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

Claim No CO/3093/2020

B E T W E E N:

R (on the application of)
GEORGIA ELLIOTT-SMITH

Claimant

-and-

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY
(2) DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND
(3) THE SCOTTISH MINISTERS
(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

SECRETARY OF STATE'S SKELETON ARGUMENT

Preliminary

Listing: 14-15 April 2021 (2 days)

Time estimate for pre-reading: 4.5 hours

List of essential pre-reading (in addition to skeleton arguments):

- Secretary of State's detailed grounds of defence (part): PB/201-224
- witness statement of Mr Charlie Lewis of BEIS: PB/288-325
- Defendants' letter to the Committee on Climate Change dated 4.3.20: DB/177-178
- Defendants' letter to the Committee on Climate Change dated 1.6.20: DB/191-192
- 'The future of UK carbon pricing' response of 1.6.20 (part): DB/197-201, 204-206
- Impact Assessment of 1.6.20 (part): DB/261-262, 266-267, 274-278, 288-289

References to documents in the Documents and Disclosure Bundle are in the form DB/x, and references to documents in the Pleadings and Evidence Bundle are in the form PB/x, where 'x' is the page number.

Introduction

1. This judicial review is a challenge to the decision of the Secretary of State and the devolved administrations on the appropriate design of a new UK emissions trading scheme (UK ETS). The decision was published on 1 June 2020 by way of the document entitled 'The future of UK carbon pricing: UK Government and devolved administrations' response' ("the Response").

2. The foundation of the Claimant's case is that the UK ETS was knowingly designed with an initial cap which would not encourage, and indeed was incapable of encouraging, the limitation of activities that cause greenhouse gas (GHG) emissions. This is a startling proposition. It is not right.

3. In any event, the Claimant's contentions that the effect of the UK ETS as designed is not to encourage GHG emissions reductions, and that the UK ETS will not achieve GHG emissions reductions, are arguments on the substantive merits – and on questions of expert technical opinion relying on predictive assessments of complex market behaviour. These are not matters upon which the Court can or should adjudicate.

4. It is not the function of the Court to enter into scientific debate.[1] An analysis of scientific opinion is not a proper subject for judicial review proceedings.[2] The Court should also accord an enhanced margin/area of respect to decisions involving or based upon scientific, technical and predictive assessments.[3] Where a decision is highly dependent upon the assessment of a wide variety of complex technical matters, the margin of appreciation will be substantial. The Court should be very slow indeed to impugn a decision-maker's "educated prophecies and predictions for the future".[4]

5. The background to this matter is set out in the Secretary of State's detailed grounds of defence dated 7 January 2021 ("DGD"). The DGD address the legal and policy context, the design of the UK ETS, including the level of the initial cap, and the position with

[1] *R (Assisted Reproduction and Gynaecology Centre) v Human Fertilisation and Embryology Authority* [2002] EWCA Civ 20 at para 15.
[2] *R (British Union for the Abolition of Vivisection) v SSHD* [2008] EWCA Civ 417 at paras 1, 15 and 54.
[3] See *R (Plan B Earth) v SSfT* [2020] EWCA Civ 214 at para 68.
[4] *R (Mott) v Environment Agency* [2016] 1 WLR 4338 at para 78.

municipal waste incinerators (MWIs). That is not repeated here, but the Court is asked to read the DGD at PB/201-224.[5] The Secretary of State maintains the submissions set out in the DGD but in this skeleton argument concentrates on addressing the points made by the Claimant in her skeleton argument dated 23 March 2021 ("CSk").

6. The Secretary of State has provided a witness statement by Mr Charlie Lewis, the Deputy Director for Emissions Trading in BEIS [PB/288]. The witness statement of Mr Lewis sets out: the context to climate change and the establishment of the UK ETS, including the legal and policy context; an explanation of how emissions trading schemes work; and, an explanation of the policy and decision-making process for the UK ETS, exhibiting the relevant contemporaneous documentation. It includes explanations in response to the challenge to ensure that the Court has the correct picture and to fulfil the duty of candour. The Court is asked to read the witness statement of Mr Lewis in full.

7. The Claimant has suggested that the witness statement of Mr Lewis is inadmissible because it is "after the event" evidence which is inconsistent with contemporaneous documents.[6] That is not the case. Mr Lewis's evidence does not contradict the documentary evidence. There is no basis to conclude that any part of the witness statement is inadmissible.

The new UK emissions trading scheme (UK ETS)

8. The Claimant contends that the Defendants' deliberate purpose or intention in establishing the UK ETS with the initial -5% cap and trajectory was not to achieve or even encourage GHG emissions reductions. The Claimant also contends that it does not in fact encourage GHG emissions reductions, and will not lead to any reductions, and so does not achieve the statutory purpose.[7] The foundation for these arguments is the contention that, because the cap was set above the level of 'business as usual' (BAU) emissions, it is incapable of causing any emissions reductions. It is also said that this is admitted in the Defendants' documents.

[5] The page references stated in the DGD have been superseded by the two bundles prepared for the hearing, but the up-to-date references to documents the Court is invited to read are provided in this skeleton argument.
[6] CSk 67.
[7] See CSk 5-7.

9. None of this is right. The Claimant misunderstands how the UK ETS operates and what the documents say. The UK ETS was intended and designed to encourage the limitation of activities that cause GHG emissions and is predicted to lead to GHG emissions reductions in its initial years of operation, from 2021 to 2024.

The operation of the UK ETS

10. The Claimant's case is based on a false premise, apparently because she does not understand how ETSs work. The Claimant argues that the only way the UK ETS could encourage GHG emissions reductions – or, as the Claimant puts it, put downward pressure on GHG emissions – is if the cap is lower than the level of BAU emissions in any year.[8] This is incorrect.[9] It is not the case that the cap alone drives abatement.[10] This was noted in the BEIS analysis of the cap options in 2019 [DB/1251-1253].

