Neutral Citation Number: [2021] EWHC 1633 (Admin)

Case No: CO/3093/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/06/2021

Before :

THE HONOURABLE MR JUSTICE DOVE

- -

Between :

Georgia Elliott-Smith	**Claimant**
- and -	
Secretary of State for Business, Energy and Industrial Strategy	**First Defendant**
- and –	
Department for Agriculture, Environment and Rural Affairs Northern Ireland	**Second Defendant**
- and –	
Scottish Ministers	**Third Defendant**
- and –	
Minister for Environment, Energy and Rural Affairs Welsh Government	**Fourth Defendant**

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David Wolfe QC and **Ben Mitchell** (instructed by **Leigh Day Solicitors**) for the **Claimant**
Richard Honey QC (instructed by **Government Legal Department**) for the **First Defendant**
Andrew Sharland QC (instructed by **Government Legal Department**) **for the Second Defendant**
Tom de la Mare QC (instructed by **Government Legal Department**) and **Stephen Donnelly** (instructed by **Government Legal Department**) for the **Third Defendant**
Mona Bayoumi (instructed by **Welsh Government Legal Services**) for **Fourth Defendant**

Hearing dates: 14th & 15th April 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII
and publication on the Courts and Tribunals Judiciary website.
The date and time for hand-down is deemed to be 10:00 am 27 April 2021.

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Mr Justice Dove:

Introduction

1. This application for judicial review concerns the legality of the defendants' joint decision to create the UK Emissions Trading Scheme (the UK ETS) as a replacement for the UK's participation in the European Union Emissions Trading System (the EU ETS) following the departure of the UK from the European Union. The claim as originally formulated sought declarations in relation to the defendants' decision on the 1st June 2020 to create a form of UK ETS described in a document entitled "The future of UK carbon pricing, UK Government and devolved administrations response" ("the Response"). The particular features of concern to the claimant are described below. At the time when the claim was issued a draft order to give effect to the UK ETS had been published but not made. Subsequent to the issuing of proceedings, on 11th November 2020, the Greenhouse Gas Emissions Trading Scheme Order 2020 ("the 2020 Order") was made. At the hearing it was clarified by the claimant that she does not seek for that order to be quashed, but rather seeks declarations that the scheme which is enacted by it is unlawful for the reasons which are explained below. It is apparent that the 2020 Order will require revision in the future as part of further phases of the UK ETS, and the claimant seeks the declarations to inform those future revisions so as to take account of the concerns which are central to her bringing this action for judicial review.

2. The second and third defendants raise as part of their defence to this claim, albeit at a very late stage, the submission that this court does not have jurisdiction over the decisions which were reached by those defendants to participate in the UK ETS. Prior to the hearing of this matter it was agreed that the sensible course was for me to determine the substance of the claimant's grounds for challenging the decisions in respect of the UK ETS, and for these jurisdictional questions to be litigated in the event that it was concluded that, in principle, the claimant is entitled to relief. As such, apart from furnishing written material, the second and third defendants did not take an active part in the hearing. In any event both the second and third defendants adopted the submissions made by the first defendant in resisting the substance of the claimant's case.

The factual background

3. The essence of a scheme such as the EU ETS or UK ETS is to establish a scheme to encourage the reduction of emissions of greenhouse gases, in particular by those operating activities which give rise to major greenhouse gas emissions. Both the EU ETS and UK ETS operate as what is known as a "cap and trade" scheme. A cap is set on the total amount of certain greenhouse gases that can be emitted by sectors of the economy over a given period of time (usually around 10 years), and that cap is then divided into allowances. Those required to participate in the scheme are then either given allowances or they have to purchase them to cover the emissions which their activities are generating. Failure to surrender sufficient allowances to cover emissions generated results in civil penalties. Over the course of time the cap is reduced so as to impose a limit on emissions which steadily falls and thereby contains the generation of greenhouse gases. Allowances can be traded, thereby effectively putting a price on emissions or, as it is often termed, carbon. Allowances are sold through auctions by the governments administering the scheme, and the purchase of allowances can lead

to both a trade in allowances taking place and also cause hedging of allowances that may be required in future years. The price of allowances has the potential to have a number of significant influences. It can influence the viability of businesses required to participate in the scheme; it can incentivise investment and other activities to reduce the generation of emissions; it can, if too high, lead to carbon leakage whereby energy intensive industries may seek to transfer to countries elsewhere to avoid the extra costs of the scheme. In establishing the scheme, it is the contention of the defendants that it is necessary to establish a liquid and stable market in allowances in order for the objective of reducing emissions over time to be accomplished. The evidence before the court demonstrates that there are numerous emissions trading schemes in operation, with the EU ETS being the largest.

4. The objective of implementing an emissions trading scheme and the need to limit greenhouse gas emissions is directly related to the need to combat climate change. In November 2008 the Climate Change Act 2008 (which is dealt with in greater detail below) came into force, bringing with it a decision-making structure which included the enactment of carbon budgets taking account of the advice of the Committee on Climate Change ("the CCC"), an institution created by the 2008 Act. The setting of legally binding carbon budgets through the 2008 Act is designed to bear down on the emission of greenhouse gases in order for the UK to play its part in combatting climate change.

5. Following advice from the CCC delivered in May 2019 to the first defendant, the UK legislated for a target comprising a net zero increase in greenhouse gas emissions compared to the level of emissions in 1990 to be achieved by 2050. Amongst the other provisions contained within the 2008 Act are powers to establish an emissions trading scheme which are dealt with in detail below.

6. On 12th December 2015 the state parties to the UN Framework Convention on Climate Change adopted the Paris Agreement in relation to climate change. The recitals to the agreement recognise "the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge", along with "the importance of the engagements of all levels of government and various actors… in addressing climate change". The recitals recognised that sustainable lifestyles and sustainable patterns of consumption and production, with developed country parties taking the lead, play an important role in addressing climate change. Articles 2 and 4 of the agreement provided as follows so far as relevant to the issues in this case:

> "Article 2
>
> 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 ℃ above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 ℃ above pre-

> industrial levels, recognising that this would significantly reduce risks and impacts of climate change.
>
> …
>
> Article 4
>
> 1. 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, recognising that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic by sources and removals by sinks of greenhouses gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty."

7. In October 2017 the first defendant published a document entitled "The Clean Growth Strategy". At that time, it was clear that the UK would be leaving the EU and the document noted that the UK's departure would have no impact on the level of commitment to tackling climate change and implementing the provisions of the Paris Agreement. The document also noted the participation of the UK in the EU ETS, and indicated that consideration was being given to future participation in the EU ETS after exit from the EU.

8. On the 2nd May 2019, and with the deadline for the UK leaving the EU no doubt clearly in mind, the defendants wrote to the CCC seeking their advice on the establishment of a UK ETS. This was on the basis of two scenarios: firstly, a standalone UK ETS and, secondly, a UK ETS linked to the EU ETS (subject to satisfactory negotiation of a linking agreement). The letter pointed out (with specific reference to the statutory framework) as follows:

> "Pursuant to Section 41(3)(b) of the CCA, we request that your advice takes into account the following principles that a UK ETS must:
>
> - Be an operational system which facilitates cost effective decarbonisation through trading of allowances;
>
> - Be deliverable for operation from 1 January 2021;
>
> - meet the UK Government's commitment in the Clean Growth Strategy: *"We will seek to ensure our future approach is at least as ambitious as the current scheme and provides a smooth transition for the relevant sectors"* p.44, CGS;

- maintain industrial competitiveness whilst supporting delivery of the UK's and DA's domestic and international climate change commitments and targets – noting that UK, Scottish and Welsh Ministers have also recently jointly sought the CCC's advice on long term emissions reduction targets in light of the Paris Agreement and recent IPCC Special Report;

- meet the UK's commitment to the robust implementation of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA); and

- be capable of being linked to the EU scheme, so that UK and EU tradable allowances are fully fungible, noting that securing a linking agreement is the UK's preferred outcome."

9. The CCC responded in a letter dated 7th August 2019. This response provided as follows:

> "Economic theory characterises carbon pollution as a market failure and an externality that needs to be priced in order to ensure that those responsible bear the costs of polluting. Appropriate pricing incentivises emissions reductions by encouraging investment decisions that reduce the damage that greenhouse gases cause.
>
> However, carbon pricing alone will not provide sufficient decarbonisation – for example the Stern Review also identifies the need for support for innovation and in tackling barriers to behaviour change. Whilst carbon pricing is essential it needs to be used as part of a suite of policy instruments, as confirmed by real-world experience internationally.
>
> …
>
> We agree with the Government's preference for a linked UK-EU ETS in the case of the EU exit. This maintains key benefits of membership of the EU system, most notably access to a wider market and addressing competitiveness within a level playing field across the EU.
>
> We recommend that the cap of the linked UK ETS be set based on the cost-effective path to the UK's new net-zero target. We will provide that trajectory in our advice on the sixth carbon budget (covering 2033-2037), which is due in 2020. Following this advice, the level of the cap should be adjusted as soon as possible to align to the carbon budgets.

- For sectors currently covered by the EU ETS, the UK is decarbonising more quickly than other EU countries, meaning the UK's emissions are lower than its share of the EU ETS cap (the overall limit on allowed emissions during a prescribed period).

- If this remains the case during the 2020s, this risks other EU countries buying UK allowances to continue polluting rather than reducing overall EU emissions. That would provide a net gain to UK Treasury, as the UK sells excess permits to non-UK participants, but reduce the impact of UK actions in tackling climate change as the quantity of emissions assigned to the UK would exceed expected UK emissions.

- A lower cap in the 2020s would avoid this, and be more in line with expected UK emissions over the fourth and fifth carbon budget periods (2023-2027 and 2028-2032)."

10. On 4th March 2020 the defendants again sought the advice of the CCC in respect of a UK ETS, operating as a standalone system and not linked with the EU ETS, but retaining the option of becoming linked to the EU ETS at a later date if that was considered desirable. The advice which was sought, (again pursuant to s41(3)(b) of the 2008 Act and with the same parameters set out above) and the context of the proposed scheme, was described in the letter as follows:

> "We would like to follow up on your offer to provide further advice on a standalone system operational from 1 January 2021, which retains the option of being linked to the EU ETS at a later date if desired. Therefore we are asking for your advice on the key elements of our proposed standalone system, relating to ambition, effectiveness and competitiveness."
>
> 1. We acknowledge your recommendation that the cap of a linked UK ETS be set based on the cost-effective path to the UK's net zero target, which you are providing as part of your advice on the sixth carbon budget (CB) later in 2020. However, in order to implement a UK ETS for January 2021, we will need to lay legislation before receiving this advice. Having analysed a number of scenarios, we intend to set the cap on the total number of allowances at 95% of the UK's expected national share of the EU ETS Phase IV cap. The cap will then be reduced annually, in line with the EU ETS IV trajectory. The rationale for setting the cap at this level is that we believe it provides the right balance between climate ambition and business competitiveness in the early years of a UK ETS by signalling our ambition in cutting carbon emissions, whilst minimising the risk of high and volatile prices which could destabilise a new market which could occur if the cap is tightened beyond 95%. We

will make it clear in the government response to the consultation that this will be the cap for the initial years of the system, and make a commitment to reconsult on the level of the cap in 2021 following receipt of your advice later this year on Carbon Budget 6 and a net zero consistent cap. We will make an announcement on the cap and trajectory for the remainder of the phase following the consultation, and ensure the implementation of any changes provides a reasonable notice period for participants.

