IN THE HIGH COURT OF JUSTICE **CO/126/2022**
QUEEN'S BENCH DIVISION **CO/163/2022**
ADMINISTRATIVE COURT **CO/199/2022**

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

THE QUEEN

on the application of

(1) FRIENDS OF THE EARTH LIMITED (CO/126/2022)

(2) CLIENTEARTH (CO/163/2022)

(3) GOOD LAW PROJECT and JOANNA WHEATLEY (CO/199/2022)

Claimants

-and-

SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Defendant

SKELETON ARGUMENT
ON BEHALF OF THE CLAIMANTS

For hearing 8-9 June 2022

CB/X refers to the Core Bundle; **SB/X** to the Supplementary Bundle; **NZS/X** to the NZS Bundle; **AB/X** to the Authorities Bundle

Essential reading (time estimate: 4 hours):

- Pleadings:
  - FoE Statement of Facts and Grounds [**CB/19-45**]
  - CE Statement of Facts and Grounds [**CB/73-101**]
  - GLP Statement of Facts and Grounds [**CB/128-151**]
  - Detailed Grounds of Resistance [**CB/301-344**]
- Witness statements:
  - Michael Andrew Childs [**CB/46-55; 408-411**]
  - Sam Hunter Jones dated 17 January 2022 [**CB/102-111**]

- Joanna Wheatley [**CB/297-300**]
- Sarah James [**CB/345-401**]

- "*Net Zero Strategy: Build Back Greener*", dated 19 October 2021, pages **[NZS/17-29, 74-79, 131, 306-324]**
- Sections 13 and 14 Climate Change Act 2008 [**AB/13-14**]

Notes:

The three separate JR claims are being heard together. As required by Cotter J's Order granting permission dated 1 March 2022 [**CB/285-288; 289-292; 293-296**], this skeleton comes from all Claimants.

The Claimants have consolidated and re-numbered their grounds of challenge, as set out in paragraph 2 below. This is for two reasons:

- In order to present a single, consistent set of submissions in the single skeleton argument required by the Court; and
- In response to developments in the Defendant's case as between pre-action correspondence and pleading/disclosure stages, following which the Defendant now relies on quantitative analysis which was not mentioned in the NZS and not revealed in the Defendant's pre-action correspondence.

The Claimants' enumeration of their Grounds is similar to that used by the Defendant at DGD §92 [**CB/325**].

INTRODUCTION

1. The Claimants challenge the failure of the Defendant to comply with his duties under sections 13 and 14 of the Climate Change Act 2008 ("**the CCA**").

2. The Claimants rely on the following grounds, in summary:

    a. **Ground 1: the Section 13 Ground.** The Defendant misdirected himself as to his obligation under s.13 CCA, in that he considered:

i. that he was not required to quantify the impact of his proposals on UK carbon emissions, so as to determine that the carbon budgets would be met; and/or

ii. that he was not required to have any particular degree of confidence (including by reference to a quantification methodology providing any particular degree of confidence) that the policies and proposals will enable the carbon budgets to be met; and/or

iii. that it was legally sufficient to rely on the impact of policies and proposals whose impact was unquantified and/or on a possible future change to the weighting of non-CO_2 greenhouse gases ("**GHG**") in order to make up an around 5% shortfall in the emissions reductions necessary to meet the sixth carbon budget ("**CB6**").

b. **Ground 2: the Section 14 Ground**: The Defendant failed to include in the Net Zero Strategy ("**NZS**") the information legally required to discharge his reporting obligations under s.14 CCA, namely:

i. an explanation for his conclusion that the proposals and policies within the NZS will enable the carbon budgets to be met;

ii. an estimate of the contribution those proposals and policies are expected to make to required emissions reductions; and

iii. the time-scales over which those proposals and policies are expected to have that effect.

c. **Ground 3: the Human Rights Ground**[1]. In the alternative, ss.13 and 14 CCA have the effect for which the Claimants contend pursuant to s.3 Human Rights Act 1998 ("**the HRA**"), because to construe them in the way for which the Defendant contends would contravene or risk contravention of Convention rights.

[1] ClientEarth no longer considers it necessary for it to make this argument and is content for the Good Law Project and Ms Wheatley to do so.

3. In summary, the Defendant's response to each of these grounds is that:

    a. **Ground 1**: The Defendant has complied with the s.13 duty, which he contends does not require him to be satisfied to any degree of confidence, nor for him to carry out any quantification; alternatively that such quantification as he carried out was legally adequate.

    b. **Ground 2**: The NZS complies with the requirements of s.14. There is no need for the NZS to explain his view that the proposals and policies enable the carbon budgets to be met; quantification of the expected effect, and time-scales in relation to each policy and proposal need not be included in the NZS.

    c. **Ground 3**: The Defendant contends that GLP and Ms Wheatley have not demonstrated that the interpretation of ss.13-14 CCA for which he contends leads to a breach of any Convention right, and accordingly s.3 HRA is not engaged.

4. The claims are focussed on whether the Minister (for the Secretary of State) made a NZS which met the essential statutory requirements. To be clear: that does not involve any challenge to any judgement made by him in relation to the content or effectiveness of any policies or proposals, let alone all of them in combination. The claims do not seek to draw the court into the merits of the NZS as a statement of policy for meeting the Sixth Carbon Budget. The issue is whether it was lawfully made, so as to allow for the necessary scrutiny by Parliament, by the Climate Change Committee (see §9 below) and the public.

5. FoE had raised a separate ground in relation to the Defendant's failure to comply with s.149 of the Equality Act 2010 when preparing and publishing the Heat and Buildings Strategy which the Defendant has now conceded (DGD [**CB/303** §5; **CB/418-419**]).

LEGAL FRAMEWORK

The Climate Change Act 2008

6. Section 1(1) CCA **[AB/5]**, as amended by the Climate Change Act 2008 (2050 Target Amendment) Order 2019, requires the Defendant to ensure that emissions of UK Greenhouse Gases ("**GHG**") are at least 100% lower in 2050 than they were in 1990 (namely a duty to achieve "**the 2050 Target**").

7. Section 4 CCA **[AB/7]** requires the Defendant (a) to set five-yearly carbon budgets (stepping-stones to the 2050 Target), and (b) to ensure that the net UK carbon account for a budgetary period does not exceed the carbon budget. The net UK carbon account for a period is the amount of net UK emissions of targeted greenhouse gases for that period: s.27(1).[2] The following budgets set pursuant to s.4 remain relevant:

    a. 2018-2022: Third Carbon Budget, 2544 MtCO2e;

    b. 2023-2027: Fourth Carbon Budget, 1950 MtCO2e;

    c. 2028-2032: Fifth Carbon Budget, 1725 MtCO2e;

    d. 2033-2037: Sixth Carbon Budget, 965 MtCO2e.

8. Section 10 **[AB/11]** provides for certain factors to be taken into account in the setting of carbon budgets: s 10(1)(a) and (b). Those factors are (s 10(2)):

    "(a) scientific knowledge about climate change;

    (b) technology relevant to climate change;

    (c) economic circumstances, and in particular the likely impact of the decision on the economy and the competitiveness of particular sectors of the economy;

    (d) fiscal circumstances, and in particular the likely impact of the decision on taxation, public spending and public borrowing;

[2] These two terms are defined at s.29(1) and s.24(1) respectively.

(e) social circumstances, and in particular the likely impact of the decision on fuel poverty;

(f) energy policy, and in particular the likely impact of the decision on energy supplies and the carbon and energy intensity of the economy;

(g) differences in circumstances between England, Wales, Scotland and Northern Ireland;

(h) circumstances at European and international level;

(i) the estimated amount of reportable emissions from international aviation and international shipping for the budgetary period or periods in question."

9. Part 2 **[AB/28-35]** (s.32) of the CCA establishes the Climate Change Committee ("**the CCC**"), an independent expert advisory body. Before setting a budget, the Defendant must consult the CCC. Further provisions about the CCC's functions are set out in Schedule 1 **[AB/40-56]**. It has an annual reviewing function under s.36 **[AB/31]**: it must lay before Parliament each year a report setting out its views on progress made towards meeting the carbon budgets under Part 1. The CCC must advise on a proposed carbon budget at least 12 years in advance (s.34) **[AB/29-30]**, in line with the Government's duty to set the carbon budget at least 11.5 years in advance (s.4) **[AB/7]**.

10. The Defendant has followed the CCC's advice in respect of the setting of all six budgets to date (though the Carbon Budget Order 2021 confirmed the government carries out its own analysis as well). It follows that the budgets have been set at an achievable level by the Defendant on the basis of up-to-date expert advice of the CCC, as well as internal analysis, taking into account issues such as economic, fiscal and social circumstances, energy policy and technology relevant to climate change (s. 10(2) **[AB/11]**).

11. The Defendant is required to publish projections of the indicative annual range of carbon emissions "*expected*" for each year of the recently set budget period: s.12 CCA **[AB/13]**.

