IN THE HIGH COURT OF JUSTICE **CO/2003/2020**
QUEEN'S BENCH DIVISION
PLANNING COURT

BETWEEN:

THE QUEEN (on the application of TRANSPORT ACTION NETWORK)

Claimant

- and –

THE SECRETARY OF STATE FOR TRANSPORT

Defendant

- and –

HIGHWAYS ENGLAND COMPANY LIMITED

Interested Party

DEFENDANT'S SKELETON ARGUMENT

References

The following referencing is used in this skeleton argument:-
[**CB/…**] = Core Bundle followed by the page number
[**DB/…**] = Documents Bundle followed by the page number
[**PA1/…**] = First Witness Statement of Philip Andrews **[CB/106]** followed by the paragraph number
[**PA2/…**] = Second Witness Statement of Philip Andrews **[CB/151]** followed by the paragraph number
[**BM/…**] = First Witness Statement of Bob Moran **[CB/83]** followed by the paragraph number
[**PA1/…**] = First Witness Statement of Prof. Phil Goodwin **[CB/134]** followed by the paragraph number
[**PA1/…**] = First Witness Statement of Prof. Jillian Anable **[CB/145]** followed by the paragraph number
[ASFG/…] = Claimant's Amended Statement of Facts and Grounds followed by the paragraph number **[CB/13]**
[ADGR/…] = Defendant's Amended Detailed Grounds of Resistance followed by the paragraph number **[CB/39]**

Pre-reading

As for the Claimant's suggested pre-reading, plus the following sections of RIS2 (time estimate 3.5 hours):

- Ministerial Forward **[CB/187-8]**
- Introduction **[CB/189-190]**
- Vision of the network in 2050 **[CB/205-207]**
- A greener network **[CB/211-216]**
- Outcome 4: Delivering better environmental outcomes **[CB/247-250]**
- Part 3.a Investment Plan/Government priorities **[CB/257-261]**

Introduction

1. By an Order dated 21st July 2020 **[CB/67]**, Lieven J granted the Claimant permission to apply for judicial review of the Defendant's decision, made on 11th March 2020, to set the Road Investment Strategy 2: 2020-2025 ("RIS2") [**CB/181**]. The Order granted permission for the

Claimant's Ground 1 to proceed. This ground relates to an alleged failure to comply with the duty, set out in s. 3(5)(a) of the Infrastructure Act 2015 ("the IA 2015"), to have regard to the environment when setting RIS2.

2. At a further hearing on 2nd March 2021 of the Claimant's application to file further evidence, Lang J permitted the Claimant to file redacted witness statements of Professors Goodwin and Anable and to amend the Claimant's Detailed Grounds of Resistance "*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*" **[CB/76]**. The Claimant took the opportunity to amend its grounds of claim, but in so doing introduced two further grounds of claim without seeking the permission of the Court to do so. The Defendant objected to the Claimant's reliance on these two new grounds in correspondence and his ADGR (see below).

Preliminary matters

3. There are three preliminary matters in respect of which it is necessary to set out the Defendants' position, arising from the Claimant's Skeleton Argument and the ASFG, prior to responding to the Claimant's ground of claim. These are as follows.

(i) The limited scope of the ground of challenge

4. Self-evidently, the single ground on which the Claimant has been granted permission is limited in scope. It asserts only a failure to "*take account of the impact of RIS2*" on certain matters relating to the environment: see [**ASFG/5(a)**]. Those climate change related matters, referred to by the Claimant as "the Climate Objectives" are:
   (1) The Paris Agreement, and/or its objectives [**ASFG/5(a)(iii) & 61-65**];
   (2) The carbon budgets set pursuant to the Climate Change Act 2008 ("CCA 2008"), including those aspects of the UK's implementation of the Paris Agreement [**ASFG/5(a)(ii) & 66-70**]; and
   (3) The need to achieve the net zero target (i.e. the duty provided by s. 1 of the CCA 2008 to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline) [**ASFG/5(a)(i) & 71-73**].

5. The Claimant's Ground 1 relies on the obligation in s. 3(5)(a) of the IA 2015, which provides, *inter alia*, that in "*setting or varying a Road Investment Strategy, the Secretary of State must have regard, in particular, to the effect of the Strategy on … the environment*". This is emphasised at this stage because the Claimant in places submits that the manner or intensity of the Secretary of State's review of

these matters was inadequate. In so far as the Claimant attacks the manner or intensity by which the Secretary of State considered the Climate Objectives, it is submitted that:

(1) This is outside the scope of the ground of claim in respect of which the Claimant has been granted permission to proceed. That ground, as set out above, is a straightforward allegation that a material consideration has been entirely ignored.

(2) Even if within the scope of the Claimant's ground of claim, the Claimant faces a high hurdle, since the nature of the Defendant's consideration is pre-eminently a matter for his judgement, which may only be challenged on the grounds of irrationality: *R (Khatun) v Newham London Borough Council* [2005] QB 37, at [35]; *R. (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] P.T.S.R. 1709, at [256].

6. So far as this latter matter is concerned, the Defendant further submits that his decision is concerned with multi-billion pound road investments which will bring enormous wider benefits that will be in the public interest and is firmly in the macro-political field. It is thus in the nature of a decision in respect of which the Courts have consistently concluded that their supervision will be less intrusive: *R. v Secretary of State for Education and Employment Ex p. Begbie* [2000] 1 W.L.R. 1115, at 1131. This is of particular relevance to the manner in which the Secretary of State has chosen to have regard to the effect of the Strategy on the environment, and his reliance, among other matters, on cross-governmental policies and wider decision-making which address climate change considerations (see below).

(ii) The Defendant opposes the Claimant's two additional grounds of claim

7. By its ASFG the Claimant relies upon two additional grounds of claim, grounds 1(iv) and 1(v), which the Defendant has objected to in his **[ADGR/46A]**, **[CB/54]**). The Claimant's position is that Lang J's order gave permission to advance these new grounds by its ASFG, despite these grounds not in any way being foreshadowed at the hearing which preceded the order. It cannot have been Lang J's intention to grant the Claimant permission to advance entirely new and unarticulated grounds, without the Defendant being given any opportunity to oppose the grant of permission. That would be entirely unfair to the Defendant, contrary to standard judicial review procedures and the procedural rigour in public law proceedings – see the observations of Holgate J in *Keep Bourne End Green v Buckinghamshire Council* [2020] EWHC 1984 at [37] – [41] applying *R(Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841. It is submitted that the Lang J's order only permitted the Claimant to modify the submissions applicable to the single ground which had already been granted permission.

8. The Claimant has further modified the first of these new grounds in section (a) of its skeleton argument, and now relies on *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154. What is now said further perpetuates the Claimant's fundamental misunderstanding of the Defendant's evidence, and the distinction between the alternative arguments and the evidence provided in support of those alternative arguments that the Defendant relies upon (see below).

9. The Defendant responds to the Claimant's additional two grounds of claim below. The Defendant's principal position is that the Claimant should not be given permission to rely on these additional grounds of claim, in the absence of a proper application being made: see the *White Book* at 54.15.1, and *Keep Bourne End Green*. The grounds relied upon are otherwise unarguable.

(iii) The Claimant fundamentally misunderstands the Defendant's defence

10. In several respects, the Claimant fundamentally misunderstands the Defendant's defence to its claim, and the evidence that has been provided in support of that defence. Two alternative arguments were (and are) made by the Defendant in response to the Claimant's first ground of claim. Those alternative arguments are:
    (1) The Climate Objectives were not obviously material to the Defendant's decision such that there was no legal obligation to take them into account (this includes, *inter alia*, because the carbon impacts of RIS2 compared to the Climate Objectives are *de minimis*): **[ADGR/21–35]**.
    (2) Alternatively, the Climate Objectives matters were in any event considered by the Defendant: **[ADGR/36–44]**.