2. We acknowledge your advice that the Government should ensure a tighter cap does not lead to carbon leakage. Therefore, we propose keeping the size of the free allocation share and the new entrants reserve the same as expected if the UK remained in Phase IV of the EU ETS. The reduction in the overall cap set out above will be taken from the auction share.

3. To ensure a minimum and consistent carbon price signal in the early years of a standalone link-ready system, we intend to implement an Auction Reserve Price (ARP) of £15. The ARP is intended to be transitional, and will be reviewed in line with any changes to the cap. The ARP will not apply if the system is linked to the EU ETS.

4. To protect UK participants from the risk of sustained high prices in the early years of the system, which could place them at competitive disadvantage compared to EU counterparts, we intend to make the Cost Containment Mechanism (CCM) more responsive by lowering the price trigger threshold and reducing the time period before intervention. In a linked system these adaptations would not apply, and we would instead seek to mirror the EU ETS mechanism (subject to negotiations). We intend to implement a CCM which will be trigged if the carbon price is:

(a) Year one of the system: two times the average carbon price in effect in the UK in the two preceding years, for three consecutive months.

(b) Year two of the system: two and a half times the average carbon price in effect in the UK in the two preceding years, for three consecutive months.

(c) Year three of the system and thereafter: three times the average carbon price in effect in the UK in the two preceding years, for six consecutive months.

5. As stated in our consultation, the scope for a standalone system would remain the same as EU ETS for the first 10

year phase, but we will review how the scope could be increased for subsequent phases.

11. The CCC responded to this letter on 20th March 2020. The essence of the advice which they gave in response to the statutory request is contained in the following extract from the letter:

> "However the interim proposals for the scheme set out in your letter are inconsistent with the UK's Net Zero ambitions in some respects, primarily relating to the relatively high level of allowed emissions under the proposed cap. In a year when the UK needs to be seen as a climate leader, adopting the proposed trading scheme risks sending a damaging signal internationally ahead of UN climate talks in Glasgow in November. It also risks undermining the scheme as a trading system, since if the cap is set too high the floor price in the scheme will set the price and become a de-facto tax.
>
> - Your letter proposes launching the scheme with a cap set at 5% below the UK's notional share of the EU ETS. We do not consider that to be a suitable basis, as the UK will no longer be part of the EU scheme. Rather, the starting point for the cap should be the latest data on actual UK emissions in the traded sector.
>
> - UK traded sector emissions from stationary sources (i.e. power and industry) were around 129 $MtCO_2$ in 2018. Verified emissions in 2019 are likely to be lower than this, given continued reduction in coal-fired electricity generation. 2019 emissions will be published in early April and are likely to be a better basis for informing the cap.
>
> - The cap as currently proposed would begin the scheme in 2021 with considerably higher allowed emissions from stationary sources of 150 $MtCO_2$ (around 17% above the actual emissions in 2018). That implies a large surplus continuing until the point when a revised cap in line with the sixth carbon budget advice comes into force (e.g. 2023). That surplus is likely to trigger the price floor (£15/ tCO_2) and mean the scheme effectively operates as a tax.
>
> - In theory there may be arguments for creating some initial 'headroom' in the scheme by issuing permits above the level of expected emissions in the early years. That would allow participants to buy additional permits beyond their immediate needs in the initial years of the scheme as a hedge against future prices increases, and reduce the risk of high prices resulting

> from the cap being set too tight, which could lead to negative competitiveness effects and 'carbon leakage'.
>
> - However given the world's current economic position and uncertainty around Covid-19, in practice the need for 'headroom' is likely to be limited. Risks are also limited by your proposals to continue free allocation of allowances for at-risk industries and for the Cost Containment Mechanism.
>
> - If the Government chooses to keep the cap as proposed, then a higher Auction Reserve Price will be necessary since this will effectively become the price-setting mechanism and not merely a backstop.
>
> We also note a change in language over linking to the EU ETS, which was originally the Government preference – and with which the Committee agreed. It is now described only as an option at a later date, and if desired. The Committee remains of the view that a UK ETS should link to the EU ETS as soon as is practicable, for the same reasons as expressed in our advice of 8 August 2019, including increased liquidity and the protection around competitiveness of being part of a larger scheme."

12. On the 1st June 2020 the defendants responded to the CCC in a letter contemporaneous with the publication of the results of a consultation exercise which had been undertaken in respect of a UK ETS between May 2019 and 12th July 2019 in the form of the Response. The letter which the defendants wrote to the CCC provided as follows:

> "We share your view that there is a need to ensure the UK ETS cap is in line with a trajectory consistent with the UK's net zero targets and ambitions. We look forward to receiving your full and considered advice on the next Carbon Budgets, which will enable us to review our current approach and work towards meeting our commitments as quickly as possible through a suite of decarbonisation measures, including the cap.
>
> However, it is the joint governments' view that for the launch of the UK ETS, it is important to put in place a policy which provides a pragmatic and feasible approach to meeting net zero through ETS. Our approach, as set out below, provides the necessary flexibility to raise ambition in the near future and supports the traded sector to decarbonise, while appropriately mitigating the risks of carbon leakage.
>
> Ensuring we have a fully functioning UK market from January 2021, which gives industry certainty and continues to deliver

> significant emission reductions in line with current carbon budgets, is key. This task is further complicated by an unprecedented pandemic and associated economic emergencies, whose full, long term impact on traded emissions cannot by assessed by present, making it difficult to accurately adjust the cap or set an auction price reserve (APR) in advance.
>
> As such we are proposing a two-stage approach. The first stage is intended to be purely temporary in nature. We will continue to demonstrate clear climate ambition by cutting the cap by 5% compared to the notional cap the UK would have had if we remained in the EU ETS. Our analysis suggests that this starting point, combined with a transitional ARP of £15 and temporary market stability mechanisms, would also minimise the risks associated with transition from the EU ETS. This provides a balance between a tightening of the cap on emissions and stability and competitiveness for business.
>
> Our administrations are strongly committed to ensuring UK emissions reduction is consistent with our different net zero commitments, including the different pace of our interim targets. Once we have your published advice on the Sixth Carbon Budget, we will consider this again immediately. Our response therefore commits us to a second stage, during which we will swiftly consult on an appropriate net zero consistent trajectory for the cap for Phase 1 of the UK ETS within nine months of your advice being published. We will commit to implementing any changes by January 2023 if possible, and certainly no later than January 2024.
>
> Reducing carbon emissions and enhancing the environment are major priorities for the UK Government and Devolved Administrations and we intend to continue to lead the global carbon markets. All administrations demonstrate global leadership in tackling climate change: the UK government as president of COP 26 climate negotiations and the Welsh and Scottish Governments through states and regions initiatives, such as the Under2Coalition."

13. Within the Executive Summary of the Response document the defendants set out the purpose of the design of the UK ETS that they were seeking to establish in the following terms:

> "2. We intend to establish a UK Emissions Trading System with Phase 1 running from 2021-2030, which could operate as either a linked or standalone system. As stated in 'The UK's Approach to Negotiations' the UK would be open to considering a link between any future UK Emissions Trading Scheme ETS and the EU ETS (as Switzerland has done with its ETS), if it suited both sides interests. As announced at Budget 2020, the UK Government will publish a consultation later this

year on the design of a Carbon Emission Tax as an alternative to a UK ETS, to ensure a carbon price remains in place in all scenarios.

3. The UK ETS will apply to energy intensive industries (Ells), the power generation sector and aviation – covering activities involving combustion of fuels in installations with a zero rated thermal input exceeding 20 MW (except in installations for the incineration of hazardous or municipal waste) and sectors like refining, heavy industry and manufacturing. The proposed aviation routes include UK domestic flights, flights between the UK and Gibraltar, flights from the UK to EEA, and flights from the UK to Switzerland once an agreement is reached.

4. In light of the UK's commitment to reaching net zero emissions by 2050, the UK ETS will show greater climate ambition from the start. As such, the cap will initially be set 5% below the UK's notional share of the EU ETS cap for Phase IV of the EU ETS. The Committee on Climate Change (CCC) will advise later this year on a cost-effective pathway to net-zero, as part of their advice on the Sixth Carbon Budget. We will consult again on what an appropriate trajectory for the UK ETS cap is for the remainder of the first phase within nine months of this advice being published. Our aim is that any changes to the policy to appropriately align the cap with a net zero trajectory will be implemented by 2023 if possible and no later than January 2024, although we would also aim to give the industry at least one year's notice to provide the market with appropriate forewarning.

5. Auctioning will continue to be the primary means of introducing allowances into the market. To safeguard competitiveness in the UK ETS and reduce the risk of carbon leakage, a proportion of allowances will be allocated for free. Some free allowances will also be made available for new stationary entrants to the UK ETS as well as existing operators who increase their activity – these allowances will be accessible through the New Entrants Reserve. Our initial UK ETS free allocation approach will be similar to that of Phase IV in order to ensure a smooth transition for participants for the 2021 launch.

6. However, we recognise the range of views expressed in response to the consultation and the crucial need to take a fair, proportionate and considered approach to potential improvements to free allocation and we will begin a full review of possible future changes in the coming months.

7. In a standalone UK ETS we will introduce a transitional Auction Reserve Price (ARP) of £15 (nominal) to ensure a minimum level of ambition and price continuity during the

> initial years of UK ETS. To address concerns around the reactiveness of the UK ETS in managing high price spikes, in years one and two of a UK ETS the Cost Containment Mechanism (CCM) will have lower price and time triggers, providing a mechanism by which the UK Government can decide whether to intervene sooner should very high prices occur. We will revert to the EU ETS CCM design in year three of a UK ETS, or sooner if we link with the EU ETS. We will consult separately on the design of a Supply Adjustment Mechanism (SAM) in a standalone UK ETS if required.
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> …
>
> 11. The UK ETS will play an important role in cross-government efforts to deliver the net zero target as part of a coherent policy package alongside £2 billion to support decarbonisation in a range of sectors, and the £315m Industrial Energy Transformation Fund to support industry to invest in energy efficiency and decarbonisation technology."

