Neutral Citation Number: [2021] EWHC 2095 (Admin)

Case No: CO/2003/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2021

Before :

THE HON. MR JUSTICE HOLGATE

Between :

THE QUEEN (on the application of TRANSPORT ACTION NETWORK LIMITED)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR TRANSPORT	**Defendant**
-and-	
HIGHWAYS ENGLAND COMPANY LIMITED	**Interested party**

- -
- -

David Wolfe QC and Peter Lockley (instructed by **Leigh Day**) for the **Claimant**
John Litton QC and Andrew Byass (instructed by **Government Legal Department**) for the **Defendant**
The Interested Party did not appear and was not represented

Hearing dates: 29th and 30th June 2021

Approved Judgment

Covid-19 Protocol: This judgment will be handed down remotely by circulation to the parties or their representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down will be deemed to be 2pm on 26 July 2021.

Mr Justice Holgate:

Introduction

1. This is a challenge by judicial review to the decision by the Secretary of State for Transport ("SST") made on 11 March 2020 to set the "Road Investment Strategy 2: 2020-2025" ("RIS 2") pursuant to s.3(1) of the Infrastructure Act 2015 ("IA 2015").

2. The claimant, Transport Action Network Limited, is a not for profit company that campaigns for "more sustainable transport." This includes opposing road schemes that it considers to be damaging.

3. The Interested Party, Highways England Company Limited ("HE") has been appointed by the SST under s.1 of the IA 2015 as the highway authority in place of the defendant for the strategic road network ("SRN") in England and as the "strategic highways company" for that network.

4. There are about 247,100 miles of roads in Great Britain of which 189,100 miles are located in England. The SRN comprises about 4,500 miles of motorways and trunk roads or about 2% of the overall road network in England. The remainder of the network is the responsibility of local highway authorities. The SRN is used more intensively than most other roads and so, for example, the greenhouse gas ("GHG") emissions from the use of that network in England, accounts for about 39% of GHG emissions from all English roads. By far the main component of GHG emissions is carbon dioxide.

5. RIS 2 sets out the government's expenditure priorities for the operation, maintenance, renewal and enhancement of the SRN. HE is to develop the schemes listed in the Strategy and to construct those for which funding has been authorised, so long as they continue to provide value for money and be deliverable, which includes satisfying any statutory requirements such as need to obtain planning and environmental consents.

6. "The Road Investment Strategy: 2015-2020" ("RIS 1") had been adopted on 1 December 2014 and covered the period 2015-2020. It contained 112 schemes. Some 12 schemes were subsequently dropped from the strategy because they were found not to offer value for money or to be deliverable. Of the remaining 100 schemes, 55 were completed by 2020. The 45 other schemes were rolled forward into RIS 2.

7. The Strategy for 2020-2025 adds a further 5 new schemes which would create or improve about 40 miles of the SRN:-

> (1) Lower Thames Crossing (14.5 miles of new dual carriageway);
>
> (2) A66 Northern Trans-Pennine: 18 miles of dual carriageway to replace a single carriageway;
>
> (3) A46 Newark bypass: converting 3 miles of single carriageway to dual carriageway;
>
> (4) A417 Air Balloon: 3.6 miles of dual carriageway to replace single carriageway;

(5) M60/M62/M66 junction: new slip road.

The government has committed £27.4 billion of funding for the period 2020-2025 (Philip Andrews' first witness statement ("WS") paras. 28, 42-5 and second WS para.14). Only the Air Balloon scheme is expected to open before 2025. The others are unlikely to be completed until the period 2030 to 2035.

8. Section 3(5) of the IA 2015 requires the SST when setting a road investment strategy to "have regard, in particular, to the effect of the strategy on (a) the environment". In summary, the claimant submits that the defendant failed to comply with that obligation in that he failed to take into account the effect of the strategy in RIS 2 on achieving:-

> (i) the objective of the Paris Agreement for State Parties to reach peaking in GHG emissions as soon as possible and to achieve "rapid reductions" thereafter in accordance with best available science;
>
> (ii) the net zero target for the UK in 2050 contained in s.1 of the Climate Change Act 2008 (CCA 2008);
>
> (iii) the fourth and fifth carbon budgets ("CB4" and "CB5") in s.4 of the CCA 2008.

9. The claimant says that the defendant was obliged (a) to take into account a quantitative assessment of the carbon emissions from the projects in RIS 2 not only in 2050 but also in the period running up to that year and (b) to form a judgment on how these emissions would affect the achievement of those three objectives in the UK. Mr. David Wolfe QC who, together with Mr. Peter Lockley, appeared on behalf of the claimant, accepted that (b) could lawfully be addressed in qualitative, and not necessarily quantitative terms. But they emphasised that it is the effect of the strategy in RIS 2 which needed to be assessed.

10. Mr. Wolfe QC also accepted that the IA 2015 does not mandate that those matters be taken into account, whether expressly or by implication. In these circumstances, Mr. Wolfe QC agrees that the claimant has to show that the SST was legally obliged to take them into account because they were "obviously material" to his decision to set "RIS 2", such that it was irrational for him not to have taken them into consideration. He accepts that if he cannot satisfy that test then the challenge must fail.

11. The defendant submits that the matters in question were taken into account by officials in the Department for Transport ("DfT") and, in essence, by the defendant himself, on the basis of his knowledge of relevant policies and climate change objectives and the briefing he received on RIS 2. Secondly, the defendant submits that, even if it is held by the court that he did not have regard to the matters identified by the claimant, they were not "obviously material" considerations for the purposes of his decision to set RIS 2 and so there is no basis in public law entitling the court to intervene. In other words, the SST says that the climate change issues raised by the claimant were matters that he was entitled, but not legally obliged, to take into account. This second submission is based on a very specific argument, namely that the evidence before the court shows that the effects of the strategy in RIS 2 are so small as to be *de minimis*, that is, too trivial as a matter of law to require consideration.

12. It is well-established that where a decision-maker decides to take a consideration into account it is generally for him to decide how far to go into the matter, or the manner and intensity of any inquiry into it, which judgment may only be challenged on the grounds of irrationality (*R (Khatun) v Newham London Borough Council* [2005] QB 37 at [35]; *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] PTSR 1709 at [256]). Likewise, it is for the decision-maker to decide how much, if any, weight to attach to a factor he takes into account, a judgment which cannot be challenged unless irrational (*Tesco Stores Limited v Secretary of State for the Environment* [1995] 1WLR 759, 780).

13. Accordingly, the success of this challenge depends upon whether the claimant is able to show that the decision to set RIS 2 was vitiated by irrationality. The concept of irrationality refers to a decision which is beyond the range of rational responses by different decision-makers to a given set of circumstances or information, or which is based upon flawed logic (*R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 at [65]. As to the former Lord Diplock observed in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1064:-

> "The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred."

The court must be careful to avoid trespassing into the forbidden territory of evaluating the substantive merits of the decision to set RIS 2 (see e.g. Bingham LJ, as he then was, in *R v Chief Constable of Thames Valley Police ex parte Cotton* [1990] IRLR 344, 352; *R v Secretary of State for Trade and Industry ex parte Lonro plc* [1989] 1WLR 525, 535 B-C).

14. The adoption of a programme for the building or improvement of strategic roads and its effect upon climate change is a subject attracting many widely differing views, whether for or against. As the Divisional Court said in *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 553, 559 at [6];-

> "It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully."

15. In the Amended Detailed Grounds of Resistance the defendant submitted that if the court should uphold a ground of challenge, it should nonetheless refuse to grant any relief under s.31(2A) of the Senior Courts Act 1981 because it is highly likely that the outcome for the claimant would not have been substantially different if that error had not been made. Given that the claim can only succeed if the court is persuaded that the Secretary of State failed to take into account relevant climate change effects which were obviously material and *not* de minimis, it is difficult to see how s.31(2A) could justify the refusal of relief. Rightly, Mr. John Litton QC who, together with Mr. Andrew Byass, appeared for the defendant, did not pursue this aspect in his oral submissions.

