

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

Claim No.

THE QUEEN
on the application of
TRANSPORT ACTION NETWORK LIMITED

Claimant

- and -

THE SECRETARY OF STATE
FOR TRANSPORT

Defendant

STATEMENT OF FACTS AND GROUNDS

Page references below are to the pages of the claim bundle. These are expressed as [CB/x/y] where x is the page number and y is the paragraph number, where relevant.

Essential Reading

- *National Policy Statement for National Networks (extracts) [CB/71-91]*
- *Ministerial Submission and recommendation to review the NPS, 15 October 2020 [CB/167-179]*
- *Letter containing 23 October 2020 decision not to review the NPS [CB/180]*
- *CCC advice on the UK's Nationally Determined Contribution [CB/215-218]*
- *The UK's Nationally Determined Contribution, page 1 [CB/225]*
- *Ministerial Submission and recommendation to review the NPS, 3 February 2021 [CB/181-188]*
- *Decision document: Minute of Secretary of State for Transport's decision not to review the NPS, dated 12 March 2021 [CB/189-190]*

A. Introduction and summary of claim

1. As explained in the witness statement of Chris Todd [CB/24-33] 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, air quality and biodiversity.

2. The Claimant is seeking permission to bring judicial review of the decision of the Defendant, taken on 12 March 2021, not to review all or part of the National Networks National Policy Statement ("**the Decision**"; "**the NPS**").
3. The Decision was unlawful because the Defendant purported to take account of the UK's obligations under the Paris Agreement on climate change, but he directed himself that those obligations were given full effect by domestic law, so that no free-standing consideration of the Paris Agreement was necessary. That was a misdirection in law, because:
 - a. By the date of the Decision, the UK had adopted a target for a 68% reduction in greenhouse gas ("**GHG**") emissions by 2030 ("**the 2030 Target**"). The UK committed to the 2030 Target in its Nationally Determined Contribution ("**NDC**"), required by Article 4(2) of the Paris Agreement and submitted to the United Nations Framework Convention on Climate Change ("**UNFCCC**") on 11 December 2020;
 - b. The 2030 Target is more stringent than the requirements of the fifth carbon budget set under s.4 Climate Change Act 2008 ("**CCA 2008**"), which covers the year 2030.
 - c. Accordingly the UK had assumed obligations under the Paris Agreement that went beyond those imposed by domestic law, and it was incorrect to regard the Paris Agreement as fully implemented by commitments under the CCA 2008.
4. As a result of the Defendant's misdirection in law, his assessment that it was not appropriate to review the NPS at the time of the Decision was unsafe and unlawful. It is impossible for the Court to conclude that he would have reached the same decision as he did, had he directed himself correctly on the effect of the Paris Agreement.

B. Legal Framework

Planning Act 2008

5. The Planning Act 2008 establishes a planning regime for Nationally Significant Infrastructure Projects (“**NSIPs**”) (as defined in Part 3 of PA 2008). The Secretary of State has a broad power to designate an NPS under s.5 PA 2008 [**CB/255**], establishing national policy for different types of development. Part 4 PA 2008 establishes that ‘development consent’ is required for NSIPs and Part 5 establishes a regime for the granting of development consent. By s.104(3) PA 2008 [**CB/263**], within Part 5, where an NPS has effect, the Secretary of State must determine an application for development consent in accordance with the NPS, unless one of the exceptions listed in s.104(4) to (8) applies. Accordingly, any NPS has a very significant influence on the planning process in respect of the developments to which it applies.

6. Section 6 PA 2008 [**CB/257**] provides for review by the Secretary of State of an NPS, in the following terms:

“Review

- (1) The Secretary of State must review each national policy statement whenever the Secretary of State thinks it appropriate to do so.
- (2) A review may relate to all or part of a national policy statement.
- (3) In deciding when to review a national policy statement the Secretary of State must consider whether—
 - (a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,
 - (b) the change was not anticipated at that time, and
 - (c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different.

[...]¹

(5) After completing a review of all or part of a national policy statement the Secretary of State must do one of the following—

(a) amend the statement;

(b) withdraw the statement's designation as a national policy statement;

(c) leave the statement as it is.

(6) Before amending a national policy statement the Secretary of State must carry out an appraisal of the sustainability of the policy set out in the proposed amendment.”