14. Within the introduction to the Response the following appears by way of explanation in respect of the approach which has been taken:

> "14. Having left the EU, the UK will remain at the forefront of domestic and international action on climate change by committing to go further and faster in our efforts to deliver clean energy and a net zero future.
>
> 15. The UK Government are expecting advice from the Committee on Climate Change (CCC) on Sixth Carbon Budget (emissions for 2033-2037). This will include advice on the cap for the UK Emissions Trading System (UK ETS) in a net zero context, which will go to both UK Government and DAs. This advice will give the evidence on what is cost-effective and inform the evolution of the UK ETS after its launch.
>
> 16. The UK Government and the DAs are committed to carbon pricing as an effective emissions reduction tool. Placing a price on carbon creates the incentive for emissions to be reduced in a cost-effective way, while mobilising the private sector to invest in emissions reduction technologies and measures.
>
> …
>
> 24. The UK ETS will cover a significant proportion of emissions within scope of our carbon budgets (between 2013 and 2020 the EU ETS has covered around a third of UK emissions) and will play an important role in cross-government efforts to deliver the net zero target as part of a policy package

which includes £2 billion to support decarbonisation in a range of sectors, and the £315 million Industrial Energy Transformation Fund to support industry to invest in energy efficiency and decarbonisation technologies.

25. The overall cap for the UK ETS will determine the limit on total emissions allowances. Our UK ETS cap is set to signal our long-term climate commitments while ensuring our economy remains competitive.

26. The UK Government and DAs are committed to clean growth. The global shift to a low carbon economy is one of the greatest industrial opportunities of our time, and climate leadership can drive UK competitiveness while securing long term prosperity.

27. We are however aware that UK industry competes in a global market, and operators exposed to international competition may be put at a competitive disadvantage compared to their counterparts in other countries without similar carbon costs. There is a risk that this disadvantage could lead to businesses relocating their production, investment and associated emissions abroad – a concept known as carbon leakage.

…

32. The Future of UK Carbon Pricing consultation ran prior to the ongoing COVID-19 emergency. We appreciate that some businesses are facing financial difficulties as a result of COVID-19, and we will be working closely across Government and the DAs to respond to difficulties faced by operators. The UK Government has set out a package of temporary, timely and targeted measures to support businesses through this period of disruption caused by COVID-19. A dedicated website helps businesses to find the right support, advice and information to help with the impact of COVID-19.

33. Business support is also offered by DAs, with dedicated websites outlining support in Scotland, Wales and Northern Ireland

34. We are also mindful of the continuing need to maintain climate ambition, and will continue to put measures in place that enable us to achieve net zero emissions by 2050, whilst balancing this with the need to maintain UK business competitiveness."

15. Questions were contained within the consultation exercise related to the proposed scope of the UK ETS, and in particular the sectors and activities which would be included within it. One of the issues raised in the consultation process was the question of whether or not municipal waste incinerators should be included within the scheme The Response deals with that issue at paragraph 52 as follows:

> "52. We acknowledge respondents' comments regarding expanding the scope of the scheme to include municipal waste incinerators. The complex environmental requirements placed on municipal waste incinerators, as well as their role in diverting waste from landfill, make it difficult to include them in a UK ETS. We also acknowledge the CCC's advice to expand the scope to include agriculture and land use. While we agree emissions from these sectors will need to be abated to meet our net zero target, there may be more appropriate measures than the UK ETS for doing so. This will be for the appropriate government departments to consider following the CCC's advice on the Sixth Carbon Budget and a net zero trajectory, however municipal incinerators will not be included within the scope of the UK ETS for the period 2021-2015."

16. A further consideration which featured in the consultation exercise was the role of costs to business alongside climate ambition in the decisions related to setting the cap and the trajectory for emissions reduction. The Response records that a company in the power sector was "suggesting that alignment to the Paris Agreement future recommendations from the Intergovernmental Planning Climate Change (IPCC) and CCC should be considered". The document addressed the responses in relation to costs to business and climate ambition in the following terms:

> "58. The UK and Devolved Administrations firmly believe that the key considerations in setting the level of the cap are climate ambition balanced with the costs to business. We welcome the support for this approach from the majority of our stakeholders.
>
> 59. The UK is committed by law to reducing emissions to net zero by 2050, and the UK ETS will play a key role in decarbonising the power sector, EIIs and aviation. However, it is important that in meeting this commitment the UK Government considers the traded sectors competitiveness, and other pressures that businesses currently face as a result of our departure from the EU. In addition, the UK ETS will be a new emissions market, whereby any uncertainties around how the market will respond will need to be considered when setting the cap.
>
> 60. To balance these objectives, the cap for a UK ETS will initially be set at 5% below the UKs expected notional share of the EU ETS cap for Phase IV of the EU ETS. Based on the proposed design scope, this equates to around 156 million allowances in 2021. These cap figures include our proposed aviation scope.

> 61. We note the CCC's advice from 20 March 2020 on further tightening of our proposed cap for day 1 of the UK ETS, and have considered this advice carefully, particularly in the context of the uncertainties and risks posed by COVID-19. We also note the CCC's recommendation that the cap for a standalone or linked UK ETS should be set in line with the cost-effective pathway to net zero emissions in 2050. They will be providing more detail on this when they advise on the Sixth Carbon Budget, which is expected in December 2020. It was recommended that the cap should be adjusted to align with this trajectory as soon as possible following receipt of further advice.
>
> 62. We intend to consult again on what an appropriate trajectory for the UK ETS cap is for the remainder of the first phase within nine months of this advice being published. Our aim is that any changes to the policy to appropriately align the cap with a net zero trajectory will be implemented by January 2023 if possible and no later than January 2023, although we would also aim to give the industry at least one year's notice to provide the market with appropriate forewarning.
>
> 63. In the interim, particularly given the current uncertainties, we believe it is appropriate to maintain sufficient headroom of allowances for a time-limited period at the start of the UK ETS. We therefore believe that initially tightening the cap by 5% provides the appropriate balance between the UK's climate ambition in the context of the UK's net zero commitment and any risk of disproportionate costs to businesses which could arise in the early years of a UK ETS. The initial cap will be reduced annually by 4.2 million allowances, meaning that the UK ETS cap will remain 5% below where we would have expected the UK's notional share of the Phase IV EU ETS cap to be year on year."

17. The consultation had included a question relating to whether or not there should be a transitional Auction Reserve Price (ARP). The conclusions which the defendants had reached in the light of the responses from consultees were set out as follows:

> "135. In order to ensure a minimum level of ambition in a standalone UK ETS and to minimise the potential for a significant fall in the UK carbon price in a transition to a standalone UK ETS, we plan to introduce a transitional ARP of £15. This will reduce the severity or possibility of a large difference between the EU ETS price and the price in a standalone UK ETS.
>
> 136. We are tightening the cap compared to the UK's expected notional share of the EU ETS cap for Phase IV. There remains

> a risk that prices in a standalone UK ETS could be very low in the early years. Low prices will undermine our climate ambition, confidence in the market and remove the investment signal necessary to drive innovation in low carbon technologies. A £15 ARP will mitigate against these risks and maintain a level of climate ambition until we are able to reassess the level of the cap in terms of our net zero commitment, following further advice from the CCC.
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> 137. As set out in the consultation, the ARP will be to facilitate the transition from a EU ETS to a standalone UK ETS, and we will review it alongside a subsequent consultation on the cap (as set out in the cap section above). This may take place outside the whole-system reviews mentioned in the Phases and Reviews section. We will aim to coordinate this review with other targeted reviews.
>
> 138. Stakeholders expressed concerns around competitiveness should the EU ETS price fall below the level of the ARP. While this risk is likely to be somewhat increased due to the effects of COVID-19, we believe that an ARP of £15 strikes the appropriate balance between climate ambition and business competitiveness. This price will be kept under review however given the full implications of COVID-19 are, as yet, uncertain. Free allocation of allowances also exists to protect those most exposed to the risk of a negative price disparity between UK and EU allowance prices."

18. A question was also presented to consultees in relation to the phasing periods proposed within the UK ETS, and in response the defendants indicated that they had decided to implement two whole system reviews of the UK ETS, firstly from 2023 to assess performance during the first half of the phase from 2021 – 2025 and, secondly, from 2028 to assess performance across the whole of Phase 1 of the UK ETS from 2021 – 2030 enabling any update to inform Phase 2 from 2031. The Response noted that the reviews proposed were "exactly in line with the EU ETS Phase IV reviews and Paris Agreement Global Stock take" dates. It was noted that aligning the review points with the Global Stock take dates would ensure that the UK ETS remained "aligned with our global ambitions on carbon".

19. The Response document was accompanied by an Impact Assessment. At the start of the document a summary pro forma was presented addressing an overview of the contents of the Impact Assessment. At the outset this identified the policy objectives and intended effects of the implementation of the UK ETS design which the defendants had arrived at. That noted that the objective of the policy was "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". Part and parcel of this was to be at least as ambitious as the current EU ETS and to provide a smooth transition from that scheme into the new scheme.

20. The summary set out that the policy option which was under consideration related to the initial years of operation of the UK ETS, from 2021 to 2024, and was intended

both to operate as a standalone system and also as a platform from which to negotiate a linked system with the EU ETS if that was in the best interests of both parties. The summary sheet posed the question as to what was "the CO_2 equivalent change in greenhouse gas emissions?" and the answer was identified as -2 to -3 million tonnes (see below). It went on to establish that the UK ETS design which had been modelled was expected to deliver greater greenhouse gas emission reductions than the counterfactual which had been evaluated, namely the EU ETS.

21. The accompanying impact assessment set out in detail the key features which had been included within the policy analysis and the consideration and evaluation of its impact. For the purposes of the present proceedings one of the features relied upon by the claimant was the design of the cap about which the impact assessment provided as follows:

> "20. A key feature of the UK ETS design is the cap which sets the maximum level of emissions allowed in the system and therefore the supply of allowances. Relative to 'business as usual' (BAU emissions), this determines the level of abatement effort required under the policy.
>
> 21. As set out in the introduction section of this IA and government response, we are fully committed to achieving the UK's net zero targets and recognise the contribution that can be made by the UK ETS policy. As set out in the government response we acknowledge the CCC's recommendation to set the UK ETS cap in line with their cost-effective pathway to net zero, which they will provide further detail on as part of their Sixth Carbon Budget advice at the end of this year. We will subsequently consult again on what an appropriate trajectory for the UK ETS should be in light of this advice and aim to implement any amendments by January 2023 and no later than January 2024, while aiming to give participants at least one year's notice of changes.
>
> 22. In the meantime the UK ETS will be initially set at 5% below the UK's expected notional share of the EU wide cap in Phase IV of EU ETS (hereafter referred to as the 'notional minus 5%' cap).
>
> 23. In 2021 the notional minus 5% cap level equates to around 156 $MtCO_2e$ (based on the assumed scope of the policy set out earlier in the year). This is higher than our BAU emissions projections in that year (ranging from around 126 to 131 $MtCO_2e$). However there is significant uncertainty over these projections and market participant behaviour in this initial period could lead to significant demand for allowances above BAU emissions. This in turn means there is uncertainty over the level of demand for allowances in these years relative to supply, and therefore risk of extreme high or low prices.

