to review, unlawfully frustrates the objects and purpose of the statutory scheme of the PA 2008 and the CCA 2008 to mitigate and adapt to climate change, and to reach the target for the year 2050 of Net Zero.

72. The reliance on the false distinction between a statutory decision not to review and a non-statutory decision not to consider whether to review will be addressed in ground 2 below. However, even if the Secretary of State's decision not to consider whether to

review is outside the statutory framework of section 6, the Secretary of State's failure to make a decision as to whether to review the Energy NPSs is a breach of and an abrogation of his legal duties and/or frustrates the policy and objects of the PA 2008 (as per *Fire Brigades Union* and *Padfield* explained above). These errors of law, particularly the Secretary of State's failure to comply with the express and inherent legal duties in section 6, are simply not engaged with by the Secretary of State in the SGR.

73. As to the power under section 11 to suspend the NPSs pending review, the Secretary of State does not suggest he has considered whether to exercise that power. He is obliged to consider the exercise of that power in connection with a statutory section 6 decision. He is in any event obliged to consider the exercise of that power from time to time. The purpose of the exercise of that power is indicated by the factors to which he is to have regard when he considers exercising the power. Those factors are the same as those set out in section 6(3). For reasons set out above, the Defendant is obliged to consider whether to suspend pending review.

(ii) <u>Ground 2</u>

74. The Secretary of State's pleaded case is that he has taken a decision not to consider whether to review the Energy NPSs for 6-12 months. At paragraphs 40-41 of the SGR his case is:

> "First, no decision has been taken whether to review the Energy NPSs under s.6 and there was, therefore, no requirement for the Secretary of State to take account of the s.6 review considerations in taking the decision that he did."
>
> Secondly, the Secretary of State has clearly said that he *will* consider whether to review the Energy NPSs following the publication of the EWP (expected to be by the end of 2020).

75. To recall, section 6(3) of the PA 2008 provides (emphasis supplied):

> (3) In deciding **<u>when to review</u>** a national policy statement the Secretary of State must consider whether—
>
> (a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,
>
> (b) the change was not anticipated at that time, and

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

Section 13(2) of the PA 2008 contemplates that a decision "not to review" is judicially reviewable within six weeks following the decision. By section 10(3) the SS must exercising functions under section 6 so as to contribute to sustainable development and in doing so must have particular regard to the desirability of adaptation to and mitigation of climate change.

Ground 2a

76. The Secretary of State asserts his decision is a decision not to consider whether to review and that there was no requirement to take account of the factors in section 6. Yet the decision did involve, in the words of section 6(3) "deciding when to review a national policy statement": The Secretary of State's decision not to consider whether to review carries with it a decision not to review the Energy NPSs now and thus a decision when to review (this appears to be possibly agreed at SGR §26, though not at SGR §35 and 40). He was therefore obliged to consider the matters set out in section 6(3) (having particular regard pursuant to s. 10(3) to the desirability of mitigation of and adaptation to climate change). It is common ground that he did not consider those section 6(3) factors or the desirability of mitigating and adapting to climate change (See SGR 35 and 40, and accordingly the decision was unlawful: *R (Packham) v SST* [2020] EWHC 829 (Admin) at [51]; *Plan B Earth* at [237].

Ground 2b

77. Alternatively, even if the decision is not characterised as a decision "when to review" or otherwise within section 6 PA 2008 and is in fact a decision outside the contemplation of the statutory framework, it is a decision of a character sufficiently close to a section 6(3) decision, having the same effect as a section 6(3) decision and whose effect is to preclude a section 6(3) decision that it follows that factors as set out in section 6(3) (and the mitigation of and adaptation to climate change) are in any event "obviously material" to that decision. There is no dispute that the Secretary of State did not, in making the decision, have regard to the factors set out in section 6(3) or the mitigation of and adaptation to climate change. The decision is therefore unlawful in that it fails to have regard to obviously material circumstances: *R (Packham) v SST*

[2020] EWHC 829 (Admin) at [51]; *Plan B Earth* at [237]. Those significant changes of circumstance are now addressed in detail.