16. On 21 July 2020 Lieven J granted the claimant permission to apply for judicial review limited to ground 1, which raised the climate change issues now before the court. The judge refused permission in relation to grounds 2, 3 and 4. The claimant renewed its application for permission on grounds 3 and 4, but not ground 2. That application was refused by Lang J at a hearing on 29 October 2020. The claimant then appealed against that decision to the Court of Appeal. On 2 March 2021 Stuart-Smith LJ refused that application. It is relevant to note grounds 3 and 4, because they reveal how the claimant has seen the nature of a RIS under the IA 2015. Ground 3 alleged that RIS 2 failed to address how the schemes promoted would comply with air quality legislation. Ground 4 alleged that RIS 2 was a "plan or programme" for the purposes of the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No 1633) ("the 2004 Regulations") and ought to have been subject to strategic environmental assessment ("SEA"). The claimant said that a SEA would have had to cover impacts on climate change and air quality (para. 87c of the original Statement of Facts and Grounds). The claimant sees RIS 2 as an environmental decision-making strategy (see below).

17. I would like to express my gratitude for the help I received from counsel in their submissions and also from the witnesses who provided written evidence for the court. Dr Bob Moran, Head of Environment Strategy at DfT, gave evidence on the approach taken to climate change by the government and the department, specifically in relation to the transport sector. Mr. Philip Andrews, Head of Road Investment Strategy Futures Division, at DfT, gave evidence on the framework created by the IA 2015, the setting of RIS 1 and RIS 2, and the assessment of carbon emissions resulting from the strategy in RIS 2. Professor Phil Goodwin, Emeritus Professor of Transport Policy at University College London and at the University of the West of England, and Professor Jillian Anable, Professor of Transport and Energy at the Institute for Transport Studies, University of Leeds, gave evidence on behalf of the claimant criticising certain aspects of the assessment of carbon emissions presented by Mr. Andrews.

18. The remainder of this judgment is set out under the following headings:

Infrastructure Act 2015

Policy Background

19. It is necessary to summarise the genesis of the IA 2015. In July 2013 the government presented to Parliament "Action for roads: A network for the 21st century" (Cm. 8679). At that stage the SRN was managed by the Highways Agency, an executive agency of

the DfT. A review carried out in 2011 had already identified problems in the relationship between the Agency and government (para.13). First, the Agency lacked independence from government. Second, government had not given a clear, consistent view of its long-term aims. Third, the annual funding of the agency and its stop-start nature made it more difficult to secure efficiencies. Inefficiencies were said to prevent construction companies from making long-term investments towards the future management of the SRN. Fourth, there was a lack of clear yardsticks for assessing the performance of the Agency (para.14).

20. Action for Roads said in paragraph 15 that to address these issues:-

> (i) The Highways Agency would be converted into a strategic highways company which would be 100% owned by the state, but free of many of the red tape requirements through being a part of central government;
>
> (ii) From 2015 onwards, the company would have long-term funding certainty for its capital programme and resources for maintenance, initially to 2021;
>
> (iii) A Roads Investment Strategy would be introduced setting out plans for construction and maintenance to 2021 and beyond, together with performance criteria. A coherent, pro-active investment strategy would be provided which would also cover operations and management;
>
> (iv) To provide a firm foundation, legislation would secure the requirements of funding and the RIS.

21. The document envisaged that in 2013-14 a National Policy Statement for national networks would be designated under the Planning Act 2008 ("PA 2008") for use in determining applications for development consent orders for schemes qualifying as "nationally significant infrastructure projects". In addition, the necessary legislation for the establishment of the new company and RISs would be introduced.

22. Chapter 1 described the economic and social importance of the road system, particularly the SRN. It identified past underinvestment in the system compared with competing countries and the need to address problems, such as safety issues and worsening congestion. That last factor can harm safety and the environment "as congested traffic is more polluting and more at risk of accidents" (para.1.25). The document recognised that the construction and operation of roads can have significant impacts on the environment. The document referred to effects on landscapes and biodiversity, GHG emissions, air and noise pollution (para.1.47). The government repeated its commitment to ensuring that transport plays its part in meeting target reductions for GHG emissions and carbon budgets contained in the CCA 2008 (paras. 3.14 to 3.16).

23. The Command paper explained how the RISs would provide longer-term certainty for investment in roads, drawing upon experience of the Rail Investment Strategy (paragraphs 4.13 to 4.16). Paragraph 4.17 stated:-

> "The RIS will be built of three core elements:

> • A broader roads strategy, articulating government's ambition for the roads network.
>
> • The performance specification for the strategic road network and the Highways Agency, setting out specific expectations for future delivery.
>
> • A statement of available funds, setting out how much can be spent on strategic roads during the lifetime of the RIS."

A RIS would identify schemes and works to be taken forward over the next 5 years (para 4.18), recognising that larger schemes would take several years to realise from inception to opening, often beyond the five-year lifecycle of a RIS (para.4.20). Paragraph 4.23 stated that projects supported by a RIS would need to be approved through the planning system and to comply with environmental standards.

24. The National Policy Statement for National Networks ("NPS") was promoted through the PA 2008, approved by Parliament and published by the SST in December 2014.

25. In June 2014 draft legislation to achieve the aims of the Command paper was introduced. In the same month the government published a draft framework document and licence in order to explain the proposed relationship between the DfT and a strategic highway company. At the same time the DfT's document "Setting the Road Investment Strategy – Now and in the future" explained the proposed approach to the content of RISs. Paragraph 6.1 explained that the first RIS was being developed so that it could be agreed by the end of 2014.

26. RIS 1 was adopted on 1 December 2014. The IA 2015 received Royal Assent on 12 February 2015. It recognised that RIS 1 was already in existence.

27. There was therefore a considerable overlap between the legislative process and the consideration of RIS 1 and the NPS.

Infrastructure Act 2015

28. Part 1 of the Act is entitled "strategic highway companies." Sections 1 and 2 enable the SST to appoint a company, of which he is the sole owner, to be a highway authority in respect of roads in England for which he is responsible. Such a company is referred to as a strategic highway company.

29. Section 3 deals with RISs:-

> "(1) The Secretary of State may at any time—
>
> (a) set a Road Investment Strategy for a strategic highways company, or
>
> (b) vary a Strategy which has already been set.
>
> (2) A Road Investment Strategy is to relate to such period as the Secretary of State considers appropriate.

(3) A Road Investment Strategy must specify—

(a) the objectives to be achieved by the company during the period to which it relates, and

(b) the financial resources to be provided by the Secretary of State for the purpose of achieving those objectives.

(4) The objectives to be achieved may include—

(a) activities to be performed;

(b) results to be achieved;

(c) standards to be met.

(5) In setting or varying a Road Investment Strategy, the Secretary of State must have regard, in particular, to the effect of the Strategy on—

(a) the environment, and

(b) the safety of users of highways.

(6) The Secretary of State and the company must comply with the Road Investment Strategy."

(7) ……;

(8)……..

30. Section 3 includes the following key points:-

(i) Section 3(1) gives the SST a power to set a RIS or to vary a RIS which has already been set;

(ii) Section 3(3) specifies matters which a RIS must include, namely the objectives to be achieved by the company and the financial resources to be provided by the SST to achieve those objectives;

(iii) Section 3(5) requires the SST when setting or varying a RIS to have regard, in particular, to the effect of the strategy on (a) the environment and (b) the safety of users of highways. However, s.3(5) does not require either of those subjects to form part of the contents of the strategy (contrast ss.3(3)) unless the SST chooses to specify them as part of its objectives;

(iv) Furthermore, s.3(5) only refers to those two subjects in very broad terms. It does not impose any duty to treat either subject in a particular way or to require compliance e.g. with a standard or target. It is common ground that the subsection does not

> require the SST to have regard to any topic which could fall within either of those broad subjects. It is a matter for the judgment of the SST to determine the nature and extent of the safety and environment topics to which he has regard. A RIS is a document of a high-level, strategic nature;
>
> (v) Both the SST and the company must comply with the RIS (s.3(6)).