> 24. Given these uncertainties we therefore believe it is appropriate to maintain sufficient headroom of allowances for a time-limited period at the start of the new system. However we believe that initially tightening the cap by 5% provides an appropriate balance between climate ambition in the context of the UK's net zero commitment and business competitiveness, which may be at risk due to early years' market behaviour (see 'behavioural section' below). This cap level alongside other temporary measures (see 'market stability mechanisms' section) seeks to provide appropriate mitigation of extreme high or low price risks, in the initial years of the UK ETS market.
>
> 25. As in the EU ETS, this cap level will be reduced annually to drive emissions reductions over time. In this IA we assume an annual linear reduction of around 4 $MtCO_2e$, based on the policy set out in the government response. Within the overall cap, all allowances are interchangeable between participating sectors, including stationary installations and aircraft operators."

22. The impact assessment went on to consider market stability measures and included within the assessment it was noted that the defendants intended to introduce an ARP of £15/tCO_2e. The approach to modelling assumed an ARP consistent with that level.

23. The impact assessment described in detail the economic modelling work which had been undertaken in order to establish the impact of the scheme design upon greenhouse gas reductions. Behavioural assumptions including the foresight of the market in relation to its performance and the practice of buying allowances in advance, or hedging, were built into the modelled scenarios. The results of the modelling are described in the following passages from the impact assessment:

> "56. The following tables summarise the average modelled carbon values and total abatement in the initial years of the UK ETS (from January 2021 to December 2024) relative to the counterfactual over the same period. Note: this abatement represents abatement <u>in addition to</u> abatement delivered by other UK policies in the BAU scenarios.
>
> …
>
> Table 5 estimated total level of abatement in the UK ETS and counterfactual scenarios, $MtCO_2e$ (from 2021 to 2024 inclusive)

Counterfactual			UK ETS
	Low	High	Low
Total abatement	1	9	4

$MtCO_2e$			
Difference from counterfactual			+3

…

UK ETS Results

61. In this scenario we estimate an average annual carbon value ranging from £15 to £32/tCO_2e per year from 2021 to 2024, based on the UK ETS design assumptions set out earlier in this IA.

62. At the low end of the range BAU emissions in the UK are lower than the notional minus 5% cap over the entire period modelled. This suggests there is an over-supply of allowances relative to demand. In the absence of any market stability measures, our model would suggest equilibrium carbon values of £0/tCO_2e (as no additional abatement effort would be required to achieve the cap) – even when our hedging and foresight assumptions are taken into account. The main driver of the carbon values at this end of the range in this IA is therefore the introduction of the ARP, which in our model reduces the supply of allowances to the point at which the £15/ tCO_2e reserve price is achieved. At this value, we estimate that it would be cost-effective for UK participants to deliver around 4 $MtCO_2e$ in total from 2021 to 2024.

63. At the high end of our range our projected BAU emissions in the UK are higher than at the low end of the range, but still lower than the notional minus 5% cap over the initial period. However, these higher BAU emissions in combination with our hedging behaviour assumptions (described earlier) drive the demand for allowances higher relative to the cap. As a result, additional abatement effort is required to meet the cap level, resulting in higher average annual carbon values (of around £32/tCO_2e) compared to the low end of the range. At this value, we estimate that it would be cost-effective for UK participants to deliver around 11 $MtCO_2e$ in total from 2021 to 2024.

64. Our modelling therefore suggests that a UK ETS – based on the design set out in the government response, combined with it being in its initial years of operation and a relatively smaller carbon market – could lead to higher carbon values compared to if the UK remained in Phase IV of the EU ETS. This in turn suggests UK installations/operators within scope of the policy

> could be incentivized to deliver more abatement compared to the counterfactual."

24. The impact assessment observed that the "key aim and benefit of the policy is the reduction of GHG emissions", and that the analysis which was presented showed more abatement being achieved under the UK ETS scheme compared to the counterfactual, namely the EU ETS. All of this material was placed into the public domain at the time that the defendants reached the decisions in relation to the appropriate design of the UK ETS.

25. As part of the disclosure process in these proceedings documentation has been disclosed from the defendants addressing the briefing of ministers in each of the administrations, and the process of decision making preparatory to the publication of the Response and the impact assessment on the 1st June 2020. Starting with the first defendant there is a ministerial submission dated 22nd April 2020 related to seeking clearance of the Response document. Within it the minister was reminded of the letter which had been written by the defendants to the CCC on 4th March 2020 within which the ARP of £15 had been identified "to ensure a minimum level of ambition and price continuity during the initial years of the UK ETS". The document went on to record the substance of the CCC's formal response to the request for advice dated 20th March 2020 (a full copy of the letter was annexed to the submission). The advice provided to the minster was set out in the following terms:

> "12. On substance, we agree with the CCC's advice but judge that it is better to implement changes to the cap to a different timescale; we will seek to implement a Net Zero consistent cap as soon as possible after the start of the UK ETS. This is appropriate given the need for a smooth transition for industry, and furthermore, given the full implications of COVID-19 are as yet uncertain. While there may be some benefits in tightening the cap or increasing the ARP in the initial years of the UK ETS, these are far outweighed by the significant risks that this could pose to the functionality of this new UK market. At the same time, there is little evidence to support the CCC's assumption that a large headroom of allowances would lead to low carbon values. A more detailed policy analysis and response to the points made by the CCC can be found in Annex C.
>
> 13. We therefore recommend to not change the previously cleared policy on the cap and ARP for the start of the UK ETS, while signalling in the Government Response our commitment to the net zero ambition for the longer term. We consider that our initial for the start of the UK market remains more appropriate in light of Covid than what has been suggested by the CCC; although a case may now be emerging for lowering the ARP and we therefore recommend to keep it under review. This is important given the uncertain economic outlook currently presented by the COVID-19 crisis and the CCC are

yet to provide their thinking on COVID-19 (expected May 2020) and their formal advice on CB6 (expected December 2020).

14. This recommendation is supported by our extensive analysis on hedging and other types of expected market behaviours. The analysis findings indicate that a tighter cap could result in unacceptably high prices in the early 2020s, depending on participants' behaviour, and jeopardise our objectives of delivering a smooth transition for participants while safeguarding the competitiveness of our industry. Further detail is provided in Annex C. This will be kept under review, however, given the full implications of COVID-19 remain uncertain.

15. At the same time, we agree that concerns raised by the CCC could risk our climate ambition in the long term and intend to promptly set out an enduring approach following their advice on the Sixth Carbon Budget (CB6), expected December 2020. To show that we recognise the CCC's concerns, we recommend reinforcing our longer-term commitments on the cap in the government response. Therefore our proposal in response to the latest CCC advice on a standalone UK ETS consists of:

i. Retaining the previously agreed cap and ARP in the initial years of the UK ETS.

ii. Considering the CCC's advice on a net zero-compliant cap and consulting on the appropriate trajectory for the UK ETS cap within nine months of the CCC advice being published.

iii. Aiming to implement any changes to the trajectory of the cap by January 2023 and no later than January 2024, while aiming to give participants at least one year's notice of changes.

iv. Recognising the CCC's advice to expand the scope of the traded sector for a standalone UK ETS, we recommend to commit to considering this part of the first ETS review to enable implementation of any changes in 2026.

v. Consulting on how to appropriately address any long-term surplus of allowances that build up in the UK ETS allowance reserve, as part of the other planned reviews during Phase 1 of the UK ETS."

26. Within the material furnished to the minster at Annex D was a policy analysis in relation to the recommendations with respect to the cap and the market stability mechanisms within the design of the scheme. This analysis noted that the CCC in

their response "has not presented any analysis or brought forward any arguments that bring this original policy and analytical assessment into question" in relation to the cap and ARP presented to them. The document notes in relation to decarbonisation that a policy objective is "increased ambition consistent with UK and DA carbon budget and net zero commitments". The recommendation in relation to the cap (-5% on the UK share of the EU ETS cap) is recommended on the basis that it "takes a step towards our net zero ambition whilst minimising the risk of high prices and associated competitiveness concerns". In the cap options analysis section of the paper, the claimant draws attention to the fact that it states "little/no abatement is needed to meet the notional or notional -5% caps across our range of demand scenarios". Further analysis is provided adopting ARP levels of £5, £15 and £25 leading to the adoption of a recommendation of an ARP of £15 on the basis that it is high enough to provide a smooth transition from the EU price and provide a signal for investment, but not so high as to pose a competitiveness risk should the EU price fall, nor would it preclude "price discovery".

27. On 28th April 2020 a further note was provided for the first defendant analysing the UK ETS cap and ARP in response to the CCC's advice on 20th March. The recommendation remained that the cap should be fixed at -5% of the UK's proportion of the EU ETS coupled with an ARP of £15, that being consistent with timely implementation of a net zero consistent cap once the CCC provided the advice which was expected on that topic in December 2020. The paper observed that this recommendation was appropriate in that "it is better to set a temporary cap with clear climate ambition (-5%) but to manage other set up risks, and then implement changes to the cap to a different time scale" rather than adopting other options. This would ensure a healthy headroom of allowances necessary when moving to a standalone UK ETS scheme so as to provide smooth transition for businesses from the EU ETS scheme "with the -5% acting as a down payment on our future, more ambitious, net zero consistent cap". The option preferred would provide acceptable price risks in respect of a new and uncertain UK ETS carbon market "whilst still demonstrating climate ambition". The paper analysed, in the light of the CCC's advice, tightening the cap further to -6.5% and -10%. It set out significant adverse consequences in both cases, and noted that there would only be a smaller decarbonisation benefit compared to the recommendation even if the cap were tightened to -10%. The paper concluded that tighter cap options led to the risk of zero or low values for carbon remaining, but also brought substantially increased risk of significantly higher values relative to EU ETS carbon prices.

28. It appears that the first defendant accepted the recommendations made to him with respect to the design of the UK ETS, and this is recorded in an email dated 30th April 2020. On the same date there was a conference call between all four defendants at which they concluded agreement in principle to the Response's text subject to a final agreement following consultation with other government departments. That consultation was undertaken by way of a memo dated 15th May 2020 which reiterated the nature of the proposal. On the 18th May 2020 the first defendant wrote to the Prime Minister seeking clearance for the UK ETS scheme and again explaining the nature of the proposal. Following this approval process the Response was issued along with the response to the CCC on 1st June 2020.