i) *Section 6(3)(a)*

78. Since July 2011 when the Energy NPSs were published, the principal significant changes in circumstances on the basis of which the Energy NPSs were decided are set out at paragraphs 33- 59 above and summarised as follows:

a. **The net UK carbon account for the year 2050 is now set at least 100% below the 1990 baseline**, i.e. Net Zero. In 2011 when the Energy NPSs were introduced, the CCA 2008 committed the UK to reducing greenhouse gas emissions by at least 80 per cent by 2050 when compared to 1990 levels. However, on 27 June 2019 the Secretary of State made the Climate Change Act 2008 (2050 Target Amendment) Order 2019/1056 ("**the 2019 Order**") by which section 1 of the CCA 2008 was amended so as to ensure that the target is now at least 100% below the 1990 baseline.

b. **There have been significant developments in scientific knowledge not anticipated in 2008**. As shown by the preamble to the 2019 Order the Secretary of State's own view is that there have been significant developments in scientific knowledge not anticipated in 2008 such that the conditions in section 2(1) to the CCA 2008 were met and which merited changes in government policy (the very tests under section 6(3) for a review);

c. **The Paris Agreement was made and ratified by the UK.** The background to these changes includes that in December 2015 the Paris Agreement was concluded to bring about a strong international commitment to mitigating climate change. In particular, article 2 establishes not only a firm commitment to restrict the increase in the global average temperature to "well below 2 degrees Celsius above pre-industrial levels", but also to "pursue efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels" and an aspiration to achieve Net Zero greenhouse gas emissions during the second half of the 21st century. On 22 April 2016, the UK signed the Paris Agreement and then ratified it on 18 November 2016.

The Paris Agreement was accompanied by pledges of action to 2030. These international commitments were not made in 2011.

d. **Government policy is now expressly stated to be to commit to well below a 2 ˚C rise in global temperature and to pursue efforts to limit it to 1.5˚C.** In *Plan B Earth* the Court of Appeal confirmed that the Government's expressly stated policy is that it is now committed to adhering to these temperature limits in the Paris Agreement. The Court of Appeal recognised that this was not inconsistent with the "*at least*..." target in section 1 of the CCA 2008, and that the CCC has found that to stay close to a 1.5˚C rise, CO_2 emissions would need to reach Net Zero by the 2040s (see *Plan B Earth* at [207], [216], [225]). These commitments, and the effect of any further delay in reaching these commitments,[32] are further significant changes in circumstance since 2011.

e. **The government has committed to a Clean Growth Strategy including the phasing out unabated coal use by 2025, possibly earlier**. On 16 April 2018 the Government published a new Clean Growth Strategy containing measures across all sectors, but including a commitment to phase out the unabated use of coal to produce electricity by 2025; deliver new nuclear power and take measures to encourage off shore wind[33]. This strategy- and most starkly the commitments on coal- are not reflected in the Energy NPSs. On 25 June 2020 the CCC recommended [SB/11/121] to the Department for Business Industrial Strategy and Energy that this strategy in itself requires revision in order to conform to the net zero target.

f. **There is a need to limit global warming to 1.5 rather than 2 degrees above pre-industrial levels entailing a fall of about 45% globally from 2010 levels by 2030**. On 8 October 2018 the IPCC published their special report on the impacts of global warming of 1.5 degrees above pre-industrial levels. This report deepens the scientific evidence base on the implications of pursuing efforts to limit global warming to 1.5 degrees above pre-industrial levels, as set out in the Paris Agreement (see *Spurrier* at [590]).

[32] For example, delaying until at least mid-2021 for the EWP to be published.
[33] [CB/C14/117-132].

This was acknowledged in the parliamentary declaration of climate emergency.

g. **There is a climate emergency**. On 1 May 2019 the UK Parliament unanimously declared an environment and climate emergency. The terms of the motion passed called on the government to "increase support for and set ambitious, short-term targets for the roll-out of renewable and low carbon energy…" which had been presaged by the CCC's report entitled "Net Zero- the UK's contribution to stopping global warming recommending a net-zero GHG target for 2050". On 28 November 2019 the European Parliament declared a climate emergency.

h. **There have been a range of policy reviews initiated already**:

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

   b. On 6 May 2020 the UK Oil and Gas Authority responsible for regulating and promoting the UK oil and gas industry announced its consultation "on its intention to refresh its core aim, including a requirement for industry to help the government achieve the target of net zero greenhouse gas emissions by 2050". The 12-week consultation runs until 29 July 2020[34].

   c. In December 2017 the Government consulted on the nuclear NPS EN-6 with a view to designating a new NPS facilitating nuclear power stations capable of deployment from 2026 to 2035[35].

i. **2020 is the year for action**. On 18 December 2019 the CCC wrote to the (new) Prime Minister stating that Government actions in the coming year will define the UK response to the climate crisis and that "in this Parliament, the UK *must* get on track to delivering Net Zero emissions". On 28 January

[34] [SB/C8/55].
[35] [SB/C6/13].