12. Once the carbon budgets are set, Section 13 CCA **[AB/13]** requires the Defendant to prepare such proposals and policies as he considers will enable them to be met:

> "**13 Duty to prepare proposals and policies for meeting carbon budgets**
>
> (1) The Secretary of State must prepare such proposals and policies as the Secretary of State considers **will enable** the carbon budgets that have been set under this Act **to be met**.
>
> (2) The proposals and policies must be prepared with a view to meeting— (a) the target in section 1 (the target for 2050), and (b) any target set under section 5(1)(c) (power to set targets for later years).
>
> (3) The proposals and policies, taken as a whole, must be such as to contribute to sustainable development.
>
> (4) In preparing the proposals and policies, the Secretary of State may take into account the proposals and policies the Secretary of State considers may be prepared by other national authorities." [underlining and bold added]

13. "*Sustainable development*" is not defined in the CCA, but it has a widely accepted meaning, the origins of which are in Resolution 42/187 of the United Nations General Assembly. This definition is summarised in the National Planning Policy Framework (July 2021), at §7 **[AB/1022]**, as "*meeting the needs of the present without compromising the ability of future generations to meet their own needs*." See **R (Spurrier) v Secretary of State for Transport** [2020] PTSR 240 in which the court (at §635 **[AB/582]**) described sustainable development as "*an uncontroversial concept*"; also **Powell v Marine Management Organisation** [2017] EWHC 1491 (Admin) at §50 **[AB/272]**.

14. Section 14 CCA **[AB/14]** requires the Defendant, after setting the carbon budget for a period, to lay before Parliament a report setting out (among other things) those proposals and policies:

> "**14 Duty to report on proposals and policies for meeting carbon budgets**
>
> (1) As soon as is reasonably practicable after making an order setting the carbon budget for a budgetary period, the Secretary of State must lay before Parliament a report setting

out proposals and policies for meeting the carbon budgets for the current and future budgetary periods up to and including that period.

(2) The report must, in particular, set out — (a) the Secretary of State's current proposals and policies under section 13, and (b) the time-scales over which those proposals and policies are expected to take effect.

(3) The report must explain how the proposals and policies set out in the report affect different sectors of the economy.

(4) The report must outline the implications of the proposals and policies as regards the crediting of carbon units to the net UK carbon account for each budgetary period covered by the report.

[…]"

15. Section 15 CCA **[AB/14]** provides that, in exercising functions under Part 1, including preparing a report under s.14, the Defendant must have regard to the need for UK domestic action on climate change:

"**15 Duty to have regard to need for UK domestic action on climate change**

(1) In exercising functions under this Part involving consideration of how to meet—

(a) the target in section 1(1) (the target for 2050), or

(b) the carbon budget for any period,

the Secretary of State must have regard to the need for UK domestic action on climate change.

(2) "UK domestic action on climate change" means reductions in UK emissions of targeted greenhouse gases or increases in UK removals of such gases (or both)."

16. Section 17 CCA **[AB/16]** provides the Defendant with 'Powers to carry amounts from one budgetary period to another'. Section 17(1)-(2) create the power to carry forward up to 1% of a future budget so as to enlarge the preceding budget. Section 17(3) creates a power to 'bank' any amount by which a carbon budget is over-achieved, so as to enlarge the succeeding carbon budget. Prior to using either of these powers the CCC's advice must be sought: s.17(4).

17. Those provisions must be construed and understood in the context of CCA as a whole and consistently with their statutory purpose. The Defendant agrees that the statutory purpose of s.14 is to enable Parliament to be "*clear about <u>how</u> the Government intends to satisfy its obligation to meet carbon budgets*", and that s.14 is intended to provide *"<u>transparency</u>"* as to what the Government intends to do to meet those budgets (DGD [**CB/319 §67**], underlining added). Sections 13 and 14 must also be construed so as to support the key substantive duties imposed upon the Secretary of State by the CCA: in particular, the s. 1 duty to ensure that the 2050 Target is reached, and the s. 4 duty to ensure that each carbon budget is met. The Claimants submit that those duties are supported by obligations in ss. 13 and 14 to prepare and publish policies and proposals which the Secretary of State considers will result in the discharge of the substantive duties and which are capable of public scrutiny as to whether or not they will do so.

<u>The Sixth Carbon Budget (Including Background)</u>

18. Pursuant to s.34 of the Act, the CCC presented its recommended sixth carbon budget to the Defendant in December 2020 [**SB/133-168**].

19. As regards the expected Net Zero Strategy (and ss.13-14 of the CCA), the CCC noted [**SB/141**]:

> "**Net Zero Strategy**. We recommend that the Government legislates our recommended Sixth Carbon Budget as soon as possible and sets out its Net Zero plans and policies in the first half of 2021 (many of which have been under development since 2019) <u>to deliver in full against the budget</u>. The expected impact of policies, including those in early planning, should be <u>clearly quantified</u> and <u>in sum be enough</u> to meet the budget and the 2030 [Nationally Determined Contribution]." (p.15, underlining added)

20. On ss.13-14 specifically, the CCC stated [**SB/163-164**]:

"The Climate Change Act (sections 13 and 14) requires that the Government develop policies and proposals that would [sic] 'enable' the carbon budgets and 2050 target to be met. It is inevitable that not all proposals will be fully developed and implemented by early next year. However, the Committee's interpretation of the requirements of the Act (and of good policymaking) is that the Government should clearly and quantitatively demonstrate how its proposals will deliver the Sixth Carbon Budget.

That should be the goal of the Government's response to this advice, which should set out a quantified set of policy proposals to deliver the Sixth Carbon Budget and later Net Zero target:

• The Government's Energy and Emissions Projections 'Reference Scenario' sets out expectations for emissions through the carbon budget periods under 'implemented, adopted and agreed' policies, where the impact of these policies has been quantified. The latest publication projects a 57%* reduction in emissions from 1990 to 2035 – a long way short of the 72% reduction required by our recommended Sixth Carbon Budget on the same basis.

• Many other policies have been announced or are being developed. These include, for example, the Buildings and Heat Strategy, the Transport Decarbonisation Plan, the energy White Paper, a hydrogen strategy and the National Infrastructure Strategy. For the purposes of section 14 of the Climate Change Act, the Government should set out the intended effect of these policies and 'the time-scales over which those proposals and policies are expected to take effect'. They should progress as soon as possible to full implementation.

• If these proposals in sum are insufficient to deliver the Sixth Carbon Budget the Government should set out the areas where it will develop further and stronger policies to deliver deeper emissions reductions, and quantify the expected effect of those. […].

• If as individual policies progress, their expected impact is reduced, then they must be compensated by increasing the impact from other policies or by introduction of new policies to fill the gap. The Government's response should therefore also set out an approach to its own tracking of policy development and progress to ensure that it stays on track to the Sixth Carbon Budget […]." (underlining added).

21. The Government accepted the CCC's recommendation as to the level of the Sixth Carbon Budget. It laid the Carbon Budget Order 2021 No. 750 ("**the 2021 Order**"), which came into force on 24 June 2021 [**AB/57**].

FACTUAL & POLICY BACKGROUND

The Net Zero Strategy

22. The Defendant published the NZS on 19 October 2021 pursuant to s.14 [**NZS/2-368**]. As explained in the Detailed Grounds of Defence (§37 and FN34 [**CB/312**]), the NZS was made by the Minister for Business, Energy and Clean Growth on behalf of the Defendant. As detailed further below, it is the Minister's understanding (based on the documents provided to him) which is relevant for determining the basis on which the NZS was made (and not therefore that of civil servants or other advisers).

23. The proposals and policies within the NZS are divided by sector (for example, the proposals and policies relating to the power sector are at §22-42 of Chapter 3i at pp.100-104; fuel supply and hydrogen at Chapter 3ii; and so on). The Defendant's position is that the NZS must explain how the policies and proposals affect different sectors of the economy but does not need to explain the basis for the Defendant's conclusion that these proposals and policies will enable the carbon budgets to be met (DGD §74, §76 and §78 [**CB/321-322**]). In response to this claim, the Defendant has revealed that analysis by officials indicated that the quantified policies (and only some were quantified) to be included in the NZS would not fully meet the sixth carbon budget (see DGD §37 [**CB/312**]). At the time the NZS was published, he relied on unquantified additional proposals and policies to assume the shortfall would be made up (see DGD §164 [**CB/342-343**])[3].