31. Schedule 2 sets out the procedure by which a RIS is set (other than RIS 1: see para.1(2)) or varied. The first step is for the SST to provide the strategic highways company with his proposals for a RIS, which must include details of the objectives to be achieved by the company, the financial resources to be provided by the SST for those purposes and the period to which they relate, and a statement of his general strategy in respect of the highways for which the company is responsible (para.2). The company may agree to those proposals or may make counter-proposals (para.3). In the former case the SST may publish the document as a RIS, provided that he is satisfied that "appropriate consultation" has taken place (para 4). In any other case, the SST may provide revised proposals, or proceed to set a RIS (subject to "appropriate consultation" if he wishes to adopt the company's counter-proposals) (para.5). "Appropriate consultation" is not defined by the legislation; it is left as a matter of judgment for the SST to determine. Essentially the same procedure applies to proposals to vary a RIS (para.6(2)), but the SST and the company must also have regard to the desirability of maintaining certainty and stability in respect of RISs (para. 6(3)).

32. Section 5 imposes general duties on a strategic highways company. Section 5(2) provides:-

> "A strategic highways company must also, in exercising its functions, have regard to the effect of the exercise of those functions on—
>
> (a) the environment, and
>
> (b) the safety of users of highways."

33. Section 6 enables the SST to give to a strategic highways company directions, with which it must comply, and guidance, to which it must have regard.

34. Section 10 requires the independent regulator, the Office of Rail and Road ("ORR"), to monitor how such a company exercises its functions. The ORR may investigate, publish reports (which must be laid before Parliament) and advise the SST on (inter alia) whether a company has achieved its objectives under a RIS and on objectives for a future RIS (s.10(2) and (8)). The SST must have regard to any such advice (s.10(7)). Where a company contravenes a RIS the ORR may serve a notice setting out the steps which the company must take in order to remedy the contravention and may impose a fine payable to the SST (s.11). Under s.11(1) the ORR must exercise its functions under ss.10 and 11 in the way it considers most likely to promote the performance and efficiency of the company having regard to the matters listed in s.11(2), which include not only the interests and safety of highway users, but also "the economic impact" and "the environmental impact" of the way in which the company achieves its objectives.

35. Under s.14 the SST must publish and lay before Parliament periodic reports on how the strategic highways company exercises its functions. Under s.17 the SST may provide financial assistance to a company for the purpose of any of its functions, by way of grants, loans or guarantees.

36. Mr. Andrews adds that directions and guidance under s.6 have included the provisions of a licence between the SST and the HE made in April 2015. Paragraph 5.29 of that licence requires the HE to have due regard to government policies notified by the SST, including the Clean Growth Strategy (see below).

37. It is plain from this analysis of the IA 2015, that the focus of the setting of a RIS is on the objectives with which the company must comply and the financial resources to be provided by the SST. Environmental matters need not form part of those objectives. The SST must have regard to the effect of a RIS on the environment, but Parliament has left the scope of that consideration to his judgment. This is consistent with the high-level nature of a RIS as a strategy for public investment in the SRN. Environmental considerations may affect the overall costs of a project, and whether in strategic terms it is appropriate to include it as part of a RIS. But the very broad manner in which the RISs published to date have dealt with environmental topics such as biodiversity, air quality and noise is consistent with the statutory purposes of these documents.

Paris Agreement, Climate Change Act 2008 and climate change policy

38. The provisions of the Claimant Change Act 2008 have been summarised by the Supreme Court in *R (Friends of the Earth Limited v Secretary of State for Transport* [2021] PTSR 203 at [39]-[46] drawing upon the account given by the Divisional Court in *R (Spurrier v Secretary of State for Transport* [2020] PTSR 240 at [558]-[570]. There is no need for that analysis to be repeated here.

39. Section 1 of the CCA 2008 as originally enacted set a mandatory target for the reduction of UK carbon emissions so that by the year 2050 the "net carbon account" should be at least 80% lower than "the 1990 base line" (that is the aggregate of UK emissions of CO_2 and other GHG). This formed part of the UK's commitment to restricting the rise in average global temperatures to 2ºC above pre-industrial levels.

40. The Paris Agreement was adopted on 12 December 2015 and ratified by the UK on 17 November 2016. Article 2 provided for a more demanding temperature objective, namely, to hold the increase in global average temperature to "well below 2ºC above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5ºC above pre-industrial levels". Article 4 of the Agreement addressed the obligation of individual states:-

> "1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

> 2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.
>
> 3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

Article 4(9) requires each state to communicate a "nationally determined contribution" ("NDC") every 5 years.

41. As the Supreme Court pointed out in *Friends of the Earth* at [71], the Paris Agreement did not impose an obligation on any state to adopt a binding domestic target to ensure that the objectives of the Agreement were met. The specific legal obligation imposed was to meet any NDC communicated by the state in question.

42. In 2015 the European Union communicated on behalf of the UK an NDC to achieve by 2030 a 40% reduction from 1990 levels of GHG emissions. On 11 December 2020 the UK communicated a revised NDC to reduce 1990 levels of emissions by 68% by 2030.

43. In order to reflect the change in temperature target set by the Paris Agreement the Secretary of State for Business, Energy and Industrial Strategy, the relevant Minister for the purposes of the CCA 2008, exercised the power in s.2 (subject to affirmative resolution by Parliament) to amend the target in s.1 to net zero, so that s.1 now reads:-

> "(1) It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline.
>
> (2) "The 1990 baseline" means the aggregate amount of—
>
> (a) net UK emissions of carbon dioxide for that year, and
>
> (b) net UK emissions of each of the other targeted greenhouse gases for the year that is the base year for that gas."

44. Article 4.1 of the Paris Agreement acknowledges that some human activities will always generate GHG. Other actions can remove GHG from the atmosphere, such as the planting of trees and carbon capture and storage. The long-term goal of the Agreement is a balance between anthropogenic sources of GHG emissions and the removal of such gases by "sinks". That in effect is what is meant by net zero. Article 4.1 seeks to achieve net zero globally during the second half of the twenty first century. The UK has committed itself to achieving that target in this country by 2050.

45. In *Friends of the Earth* the Supreme Court decided that the UK has given effect in domestic law to its obligations under the Paris Agreement through the target under s.1 and the carbon budgets under s.4 ([122] and [132]).

46. Dr Moran explains that because climate change is a global phenomenon, the negative effects of GHG emissions are felt at a global level and do not generate more or less harm according to the source of a specific emission. The UK government has decided not to set targets on a sector-by-sector basis, whether on an equal or pro rata basis (para. 41 of his WS). Some government policies result in GHG emissions but they are nonetheless promoted in order to achieve other policy goals.

47. The court was informed that GHG emissions in the UK peaked in the 1990s and so Mr. Wolfe QC submitted that the objective of article 4.1 for the UK is that "rapid reductions" in GHG should be achieved, in accordance with best available science, so as to achieve net zero. He referred to this as a need for urgency in the reduction of GHG emissions in the period before 2050. His submissions relating to the Paris Agreement concentrated on this point, just as he did in the recent case of *Elliot-Smith v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 1633 (Admin) at [40], a challenge to the legality of the UK's Emissions Trading Scheme ("ETS").