2020, the Prime Minister affirmed that "2020 is a crucial year for action on climate change" and that "The Government has been elected with an unambiguous commitment to net zero, which we will deliver… this requires action across the economy. This year we will be bringing forward plans… from buildings to power generation…" (obviously, none of this is consistent with the departmental timetable announced in the Sir Humphrey letter and now affirmed in the SFG).

j. **The Secretary of State is revising the emissions trading scheme, what the Energy NPSs call "the cornerstone of UK action to reduce greenhouse gas emissions" so as to become the world's first netzero emissions trading scheme**. On 31 January 2020 the UK left the European Union. On 1 June 2020 the Secretary of State announced the EU emissions trading scheme (described in EN-1 para 2.2.13 as "the cornerstone of UK action to reduce greenhouse gas emissions") will be replaced with a UK ETS at the end of the transition period. It sets a tougher target than the EU scheme.[36]

k. **A substantial body of new fossil fuel generating capacity has been consented and developed**[37] since the Energy NPSs were designated.

l. **The Committee on Climate Change** advised on 25 June 2020 in its report "Reducing UK Emissions: Progress Report to Parliament [SB/11/120] that (emphasis original):

> Increasingly, **all policy and infrastructure decisions** will need to be checked against their consistency with the UK's Net Zero target and the need to adapt to the impacts of climate change. Government planning documents should be reviewed (e.g. Green Book, National Planning Policy Framework) to ensure consistency against this objective.

79. None of these obviously material considerations, relevant to the criteria in section 6(3)(a) of the PA 2008 (and to which particular regard is to be had pursuant to s.10(3)), have been taken into account by the Secretary of State in the decision not to review the

[36] [SB/C9/75].
[37] *Drax Power Station Re-power Project Examining Authority's Report of Findings and Conclusions 4 July 2019 paragraph 11.1.1*

Energy NPSs now. Indeed, the Secretary of State accepts in the SGR that none of these considerations have been taken into account.

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

80. It is self-evident that the deepening of the climate emergency, the developments in scientific understanding, the Paris Agreement and the other matters outlined above leading up to and beyond the recent change to net UK carbon account for the year 2050 to at least 100% below the 1990 baseline were not anticipated when the UK adopted the Energy NPSs in 2011. The Energy NPSs are expressly premised upon the former 80% statutory target. For example, EN-1 at 2.2.8; 3.3.1, fn17; 3.3.14; 3.4.1 rely on the July 2010 Pathways Analysis[38] that also sets a route to an 80% reduction by 2050.

81. Nor was it anticipated in 2011 that the UK would leave the European Union on 31 January 2020 requiring it establish its own emissions trading scheme with a tightened cap and a broader scope.[39]

82. Again, none of these obviously material considerations, relevant to the criteria in section 6(3)(b), have been taken into account; and that is not disputed in the SGR.

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

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

84. When designating the Energy NPSs, the Secretary of State regarded that 80% target as material to the framework for policy related to energy infrastructure. The position now is that, nine years into the planned window for achieving the cut, the target has been set at a materially more ambitious level. It is obvious that if it had been anticipated in 2011

[38] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/42562/216-2050-pathways-analysis-report.pdf
[39] https://www.theccc.org.uk/publication/letter-the-future-of-carbon-pricing-to-the-rt-hon-kwasi-kwarteng-mp/

that the 80% target would be increased to a 100% target in 2019, then the Energy NPSs would not have been premised upon the 80% target throughout the lifespan of the plan.

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

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

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

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

    (d) there would be a markedly different emphasis to the "vital role" of fossil fuel power stations and the "important role [of fossil fuel power] in our energy mix as the UK makes the transition" (EN-1 para 3.6.1), particularly coal-fired stations given that by separate strand of government policy in the Clean Growth Strategy that source of power is to be phased out within four or five years;

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

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

86. Again, it appears to be common ground that none of these obviously material considerations, relevant to the criteria in section 6(3)(c) of the PA 2008, have been taken into account in the decision not to consider reviewing the Energy NPSs now. Similarly, none of them have been considered in relation to a decision whether to exercise the discretion to suspend the existing Energy NPSs pursuant to section 11 of the PA 2008.

iv) *Drax Decision and Exmouth Decision: illustrations of the problems*

87. Two recent decisions by the Secretary of State[40] illustrate the contradictions that are now inherent between the statutory Net Zero target and the Paris Agreement on the one hand, and the Energy NPSs on the other.