24. But while such (incomplete) information was available behind the scenes, no information on the predicted emissions reductions of policies and proposals was published in the NZS

[3] However, the quantification was not published or known to the Claimants (or the public) until it was disclosed during the course of these proceedings.

itself. It merely set out "*an indicative delivery pathway*" (showing potential emission reductions to the end of the sixth carbon budget and three "*illustrative scenarios*" regarding the 2050 Target: see Chapter 2 at §17-29 and Figures 12-16 [**NZS/74-89**] and §6 (p.306) of the Technical Annex [**NZS/306**]). The Technical Annex explains that the pathway "*provides an indicative trajectory of emissions reductions*" and "*[t]here is uncertainty associated with our decarbonisation pathway through to 2037 and the 2050 scenarios – the exact path we take to meet our climate targets is likely to differ*" (§6 [**NZS/306**]). Crucially, the indicative delivery pathway was not an analysis of the predicted effects of the proposals and policies set out in the NZS, let alone any prediction of their combined ability to meet the carbon budgets. As the Defendant puts it, the indicative emissions pathway analysis "*is separate*" from the proposals and policies in the NZS (DGD §22 [**CB/308**]). Rather, the NZS explains (§17-18 [**NZS/74**]):

> "It is designed only to provide an indicative basis on which to make policy and plan to deliver on our whole-economy emissions targets […] The pathway is based on our understanding now of the potential for each sector to reduce emissions […] ." (underlining added)

25. The Defendant now asserts that there is a "*reciprocal relationship*" (DGD §26 [**CB/309**]) between the pathway and the policies and proposals in the NZS, including because in successive iterations of the pathway "*the modelled effects of many of [the] proposals and policies were fed into the analysis that underpinned the delivery pathway*" (DGD §23 [**CB/309**]. It is not clear, however, from the evidence of Sarah James, that this was done[4]; or, if it was, how many and which of the policies and proposals were included in any such exercise – the Defendant himself does not assert that all of them were. Ms James' evidence indicates that the primary purpose of the pathway was as a "*benchmark towards which NZS proposals and policies were developed*" (underlining added) [SJ §69 [**CB/368-369**], rather than representing the expected effect of those policies and proposals. So, whilst indicative pathways were provided, quantified policies to enable emissions to be cut in line with those pathways were not developed or shown. Accordingly, the pathways do not of themselves show how the budgets will be met.

[4] No reference to her evidence is given in support of this assertion at DGD §23.

26. Under the heading "*Meeting the carbon budgets*", the Technical Annex explained how that indicative delivery pathway had been derived (§43, pp.321-326 and Tables 6 to 10 [**NZS/321-327**]. For most sectors, what was presented was merely modelling of the level of reduction which the Defendant considers is theoretically feasible for that sector to achieve. For example, emissions for the power sector are based on a model "*used to generate technically feasible pathways that are consistent with achieving the NDC in 2030, the sixth carbon budget in 2033-37 and net zero in 2050*" [**NZS/338**]. Similar approaches are found for other areas, such as the industrial sector at p.340 [**NZS/340**].

27. Table 6 indicates that under the "*baseline*" of policies and proposals in place as of August 2019, the sixth carbon budget is expected by the Defendant to be exceeded by 1,064 MtCO2e (i.e. over double the budget limit), with the fourth and fifth budgets also exceeded [**NZS/321**]. Tables 8 and 9 [**NZS/323-324**] then set out an indicative carbon emissions pathway, broken down by sector, to show how it is postulated by the Defendant that each sector of the economy may contribute to meeting those budgets. But no projections as to expected emissions reductions are provided in respect of the Defendant's policies and proposals as included in the NZS.

28. The CCC issued an assessment of the NZS at the time of its release in October 2021. Whilst it found that the NZS overall "*represent[ed] a strong foundation for policy to reduce emissions across the economy [and that in] most areas, the Government ha[d] set goals aligned to the path to Net Zero and put forward credible policy packages to deliver them*", the NZS had "*not quantified the effect of each policy and proposal on emissions*." **[SB/305]** (underlining added). Accordingly, the CCC considered that *"it [was] not clear how the mix of policies will deliver on those ambitions – albeit in theory they could*." [**SB/305**] (underlining added).

29. The CCC also noted that as regards certain elements, no timelines had been set (see p29-31) [**SB/307-309**].

Climate Change and Human Rights

30. There is now a global consensus that the world faces a climate change crisis. There is, presumably, no dispute that negative climate change impacts are being felt already, and will worsen, but will worsen less quickly and less catastrophically if concerted action is taken now to reduce emissions in the coming decades. In the Glasgow Climate Pact **[AB/1017-1020]** concluded at COP26 in November 2021 (shortly after the publication of the NZS), the Parties to the UN Framework Convention on Climate Change ("**UNFCCC**") recognise: that climate change amounts to a crisis (Recital); signify alarm at current levels of heating and impacts in every region of the world (Art. 3); note that limiting warming to 1.5 degrees would give rise to significantly fewer negative climate impacts than allowing warming of 2 degrees (Art. 16); and acknowledge the steep emissions reductions required to achieve that (Arts. 17-18).

31. The adverse physical effects of climate change – for example extreme heat leading to drought and/or wildfires, or extreme precipitation leading to flooding (to name but a few) – have catastrophic impacts on human wellbeing, and even survival, in ways that plainly interfere with Convention rights such as the Article 2 right to life, the Article 8 right to respect for private and family life, and the right under Article 1 of the First Protocol ("**A1P1**") to peaceful enjoyment of possessions [**AB/63-65**].

32. It follows that robust action to reduce greenhouse gases is required to limit the scale of human rights infringements arising from climate change. In the recitals to the Glasgow Climate Pact, the Parties recognise the human rights dimension of the climate crisis, and of policy actions to tackle it:

> "Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights."

33. The human rights obligations placed on states by international law have recently been synthesised in a report by the UN Special Rapporteur on Human Rights and the Environment, who notes (para 62 **[SB/100]**) that:

"States have obligations to protect human rights from environmental harm and obligations to fulfil their international commitments. The foreseeable and potentially catastrophic adverse effects of climate change on the enjoyment of a wide range of human rights give rise to extensive duties of States to take immediate actions to prevent those harms. To comply with their international human rights obligations, States should apply a rights-based approach to all aspects of climate change and climate action."

34. There are no decided cases of the European Court of Human Rights ("**ECtHR**") applying Articles 2 and 8 of the Convention to the issues of climate change, although there are two such cases currently pending[5]. However, the Court has developed extensive case-law on the scope of states' positive obligations to prevent or minimise future infringements of those rights, arising from other environmental harms. That case law was recently synthesised and applied to climate change by the Supreme Court of the Netherlands in **State of the Netherlands v. Urgenda Foundation** (ECLI:NL:HR:2019:2007) **[AB/977-1016]**[6]:

"5.2.2 […] The ECtHR has on multiple occasions found that Article 2 ECHR was violated with regard to a state's acts or omissions in relation to a natural or environmental disaster. It is obliged to take appropriate steps if there is a real and immediate risk to persons and the state in question is aware of that risk. In this context, the term 'real and immediate risk' must be understood to refer to a risk that is both genuine and imminent. The term 'immediate' does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved. The protection of Article 2 ECHR also regards risks that may only materialise in the longer term[7].

[5] **Agostinho and Ors v. Portugal and 32 Other States** (no. 39371/20); **Verein KlimaSeniorinnen Schweiz and Ors v. Switzerland** (no. 53600/20). The latter case was granted priority in March 2021 and on 26 April 2022 was transferred to the Grand Chamber of the ECtHR.

[6] The citation that follows includes only some of the Court's references to ECtHR case law. The Court also referred to the case-law as collected in the ECtHR Guides on Arts. 2 and 8.

[7] Case no. 48939/99 (**Öneryildiz/Turkey**), paras 98-101; Case no. 15339/02 (**Budayeva et al./Russia**), paras. 147-158; Case no. 17423/05 (**Kolyadenko et al./Russia**), paras. 165 and 174-180

5.2.3 Article 8 ECHR protects the right to respect for private and family life. This provision also relates to environmental issues. […] when it comes to environmental issues, Article 8 ECHR encompasses the positive obligation to take reasonable and appropriate measures to protect individuals against possible serious damage to their environment. The ECtHR has found that Article 8 ECHR was violated in various cases involving environmental harm. The obligation to take measures exists if there is a risk that serious environmental contamination may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. That risk need not exist in the short term.[8]

5.3.1 The protection afforded by Articles 2 and 8 ECHR is not limited to specific persons, but to society or the population as a whole.[9] The latter is for instance the case with environmental hazards.[10] […]

5.3.2 The obligation to take appropriate steps pursuant to Articles 2 and 8 ECHR also encompasses the duty of the state to take preventive measures to counter the danger even if the materialisation of that danger is uncertain. This is consistent with the precautionary principle.[11] If it is clear that the real and immediate risk referred to above in paras. 5.2.2 and 5.2.3 exists, states are obliged to take appropriate steps without having a margin of appreciation. The states do have discretion in choosing the steps to be taken, although these must actually be reasonable and suitable.[12]"

35. The Court in **Urgenda** went on to conclude (at §5.6.2 **[AB/998-999]**) that no other conclusion can be drawn but 'that the State is required pursuant to Articles 2 and 8 ECHR to take measures to counter the genuine threat of dangerous climate change', given that it constituted a 'real and immediate risk', noting that the 'fact that this risk will only be able to materialise a few decades from now and that it will not impact specific persons or a

[8] Case no. 46117/99 (**Taşkin et al./Turkey**), paras. 107 and 111-114; Case no. 67021/01 (**Tătar/Romania**), paras. 89-97
[9] Art. 2: Case no. 36146/05 (**Gorovenky and Bugara/Ukraine**), para. 32, Case no. 26562/07 (**Tagayeva et al./Russia**), para. 482; Art. 8: Case no. 9718/03 (**Stoicescu/Romania**) para. 59
[10] Case no. 30765/08 (**Di Sarno et al./Italy**), para. 110, Case no. 54414/13 (Cordella et al./Italy), para. 172
[11] Case no. 67021/01 (**Tătar/ Romania**), para. 120
[12] Art. 2: Case no. 15339/02 (**Budayeva et al./Russia**), para. 134, and ECtHR 24 July 2014, no. 60908/11 (**Brincat et al./Malta**), para. 101; Art. 8: Case no. 55723/00 (**Fadeyeva/Russia**), para. 96.

specific group of persons but large parts of the population does not mean […] that Articles 2 and 8 ECHR offer no protection from this threat […] This is consistent with the precautionary principle.' The Court considered that this conclusion was sufficiently clear that no reference to the Strasbourg Court was required (§5.6.4 **[AB/999]**).