11. The cap is only one factor which influences abatement in an ETS. Efforts to reduce GHG emissions within an ETS are driven by the participants' expectations of the future tightening of the cap and the decreasing availability of allowances. This provides the certainty for participants to make short and long-term decisions on investment that would be necessary to abate their emissions. It is the expectation amongst participants of rising allowance prices which incentivises emissions reductions. There is no need to have the cap below BAU emissions for an ETS to encourage emissions reductions. This is all explained by Mr Lewis in his witness statement, in particular in paragraphs 64, 73 and 89-90 [PB/300, 303, 306].[11]

12. In any event, allowances within the cap are not required in the initial years of the UK ETS just to cover the BAU emissions. They are also required, for example, for participants to re-build the hedging positions they had established under the EU ETS and which were wiped-out on the commencement of the new UK ETS. The demand for allowances will not be merely at the level of BAU emissions.

[8] See CSk 36-38, 40, 46 and 84.
[9] This was pointed out in the DGD at paras 39, 60-61, 65, 78 and 135 [PB/211-212, 217-218, 222, 238].
[10] See DGD para 39 [PB/211-212].
[11] See also Mr Lewis's witness statement at paras 58, 60, 63-64, 65-68, 72-73, 89-91 and 132 [PB/299-303, 306-307, 314-315].

13. Mr Lewis explains in his witness statement at paragraphs 68 and 170-171 [PB/301-302, 321] that the cap does not need to be below the BAU emissions level in order to cause emissions reductions and, indeed, that other ETSs have had available allowances much higher than BAU emissions and been effective in reducing emissions. It is not uncommon to find caps set above BAU emissions.[12] The EU ETS in particular has had surplus allowances available well above BAU emissions[13] and still achieved significant emissions reductions.

14. In short, the premise of the Claimant's argument on the effect of the UK ETS is flawed [PB/322, para 176].

The Defendants' modelling of the UK ETS

15. The Claimant's contention that the UK ETS as designed does not in fact encourage GHG emissions reductions, and will not lead to any reductions, is baseless. The Defendant has modelled the abatement effect of the UK ETS and it is predicted to lead to GHG emissions reductions in its initial years of operation.

16. The Claimant characterises the Defendants' conclusion that the UK ETS will create a reduction in GHG emissions in its initial years as merely an "assumption".[14] It is not assumption. It is derived from expert, predictive modelling.

17. The Impact Assessment reports the modelling which was undertaken of the abatement of GHG emissions which the UK ETS would cause in its initial years, from January 2021 to December 2024. Annex B to the Impact Assessment explains the modelling undertaken [DB/291-297].

18. The modelling predicted that the total level of abatement from the UK ETS as set out in the Response, even where there was an over-supply of allowances relative to demand,[15]

[12] See DB/724 in relation to the EU, California and South Korea.
[13] Mr Lewis gives the figure of 87% in his witness statement at paras 68 and 171 [PB/301, 321-322].
[14] CSk 8, 12 and 45.
[15] The low end of the range (4 $MtCO_2e$) arose where there was an over-supply of allowances relative to demand. The high end of the range (11 $MtCO_2e$) also arose where the cap was higher than 'business as usual' emissions

was between 4 and 11 $MtCO_2e$ in GHG emissions in total from 2021 to 2024 [DB/276-277]. The minimum amount of GHG emissions abatement predicted as a result of the UK ETS was 4 $MtCO_2e$. The modelling also concluded that there would be additional abatement under the UK ETS when compared to the counterfactual of remaining in the EU ETS [DB/288, para 123].[16]

19. This information was presented to the Secretary of State when he made his decision on the UK ETS [DB/1558, para 45; DB/1559, in Annex F; DB/1579; DB/1611, in Annex C].[17] Mr Lewis confirms in his witness statement at paragraphs 143 and 173-175 that the modelling shows that the UK ETS would achieve a reduction in GHG emissions in its initial years, with the initial cap as set [PB/317, 322].

20. The Claimant contends that the Secretary of State has identified no basis for the prediction that the UK ETS as established would lead to abatement in the initial years,[18] but the basis is explained in the Impact Assessment. It is this same information that was presented to the Secretary of State in April and May 2020. There is no evidence which contradicts it, despite what the Claimant asserts.[19] Indeed, the reference in CSk 44 says the opposite of what the Claimant suggests. It says that an auction reserve price (ARP) of £15 would "ensure a reasonable signal for investment is maintained during the initial period of a standalone UK ETS" [DB/1404] and would drive some additional abatement [DB/1405]. Even with the allowance price being set by the ARP at £15, the modelling predicted GHG emissions abatement of 4 $MtCO_2e$ due to the UK ETS in 2021 to 2024.

21. The Secretary of State's modelling predicts that the UK ETS would achieve a reduction in GHG emissions in its initial years. There is no other evidence, let alone better evidence, of the expected effect of the UK ETS. There is no basis for the Claimant to contend that

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but took into account the anticipated hedging behaviour driving increased demand for allowances and additional abatement effort.

[16] The BEIS carbon price models which were used in the scenario analysis and decision-making were explained in the annexes to the Impact Assessment [DB/291-300].

[17] The Welsh Government also concluded that the UK ETS design would deliver emissions reductions: DB/2544, DB/2533.

[18] CSk 43.

[19] See CSk 41-45. As the Claimant notes in CSk 42-44, the modelling was based on the ARP of £15 proposed in the Response. The UK ETS will now, however, in fact operate with a higher ARP of £22, being set before the start of any auctioning or trading in Regulation 6(9) of the Greenhouse Gas Emissions Trading Scheme Auctioning Regulations 2021 (currently in draft: https://www.legislation.gov.uk/ukdsi/2021/9780348220049).

"the Defendants knew there would be no downward pressure when they chose to set the cap above the level of BAU emissions".[20]

The Defendants' documents

22. The Claimant contends that the Defendants' documents "admit" that the purpose in setting the cap was to alleviate pressures on businesses and that the level of the cap adopted "is incapable of applying downward pressure to GHG emissions" because it was "above the BAU emissions".[21] She argues that the documents show that "the Defendants knew there would be no downward pressure when they chose to set the cap above the level of BAU emissions".[22] The documents do not show what the Claimant contends.