48. In *Packham v Secretary of State for Transport* [2021] Env.L.R. 10 the Court of Appeal summarised other key provisions of the CCA 2008 at [83]:-

> "…… Section 4(1) imposes on the Secretary of State a duty to set carbon budgets to cap carbon emissions in a series of five-year periods (subsection (1)(a)), and to ensure that the net United Kingdom carbon account for a budgetary period does not exceed the carbon budget (subsection (1)(b)), thus ensuring progress towards the 2050 target in the period before that year. Carbon budgets must be set with a view to meeting the target for 2050 (section 8(2)). Before he sets a carbon budget, the Secretary of State for Business, Energy and Industrial Strategy must take into account the advice of the Committee on Climate Change (section 9(1)(a)). In setting a budget, he must take into account a number of things, including "scientific knowledge about climate change" (section 10(2)(a)), "technology relevant to climate change" (section 10(2)(b)), "economic circumstances …" (section 10(2)(c)), and "social circumstances …" (section 10(2)(e)). He is also required to prepare proposals and policies for meeting carbon budgets (section 13(1)). After a new carbon budget is set, he must lay before Parliament a report setting out proposals and policies for meeting carbon budgets for the current and future budgetary periods (section 14(1)). The Secretary of State is required to report to Parliament in an annual statement of emissions "[in] respect of each greenhouse gas", setting out the steps taken to calculate the net carbon account for the United Kingdom (section 16(2)) – which will show whether or not carbon budgets are being met. The Committee on Climate Change, whose function, in part, is to provide advice to the Government on climate change mitigation and adaptation (section 38(1)), is required to report annually to Parliament on the progress made towards meeting the carbon budgets (section 36), and the Secretary of State is required to respond (section 37)."

49. Carbon budgets are also subject to the affirmative resolution procedure. The relevant statutory instruments specify a figure expressed in tonnes of CO_2 equivalent which represents the total allowable net GHG emissions over the relevant budgetary period of 5 years. For example, CB5 set a budget of 1,725 $MtCO_2e$ for 2028-2032. This represents an average reduction of 57% on 1990 levels of GHG over the 5 year period, or a 57% reduction by 2030, the middle year of that period. As soon as practicable after an order is made setting a carbon budget, the Secretary of State must lay before Parliament a report setting out an "indicative annual range" for the net UK carbon account expected for each year of the budget (s.12).

50. At the time RIS 2 was set, CB1 to CB5 had already been adopted. CB4 came into force on 30 June 2011 and CB5 on 21 July 2016. The position regarding these 5 carbon budgets is summarised by Dr Moran (para. 30 of his WS):-

Carbon Budget	Period	Target		Status
		Net emissions (MT)	Percentage reduction on 1990 levels	
1	2008-2012	3,018	-25%	Achieved
2	2013-2017	2,782	-31%	Achieved
3	2018-2022	2,544	-37%	On track to outperform
4	2023-2027	1,950	-51%	Off track
5	2028-2032	1,725	-57%	Off track

51. In its report "Net Zero: the UK's contribution to stopping global warming" (May 2019) the Committee on Climate Change had recommended that the target in s.1 of the CCA 2008 should be amended from 80% to 100% by 2050. The Committee also stated that CB4 and CB5 had been set on the basis of contributing to the superseded 80% target and were "likely to be too loose."[1] However, they decided not to recommend any change to those budgets at that stage and left that issue to be dealt with in their advice on CB6 in 2020. They also suggested that the aim should be to outperform the targets in CB4 and CB5 for the period between *2023 and 2032*. As for transport policy, the Committee advised that the date for ending the sale of new diesel and petrol cars should be brought forward from 2040 to 2035 at the latest and, if possible, to 2030.

52. In December 2020 the Committee gave its advice on the setting of CB6. The statutory instrument providing for CB6 came into force on 24 June 2021 and covers the period 2033-2037. In effect, it provides for a reduction in 2035 of 78% from 1990 levels. Dr Moran explains that the government will publish as soon as reasonably practicable a strategy setting out how it plans to meet CB6. This will address emissions across the UK economy for the period, including infrastructure projects such as those in RIS 2 (see para. 32 of his WS).

[1] This statement formed part of the appellant's argument which was rejected by the Court of Appeal in *Packham* (see e.g. [91] and [98-999]).

53. Following the setting of CB5, the Secretary of State for Business, Energy and Industrial Strategy laid the "Clean Growth Strategy" before Parliament in October 2017 (pursuant to ss.12 and 14 of the CCA 2008). It is common ground that the SST took that document into account when setting RIS 2. The relevant parts of the government's policy statement may be summarised as follows:-

> (i) Actions taken to cut emissions must ensure that the UK's economy remains competitive (p.10);
>
> (ii) The Strategy aims to accelerate the pace of "clean growth", i.e. to deliver increased economic growth and decreased emissions. This includes meeting the commitments in the CCA 2008 at the lowest net cost to UK taxpayers, consumers and businesses (p.10);
>
> (iii) The Strategy focuses on areas where more needs to be done to achieve CB5 (p.11);
>
> (iv) Contemporaneous projections suggested that the UK would deliver 94% of the CB4 and 93% of the CB5 targets. The Strategy's policies and the accelerating pace of change in low carbon technology indicate that the targets may be met (p.40);
>
> (v) But technologies may develop more quickly or more slowly than expected. Projections had been sensitivity-tested to identify where progress was most needed to meet CB4 and CB5. A possible pathway for meeting CB5 included a range of actions, including a reduction in transport emissions by 29% "largely achieved by accelerating the shift to electric and other low emissions vehicles."

54. The Clean Growth Strategy refers to the power sector as an example of where efficiency improvements and faster than expected cost reductions in wind and solar technologies have contributed to a substantial reduction in emissions. In 2016 47% of electricity was generated from low carbon sources (p.93). Accordingly, the contribution of the power sector to UK emissions has dropped, so that by 2015 it accounted for only 21% of the total. Although emissions from the transport sector have declined, the rate of change has been slower, and so as of 2018 that sector produced 27.5% of UK emissions (see Mr Andrews' first WS para. 22). As Dr Moran explains (para. 35 of his WS), it is the government's role to determine how best to balance emissions reductions across the entire economy. "Any net emissions increase from a particular policy or project is therefore managed within the government's overall strategy for meeting carbon budgets and the net zero target for 2050, as part of an economy-wide transition". The Committee on Climate Change makes annual progress reports to Parliament, to which the government responds (ss.36 and 37 of the CCA 2008).

55. The Court of Appeal's reasoning in *Packham* had well in mind these key features of the Clean Growth Strategy, along with the regular monitoring under the CCA 2008 ([83-87] and [97]).

Legal Principles

56. It is necessary to set out relevant legal principles in four areas:-

(i) Intensity of Review;

(ii) Decision-making by Ministers;

(iii) Obviously material considerations;

(iv) Fresh evidence and matters of expert opinion.

Intensity of Review

57. In *Spurrier* the Divisional Court had to consider the intensity of review appropriate for a challenge to the Airports National Policy Statement (at [141] to [184]). That document was a statement of government policy at a high level in a macro-political field, but is also used as a primary and detailed tool for determining applications for development consent. RIS 2 is simply a high-level strategy in a macro-political field and is not used for planning or environmental controls. It involves central government political decisions on substantial public investment in a road network which is judged to be vital for the national economy, but where there are competing factors. These matters indicate that a less intensive approach to judicial review is appropriate. As Sullivan J (as he then was) said in *R (Wandsworth London Borough Council) v Secretary of State for Transport* [2006] 1 EGLR 91 at [58], on matters of political and economic judgment a claimant for judicial review bears a heavy evidential onus to establish that a decision was irrational, absent bad faith or manifest absurdity (*Spurrier* at [169]). A further consideration is that RIS 2 is a policy statement without direct substantive effects. Those effects depend upon the grant of statutory authorisations (*Spurrie*r at [157-8]).

