

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

Claim No. **CO/2003/2020**

BETWEEN:-

THE QUEEN  
on the application of  
TRANSPORT ACTION NETWORK LIMITED

Claimant

- and -

THE SECRETARY OF STATE  
FOR TRANSPORT

Defendant

- and -

HIGHWAYS ENGLAND COMPANY LIMITED

Interested Party

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**AMENDED STATEMENT OF FACTS AND GROUNDS**

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*Page references below are to the pages of the claim bundle. They are expressed as: [CB/x] where CB stands for Core Bundle and x is the page number; and [SB/x] where SB stands for Supplementary Bundle and x is the page number.*

*Key documents:*

- *Statement of Facts and Grounds [CB/9-42]*
- *Witness statement of Chris Todd [CB/43-47]*
- *Pre-action correspondence [CB/63-77; 48-57]*

This Statement of Facts and Grounds has been amended pursuant to paragraph 4 of the Order of Lang J dated 2 March 2021: "The Claimant do amend its Statement of Facts and Grounds, to take account of the judgment of the Supreme Court in **R (Friends of the Earth Ltd & Ors) v Heathrow Airport Ltd** [2020] UKSC 52 and (if so advised) the evidence filed."

Additions are in red. Deletions are in ~~striketrough~~, save that, for ease of navigation, the Claimant has entirely removed all text that related solely to Grounds 2 to 4, which have been

refused permission. The paragraph numbers from the unamended Statement of Facts and Ground have been preserved.

## A. INTRODUCTION

1. As explained in the witness statement of Chris Todd [CB/43-47], which the court is asked to read in full, the Claimant is an NGO which is concerned with the environmental impacts of the transport sector, including the impacts of the road transport sector on climate change and air quality.
2. The Interested Party (Highways England: “HE”) is a “strategic highways company” appointed by the Secretary of State (“SofS”) pursuant to section 1 of the Infrastructure Act 2015 (“IA 2015”). The SofS is HE’s sole shareholder and sole client. HE’s remit relates to the “Strategic Road Network” (“SRN”) - motorways and major A-roads – as distinct from local highways which are the responsibility of local highway authorities, typically upper-tier councils.
3. The Claimant challenges the legality of the SofS’ Second Roads Investment Strategy (“RIS2”), which covers the period 2020 to 2025. Its predecessor, RIS1, had been ‘set’ in December 2014 to cover the period 2015 to 2020. RIS2 was set by the SofS on 11 March 2020, pursuant to subsections 3(1) and (7) IA 2015 (subsection (1) empowers the SofS to set a RIS, and subsection (7) requires him to maintain a current one).
4. RIS2 not only allocates funding, but also determines which specific road projects, including projects to increase road capacity (termed ‘capital enhancements’) that the Interested Party is required by statute (see section 3(6) IA 2015) to take forward during the relevant period. RIS2 also sets performance specifications for HE in managing the SRN and undertaking the required projects.
5. The SofS’s setting of RIS2 was unlawful for any or all of the following reasons:
  - a. **Ground 1:** In setting RIS2, the SofS unlawfully failed to take account of the impact of RIS2 on achieving specific climate change objectives (when they

were a mandatory material consideration) when discharging the SofS's duty under section 3(5)(a) IA 2015 (which required the SofS to have regard to the effect of RIS2 on the environment). Specifically, the SofS failed to take account of the impact of RIS2 on achieving:

- i. The carbon budgets set by the Government pursuant to section 4 Climate Change Act 2008 ("**CCA 2008**") and, in particular, the "fifth carbon budget" covering the period 2028-2032;
- ii. The target set by section 1 CCA 2008 for the net UK carbon account to be zero by 2050<sup>1</sup> ("**the Net Zero Target**"); and
- iii. The objectives of the Paris Agreement on climate change (adopted by the parties to the United Nations Framework Agreement on Climate Change ("**UNFCCC**") in December 2015 and ratified by the UK in November 2016) and, in particular, the fact that the Paris Agreement sets temperature-based goals (which require a focus on carbon emissions over time; i.e. not just in 2050 itself), and of its principles of equity between developed and developing countries, as explained further below.

iv. [GROUNDS 2 TO 4 DELETED]

## **B. BACKGROUND**

### **The Climate Emergency**

6. As explained by the Intergovernmental Panel on Climate Change ("**IPCC**") in its Special Report on Global Warming of 1.5°C ("**the Special Report**") in October 2018, and not disputed by the SofS, anthropogenic emissions of greenhouse gases, together with the degradation of natural carbon sinks such as forests, are causing an energy imbalance

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<sup>1</sup> i.e. that, in the year 2050, the emissions of carbon produced into the atmosphere by the UK will be balanced by the carbon which it removes from the atmosphere (which says nothing about the position in other years)

in the earth's atmosphere that is warming the planet; to date, human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels;<sup>2</sup> and the impacts of this warming on human well-being and the natural environment are overwhelmingly negative. Catastrophic events such as flooding, droughts and wildfires linked to extreme weather conditions are already occurring with increased frequency and severity.