11. This distinction is apparent from the Defendant's pleadings and evidence but was also explained in the Secretary of State's skeleton argument for the hearing on 2nd March 2021 before Lang J (extract attached to this skeleton).

12. Notwithstanding the distinction between these alternative arguments, the Claimant has failed to distinguish between them and the evidence in support of these arguments. This is evident from what the Claimant defines as "*the GHG Analysis*" at para. 5 of its skeleton argument, from the Claimant's submissions about the GHG Analysis in the rest of its skeleton argument, and from its new grounds of challenge. The GHG Analysis is defined by the Claimant as being "*the analysis … undertaken by [the Defendant's] officials and those of the Interested Party Highways England ("HE") but which was not part of his deliberations*" (emphasis added).

13. It appears from the Claimant's skeleton that the Claimant defines the GHG Analysis in a way that includes all the evidence set out in Philip Andrews' first statement (skeleton, para. 14), which broadly speaking is a summary of the analysis of climate change impacts that informed the development of RIS2, save for a "*legal briefing dated 6 March 2020*" (which is the document at **[DB/346]**). Further, on the Claimant's case, the GHG Analysis includes the evidence from Philip Andrews which supported the Defendant's legal submission that the effects of RIS2 were *de minimis* so far as the Climate Objectives were concerned, such that these were not obviously material to the Defendant's decision, i.e. to the first of the two alternative arguments set out above.

14. The Claimant's description of what it describes as the GHG Analysis should be ignored. It is wrong and conflates and fundamentally misunderstands the Defendant's defence and his evidence.

15. As set out above, the Defendant has provided two alternative arguments in response to the Claimant's ground of challenge. The evidence provided by Dr Moran and Philip Andrews is intended to, and does, support both of these arguments, including of course the argument that the Climate Objectives were in any event considered by the Defendant. The following matters further illustrate the Claimant's misunderstanding:
    (1) At **[ASFG/73A]**, **[CB/33]**, the Claimant by his first new ground (1(iv)) asserted that "*regardless of the merits"* of the analysis supporting the Defendant's *de minimis* argument (i.e. the first of the Defendant's alternative arguments set out at **[ADGR/21–35]**), that analysis "*(i) … 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*".
    (2) Since the Defendant's *de minimis* argument was essentially a legal submission refuting the Claimant's arguments about the alleged obvious materiality of the Claimant's Climate Objectives, there was no need for the related analysis to either appear in RIS2 or to have been considered by the Secretary of State. That indeed was the position.
    (3) The Defendant set out as much at **[ADGR/46B]**, saying there that the "*Claimant's first new ground wholly misunderstands the Defendant's case on the* de minimis *issue. It is not the Defendant's case that the Secretary of State took into account the* de minimis *nature of the additional carbon impacts from the five new schemes included in RIS2 when setting RIS2. The Defendant's case is that the* de minimis nature *of those carbon impacts supports its submission that the matters relied on by the Claimant (the Paris Agreement, carbon budgets and Net Zero) were not "obviously material" considerations the Secretary of State was required to take into account when setting RIS2*" (emphasis in original).

16. The Claimant's submission (skeleton, para. 6) that the Defendant by his ADGR accepts that the Defendant failed to take into account what the Claimant describes as the GHG Analysis is therefore wrong. This is not what the ADGR says. All that was set out, in response to the Claimant's new ground 1(iv) (which was concerned only with the first of the Defendant's alternative arguments), was that the Defendant had not taken into account the *de minimis* nature of the additional carbon impacts. The matters that were taken into account, and the way in which they were, were set out in support of the second of the Defendant's alternative arguments, at **[ADGR/36–44]**.

17. It follows that the Claimant is wrong to submit, as it does, that: (1) the Defendant did not consider the carbon impacts of RIS2 (save for the "*legal briefing*"), or that the Defendant has ignored the climate change impacts of RIS2 (skeleton, paras 5 – 6, 14, 21 and 28); and (2) that the GHG Analysis should be treated as ex post facto evidence (skeleton, para. 17). The position instead is that the Claimant has fundamentally misunderstood, or ignored, the Defendant's grounds and evidence, and the clear statements as to the matters that were considered by the Defendant when determining to publish RIS2.

18. Once the Claimant's misunderstandings of the Defendant's case are cleared away, the unmeritorious nature of the Claimant's claim is made apparent. What also becomes apparent is that the nub of the Claimant's complaint is not what has been considered in respect of climate change, but rather how it has been considered. But, as set out above, even if this does form part of the grounds on which permission has been granted (which is denied), the Claimant faces a particularly high hurdle in demonstrating that the manner of consideration by the Defendant was irrational.

Overview of RIS2

19. In order to provide some background to the Claimant's claim, the evidence of Mr Andrews explains the current system relating to the management of the strategic road network ("SRN"), the process leading to the setting of RIS2, how the effect of RIS2 on the environment was considered during this process (including, but not limited to, the impacts of RIS2 on wider transport and cross-governmental decarbonisation requirements and policies), and sets out the factual matters in response to the Claimant's claim. In doing so, Mr Andrews relies on the evidence of Dr Moran which addresses wider government policy on climate change and decarbonisation in particular.

20. As Mr Andrews explains **[PA1/17–19]**, RIS2 was set under s. 3(1) of the IA 2015, and commits the Government to a five-year funding settlement of £27.4 billion in the SRN. Pursuant to s. 3(3) of the IA 2015, RIS2 specifies the objectives for the Interested Party ("Highways England") during its five-year investment period and the financial resources to be provided by the Defendant to Highways England for the purposes of achieving those objectives. By s. 3(4), the objectives of Highways England may include activities to be performed, results to be achieved, and standards to be met.

21. RIS2 itself explains that the IA 2015 reformed the way in which England's strategic roads were funded and managed. It describes, in the Introduction, what was done in respect of the first Road Investment Strategy, following the enactment of the IA 2015 **[CB/189]**:

> "Government committed to a five-year funding settlement, the first Road Investment Strategy (RIS1), which allowed Highways England and its supply chain to plan their work efficiently and provided the confidence needed for them both to invest in people and equipment, growing the skills and capability necessary to deliver the scale of improvements planned to the network. RIS1 invested some £17 billion in our strategic roads – not only in upgrades, but in maintenance and measures to address the effects that old roads have on nearby communities."

22. And further in respect of RIS2, that **[CB/189]** (emphasis added):

> "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. In total, RIS2 commits the Government to spend £27.4 billion during RP2. Some of this will be used to build new road capacity, but much more will be used to improve the quality and reduce the negative impacts of the existing SRN, so that every part of the country will benefit."

23. The theme of addressing the negative impacts of the SRN (especially the older parts of the SRN), as identified here in the Introduction, runs throughout RIS2. By way of example only, Part 1 of RIS2, which addresses "*Strategic Vision",* has a section dedicated to the "*Vision of the network in 2050"* **[CB/205],** which envisages a "*greener network"* with the majority of vehicles on the SRN being zero emission, so "*transforming the impact of the SRN on … carbon emissions.*" The delivery of the strategic vision further recognises the impacts of the SRN on the environment, and sets out that the vision for the network involves tackling vehicle emissions **[CB/211]** (emphasis added):

> "The Government has adopted one of the most ambitious plans in the world to decarbonise road transport. The Road to Zero strategy set out a commitment to end the sale of new conventional petrol and diesel cars and vans by 2040 and steps to decarbonise freight. In February 2020, we launched a consultation on bringing this date forward to 2035, or earlier if a faster transition appears feasible. Other plans to improve the environmental performance of

> transport can be found in the Government's Clean Air, Clean Growth and nitrogen dioxide (NO2) strategies.
> With transport accounting for a third of all UK greenhouse gas emissions, it is clear that all modes need to take urgent action to scale up their efforts to tackle climate change. 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.
> Achieving this will make our towns and cities better places to live, help to create new jobs and improve air quality and our health. Our The Road to Zero strategy put us on track to make substantial reductions in road transport emissions, but we now intend to go further and faster."