58. Similarly, in the *Packham* case the Court of Appeal accepted that the government's non-statutory review of whether to proceed with the HS2 project required only a low intensity of review ([48-9]). Although the setting of a RIS involves the exercise of a statutory power, Mr. Wolfe QC made no attempt to submit that any greater intensity of review would be justified for this challenge.

59. Likewise, there was no issue about the applicability to the carbon emission modelling carried out by specialists for DfT and HE of the principle in *R (Mott) v Environment Agency* [2016] 1 WLR 4338 that the court should accord an enhanced margin of appreciation to decisions involving or based upon "scientific, technical and predictive assessments" by those with appropriate expertise (and see *Spurrier* at [179]).

Decision-making by Ministers

60. Mr. Wolfe QC cited *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26-38] for the proposition that a Minister only takes into account a consideration, whether relevant or irrelevant, if it is within his own knowledge or is drawn to his attention, for example by briefing material or a precis. The mere fact that a matter is within the collective knowledge of the Minister's department is insufficient for this purpose. This principle has recently been approved

by the Supreme Court in *Revenue and Customs Commissioners v Tooth* [2021] 1WLR 2811 at [70].

61. In *National Association of Health Stores* the Court of Appeal drew considerable support from the decision of the High Court of Australia in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40; (1986) 162 CLR 24. In that case a Minister had to decide whether a land grant should be made to a Land Trust to hold for the benefit of aboriginal people. The legislation contained a list of considerations which were required to be taken into account, including detriment to any person or communities which might result from the land grant. A mining company had made applications for the grant of mineral leases in respect of highly valuable uranium deposits it had discovered. The report to the Minister by the Commissioner conducting an inquiry into the aboriginal land claims proceeded on the basis that the company had not identified any uranium deposit as falling within the relevant area. When the report was published the company wrote to the Minister to point out that the whole of the deposit fell within the area of the proposed land grant and asking for the detriment to its position to be re-assessed on that basis. The briefing provided to the Minister by his officials did not raise this issue and he was not made aware of the correspondence from the company. The court held that he had been obliged by the legislation to take that "detriment" into account, he had failed to do so, and therefore his decision had to be set aside.

62. Gibbs CJ held at [3]:-

> "Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department. No complaint could be made if the departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law. "

63. Mason J held at [15(b)] that what a decision-maker is bound to consider in making a decision is determined by the construction of the legislation conferring the discretionary power. In so far as those factors are not expressly stated "they must be determined by implication, from the subject matter, scope and purpose of the Act" (see also Brennan J at [11]). He added at [15(e)]:-

> "However, in conformity with the principle expressed in (b) above, namely that relevant considerations may be gleaned from the subject matter, scope and purpose of the Act, where the decision is made by a Minister of the Crown, due allowance may have to be made for the taking into account of broader policy considerations which may be relevant to the exercise of a ministerial discretion."

64. At [15(c)] Mason J stated that not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering the discretion to be exercised afresh according to the law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision (citing inter alia *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999, 1020).

65. In relation to the circumstances of the *Peko-Wallsend* case, Mason J stated that once the "subject matter, scope and purpose of the Act indicate that the detriment that may be occasioned by a proposed land grant is a factor vital to the exercise of a Minister's discretion, it is but a short and logical step to conclude that a consideration of that factor must be based on the most recent and accurate information that the Minister has at hand". The judge had in mind a material change of circumstances during a period of delay following a Commissioner's report or the correction of an omission or error in that report ([20]). He added that "this conclusion is all the more compelling when the decision in question is one which may adversely affect a party's interests or legitimate expectations by exposing him to new hazard or new jeopardy". The land grant was such a decision because it would result in the creation of a power to refuse to grant a mining interest over Aboriginal Land ([21]).

66. Brennan J held at [18];

> "A decision-maker who is bound to have regard to a particular matter is not bound to bring to mind all the minutiae within his knowledge relating to the matter. The facts to be brought to mind are the salient facts which give shape and substance to the matter: the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered."

and at [27]:-

> "The Department does not have to draw the Minister's attention to every communication it receives and to every fact its officers know. Part of a Department's function is to undertake an analysis, evaluation and precis of material to which the Minister is bound to have regard or to which the Minister may wish to have regard in making decisions. The press of ministerial business necessitates efficient performance of that departmental function. The consequence of supplying a departmental analysis, evaluation and precis is, of course, that the Minister's appreciation of a case depends to a great extent upon the appreciation made by his Department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function. A Minister may retain his power to make a decision while relying on his Department to draw his attention to the salient facts. But if his Department fails to do so, and the validity of the Minister's decision depends upon his having had regard to the salient facts, his ignorance of the facts does not protect the decision. The Parliament can be taken to intend that the Minister will retain control of the process of decision-making while being assisted to make the decision by

> departmental analysis, evaluation and precis of the material relevant to that decision."

67. In *National Association of Health Stores* the Court of Appeal expressly endorsed at [29], [61] and [73] the passages cited above from the judgments of Gibbs CJ and Brennan J.

68. That case concerned a challenge to two statutory orders made by a Minister banning the sale of a herbal tranquiliser, Kawa-Kawa, for medical purposes and in foodstuffs. The Minister had been obliged to consult a Commission, comprising a body of experts charged with providing advice on the exercise of his powers. The claimant was an organisation "representative of interests likely to be substantially affected" by the proposed ban and had therefore been entitled under the legislation to appear before the Commission ([12]). The officials provided the Minister with the Commission's advice and briefing which explained that one of its members, Professor Ernst, had opposed the prohibition, giving a summary of his objections, but after lengthy discussion the commission had reached the view that the orders were justified. However, the Minister was not provided with Professor Ernst's "cogent" published meta-analysis or its conclusions, nor was he told about the author's special expertise ([2, 44 and 51]). That analysis had simply formed part of the material taken into account by an official when formulating his advice to the Minister. The Minister was told that Professor Ernsthad opposed a ban because the benefits of Kawa-Kawa were real and the evidence of toxicity inconclusive ([57]).

69. The Court of Appeal accepted that the requirement for the decision to be taken at Ministerial level reflected not only the potential for a ban to cause economic damage and restrict choice, but also conflicts of interest between the pharmaceutical industry and the health foods market which could affect an inquiry into product safety. Thus, it was important for a disinterested decision to be made at a high level with the benefit of the best available information. Thus, it had been more, not less, appropriate for the Minister to have known the grounds of the dissenting view from a distinguished authority.

70. Accordingly, it might have been thought better if the Minister had been supplied with additional information ([59]). But the court decided that that was not the test and the orders should not be quashed. Sedley LJ said at [62]:-

> "Given the constitutional position as this court now holds it to be, a minister who reserves a decision to himself – and equally a civil servant who is authorised by him to take a decision - must know or be told enough to ensure that nothing that it is necessary, because legally relevant, for him to know is left out of account. This is not the same as a requirement that he must know everything that is relevant. Here, for example, much that was highly relevant was appropriately sifted by the Commission in formulating its advice and then distilled within the department in order to make a submission to the minister which would tell him what it was relevant (not simply expedient or politic) for him to know. What it was relevant for the minister to know was enough to enable him to make an informed judgment. This centrally included the Commission's advice and the reasons for it. It also

> included the fact of Professor Ernst's opposition and the essential reasons for it. All this he had."

71. A distinction must be drawn "between things which are so relevant that they must be taken into account and things which are not irrelevant and so may legitimately be taken into account", applying the "obviously material" or irrationality test in *CREEDNZ* and *Findlay* (see below). In this context, it is only a decision in the former category that will vitiate a public law decision ([63] and [73-5]). The matters, which had been omitted from the briefing were not matters which either the statutory purpose or the nature of the issue before the Minister made so relevant that a lawful decision could not be made in ignorance of them. The fact that those matters enhanced the case against the ban was not the test ([64]).