29. Disclosure has also been provided by the second, third and fourth defendants. Commencing with the second defendant, a Final Executive Paper was presented by the second defendant to his colleagues on the executive setting out the nature of the UK ETS and identify its intention as being "at least as ambitious as EU ETS". The aim of the UK ETS cap is identified as having been set to meet long-term climate commitments whilst ensuring economic competitiveness for UK companies. The danger of carbon leakage is noted. The observations of the CCC in the advice which was sought from them and obtained on 20th March 2020 is noted, and the response to those concerns is addressed in similar terms to those set out in the first defendants' documentation. A copy of the Response and the Impact Assessment in draft form also appear to have accompanied this paper. The paper recommended that the Executive adopt the proposals which were set out. Specific material in relation to the impact on Northern Ireland was provided.

30. The third defendant has disclosed a briefing document provided in order to prepare for the conference call on 30th April 2020. The paper sets out the development of the UK ETS and the response received to the request for advice from the CCC provided on 20th March 2020. The nature of the response to the CCC is identified including the rationale for the approach taken to the cap and the ARP. The briefing note provides points that it was suggested might be taken up during the course of the meeting.

31. The fourth defendant has disclosed briefing material provided in relation to the UK ETS in the early part of 2020. In particular a paper providing ministerial advice dated 27th April 2020, has been disclosed containing a recommendation to agree the key policy decisions required for the setting up of the UK ETS whilst recognising the CCC's concerns. It was recommended to the minister that the CCC be written to with a commitment to consult on future required changes once the CCC's advice on net zero emissions had been obtained and, further, agreement was sought in relation to the content of the Response. The reasons for this approach were set out in the document and reflected those in the material which has been set out above. A further ministerial advice paper was provided dated 28th May 2020 which addressed the arrangements necessary for the publication of the Response and the correspondence with the CCC. A written statement from the minister pursuant to this was published on 1st June 2020 which provided as follows:

> "Today, I jointly published the Government response to the consultation on the future of UK carbon pricing alongside Ministers of the other UK nations. We intend to establish a UK Emissions Trading System (UK ETS) with Phase 1 running from 2021 – 2030, which could operate either as a linked or a standalone system. The scheme delivers on our environmental ambition while managing costs to businesses and leading the development of global carbon markets.
>
> …
>
> Our policies in Wales will deliver our statutory targets and contribute fully to the net zero UK emissions by 2050. As such, the cap will initially be set 5% below the UK's notional share of the EU Trading Scheme (EU ETS) cap for Phase IV which starts in 2021. However, we will review this level following

> receipt of advice from the Committee on Climate Change regarding our carbon budgets and future emissions reduction pathway."

The Grounds

32. The claimant brings the application for judicial review on two grounds. The claimant's ground 1 is the contention that in approving the UK ETS with the cap and ARP proposed the defendants failed to have regard to a material consideration, namely the imperatives of the Paris Agreement. The claimant contends that the Paris Agreement requires, by virtue of articles 2 and 4, that alongside limiting global temperature increases to 1.5℃ above pre-industrial levels the participating states should reach global peak emissions and start to reduce them as soon as possible. Thus, it is contended that the Paris Agreement includes as an important component of its provisions a requirement to take urgent action, and that in the present case the defendant focused simply upon the longer term and achieving net zero, not the need for short term urgency in limiting greenhouse gas emissions. It is submitted for the further reasons set out below that the Paris Agreement was a mandatory material consideration to be taken into account by the defendants, and the claimant points to the fact that neither articles 2 nor 4 are specifically referenced in the Response. The claimant furthermore relies upon the fact that whilst extensive reference is made by the defendants to what was known by civil servants, the key question in relation to the legality of the decision is what was known to the ministers themselves in reaching their decisions. In this connection the claimant contends that it is not possible to draw any inference that the ministers were aware and took account in the decision of the requirement for urgency required by the provisions of the Paris Agreement. There was, therefore, in the claimant's submission a clear illegality in the decision reached in that a material consideration was left out of account by the decision makers.

33. Ground 2 is the contention that the UK ETS which has now been established does not fulfil or serve the statutory purpose for establishing such schemes under section 44 of the 2008 Act (see below). The level at which the cap was set and the ARP decided upon was, for instance, above the anticipated emissions under business as usual, and therefore would not be effective in order to achieve abatement of greenhouse gas emissions. The claimant draws attention to the observations of the CCC as supporting the contention that as designed the scheme will not be effective or fulfil its statutory purpose, and therefore as a consequence the scheme itself is unlawful. The claimant submits that the documentation shows that considerations such as the impact on businesses were taken into account in designing the scheme before it had been established that the scheme fulfilled or was justified by the statutory purpose.

34. The claimant contends that there is no substance in the suggestion that if the illegality had not occurred it would be highly likely that the decision which the defendants reached would be the same. As an example the claimant draws attention to her particular concerns with the exclusion of municipal waste incinerators from the scheme. Had the decision been properly directed in accordance with the concerns raised in her grounds the claimant contends that municipal waste incinerators could

well have been incorporated within the scope of the scheme. Furthermore, the claimant contends that re-evaluation would lead to a different cap and ARP being imposed.

The Law

35. Section 1 (1) of the 2008 Act provides that it is the duty of the first defendant "to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline". Under section 4 of the 2008 Act a further duty is provided for the first defendant to set carbon budgets in 5 year periods and to ensure that the net UK carbon account for each budgetary period is not exceeded. Subsidiary sections set out further details in relation to the setting of carbon budgets. For the purposes of the present case it is important to set out the detail of the sections pertaining to the establishment of trading schemes and the role of the CCC in that process. In particular, sections 44 and 48 of the 2008 Act provide as follows:

> "44 Trading Schemes
>
> 1. The relevant national authority may make provision by regulations for trading schemes relating to greenhouse gas
>
> 2. A "trading scheme" is a scheme that operates by -
>
> (a) limiting or encouraging the limitation of activities that consist of the emission of greenhouse gas or that cause or contribute, directly or indirectly, to such emissions, or
>
> (b) encouraging activities that consist of, or that cause or contribute, directly or indirectly, to reductions in greenhouse gas emissions or the removal of greenhouse gas from the atmosphere.
>
> …
>
> 48 Procedure for making regulations
>
> 1. Before making regulations under this Part, a national authority must;
>
> (a) obtain, and take into account, the advice of the Committee on Climate Change, and
>
> (b) consult such persons likely to be affected by the regulations as the authority considers appropriate.
>
> 2. In particular, before making regulations under this Part that set a limit on the total amount of activities to which a

> trading scheme applies for a trading period or periods, a national authority must obtain, and take into account, the advice of Committee on Climate Change on the amount of that limit."

36. In Wales section 29 (1) of the Environment (Wales) Act 2016 similarly sets a requirement upon the fourth defendant to ensure that the net Welsh emissions account for the year 2050 is a least 100% lower than 1990. The provisions of this Act are related to the well-being goals set out in section 4 of the Wellbeing of Future Generations (Wales) Act 2015. Furthermore in the Climate Change (Interim Emissions Targets) (Wales) Regulations 2018, regulation 2 sets out interim emissions targets for 2020, 2030 and 2040 so as to enable the net zero target to be achieved.

37. Mr Wolfe's submissions on behalf of the claimant in relation to ground 1 commence with the contention that the Paris Agreement was a material consideration to which the defendants needed to have regard in reaching their decision. In this respect he placed reliance upon the decision of the Supreme Court in *R (on the application of Friends of the Earth limited & others) v Heathrow Airport Limited* [2020] UKSC 52, a challenge under the provisions of the Planning Act 2008 to the decision to designate a national policy statement in respect of airports, including the proposal to provide for a further north western runway at Heathrow as part of the policy framework. Before the Supreme Court four grounds of challenge were advanced, including the contention that the defendant failed to have regard, or adequate regard, to the Paris Agreement when reaching the decision to designate the national policy statement. In paragraph 116 of the judgment of Lord Hodge and Lord Sales (with whom the other members of the court agreed) the judgment of Simon Brown LJ in *R v Somerset County Council ex p Fewings* [1995] 1 WLR 1037 at page 1049 was cited as follows:

> "The basic legal approach is agreed. A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:
>
> "…The judge speaks of a decision maker who fails to take account of all and only those consideration materials to his task. It is important to bear in mind, however, that there are in fact three categories of consideration. First, those clearly (whether expressly or implied) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Thirdly, those to which the decision-maker may decide just what considerations should play a part in his reasoning process.""

38. The judgment of Lord Hodge and Lord Sales went on to reflect that this statement of the law had been endorsed subsequently in decisions of the House of Lords and the Supreme Court. At paragraph 122 of the judgment the following is recorded:

> "122. The Divisional Court (para 648) and the Court of Appeal (para 237) held that the Paris Agreement fell within the third category identified in *Fewings.* In so far as it is an international

> treaty which has not been incorporated into domestic law, this is correct. In fact, however, as we explain, the UK's obligations under the Paris Agreement are given effect in domestic law, in that the existing carbon target under section 1 of the CCA 2008 and the carbon budgets under section 4 of that Act already meet (and, indeed, go beyond) the UK's obligations under the Paris Agreement to adhere to the NDCs notified on its behalf under that Agreement. The duties under the CCA 2008 clearly were taken into account when the Secretary of State decided to issue the ANPS."

39. The Supreme Court went on to conclude that on the particular facts of that case the defendant had asked the question as to whether or not the Paris Agreement should be taken into account beyond the extent to which it was reflected in the provisions of the 2008 Act, and determined that it would not be appropriate to do so and, further, that this judgment was plainly rational in the circumstances. Mr Wolfe submits on this basis that in the present case the provisions of the Paris Agreement were plainly a mandatory material consideration which needed to be taken into account.

40. Mr Wolfe makes the further submission that what he characterises as the urgency requirement of the Paris Agreement is part and parcel of this material consideration, and that the defendant failed to understand and take account of the urgency requirement in setting the cap and ARP in the present case. He submits that a proper construction of articles 2 and 4 of the Paris Agreement require the tackling of greenhouse gas emissions "as soon as possible" so as to "undertake rapid reductions" (see in particular article 4.1), and that this imperative of the Paris Agreement is not properly reflected in the design of the UK ETS which has been approved.

41. Mr Richard Honey QC on behalf of the first defendant observes that this submission raises the question of the role of the court in construing an obligation created in an unincorporated international treaty's provisions. In *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756 Lord Bingham observed at paragraph 44 of his speech that it was "at least questionable" as to whether or not the court would embark upon resolving a dispute on the meaning of an unincorporated provision from an international treaty on which there was no judicial authority, since it would be "unfortunate if decision-makers were to be deterred from seeking to give effect to what they understand to be the international obligations of the United Kingdom by fear that their decisions might be held to be vitiated by an incorrect understanding". In his speech Lord Brown stated as follows in paragraph 65:

> "65. Although, as I have acknowledged, there are occasions when the court will decide questions as to the state's obligations under unincorporated international law, this, for obvious reasons, is generally undesirable. Particularly this is so where, as here, the contracting parties to the Convention have chosen not to provide for the resolution of the disputed questions of constructions by an international court but rather (by article 12) to create a Working Group through whose continuing processes it is hoped a consensus view will emerge. Really this is no more than to echo para 44 of Lord Bingham's opinion. For a national court itself to assume the role of

> determining such a question (with whatever damaging consequences that may have for the state in its own attempts to influence the emerging consensus) would be a remarkable thing, not to be countenanced save for compelling reasons."