23. The Response does not recognise "the importance of the cap in determining whether the UK ETS will apply downward pressure to emissions".[23] As explained above, the cap does not do this. The point made in paragraph 25 of the Response is a different point, namely that the cap determines the limit on the allowances issued in the ETS [DB/200].

24. The documents cited in CSk 37-40 do not "admit" that the cap "is incapable of applying downward pressure to GHG emissions". The documents say nothing which could reasonably be construed as doing this:

    (1) The document at DB/1260 indicates that some abatement could be driven by the notional -5% cap level. This is the opposite of what is suggested in CSk 37.

    (2) The documents cited in CSk 38 and 40 [DB/1250; DB/2483] refer to the notional cap, which was not used in the UK ETS, and not to the notional -5% cap which was.

    (3) The document cited in CSk 39 [DB/1451] refers jointly to the notional cap and the notional -5% cap. It does not show that no abatement was expected with the notional

[20] CSk 46.
[21] CSk 37-38, 44.
[22] CSk 46.
[23] CSk 34.

-5% cap. The next page in the document [DB/1452] states that the notional -5% cap and an ARP of £15 would provide a "signal to invest" in GHG emissions abatement.

25. The graph in Figure 1 on DB/1451 and DB/1597 shows the notional -5% cap trajectory within the projected range of demand scenarios for the period 2021 to 2024, save for the very start and end of that period, illustrating that abatement was likely. The position is as set out in the Impact Assessment based on the modelling, namely that the UK ETS was predicted to lead to GHG emissions reductions in its initial years of operation.

Ground 4: s44 power exercised for improper purposes

26. There is no dispute as to the proper purpose for which the UK ETS could be established under s44 of the Climate Change Act 2008, namely as a scheme to operate by encouraging the limitation of activities that cause or contribute to GHG emissions. The UK ETS was established for this purpose.

27. Section 44 does not require an ETS to seek to limit emissions to any particular extent, let alone the maximum possible extent. It does not require an ETS to achieve a reduction in GHG emissions when compared to pre-existing levels. It is enough for s44 if the scheme encourages the limitation of activities that cause or contribute to GHG emissions.

28. The Claimant accepts that factors such as business competitiveness would be legitimate matters to take into consideration when designing the UK ETS, provided the UK ETS was within the purpose of s44. The *WDM* case[24] established that it is for the Court to consider on the evidence whether the particular act complained of – here, establishing the UK ETS as designed – was within the purpose of the statute (at 401H). If so, it would be perfectly lawful for the Defendants to take into account competing factors. *WDM* was a case where the Court concluded there was no developmental promotion purpose at the time of the decision because by then the project was accepted to be clearly uneconomic. This is far removed from the facts of the instant case.

[24] *R v Foreign Secretary, ex p World Development Movement* [1995] 1 WLR 386.

29. The Court in *WDM* said that "the crucial question, as it seems to me, is whether there was, indeed, a purpose within the Act of 1980" (at 399H). There had to be "a development purpose within section 1" (at 401F) or "a developmental promotion purpose within section 1" (at 402F).

30. The crucial question in the instant case is whether, in establishing the UK ETS as designed, the Defendants were acting to advance or promote the statutory purpose in s44: was a purpose of establishing the UK ETS to establish a scheme to operate by encouraging the limitation of activities that cause or contribute to GHG emissions.

31. The Claimant's case on Ground 4 contains the following elements:

    (1) because the initial cap is above the level of BAU emissions, the UK ETS is incapable of applying downward pressure to GHG emissions;[25]

    (2) in designing the UK ETS as they did, the Defendants did not act to advance the statutory purpose in s44;

    (3) the UK ETS in its initial design will not achieve the statutory purpose;[26]

    (4) business competitiveness was an "extraneous" consideration or purpose as far as s44 is concerned.[27]

Effect of the initial cap being above BAU emissions

32. The core of the Claimant's case is that, because the initial cap is above the level of BAU emissions, the UK ETS is incapable of applying downward pressure to GHG emissions. It has been explained above that this is incorrect. ETSs with caps and available allowances above the level of BAU emissions can and do achieve GHG emissions reductions. The Claimant's case is based on a misunderstanding of how ETSs work.

[25] See CSk 36-38, 40, 46 and 84.
[26] See CSk 5, 6, 12, 48, 50, 52, 56, 59 and 61.
[27] See CSk 26, 47, 49 and 61.

Advancing or achieving the statutory purpose

33. The starting point must surely be that, unless it is a sham (which is not alleged here), the only purpose for establishing an ETS would be to encourage the limitation of activities that cause GHG emissions. It is simply not credible that the UK ETS would have been set up for a purpose other than this, or that the Defendants would have knowingly designed the UK ETS so that it was incapable of achieving this purpose.

34. The Claimant contends that the "admitted purpose" for which the Defendants acted when setting the cap was in order to alleviate pressures on business.[28] This is not admitted and it is not what is shown by the documents. The Claimant cites various documents in CSk 49-59, but those documents simply do not have the meaning or effect which the Claimant seeks to attribute to them, as is apparent from reading those documents.

35. First, in designing the UK ETS as they did, the Defendants did act to advance the statutory purpose in s44. The contemporaneous documents show that the purpose of establishing the UK ETS was as a scheme to operate by encouraging the limitation of activities that cause or contribute to GHG emissions. The fact that the initial cap was set so that the level of climate ambition was balanced with the impact on business competitiveness does not eliminate this purpose.

36. The purposes for which the Defendants acted in designing the UK ETS are apparent from the following contemporaneous documentation:

    (1) Letters from the Defendants to the Committee on Climate Change (CCC) dated 2 May 2019 and 4 March 2020 which set out the principles for the UK ETS, including that it should facilitate cost effective decarbonisation and support the delivery of domestic and international climate change commitments and targets [DB/129, 178]. The 4 March 2020 letter also sets out the rationale for the initial cap, including the ambition to cut emissions, and records that the cap "provides the right balance between climate ambition and business competitiveness in the early years of a UK ETS" [DB/177].