72. It is therefore plain from the decisions in *Peko-Wallsend* and *National Association of Health Stores* that the extent of a Minister's actual knowledge is not in itself a public law ground for vitiating his decision. The real question is whether the Minister was not aware of a matter which, as a matter of law, he was legally obliged to take into account (see the Divisional Court in *Packham* [2020] EWHC 829 (Admin) at [50] to [51]).

73. It is also plain from these authorities that in considering the legal adequacy of briefing to a Minister, it is necessary to have regard to the nature, scope and purpose of the legislation in question, including any matters expressly required to be taken into account, and the nature and extent of any matter which has not been explicitly addressed. It is also lawful for a ministerial decision to be reached on the basis of evaluation and analysis by experienced officials in his department followed by a briefing which provides a precis of material which the Minister is "bound to have regard to." To some extent, the preparation of ministerial briefing involves judgment on the part of those officials as to the material to be included. In this respect, there is a broad analogy to be drawn with the approach taken by the courts to challenges to an officer's report prepared to brief the members of a local authority's committee (see e.g. *R (Luton Borough Council) v Central Bedfordshire Council* [2014] EWHC 4325 (Admin) at [91]-[94]).

Obviously material considerations

74. In *R (Oxton Farm) v Harrogate Borough Council* [2020] EWCA Civ 805 the Court of Appeal endorsed at [8] the following summary of the legal principle:-

> "In *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221 the Supreme Court endorsed the legal tests in *Derbyshire Dales District Council* [2010] 1 P & CR 19 and *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 182 which must be satisfied where it is alleged that a decision-maker has failed to take into account a material consideration. It is insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is *not* irrelevant or immaterial, and therefore something which the decision-maker is *empowered or entitled* to take into account. But a decision-maker does not *fail* to take a relevant consideration into account *unless he was under an*

> *obligation to do so*. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account."

75. The "obviously material" test derives from *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 where Cooke J stated that, even where legislation is silent:-

> "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] … would not be in accordance with the intention of the Act."

This passage was approved by the House of Lords in *Re Findlay* [1985] AC 318, 334 and by the Supreme Court in *Friends of the Earth* [2021] PTSR 190 at [118].

76. The test for whether a consideration is "obviously material" is whether a failure to give direct consideration to it would not accord with *the intention of the legislation* and would be *irrational* (*Friends of the Earth* at [118-119]).

77. In *R v Somerset County Council ex parte Fewings* [1995] 1WLR 1037 Simon Brown LJ (as he then was) identified three categories of consideration:-

> "First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision- maker may decide just what considerations should play a part in his reasoning process."

It is only if a consideration in the third category is regarded by the court as "obviously material" (as defined above) that a decision-maker becomes legally obliged to take it into account.

78. It follows that the mere fact that a decision-maker does not advert to a consideration falling within the third category does not amount to a legal error unless the court decides that that consideration is obviously material. A decision-maker is not obliged to work through every other consideration which might potentially be regarded as relevant under the third category to decide whether it will be taken into account as a discretionary factor (*Friends of the Earth* at [120]).

79. The "obviously material" test is not to be applied at large, but instead in the context of the IA 2015. In relation to the claimant's grounds of challenge it is necessary to identify the particular points which it is said the defendant wrongfully failed to take into account

and to ask whether they were obviously material such that it was irrational not to have taken them into account, in the context of the setting of a RIS under the IA 2015.

Fresh evidence and matters of expert opinion

80. The relevant principles were set out by the Divisional Court in *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 at [36] to [41]. Because it is not the function of the courts to assess the merits of a decision the subject of a claim for judicial review, it is seldom necessary for expert evidence to be adduced. Indeed, it is seldom appropriate to consider evidence going beyond the material which was before the decision-maker and evidence of the process by which the decision was taken [36]. Consequently, the categories of evidence admissible in proceedings for judicial review are generally limited to the well-known list in *R v Secretary of State for the Environment ex parte Powis* [1981] 1WLR 584, 595.

81. But where a court needs to understand technical matters to be able to appreciate the basis for a decision challenged for irrationality, expert evidence may be admissible to explain those matters ([38]). The Divisional Court added:-

> "40. A decision may be irrational because the reasoning which led to it is vitiated by a technical error of a kind which is not obvious to an untutored lay person (in which description we include a judge) but can be demonstrated by a person with relevant technical expertise. What matters for this purpose is not whether the alleged error is readily apparent but whether, once explained, it is incontrovertible.
>
> 41. The corollary of this is that, as was recognised in the Lynch case, para 18, if 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. This places a substantial limit on the scope for expert evidence. In practice it means that, if an expert report relied on by the claimant to support an irrationality challenge of this kind is contradicted by a rational opinion expressed by another qualified expert, the justification for admitting any expert evidence will fall away."[2]

Transport Policy Documents

82. It is common ground that in assessing the Secretary of State's knowledge and state of mind when setting RIS 2, he is to be taken as having been fully aware of the policy and approach set out in documents referred to in RIS 2, in particular the Clean Growth Strategy (previously referred to) and the Road to Zero (July 2018). Furthermore, the briefing on RIS 2 provided to the SST on 6 March 2020 referred to the delivery of "net zero." It is common ground that this was a reference to the net zero target in s.1 of the CCA 2020. From the Clean Growth Strategy, at the very least, the SST would have been aware of CB4 and CB5 and that the carbon budgets had been set for successive 5 year periods under the CCA 2008 as a basis for pathways leading to the achievement

[2] *R (Lynch) v General Dental Council* [2004] 1 All ER 1159

of net zero by 2050. In short, the defendant must have been aware of the relevant requirements and principles of the CCA 2008, reflecting the UK's contribution to the objectives of the Paris Agreement, which is referred to throughout the Strategy.

83. But there are other key documents of which the SST must have been properly aware when setting RIS 2. First, the SST must have been aware of RIS 1 and the continuity between the two strategies. RIS 1 was adopted on 1 December 2014. It is referred to in RIS 2 and 45 of its schemes were rolled forward into RIS 2. Second, the NPS was published on 17 December 2014 (and formally designated under s.5 of the PA 2008 on 14 January 2015). This document was referred to in RIS 1. But plainly, it is a document of which the SST would be well aware through dealing, for example, with decisions on applications for development consent orders. Third, on 26 March 2020 the SST published "Decarbonising Transport: Setting the Challenge." This document was the first step in developing policies for the anticipated Transport Decarbonisation Plan ("TDP") (p.6). The document announced a series of workshops, consultations and other work leading up to the publication of the Plan. It is reasonable to infer that consideration of this document, involving the SST, must have preceded the setting of RIS 2, which itself referred to the TDP at p.26 (see also para.75 of Mr. Andrews' first WS).

The NPS

84. Paragraph 3.8 of the NPS states:-

> "The impact of road development on aggregate levels of emissions is likely to be very small. Impacts of road development need to be seen against significant projected reductions in carbon emissions and improvements in air quality as a result of current and future policies to meet the Government's legally binding carbon budgets and the European Union's air quality limit values. For example:
>
> • Carbon – the annual CO2 impacts from delivering a programme of investment on the Strategic Road Network of the scale envisaged in Investing in Britain's Future amount to well below 0.1% of average annual carbon emissions allowed in the fourth carbon budget.[44] This would be outweighed by additional support for ULEVs also identified as overall policy."

Footnote 44 explains that the estimate of 0.1% of average annual carbon budgets for CB4 was based on a roads programme of the scale envisaged in "Investing in Britain's Future" (Cm. 8689 June 2013) over a 10-15 year period. Much of that programme was carried forward into RIS 1.