24. Pausing there, the suggestion made by the Claimant that the Defendant has ignored climate change matters (or as the Claimant's skeleton puts it, that the Defendant has ignored the GHG Analysis) is flatly contradicted on the face of RIS2 itself. The Defendant returns to his consideration of climate change matters below.

25. As Mr Andrews also explains **[PA1/14-16]**, the arrangements provided for under the IA 2015 set a framework by which the Government is able to ensure that adequate financial provision is made for those roads in England that connect main population centres, major ports, airports and rail terminals, geographically peripheral regions and the chief cross-border routes to Scotland and Wales. This in turn means that RIS2 can respond to broader government policy objectives (which also shaped the development of RIS2), such as increasing the supply of houses, levelling up the economy across the country with more jobs and growing skills, supporting international trade, securing environmental and cultural heritage goals, and increasing resilience in the face of climate change.

26. Plainly, these are all matters which go to the very substantial public benefits that the government quite rightly sought and expected to achieve by way of the multi-billion pound proposed investment in the SRN. It was explained in RIS2 **[CB/260]**, in this regard, that the projects it funded:

> "… could support the creation of hundreds of thousands of jobs and homes. These arise not just from large-scale enhancements, but also many of the individual junctions and widenings, several of which could help unlock ten thousand or more new homes or enable major new business developments, while safeguarding the SRN's strategic function."

27. These matters all underscore the macro-political nature of RIS2, as does the fact that:-
    (1) It was referred to in and set on the same date as the Budget 2020 was presented to Parliament, with the Budget indicating at paragraph 1.41. **[DB/355]** that "*RIS2 will be delivered alongside the government's plans for decarbonising the transport sector, which are set out in the 'Growing a greener economy' section of this chapter*".

(2) The wider environmental policies which were considered in developing RIS2, and which RIS2 refers to, are part of the suite of policies relied upon to achieve the carbon budgets set under s. 4 of the Climate Change Act 2008 ("CCA 2008") which requires a wide range of factors to be taken into account when being set including economic circumstances (in particular the likely impact of the decision on the economy and competitiveness of particular sectors), competitiveness, the public finances, energy policy, technological progress, international and EU circumstances, scientific knowledge about climate change and the differences between the devolved administrations – see s.10 CCA 2008.

28. These matters also put into focus the Claimant's very narrow perspective and unwillingness to see that the decision to set RIS2 sits within a much wider policy context which has proper regard to its impacts on the environment and climate change, but also takes account of and balances those important matters against broader socio-economic considerations.

29. As set out in further detail below, when responding to the Claimant's amended grounds of challenge, the particular issue of the carbon impacts of RIS2 was given extensive consideration during the development of RIS2. Mr Andrews explains, *inter alia*, that the carbon impact of RIS2 was forecast and assessed prior to it being published and showed that the new road enhancements proposed to be funded through RIS2 would add 0.2 $MtCO_2e$ by 2031 (when all those new schemes might be expected to be open) accounting for 0.2% of that year's total road emissions **[PA1/51; PA2/62]**.

30. In April 2020, following the publication of RIS2, Highways England carried out full individual year assessments to 2050 of the impact of the new RIS2 schemes to provide further detail on carbon impacts including for Carbon Budget 4 and 5 emissions **[PA1/62–63; PA2/67]**. This further analysis confirms that the increase in carbon emissions forecast as a result of RIS2 is *de minimis* and will have no substantive impact on the UK's ability to meet net zero or the fourth and fifth carbon budgets. Far from being ignored in setting RIS2, matters relating to the carbon impacts of RIS2 on the environment, and on climate change in particular, were plainly taken into account. This is the important context to the consideration of the Claimant's sole ground of challenge.

Response to Claimant's first ground of challenge

Preliminary matters

31. In addressing Ground 1, it is important to understand that (1) the Paris Agreement sets out an international goal of "*[h]olding the increase in the global average temperature to well below 2°C above pre-*

industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels" (Article 2(1)(a) **[SB/90]**) which was taken into account when setting the net zero target; and (2) the UK's carbon budgets are part of the measures by which the UK is staging its progression towards achieving the net zero target **[ASFG/16–20]**.

32. As the Supreme Court explained in *R (Friends of the Earth Ltd and another) v Secretary of State for Transport* [2020] UKSC 52; [2021] P.T.S.R. 190 ("the *Heathrow* judgment"), at [70-71] (emphasis added):

> "71. … In article 2 the Paris Agreement sought to enhance the measures to reduce the risks and impacts of climate change by setting a global target of "holding the increase in the global average temperature to well below 2ºC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5ºC above pre-industrial levels". Each signatory of the Paris Agreement undertook to take measures to achieve that long-term global temperature goal "so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" (article 4(1)). Each party agreed to prepare, communicate and maintain successive nationally determined contributions ("NDCs") that it intended to achieve and to pursue domestic mitigation measures with the aim of achieving the objectives of such NDCs (article 4(2)). A party's successive NDC was to progress beyond its current NDC and was to reflect its highest possible ambition (article 4(3)).
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> 71. Notwithstanding the common objectives set out in articles 2 and 4(1), the Paris Agreement did not impose an obligation on any state to adopt a binding domestic target to ensure that those objectives were met. The specific legal obligation imposed in that regard was to meet any NDC applicable to the state in question. So far as concerns the United Kingdom, it is common ground that the relevant NDC is that adopted and communicated on behalf of the EU, which set a binding target of achieving 40% reduction of 1990 emissions by 2030. This is less stringent than the targets which had already been set in the fourth and fifth carbon budgets issued pursuant to section 4 of the CCA 2008, which were respectively a 50% reduction on 1990 levels for the period 2023–2027 and a 57% reduction for the period 2028–2032."

33. The Supreme Court further confirmed its conclusion, at [122], that:-

> "the UK's obligations under the Paris Agreement are given effect in domestic law, in that the existing carbon target under section 1 of the CCA 2008 and the carbon budgets under section 4 of that Act already meet (and, indeed, go beyond) the UK's obligations under the Paris Agreement to adhere to the NDCs notified on its behalf under that Agreement".[1]

[1] The Defendant understands that it was these passages in the *Heathrow* judgment that Lang J had in mind when allowing the Claimant permission to amend his statement of facts and grounds to take account of this judgment. Remarkably, they are not mentioned at all by the Claimant.

34. Consistent with this judgment, Dr Moran explains in his evidence that that the CCC's advice of May 2019 **[DB/267]**[2] was that the net zero target "… *meets fully the requirements of the Paris Agreement, including the stipulation of 'highest possible ambition', and sets the standard for the EU and other developed countries as they consider their own pledges to the global effort."* Notably, in the same report, the CCC recommended that no changes be made to the fourth or fifth carbon budgets at the time.

35. The carbon budgets set under s. 4 of the CCA 2008 require a wide range of factors to be taken into account when being set including economic circumstances, competitiveness, the public finances, energy policy, technological progress, international and EU circumstances, scientific knowledge about climate change and the differences between the devolved administrations – see s.10 CCA 2008. Dr Moran explains the latest policy initiatives set out by the Government to meet the carbon reductions necessary to comply with the present carbon budgets, which involve cross-Government action and involve society-wide initiatives. These policy initiatives, described in *Leading on Clean Growth*,[3] include matters relating to energy, carbon capture and storage, expansion of tree planting and peatland restoration, further initiatives relating to ultra-low emission vehicles, tax measures to encourage greater energy efficiency and to tackle plastic waste, and the announcement that the Prime Minister is to chair a new Climate Action Strategy Cabinet Committee which has subsequently met.