[28] CSk 7(b).

(2) The letter from the Defendants to the CCC dated 1 June 2020 which records that it was expected that the UK ETS would deliver emission reductions and that the rationale was "demonstrating clear environmental ambition and commitment while maintaining protections for businesses' competitiveness in a hugely uncertain economic context" [DB/191-192].

(3) The Response of 1 June 2020 which included the following: the UK ETS will show greater climate ambition than the EU ETS from the start (para 4); the UK ETS will play an important part in efforts to deliver the net zero target (paras 11 and 24); and, the Defendants are committed to carbon pricing as an effective emissions reduction tool (para 16) [DB/197-200]. Discussion of the initial cap and trajectory in paragraphs 58 to 63 shows that the key considerations were climate ambition balanced with business competitiveness pressures, and that the UK ETS would play a key role in decarbonising the sectors within it [DB/206].

(4) The Impact Assessment of 1 June 2020 which stated that "the objective of the policy is to incentivise cost-effective emissions reductions for sectors currently in scope of the EU ETS, while balancing this ambition with the competitiveness of UK industry" [DB/261]. The Impact Assessment predicted that the UK ETS would lead to reduced emissions and indeed greater emissions reductions than the counterfactual of continuing in the EU ETS for Phase IV [DB/262, 288]. This is shown by the modelling results [DB/276-278].

(5) The documents relating to the consideration of where the initial cap should be set which referred to the intention to support climate ambition and net zero, including that "reducing greenhouse gas emissions is the ultimate aim of the ETS" [DB/1395, 1397, 1405, 1420, 1422, 1430].

(6) The documents which show that one of the "policy objectives" of the UK ETS was "decarbonisation", including "increased ambition consistent with UK & DA carbon budget and net zero commitments" [DB/1449, 1572, 1592]. The UK ETS was described as taking "a step towards our net zero ambition" [DB/1450, 1573].

(7) The submissions to Ministers which referred to the intention to support climate ambition and net zero, and recorded that the initial cap showed the "intent to go further than the current EU ETS in reducing our carbon emissions to meet our net zero commitment" [DB/1440-1141, paras 5-8]. Ministers were informed that the modelling predicted that the UK ETS could deliver emissions reductions of up to 11 $MtCO_2e$ and that greater emissions reductions were predicted under the UK ETS than under Phase IV of the EU ETS [DB/1558, paras 45 and 47; DB/1579].

(8) The 28 April 2020 briefing for the Secretary of State which explained that the policy to set-up a UK ETS must help meet the UK's net zero emissions requirement and that the notional -5% initial cap demonstrated "clear climate ambition" [DB/1592].

(9) The briefings with the Secretary of State which show that in approving the UK ETS he was intending to advance GHG emissions reductions [DB/1587, 1599-1600].

37. It is apparent from this documentation that the UK ETS was established with the intention of advancing the statutory purpose,[29] and in the expectation that it would do so. This is confirmed in the witness statement of Mr Lewis at paragraphs 177-180 [PB/322-323]. The UK ETS was not set-up with the objective of having no effect at all in terms of encouraging the limitation of activities that cause or contribute to GHG emissions.

38. Secondly, the Claimant's contention that the UK ETS as designed will not *achieve* the statutory purpose is without foundation.[30] The modelling reported in the Impact Assessment predicts that the UK ETS as designed would cause GHG emissions abatement of between 4 and 11 $MtCO_2e$ in its initial years [DB/276-277].

39. The evidence shows that the UK ETS, with the initial cap as designed, would in its initial years (2021 to 2024) create a minimum reduction of 4 $MtCO_2e$ in GHG emissions. The UK ETS will not just lead to *limiting* the emission of GHGs – which would be enough to ensure it was within the statutory purpose – but will go further and lead to a *reduction* in the emission of GHGs.

[29] The purpose is also confirmed in the explanatory memorandum to the 2020 Order at paragraphs 2.1 and 7.3 [DB/1864, 1867].
[30] See eg CSk 59-61.

Business competitiveness as a consideration

40. The Claimant's case depends on establishing that the competitive pressures on businesses was an "extraneous"[31] consideration rather than one which had a bearing on establishing the UK ETS so that it actually operated by encouraging the limitation of activities that cause or contribute to GHG emissions. Business competitiveness was not an "extraneous" consideration but was part and parcel of ensuring that the UK ETS as a new market functioned effectively so as to advance this statutory purpose.

41. The Response recognised the risk of 'carbon leakage'[32] if UK operators were put at a competitive disadvantage [DB/200-201, para 27] and recorded that, given the uncertainties, it was "appropriate to maintain sufficient headroom of allowances for a time-limited period at the start of the UK ETS" [DB/206, para 63].[33]

42. Including this headroom between the level of BAU emissions and the initial cap was an aspect of ensuring the UK ETS functioned effectively as a new market. This was in accordance with the purpose of s44 and establishing an ETS which operates effectively to encourage the limitation of activities that cause or contribute to GHG emissions. The initial level of the cap was set not above the level of BAU emissions to assist businesses, but rather to ensure that the UK ETS functioned effectively as an emissions trading scheme. Setting the cap at this level would facilitate, and not frustrate, the UK ETS in effectively encouraging the limitation of relevant activities.