7. These impacts and events will continue to increase in the coming decades, but they can be made less severe if deep and early reductions in greenhouse gas emissions can be achieved. The Special Report analysed the differences in impacts as between warming of 1.5°C and warming of 2°C, and found in the latter scenario, among other differences:
  - a. There would be increased risks from droughts and conversely from floods<sup>3</sup>;
  - b. There would be an additional 10cm of sea-level rise by 2100<sup>4</sup>;
  - c. Greater impacts on biodiversity and ecosystems, both on land and in the oceans;<sup>5</sup>
  - d. There would be a greater risk for people of heat-related morbidity and mortality, and of vector-borne diseases such as malaria and dengue fever;<sup>6</sup>
  - e. There would be smaller net reductions in yields of maize, rice, wheat, and potentially other cereal crops, particularly in developing regions of the world;<sup>7</sup>

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<sup>2</sup> **Special Report on Global Warming of 1.5°C**, Intergovernmental Panel on Climate Change, June 2019. Summary for Policy Makers, para. A.1 [SB/169]

<sup>3</sup> Ibid, para. B.1.3 [SB/170]

<sup>4</sup> Ibid, para. B.2 [SB/170]

<sup>5</sup> Ibid, paras. B.3 – B.4 [SB/171-2]

<sup>6</sup> Ibid, para. B.5.2 [SB/172]

<sup>7</sup> Ibid, para B.5.3 [SB/172]

- f. Adaptation to climate change is more challenging, and in some vulnerable regions the capacity to adapt to climate impacts may not exist for warming above 1.5°C.<sup>8</sup>
8. The Special Report went on to analyse the global emissions trajectories that will be necessary to limit warming to the two thresholds. It found that holding warming to 1.5°C with no or limited overshoot requires global net anthropogenic CO<sub>2</sub> emissions to decline by about 45% from 2010 levels by 2030, and to reach ‘net zero’ (that is, where any emissions are balanced by removals of greenhouse gases from the atmosphere) around 2050.<sup>9</sup>
9. However (and key here), the Special report also stressed that limiting global warming requires limiting total cumulative greenhouse gas emissions over time up to that point (because the extent of global warming is a function of the total emissions over time). That requires staying within a “carbon budget”<sup>10</sup> even on the way to getting to the point where the levels of emissions in 2050 itself are “net zero”. Because the climate system responds to total cumulative emissions, it is the extent of those emissions in the intervening years, rather than just the emissions level in the particular year of 2050, which is the primary determinant of how much human-induced warming will occur overall (and thus by how much global temperatures, as considered by the Paris Agreement as explained below, will rise) by that point<sup>11</sup>.
10. The Special Report found that emissions pathways consistent with warming of 1.5°C:
- “would require rapid and far-reaching transitions in energy, land, urban and infrastructure (including transport and buildings) [...] These systems transitions

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<sup>8</sup> Ibid, para. B.6.2 – 6.3 [SB/173]

<sup>9</sup> Ibid, para C.1 [SB/175]

<sup>10</sup> Ibid, para C.1.3 [SB/175]

<sup>11</sup> The Defendant has suggested in the course of this case (Detailed Grounds of Resistance ¶133) that the Court of Appeal’s permission decision in **Packham v Secretary of State** [2020] EWCA Civ 1004 is authority for the proposition that impacts over time do not need to be considered. That is simply wrong: the Court of Appeal held that the assessment in that case did not need to go further than it had gone in assessing those matters, not that it did not need to consider them at all. The point goes against the Defendant here.

are unprecedented in terms of scale, but not necessarily in terms of speed, and imply deep emissions reductions in all sectors, a wide portfolio of mitigation options and a significant upscaling of investments in those options”.<sup>12</sup>

11. On 1 May 2019, in recognition of the scale and urgency of the challenge of climate change, the House of Commons declared a climate change emergency.

### **The Paris Agreement**

12. In December 2015 the parties to the United Nations Framework Agreement on Climate Change (“**UNFCCC**”), including the UK, adopted the Paris Agreement [**SB/89-93**]. The UK ratified the Paris Agreement in November 2016.

13. The Paris Agreement aims to strengthen the global response to climate change, including by limiting warming “to well below 2°C above pre-industrial levels” and pursuing efforts to limit the increase to 1.5°C (Article 2.1). To stay within this temperature goal, Article 4(1) of the Paris Agreement requires Parties to aim to reach global peaking of emissions as soon as possible, recognizing that peaking will take longer for developing countries. Thereafter, Parties are to undertake rapid emissions reductions in accordance with best available science, in order to achieve net zero global emissions in the second half of this century (i.e. from 2050). In other words, Paris embodies not just a 2050 consideration, but also a focus on emissions in the years up to that point. That is key here.

### **The Climate Change Act 2008**

14. Section 1 of the Climate Change Act 2008 (“**the CCA**”), as amended by The Climate Change Act 2008 (2050 Target Amendment) Order 2019 (“**the 2019 Order**”) with effect from 27 June 2019, requires the UK Government to reduce net emissions of ‘targeted greenhouse gases’ to zero by 2050 (“**the Net Zero Target**”).