36. Notably, and also of relevance to this matter, *Leading on Clean Growth* **[DB/310]** explained that work was underway on a Transport Decarbonisation Plan ("TDP"), with the aim of increasing the pace of progress towards a cleaner, more sustainable and innovative transport network.

37. The approach taken by the Government, as reflected in RIS2, is that the contribution of road transport to reducing national carbon emissions, and to achieving net zero, is and will be mapped out in the wider plans aimed at decarbonising the whole of the transport network. That is, the plans are not limited to the SRN, and will consider transportation emissions holistically, in order that the benefits and disbenefits of the whole transport network and other sectors of the economy can be considered together. These wider plans include the forthcoming TDP and other wider policies referred to in RIS2, namely "*The Road to Zero*", "*Clean Air Strategy*", "*Clean Growth Strategy*" and the "*UK plan for tackling roadside nitrogen dioxide concentrations*" – see for example page 25 of RIS2 [**CB/211**].

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2 The advice on the implications of the Paris Agreement and the Intergovernmental Panel of Climate Change's Special Report for the UK's long-term emissions reduction targets.

3 This is the Government's response of October 2019 to the CCC's annual progress report.

38. This was a reasonable approach and can be seen both by the matters set out in RIS2, but also in the 2020 Budget (see above). This approach also reflects the need to tackle carbon emissions in a coordinated fashion across the whole of the UK economy, and the limitations of the Claimant's approach of considering the SRN in isolation. In this regard, the proper context in which to assess the projected carbon emissions from new RIS2 schemes is that they will be an extremely small component of all English road transportation emissions, as well as of total emissions during the period of the fifth carbon budget (which relates to the first of the Defendant's arguments in response to this ground, below).

39. In this regard, Mr Andrews' evidence describes (1) the analysis of the carbon impact prior to RIS2 being set; and (2) the further analysis carried out in April 2020, after RIS2 was set, which showed that the additional effect of new RIS2 schemes will be around 81 $KtCO_2e$ in 2032 (or 0.08 $MtCO_2e$), which would equate to less than 0.2% of all English road transportation emissions. When compared to the UK's fifth carbon budget of 1,725 $MtCO_2e$ (for the five-year period between 2028 - 2032), RIS2 will represent an extremely small component, representing emissions over this five-year period of just 0.28 $MtCO_2e$ out of 1,725 $MtCO_2e$ or 0.02%.[4]

40. This underscores the need to consider the whole of road transport and not just focus, as the Claimant does, on the upgrades to the SRN in planning for economy-wide decarbonisation. The Claimant's claim comes close to saying that any transport related development leading to an increase in emissions must be unlawful. Plainly, the Government is entitled to make decisions supporting new development, and to make such decisions having regard to the overall package of measures aimed at achieving transport decarbonisation together with the economic and other benefits of such development.

Argument 1: the matters relied upon were not obviously material to the Defendant's decision

41. In order to succeed in this challenge, the Claimant must first show that the matters it relies upon were 'obviously material' to the Defendant's decision when determining to set RIS2. It cannot do so, for the following reasons.

42. First, the duty under s. 3(5)(a) of the IA 2015 to have regard to the environment when setting a Road Investment Strategy is broad. The obligation in setting RIS2 was simply to have regard to the effect of the Strategy on the environment. S. 3(5)(a) therefore does not either:-

[4] RIS2 emissions are not spread evenly across the period because of the dates at which new schemes open, but total 0.28 $MtCO_2e$ over the period of the fifth carbon budget.

(1) expressly mandate consideration of the matters relied upon by the Claimant (a matter seemingly accepted by the Claimant given the arguments it advances under this first ground); or

(2) dictate that a Road Investment Strategy should have a particular outcome[5].

43. In respect of the Claimant's arguments that the matters it relies on were "obviously material", it is well-settled (see, e.g., *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, at [57] – [58]) that *"[s]ome considerations are required to be taken into account by decision makers. Others are required not to be. But there is a third category: those considerations which the decision maker may choose for himself whether or not to take into account*". See also *Oxton Farms v Harrogate Borough Council* [2020] EWCA Civ 805 per Lewison LJ at [8] and the Supreme Court in the *Heathrow* judgment at [116]-[121]. The Claimant seeks to place the Ground 1 considerations within the first of these categories. It does not seek to do so because of the express language of s. 3(5)(a) (see above), but instead contends that the Paris Agreement, carbon budgets, and the net zero target (i.e. the Climate Objectives) were "obviously material" to the Defendant's decision in this matter.

44. The Defendant disputes the Claimant's starting point. It is not accepted that the Climate Objectives were so "obviously material" to the decision to set RIS2 that the Defendant was legally obliged to take them into account in setting RIS2. Instead, these were considerations which the Defendant was able, as a matter of discretion, to consider and take into account. Ground 1 is narrowly focussed and asserts that there was a failure to take into account these matters as *mandatory* considerations. But if they are not mandatory, as the Defendant submits, the alleged error simply does not arise. It follows that the Claimant's ground of challenge cannot succeed.

45. Second, neither of the reasons provided by the Claimant for saying that the Climate Objectives were "obviously material" to the Defendant's decision withstand proper scrutiny. The Claimant's reasons, in turn, are that (see [**ASFG/63**]):

(1) because RIS2 is "*on the face of it, enabling a significant increase in [greenhouse gas] emissions*", the objectives of the Paris Agreement, and/or Government policy on climate change which include the objectives of the Paris Agreement, were "obviously material"; and/or

(2) the Court of Appeal's judgment in *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, which held that the Paris Agreement was "obviously material" to the

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5 At times (see, for example, [**ASFG/68**]), the Claimant lapses into submitting that because RIS2 supports potential enhancements to the SRN which will cause greenhouse gases emissions to increase in the short term, it is impossible to demonstrate that appropriate regard has been given to the effects on the environment. This is plainly wrong. See also the Claimant's skeleton at para. 47.

determination to designate the Airports National Policy Statement ("ANPS"), applies by analogy.

RIS2 contributions are *de minimis* compared to the Climate Objectives

46. The Claimant's submissions on the *de minimis* issue are misconceived. It fails (even with its late provided evidence) to properly engage with how significant the GHG emissions from RIS2 will be in the context of the international obligations and associated national policies upon which it relies and that apply to the whole of the UK.

47. When Ground 1 is put in its proper context, including the *de minimis* impact RIS2 will have, it is plain that the suggestion that the matters it relies upon were "obviously material" to the decision to set RIS2 is wrong. Nor is it sufficient to argue, as the Claimant now does, that because it was obviously material to consider climate change impacts, that it follows that it was obviously material to consider the Climate Objectives (skeleton, paras 22, 28 – 30). The logic of this (new) submission, of course, is that any decision which results in any increase in greenhouse gas emissions is required to consider the Climate Objectives. That is obviously wrong. It remains necessary to engage with whether the Climate Objectives were obviously material in light of the particular decision made by the Defendant in this matter.

48. The Defendant's position, as set out in his ADGR, and supported by the evidence of Mr Andrews, is that the impacts of RIS2 when compared to the Climate Objectives, are *de minimis*. In this regard, Mr Andrews' second witness statement explains the means by which the comparative impact of RIS2 as against the Climate Objectives can be assessed. This includes a review of the criticisms made of these matters by Professors Goodwin and Anable: see **[PA2/43–82]** as well as Annex A – Emissions figures at **[CB/175–179]** which summarises the emissions figures set out in the respective parties' evidence.