43. In order for the UK ETS to be effective and avoid increasing global emissions, it is important to avoid 'carbon leakage'. Consideration of the circumstances in which businesses operate is part of considering whether the UK ETS would undermine business competitiveness, which is in turn relevant to whether the UK ETS would be effective in

[31] See CSk 26, 47, 49 and 61.
[32] Carbon leakage is the transfer by businesses of activities to other countries with less stringent emission constraints. See para 61 of Mr Lewis's witness statement [PB/300]. Carbon leakage was raised in the letters to the CCC of 2 May 2019 and 1 June 2020 [DB/128-129, 191].
[33] This was addressed in more detail in the Impact Assessment [DB/267, paras 23-24; DB/274-275, paras 51-55; DB/289, para 126]. It was also covered in the briefing for the Secretary of State [DB/1592-1593]. It is explained further in the DGD at paras 56-71 [PB/216-220] and in Mr Lewis's witness statement in paras 66-68, 78-80, 125, 159 and 163-169 [PB/301, 304, 313, 319-321].

reducing emissions, rather than just displacing them to another country. Considering business competitiveness has climate aims, to mitigate carbon leakage.

44. The effective functioning of the UK ETS is necessary to ensure the scheme's climate change objectives are achieved. Achieving the reduction of GHG emissions through an ETS is not as simple or blunt an exercise as just setting a low cap. Setting the UK ETS cap simply to drive down UK emissions, regardless of the impacts of business, would be counter-productive. It would prevent the UK ETS market from functioning effectively, and encourage carbon leakage, and not make a contribution to reducing global GHG emissions. Considering the costs to business is not a negative in terms of tackling climate change. It is not something which must be regarded as compromising or reducing the ability of the UK ETS to tackle climate change. It is part and parcel of ensuring that the UK ETS as a new market is effective in actually tackling climate change in practice.

Conclusion on Ground 4

45. None of the four elements of the Claimant's case on Ground 4 can be made out. The UK ETS was established in order to advance and achieve the statutory purpose in s44. Indeed, the UK ETS will operate to encourage the limitation of activities that cause or contribute to the emission of GHGs. It is predicted to achieve GHG emissions reductions. The UK ETS with its initial cap is within the statutory purpose. The power in s44 has been exercised for the purpose for which it was conferred.

Ground 1: failure to have regard to alleged imperatives in the Paris Agreement

46. The Claimant's case on Ground 1 depends on establishing the following propositions:

    (1) there are distinct "short and medium term imperatives" in the Paris Agreement, separate from the long-term goals;[34]

    (2) these "short and medium term imperatives" in the Paris Agreement were themselves distinct mandatory material considerations because they were so obviously material

[34] See CSk 72 and 79.

to the initial design of the UK ETS that it would have been irrational not to take them into account;

(3) the Defendants failed to have regard to these "short and medium term imperatives" when deciding on the initial design of the UK ETS.

47. None of these propositions is correct. To succeed on Ground 1, the Claimant needs to make good her case on all three propositions.

Alleged "short and medium term imperatives" in the Paris Agreement

48. The Claimant refers to two parts of the Paris Agreement said to be the "short and medium term imperatives" which are "a different set of considerations" from the longer-term elements such as the net zero commitment. They are not. Moreover, the Claimant's approach of carving-up the Paris Agreement – even individual sentences – to seek to argue that parts of it were left out of account is wholly untenable.

49. The first element relied on – the temperature goal in Article 2.1(a) – is not a "short and medium term" element. It is a long-term temperature goal, as is stated in Article 4.1. Article 2.1(a) does not contain a distinct "short and medium term" imperative.

50. The second element relied on is the phrase in Article 4.1: "global peaking of greenhouse gas emissions as soon as possible". The Claimant seeks artificially to carve out this one element of the Paris Agreement to argue that it constitutes a separate, distinct and freestanding "short and medium term" imperative.

51. The Claimant's contention that the aim to reach global peaking of GHG emissions as soon as possible is a separate and distinct imperative, independent from the longer-term aspects, involves artificially dividing up the Paris Agreement. Article 4.1 of the Paris Agreement is clear that one is an aspect of the other:

> "In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible … and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between

anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" (emphasis added).

52. In the Paris Agreement, reaching "global peaking of greenhouse gas emissions as soon as possible" is inextricably linked to achieving net zero emissions in the second half of this century and the long-term temperature goal in Article 2.1.[35] The aim of reaching global peaking of GHG emissions as soon as possible is so as to achieve net zero emissions in the second half of this century. It is part and parcel of the journey to net zero: a step on the pathway to 2050 net zero. It is not a separate and distinct commitment in the Paris Agreement, independent from the longer-term aspects of the Paris Agreement.

53. The Claimant can only argue that "short and medium-term imperatives" of the Paris Agreement were not taken into account by treating them as entirely separate, freestanding elements of the Paris Agreement. Seeking to divorce the two elements from each other is wholly artificial.

54. Moreover, to the extent that there is a dispute between the parties on the interpretation of the Paris Agreement, this is not an issue on which the Court ought to adjudicate. The Court should proceed on the basis of the Secretary of State's interpretation.

55. It is not appropriate for a court to rule on the disputed meaning of an international treaty which has not been implemented into domestic law. In *R (Corner House) v Director of the Serious Fraud Office* [2009] 1 AC 756,[36] Lord Brown (with whom Lord Rodger agreed) said at paragraphs 65-66 that it would be "remarkable" for a national court to be required to assume the role of determining the meaning of an international instrument, particularly where the contracting parties have chosen not to provide for the resolution of disputed questions of construction by an international court but rather to create a working group through whose continuing processes it is hoped a consensus view will emerge.

56. The Paris Agreement does not provide for any mechanism of enforcement by which the provisions are construed and applied by a court. On the contrary, Articles 14 and 15

[35] See also how the Supreme Court summarised Art 4.1 in *R (Friends of the Earth) v Heathrow Airport* [2020] UKSC 52 at para 70, and how the CCC summarised Art 4.1 at DB/803 and DB/857.
[36] See also Lord Bingham at para 44, and *R (ICO Satellite Ltd) v Office of Communications* [2010] EWHC 2010 (Admin) at paras 88-94.

respectively provide for global stock-takes at five-year intervals and for the facilitation of implementation by a non-adversarial and non-punitive committee. It would be wrong for all the reasons given in *Corner House* for the Paris Agreement to be interpreted and applied in determining the lawfulness of a decision as if it were a domestic statute.