GROUND 1: THE DEFENDANT MISDIRECTED HIMSELF AS TO THE NATURE OF HIS OBLIGATION UNDER SECTION 13 CCA

36. The Defendant misdirected himself as to the nature of his obligation under s.13 CCA when purporting to conclude the proposals and policies set out in the NZS will enable carbon budgets to be met, in terms of both the level of confidence required and what information he needed to consider.

What Section 13 CCA Requires

37. The Defendant's obligation under s.13(1) is to prepare policies and proposals that he is satisfied will enable the carbon budgets to be met. The title of s.13 – and the title of the group of sections in which it is found – indicates that the policies and proposals are "*for meeting carbon budgets*" (underlining added). "*Will*" is not the same as "*could*", "*might*" or anything similar. The Minister needed to understand, consider and address his mind (on a basis capable of being evidenced) to this statutory objective and reach a conclusion as to whether the sixth carbon budget would be met.

38. The planning and reporting duties are thus not a duty to "*use reasonable endeavours*" to meet, or to meet "*as far as reasonably practicable*" a broad target. The targets under the CCA are (i) specific and quantified, (ii) set by the Defendant himself, based on a realistic estimate for a budget, reflecting the advice of his expert statutory advisor, and (iii) already take into account a range of scientific, technology and policy considerations: s.10(2).

39. To be satisfied that proposals and policies will enable the carbon budgets to be met, the Minister had to carry out an assessment of the expected impact of the proposals and policies on carbon emissions and the time-scales within which those proposals and policies are

expected to take effect. Without such an assessment, there could be no proper basis for him concluding that quantitative targets, which are based on fixed emissions levels and established deadlines, will be achieved. Put the other way: a conclusion that a series of policies and proposals will enable numeric GHG targets to be met by particular dates plainly requires numeric predictions as to the contribution those policies will make, and by when, to meeting the targets. Without that, there can be no conclusion that the policies and proposals 'will' enable budgets to be met. Instead, the Minister could only speculate about what policies and proposals could theoretically deliver, rather than what, realistically, they would deliver.

40. Any looser reading of the s.13 duty is not in accordance with the statutory scheme. Overall, the Defendant needs to ensure that the net carbon account does not exceed the budget: s.4. He will fulfil that if he prepares policies and proposals which will enable the budgets to be met under s.13 (and then effectively implements those policies). The scheme therefore requires the Defendant to plan to meet 100% of the budget, not 80% or 90%, or even 95%.[13] To do otherwise would undermine the Government's ability to meet the 2050 Target along the trajectory set by the carbon budgets (which he is required under statute to meet), and thus the wider purposes of the Act, as the CCC has explained in clear terms.

41. In addition, under s.13(3), the proposals and policies "*taken as a whole, must be such as to contribute to sustainable development*". As noted above, sustainable development includes meeting the needs of the present while safeguarding the ability of future generations to meet their needs. That necessarily builds in consideration of timescales: the needs of the present and the needs of the future. It plainly requires an informed consideration of the time-scales of the steps over which actions to tackle climate change are being taken.

The Defendant's Misdirection

42. In failing to take the approach set out above, the Defendant failed to address his mind to the correct statutory objective.

[13] This obligation was met by the policies and proposals included in the first s. 14 report, the Low Carbon Transition Plan (pp 39, 45-46 and Annex A [**SB/10, 16-17, 21-40**]).

43. First, the NZS does not claim that the proposals and policies set out therein will enable the carbon budgets set under the CCA to be met. Rather, it states that the proposals and policies in the NZS are "*for keeping us on track for our coming carbon budgets…*" ([**NZS/17**]) and talks in terms of "*emissions reductions which we aim to achieve through the* [NZS]" (§6 [**NZS/306**]). Contrary to the assertions of the Defendant (DGD §97 [**CB/327**]), this is not the same as a statement that the Defendant (through the Minister) considered that the policies and proposals will enable the carbon budgets to be met.

44. Moreover, the statements in the NZS that do refer to the policies and proposals as meeting carbon budgets set under the CCA are not derived from an assessment of the effect of the Defendant's proposals and policies. Rather, they are based on the "*indicative emissions pathway*" (see §17 of [**NZS/74**]), which is not (on the Defendant's own case) a developed assessment of the emissions reductions arising from the proposals and policies set out in the NZS.

45. The issue is not merely one of semantics, as the Defendant seeks to characterise it. Rather, the Defendant's error derives from his reading of s.13 of the CCA as requiring him only to prepare proposals that merely keep the budgets "*in reach*" and that could enable the budgets to be met with the future development of "*further policies and proposals*". That error of approach is plain to see in the Ministerial Submission of 15 October 2021, which says [**SB/193**]:

> "10. Although our ambitious SR bid for NZS policies did not result in all the funding requested, we advise that the NZS package of policies and proposals credibly enables us to be on track for all our legislated carbon budgets, and therefore fulfils our duty under sections 13 and 14 of the CCA (see Annex F). This is based on current modelling and planned policy work to identify further options over the coming years to deliver CB6 in full, taking advantage of technological progress, innovation and societal trends. It is not necessary for the policies and proposals included on the face of the NZS to deliver 100% of the emissions reductions required for CB6, providing they are sufficient to keep the targets in reach and that we continue to develop further policies and proposals as required in coming years

(see paras 15 and 16, and Annex F, for legal risks associated with this position)." (underlining added).

46. While the Defendant now apparently concedes that he needed to conclude that the policies and proposals "*will*" rather than merely "*could*" enable the carbon budgets to be met (DGD §14 [**CB/306**]; DGD §59 [**CB/318**]), he curiously still does not accept that s.13 requires him to have confidence in his assessment. The Defendant now argues the level of evidence and analysis – including the degree of certainty or confidence – needed to meet that test is ultimately a matter for him to judge, subject only to review on the grounds of *Wednesbury* irrationality (DGD §90 [**CB/325**]). That cannot be right. The Defendant cites **R (Khatun) v Newham LBC** [2005] QB 37 [**AB/196-231**] (at [35]) as support for that proposition. However, the passage relied on says that "*where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decision-maker and not the court to conclude what is relevant, subject only to Wednesbury review*" [§35 [**AB/214**]]. That is not applicable here: ss.13 and 14 are not discretionary powers but contain precise requirements which must be complied with by the Secretary of State. Indeed, one of the Defendant's main arguments is that s.14 is explicit as to precisely what is required (see e.g. DGD §68 [**CB/319**]): "*Where it was intended that a s14 report must do certain things, that was explicitly required by s14, in subsections (2), (3) and (4). There is no scope to read in additional requirements*").

47. The Claimants are not asking the Court to read additional requirements into s.13 or s.14. The simple point is that the only way in which the Minister could conclude that the policies and proposals contained in the NZS would enable the carbon budgets to be met, was to quantify the emissions reductions expected from them, and for those reductions to add up to at least 100% of what was necessary. That is not an "*unwarranted gloss*" (DGD §79-80 [**CB/322**]) on the statutory language. It is the obvious, common sense construction of the statutory language and the construction most likely to achieve the purpose of the statute, namely to ensure that carbon budgets are met, and the net zero target achieved. The Defendant repeatedly refers to his "*predictive*" judgement (see e.g. DGD §83 **[CB/323]**), but any such judgement must be founded in the evidence. He cannot "*predict*" that the policies and proposals will enable the carbon budgets to be met without a quantification of emissions figures that provides a sound basis for the required judgement.

48. The Defendant revealed for the first time in the SGD that the Minister's conclusion was based on advice from departmental officials that the quantified proposals and policies in the NZS would, "*[i]f delivered in full*", directly deliver only around 95% of the emissions required for the sixth carbon budget (§8 [**SB/193**]). The fact that departmental officials (correctly) considered it necessary to seek to calculate (in some form) the carbon emissions reductions that could be produced from the various proposals and policies reinforces the Claimants' position: that the s.13 process requires quantification of expected carbon emission reductions, in order to support a conclusion that the relevant proposals and policies 'will enable' carbon budgets to be met. It is important to appreciate, however, that the exercise in which the Defendant's officials engaged was not a prediction of what would in fact result from the proposals and policies. Indeed, Ms James explains that the quantifications carried out in respect of specific policies and proposals were <u>not</u> intended to serve as "*predictions*" of emissions savings, but rather simply as "*analysis supporting internal policy development and implementation*" (SJ §97 [**CB/377-378**]). By contrast, a prediction that the budgets <u>will</u> be met must be based on the Defendant's 'central' or 'best' estimate of the likely emissions reductions (consistent with the usual approach of relying on the 'central projections' or 'reference case' under the Energy and Emissions Projections (EEP) [**SB/14, 16-17, 22, 28, 52-53, 82**]), from those policies and proposals that could be quantified on this basis. As explained below, the calculation which was in fact undertaken was of <u>maximum potential</u> impact ("*if delivered in full*"), rather than an attempt to quantify what was genuinely expected to happen.