85. Paragraphs 5.16 to 5.18 of the NPS contain specific policies for dealing with carbon emissions in applications for a development consent order:-

> "Introduction
>
> 5.16 The Government has a legally binding framework to cut greenhouse gas emissions by at least 80% by 2050. As stated above, the impact of road development on aggregate levels of

> emissions is likely to be very small. Emission reductions will be delivered through a system of five year carbon budgets that set a trajectory to 2050. Carbon budgets and plans will include policies to reduce transport emissions, taking into account the impact of the Government's overall programme of new infrastructure as part of that.
>
> Applicant's assessment
>
> 5.17 Carbon impacts will be considered as part of the appraisal of scheme options (in the business case), prior to the submission of an application for DCO. Where the development is subject to EIA, any Environmental Statement will need to describe an assessment of any likely significant climate factors in accordance with the requirements in the EIA Directive. It is very unlikely that the impact of a road project will, in isolation, affect the ability of Government to meet its carbon reduction plan targets. However, for road projects applicants should provide evidence of the carbon impact of the project and an assessment against the Government's carbon budgets.
>
> Decision making
>
> 5.18 The Government has an overarching national carbon reduction strategy (as set out in the Carbon Plan 2011) which is a credible plan for meeting carbon budgets. It includes a range of non-planning policies which will, subject to the occurrence of the very unlikely event described above, ensure that any carbon increases from road development do not compromise its overall carbon reduction commitments. The Government is legally required to meet this plan. Therefore, any increase in carbon emissions is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the proposed scheme are so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets."

86. Thus, the approach adopted in the NPS, not only when it was designated in 2015 but also as a continuing policy tool used by the SST in 2020, is that:-

> (i) The impact of road development on aggregate carbon emissions is likely to be small, *a fortiori* in the context of policies designed to make significant reductions in emissions to meet carbon budgets in the CCA 2008;
>
> (ii) Government polices address reduction in transport emissions, taking into account the government's overall programme of new infrastructure;
>
> (iii) An applicant for a development consent order should assess the carbon impact of the project against the carbon budgets;

> (iv) The government has a range of non-planning policies to ensure that any carbon increases from road development do not compromise its overall carbon reduction commitments.

On point (iv) I note the reference by the Court of Appeal in *Packham* at [85] to the Clean Growth Strategy as not prescribing only one particular pathway to 2050. The Strategy envisages a number of methods for managing emissions, such as taxation, regulation, investment in innovation and the establishment of the UK ETS.

RIS 1

87. Shortly after the adoption of RIS 1 the DfT published in March 2015 "Road Investment Strategy: Economic Analysis of the Investment Plan". Paragraph 2.28 stated that the forecast increase in carbon emissions from the "full package" of schemes covered by RIS 1 would add 0.1 to 0.2% to the emissions predicted for 2040. It can be seen from table 3.1 that most of that increase related to "existing commitments" including schemes already announced by 2013. Paragraph 2.28 added that the overall emissions from RIS 1 would "be much smaller than the reduction in carbon emissions from the support for low emission vehicles". That approach aligned with that already explained in the NPS, and as will be seen, is similar to that taken in the setting of RIS 2.

The Road to Zero (July 2018)

88. This policy document of the SST sought to go further than the Clean Growth Strategy in reducing carbon emissions from road transport (see the Foreword). It reiterated the fundamental importance of road transport to UK journeys and to the movement of goods. But Dr Moran explains (para.46 of his WS) that the document expanded upon existing policy, so that all new cars and vans would be zero emission by 2040 (p.2). The sale of petrol and diesel cars and vans would end in that year. By 2030 between 50 and 70% of new car sales and up to 40% of new van sales would be of ultra-low emission vehicles (p.2). He also referred to 46 government measures, involving £1.5 billion of public investment, for dealing with *inter alia* vehicles already on the roads and to reduce emissions from HGVs, including investments in new technology (para.47 of Dr Moran's WS).

Decarbonising Transport: Setting the Challenge

89. Paragraphs 4.4 to 4.5 of this document stated that the UK must go much further than the DfT's then central projection for domestic transport emissions compared to (a) the 2032 Clean Growth projection and (b) projections produced by the Committee on Climate Change for net zero by 2050. Although the department's central projection indicates that transport emissions will fall steadily as the result of existing firm and funded policies, the rate of reduction is "much slower than what is likely to be needed if transport is to fully play its part in contributing to our legal obligations." For example, there is an estimated gap of 16 $MtCO_2e$ between DfT's central projection and emission levels in 2032 under the Clean Growth Strategy. In this connection Mr. Andrews reiterates that the government has not set sectoral targets, for example for the transport sector, and that the 16 $MtCO_2e$ figure does not represent a target for emissions which it is government policy to eliminate entirely. There is no requirement for the transport sector to achieve a pro-rota share of the overall decarbonisation target (paras. 66-67 of Mr. Andrews' first WS).

90. The TDP will set out what government, business and society will need to do to achieve the significant emissions reduction needed across all modes of transport. The pathway to net zero requires that the transport sector as a whole "moves further, faster" (p. 5). Indeed, in October 2019 in its response presented to Parliament under s.37 of the CCA 2008, Leading on Clean Growth, the government had already accepted "the urgency of stepping up the pace of projects to ensure that the transport sector plays its part in supporting the delivery of the UK's emission reduction targets" (p.80), hence the need for the TDP. One consequence was that the Prime Minister announced on 4 February 2020 a consultation on bringing forward the end date for the sale of new petrol and diesel cars and vans from 2040 to 2035, or earlier, if a faster transition should appear feasible (Dr Moran para. 53 of WS).

91. Although, the claimant and Mr. Wolfe QC have sought to make a good deal of the DfT's central projection and the 16 $MtCO_2e$ "gap" indicated, it is important to note para. 2.15 of Setting the Challenge. First, the forecast only includes the effects of "legislated policies or those with confirmed funding." It does not include the proposal to end petrol and diesel vehicle sales by 2040 (see the Road to Zero) or the consultation on bringing that date forward to 2035. Indeed, in November 2020 the government announced that it would bring forward that date to 2030. Likewise, paragraph 4.7 of Setting the Challenge confirms that DfT's central projection only reflects previously committed expenditure or regulation already in place and so future spending measures and policies are expected to make significant further reductions in carbon emissions. The submissions during the hearing clearly showed how government policy continues to evolve to address the urgency of the need to meet carbon targets. Second, car GHG emissions are projected to fall by 52% between 2018 and 2050 despite a projected increase of 35% in car km over the same period.

92. Other parts of the document indicate the direction of travel and certain specific objectives. The DfT has split the work leading up to the publication of the TDP into six strategic priorities, which include accelerating modal shift to public and active transport, decarbonising of road vehicles and decarbonising of transportation of goods. Dr Moran has explained in more detail key aspects of Setting the Challenge and work being undertaken prior to the TDP (paras. 55 to 62 of his written statement). Mr. Litton QC submitted that this material showed that the government is taking a range of steps to tackle the need for urgency in addressing carbon production in the transport sector. Whether they are enough is not a matter for the court, but the evidence is plain that the government is seeking to deal with the need for urgency which Mr. Wolfe QC has emphasised in his submissions.

The setting of RIS 2

93. I now summarise relevant aspects of the work carried out for setting RIS 2.

94. The DfT carried out research and gathered evidence for RIS 2 from 2016, not long after the setting of RIS 1. HE published "SRN Initial Report" in 2017 suggesting priorities for RIS 2 to address. The department conducted public consultation on that document. In October 2018 it published a draft RIS based upon the engagement and work carried out up until then (para. 29 of Mr. Andrews' first WS and p. 4 of RIS 2).

95. Undoubtedly the work on RIS 2 must have been the subject of briefings to the SST from time to time. But the only briefing note the Court has seen is that dated 6 March 2020 (see below).