88. First, the Secretary of State's decision on the Drax Power (Generating Stations) Order.[41] The Inspector in the Drax Decision recommended that the order be not confirmed,[42] but the Secretary of State, applying the Energy NPSs, overruled that recommendation. At paragraph 5.7 of the Secretary of State's decision, he accepted the importance and relevance of the Net Zero target, but decided at paragraph 5.9 that the move to Net Zero is not in itself incompatible with the existing policy because there are – the Secretary of State asserted - potential pathways that will bring about a minimum 100% reduction in the UK's emissions. Yet that implicitly admits and highlights the obvious and unsurprising point that the Energy NPSs allow for pathways to 2050 which fail to achieve Net Zero. Those pathways are now obsolete, and accordingly there have been material changes in circumstance, directly relevant to the Energy NPSs, which if considered would have meant the policy was drafted differently: in short, the conditions or criteria for review in section 6(3) PA 2008 are satisfied.

89. More striking still is the Inspector's decision to grant permission for a synchronous gas-powered standby generation facility in Exmouth.[43] The Inspector took account of the new statutory Net Zero target in the UK and the UK's obligations under the Paris Agreement, and in light of this found that the proposed facility would have an adverse

[40] Including by a Planning Inspector appointed on the Secretary of State's behalf.
[41] [AB/C14/805-818].
[42] [AB/C13/789-804].
[43] Appeal Ref: APP/U1105/W/20/3247638, Land at Liverton Business Park, Salterton Road, Exmouth EX8 2NU, [SB/C10/81].

effect on climate change by reason of likely GHG emissions of substantial significance, which should be given considerable weight in the planning balance. However, despite this, the Inspector granted permission based on the policy support that EN-1 provided for some fossil fuel generating capacity. The Inspector found that this was a finely balanced decision but that "the support the proposed development gains from EN-1, which is a relevant material consideration here, notwithstanding that the scheme is not an NSIP, is sufficient to tip the planning balance in favour of the proposal."[44] In other words, without the current Energy NPSs, the Inspector would have refused permission on grounds of climate change harm, but instead he found that the policies tilted the balance in favour of harmful development. This decision indicates how the current Energy NPSs- absent suspension or review- operate to tip the balance in favour of development that is acknowledged to be harmful from a climate change perspective, in direct conflict with government policy expressed through the statutory Net Zero target and the Paris Agreement.

Ground 2c

90. Further or alternatively, in light of the considerations that are statutorily required to be considered under section 6 being obviously material (as set out above), and/or in light of the fact that if considered, the section 6 criteria would all be met, it is irrational for the Secretary of State to refuse a review of the Energy NPSs now, or to refuse to even consider under section 6 PA 2008 whether such a review should be undertaken prior to publication of the EWP. It is also irrational to fail to even consider the concomitant question of a suspension pursuant to section 11 of the PA 2008. These considerations include particularly the UK's commitment to adhering to the temperature limit in the Paris Agreement, the Secretary of State's own view that there have been significant developments in scientific knowledge to change the target in section 1 of the CCA 2008, and the effect of further delay on reaching these targets.

91. If the Secretary of State were to rationally consider the factors in section 6(3), he would have to conclude that on any view there have been significant changes of circumstances on the basis of which the policies were decided which were not anticipated at the time and which if they had been anticipated, would have resulted in the policy being

[44] See paragraphs 8-18 and 49-56 of the appeal decision at [SB/C10/81].

materially different. It is not open to the Defendant in those circumstances to refuse to even consider whether to review and whether to suspend existing policy pending review.

92. An illustration of the practical implications is the *Exmouth* decision above by which a fossil fuel development, harmful to climate change had to be permitted. By way of further example, an application for a new coal mine would benefit from a presumption in its favour according to the Energy NPSs, but would be inconsistent with government policy in the Clean Growth Strategy (see para 45 above) to phase out coal by 2025 (and indeed currently there is a consultation to bring that forward to 2024[45]).