42. This question was returned to by the High Court in the case of *R (ICO Satellite Limited) v The Office of Communications* [2010] EWHC 2010 Admin in which Lloyd Jones J (as he then was) dealt with an application for judicial review of the defendant's decision to write to the International Telecommunications Union requesting cancellation of assignments in its Master International Frequency Register in respect of the claimant's mobile satellite communications system. The International Telecommunications Union was established by an international treaty and the UK was a member of that organisation. Part of the argument in the case involved a dispute between the parties as to the meaning and effect of the instruments creating the International Telecommunications Union regime. Having noted the passages from the case of *Corner House* set out above, Lloyd Jones J observed as follows in relation to the approach which the court should take:

> "92. There are, undoubtably, circumstances in which the courts of England and Wales will decide questions as to the extent of the obligations of the United Kingdom or, indeed, other States under treaties which have not been implemented into domestic law. (See, for example, *J H Rayner (Mincing Lane) Limited v Department of Trade and Industry* [1990] 2 AC 418 per Lord Oliver at pp. 500-501; *Occidental Exploration and Production Company v. The Republic of Ecuador* [2005] EWCA Civ.1116). Thus as Lord Pannick points out, in *R v. Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839 and *R v. Director of Public Prosecutions, ex parte Kebilene* [2000] AC 326 domestic courts decided the extent of the United Kingdoms obligations under the European Convention on Human Rights before it was given effect in domestic law by the Human Rights Act 1998. In *R (Barclay) v. Lord Chancellor* [2009] UKSC 9; [2009] 3 WLR 1270 *Launder* and *Kilbene* were treated in *Corner House* as exceptions to the general rule (Lord Brown at paragraph 65) and justified as cases in which there was no live dispute over the provisions of international law in issue or where there was a body of Convention jurisprudence on which the national court could draw in deciding the issue before it (Lord Bingham at paragraph 44 and Lord Brown at paragraph 66).
>
> 93. Lord Pannick submits that the present case is to be distinguished from *Corner House* because the decision maker is not suggesting that it has acted in accordance with international law; rather it has based its decisions on a mistaken view of international law and so has acted by reference to irrelevant considerations. As explained earlier in this judgment, I do not accept the premise. However, in any event, I do not see that the distinction proposed provides any relief from the difficulty. In

> either case, to the extent that the issue before the court requires it to decide the disputed question of the effect of the ITU regime the objections identified in *Corner House* apply.
>
> 94. To my mind, the present case provides a compelling example of the difficulties and the undesirability of a domestic court expressing a concluded view on a disputed point as to the meaning and effect of non-implemented instruments governing a regime established by an international organisation. It will be apparent from the documents referred to above that widely different views are held as to the consequences which should follow under the ITU regime in circumstances where, as in the present case, a number of years after its registration, an assignment has not been brought into regular operation in accordance with its notified specification. That is a live dispute as to the rights and duties of the 191 national administrations which participate in the ITU regime. Moreover, there is provision within the ITU regime for dispute resolution, although the question whether that would be applicable in the circumstances of the present case is itself apparently in dispute. A further difficulty in the present case is that the statements emanating from various officers of the ITU referred to above would, given their quality and characteristics, hardly be an appropriate basis for the task of resolving the issue. However, that apart, it would not be appropriate for this court to embark on such an undertaking for the policy reasons given by Lord Bingham and Lord Brown in *Corner House*. This court is not in an appropriate position to determine the issue for all those subject to the ITU scheme. Given the dispute between the parties as to the effect of the ITU regime, it would not be appropriate for this court to go beyond the "tenable view" approach in examining the point of international law in question."

43. A further subsidiary issue raised in connection with these arguments is the contention that the nub of the issue is what was known to the minister making the decision in the case of each of these defendants, as opposed to that which was known to the civil servants advising the minster. Mr Wolfe on behalf of the claimant places reliance on the case of *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 in which this point was observed by McCombe LJ at paragraph 26(3) of his judgment with which the other members of the court agreed. This decision was in the context of the Public Sector Equalities Duty and the court concluded that the material presented to the minster failed to "give to her an adequate flavour of the responses received" in relation to the issues which were to be determined.

44. A further case related to the Public Sector Equalities Duty relied upon by the claimant is the case of *R (on the application of Hunt) v North Somerset Council* [2013] EWCA Civ 1320. The facts of the case were that the defendant had decided to cut its Youth Services Budget, a service from which the claimant benefitted. One of the issues before the court was whether the members of the defendant charged with the

responsibility of deciding that to approve the budget had read the relevant equalities impact assessments ("EIA's"). The EIA's were not included in the papers sent to the members but they were informed how to access them in order to read them. Whilst the court accepted the evidence of the defendant's portfolio holder in relation to equality issues that he had read the EIA's in order to discharge the Public Sector Equalities Duty, the court was unprepared to draw the inference from the circumstances that the other members of the committee making the relevant decision had themselves read that material given that the EIA's were not available as part of the committee papers. The court was therefore unable to accept that the duty had been discharged. Further discussion in relation to the question of the knowledge of a minister in reaching a decision and the correct approach to examining whether or not there was a legal flaw in the process caused by inadequacies in the available material is set out in the case of *R (Stephenson) v SSHCLG* [2019] EWHC 519 (Admin); [2019] PTSR 2209 at paragraphs 36 to 40.

45. In relation to ground 2, namely the contention that the UK ETS which has been designed and approved does not meet the requirements of the statutory framework, the correct approach is set out in the case of *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement Limited* [1995] 1 WLR 386. The case concerned the award of a grant of overseas aid in respect of the Pergau Dam Project in Malaysia. It was contended by the claimant that the award of the aid was outwith the power granted to the defendant by section 1 (1) of the Overseas Development Co-operation Act 1980. The evidence before the court included material advising the defendant that the project was uneconomic and unsound and indeed an abuse of the aid programme. This led the claimant to contend that the award of the grant was not within the powers of the Act, and that the defendant had been motivated by purposes which were not permitted by the terms of the statute. In response it was contended that the project was within the power conferred by Section 1 (1) in that it was for a developmental purpose, and the defendant was entitled to take into account wider political and economic considerations.

46. It was common ground before the court that the decision-maker could take into account political and economic considerations provided that in the first place there was sufficient and substantive power to authorise the award of the grant pursuant to section 1 (1) of the 1980 Act. Giving the leading judgment in the Divisional Court Rose LJ observed as follows:

> "For my part, I am unable to accept Mr Richards' submission that it is the Secretary of State's thinking which is determinative of whether the purpose was within the statute and that therefore paragraph 3 of his affidavit is conclusive. Whatever the Secretary of State's intention or purpose may have been, it is, as it seems to me, a matter for the courts and not for the Secretary of State to determine whether, on the evidence before the court, the particular conduct was, or was not, within the statutory purpose.
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> …
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> Accordingly, where, as here, the contemplated development is, on the evidence, so economically unsound that there is no

> economic argument in favour of the case, it is not, in my judgment, possible to draw any material distinction between questions of propriety and regularity on the one hand and questions of economy and efficiency of public expenditure on the other. It may not be surprising that no suggestion of illegality was made by any official, of that the Secretary of State was not advised that there would, or might be, any illegality. No legal advice was ever sought.
>
> The Secretary of State is, of course, generally speaking, fully entitled, when making decisions, to take into account political and economic considerations such as the promotion of regional stability, good government, human rights and British commercial interests. In the present case, the political impossibility of withdrawing the 1989 offer has been recognised since mid-April of that year, and had there, in 1991, been a developmental promotion purpose within section 1 of the Act of 1980, it would have been entirely proper for the Secretary of State to have taken into account, also, the impact which withdrawing the 1989 offer would have had, both on the United Kingdom's credibility as a reliable friend and trading partner and on political and commercial relations with Malaysia. But for the reasons given, I am of the view, on the evidence before this court, that there was, in July 1991, no such purpose within the section. It follows that the July 1991 decision was, in my judgment, unlawful. This, of course, serves to reinforce the conclusion already indicated, that the applicants have standing."

47. Finally, it was submitted on behalf of the first defendant by Mr Honey that even were the court to be satisfied that the legal errors which the claimant relied upon had been committed the court should, pursuant to Section 31 (2A) of the Senior Courts Act 1981, refuse to grant relief on the basis that it is highly likely the outcome would not have been substantially different even if the conduct complained of had not occurred. In essence, Mr Honey submitted that the same decisions would have been reached on the available evidence, and therefore the legal errors complained of would have made no difference. Mr Wolfe responds to this contention by submitting that alternatives to the cap and ARP proposals could have been arrived at, and the scope of the scheme may have been different incorporating, for instance, municipal waste incinerators.

Submissions and Conclusions

48. Ground 1 of the claim, as set out above, is the contention that the defendants left out of account a mandatory material consideration, namely the Paris Agreement and, in particular, the requirement of the Paris Agreement as properly construed, which required an urgency in seeking the reduction of greenhouse gas emissions in order to achieve the Paris Agreement's temperature objectives.

49. The interpretation placed upon the Paris Agreement by the claimant has already been rehearsed. The claimant notes the defendants' concession that nowhere in the Response is there express reference to the provisions of articles 2 and 4.1 of the Paris

Agreement, and thus it is submitted the requirement that action to reduce greenhouse gas emissions should be taken urgently was left out of account in constructing the provisions of the UK ETS. The claimant relies upon the observations of the Supreme Court in the *Friends of the Earth* case and submits that this consideration, and in particular the dimension of the Paris Agreement addressing urgency, has not been taken into account. It is not sufficient for the defendants to rely solely upon the provisions of the 2008 Act in this respect, because it is submitted that the Paris Agreement's requirements to take action in the short and medium term are not encompassed within its provisions. The net zero requirement of Section 1 of the 2008 Act is not a proxy for the Paris Agreement imperative for urgent action to be taken in the short and medium term. The inference which the defendants rely upon, namely that the defendants can be taken to have brought the provisions of article 4.1 of the Paris Agreement into account on the basis that all of the ministers were well familiar with the Paris Agreement and its provisions, is not an inference which is open to the defendants in order to excuse the fact that ministers did not have placed before them the implications for the implementation of article 4.1 of the Paris Agreement in constructing the design of scheme that they did.