7. Section 13 PA 2008 **[CB/261]** provides for legal challenges relating to an NPS. Section 13(2) expressly provides that a decision of the Secretary of State not to carry out a review of all or part of a national policy statement is amenable to judicial review.

C. Factual Background

The NPS

8. The NPS was designated in December 2014. It ‘sets out the need for, and Government’s policies to deliver, development of nationally significant infrastructure projects (NSIPs) on the national road and rail networks in England.’ **[CB/67/1.1]**. It was intended to be used by the Defendant as ‘the primary basis for making decisions on development consent applications’ for road and rail NSIPs in England.
9. Section 2 of the NPS set out the Defendant’s assessment of need for capacity enhancements of national networks. Paragraphs 2.12 - 2.27 in particular addressed the need for development of the Strategic Road Network (“SRN”), which was said to arise in order to ease congestion that was forecast to increase significantly to 2040. Paragraph 2.21 **[CB/75]** considered three options for meeting this need – maintaining

¹ S.6(4) replicates the considerations in s.6(3), where what is being considered is review of part of the NPS.

the existing network, managing demand through non-fiscal measures (ruling out fiscal measures such as national road pricing), and modal shift – but concluded that these options were insufficient to meet the identified need. Accordingly, paragraph 2.23 [CB/77] set out ‘wider Government policy’ of supporting enhancements to the SRN, including ‘implementing “smart motorways”² to increase capacity’, and ‘dualling of single carriageway strategic trunk roads and additional lanes on existing dual carriageways to increase capacity’.

10. Section 3 of the NPS set out Government policy on the environmental impacts of road development. It acknowledged that ‘Transport will play an important part in meeting the Government's legally binding carbon targets and other environmental targets’ [CB/87/3.6] but went on to assert that ‘The impact of road development on aggregate levels of emissions is likely to be very small’, when set against projected reductions from other climate change policies [CB/87/3.8].

The Paris Agreement

11. In December 2015 the parties to the UNFCCC adopted the Paris Agreement. The UK ratified the Paris Agreement in November 2016.
12. 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 (Art. 2.1) [CB/273].
13. To achieve these temperature goals, Art.4(1) sets out various collective commitments of the Parties: to aim to reach global peaking of emissions as soon as possible, recognizing that peaking will take longer for developing countries, and thereafter 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 [CB/274].
14. Article 4(2) contains the key obligation placed on individual parties by the Paris Agreement: to prepare, communicate, and pursue policies to achieve, successive

² Where the hard shoulder is transformed into a permanent additional running lane and traffic flow is moderated by the use of variable speed limits.

‘nationally determined contributions’ (“**NDCs**”). The interplay between the collective ambitions and the individual obligations of the Paris Agreement was explained by the Supreme Court in the Heathrow case³ (at ¶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.”

15. From 2016 until late 2020, the relevant NDC for the UK was that adopted and communicated on behalf of the EU (“**the EU NDC**”), which set a binding target of achieving 40% reduction of 1990 emissions by 2030, averaged across the EU Member States. On 11 December 2020⁴, the UK submitted its first NDC as an independent nation (“**the UK NDC**”), which set a target of a 68% reduction of 1990 emissions by 2030 (“**the 2030 Target**”) [CB/225].

The Climate Change Act 2008

16. Section 1 of the Climate Change Act 2008 (“**the CCA**”) requires the UK Government to reduce net emissions of ‘targeted greenhouse gases’ to zero by 2050 (“**the Net Zero Target**”) [CB/266]. The Net Zero Target was adopted in 2019, following the advice of the Committee on Climate Change (“**CCC**”) that the s.1 target should be increased from an 80% reduction to a 100% reduction.
17. Sections 4 to 10 of the CCA 2008 create a scheme of five-yearly carbon budgets [CB/267-271]. 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. All existing carbon budgets were set before the Net Zero Target was adopted; that is, at a time when the target under s.1 CCA was for an 80% reduction in

³ Friends of the Earth Ltd & Ors, R (on the application of) v Heathrow Airport Ltd [2020] UKSC 52

⁴ <https://www4.unfccc.int/sites/NDCStaging/pages/Party.aspx?party=GBR>

emissions relative to 1990 levels. The CCC has advised that the fourth and fifth carbon budgets are ‘therefore are likely to be too loose’ [CB/193].

18. Although carbon budgets cover five-year periods and do not set targets for individual years, it is possible to derive from them the approximate maximum level of GHG emissions in a given year that is compatible with achieving them. In this way, the fifth carbon budget implies a ‘target’ for 2030 of approximately a 57% reduction on 1990 levels of GHG emissions.