Alleged "short and medium term imperatives" as mandatory material considerations

57. The Heathrow judgments on which the Claimant relies dealt with whether the Paris Agreement was a mandatory material consideration.[37] This case is different. The Claimant contends that specific phrases within the Paris Agreement were themselves distinct mandatory material considerations.

58. The temperature goal in Article 2.1(a) is a long-term temperature goal. It is not even arguably a "short and medium term" imperative.

59. The phrase in Article 4.1 on which the Claimant relies – "aim to reach global peaking of greenhouse gas emissions as soon as possible" – would not itself be a specific, distinct and separate mandatory material consideration to which the Defendants were obliged by law to have regard when designing the UK ETS. Whilst it would be lawful to have regard to this part of Article 4.1, as an unincorporated treaty provision, it would not have been unlawful if regard had not been had to it.[38]

60. There is no requirement, express or implied, in the 2008 Act to have regard to this specific aim of the Paris Agreement when establishing an ETS. It would only qualify as a mandatory consideration on the basis that it was so obviously material to the decision that anything short of direct consideration of it would not be in accordance with the intention of the Act.[39] This is to be tested using the *Wednesbury* irrationality test.[40] Where a decision-maker does not turn his mind to a particular consideration, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness.[41]

[37] CSk 87-89.
[38] *R (Friends of the Earth) v Heathrow Airport* [2020] UKSC 52 at para 118.
[39] *Heathrow Airport* at paras 117-119.
[40] *Heathrow Airport* at paras 125 and 152.
[41] *Heathrow Airport* at para 120.

61. It would not have been irrational to leave this specific aim in Article 4.1 out of account (if that was what had happened) for the following reasons:

(1) The task was to set a temporary, initial cap for the UK ETS in order to get a functioning ETS up and running. It was acknowledged that the initial cap was not set to achieve a net zero trajectory and there was a simultaneous commitment to revise the cap to meet a net zero trajectory once advice on this had been received from the CCC. The UK ETS delivered for January 2021 was not supposed to be the final product but only a temporary, interim policy.

(2) The aim in this phrase from Article 4.1 is a collective aim of all parties to the Paris Agreement relating to global peaking. The UK's GHG emissions peaked in the early 1990s. Beyond that, a collective aim at a global level would be of less relevance when establishing a purely domestic emissions trading scheme.

(3) The UK had committed to reach net zero by 2050 and was one of the few nations globally to do so. This commitment went further than the UK's then nationally-determined contribution (NDC) under the Paris Agreement. The CCC had judged in its May 2019 net zero report that this would fully meet the UK's commitments under the Paris Agreement and represented the highest possible ambition for the UK [DB/795, 798]. This was repeated in the CCC's July 2019 progress report [DB/132]. To the extent that this aim in Article 4.1 added anything to the 2050 net zero commitment, it would have meant going beyond this highest possible ambition. It would have meant the UK going further than had been judged necessary, and indeed possible, in order to make a greater contribution globally.

(4) Taking this aim into account in the way suggested by the Claimant would mean setting a tighter initial cap for the UK ETS which would not, in any event, tackle global GHG emissions as it would encourage 'carbon leakage' and simply export the emissions from the UK. It would also risk undermining the effective functioning of the UK ETS in the initial period.

(5) The UK has determined the contribution it will make to the global goals of the Paris Agreement through the means of the 2008 Act, as recognised in the case law noted in the DGD at paragraphs 21 and 30-31 [PB/205, 208-209].

(6) This aim in Article 4.1 does not place any requirement on the UK as to how urgently it should act when seeking to address climate change through domestic policy or legislation. This is clear from the case law summarised at paragraph 31 of the DGD [PB/208-209], as is that there is no commitment for the purposes of domestic law to perform the obligations in the Paris Agreement. They are not part of UK law and they give rise to no legal obligations in domestic law.

62. In these circumstances it would not have been irrational to leave out of account the specific aim in Article 4.1 to reach global peaking of GHG emissions as soon as possible. This specific aim would not itself therefore qualify as a mandatory material consideration for the Defendants' decisions.

Failure to have regard to "short and medium term imperatives"

63. The Claimant contends that the Secretary of State failed to have regard to the so-called "short and medium term imperatives" of the Paris Agreement[42] because they were not expressly mentioned in the documentation relating to the establishment of the UK ETS. Where a decision is taken by a Minister, what matters is "what he or she knew".[43] The Claimant's case is that, unless it was explicitly spelled out for the Secretary of State in the papers relating to this decision, he would not have known about the content of the Paris Agreement.

64. The Claimant's argument that "a Minister only knows what he or she is actually told"[44] cannot be right. Ministers can be taken to know about matters of general knowledge and matters that are important to and arise commonly in their Ministerial role. A Minister does not have to be told what he can be expected to know. If that were not the case, and

[42] CSk 7(a), 62 and 70(d)-(e).
[43] *Bracking v SSWP* [2013] EWCA Civ 1345 at para 26(3) and *R (National Association of Health Stores) v DoH* [2005] EWCA Civ 154 at paras 26-27.
[44] CSk 66.

the courts would conclude that anything not expressly mentioned in a Ministerial briefing was left out of account in taking the relevant decision, then that would place an intolerable burden on both briefing civil servants and decision-making Ministers.

65. In cases like this, there is only scope for drawing an inference that a matter not expressly mentioned has been left out of account when all other known facts and circumstances appear to point overwhelmingly to a different decision.[45] As is set out below, the known facts and circumstances point strongly to the conclusion that the Secretary of State would have known of the contents of the Paris Agreement when reaching his decision.