49. As can be seen from the interim and final lists of quantified policies exhibited by Ms James [**SB/206-247**], many of these policies and proposals are (on their own terms) at such an early stage of consideration that there cannot be clarity about their content and likelihood of implementation, and by extension no basis for predicting they "*will enable*" a given amount of emissions savings. To use the terminology of the EEP, there is no evidence that the quantification included only those policies and proposals with "*a realistic chance of being adopted and implemented in future*" (FN 25 [**SB/124**]).

50. As a fallback, the Defendant now asserts that the Minister could lawfully conclude that a set of proposals and policies will enable the budgets to be met without those proposals

being "*quantified to add up to the full amount of all the relevant carbon budgets over such a period*" (DGD §87 [**CB/324**]) (underlining added), and that he was therefore entitled to rely on the analysis estimating that quantified policies and proposals would achieve around 95% of the necessary reductions. That cannot be right. The Minister could not conclude that the policies will enable quantified targets to be met by a certain date without knowing that the proposals were together projected to generate all of the necessary emissions by the relevant date, and he could not know that without quantifying their effects. The Defendant disputes that there is a need to show that the carbon budgets will be met "*in full*" (DGD §133 [**CB/334**]). However, it is impossible to see how the statutory language could require anything else, or how the Defendant could conclude that unassessed (in fact, as yet non-existent) policies and proposals would close the emissions gap.

51. While the Defendant points to unquantified 'enabling' policies as a potential source of the missing emissions reductions (SJ §143 [**CB/390-392**]), there is no evidence that such enabling policies would deliver reductions additional to the c. 95% (as opposed to facilitating the achievement of the c. 95%), or if they would, to what extent. The highest it is put on behalf of the Defendant is that such enabling policies 'could be developed or delivered' so as to generate additional savings (SJ §143 [**CB/390-392**]) – but that simply highlights that these policies in their current state of development cannot do that, and must therefore be discounted from the calculation and cannot be relied on in discharging the s.13 duty. From the account given by Ms James, it is clear that the NZS analysts took a very broad approach to which policies could be quantified. She explains that the quantification that led to the c. 95% covered "*proposals that are not yet fully developed*" and "*based on assumptions as to their deployment*", as well as policies and proposals before they were "*fully developed, assessed, or consulted on, and in some cases ahead of being announced*" (underlining added) (SJ §97 [**CB/377-378**]). It follows that any policies that fell outside even this broad scope were so undeveloped that even 'assumptions as to their deployment' could not be made. It is simply illogical then to rely on such unquantifiable policies to make up the shortfall in the quantified policies.

52. The Defendant asserts that it cannot be right that every policy or proposal must be quantified (DGD §86, §131 [**CB/324, 334**]). That is not the Claimants' position. Rather, the Claimants' case is that the Defendant needs to set out sufficient quantified policies and

proposals to allow him to reach the conclusion that those policies and proposals 'will enable' carbon budgets to be met. That does not preclude him from also including other unquantifiable policies or proposals in the NZS; it simply precludes him from counting them towards achievement of the budgets. If, as the Defendant asserts, it is impossible to estimate the effect of some policies and proposals (DGD §11 [**CB/305**]) then they cannot properly form part of an evaluation that, taken with others, they "*will enable*" numeric targets to be met. Of course, that does not make them inherently unlawful policies or proposals, or negate their potential utility. But if the Minister wants to rely on them as part of the overall "*will enable*" evaluation, he needs to be able to quantify their effect.

53. The Defendant further asserts that precise quantification is not possible because it "*does not in any event account for uncertainty, for example technological uncertainty*" (DGD §35 [**CB/312**]). However, as Ms James recognises (SJ §97 [**CB/377-378**]), the Defendant uses EEPs to quantify emissions projections in other contexts, which expressly factor in such uncertainty [**SB/125**] (indeed, as explained in the NZS **(**§45 [**NZS/321**]**)**, the Defendant's annual indicative range under s.12 of the Act adopts the EEP approach to modelling uncertainty). The EEP approach (i) quantifies emissions savings from existing and planned policies that have a "*realistic chance of being adopted and implemented in future*", [**SB/124**] and "*where decisions on policy design are sufficiently advanced to allow robust estmates of impact*" [**SB/132**]; (ii) is used by the government to measure the "*policy gap*" for meeting carbon budgets [**SB/189**]; and (iii) was used in the "*baseline*" projections in Table 6 of the Technical Annex to the NZS [**NZS/321**], which Ms James describes as "*the projected trajectory of UK emissions*" under the policies and proposals included in the 2019 EEP (SJ §38 [**CB/359**]) (see also §44 [**NZS/321**]). This approach to quantifying emissions reductions from policies and proposals was used in all previous s.14 reports, by reference to the "*central projections*" under the EEP (see, e.g., pp 39, 45-46 and Tables A1-A6 of the Low Carbon Transition Plan [**SB/10, 16-17, 23-35]**, Chart B1 and Table B3 of the Carbon Plan [**SB/53-54**], and Tables 2 and 5 of the Clean Growth Strategy[14] [**SB/81, 83**]). In the most recent s.14 reports prior to the NZS, the EEP were described respectively as "*an essential tool for tracking progress and risks towards meeting the carbon budgets*" (Carbon

[14] See also p. 145: *"We have met our first carbon budget and current central projections show us exceeding requirements for both the second and third carbon budgets. Emissions are projected to continue to fall through the 2020s, but there is an estimated shortfall against the fourth and fifth carbon budgets, based on estimates of emissions reductions from existing policies."* [**SB/82**]

Plan, §B2.5 [**SB/51]**), and as the projections used by government to give "*a sense of whether we are on track to meet our carbon budgets*" (Clean Growth Strategy, p. 145 [**SB/82**]). The Defendant has provided no explanation for why it would not be feasible to use the EEP approach to assess the impact of the NZS policies and proposals, or why he has departed from previous practice.

54. In sum, the Defendant considered that he was not required to have any particular degree of confidence that the budgets would be met, and that he was not required to assess the quantified impacts of his policies and proposals. This was a clear error of law as to his statutory duties under s.13 CCA. To the extent that a quantified estimate was in any event considered, it did nothing other than to confirm that the policies and proposals whose effect could be measured would not enable the sixth carbon budget to be met, yet the strategy was still approved. The NZS was unlawful as a result.

55. The need for information about time-scales for individual policies and proposals is made particularly obvious because, without that, the Minister (as we now know was the decision-maker) could not have known whether, and to what extent, the burden of measures required to ensure carbon budgets are met, are expected to be shouldered by (or lead to benefits for) current rather than future generations (as part of addressing sustainable development, as he needed to do). As is clear from the witness statement of Ms James (SJ §94 **[CB/375-377]**), and the DGD (DGD §15 **[CB/307]**), no further information (beyond what was contained in the NZS and its Technical Annex) was provided to the Minister on the contribution of the policies and proposals to sustainable development. The Defendant cannot therefore have discharged the duty in s.13(3) to ensure that the policies and proposals contributed to sustainable development.

GROUND 2: THE NZS FAILED TO INCLUDE THE INFORMATION REQUIRED BY SECTION 14 CCA

56. The policies and proposals set out in the NZS do not meet the Defendant's obligations under s.14 CCA. As noted above and as accepted by the Defendant, s.14 is intended to enable Parliament (including with the assistance of the CCC) to evaluate and scrutinise, on

behalf of the public which it represents, how the Government will meet the carbon budgets. That is not changed or diluted by what the CCC is separately required to do.

The Statutory Purpose of Section 14

57. Section 14 CCA is a reporting obligation on the Defendant, imposing a *"[d]uty to report on proposals and policies for meeting carbon budgets*" to Parliament. The Defendant frames the claims as attempts to read words into the statute. That is inapt. The claims rest on the clear language of the CCA taken as a whole. They do not require reading any words into s.14 (or, in relation to Ground 1, into s.13).

58. The purpose of the publication of such a report in the prescribed manner plainly includes enabling members of Parliament to scrutinise (to be able to hold the Defendant to account for) the formulation of policies and proposals that will purportedly achieve the carbon budgets. Ms James has confirmed these proposals and policies are described in NZS Chapters 3 (Reducing Emissions across the Economy) and 4 (Supporting the transition across the Economy) (SJ §58 [**CB/365**]).

59. Of course, any particular s.14 report is necessarily a snapshot outlining the Defendant's thinking at the relevant time. The proposals and policies such a report sets out may (quite properly) be at different stages of evolution and may change in future. However, that does not dilute the overall purpose and what is needed to achieve it, namely of enabling proper scrutiny by Parliament. Just as the CCC must advise on, and the Government determine, a specific quantified carbon budget over a decade in advance, despite uncertainty, the Defendant must quantify the effect of his policies and proposals designed to meet it, despite uncertainty. Where there is uncertainty, a precautionary approach should be adopted given the scale of the climate crisis and the significant risk of harm that it represents; harm which is in fact already manifesting itself in this country and across the world (see s.13(3) [**AB/13**]).