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<sup>12</sup> Ibid, para C.2 [**SB/178**]

15. The 2019 Order was made following the May 2019 advice of the statutory Committee on Climate Change (“**CCC**”) that the target specified in section 1 CCA 2008 should be increased from an 80% reduction to a 100% reduction (“**the Net Zero Advice**”).<sup>13</sup> The recommendation for a Net Zero Target was intended to reflect the climate science synthesised in the Special Report, and the UK’s obligations under the Paris Agreement.
16. Sections 4 to 10 of the CCA 2008 then create a scheme of five-yearly “carbon budgets” which specify what is to happen in those periods in the context of heading for 2050. At present, the Secretary of State has legislated for the amounts of such carbon budgets up to and including the fifth carbon budget, which covers the period 2028-2032. However, all the existing carbon budgets were set that way before the Net Zero Target was adopted in 2019.
17. In other words – and key here – the carbon budgets were set when the target under section 1 CCA was for only an 80% reduction (not the 100% reduction now required) in emissions relative to 1990 levels.
18. The CCC has advised that the fourth and fifth carbon budgets are “therefore are likely to be too loose”.<sup>14</sup>
19. Sections 13 and 14 of the CCA 2008 then go on to require the Government to prepare and report on policies and proposals to enable the carbon budgets to be met. Pursuant to those provisions, the Government published its “Clean Growth Strategy” (“**CGS**”) in 2017<sup>15</sup>. The CGS contains policies and proposals intended by Government to meet the fourth and fifth carbon budgets. However, as the CCC has stated in its Net Zero Advice, the Clean Growth Strategy still “does not fully close the policy gap to the UK’s existing carbon budgets”, and its intentions “still need to be backed up by detailed policy

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<sup>13</sup> **Net Zero – The UK’s contribution to stopping global warming**, CCC, May 2019 [SB/150-154]

<sup>14</sup> *Ibid*, p.30 [SB/152]

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/700496/clean-growth-strategy-correction-april-2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700496/clean-growth-strategy-correction-april-2018.pdf)

designs in many cases” so that, overall, “policy is not yet on track to meeting those budgets”.<sup>16</sup>

20. The effect, overall, is that the CGS is not sufficient to bring about compliance with the existing carbon budgets and they are anyway not sufficient to bring about compliance with Net Zero (in 2050).
21. One sector in which policy is notably ‘off-track’ is road transport, which accounts for the large bulk (91%) of UK domestic transport emissions<sup>17</sup> and 25% of total UK domestic emissions. Although there are no up to date figures showing GHG emissions from use of the SRN, the 2018 Road Traffic Forecasts published by the SofS include data for CO<sub>2</sub> by type of road in 2015. These show that emissions from the SRN in England in 2015 (35.6 MtCO<sub>2</sub>) were equivalent to around 29% of the UK’s domestic transport emissions (122.2 MtCO<sub>2</sub>) or 32% of total road emissions in 2015.
22. Moreover, emissions from road transport have barely declined since 1990, because (as the SofS himself acknowledges) “progress through regulation to improve the efficiency of new passenger cars has been largely offset by their increased use”.<sup>18</sup> On the basis of current policies, the SofS predicts a slow reduction in overall domestic transport emissions, from around 124 MtCO<sub>2</sub>e today, to approximately 80 MtCO<sub>2</sub>e in 2050, when to achieve compliance with the Net Zero Target such emissions would need to be at or very close to zero.<sup>19</sup> More immediately, the SofS forecasts an excess relative to compliance with the fifth carbon budget:

“the UK must go much further in reducing domestic transport emissions than currently projected if we are to meet the emission levels set out in the 2032 Clean Growth Strategy scenario (there is an estimated gap of 16 MtCO<sub>2</sub>e between this and DfT’s current projection in 2032)<sup>20</sup>.”

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<sup>16</sup> p.16, p.191 [SB/153]

<sup>17</sup> **Decarbonising Transport: Setting the Challenge**, Department for Transport, 26 March 2020, para 3.3 [SB/183]

<sup>18</sup> *Ibid*, para 1.10 [SB/182]

<sup>19</sup> *Ibid*, Figure 18 on p.56 [SB/186]

<sup>20</sup> *Ibid*, para 4.5 [SB/185]

23. Overall, therefore, while the UK's Net Zero Target is considered by the CCC to align with the UK's obligations under the Paris Agreement:

- a. Current carbon budgets reflect an earlier, less stringent target and are therefore likely to be too large (in order to meet Net Zero);
- b. Current Government policy in the CGS is not ambitious or detailed enough to meet even those budgets; and
- c. Within that, the trajectory of road transport emissions causes a particular problem for meeting the fifth carbon budget.

#### Air Pollution and Air Quality Legislation

24. [DELETED].

25. [DELETED]

26. [DELETED]

27. [DELETED]

#### The statutory requirements relating to a RIS

28. As below, section 3(1) of the IA 2015 empowers the SofS to set a Road Investment Strategy ("RIS"); section 3(7) requires him to do so where a strategic highways company does not currently have one; sections 3(3)-(4) provide for the content of such a RIS; section 3(5)(a) requires the SofS in making a RIS to consider, among other things, the impact of a RIS on the environment; section 3(6) requires the SofS and the strategic highways company to comply with the RIS (a requirement monitored, pursuant to sections 10 and 11 IA 2015, by the Office of Rail and Road ("**ORR**"), which has power to fine a strategic highways company for non-compliance with a RIS) and section 3(8) gives effect to Schedule 2 to the IA 2015, which makes detailed rules about the procedure for setting a RIS (s.3(8)):