66. The fact that the Response did not expressly refer to specific provisions of the Paris Agreement – such as Article 2.1 or a part of Article 4.1 – does not mean that it should be inferred that they were left out of account. It cannot be inferred that parts of the Paris Agreement were left out of account simply because they were not expressly mentioned in the Response, especially when the very purpose of part of the Response was to consider whether the initial cap should be tighter at the start of the UK ETS.[46]

67. Moreover, the Claimant has conceded that "the Defendants did consider some aspects of the Paris Agreement: specifically, the procedural deadlines for filing returns for the Global Stocktake, and the long-term target of achieving net-zero emissions" [PB/166, para 9].

68. The contention that the Defendants did not take into consideration the global peaking phrase in Article 4.1 is untenable where the Claimant accepts that they had regard to the Paris Agreement generally and did consider "the longer-term target of achieving net zero emissions" in the Paris Agreement. The Claimant's position involves submitting that the Defendants left out of account part of one sentence[47] in Article 4.1 of the Paris Agreement, whilst accepting they took into account a later part of the same sentence.[48]

[45] See *Bolton MDC v SSE* [2017] PTSR 1091 at 1096C.
[46] See, for an example from a different field, *R (McDonald) v RBKC* [2011] UKSC 33 at para 24.
[47] "Parties aim to reach global peaking of greenhouse gas emissions as soon as possible".
[48] "so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century".

69. The Claimant accepts that the Defendants did consider the 'global stocktake' aspect of the Paris Agreement. This is defined in Article 14.1 as a process to:

> "periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the 'global stocktake')".

70. The global stocktake is the review of progress towards the long-term goals of the Paris Agreement. This necessarily relates to the period before the long-term, ie progress in the short to medium-term. The Claimant's position involves submitting that the Defendants took into account the global stocktake exercise but not the fact that the exercise is intended to consider progress in the short to medium-term towards the long-term goals.

71. It is not tenable to suggest that the two specific provisions were excluded from consideration by the Secretary of State when it is accepted that regard was had to the Paris Agreement more generally. It is unsurprising that the documentation did not descend to the level of citing specific parts of the Paris Agreement. An absence of references to specific parts of a document, which was itself expressly mentioned, is no basis from which to infer that those parts of the document were not taken into account.

72. Further, the Secretary of State knew about the Paris Agreement and its contents. He did not need this to be spelled out for him in relation to this particular decision before he can be said to have been mindful of them. This is because:

    (1) The Paris Agreement was a matter of general knowledge within the Department, unsurprisingly given that it is the most prominent international instrument on climate change and BEIS is the Department – and the Secretary of State and Minister Kwarteng were the Ministers – with responsibility for this important policy area. There is a particular focus in BEIS on the Paris Agreement, including in relation to the UK ETS [PB/309, para 102; PB/310, para 108]. The Secretary of State also chairs the Cabinet Climate Action Implementation Committee [PB/297, para 48].

(2) The decision-making Secretary of State was also COP26 President at the time. The aim of COP26 is to accelerate action towards the goals of the Paris Agreement and agree further measures to implement the Paris Agreement [DB/187-188].

(3) The decision-making Secretary of State was well-aware of and familiar with the Paris Agreement and its provisions. This is an obvious point, but it is confirmed in the witness statement of Mr Lewis [PB/315, para 138] and is demonstrated by speeches given by the Secretary of State at the time the decision challenged was being reached:

(a) in a speech to the UN as COP26 President on 8 March 2020, the Secretary of State referred to the Paris Agreement and the importance of all nations reducing emissions "as soon as possible" [DB/182]; and

(b) at the Petersberg Climate Dialogue meeting on 27 April 2020, the Secretary of State spoke of the need to speed-up the pace of progress in decarbonising the global economy in order "to meet the goals of the Paris Agreement" [DB/1583].

(4) The documentary evidence shows that, when making the decision on the UK ETS design, the Secretary of State himself had COP26 – and necessarily therefore the Paris Agreement – in mind [DB/1599; PB/315, para 137].

(5) The key documentation relating to the decision refers repeatedly to:

(a) the Paris Agreement – see eg the consultation document [DB/1077, 1079, 1097, 1109-1100, 1113, 1131], the Response [DB/198, 205, 220, 230, 238, 244] and the 1 June 2020 letter to the CCC [DB/191-192]; and

(b) tackling climate change generally – see eg the Response (eg paras 12, 14, 25, 26 and 58) [DB/199-200, 206] and the 1 June 2020 letter to the CCC [DB/191-192].

(6) The design of the UK ETS was expressly integrated with the Paris Agreement in that the reviews under the UK ETS were deliberately aligned with the Paris Agreement

Global Stocktakes, so that the UK ETS was aligned with the UK's global ambitions on carbon [DB/220, para 151].

(7) The net zero target in the 2008 Act – which was expressly referenced in the key contemporaneous documentation relating to the decision – was a direct result of Article 4.1 of the Paris Agreement. It is artificial to suggest that someone can consider the 2008 Act's net zero target without also having in mind the Article of the Paris Agreement that led directly to it. The 2008 Act's 2050 net zero target arises from Article 4.1 of the Paris Agreement. The two are inextricably linked and cannot be divorced from each other.

73. In the circumstances, the Secretary of State (and Minister Kwarteng and civil servants) can be taken to have had regard to the relevant provisions of the Paris Agreement without having to provide contemporaneous documentation demonstrating this. The content of the Paris Agreement is not something about which the Secretary of State would have to be informed when taking this decision. The known facts and circumstances point strongly to the conclusion that the Secretary of State would have had the contents of the Paris Agreement in mind when reaching the decision.

The witness statement of Mr Lewis

74. Mr Lewis's witness statement does not give evidence on the civil servants' knowledge for the purpose of arguing that that knowledge should be imputed to the Secretary of State. Rather, it is relevant because it helps show the position that the Secretary of State, at the head of BEIS, would have been in. In any event, the witness statement also contains evidence of what the Secretary of State knew, as noted above.

The devolved administration (DA) defendants

75. The above points would also apply in the main to the three DA defendants. There are not witness statements from the DAs giving evidence to show that the specific decision-making Minister would have known about the contents of the Paris Agreement without having to have it spelled out for them, but that is not necessary. All the decision-making Ministers had responsibility for climate change as a prominent element of their portfolios.