The UK NDC

19. On 3 December 2020, the CCC wrote to the Government giving advice on the appropriate UK target for 2030, to inform the NDC that the UK was due to submit to the UNFCCC [CB/215-218]. The CCC advised the Government that a target of a 68% reduction in GHG emissions from 1990 levels by 2030 (“**the 2030 Target**”), would be an appropriate contribution to achieving the goals of the Paris Agreement. The CCC described such a target as ‘a clear progression from the UK’s existing commitments’, including ‘the existing fifth carbon budget (-57%)’ [CB/216].
20. On 4 December 2020 the Government accepted this advice and announced the 2030 Target [CB/219]. The UK NDC containing the 2030 Target was submitted to the UNFCCC on 11 December 2020.⁵

D. History of the Decision under challenge

The First Decision

21. On 5 March 2020, the Claimant wrote to the Defendant to request him to review the NPS [CB/34-40]. After protracted pre-action correspondence, the Defendant wrote to the Claimant on 4 November 2020, to confirm that on 23 October 2020 he had made a decision that it was not appropriate to review the NPS at that time (“**the First**

⁵ <https://www4.unfccc.int/sites/NDCStaging/pages/Party.aspx?party=GBR>

Decision”) [CB/180]. No minute or record of the First Decision was provided to the Claimant.

The First Advice

22. On 3 December 2020, the Defendant provided the Claimant with a partially-redacted copy of the written advice of his officials dated 15 October 2020 (“**the First Advice**”) [CB/167-179]. His officials advised that it was appropriate to review the NPS.

23. Paragraph 8 of the First Advice stated as follows in relation to the Paris Agreement:

“Officials have assessed the current NNNPS and have not identified any grounds for review which meet all three considerations noted above at the present time (see Annex E for a summary, including consideration of the Paris Agreement”

24. Annex E consisted of a table assessing several factors against the criteria in s.6(3) PA 2008. It identified that the Paris Agreement did amount to a significant change in circumstances that was unforeseen at the time of designation, but stated that policy would not have been materially different had it been anticipated. It commented that the Paris Agreement was ‘taken into account in setting net zero target. See Annex C.’

25. Annex C addressed the Claimant’s then-proposed challenge. In relation to the Paris Agreement, it stated (at ¶14) that:

“While the UK’s commitments under the Paris Agreement¹, and the UK’s subsequent commitment to net zero emissions by 2050², were unforeseen at the time of publication we believe that they would not have led to a material change to the NNNPS, as other policy instruments remain more effective and appropriate for eliminating road transport emissions – most notably the approach to encouraging electric vehicle use laid out in the Road to Zero strategy and any policies outlined in the forthcoming Transport Decarbonisation Plan.”

26. Footnote 1 read (in material part):

“The Agreement also allowed for the setting of non-binding nationally determined contributions. The UK is covered by the EU nationally determined contribution of at least a 40% domestic reduction in greenhouse gases by 2030 compared to 1990 levels. The UK’s current reduction is 45.2%.”

The Decision and Second Advice

27. The Claimant issued judicial review proceedings on 4 December 2020 challenging the First Decision (Claim CO/4575/2020). On 14 January 2021, the Defendant applied for a stay of those proceedings on the basis that he was considering again whether it was appropriate to review the NPS. The stay was granted on 4 February 2021.

28. On 12 March 2021, the Defendant communicated a Minute of the Decision (“**the Minute**”) to the Claimant and the Court [CB/41-42; 189-190]. On 23 March 2021, the Defendant disclosed to the Claimant a partially-redacted copy of the written advice of his officials dated 3 February 2021 (“**the Second Advice**”) [CB/181-188]. The Second Advice again recommended a review of the NPS.

29. The Second Advice made no reference to the fact that, since the time of the First Advice, the UK had submitted the UK NDC to the UNFCCC, or that in doing so it had committed itself to a new, more stringent emissions reduction target for 2030. The main part of the Second Advice made no reference to the Paris Agreement at all.

30. Annex C consisted of a slightly updated version of the table that appeared in Annex E of the First Advice. In relation to ‘Net Zero’, it incorporated the text cited from Annex C of the First Advice at ¶25 above, without the footnotes. In relation to ‘Paris Agreement’ it stated ‘taken into account in setting net zero target. See comment for Net Zero above’. Officials’ assessment was, again, that the Paris Agreement did amount to a significant change in circumstances that was unforeseen at the time of designation, but that policy would not have been materially different had it been anticipated.