### **“3 Road Investment Strategy**

- (1) The Secretary of State may at any time—
  - (a) set a Road Investment Strategy for a strategic highways company, or
  - (b) vary a Strategy which has already been set.
- (2) A Road Investment Strategy is to relate to such period as the Secretary of State considers appropriate.
- (3) A Road Investment Strategy must specify—
  - (a) the objectives to be achieved by the company during the period to which it relates, and
  - (b) the financial resources to be provided by the Secretary of State for the purpose of achieving those objectives.
- (4) The objectives to be achieved may include—
  - (a) activities to be performed;
  - (b) results to be achieved;
  - (c) standards to be met.
- (5) In setting or varying a Road Investment Strategy, the Secretary of State must have regard, in particular, to the effect of the Strategy on—
  - (a) the environment, and
  - (b) the safety of users of highways.
- (6) The Secretary of State and the company must comply with the Road Investment Strategy.
- (7) If a strategic highways company does not have a Road Investment Strategy currently in place, the Secretary of State must—

(a) lay before Parliament a report explaining why a Strategy has not been set, and

(b) set a Road Investment Strategy as soon as may be reasonably practicable.

(8) Schedule 2 (which contains provision about the procedure for setting or varying a Road Investment Strategy) has effect.”

### **The setting of RIS1 then RIS2**

29. RIS1 was set in December 2014 and covers the period 1 April 2015 to 31 March 2020.

As the SofS was required by section 3(7) to maintain continuity between one RIS and the next, he prepared RIS2 and set it on 11 March. RIS2 covers the period 1 April 2020-31 March 2025.

30. The core of RIS2 is in three parts: Strategic Vision, Performance Specification, and Investment Plan. The scheme of RIS2 is described by its “Introduction” as follows:

(RIS2 p.3 [CB/87]):

“This second Road Investment Strategy (RIS2) sets a long-term strategic vision for the network. With that vision in mind, it then: specifies the performance standards Highways England must meet; lists planned enhancement schemes we expect to be built; and states the funding that we will make available during the second Road Period (RP2), covering the financial years 2020/21 to 2024/25.” [underlining added]

31. Pages 93 to 106 of RIS2 contain a list of the major specific schemes that the SofS requires HE to take forward.<sup>21</sup> This list is preceded by a text box explaining “the nature of commitments in RIS2”, in which the SofS is at pains to emphasise the specificity with which RIS2 determines not only the location, but also the timing, of the various road schemes it requires (RIS p.91 [CB/175]):

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<sup>21</sup> It is intended that further ‘local capital enhancements’ will be made using the £140m ‘Safety and Congestion’ element of Designated Funds, but these are for HE to determine and are not set out in RIS2: see p.111 [CB/195].

“A RIS is built around a series of investment commitments to specific infrastructure projects. Unlike historic infrastructure programmes, a RIS makes clear and accountable promises about which projects are expected to proceed and by when. This process for planning strategic road investment is amongst the most transparent and explicit in the world.

Whereas historic infrastructure programmes have promised action at an unspecified point in the future, RIS2 is built around a structure of commitments that expect projects to enter construction by 1 April 2025. The progress against this is monitored by the Department for Transport and ORR, with regular updates to Parliament.” [underlining added]

32. The projects which RIS2 requires remain subject to planning consent (where relevant), and “must remain deliverable and offer sufficient value for money to justify public investment projects” (RIS2 p.92 [SB/176]). However, in RIS2, the SofS makes clear that he expects departures from the RIS2 requirements will be “minimal”:

“We will hold Highways England to account on the delivery on the commitments set out in RIS2, but also on their ability to identify schemes that no longer meet the above tests and therefore need to be substantially reconsidered. Given the degree of analysis and design work already completed for RIS2 schemes, however, we would expect these circumstances to be minimal.” (RIS2 p.92 [SB/176])

33. The analysis and design work referred to in RIS2 was completed before the 2050 Target was suddenly amended in June 2019: HE submitted its draft Strategic Business Plan for approval by the SofS in January 2019<sup>22</sup>. The supporting analysis therefore could not have taken account of the Net Zero Target.

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<sup>22</sup> <https://www.gov.uk/government/publications/highways-england-annual-report-and-accounts-2019>, page 55

34. Over half of the total funding committed in RIS2 (£14.1 billion out of £27.4 billion – see RIS2 p.119<sup>23</sup> [CB/203]) relates to “capital enhancements”; that is, new roads and increasing the capacity of existing roads.
35. New road schemes impact carbon emissions in several ways and will almost always increase them. First, if (which is generally the case) there is extensive land clearance with the subsequent loss of vegetation (particularly mature trees) and soils, then existing carbon ‘sinks’ are lost. Secondly, there is significant ‘embodied’ carbon in the concrete, asphalt and other raw materials used to build it (that is, the emissions generated in producing the raw materials). Thirdly, once the road is opened, it may both result in higher vehicle speeds which may lead to more carbon emissions (because an increase in average speeds from 60mph to 70mph causes carbon emissions to go up by about 13%) and because, over time, increased road capacity generates more traffic (as it encourages driving and enables car-dependent development of housing estates, retail parks and business parks. This last phenomenon is known as ‘induced’ traffic, and ~~while he recognised it as a phenomenon in preparation of RIS2<sup>24</sup> – he did not take account of or attempt to quantify the resulting GHG emission increases and thus did not take them into account in his overall evaluation.~~
36. RIS2 makes a number of very high-level mentions of the need to achieve the Net Zero Target. However, it does not contain any evaluation, assessment or consideration at all of the GHG emissions likely to arise from the schemes to which it commits the SofS and HE. Mentioning Net Zero is plainly not the same as considering the impact of RIS2 on achieving Net Zero. Insofar as RIS2 addresses the substance of the Net Zero Target at all, that is to place exclusive reliance on the potential for a switch from diesel/petrol to electric vehicles (“EVs”) occurring by 2050. The references to modal shift relate only to short journeys, and so do not propose any viable alternative to most journeys taken on the SRN (i.e. those with which RIS2 is concerned).