93. Further, the continuation of the NPS policies is now inconsistent or potentially inconsistent with section 1 of the CCA 2008: a point that no more than reflects the submission recorded as made for the Secretary of State at [642] of the Divisional Court's judgment in *Spurrier,* that "of course, policy cannot be inconsistent with legislation, but as long as these other policies are not inconsistent with the statutory restrictions, they may equally be "Government policy". The Oil and Gas authority's current consultation [SB/11/56] on its policies is expressly designed to bring its policy into line with this government policy [SB/11/60-63].

94. The Secretary of State in the SGR[46] has contended (without supporting authority) that the only way the Claimants can challenge the Defendant's non-statutory decision to defer considering whether to review the Energy NPSs until the EWP is published is if the decision to wait is *Wednesbury* unreasonable. As set out above under grounds 1 and 2(a and b) the Claimants also say that the Secretary of State has unlawfully failed to take account of material considerations, abrogated its legal duties and frustrated the policy and objects of the PA 2008 and the Secretary of State in the SGR provides no legal explanation as to why such grounds may not be alleged.

95. However, the Claimants do in any event make the allegation as above that the decision not to review the Energy NPSs is *Wednesbury* unreasonable and the SGR augments rather than allays that ground. The Defendant asserts at SGR47 that awaiting the EWP is a rational basis for not reviewing the NPSs, but gives no explanation as to why the

[45] [SB/C7/52].
[46] SGR42.

statutory considerations under section 6 PA 2008 can be jettisoned or why by contrast it is already appropriate to review the Nuclear NPS (EN-6) and to have begun consultation on this, without the need to wait for the EWP.[47]

The Sir Humphrey decision: grounds 3, 4 and 5

(iii) Ground 3

96. The Defendant's pleaded case in the SGR[48] contends that the decision not to review the Energy NPSs now and instead to wait until the EWP is published was taken by the Secretary of State himself and not by a departmental official. Grounds 1 and 2 above are directed at this pleaded case. However, the April 2020 Letter and now the 22 June 2020 letter and the 23 April 2020 submission to the Minister confirm that un-named officials in the Department of Business Energy and Industrial Strategy *have* been considering whether to review the Energy NPSs but have decided not to seek a view from the Minister on whether a review is appropriate. That is also unlawful and is challenged by grounds 3-5.

97. That Departmental officials have considered a review, but decided not to seek a decision from the Minister is in substance a decision by those officials not to review the Energy NPSs now. Such a decision is, by section 6(1) (and indeed by section 13(2) of the PA 2008) a formal decision for the Secretary of State. It is the Secretary of State who is conferred with the decision by the PA 2008 and who is accountable to parliament (see paragraph 4.6 of the Ministerial Code). If the decision has been made by a departmental official then it unlawfully usurps the decision-making function of the Secretary of State and is unlawful.

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

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

99. Lord Greene MR held in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 that civil servants acted not on behalf of, but in the name of their ministers. In *R v*

[47] SGR9.
[48] SGR18, 19(3), 22, 34 etc.

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

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

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

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

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

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

and now deciding not to ask the Secretary of State his view for a further 12 months, they have usurped a statutory function of the Secretary of State.

f. To illustrate the point, when declining to review the Airports NPS on 27 November 2018,[49] the Secretary of State was advised on the decision and took the decision (after reflection) not to review the Airports NPS. It was confirmed in *Spurrier* at paragraph 586 that that was a judicially reviewable decision within the contemplated statutory framework (though no such claim was brought).

100. This assumption of authority by the Department of Business Energy and Industrial Strategy was therefore unlawful and moreover has been going on for a long time. It is admitted and averred in the pre-action correspondence that the department has been thinking about whether to refer a decision to review since before July 2018; and it is clear now that it is expects that this extra-statutory consideration process will continue for another 6 to 12 months. It is therefore right that the Court intervene and grant the remedies sought.

101. If, contrary to the above, the Sir Humphrey decision (that in effect it is not now appropriate to review the Energy NPSs) was taken by an official authorised to do so on behalf of the Secretary of State, then the decision was in any event unlawful because it has not been promulgated in a lawful fashion. At the very least the April 2020 Letter should have explained that it was a decision pursuant to section 6 as the November 2018 decision did: see *R (Anufrijeva) v SSHD* [2004] 1 A.C. 604 at §26.