31. The Minute **[CB/189-190]** stated that the Defendant had considered the Second Advice and considered again the First Advice (¶1). Referring to the analysis in Annex C of the Second Advice, he took note of the fact that ‘officials have still not identified grounds which meet all three considerations in s.6(3) of the Planning Act’ (¶2).

32. The final paragraph of the Minute states that the Defendant:

“noted that he has reached his decision having regard to his s.10 duty to exercise his powers with the objective of contributing to the achievement of sustainable development (and specifically desirability of a) mitigating, and adapting to, climate change; and b) achieving good design) and notwithstanding greater and increasing climate change commitments. He sees no inconsistency between his decision and these considerations at this time.”

33. The Minute makes no reference to the UK NDC or the 2030 Target.

E. Ground of challenge

34. The Defendant, in taking the Decision, directed himself that the UK’s obligations under the Paris Agreement were given full effect by domestic law, specifically the Net Zero Target provided for by s.1 CCA 2008. As a result of that misdirection, he wholly failed to consider the 2030 Target or its implications.

35. Neither the Minute nor the Second Advice makes any reference to the UK NDC or the 2030 Target. In the Second Advice (written after the UK NDC was adopted) officials simply equated the Paris Agreement with the Net Zero Target **[CB/187]**, in exactly the same way that they did in the First Advice (written before the UK NDC was adopted) **[CB/178]**.

36. In fact, when assessing the effect of Net Zero in the Second Advice, officials went so far as to cut and paste the text from the First Advice dealing with the Paris Agreement that had been prepared, explicitly, on the basis that the UK’s target for 2030 was that

contained in the EU NDC, without any acknowledgement that the position had changed⁶. The advice in relation to the Paris Agreement was then simply ‘Taken into account in setting net zero target. See comment for Net Zero above.’

37. The failure to take account of the 2030 Target cannot be saved by construing references to ‘Net Zero’ as encompassing the carbon budgets set under s.4 CCA 2008. As explained above, the existing budgets were set with a view to meeting the previous target of an 80% reduction, not the Net Zero Target. By the date of the Decision, the UK had committed, in furtherance of its obligations under Art. 4(2) of the Paris Agreement, to a reduction of 68% by 2030, which was more stringent than the ‘target’ for 2030 implied by its existing fifth carbon budget (a 57% reduction). In other words, the UK’s obligations under the Paris Agreement went further than any obligation imposed by domestic law.

38. The difference in the position before and after the adoption of the 2030 Target can be illustrated by reference to the decision of the Supreme Court in Heathrow case, which described the position before adoption of the 2030 Target, when the UK’s obligation under the Paris Agreement was contained in the EU NDC (¶71 and 122, underlining added):

“71. [...] 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.

122. [...] as we explain (para 71 above), 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

⁶ See extracts cited at ¶25, ¶26 and ¶30 above.

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."

39. So far as the Claimant is aware (and the Defendant has not denied it in pre-action correspondence), the Defendant simply relied on the statement by the Supreme Court that 'the UK's obligations under the Paris Agreement are given effect in domestic law' as meaning that no free-standing consideration of the Paris Agreement was required. In doing so he failed to appreciate that the statement no longer applied, because the UK NDC was now more stringent than existing carbon budgets set under domestic law, whereas it had been less stringent at the material time in the Heathrow case.

40. In pre-action correspondence, the Defendant has continued to misunderstand the issue. He first asserts that ¶122 of the Heathrow judgment continues to apply, because the UK NDC is compatible with the Net Zero Target [CB/56]. This misses the point. The Claimant's case is not that the 2030 Target is more ambitious than the Net Zero Target (which applies to 2050); rather that it is more ambitious than the carbon budgets legislated to date under s.4 CCA 2008; specifically the fifth carbon budget, which encompasses the year 2030 but requires a significantly lower level of emission reductions than the 2030 Target.

41. Secondly, the Defendant asserts in the alternative that the 2030 Target was taken into account, notwithstanding the absence of any reference to it, because the Defendant 'was plainly aware of the NDC and the CCA 2008's "greater and increasing climate change commitments"' ⁷ [CB/56]. Of course, it is not the greater and increasing commitments of the CCA 2008 that the Defendant failed to take into account, but the separate commitment to an emissions reduction target for 2030 in the UK NDC that has not been reflected in any legislated budget under the CCA 2008.