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<sup>23</sup> Although a figure of £14.7 bn for ‘upgrades’ is given on p.90 [CB/174].

<sup>24</sup> [SB/115-121]

37. Thus, in the “Tackling Emissions” section of RIS2 (pp. 26-28) [CB/110-112], the SofS set out his intention to increase road capacity in order to reduce additional congestion from projected increases in road traffic. He seemingly did so on the basis that because EVs will be “zero emission” by 2050, any number of them can be compatible with the Net Zero Target for 2050, and that therefore increases in road traffic in the meantime are not a matter for concern. RIS2 deferred proper consideration of these issues to the future Transport Decarbonisation Plan (RIS2 p.26 [CB/110]):

“The UK’s first Transport Decarbonisation Plan, due to be completed later this year, will bring together a bold and ambitious programme of coordinated action needed to reach net zero emissions by 2050.”

38. EVs make up only a tiny proportion of the current UK vehicle fleet,<sup>25</sup> and in 2020 still only account for 5% of new car sales.<sup>26</sup> The sale of new conventional cars and vans is currently only to be ended in 2040. There is a live consultation on bringing the date forward to 2035, or earlier “if a faster transition appears feasible.” However, that consultation makes no mention of actively retiring conventional vehicles from the road or banning sales of second-hand vehicles. While the SofS did not actually address or consider the point in the context of setting RIS2, had he done so he would have had to confront the fact that it is highly unlikely that emissions savings from EVs could offset emissions increases from additional road capacity in the short to medium term, and (accordingly) that it is unlikely that they could make a significant contribution to achieving the fourth and fifth carbon budgets.

39. RIS2 makes no reference to carbon budgets.

### The air pollution impacts of RIS2

40. [DELETED].

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<sup>25</sup> Fully electric vehicles account for 0.3% of the UK car fleet, rising to 2.3% if hybrid vehicles are included [SB/190-191]

<sup>26</sup> [SB/189]

**Promises to develop a user metric**

- 41. [DELETED]
- 42. [DELETED]
- 43. [DELETED]
- 44. [DELETED]
- 45. [DELETED]
- 46. [DELETED]

**The Strategic Environmental Assessment Regime**

- 47. [DELETED]
- 48. [DELETED]
- 49. [DELETED]
- 50. [DELETED]
- 51. [DELETED]
- 52. [DELETED]
- 53. [DELETED]
- 54. [DELETED]
- 55. [DELETED]
- 56. [DELETED]
- 57. [DELETED]
- 58. [DELETED]
- 59. [DELETED]

**C. GROUNDS OF CLAIM**

60. The following grounds of claim are plainly arguable and also raise points of much wider public importance.

## Ground 1: failure to take account of mandatory considerations relating to climate change

### (i) The Paris Agreement

61. In **Friends of the Earth Ltd v Secretary of State for Transport** [2020] EWCA Civ 214, the Court of Appeal (Lindblom, Singh and Haddon-Cave LJ) held that, in setting planning policy of national significance the impacts of the proposed development on the Paris Agreement were so obviously material that they had to be taken into account (at [237]) by the SofS, even though the project to which the Secretary of State for Transport had there given support (a third runway at Heathrow) would still require development consent in the course of which climate change matters would be considered again, **and that the SofS had erred by not taking them into account. The Supreme Court ([2020] UKSC 52), overturning the decision of the Court of Appeal, held that the Secretary of State had in that particular instance taken the Paris Agreement into account. It followed that the question of obvious materiality (i.e. whether he would have acted unlawfully had he not done so on the facts) did not arise and was expressly not decided [134]. That leaves untouched the Court of Appeal's finding of law that the implications of the Paris Agreement are indeed an obviously material consideration to which the Defendant had been required to have regard.**

~~62. The Court of Appeal also held that the commitments and objectives of the Paris Agreement were "Government policy on climate change", which the Secretary of State was obliged by section 5(8) Planning Act 2008 to take into account, but had failed to do so.~~

63. Here, the SofS **was** required by section 3(5)(a) IA 2015 to consider the impact of RIS2 on the environment. Given that obligation, the logic of the Court of Appeal's decision relating to Heathrow applies here: the objectives of the Paris Agreement were obviously relevant to a plan or programme that committed £14bn to enhancing road capacity, and thus, on the face of it, enabling a significant increase in GHG emissions. ~~Alternatively, the Paris Agreement objectives were part of Government policy on climate change, and given the scale and urgency of the climate change challenge, it~~

~~was obviously material to consider the interplay between RIS2 and those areas of Government policy that were aimed at tackling climate change. If RIS2 was found to be incompatible with or a hindrance to the achievement of those policies, then there was an obligation to give reasons why RIS2 was nonetheless published.~~