What is Required to Comply with Section 14

60. The wording of s.14 – to set out proposals and policies "*for meeting*" carbon budgets (s.14(1)) – makes clear that Parliament must be told why the Defendant considers the necessary emission reductions will be met. The Defendant accepts that s.14 requires transparency, but tries to limit that to transparency only in respect of which policies and proposals are relied on (DGD §68 **[CB/319-320]**). That cannot be right. The purpose of a s.14 report is to enable Parliament to scrutinise how the Defendant intends to meet the numerically quantified carbon budgets. Accordingly, for the NZS to meet the statutory requirements, it must include (a) a numeric explanation of the basis for the Defendant's conclusions that the policies and proposals will meet those budgets, and (b) a numeric analysis of the extent to which those policies and proposals will individually and in combination meet those budgets (i.e. quantification). Without such information Parliament is presented with a set of policies and proposals which might meet the targets. However, Parliament cannot scrutinise and understand the claim then being made by the Minister, namely whether the policies and proposals will enable the carbon budgets to be met. Parliament can only meaningfully assess whether what is put forward will meet these numeric targets by the specified dates, if it has numeric information (quantification) about what the Minister expects the policies and proposals to achieve.

61. Moreover, s.14(4) requires the s.14 report to outline the implications of the proposals and policies as regards the crediting of carbon units to the net UK carbon account. The Defendant has stated that his intention is to meet the budgets covered by the NZS without the use of carbon credits (DGD §16 [**CB/307**], §12 [**NZS/307**]), but the statutory language is revealing: even outlining the implications of the policies and proposals for the use of carbon credits would require quantification of their effects, whether caveated or not.

62. Section 14 also stipulates that the report must, "*in particular*", set out the "*time-scales over which those proposals and policies are expected to take effect*": s.14(2)(b) [**AB/14**]. The Defendant denies that s.14(2)(b) requires time-scales of individual policies and proposals to be outlined (DGD §147, FN82 [**CB/338]**). However, a straightforward reading of s.14 makes clear that they do. S.14(2)(a) requires the Defendant to set out s.13 policies and proposals. That obviously includes individual policies and proposals (and that is accepted by the Defendant). S.14(2)(b) says "*the time-scales over which those proposals and policies*

are expected to take effect" (underlining added). This refers to: (i) plural timescales; and (ii) the individual policies and proposals in s14(2)(a). To argue otherwise is contrary to the language of the statute.

63. The Defendant's interpretation would undermine the purpose of the provision, which is to allow for meaningful tracking of progress by reference to the time-scales. The Defendant's interpretation gives rise to a permanent risk of leaving it too late to take remedial action to meet the relevant carbon budget in time. The carbon budgets are numeric targets with set dates in terms of emissions reductions, not undertakings to achieve qualitative outcomes. Therefore, for Parliament to be able to effectively scrutinise whether and how those targets will be met, and to track progress, it needs to understand the time-scales and numeric expectations for the specific policies and proposals that are relied upon.

64. The Defendant contends that "*[h]olding the Government to account in Parliament*" for meeting the carbon budgets (a function which he clearly accepts to be part of s.14) does not require the report to explain the basis on which it was considered that the proposals and policies will enable the carbon budget to be met, and the level of detail and analysis to be included is ultimately something over which he has untrammelled discretion (DGD §76 [**CB/321**]). With respect, this is not a plausible or consistent interpretation of s.14: Parliament cannot hold the Government to account without knowing how, to what extent, and when the Government expects that the proposals and policies will achieve the numeric targets in question. Put simply, Parliament needs information about the contribution each policy/proposal is relied on as making.

What the NZS Actually Included

65. The NZS did not in any way set out the basis for the Minister's apparent conclusion (under s.13 CCA) that proposals and policies prepared will enable the UK to achieve the carbon budgets. Specifically, the NZS did not provide any quantified estimate or prediction of the contribution that each proposal or policy is being relied on as making towards reducing carbon emissions, nor time-scales over which those reductions are expected to take effect as part of meeting these numeric and date-specific targets. As only later became apparent,

the Minister approved publication of the NZS on the basis that it contains policies projected to deliver c. 95% of the sixth carbon budget. Parliament was not informed of that.

66. The indicative delivery pathway for emissions reduction in the NZS does not substitute for these requirements (nor does it claim to). As the Defendant confirmed, this pathway is not a quantitative assessment of the actual policies and proposals in the NZS. Ms James said in her witness statement (SJ §44 [**CB/361**]):

> "Through the deployment assumptions we sought mainly to signal the type and scale of action needed across the UK economy and society to stay on track for our carbon budgets, focussing on some of the key assumptions as a proxy. They should therefore be read as indicative, and not as targets for deployment."

67. The Defendant has confirmed the pathway "*is designed only to provide an indicative basis on which to make policy and plan to deliver on our whole-economy emissions targets. The exact path we take is likely to differ and must respond flexibly to changes that arise over time*" (DGD §17 [**CB/307**]), and "*the pathway analysis is separate from the proposals and policies in the NZS*" (DGD §22 [**CB/308**]; See also NZS itself §17-18 [**NZS/74**]).

68. It follows, therefore, that it cannot be right that *"[t]he time-scales over which the proposals and policies in the NZS are expected to take effect are set out… by reference to the delivery pathway in Chapter 2*" (DGD §12 [**CB/305-306**]). The delivery pathway is modelled on what could be done (an indicative trajectory of emissions reductions based on the *potential* of each sector of the economy), and is not a complete prediction of what will result from the actual policies and proposals. The indicative pathway may help "*sense check*" the policies and proposals of the NZS, but it does not describe their specific time-scales or effects in a way which would allow for the requisite Parliamentary scrutiny.

69. Moreover, as the first witness statement of Michael Childs ("**MC1**"), Head of Science, Policy and Research for the First Claimant [**CB/46-55**][15], explains (at §15 [**CB/50**]): with only an "*indicative pathway*" based on theoretical potential, it is not possible (either for Parliament, the Defendant, or anyone else) to scrutinise whether the proposals and policies

[15] Mr Childs is someone with technical expertise, having worked in the field of climate policy for the last 20 years (including leading the team at FoE that proposed the Bill that eventually became the CCA).

will actually enable the carbon budgets to be met. Indeed, in some areas, such as insulation for owner-occupied homes, behaviour change and land-use, there is an absence of policy at all, let alone any quantification of what the impact of the polices will be in terms of emissions reduction (MC1 §21 and §29-30, [**CB/51, 53-54**]).

70. Furthermore, as explained in Mr Childs' second witness statement (MC2 §5 [**CB/409**]), where policy exists, there is an absence of information on *how or when* the policies will or should contribute to even the fourth carbon budget (which begins next year; it covers the period 2023-2027), let alone any of the subsequent carbon budgets. For example, Mr Childs refers to the NZS policy on heat pumps and the target for 600,000 heat pump installations to occur annually by 2028 (MC2 §6 [**CB/409-410**]). There is a complete absence of information as to what contribution the policy will actually make to the fourth carbon budget (which ends in the preceding year; 2027). Mr Childs makes this same point in relation to the limited policies to decarbonise owner-occupied homes and agriculture (MC2 §7-8 [**CB/410**]), policy areas in the NZS that have been criticised by the CCC. The NZS does not explain how the upcoming fourth carbon budget will be met, or any of the subsequent carbon budgets. It does not explain which of the policies in the NZS will ensure that the fourth carbon budget is met, or how, because their emission reduction impacts are not quantified and time-scales in which they will deliver emissions reductions are not specified.

71. The SGD revealed, for the first time, that the Minister had in fact considered additional information from officials (neither contained nor referred to in the NZS itself) when concluding that the proposals and policies set out in the NZS "will" enable carbon budgets to be met (see SGD §31 [**CB/170-171**]). The revelation that the analysis and advice **was** to some extent based on quantification and time-scales confirms the Claimants' submission that the NZS could have included information of this nature, as also demonstrated by the content of previous s.14 reports.

72. The Defendant submits that a lawful s.14 report does not need to contain all of the workings and thinking which lie behind the report (DGD §74-78 [**CB/321-322**]). That is correct but what does need to be set out are the main workings, namely the policy emissions projections. In all previous s.14 reports, the Defendant set these out; it provided the

estimated quantified impact of his policies and proposals by reference to carbon budgets. For example, in the previous s.14 report (the Clean Growth Strategy), the Defendant showed the quantifiable EEP policy gap as regards emissions reductions requirements for the fourth and fifth budgets (see Tables 2 and 5 of the Clean Growth Strategy [**SB/81, 83**]). The Defendant fails to explain why it did not do so in the NZS. Indeed, in the s.14 reports preceding the Clean Growth Strategy, the expected emissions savings under the EEP were shown by policy / proposal and by year (see Tables A1-A6 of the Low Carbon Transition Plan [**SB/23-35**], Tables B26 and B28 of the Carbon Plan [**SB/68-72, 75-77**]). Ms James claims to have used previous s.14 reports as a starting point, but she does not explain why she did not follow the previous approach of including an EEP-style assessment of the impact of their policies and proposals (SJ §25 [**CB/354**]).