The DAs' disclosure shows that they were well-briefed and on top of climate change issues. The Paris Agreement is the single most prominent document in this area. It is simply not credible to contend that, unless it was explicitly spelled out for them in relation to this decision, they would not have known about and been mindful of the contents of the Paris Agreement.

The alleged consequences

76. The Claimant's argument on Ground 1 is tantamount to giving effect to the Paris Agreement in domestic law despite it being an unincorporated treaty. Arguing that specific parts of the Paris Agreement were mandatory material considerations, and required the Defendants to act in specific ways,[49] amounts to giving effect to the Paris Agreement domestically by the back door. This is impermissible. Any obligation imposed on the Defendants by the Paris Agreement has no effect in domestic law.

77. In any event, the Claimant's arguments on the consequences in relation to Ground 1 are misconceived.

The level of the initial cap

78. The Claimant relies on the contention that the initial cap "places no downward pressure on emissions",[50] to contend that the "short and medium term imperatives" in the Paris Agreement would have provided a good reason to set a tighter cap and that the Defendants "may well have done so".[51] This premise for arguing that a tighter cap might have been imposed is flawed for reasons already given.

79. Moreover, a tighter cap would not have been imposed at the start of the new UK ETS market because:

    (1) it would have had adverse consequences, as summarised at DB/1596, and undermined the new UK ETS market for the longer-term; and

[49] See eg CSk 7, 21, 73 and 93.
[50] CSk 7(a) and 84.
[51] CSk 93.

(2) it would not have been likely to have achieved any additional abatement of GHG emissions in the initial years of the UK ETS, as explained in the witness statement of Mr Lewis in paragraphs 119-120, 169 and 179 [PB/312, 321, 323], and as set out in the analysis undertaken by BEIS [DB/1236; DB/1535, para 11; DB/1547, 1574, 1596-1597].

80. In short, because of the lead-in time for investment in additional GHG emissions abatement, tightening the cap further would not lead to additional abatement in the initial years of the UK ETS. It would simply raise the price of allowances and therefore affect the competitiveness of businesses, reduce their ability to invest in abatement technologies, and cause carbon leakage.

81. The Defendants did consider having a tighter initial cap. Their reasoning on why a tighter initial cap should not be imposed was set out in the Response [DB/206, paras 61-63] and in the 1 June 2020 letter to the CCC [DB/191]. Consideration was given to going further, faster. The Defendants went as far as they thought they could for the initial design of the new UK ETS. There is no reason to think that they would have gone further.

Municipal waste incinerators (MWIs)

82. The Claimant contends that, as a result of MWIs not being brought within the scope of the UK ETS, there are "substantial GHG emissions left unabated".[52] On the basis of this, the Claimant contends that the "short and medium term imperatives" in the Paris Agreement would have provided a good reason to include MWIs within the scope and that the Defendants "may well have done so".[53] This line of argument is misconceived.

83. First, MWIs were not kept out of the scope of the UK ETS due to the level of climate ambition which was adopted in the Response. There is no evidence to suggest that, if the Defendants had wanted a tougher regime, they would have brought MWIs within scope.

[52] CSk 70(b). See also CSk 82.
[53] CSk 93.

84. Secondly, the reasons why MWIs were not added into the UK ETS remain [DB/204, paras 50-52; DB/1567, para 11]. These reasons are unaffected by the level of climate ambition which was adopted for the UK ETS.

85. Thirdly, adding MWIs into the scope of the UK ETS at the start would have been incompatible with a fundamental objective of the UK ETS, namely that there must be a smooth transition for industry from the EU ETS to the UK ETS. The proposals consulted upon were that the scope of the UK ETS in terms of sectors should align with the scope of the existing EU ETS, ie not including MWIs [DB/1095, para 6]. The consultation only referenced "the potential to expand scope in later years of UK ETS operation" [DB/1074]. It was decided that the UK ETS should mirror the EU ETS [DB/1555-1556, para 27; DB/1567, para 9].

86. Fourthly, GHG emissions from MWIs are being abated as a consequence of waste management policy and regulation. This is explained in the DGD at paragraphs 79-88 [PB/222-225] and in the witness statement of Mr Preston of Defra [PB/326-341]. This is disputed by the Claimant, but it is inappropriate for a dispute like this on the merits of a technical question to be considered in a judicial review.

Conclusion on Ground 1

87. To succeed on Ground 1, the Claimant needs to establish that there are separate and specific "short and medium term imperatives" in the Paris Agreement, that they were themselves distinct mandatory material considerations, and that the Defendants failed to have regard to them. If any stage of the argument fails, Ground 1 cannot succeed. All stages are misconceived.

Whether the outcome for the Claimant would have been substantially different

88. Section 31(2A) of the Senior Courts Act 1981 provides that the Court must refuse to grant relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

89. Although misguided, it is clear from the Claimant's witness statement [PB/274-283] that the outcome at which this challenge is aimed is MWIs being within the scope of the UK ETS. It is highly likely that the outcome in this respect would not have been substantially different if the conduct complained of had not occurred.

90. It has been explained above that there are four separate reasons why MWIs would not have been included in the scope of the UK ETS from the start. Even if it had been concluded that a higher level of climate change ambition should be reflected in the design of the UK ETS, this would not have led to MWIs being included within the UK ETS.

91. Moreover, it has also been explained above that a tighter cap would not have been imposed for the initial years of the UK ETS. Even if the Court concludes on Ground 1 that the Paris Agreement's Article 4.1 aim to reach global peaking of GHG emissions as soon as possible had wrongly been left out of account, it can also conclude from the material cited above that it is highly likely that the level of the initial cap would not have been different if the aim had been taken into account.

Conclusion

92. The Claimant's two grounds of challenge are both misconceived. There is no basis for making a declaration that the Defendants' decisions set out in the Response were unlawful. The judicial review should be dismissed.

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31 March 2021