64. However, RIS2 makes no mention at all of the Paris Agreement. Moreover, it sets out policies that are fundamentally at odds with the objectives of the Paris Agreement. As explained above in relation to carbon budgets, the effect of RIS2 is to allow emissions to increase in the near to medium term, on the assumption that this will become immaterial (but only later) when the UK fleet transitions to electric vehicles. Such a strategy takes no account of the following important aspects of the UK's commitments under the Paris Agreement including that:

- a. The ultimate goals of the Paris Agreement are expressed in temperature terms. All emissions over time matter when seeking to achieve a temperature goal of that kind, because – as noted above - the key determinant of temperature rise is total cumulative emissions, not just whether emissions are reduced to a given level at a specific future date (2050);
- b. The UK is committed to pursuing efforts to hold warming to 1.5°C. As the IPCC showed in the Special Report, this will require deep emissions reductions in the next decade;
- c. The Paris Agreement (Article 4.1) commits the UK to a global effort to peak emissions “as soon as possible” and to achieve rapid reductions thereafter, and moreover recognises that developed countries should take the lead in this process.

65. However, in setting RIS2 the SofS unlawfully entirely failed to consider its impacts on the securing the objectives of the Paris Agreement. **To be clear: the brief mentions of ‘Net Zero’ in RIS2 (as noted above) are not evidence of consideration (for section 3(5) purposes, as above) of the effect of RIS2 even on Net Zero, let alone on the wider Paris Agreement imperatives, as above.**

## **(ii) CCA 2008 carbon budgets**

66. The legislative obligations imposed by the CCA 2008 were likewise mandatory considerations, and for similar reasons: both as obviously relevant policy considerations in their own right, and as aspects of the UK's implementation of the Paris Agreement.
67. The Net Zero Target was adopted in order to meet the UK's obligations under the Paris Agreement. The carbon budgets are intended to be staging posts to meeting that target, as well as embodying the UK's commitments (i) to pursue efforts to limit warming to 1.5°C, which according to the IPCC will require deep reductions in GHG over the next decade, and to (ii) developed countries taking the lead in making the necessary rapid reductions in GHG emissions.
68. RIS2 makes no mention of carbon budgets whatsoever. Its strategy for 'tackling emissions' focuses solely on 2050 (i.e. the end point of the CCA process and not the all-important route by which the UK gets to that point). Its approach is, in summary, to allow increases in road capacity in the near term, relying on the conversion of the UK fleet to zero-emission vehicles by 2050 in order to achieve the Net Zero Target by 2050; but without any consideration of the impact of that on carbon budgets. This poses very obvious and pressing problems for the near to medium term; that is, the period of the fourth and fifth carbon budgets, in circumstances where:
- a. There is already an excess of 16 MtCO<sub>2</sub> of projected GHG emissions from domestic transport, compared to what is required to meet the fifth Carbon Budget;
  - b. Adding road capacity will increase the level of excess emissions from road transport in the absence of mitigation policies;

- c. The relevant only mitigation policy identified is the switch to electric vehicles – the references to modal shift being relevant only to short journeys, and so not a viable alternative to most journeys taken on the SRN (RIS2 p.27); but
- d. The penetration of electric vehicles into the fleet is likely to remain modest during the period covered by the fourth and fifth carbon budgets. Specifically, the ban on sales of new conventional vehicles is currently only due to take effect eight years after the end of the fifth carbon budget, and current consultation only proposed bringing this forward to 2035 – three years after the end of the fifth carbon budget; and
- e. The RIS2 programme of capacity enhancements will also create significant additional emissions from road construction, some of which fall within the period of the fourth carbon budget, which runs from 2023 to 2027; and also from the additional on-going maintenance both to the new capacity, and to existing capacity (which will require greater maintenance as a result of increased traffic) – effects that will persist throughout the periods of the fourth and fifth carbon budgets.

69. This combination of circumstances reinforced the point that compliance with the carbon budgets is an obviously material (and therefore mandatory) consideration in setting RIS2. But the SofS unlawfully failed even to turn his mind to this issue.

70. In pre-action correspondence the SofS has tried to answer the point by reference to his forthcoming Transport Decarbonisation Plan. But, clearly, that is no answer since, when RIS2 was set, not even the scoping document for that Plan had been published, let alone the Plan itself. The SofS plainly cannot have lawfully discharged his duties to consider matters when setting RIS2 by reference to a Plan that had not yet been developed. The point is one of substance as well as timing: as the subsequent scoping document identifies, it will be necessary to pursue demand management and modal shift (i.e. from cars to other ways of travelling), including for longer journeys, in order to comply with statutory carbon budgets. These are the very strategies which RIS2 had

by then already precluded, by requiring schemes which enable continued increases in the use of road vehicles.

**(iii) Net Zero target**

71. In setting RIS2, the SofS unlawfully failed to consider **the effect of RIS2 on the** need to achieve the Net Zero Target (other than by reference to electric vehicles as above), an approach which ignores the serious (and presumably undisputed) challenges in fully decarbonising road transport, including that:

- a. Batteries are not currently envisaged to be a viable power source for Heavy Goods Vehicles, even in 2050, and there are also significant difficulties associated with the use of hydrogen to power HGVs;<sup>27</sup>
- b. It is not known whether there are adequate supplies of the rare earth materials used in EV batteries to sustain complete electrification of the UK fleet at a time of rising global demand.<sup>28</sup>

72. All of these challenges will be exacerbated by the increases in road capacity and hence road traffic to which RIS2 commits.