50. In response to these contentions Mr Honey on behalf of the first defendant accepts that the Paris Agreement was a material consideration, and indeed draws attention to the various places within the Response where the Paris Agreement is referenced, for instance when the Response refers to ensuring that the reviews of the UK ETS are aligned with the Paris Agreement's Global Stocktake dates. Thus he submits that the Paris Agreement was taken into account as a material consideration. Indeed, Mr Honey points out that the claimant accepts that this is the reality, and therefore seeks to rely not upon the failure to take account of the Paris Agreement, but rather a failure to take account of what the claimant contends is an aspect of the Paris Agreement namely a requirement to act urgently in the short and medium term.

51. In response to this contention Mr Honey submits as follows. Firstly, it is not open to the court to determine as a matter of law the meaning of the Paris Agreement as an unincorporated international treaty, in particular where to do so would be to give it legal effect when in truth it has none. The correct approach is, in his submission, to consider whether the approach taken to the Paris Agreement by the defendants is one which is tenable, in accordance with the authorities set out above and following the case of *Corner House.* In this connection Mr Honey submits that the approach taken by the defendants was that achieving the longer term goal requires action in the short term, and to that extent a requirement for acting as soon as possible or urgently was reflected in the approach to the UK ETS, and was recognised as being part and parcel of meeting net zero and the requirements of the Paris Agreement. Mr Honey draws attention, for instance, to the references in the executive summary of the Response to showing "greater climate ambition from the start", and in its introduction to going "further and faster in our efforts to deliver clean energy and a net zero future." Thus, whilst Mr Honey accepts that there is no express reference in the Response to articles 2 and 4.1, the need to take action urgently and in the short term is acknowledged and taken into account in the approach of the Response and the setting up of the UK ETS.

52. Mr Honey further submits that the absence of reference to articles 2 and 4.1 of the Paris Agreement is neither a material omission in the particular circumstances of the case, nor evidence that a material consideration was left out of account. The Paris

Agreement was central to the concerns of the first defendant in exercising his ministerial role, and was a matter which arose so commonly in his role both as a minister and as president of COP 26 (the next international conference in relation to climate change) it was not necessary for him to be explicitly reminded of it. Like the portfolio holder in *Hunt,* he had a special role in which considerations such as the 2008 Act and the Paris Agreement were instrumental. Mr Honey draws attention to speeches made by the first defendant as COP 26 President on the 6th March 2020, in which he exhorted member states to submit more ambitious plans for cutting carbon emissions by 2030 "with all nations committing to reaching net zero emissions as soon as possible". On 27th April 2020 the first defendant again made a speech as COP 26 President, in which he observed that in order to "meet the goals of the Paris Agreement, we need to decarbonise the global economy about three to five times faster over the next decade than we did over the last two decades". Thus, Mr Honey submits that it is plain on the public record that the first defendant was fully familiar with the requirements of the Paris Agreement and the extent to which it required urgent action to be taken on climate change in the short term.

53. Mr Honey submits that these speeches provide further context to the witness statement provided by Mr Charlie Lewis, the Deputy Director for Emissions Trading in the first defendant's department, in which he explains the centrality of the Paris Agreement to the work undertaken by the department in which he works and the first defendant's ministerial responsibilities. Mr Honey places reliance upon the observations of Lord Lloyd in *Bolton MDC v Environment Secretary* [2017] PTSR 1091 at 1096 when he observed;

> "Since there is no obligation to refer to every material consideration, but only the main issues in dispute, the scope for drawing any inference will necessarily be limited to the main issues, and then only, as Lord Keith pointed out, when "all of the known facts and circumstances appear to point overwhelmingly" to a different decision."

54. Mr Honey submits that similar considerations apply to the other defendants in relation to the obvious centrality of the Paris Agreement to their ministerial responsibilities. On behalf of the fourth defendant Ms Bayoumi, in addition to adopting the submissions made by Mr Honey, further draws attention to the setting of decadal emission targets in law in Wales, illustrating both the centrality of net zero and achieving the objectives of the Paris Agreement within the legal framework, as well as the obvious proposition that the fourth defendant was fully aware of the requirements of the Paris Agreement. The carbon budgets being set in Wales were set with articles 2 and 4.1 of the Paris Agreement clearly in mind and therefore she submits it is inconceivable that the fourth defendant was unaware of the Paris Agreement's provisions.

55. My conclusions in relation to ground 1 are as follows. It appears to be common ground that, in principle, the Paris Agreement was a material consideration in the formulation of the UK ETS and that it was taken into account. I have no difficulty in accepting that proposition, bearing in mind both the relationship between the 2008 Act and the Paris Agreement, and also the regular referencing of the Paris Agreement throughout the Response. The Paris Agreement is an obvious instrument to be reflected in the architecture of national measures to address climate change and abate

greenhouse gas emissions. The real substance of the claimant's contentions relates to their interpretation of the Paris Agreement and what they contend is the element of urgency contained in particular within article 4.1 for the short to medium term. In my view it is not for this court to resolve definitively any questions of construction in relation to an unincorporated international treaty for the reasons set out in the earlier authorities. The Paris Agreement is an international instrument to which 197 states are parties. It contains a mechanism for enforcing the implementation of the Agreement within article 14 of its text, along with other mechanisms for dispute resolution. There are, therefore, strong policy reasons as well as practical considerations which clearly militate against the court embarking on an exercise of construing the terms of the Paris Agreement. At most, in accordance with the approach set out in the authorities set out above, the court should assess whether or not the defendants' view of the Paris Agreement was one which was tenable in examining the question posed by the claimant.

56. Adopting this tenable view approach, I am entirely satisfied that the approach to the Paris Agreement described in his submissions by Mr Honey is one which is tenable and entirely appropriate. As he pointed out, this does not deny the urgency of the need to address climate change and involves the recognition that in order to meet the long term requirements of the Paris Agreement action is required now. Taking measures in the short term is an essential part of achieving the longer term objective, and that approach is clearly tenable in the light of the provisions of article 4.1. The question which then arises is whether or not the Paris Agreement as understood in this way was known to the ministers involved in the decision-making process, and thereafter taken into account in the decision to promote a UK ETS.

57. In my view it is important when establishing what would have been known and taken into account by the minister in reaching a decision to have careful regard to the factual context. This case was not concerned with a bespoke document instrumental to the decision making process such as *Hunt*, nor was it a case concerned with knowledge of specific consultation responses or the accuracy with which they had been distilled and reflected in ministerial paperwork so as to be consistent with a specific statutory duty. The claimant in this case relies upon an alleged lack of knowledge by ministers whose roles engaged them directly in climate change initiatives, and the contents of perhaps the most important international instrument on tackling climate change issues at the global scale. The Paris Agreement, as set out above, is one of the key elements in the ministers' portfolios and is an essential and firmly fixed component of the defendants' ministerial brief; it is closely allied to the current provisions of the relevant statutory framework, the 2008 Act, which contains the powers enabling the UK ETS to be established. In the circumstances I have no difficulty in accepting that each of the defendants was fully aware of the Paris Agreement as understood in Mr Honey's submissions and the tenable view as to its application set out above.

58. The speeches made by the first defendant provide further support for this and emphasise the obvious centrality of the commitments under the Paris Agreement to the discharge of his roles. I am also entirely satisfied that this approach to the Paris Agreement was not only within the defendants' knowledge but was also taken into account in reaching the decisions identified in the Response. The references to showing "greater climate ambition from the start" and "committing to go further and

faster" reinforce my conclusions in this respect. During the course of the claimant's submissions it was contended that this use of language, and indeed the use of language in the first defendant's speeches did not demonstrate the extent of the urgency required by the provisions of the Paris Agreement. At its heart that is a submission based upon a semantic disagreement rather than one demonstrating any substantive legal error.

59. Moreover, as is evident from the way in which the UK ETS is designed it is integrally linked to the Global Stocktakes required by the Paris Agreement in order to ensure appropriate progress is being made towards achieving its goals. The UK ETS thus engages with both the short and medium term requirements for the Paris Agreement as well as its longer term objectives. Thus, these points, coupled with the repeated reference within the response to the Paris Agreement, provide convincing evidence that the Paris Agreement and an appropriate or tenable understanding of its requirements were taken into account in formulating the decisions in relation to the UK ETS.

60. Whilst during the course of his submissions Mr Honey made a number of observations in support of the conclusion that it would have been rational for the defendants not to have had regard to the urgency dimension aspect of the Paris Agreement, it is unnecessary for those contentions to be resolved. I am entirely satisfied that on the basis of the material before the court that an appropriate and tenable understanding of the Paris Agreement was taken into account (reflecting the need for action to be taken in the short and medium term to achieve its long term objective) and that this understanding was known to the defendants in reaching decisions in respect of the UK ETS and taken into account by them in reaching their decisions.

61. Turning to ground 2 this ground engages, firstly, a question of statutory construction in relation to section 44 of the 2008 Act and then, secondly, issues arising in relation to whether on the evidence the UK ETS is within the power conferred by the 2008 Act. The preliminary point of statutory construction relates to section 44 (2)(a) of the 2008 Act. Section 44 (2) provides a definition for the purposes of the statute of a "trading scheme". The present case concerns a scheme which it is said was established using the power provided under section 44 (1), and falling within the definition provided by section 44 (2)(a) as a scheme "limiting or encouraging the limitation of activities that consist of the emission of greenhouse gas or that cause or contribute, directly or indirectly, to such emissions".

62. The claimant contends that the words "limiting or encouraging the limitation of activities" must be interpreted to mean a reduction in greenhouse gas emissions. This submission is founded on a number of features in relation to the 2008 Act. Firstly, attention is drawn to the provisions of section 44 (2)(b) which are directly expressed in terms of encouraging activities "that consist of, or that cause or contribute, directly or indirectly, to reductions in greenhouse gas emissions or the removal of greenhouse gas from the atmosphere". This, the claimant contends, illustrates directly that the purpose of a trading scheme within the terms of the act is to reduce greenhouse gas emissions, and the provisions of section 44 (2)(a) must be read in that light. Furthermore, the claimant draws attention to the Explanatory Notes to the 2008 Act, which in relation to the trading scheme powers describes that the Act "includes powers to enable the Government and the devolved administrations to introduce new

domestic trading schemes to reduce emissions through secondary legislation" (see paragraph 4). In paragraph 210 of the Explanatory Memorandum it is noted that Schedule 2 of the 2008 Act contains details of what could be included in a trading scheme, and provides as an example a proposed scheme to reduce energy use as being within the scope of the 2008 Acts powers. The claimant notes that in Hansard extracts from the debates in relation to the 2008 Act, trading schemes were repeatedly noted as being amongst the means available to deliver "emissions reductions". It is submitted that this provides further context to the claimant's construction of section 44 (2)(a) of the 2008 Act.