49. What is apparent from Mr Andrews' second witness statement is that there is a difference of expert opinion as to how the comparative impact of RIS2 should be considered. This is significant, since, as set out at [119] of the *Heathrow* judgment, "*the test whether a consideration falling within the third category is "so obviously material" that it must be taken into account is the familiar Wednesbury irrationality test (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223 ; Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 , 410–411, per Lord Diplock".* As set out at **[PA2/68]**, the Claimant does not dispute the accuracy of the figures relied upon by the Defendant in terms of their calculations. Instead, what is said is that they do not accurately or appropriately take into account the cumulative impacts of RIS2 in that they exclude RIS1

schemes, and other non-tail pipe emissions, and do not seek to aggregate the total carbon effects over the period to 2050.

50. The Claimant's argument, accordingly, is that the views of its experts should be preferred over the views of the Defendant, when it comes to assessing the comparative impact of RIS2. It has a high hurdle in doing so, since it must demonstrate that the Defendant's approach is irrational: see *R (The Law Society) v. The Lord Chancellor* [2018] EWHC 2094 (Admin), at [41], which makes clear that where in respect of an expert's position "*the alleged technical error is not incontrovertible but is a matter on which there is room for reasonable differences of expert opinion, an irrationality argument will not succeed.*"

51. There is no incontrovertible technical error in the Defendant's approach.

52. Emissions from new schemes: Mr Andrews explains in **[PA2/12 – 17, 46]** that the carbon impacts of RIS1 were taken into account at the time this policy was set. In accordance with standard government practice, these carbon impacts were not re-assessed with RIS2; albeit RIS1 carbon impacts were both part of the business as usual carbon baseline **[PA2/15-17]** and expressly identified in RIS2 itself **[PA2/14]**. It is plainly rational when considering the *de minimis* impacts of RIS2 under this first of the Defendant's responses to Ground 1, to take the same approach. Indeed, just as RIS1 schemes were not all completed during the currency of RIS1, not all RIS2 schemes will be completed during the currency of RIS2. That is, it is reasonable when determining what is obviously material to look at what is new, and not at what has previously been committed, assessed and costed.

53. Construction/wider emissions: as set out at **[PA2/25]**, tailpipe emissions account for 97% of all road transport carbon emissions, including emissions from construction, maintenance and operation of the network. It is plainly reasonable in this context for an assessment of the comparative impact of RIS2 to be undertaken against these emissions. The Claimant entirely ignores this matter when relying upon construction and wider emissions to critique the Defendant's approach to this issue in its ADGR. Further, as set out at **[PA2/26 – 30]**, not only is there disagreement about the analytical approach taken by the Claimant, but emissions from the industrial production of certain construction materials are already accounted for under the UK Emissions Trading Scheme. It is again reasonable not to take account of them again under RIS2, when assessing its relative impact.

54. Carbon budget 5 assessment period: the Claimant's critique of the impact of RIS2 during the period of the fifth carbon budget is not understood. It is the Claimant that has asserted that

carbon budgets were obviously material to the Defendant's decision. The material question is not (as the Claimant says at para. 45 of its skeleton) whether the carbon output during the fifth carbon budget underestimates the total or overall climate change impact of RIS2, but whether the small impact of RIS2 during the period of this carbon budget supports the Defendant's position that this was not an obviously material consideration for the Defendant. In the Defendant's submission, it plainly does.

55. Choice of denominator: the Claimant's skeleton criticises the comparison drawn between RIS2 emissions and the UK economy, the transport sector, and emission reductions from electric vehicles. This is on the basis that "*It is in the nature of what needs to be done to tackle climate change that action is needed on all fronts and by everyone",* that the "*logic of the approach … would mean that all environmental effects …could be ignored",* and that "*far deeper and faster reductions [are] required in surface transport emissions than would be achieved on the basis of current policy"* (skeleton, paras 46 and 47). These criticisms amount to bare challenges to the merits of the policy decision to adopt RIS2. They are impermissible for this reason alone.

56. Further, and in any event, they do not engage with the issue they purportedly relate to namely the choice of denominator. The Defendant's legal submission is that in order to be legally relevant, it is appropriate to determine how significant the impact of RIS2 will be against the Climate Objectives. Since those matters involve national and economy wide issues, the short point is that it is appropriate to compare RIS2 against denominators that reflect those issues. This is what the Defendant has done in the ADGR. It is no part of the Defendant's case to say that the comparative impacts it shows means that environmental effects can be ignored. Ground 1 is concerned with an express duty to consider environmental effects (s. 3(5) IA 2015). The Defendant's case is that it has properly considered the environmental effects of RIS2; it is also the Defendant's case that it is not necessary to additionally consider the Climate Objectives in order to properly consider these environmental effects.

57. In the Defendant's submission, it is the relative assessments of RIS2 that he relies upon which best demonstrate whether or not the Climate Objectives were considerations that it was irrational for the Defendant to have not taken into account: *Hurst*, *Oxton Farms*, *Heathrow* judgment. Key among these is the evidence from Mr Andrews **[PA1/55-57; PA2/65]** that the likely effect of ending the sale of petrol and diesel-fuelled cars by 2040 would be a reduction in emissions between 2020 and 2050 of around 66,000,000 tonnes per year (or 66 $MtCO_2e$). He also explains, however, that this is a likely underestimate of the effect of the government's decarbonisation policies, since this takes no account of efforts to decarbonise the freight sector, nor the proposals

to bring forward the date on which the sale of petrol and diesel-fuelled cars will end, to 2035. Set against the decrease of 66 $MtCO_2e$, the increase in carbon emissions from new RIS2 schemes will still be extremely small.

58. Given the *de minimis* contribution of new RIS2 schemes to total English road transportation emissions, let alone to UK GHG emissions, it is impossible to say that RIS2 will (to paraphrase the wording of the Claimant at [**ASFG/63**]) be "*incompatible with*" or a material "*hindrance*" to the achievement of the nation-wide ambitions set out in the net zero target, national carbon budgets, or any objectives of the Paris Agreement (in so far as these should be separate considerations in their own right, which is denied). The *de minimis* contribution to carbon emissions from new RIS2 schemes also explains why RIS2 took account of carbon emissions in the context of needing to address them at a society-wide level (see below). That plainly was a reasonable approach.

The CA's judgment in *Friends of the Earth v Secretary of State for Transport* [2020] EWCA Civ 214

59. The Claimant's reliance on the *Friends of the Earth* case **[ASFG/61 & 62]** does not show the above analysis to be wrong. At the time of the decision to designate the ANPS on 26th June 2018, the CCA 2008 had not been amended to introduce a net zero target (the previous target in s. 1 of the CCA 2008 being to achieve at least an 80% reduction against the 1990 baseline). However, after the ANPS decision was made:
    (1) the CCC provided advice, in May 2019, that "*A net-zero GHG target for 2050 would respond to the latest climate science and fully meet the UK's obligations under the Paris Agreement*";[6]
    (2) the Government took the Paris Agreement and the CCC's advice of May 2019 into account when proposing a net zero target; and
    (3) when resolving to approve the Climate Change Act 2008 (2050 Target Amendment) Order 2019, which provided for the amendment to s. 1 of the CCA 2008, Parliament can be taken to have had regard to these same matters.

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[6] See "Net Zero The UK's contribution to stopping global warming" (May 2019), page 11, available at https://www.theccc.org.uk/wp-content/uploads/2019/05/Net-Zero-The-UKs-contribution-to-stopping-global-warming.pdf. The CCC further stated in respect of a net zero target that (**emphasis** in original):
"● *It would constitute the UK's* ***'highest possible ambition'****, as called for by Article 4 of the Paris Agreement. The Committee do not currently consider it credible to aim to reach net-zero emissions earlier than 2050.*
● *It goes beyond the reduction needed globally to hold the expected rise in global average temperature to* ***well below 2°C*** *and beyond the Paris Agreement's goal to achieve a balance between global sources and sinks of greenhouse gas emissions in the second half of the century.*
● *If replicated across the world, and coupled with ambitious near-term reductions in emissions, it would deliver a greater than 50% chance of limiting the temperature increase to* ***1.5°C.***"

60. Contrary to what the Claimant claims, and as the Supreme Court subsequently held in the *Heathrow* judgment e.g. at [122], there is no basis for there to be a free-standing consideration of the Paris Agreement outside of that already conducted by Parliament. The CCA 2008 had not been amended to revise the target to at least 100% below the 1990 baseline at the time of the Court's judgment in *Plan B Earth* but had been by the time RIS2 was set. In this regard, English law is a dualist legal system and it is trite that international law only has legal force at the domestic level *after* being implemented by national legislation: see *JH Rayner v. DTI* [1990] 2 AC 418 and the *Heathrow* judgment at [108].