73. Again, RIS2 makes reference to other future Government transport initiatives, such as the Transport Decarbonisation Plan, and the Road to Zero strategy,<sup>29</sup> and insists that “RIS2 is a fully-integrated part of this wider effort to reach net zero emissions”. But those take the matter no further, because the actual effect of RIS2 is to increase road capacity and hence traffic and emissions. The SofS has made no attempt to grapple with the contradiction between this effect and the Net Zero objective.

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<sup>27</sup> [SB/157-158]

<sup>28</sup> [SB/159-163]

<sup>29</sup> DfT, July 2018

([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/739460/road-to-zero.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739460/road-to-zero.pdf)). ‘Zero’ in this context refers to zero exhaust emissions vehicles, not the Net Zero Target.

**(iv) The consideration of climate change actually undertaken by the SofS**

73A. What emerges from the witness evidence now provided on behalf of the Defendant is that, even putting aside considerations arising from the Paris Agreement or Carbon Budgets, the assessment of climate change effects entirely failed to meet the requirements of section 3(5), as above. The witness statement of Philip Andrews on behalf of the SofS describes a carbon analysis carried out by the Interested Party in conjunction with officials at the Department for Transport, by which officials arrived at the view that the carbon impacts of RIS2 were *de minimis*. The substance of that analysis was flawed for the reasons given in ¶73C-J below. However, regardless of the merits of that analysis: (i) it does not appear in RIS2 itself; and (ii) on the evidence of Mr Andrews, it was not considered by the SofS for the purposes of his decision to adopt RIS2, which is what matters here.

73B. At ¶51, Mr Andrews explains that the analysis was “prepared in the context of seeking cross-government approval for the publication of RIS2 (by way of a “write-around letter”)” – in other words, not to inform the SofS decision on RIS – but that “cross-government approval was subsequently unnecessary since RIS2 was published as part of Budget 2020”. Mr Andrews does not assert that the analysis was placed before the SofS. The only evidence the Defendant has produced of consideration of climate change impacts by the SofS is a heavily-redacted legal briefing dated 6 March 2020, prepared in response to the Court of Appeal’s decision in the Heathrow case, which states simply that “[REDACTED] RIS is consistent with a major carbon saving required to deliver net zero”. However:

- (1) The Defendant is not entitled to rely selectively on evidence from a legal briefing. Either it has waived privilege over the whole document by seeking to rely on it in evidence, or it is not admissible at all.
- (2) Even taking what the Defendant has disclosed at face value, it makes no reference to carbon emissions arising from RIS2 being *de minimis* (or anything like that). The proposition that “RIS is consistent with a major carbon saving...” could simply be

making the point that major carbon reductions can be made in other sectors. For the SofS to be told that RIS2 would not, on its own, mean that Net Zero cannot – across the whole of society and the economy - be achieved (which is the essence of what he was told) told him nothing about the effect (for section 3(5) purposes) of RIS2 on achieving that, which is what he, as the person deciding whether to set RIS2, actually needed to know. Thus, the Defendant’s pleaded case, that the SofS considered carbon emissions from RIS2 and concluded that their impact was so small as to be irrelevant, is simply not borne out by the evidence he has adduced as to the material he himself actually considered.

**(v) The assessment of climate change by departmental officials**

73C. Moreover, the assessment of officials that the carbon impacts of RIS2 were *de minimis* was irrational, because it was vitiated by a series of fundamental technical errors.

73D. First, the assessment considered only carbon impacts arising from the five road schemes that were wholly new in RIS2 (and even then, only some of the carbon emissions from those schemes, as explained below).<sup>30</sup> In doing so, it ignored the carbon emissions from a further 45 schemes which had been introduced in RIS1 but not yet carried through, and to which RIS2 now committed funding.<sup>31</sup> The Defendant does not suggest that these were considered to be part of the effect of RIS2 on the environment (for section 3(5) purposes). In failing to assess and take account of them for that purpose, the SofS erred in law.

73E. Secondly, the assessment failed to take into account emissions from the construction of the road schemes supported by RIS2<sup>32</sup>, or of consequential effects such as the true scale of induced traffic, the effects on settlement and activity patterns, emissions from maintenance, or increased power sector emissions from additional charging of EVs. Again, the emissions arising from the construction of the schemes supported by RIS2, and their

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<sup>30</sup> Andrews ¶¶44-45, ¶¶55-59, ¶¶62-63

<sup>31</sup> Anable ¶13

<sup>32</sup> Andrews ¶178

other consequential effects, were plainly a significant part of the effect of RIS2 on the environment<sup>33</sup> and in failing to take account of them, the SofS erred in law.