⁷ A reference to ¶15 of the Minute [CB/190]. As the Defendant's pre-action correspondence confirms, this appears to be a reference to the increased ambition under the CCA when adopting the Net Zero Target, not a reference to the UK NDC.

42. For these reasons, the Defendant misdirected himself in law about the true effect of the Paris Agreement, and therefore failed to take account of the UK's most recent and significant obligation arising under the Paris Agreement. His conclusions that (i) the NPS would not have been significantly different if the Paris Agreement had been foreseen at the time of designation, and (ii) it was not appropriate to review the NPS at this time, are vitiated by this misdirection and are unlawful.

43. Accordingly, the Decision is unlawful and falls to be quashed.

44. Should the Defendant raise an argument under s.31 Senior Courts Act 1981, that argument should be rejected: the Court cannot satisfy itself that the decision would have been no different had the Defendant directed himself correctly in law. Rather, the appropriate relief is an order requiring the Defendant to give lawful consideration to whether to review the NPS.

F. Conclusion

45. For the reasons above, the Decision was unlawful. The Claimant seeks permission for a judicial review challenge to the Decision not to review any part of the NPS.

46. In that challenge, the Claimant seeks:

- a. A declaration that the Decision was unlawful, and
- b. Lawful consideration by the Defendant whether it is appropriate to review the NPS (whether by Order of the Court or otherwise).

DAVID WOLFE QC

PETER LOCKLEY

23 April 2020

ANNEX

RELEVANT POLICY ON GHG EMISSIONS FROM SURFACE TRANSPORT AND ITS IMPLICATIONS FOR THE DECISION

47. In March 2020, the Defendant published *Decarbonising Transport: Setting the Challenge*. The report recognised that emissions from road transport have barely declined since 1990, because ‘progress through regulation to improve the efficiency of new passenger cars has been largely offset by their increased use’ [CB/197/1.10]. On the basis of current policies, the Defendant predicted a slow reduction in overall domestic transport emissions, resulting in an excess of approximately 80 MtCO₂ in 2050, relative to scenarios compliant with the Net Zero Target [CB/199/Fig 18]. More immediately, the Defendant 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 16Mt CO₂e between this and DfT’s current projection in 2032) [CB/198/4.5]

48. In its June 2020 Progress Report, the CCC commented [CB/203] that:

“Surface transport has emerged as the single highest emitting sector in the UK since 2015, and the current trend is off track to contribute as required to meeting the fourth and fifth carbon budgets and Net Zero.”

49. On 18 November 2020, the Prime Minister published the *Ten Point Plan for a Green industrial Revolution* [CB/204-214]. Point 4 introduced a commitment to bring forward a ban on sales of new fully petrol/diesel cars to 2030⁸. The ban had previously been intended to take effect in 2040.

⁸ With a ban on hybrid petrol/diesel-electric cars and vans from the later date of 2035. Hybrid vehicles still emit significant GHG emissions, and when driving at speed or for longer distances, as is typical for traffic on the SRN, entail at best marginal reductions in GHG emissions relative to conventional vehicles.

50. When, in the Second Advice, officials considered whether the Paris Agreement would have made a difference to the NPS had it been anticipated at the time of designation, they determined that it would not have done, because ‘other policies’ – of which the only one specified was the electrification of vehicles – would have been more appropriate ways to reduce emissions and thus meet the UK’s obligations under the Paris Agreement. However, even the November 2020 announcement in the Ten Point Plan only brought forward the proposed ban on sales of fully petrol/diesel vehicles to 2030. Clearly, officials cannot have rationally placed reliance on a policy that would only take effect in 2030 as a way of meeting a new and more stringent target that had to be achieved by 2030.

51. Rather, officials continued to assume that no more needed to be done to reduce emissions from the SRN in the period to 2030, despite the fact that surface transport was ‘off track to contribute as required’ to meeting even the less stringent requirements of the fourth and fifth carbon budget. That plainly demonstrates that officials – and the Defendant who relied on their advice in this respect – either:

- a. Omitted the 2030 Target altogether from their consideration (as appears to be the case); or,
- b. Despite being ‘aware’ of the 2030 Target, failed entirely to grapple with its implications, which were, inescapably, that more urgent emissions reductions from road transport were required in the period before 2030.