(iv) <u>Ground 4</u>

102. The Secretary of State's departmental officials, in failing to refer the question to the Secretary of State whether to review and instead taking the Sir Humphrey decision, tantamount to a decision not to review the Energy NPSs, are unlawfully failing to secure the fulfilment of the Minister's duties and indeed frustrating the objects and purpose of the PA 2008 (see *Padfield v Minister of Agriculture, Fisheries and Food*

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

[1968] AC 997, 1030 B – D;[50] and *R. v Secretary of State for the Home Department Ex p. Fire Brigades Union* [1995] 2 A.C. 513) at p.575 – 577).[51]

103. As set out fully above in ground 1, the Secretary of State is under a legal duty to consider whether to exercise the power to review the Energy NPSs under section 6 of the PA 2008 Act, and to do so by reference to the criteria or conditions set out in section 6. The Secretary of State may not exercise or fail to exercise the power in a way which would derogate from this duty. By failing to advise or ask the Minister to consider whether to carry out a review under section 6, and further by failing to advise or ask him to consider whether to suspend the Energy NPSs pursuant to section 11, so that the existing Energy NPSs persist in default of a decision to review or not to review, departmental officials are unlawfully failing to secure the fulfilment of the Minister's duties.

104. Further or alternatively, as fully set out in ground 1, the Secretary of State cannot act in a way which thwarts or frustrates the policy and objects of the statutory scheme of the PA 2008 and CCA 2008 (which are to be read together per *Spurrier*) which includes mitigate and adapt to climate change, and work towards at least the Net Zero target and further to the Paris Agreement targets. In circumstance where, on any view, the conditions in section 6(3) of the PA 2008 are satisfied, the failure by departmental officials to ask or advise the Minister to consider whether to carry out a review frustrates the objects and purpose of the scheme of the PA 2008 and the CCA 2008 to mitigate and adapt to climate change, and to reach the target for the year 2050 of Net Zero.

(v) Ground 5

105. Finally, the Sir Humphrey decision that it is not appropriate to review, or even refer a decision to the Secretary of State to consider whether to review, the Energy NPSs now, is in any event unlawful in that: (a) it was taken without regard to matters to which, by section 6(3) and 10(3) of the PA 2008 must be had regard to when deciding whether or not to review; and/or (b) was taken without regard to obviously material considerations; and/or (c) was *Wednesbury* unreasonable.

[50] [AB/C11/704-741].
[51] [AB/C12/742-788].

106. The Sir Humphrey decision was, by contrast to the May 2019 consideration whether review the Airports NPS [CB/23/186] taken without regard to the statutory tests in section 6(3) and failed to have regard to considerations which were obviously material given the statutory tests. This is set out fully above in ground 2, including particularly that the Secretary of State has already concluded that there have been significant developments in scientific understanding justifying the change to the "at least" Net Zero target in section 1 of the CCA 2008 and that it is now the Government's expressly stated policy that it is committed to adhering to the Paris Agreement temperature limit (see the full explanation in ground 3 above). The Secretary of State in the SGR does not dispute that the considerations in section 6(3) were not taken into account.

107. Further or alternatively, for the reasons more fully set out in ground 2, in light of the considerations that are statutorily required and/or obviously material as set out above, it is irrational for departmental officials to refuse a review of the Energy NPSs now, or to refuse to consider such a review until the EWP is published, under section 6 of the PA 2008 (and thus also a suspension pursuant to section 11 of the PA 2008). If the department officials were to rationally consider the factors in section 6(3), they would have to conclude that on any view there have been significant changes of circumstances on the basis of which the policies were decided which were not anticipated at the time and which if they had been anticipated, would have resulted in the policy being materially different, such that a referral to the Minister to consider review should be carried out <u>now</u> (and with a recommendation to review now).

<u>Remedies</u>

108. The Claimants seek expedition as set out above at paragraph 7.

109. It is important that in this case the Court grants the remedies sought because in the end the disclosure in this case makes plain that both the Minister and departmental officials have taken decisions whose effect is to not review the Energy NPSs, but that they are failing to take such a decision in the manner stipulated by parliament through the PA 2008. Such skirting around the side of the legal framework is anathema to good governance and the rule of law and must be remedied at both departmental and ministerial level.

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

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

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

And further, or in the alternative:

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

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

Alex Goodman

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Landmark Chambers

29 June 2020