73. As to time-scales, the Defendant appears to accept that time-scales for some individual policies are needed. Indeed, the DGD state that the NZS did not just contain a single overall time-scale, but claims that it was "*replete*" with statements as to the time-scales over which proposals and policies were expected to take effect, albeit that was not done for every single proposal and policy, and that that was enough to comply with s.14(2)(b) (DGD §131 [**CB/334**]). The reality is that time-scales as to when policies and proposals are expected to achieve the required emissions reductions are startlingly absent from the NZS. The CCC noted that there are no timelines *at all* in some areas [**SB/307**]. Even where there are timelines, those are generally for implementation of the policies, or even merely the opening of consultations or calls for evidence, rather than dates by when emissions will be reduced by quantified amounts (SJ/Exhibit 17 [**SB/248-259**]) – the latter being the time-scales "*over which*" they will "*take effect*" for the purposes of s.13 and for meeting budgets (and also being the only means by which progress and effectiveness can be measured). Any time-scales relating to the indicative emissions pathway analysis also cannot be relied upon for these purposes given their separation from the NZS policies and proposals.

74. The Defendant attempts to rely on the role of the CCC to argue that less transparency is needed. He says that BEIS shares further detailed analytical information with the CCC, which has facilitated its work (DGD §49 [**CB/315**]). The Claimants do not agree with this proposition in principle (that the existence of an expert body dilutes the importance of Parliamentary scrutiny), but in any case, the Defendant's account does not reflect what the

CCC has said. The CCC stated as recently as April 2022 that the Defendant has provided it with "*limited clarifications*", but it has not shared "*any new quantification of emissions saving from specific policies*" (see evidence from the CCC exhibited to Mr Childs' second witness statement on behalf of FoE; Ref MC2 p4 [**SB/428**]). In March 2022, the CCC also made clear that it continues to lack the data it needs in its Independent Assessment of the UK's Heat and Buildings Strategy, highlighting the Defendant's failure to "*publish detailed figures for the contribution of individual policies or technologies towards its overall ambition*" and the "*unexplained emissions reduction*" (p5) [**SB/417**]) (see also pages 20-21, 23, 30 and 86 [**SB/421-425]**).

75. In short, to comply with the obligations in ss.14(1) and 14(2)(a) CCA for the statutory purpose of Parliamentary scrutiny, the NZS needed to include an explanation of the basis for the Minister's conclusions that the proposals and policies will enable each of the carbon budgets to be met, and sufficient information (including at least the predicted quantification and time-scales for the policies and proposals) to enable meaningful Parliamentary scrutiny. The Defendant erred in law by failing to include any of this in the NZS. (Of course, the confidence in the predictions may vary, and indeed predictions made now may change over time; it may be hard to establish "*with certainty*" (DGD §34 **[CB/311**]) or to make "*precise quantification[s]*" (DGD §35 **[CB/312]**). But, contrary to what the Defendant seems to think, those limitations do not make it lawful to omit all predictions, or proceed on partial predictions.

GROUND 3: THE NZS IS UNLAWFUL WHEN SECTIONS 13 AND 14 ARE READ COMPATIBLY WITH CONVENTION RIGHTS

76. The interpretation of ss.13 and 14 CCA 2008 advanced under Grounds 1 and 2 above is correct as a matter of the plain meaning of the relevant provisions, read in their statutory context. In the alternative, however, that is the reading demanded by the interpretative obligation contained in s.3(1) HRA 1998 **[AB/59]**, which requires that (so far as possible) primary legislation be read compatibly with Convention rights. Since the Defendant (avowedly) did not interpret his duties in this way, he proceeded on a misdirection of law, and the NZS is unlawful as a result.

77. The Defendant objects, first[16], that GLP does not allege any particular breach of human rights, and cannot do so as a non-governmental organisation. This objection is misconceived: there is no requirement for a claimant to be a 'victim' in order to rely on the s.3 HRA interpretative obligation, as there is to bring a claim for breach of Convention rights under s.6 HRA.

78. That was the ruling of the House of Lords in **R (Rusbridger and others) v Attorney General** [2004] 1 AC 357 [**AB/174-195**], where the claimant journalists sought a declaration pursuant to s.3 HRA, alternatively a s.4 declaration of incompatibility in respect of s. 3 of the Treason Felony Act 1848 and did not complain of any unlawful act contrary to s. 6 HRA. Lord Steyn (with whose speech Lord Scott and Lord Walker agreed) made clear that in those circumstances the 'victim' requirements of s. 7 HRA did not have to be satisfied; ss. 3/4 HRA was an entirely separate ground for invoking the jurisdiction of the Court. He stated (§21):

> "The starting point must be that the relief claimed may as a matter of jurisdiction be granted. The Guardian do not have to demonstrate that they are "victims" under section 7 of the Human Rights Act 1998. That much is conceded and, in any event, obvious on proper view of the place of section 3 in the scheme of the Human Rights Act 1998. […]. For present purposes it is sufficient that The Guardian has an interest and standing. That is the threshold requirement."

79. The approach in **Rusbridger** was also adopted by the Supreme Court in **In Re Northern Ireland Human Rights Commission** [2019] 1 All ER 173 [**AB/314-425**], in considering the standing of NIHRC to seek a declaration of incompatibility under s.4 HRA, in the absence of an actual or potential victim as claimant. Although the Court rejected NIHRC's standing (by a narrow majority), that finding turned on the particular statutory powers of the NIHRC, not the general position under the HRA, which was explained by Lady Hale as follows (§17):

> "we know that the Human Rights Act provides two different methods of seeking to ensure compliance with the Convention rights. One is for victims to bring proceedings in respect of an unlawful act of a public authority, or to rely on such an unlawful act in

[16] In fact, this is the final point the Defendant takes against this Ground, but it is logically prior to its other objections and is said to be 'critical' (DGD §161 [**CB/342**]).

other proceedings, pursuant to section 7(1) of the HRA. The other is to challenge the compatibility of legislation under sections 3 and 4 of the HRA, irrespective of whether there has been any unlawful act by a public authority. This may be done in […] in judicial review proceedings brought by person with sufficient standing to do so."

80. To like effect are the dicta of Lord Kerr at §188, referring to **Rusbridger**. Lord Mance, for the majority on the issue of standing, expressly recognised the effect of **Rusbridger** (at §62), albeit he regarded that as an unusual case, and relied on the 'normal position' (where a victim brings a claim under ss.3-4 HRA in the context of a claim under s.6-7 HRA) in interpreting the statutory powers of NIHRC. Lord Mance, too, stated that ss.3-4 HRA are 'subject to the usual rules regarding standing in public law proceedings'.

81. The Defendant disputes the entitlement of GLP to rely upon Convention rights, citing §114 of **R (Z) v Hackney LBC** [2020] 1 WLR 4327 [**AB/622-663**] in which Lord Sales stated that: "The proper approach to construction is that legislation should be read and given effect in a particular case according to its ordinary meaning, unless the person who is affected by it can show that this would be incompatible with their Convention rights under the HRA or some provision of EU law as applied to their case". However, that case concerned an alleged s. 6 unlawful act where the claimant tried and failed to demonstrate that there was any incompatibility with her Convention rights, rather than a case like the present which pursues the ss. 3/4 HRA route. In this paragraph, which was expressly *obiter* given the previous finding of no incompatibility, Lord Sales was rejecting a submission that the claimant could rely, for the purpose of interpreting the relevant statute, on breach of rights conferred by the EU Race Directive which she did not herself enjoy. None of this affects the ability of GLP to rely upon s. 3 HRA in the present case.

82. Accordingly, there is no additional requirement to be a 'victim' in order to rely on s.3 HRA. The test is the usual one of standing to bring judicial review – and the Defendant does not contest the standing of GLP and indeed, has expressly disavowed such an argument.

83. The Defendant objects, next, that no breach of Convention rights has been shown. Once the Court accepts that there is no need for there to be a 'victim', alleging specific breaches of the victim's own Convention rights in order to rely on s.3 HRA 1998, it can be seen that

there are numerous ways in which the Defendant's interpretation of ss.13-14 would lead to breaches of Convention rights. GLP rely on the positive obligations identified by the UN Special Rapporteur to take robust action to tackle climate change, in order to prevent future harm to life, property and private life arising from (for example) extreme weather events such as heatwaves and flooding, and so prevent breaches of Article 2, Article 8 and A1P1 [**AB/63-65**]. The Strasbourg court has also developed a body of case-law establishing that Articles 2 and 8 impose positive obligations on states in relation to other environmental harms – case-law that the Dutch Supreme Court in the **Urgenda** case had no difficulty in applying to the issue of climate change.

84. The Defendant's interpretation of ss.13-14 CCA 2008 allows for materially less stringent planning of climate change mitigation policy and ultimately a lower degree of certainty that carbon budgets will be achieved. Alternatively, it allows for an increased risk that they will be achieved, but in an unplanned way that represents a less favourable outcome for the environment: for example, if the sixth carbon budget can, in the event, only be achieved by 'banking', pursuant to s.17(3) CCA, the amount by which the fifth carbon budget is overachieved. Such an outcome would not be unlawful, but would result in higher GHG emissions, greater climate change impacts, and more extensive infringements of Convention rights in future.