61. Therefore it was only the net zero "policy", now enshrined in the CCA 2008, that could have been potentially material to RIS2, and not the Paris Agreement *per se*, but even that was not obviously material in the Defendant's submission, for the reasons stated above (i.e. the *de minimis* nature of the carbon contribution of RIS2 when set against total road transportation measures, the fifth carbon budget, or just transport decarbonisation policies). In any event, the Paris Agreement imposes no obligation upon any individual state to limit global temperatures unilaterally or to implement its objectives in any particular way: *Heathrow* judgment, [71, 122].[7]

62. The Claimant seeks to support its submission that the Paris Agreement was an obviously material consideration (see [**ASFG/64**]) on the basis that it is an objective of the Paris Agreement to reduce the total cumulative emissions over time and "*not just whether emissions are reduced to a given level at a specific future date (2050)*)". This same argument was advanced in *Packham v Secretary of State for Transport* [2020] EWCA Civ 1004.[8] The Court in that case, which was concerned with the Government's decision to proceed with HS2, asked itself at [98] what basis there was "*to explore the need to restrict the global increase in temperature by that year, and the pattern and extent of emissions during the period before?*". Its answer, which provides a complete answer to the Claimant's submission in this matter also, was as follows:

> "99. No support for either of those propositions is to be found in the legal and policy framework within which the Government must act to achieve its own commitments on climate change in the period before 2050. It is not to be found in any provision of the Climate Change Act; Mr Wolfe did not contend that it is. Nor does it come from any

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7 For the avoidance of doubt, it is not accepted that the Paris Agreement lays down any specific objectives which are capable of being translated into matters to which regard was required to be had under s. 3(5)(a) of the IA 2015.

8 The Appellant in that matter was represented by the same solicitors and leading Counsel as are instructed in this matter. Following judgment being handed down in *Packham*, the Claimant was invited to withdraw its claim, or failing that to explain whether it intended to pursue all its arguments, by a letter sent to its representatives by the Government Legal Department on 5 August 2020. A response was sent by the Claimant's solicitors on 13 August 2020 but it did not engage with the issues raised.

other legislation referred to in argument before us. No statement of national policy or guidance is said to provide it.

100. Nor is there any support in authority. We do not accept Mr Wolfe's submission that the circumstances here are comparable to those in the Heathrow third runway proceedings (Plan B Earth), in which the Court of Appeal made a declaration that the designation of the ANPS was unlawful and would not have legal effect until reviewed in accordance with the relevant provisions of the Planning Act. The circumstances in which this court found it necessary to grant relief in that case were significantly different."

63. In summary, the obligation in the IA 2015 is to have regard to the effect of RIS2 on the environment. That obligation has been fully met. The evidence of Mr Andrews and Dr Moran about the consideration given to environmental effects, and the carbon impacts of RIS2 in particular, further support the Defendant's case.

Argument 2: The matters relied upon were taken into account in any event by the Defendant

64. If, contrary to the Defendant's principal submission, all or some of the matters relied upon by the Claimant were mandatory considerations which the Defendant was legally required to take into account when discharging the duty to have regard to the environment under s. 3(5)(a) of the IA 2015, Ground 1 is nonetheless bound to fail because the matters relied on by the Claimant were taken into account by the Defendant in setting RIS2, either expressly or in substance.

65. First, for the reasons already set out above, such provisions in the Paris Agreement as were relevant to the Defendant's consideration of the environment were captured by the CCA 2008, its five yearly carbon budgets and the net zero target now enshrined within it. It would plainly be wrong to say that the Defendant erred because RIS2 does not expressly refer to the Paris Agreement (which it does not), notwithstanding that the relevant objectives under the Paris Agreement were the same as set out by the CCA 2008, its net zero target, and related policies. This would be a classic, and plainly wrong argument, of form over substance, and ignore the objections based on the dualist nature of the UK's legal system.

66. As Mr Andrews further explains **[PA1]**, the development of RIS2 was informed by analysis that undertook an estimation of the potential carbon impacts of RIS2. This analysis was informed by work undertaken to develop Road Traffic Forecasts 2018 ("RTF18") **[PA1/31, 56-59, 72]**, which considered seven scenarios to take account of uncertainties affecting future road demand, and against which RIS2 was assessed. The seventh of these scenarios reflected decarbonisation policies presently in existence. The assessment of RIS2 emissions against RTF18 supports Mr Andrews' evidence that the carbon impacts of RIS2 were considered in the context of their

relationship to long-term decarbonisation goals, in order that they could be considered in light of the net zero target and carbon budgets 4 and 5.

67. Express consideration was also given to the compatibility of RIS2 with the net zero target as found within s. 1 of the CCA 2008. Mr Andrews' evidence is express in this regard (emphasis added):

> "69. In so far as the Court finds that there was a legal obligation to take into account the Paris Agreement, carbon budgets and the need to achieve net zero, my evidence in any event shows that the carbon impacts of RIS2 were considered throughout its development, including with reference to its relationship to long-term decarbonisation goals, and that the specific question of consistency with net zero was revisited prior to the publication of RIS2, with ministers explicitly informed on 6th March 2020 (see paragraph 61).
>
> 70. Furthermore, in developing RIS2, its carbon impact was assessed so that it could be considered in the light of the net zero target and carbon budgets 4 and 5. RIS2 was developed in the knowledge of wider decarbonisation planning by the DfT, in particular the policy of ending the sale of petrol and diesel-fuelled cars and vans given the substantial reduction in emissions this is forecast to produce. Indeed, the link between RIS2 and the decarbonisation of the vehicle fleet using the SRN was made at the very outset of the development phases in 2016 in Planning Ahead, which said **[DB1/29]**:
>
> > *"It is projected that vehicles will have increasingly efficient engines and there will be a greater take up of Ultra-Low-Emission Vehicles. The imperative to reduce carbon dioxide, mononitrogen oxides and other greenhouse gases in response to climate change, will drive this trend … As cost of driving and the environmental impact of vehicles reduces, traffic levels are projected to increase."*
>
> And again **[DB1/31]**:
>
> > *"It is vital that we continue to drive the transition to a decarbonised network that is environmentally and locally sensitive. We will continue to tackle the immediate and long-term environmental impacts of the road network. Key aspects include:*
> >
> > …
> >
> > *Accelerating the decarbonisation of the vehicle fleet: Low-emission vehicles are the most promising way to tackle the effects of road transport on climate change."*
>
> 71. Other elements of the DfT's decarbonisation planning were also recognised in the development of RIS2, such as the cycling and walking strategies that underpin the policy ambition of making these options the first choice for short journeys **[CB/12/125]**. The linkage with these plans was important both to understand the overall position on carbon emissions and the potential impacts for road demand."