63. In response it is contended by the first defendant that the use of the language "limiting or encouraging the limitation of activities" is not simply contemplating schemes which lead to reductions, but also schemes which set a limit or cap for emissions and are designed to retain them within that cap. In support of that construction Mr Honey draws attention to the usual meaning of the words limiting or limitation as setting a boundary or terminal point so as to confine or restrict something or fix its maximum extent. This definition does not include the necessity for reductions to take place. Secondly, he draws attention to the long title to the Act which includes the following purpose:

> "To confer powers to establish trading schemes for the purpose of limiting greenhouse gas emissions or encouraging activities that reduce such emissions or remove greenhouse gases from the atmosphere."

64. Mr Honey submits that the phrase "limiting greenhouse gas emissions" is consistent with the first defendant's construction of the Act. This use of language is also consistent with section 48 (2), the section which describes the procedure for making regulations to implement a trading scheme, in which the language used in relation to making regulations is that they may "set a limit on the total amount of activities to which a trading scheme applies". This approach is further consistent with the first defendant's construction, and certainly inconsistent, it is submitted, with the claimant's interpretation that requires reducing or reduction to be part of the interpretation of section 44 (2)(a). It is language which is further reflected within the Explanatory Memorandum at paragraph 13 which states:

> "Trading schemes may limit activities that lead, directly or indirectly, to emissions of greenhouse gases (for example, by capping emissions from a particular set of activities and allowing trading emissions within the cap), or they may encourage activities that directly or indirectly lead to a reduction in greenhouse gas emissions or the removal of greenhouse gas emissions from the atmosphere."

65. In conclusion, Mr Honey submits that a trading scheme under section 44 (2)(a) could be lawfully established so as to, for instance, limit the emissions from a sector of the UK economy, without necessarily requiring a reduction in emissions in order to qualify as being a scheme within the powers of the Act.

66. I accept the submissions made on behalf of the first defendant by Mr Honey in respect of the correct approach to section 44 (2)(a). In my judgment a trading scheme within the definition provided by section 44 (2)(a) does not necessarily have to achieve a reduction in the activities consisting of greenhouse gas emissions or causing or contributing such emissions: it is sufficient that the design of the scheme limits or encourages the limitation of those activities. That construction is consistent, firstly, with the use of the words "limiting" or "limitation" and, secondly, consistent with the language of section 48 (2) and the long title to the 2008 Act. Thirdly, it is at least not inconsistent with, and probably consistent with, the Explanatory Memorandum to the 2008 Act read as a whole.

67. In my view it is clear that section 44 (2) is describing two types of trading scheme, and it is not therefore necessary to read paragraph 44 (2)(a) in the light of section 44 (2)(b), which is directed to describing a different type of trading scheme from that covered by section 44 (2)(a). Whilst Mr Wolfe on behalf of the claimant objects to the first defendant's construction of the basis that all that is necessary is for a number to be placed in a cap and a scheme would qualify under the 2008 Act, such a scheme would nonetheless have to be designed to place a limit upon or encourage the limitation of activities leading to greenhouse gas emissions. As Mr Honey points out in his submissions, it may well be that as part of a suite of measures a judgment could be reached as to certain sectors in which the level of emissions should be held or limited and others where there should be reductions. Section 44 of the 2008 Act provides flexibility in relation to a range of approaches which might be taken in devising trading schemes so as to be part of the means whereby the objectives set in section 1 of the 2008 Act are to be met. The references relied upon by the claimant taken from Hansard do not dissuade me from the view which I have taken based upon, in particular, the language of the legislation.

68. Turning to the claimant's contentions in relation to the evidence, in ground 2 the claimant submits that the design of the UK ETS approved on 1st June 2020 is not within the powers contained within section 44 of the 2008 Act. Whilst it is not disputed that if the scheme had been within the scope of the powers of the Act other factors could have been taken into account, it is the claimant's submission that, in accordance with the principles set out in *World Development Movement*, the opportunity to take those other factors into account never arose because the scheme itself was not within the powers and purposes of the statute from the outset.

69. The first matter upon which the claimant relies is the level at which the cap was set. As the impact assessment conceded, the proposed cap was set above the emissions projections for business as usual, and thus it is contended that it did not anticipate in the opening year that there would be any reduction in emissions. In the documents related to the preparation of the UK ETS it is plain that adopting the cap at a level of -5% in relation to the EU ETS led to emissions which were above business as usual during the period of the first phase of the scheme, and only brought below business as usual once hedging assumptions had been brought into the modelling work. It is further clear from the documentation that the initial cap was decided upon as, in reality, setting an initial level of cap to "strike an appropriate balance between climate ambition and reflecting net zero with competitiveness of the traded sector". Similarly, in relation to the options analysed in the preparation of the UK ETS with respect to the ARP, it was clear that all of the options were evaluated against factors including,

but not limited to, the need to achieve net zero: in the claimant's submission the evaluation should have proceeded solely in relation to net zero in order to be a scheme within the powers provided in section 44 (2)(a). The analysis prepared for ministers on 13th January 2020 set out the modelling results in relation to the cap options and noted that "little/no abatement is needed to meet the Notional Cap or Notional -5% cap across our range of demand scenarios". Thus it is submitted that the design of the scheme was not focused upon the requirements of section 44 (2)(a), but rather depended upon other factors in its formulation.

70. The claimant goes on to place particular reliance upon the response to the proposed scheme from the CCC. This advice was provided pursuant to the statutory framework and the requirements of section 41 (3)(b) of the 2008 Act. The full context of that response is set out above, and the claimant's submission is that the observations of the CCC make plain their view that the proposed scheme was not within the statutory purpose. They pointed out the risk that with the cap set too high the scheme would effectively set a price for carbon and become a de facto tax, and contended that the starting point for the cap should not be the EU ETS, but the latest data on actual UK emissions. They expressed the view that if the cap was kept to the level proposed a higher ARP was required in order to ensure that it became the price setting mechanism rather than simply a backstop. The claimant contends that the material following receipt of this letter on 20th March 2020, and prior to the publication of the scheme on 1st June 2020, does not in reality dispute what the CCC was saying and its criticisms of the scheme. Ultimately, in the discussions following the receipt of the letter of the 20th March from the CCC and prior to the publication of the Response, there was no dispute as to the validity of the CCCs contentions, but rather simply the adoption of a strategy of delay in relation to properly engaging with the CCC's concerns and producing a scheme which would comply with the statutory purposes. This was clearly reflected in the text of the letter of 1st June 2020 which the defendants wrote to the CCC in adopting the level of the cap and the ARP as a temporary part of a two stage approach, the second stage arising once the CCC have provided their up to date advice.

71. In response to these submissions Mr Honey and Ms Bayoumi commence by drawing attention to the evidence which records the proposition that the UK ETS was an initiative established in order to achieve the statutory purpose set out in section 44 (2)(a). In terms of the proper construction of that statutory power, in addition to the points set out above, Mr Honey draws attention to the fact that no particular level of limitation or reduction is specified within the terms of the statutory power, which encompasses both encouragement as well as specific limitation. Mr Honey draws attention to the detailed modelling work which was undertaken in support of the development of the scheme and used to evaluate the options for elements of the scheme such as the levels of the cap and the ARP, together with the output of the modelling in respect of the UK ETS which was ultimately decided upon. The modelling demonstrated, as set out in the Impact Assessment, that with the cap and ARP proposed, and in the light of the incorporation in the modelling of hedging and banking of allowances, that even at the low end of the range the UK ETS would achieve effective abatement of greenhouse gas emissions. Thus, it is contended, it would achieve the statutory purpose.

72. In relation to the response of the CCC Mr Honey points out that they did not state in their letter of 20th March 2020 that the scheme as proposed would not achieve its statutory purpose. As was observed during the course of the discussions following the receipt of the CCC's letter, the CCC had not provided any modelling or analysis of their own in order to gainsay the results of the defendants' modelling exercise. It was therefore legitimate for their concerns to be acknowledged, but (in particular in the context of the COVID-19 pandemic) for the defendants to form the conclusion that the UK ETS achieved its statutory purpose and could be adopted as a part of a two stage process providing for review once the CCC's further advice in relation to carbon budgeting and achieving the net zero objective had been received.

73. In evaluating these submissions, in my judgment the first point to be observed is that it is clear from the documentation that the development of the UK ETS, and the decision reached on 1st June 2020, was underpinned by an evidence base which included a significant amount of modelling work. The modelling which was required in order to evaluate the impact of the UK ETS on abatement of greenhouse gas emissions was technically complex. It involved incorporating in its analysis an assessment of the impacts upon the way in which the scheme would operate as a result of behaviours such as banking and hedging by operators, together with forecasting how the market which would be created in the allowances within the scheme would trade. This is the kind of detailed technical work which it is neither appropriate or possible for the court to go behind (see for instance *R (Mott) v Environment Agency* [2016] EWCA Civ 564; [2016] 1 WLR 4338 paragraph 76 and 77), and indeed no detailed criticism of the modelling work has been advanced. Rather the claimant's case depends upon drawing attention to factors which were included within the modelling work. What cannot, however, be gainsaid is that the modelling work demonstrated that across the period of operation of this initial phase of the UK ETS abatement of emissions would be achieved, and therefore activities leading to the emission of greenhouse gases would be limited. This was the position notwithstanding that the cap was set above business as usual. Indeed the setting of the cap above business as usual was but a starting point to understanding the impact of the scheme, which in my judgment was modelled to examine whether a reduction in greenhouse gas emissions consistent with the statutory purpose contained with section 44 (2)(a) could be achieved. The detailed modelling showed that it would.

74. Whilst the CCC in their letter of advice of the 20th March 2020 set out detailed concerns in relation to the way in which the scheme was proposed to be constructed, and in particular whether it would indeed establish an effective market for allowances rather than simply operating as a tax, it is equally clear that they were not suggesting that the UK ETS as proposed to them would not fulfil its statutory purpose. Had that been their view I am in little doubt that it would have been clearly expressed by them as part of them providing the advice required by statute when a scheme of this kind is being contemplated. The defendants were entitled to rely upon the modelling work which had been commissioned in addressing the detailed concerns raised by the CCC in respect of the levels at which the cap and the ARP had been set. In the absence of any rival modelling the conclusion that the outputs of the model showed a functional scheme reducing greenhouse gas emissions was one which was open to the defendants on the available evidence. I am satisfied therefore that the UK ETS was developed

and designed in order to fulfil the statutory purpose contained within section 44 (2)(a), and did indeed achieve that aim and therefore fell within the scope of the statutory power. Once that point is accepted, then it was open to the defendants to take account of other factors in the detailed design of the scheme, such as impacts on business competitiveness. In summary therefore I do not consider that there is any substance in the claimant's submissions raised under ground 2.

75. In the light of these conclusions this application for judicial review must be dismissed on its merits. There is therefore no need to give consideration to the further submissions which were made in relation to the question of relief in the event of the claimant's case having been established. Further there is no need to investigate the submissions on jurisdiction made by the second and third defendants since they do not arise. The outcome, therefore, in relation to this case is that the claimant's application for judicial review must be dismissed.