85. The Defendant has relied in pre-action correspondence on **R (Plan B) v Prime Minister & Others** [2021] EWHC 3469 (Admin) [**SB/393**][17]. There are (at least) two clear points of distinction between the arguments currently before the Court and advanced in the **Plan B** case:

    a. First, the Plan B claim was one under ss. 6/7 HRA, not one relying on s.3 HRA.

    b. Second, the Plan B claimants argued that the breach of their Convention rights lay in the UK Government not having done enough to implement the goals of the Paris Agreement; but they disavowed an argument that then-current Government policies[18] breached CCA duties (§33). The HRA argument thus faced the 'insuperable problem […] that there is an administrative framework to combat the threats posed by climate change, in the form of the 2008 Act' – which the claimants

[17] A refusal of permission which has not been designated as suitable for future citation.
[18] The claim was filed before, but the oral renewal hearing held after, publication of the NZS.

had all but accepted was being lawfully implemented. Here, by contrast, the Court is not asked to look beyond the administrative framework of the CCA, but rather to interpret it in a way that respects its statutory purpose (of tackling climate change by meeting carbon budgets and targets) while also discharging the positive obligation to guard against infringements of Convention rights. That is an argument that works with the grain of the CCA 2008, not against it.

86. Even if there were force in the Defendant's objections to the ability of a non-governmetnal organisation to rely upon the HRA, Joanna Wheatley was added as a second Claimant to Claim CO/199/2022 by Order of Holgate J dated 6 May 2022 [**CB/416-417**]. The Defendant's objections to the claim by GLP do not apply to Ms Wheatley's claim.

87. Ms Wheatley is a highly committed climate change campaigner. Her witness statement sets out what she describes as a 'preoccupation' which has led her to make significant personal sacrifices (JW §5 [**CB/298**]) and devote her spare time to campaigning and developing practical climate solutions (JW §6-8 [**CB/298**]). Her concern about climate change does not, however, arise only in her capacity as a campaigner. Rather, it is a pervasive fear that affects her daily life and her family life. She explains at §10 of her witness statement, in some detail, the ways in which she is 'terrified about what will happen if the Government does not effectively plan to achieve net zero by 2050' and how this impacts her 'emotionally, psychologically and physically' including her fears for the lives of younger generations of her family.

88. It is clear from Ms Wheatley's statement that it is not only the issue of climate change generally that is affecting her present enjoyment of her private and family life, in a way that engages her rights under Article 8 of the Convention. It is also the adequacy or otherwise of current Government planning to combat climate change, which causes her to fear for the future of her family. Thus, an interpretation of ss.13 and 14 which allows Government to adopt and publish only vague and unquantified policies for tackling climate change (as it has done in the NZS), or to plan to meet less than 100% of the necessary emissions reductions (as it did in preparing for the NZS), exacerbates Ms Wheatley's present anxiety and the infringement of her Article 8 rights.

89. By contrast, the Claimants' interpretation of ss.13 and 14 set out under Grounds 1 and 2 above would require a greater degree of specificity and transparency in relation to Government policies and proposals to meet carbon budgets and targets than would the Defendant's interpretation, leading to greater certainty that budgets and targets would be achieved. For Ms Wheatley, this would alleviate her present anxiety and reduce the interference with her Article 8 rights.

90. To be clear, whilst Ms Wheatley exemplifies the impact upon Convention rights of the Defendant's interpretation of ss. 13 and 14 CCA, there will be many other members of the public who are potentially affected to similar or greater extent. As Holgate J recognised in his Order of 6 May 2022 [**CB/416-417**]: "Even if the Court should decide that Ms Wheatley's rights are not engaged is it impossible to conceive of a member of the public who would qualify as a victim for the purposes of ground 2?"

91. For these reasons, if the Court does not accept under Grounds 1 and 2 that the Claimants' interpretation of ss.13 and 14 is the natural meaning of those provisions, then it must read them down, as required by s.3 HRA 1998, in order to achieve a reading that does not breach the Defendant's positive obligations to protect Article 2, 8 and A1P1 rights, and/or the Article 8 rights of Ms Wheatley.

92. Such a reading is well within the limits of the interpretative obligation as enunciated in **Ghaidan v Godin-Mendoza** [2004] 4 All ER 411 [**AB/95-147**]. The Defendant makes only a faint attempt to argue otherwise (DGD §158 [**CB/341**]), and then by mischaracterising the interpretation for which the Claimants contend. The Claimants are <u>not</u> suggesting the CCA requires certainty that carbon budgets will be met – plainly that would be impossible – or that the courts should be the arbiter of the actual effect of policies and proposals. As above, the Claimants are simply saying that the legislation must be read as requiring the Defendant to satisfy himself, on the basis of a quantified assessment (which takes account of the inevitable uncertainty in the usual way, by using a best estimate), that his policies and proposals will enable 100% of the emissions reductions necessary to meet the budgets. That interpretation comes nowhere near being 'inconsistent with a fundamental feature of legislation' (**Ghaidan** at 33, per Lord Nicholls). On the contrary, it gives greater certainty that the budgets and targets will be achieved, and so <u>supports</u> the most crucial feature of the statutory scheme, which is the duties on the Defendant (in s.1

and s. 4 CCA) to reduce emissions to a specified level, by meeting carbon targets and budgets.

NO DIFFERENCE

93. Finally, the Defendant argues relief should be refused on the basis of s.31(2A) of the Senior Courts Act 1981 because the revised "*without feedback*" methodology adopted to account for non-CO_2 greenhouse gases meant the quantified policies alone accounted for 100% of the necessary emissions reductions for the sixth carbon budget (DGD §163-169 [**CB/342-344**]). On this basis, it is said that it is "*highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*".

94. The "*highly likely*" test in s 31(2A) of SCA 1981 sets a "*high hurdle*", in which a defendant faces a burden of proof with a standard somewhere between the ordinary civil standard and the criminal standard of beyond reasonable doubt (see **R (Cava Bien Ltd) v Milton Keynes *Council*** [2021] EWHC 3003 (Admin) at §52(i)-(ii) [**AB/794**]). The burden can only be discharged by evidence, and that evidence should consist of facts known by the witness at the time of the relevant decisions as opposed to *ex post* speculation by an official (see **R (Public and Commercial Services Union and others) v Minister for the Cabinet Office** [2018] ICR 269 at §91 [**AB/311**]). The high hurdle is plainly not surpassed in the present case.

95. First, as highlighted above, a key concern with the Defendant's approach to quantification is that the methodology was not sufficiently rigorous to enable the Defendant to be confident that the policies and proposals will enable the carbon budgets to be met. The Defendant may reach a different conclusion as to the extent to which the policies and proposals enable the carbon budget to be met by using a different approach to quantification: for example, the EEP approach that the Defendant used in relation to prior s.14 reports. On the basis of the information provided by the Defendant the court cannot be satisfied that such an alternative approach would make no difference.

96. Secondly, the Defendant failed to address the point that the Technical Annex provides that "*slightly more abatement is actually required to meet the NDC under the AR5 GWPs without feedback compared to…with feedback*" (underlining added; §19 **[NZS/309]**), and that the Defendant's intention was for the NZS to meet both what he understood the requirements under the Act to be and the UK's Nationally Determined Contribution ("**NDC**") under the Paris Agreement (see, e.g., Briefing to Minister, SJ/Exhibit 5 [**SB/181**]).

97. Thirdly, the fact that the approach to GWPs has changed since the NZS was published does not necessarily mean it is lawful for the Defendant to take a less cautious approach to calculating whether the carbon budgets will be met. As recognised in the NZS, the approach taken then was based on long-term scientific uncertainty and a desire to err on the side of caution (§41 [**NZS/318**]). Moreover, the sixth carbon budget was set on the basis of the "*with feedback*" GWPs and for consistency under the UK's NDC (see CCC advice on Sixth Carbon Budget, pages 16-17, 64 [**SB/142-143, 162**]).

98. Fourthly, if the Claimants succeed in arguing that s.14 requires the publication of greater amount of information than the Defendant in fact published, then a revised NZS will be necessary and s. 31(2A) is plainly inapplicable. It is no answer to say that adding more explanation and/or reasoning makes no difference for the Claimants (DGD §169 [**CB/344**]). The Claimants are interested in ensuring that the Defendant complies with his legal obligations and acts transparently in providing interest groups, the CCC, and the public with adequate information.

99. Finally, the orders sought by the Claimants will require the Defendant to reconsider the correct approach to his ss.13 and 14 duties, irrespective of the ultimate outcome. This is valuable in itself to the Claimants, who seek to hold the Defendant to account.

CONCLUSION

100. The Claimants respectfully ask the Court to grant: a declaration that the Defendant has failed to discharge his obligations under ss.13 and 14 CCA; a mandatory order requiring,

as soon as practicable, the Defendant to take action to comply with his obligations under ss.13 and 14 CCA; and the Claimants' costs in line with the Order.

FoE: David Wolfe QC, Nina Pindham

CE: Jessica Simor QC, Emma Foubister

GLP & JW: Jason Coppel QC, Peter Lockley

18 May 2022