73F. Thirdly, the assessment anyway only considered the two five-year periods covered by the fourth and fifth carbon budgets<sup>34</sup> (seemingly chosen to reduce any concerns for the purposes of the contemplated “write round” letter rather than to give a candid appraisal as would have been required), rather than the 60-year period that is standard in transport appraisal, and the five year period chosen was one during which the chosen schemes would not be in full operation.<sup>35</sup> Proper consideration of Net Zero required assessment at all stages up to and including 2050.<sup>36</sup>

73G. Fourthly, the assessment concluded that the emissions from RIS2 were *de minimis* in the context of emissions from (i) the whole of the UK economy<sup>37</sup> and/or (ii) the whole of the transport sector<sup>38</sup> and/or emission reductions from the introductions of EVs.<sup>39</sup> It was irrational to conclude, on the basis of such a comparison, that the emissions were so small that they could be ignored. It is in the nature of what needs to be done to tackle climate change that action is needed on all fronts, given the contribution made by many sources to the overall problem. The logic of the approach taken by the officials – namely to compare with the UK economy or even transport sector as a whole – would mean that all environmental effects (whatever their nature and whether positive or negative) of RIS2 would be *de minimis*.<sup>40</sup> That is plainly not what section 3(5) contemplates or allows for. Such a comparison distorts the true significance of the schemes, because it inevitably

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<sup>33</sup> Construction: Goodwin ¶16, Anable ¶11; consequential effects: Goodwin ¶19-22; charging of EVs: Goodwin ¶7-8 and footnote 4. Although not assigned to the transport sector for the purposes of national inventories, additional power sector emissions are still an impact of RIS2 on the environment. Moreover, they are outside the scope of the Transport Decarbonisation Plan, so will not even be addressed in that (separate) process.

<sup>34</sup> Andrews ¶63

<sup>35</sup> Goodwin ¶17; Anable ¶14-18. The unassessed schemes, by contrast, were likely to be in operation during this period – but their impact was ignored.

<sup>36</sup> Goodwin ¶22

<sup>37</sup> Andrews ¶63

<sup>38</sup> Andrews ¶51, ¶53, ¶59

<sup>39</sup> Andrews ¶56-57

<sup>40</sup> And for obvious reasons is not the approach when assessing the benefits of carbon-saving measures – Goodwin ¶26

produces a small percentage figure.<sup>41</sup> Further, comparison with the total carbon budget obscures the fact that the schemes will increase emissions during those budget periods when the UK is in fact off-track to meet them, and needs to make additional, deep, near-term reductions in emissions to achieve legally-mandated carbon budgets. The comparison with savings from EVs is illogical as it compares RIS2 impacts with the savings in a single year (2050) from EVs, compared to an irrelevant counterfactual in which conventional cars are still permitted.<sup>42</sup>

73H. For these reasons, by framing the comparisons in terms they did, officials failed to consider the true effect of RIS2 on the UK's ability to achieve its carbon budgets, and reached the erroneous conclusion that an increase in emissions could be regarded as irrelevant, at a time when additional policies were required to make deeper reductions in carbon emissions.

73I. The errors set out above are explained in greater detail in the witness statements of Phil Goodwin and Jilian Anable on behalf of the Claimant. Singly or together, they amount to serious flaws that vitiate the assessment that the carbon impact of RIS2 was *de minimis* (even if, contrary to the Claimant's case, this was a matter the SofS himself - rather than officials - actually considered). Moreover, they are highly material to overall assessment of environmental impacts. Professor Goodwin notes the startling fact that "the total emissions of carbon from RIS2 schemes reported by Highways England in its separate scheme appraisals give a number which is roundly 100 times greater than that suggested by DfT witnesses".<sup>43</sup> By adopting this flawed assessment, the SofS therefore unlawfully failed to discharge his duty under s.3(5) IA 2015, because he erroneously treated a significant environmental impact as a matter that was *de minimis* – in other words, as a matter that was small enough that it could be disregarded.

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<sup>41</sup> And is not used when assessing the benefits of road schemes, which are not presented, for instance, as a % of UK GDP – Goodwin ¶25

<sup>42</sup> Anable ¶20

<sup>43</sup> Goodwin ¶13, emphasis added; see also Goodwin ¶17

73J. Accordingly, the section 3(5) assessment was entirely flawed, regardless of the considerations (set out above) relating to the Paris Agreement and Carbon Budgets.

**Ground 2: breach of legitimate expectation in relation to user metric**

74. [DELETED].

75. [DELETED].

76. [DELETED].

77. [DELETED]

**Ground 3: failure to take account of the impact of RIS2 on discharge of duties imposed by air quality legislation**

78. [DELETED]

79. [DELETED]

80. [DELETED]

81. [DELETED].

82. [DELETED]

83. [DELETED]

84. [DELETED]

85. [DELETED]

**Ground 4: failure to carry out SEA**

86. [DELETED]

87. [DELETED]

88. [DELETED]

## Conclusion

89. For the reasons above, the SofS failed to discharge his duties under section 3(5) of the IA 2015 and regulation 12 of the SEA Regulations, and unlawfully breached the Claimant's legitimate expectation when setting RIS2.

90. ~~The Claimant seeks permission for a judicial review challenge to the legality of RIS2.~~

91. In that challenge, the Claimant seeks:

- a. ~~Permission to bring this claim;~~
- b. A declaration that the setting of RIS2 was unlawful;
- c. An order quashing RIS2;
- d. Any other such relief as is necessary to give effect to the Court's judgment; and
- e. Costs.

DAVID WOLFE QC

PETER LOCKLEY

18 MARCH 2021 ~~1 June 2020~~