68. Further, if contrary to the above and the decision in *Packham,* the Defendant was required to take account of cumulative emissions and/or the global commitment to peak emissions as soon as possible and to achieve rapid reductions thereafter [**ASFG/64**], consideration was given to those matters. The Defendant's analysis considered emissions in 2032 and 2050, as well as to potential carbon emissions in the context of wider policies to ensure that "*further and faster*" measures were

taken to decarbonise the transport sector in the shorter term (i.e. prior to 2050), including through the proposed TDP. Further detailed analysis in April 2020 of individual years to 2050 support the earlier analysis. It is thus entirely wrong for the Claimant to say that in setting RIS2, the Defendant ignored cumulative carbon emissions and/or the peaking of emissions.[9]

69. Secondly, so far as carbon budgets are concerned, the Defendant makes four further points:-

(1) What ultimately is said by the Claimant is that the Defendant's "*approach is, in summary, to allow increases in road capacity in the near term … without any consideration of the impact of that on carbon budgets"* [**ASFG/68**]. This submission is simply wrong. As already explained, the evidence of Mr Andrews is that the carbon impact of RIS2 was forecast and assessed in order that it could be considered in light of the net zero target and Carbon Budgets 4 and 5.

(2) Further, the wider policies referred to in RIS2 as supporting the Government's aims to achieve the net zero target were related to, and are part of, the wider suite of policies relied upon to achieve the aims in the carbon budgets. These policies included both the Clean Growth Strategy and the proposed TDP. The Clean Growth Strategy (referred to, for example, at page 25 of RIS2) sets out policies and proposals aimed at achieving carbon budgets, up to and including the fifth carbon budget, i.e. the budgets were plainly taken into account via consideration of the Clean Growth Strategy. And, as explained in "Decarbonising Transport: Setting the Challenge" ("Setting the Challenge"), the stated ambition in respect of future decarbonisation plans is to "*take a coordinated, cross-modal approach to deliver the transport sector's contribution to both carbon budgets and net zero*" (underlining added; page 5). Setting the Challenge also analyses the projected trajectory of GHG emissions to carbon budget 5 and beyond (chapter 4), and explains how the TDP will put forward a credible implementation plan for how the transport system as a whole can help deliver the necessary reduction in GHG emissions (chapter 5). Setting the Challenge further sets out (chapter 5) strategic priorities aimed at achieving reductions in greenhouse gas emissions ("GHG"), these being (1) "*Accelerating modal shift to public and active transport*"; (2) "*Decarbonisation of road vehicles*"; (3) " *Decarbonising how we get our goods*"; (4) "*Place-based solutions for emissions reduction*"; (5) "*UK as a hub for green transport technology and innovation*"; and (6) "*Reducing carbon in a global economy*". Given the clear ambition for the TDP to tackle emissions to help address both net zero *and* carbon budgets, and the decision in RIS2 that it will sit within a wider context to reach net zero emissions, it is impossible to suggest that there has been a failure to consider the compatibility of RIS2 with carbon budgets.

[9] Notably, also, UK emissions have long since peaked: see the evidence of Mr Andrews and Dr Moran.

(3) The Claimant's suggestion that there is "*already an excess of 16 $MtCO_2$ of projected GHG emissions from domestic transport, compared to what is required to meet the fifth Carbon Budget*" [**ASFG/68(a)**], is an argument about the merits. The 16 $MtCO_2e$ figure is taken from a projection of a potential transport contribution to carbon emissions, where other scenarios are also possible, set in the context of the 2032 pathway in the Clean Growth Strategy. There is no transport target that is in any sense "*required*" to be met. More importantly, it ignores the points made above about the *de minimis* nature of GHG emissions from new RIS2 schemes in the context of national GHG targets, road transportation as a whole, and overall efforts to decarbonise transport. The greatest carbon savings from transport are made in other areas of transport policy not covered by RIS2. This is what the TDP and other wider government policies are seeking to address.

(4) Finally, in so far as the Claimant submits that the Defendant erred in relying on wider Government strategies to address carbon reductions and carbon budgets in particular, it faces a particularly high threshold. Its challenge in this regard is not about whether carbon reductions and budgets have been considered, but is about the manner in which those matters have been considered. The Defendant's approach was pre-eminently a matter for his judgement, which may only be challenged on the grounds of irrationality: *Khatun,* at [35]; *ClientEarth,* at [256]. For all the reasons set out above, it was plainly not irrational for the Defendant to take the approach he did. This is all the more so given that the Defendant's decision is one that is firmly in the macro-political field: *Begbie*, at 1131. The related submission that the Defendant was not lawfully able to rely upon the proposed TDP as part of these wider strategies is misconceived. RIS2 clearly sets out that the TDP will be directed towards further and faster reductions in carbon emissions, i.e. it will look to help the reduction of emissions during the period of the fourth and fifth carbon budgets. It was plainly reasonable for the Defendant to rely upon such emerging policy, aimed as it is not just at the SRN but the whole transportation network, in order to satisfy any obligation to have regard to carbon budgets. In any event, the Clean Growth Strategy (which is expressly directed to meeting the carbon budgets, up to and including the fifth carbon budget) was also relied upon in RIS2.

70. Thirdly, so far as the net zero target is concerned, the Claimant's grounds are inconsistent. On the one hand, the Claimant submits that there was a failure to consider the need to achieve net zero [**ASFG/71**], while on the other it submitted that the Defendant's "*strategy for 'tackling emissions' focuses solely on 2050*" [**ASFG/68**]). The Claimant cannot have it both ways. Either the Defendant did or did not have regard to the net zero target. It is clear, even on the Claimant's own case, that

the Defendant did have regard to net zero. And the submissions already made above make this clear in any event. The repeated references to net zero in RIS2 underscore this position. Again, the Claimant's challenge is to the manner of the Defendant's consideration, which was a matter for his judgement.

71. It is also important to remember that the question for the Court is whether the Defendant has discharged his duty to have regard to the environment when setting RIS2. For the reasons set out above, it is plain that he has done so. In this regard, RIS2 makes multiple references to its potential effects on the environment and to the need, specifically, to achieve decarbonisation of the transport network. These are made in the context both of tackling vehicle emissions, and (expressly) to the connected commitment to achieving the net zero target in s. 1 of the CCA 2008. By way of example only, it is made expressly clear in RIS2 that:

(1) RIS2 is intended to support wider plans for decarbonising road transport (page 4) [**CB/190**];

(2) decarbonising road transport is an issue that is required to be dealt with "*at a society-wide level*" (page 23) [**CB/209**];

(3) the Government has adopted an ambitious plan to decarbonise road transport, including restating in "Road to Zero" a commitment to end the sale of new conventional petrol and diesel cars and vans by 2040 and to take steps to decarbonise freight (page 25) [**CB/211**];

(4) the aim to reach net zero emissions by 2050 is further supported by the "*UK's first Transport Decarbonisation Plan, due to be completed later this year, [which] will bring together a bold and ambitious programme of coordinated action*", enabling the UK to go "*further and faster"* in making substantial reductions in road transport emissions (page 26) [**CB/212**];

(5) the Department for Transport ("DfT") is preparing the SRN for a range of transformative policies to deliver "*radically improved outcomes for the environment*", including multiple measures to support the decarbonisation of vehicles using the SRN, many of which are set out in the Government's Road to Zero policy (page 27) [**CB/213**], but also include consultation as to whether the 2040 date for ending the sale of new petrol and diesel vehicles should be brought forward to 2035, or earlier if a faster transition appears feasible (page 25) [**CB/211**]; and

(6) RIS2 "*is a fully-integrated part of this wider effort to reach net zero emissions*" (page 27) [**CB/213**], a point also made in the Budget 2020 (paragraph 1.41; see above).

72. It is abundantly clear in light of the above matters that the Defendant had full and proper regard to the environment when setting RIS2, including to climate change related impacts on the environment, and carbon emissions in particular, consistent with the Government's climate

change responsibilities. In the Defendant's submission, no more was needed in order for the Defendant to discharge the duty in s. 3(5)(a) of the IA 2015 to have regard to the effect of RIS2 on the environment.

Section 31 Senior Courts Act

73. Without prejudice to the above submissions, which in the Defendant's submission provide a complete answer to the claim, if the Court were to conclude that any of the matters complained of by the Claimant were not taken into account, this is not a matter in which any relief should be granted. By s. 31(2) of the Senior Courts Act 1981 ("the SCA 1981"), the Court "*may*" grant relief if it considers it "*just and convenient*" to do so. However, by s. 31(2A), the Court "*must*" refuse relief if it appears to the Court "*highly likely that the outcome for the applicant would not have been substantially different*" absent the conduct complained of.

74. The sole issue upon which the Claimant has been granted permission relates to a failure to take account of matters relevant to climate change impacts on the environment. But as the evidence of Mr Andrews and Dr Moran sets out, extensive consideration was given to these matters through the course of the development of RIS2. The analysis undertaken in the preparation of and following RIS2, and summarised in the Defendant's evidence, show the *de minimis* impact on carbon emissions of the new schemes supported by RIS2, when set against total English road transportation emissions, the fifth carbon budget, and the predicted carbon reduction from present decarbonisation plans. Given these matters, it is highly likely that the outcome of RIS2 would have been the same, even if the Court were to determine that all or some of the Claimant's claim is justified (which is denied).

Additional grounds of challenge

75. As set out above, the Defendant objects to the Claimant's two new grounds of challenge. Without prejudice to this position, the Defendant responds to them as follows.

Ground 1(iv)

76. The Claimant's first new ground wholly misunderstands the Defendant's case on the *de minimis* issue. It is not the Defendant's case that the Secretary of State took into account the *de minimis* nature of the additional carbon impacts from the five new schemes included in RIS2 when setting RIS2. The Defendant's case is that the *de minimis* nature of those carbon impacts supports its submission that the matters relied on by the Claimant (the Paris Agreement, carbon budgets and net zero) were not "obviously material" considerations the Secretary of State was required to take

into account when setting RIS2. Consequently, the Claimant is correct that the *de minimis* nature of the carbon impacts of the five new RIS2 schemes are not referred to in RIS2 but wrong to contend that the *de minimis* nature of those scheme's carbon impacts were not taken into account by the Secretary of State when setting RIS2.

77. For the avoidance of doubt, the Defendant denies that the only consideration that he gave to climate change impacts is the "legal briefing of 6 March 2020", as asserted at **[ASFG/73B]**. It is apparent from the terms of RIS2 itself that this was not the limit of the Defendant's consideration. The Defendant has otherwise made clear through his ADGR that the Climate Objectives were taken into account by the Defendant when setting RIS2: see **[ADGR/36 and ff].** It follows that the Claimant's new reliance upon *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 does not assist it.

Ground 1(v)

78. Ground 1(v) contends that the assessment undertaken by the Defendant's officials that the carbon impacts of RIS2 were *de minimis* was irrational because it was vitiated by a series of fundamental technical errors **[ASFG/73C].** The Defendant's response to these alleged "technical errors" are set out in the Second Witness Statement of Mr Philip Andrews. His response to the Claimant's criticisms demonstrates:-
    (1) The broad context in which RIS2 was set and wide margin of appreciation enjoyed by the Defendant.
    (2) That the alleged "technical errors" are without substance and/or are largely matters of judgment in respect of which different people exercising their professional judgments may reasonably differ.
    (3) None of the alleged technical errors can be said to be irrational as alleged by the Claimant.
    (4) Absent obvious irrationality, the Court is poorly placed to determine whether the Defendant's assessment of the *de minimis* nature of the impacts is vitiated by such "errors" (i.e. any such "errors" could bear only upon the submission made by the Defendant about the lack of obvious materiality of the matters relied upon by the Claimant in any event).

79. For the reasons also set out in response to Ground 1(iv), the submission at **[ASFG/73J]** that the s.3(5) assessment was entirely flawed is misconceived and based on a misunderstanding of the Defendant's case.

Conclusion

80. In the Defendant's submission, there is no merit in the only ground for which the Claimant has been granted permission. The matters relied on were not ones the Defendant was legally obliged to take into account and, in any event, were taken into account. Moreover, the decision to set RIS2 and the policy context in which it sits are firmly in the broad macro-political field where the decision taker enjoys a wide margin of discretion and the Court's review is less intrusive. For all the above reasons, the Defendant submits that the claim should be dismissed.

14th June 2021

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CO/2003/2020

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

BETWEEN:

THE QUEEN (on the application of TRANSPORT ACTION NETWORK)

Claimant

- and –

THE SECRETARY OF STATE FOR TRANSPORT

Defendant

- and –

HIGHWAYS ENGLAND COMPANY LIMITED

Interested Party

DEFENDANT'S SKELETON ARGUMENT

Michael Jeremiah
Senior Lawyer, Planning, Infrastructure and Environment Team
Justice and Development Division
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Extract from the Secretary of State's Skeleton Argument for the Hearing on 2 March 2021 before Lang J

The *de minimis* issue

14. The Claimant accepts that the need to have regard to Claimant's climate change matters is not expressly stated in the IA 2015 (Reply submissions, para. 6 **[BH/78]**). Its argument, therefore, is that these matters are so "*obviously material*" to s.3(5)(a) that they had to be taken into account in the setting of RIS2. The Defendant met both the legal and factual basis for this ground of challenge in his detailed grounds of resistance. Two alternative submissions are made in response.

15. First, that the legal argument made by the Claimant that the Claimant's climate change matters were "*obviously material*" to the decision under challenge is wrong. At **[DGD/21 – 35]**, the Defendant addressed the circumstances in which considerations must be taken into account (applying *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, at [57] – [58] and *Oxton Farms v Harrogate Borough Council* [2020] EWCA Civ 805 per Lewison LJ at [8]), and submitted that the relevant legal test was not met.

16. At **[DGD/25]**, the Defendant identified the two reasons why the Claimant submits that the Claimant's climate change matters were obviously material, and proceeded to address each of those reasons in turn. The Claimant's first reason is that RIS2 is "*on the face of it, enabling a significant increase in [greenhouse gas] emissions*": **[SFG/63]**. In response, the Defendant:
    (1) at **[DGD/26]**, identifies that the Claimant failed to engage with (and, it is noted, failed to provide any evidence in support of) what the alleged increase in greenhouse gas emissions ("GHG") from RIS2 might be, and how significant those increases were in the context of the international obligations and associated national policies upon which it relies and that apply to the whole of the UK; and
    (2) at **[DGD/27 – 30]**, set out his position that when these matters are considered, the impact of RIS2 is *de minimis* and so demonstrates that the Claimant's legal argument that the Claimant's climate change matters were obviously material to the decision under challenge is flawed.

17. It is by this means that the *de minimis* issue is submitted by the Defendant to be relevant to the Claimant's ground of challenge. It is important to frame correctly the *de minimis* issue. It does not go to how the Defendant made the decision under challenge (as at times is suggested in the Claimant's submissions, correspondence and evidence); rather it goes only to the arguments made by the Defendant in his first submission in response to the Claimant's first ground of challenge.

18. The Defendant provided evidence in support of this argument, principally by way of the witness statement of Philip Andrews, dated 21 September 2020. Mr Andrews explains at his paragraph 10(f) that part of his evidence was intended to provide conclusions in response to the allegations in the Claimant's grounds of claim, including "*the de minimis carbon impact of RIS2 in the policy context*" **[HB/32 – 33]**. Mr Andrews then addresses this issue at paragraphs 50 – 59, and 73 of his evidence**.**

19. The Defendant's second, and alternative, submission in response to the Claimant's first ground of challenge is that he did, in any event, take account of the Claimant's climate change matters: see **[DGD/36 – 44]**. So far as the Paris Agreement is concerned, the submission at **[DGD/37]** was that "*such provisions in the Paris Agreement as were relevant to the Defendant's consideration of the environment were captured by CCA 2008, its five yearly carbon budgets and the net zero target now enshrined within it.*"