96. In summary, RIS 2 contains the following key points for the purposes of this challenge:-

> (i) The Strategy must support the government's wider plans for decarbonising road transport (p.2);
>
> (ii) The Strategy continues to emphasise the economic and social importance for the UK of the road system, particularly the SRN. It is the main network through which the nation does business, carrying more traffic per mile than other part of the network and more freight and business than other part of the transport system. The SRN must support the growth of the economy. There is a need to level up Britain's infrastructure across the country. One objective is to tackle congestion and improve the reliability of journeys, to help increase productivity (see e.g. pp. 9, 19 and 23-4);
>
> (iii) The DfT's forecasts predict strong traffic growth on the SRN ranging between 29% to 59% by 2050, driven by increases in the number of car trips and trip distances as well as increasing light goods vehicle traffic. Demand is likely to grow faster on the SRN than on local roads. The shift to the use of electric vehicles, while essential to achieving the target of net zero carbon emissions, has the potential to increase travel by road as the costs of driving fall (pp. 11-12 and 26). Mr. Andrews refers to this factor (para. 60 of his first WS), but points out that other considerations will help to mitigate the effects of increased travel demand. For example, one of the strategic priorities in Setting the Challenge is to accelerate modal shift to public and active transport (para. 5.14). Nevertheless, the government's policy is that the needs of drivers of zero-emission vehicles in 2050 should be met by a modernised transport network (p. 27 of RIS 2);
>
> (iv) RIS 2 takes into account the government's proposal to end the sale of petrol and diesel cars by 2035 "or earlier if a faster transition appears feasible" (p.25). With transport accounting for a third of UK GHG emissions, urgent action is required in respect of all modes "to scale up" efforts to tackle climate change. The TDP will bring forward a programme of co-ordinated action needed to reach net zero-emissions by 2050. The UK should go "further and faster" than the Road to Zero. Changes to the vehicle fleet (e.g. the use of electric vehicles) "mean that we should expect the pressure on our roads to be higher than they would be if we did nothing to tackle climate change." The programme of policies for transforming the SRN includes supporting the decarbonisation of freight, tackling congestion hotspots which cause emissions, and supporting the development of a network of rapid charge points along the SRN.

RIS 2 is a "fully-integrated part" of the wider effort to reach net zero emissions (pp. 25-27);

(v) The development and operation of the SRN has environmental impacts which are multifaceted including effects on noise, carbon dioxide and other GHG emissions, air quality and biodiversity. The objective is to secure positive environmental impacts from RIS 2 and to mitigate as far as possible negative impacts which cannot be avoided. HE is required under its licence to ensure that enhancing and protecting the environment is embedded in its decision-making process. It is expected to build upon progress between 2015 and 2020 and to achieve further improvement during the period 2020 to 2025 in line with, but not limited to, government policy on the environment, including the Clean Growth Strategy and Road to Zero (p.61);

(vi) Pages 72-75 of RIS 2 set out government priorities. These include maintenance, recognising that the SRN was predominantly built in the 1960s and 1970s. The analysis in preparing for RIS 2 shows that the need for maintenance will increase. A substantial increase in investment on renewal has been identified, driven by the ageing of assets and particular pressures caused high traffic volumes using key roads. This includes more extensive renewal works on structures such as bridges and underpasses and the entire phasing out of the oldest type of concrete road surfaces. Enhancements in RIS 1 are to be completed. The average road project takes about 8 years to complete from inception to opening and some of the RIS 1 works were expected to be under construction during the period covered by RIS 2. The strategy will also tackle more of the worst congestion points (e.g. at Newark, the Air Balloon in Gloucestershire and the Simister Island junction in Manchester). In order to promote "levelling-up", RIS 2 commits to 3 major schemes for delivery during subsequent RIS periods: the first new Trans-Pennine dual carriageway since 1971 (dualling the A66), a new crossing of the Thames Estuary and improving the A46 Trans-Midlands Trade Corridor between the M5 and the Humber ports;

(vii) Page 91 of RIS 2 explains the nature of the commitments in the Strategy. It is "a series of investment commitments to specific infrastructure projects," the progress of which will be monitored by the DfT and the ORR and reported to Parliament. The commitment to funding is made on the assumption that the Schemes in RIS 2 continue to demonstrate a strong business case and secure the necessary planning consents. RIS does not intrude upon the normal planning consent process. DfT will hold HE to account on the delivery of projects *and* on the identification of

any needing to be substantially reconsidered because they no longer satisfy business case and/or planning requirements.

97. Mr. Andrews has explained how analysis of carbon emissions from the SRN and the proposals for new infrastructure and works were taken into account in the preparation of RIS 2. Most of the modelling expressed emissions from the use of roads in terms of "tailpipe emissions." Mr. Andrews explains that these account for 97% of all road transport carbon emissions, including construction, maintenance and operation of the network (para. 25 of second WS). This work began in September 2019 and included sensitivity testing against seven different scenarios. For example, scenario 1 was a baseline case which only took into account pre-existing government policy and not proposals in the new strategy. The 45 schemes carried forward from RIS 1 to RIS 2 were treated as part of the baseline. They had already been assessed in the work carried out for RIS 1. Much of the modelling work assumed that RIS 2 would contain 10 new projects, whereas in its final form it added only 5 schemes, and so carbon emissions would be lower than estimated in that earlier analysis. Scenario 7 assumed a relatively fast uptake of zero emission vehicles.

98. In January and March 2020 HE provided analysis of carbon emissions to DfT before the submission of a briefing note to the SST dated 6 March 2020. The January 2020 analysis considered 10 new schemes. It was estimated that they would add about 0.2 $MtCO_2e$ by 2031 on an assumption that they would all be open to traffic. That represented 0.2% of total UK road emissions in 2031. Mr. Andrews says that that impact would be minimal in the context of UK road emissions and would not be incompatible with wider decarbonisation policies.

99. By February 2020 the number of new schemes had been reduced to 9 and further HE analysis showed that the estimated carbon emissions reduced to 0.15 $MtCO_2e$ in 2050 and, in scenario 7 to 0.1 $MtCO_2e$. Alternatively, assuming that no electric vehicles use the SRN at any point in the future, the projected annual emissions from the 9 schemes increased, but still only to 0.23 $MtCO_2e$.

100. The DfT undertook its own analysis in parallel with that of HE and before the setting of RIS 2. The department's experts estimated that under scenario 7 there would be a reduction in emissions of about 66 $MtCO_2e$ for the overall road network in England from 84.4 $MtCO_2e$ in 2020 to 18.2 $MtCO_2e$ in 2050 (of which 11 $MtCO_2e$ would be from the SRN – see para. 20 of Professor Anable's WS). This understates the effect of government policy because the estimates assume no sale of diesel or petrol cars and vans from 2040, rather than 2030 and no decarbonisation of HGVs. The emissions from 9 new schemes of 0.1 $MtCO_2e$ would negate about 0.15% of the anticipated reduction in emissions by 2050 of 66 $MtCO_2e$ or add 0.9% to the residual amount of 11 $MtCO_2e$ predicted to be generated by the SRN without the new schemes.

101. It is common ground that in assessing whether the effect of RIS 2 on carbon emissions would be, as the defendant says, *de minimis*, the court is not confined to looking at material in existence before the decision to set RIS 2 was taken. In April 2020 DfT carried out some further analysis on the 5 new schemes in the final version of RIS 2. In 2050 the emissions they would generate amount to 0.075 $MtCO_2e$ in 2050 or about 0.1% of the reduction in carbon emissions between 2020 and 2050.

102. In relation to continuing emissions on the road network in 2050, Mr. Andrews points out that most of this is attributable to HGVs, for which the modelling assumes no move towards decarbonisation at all. He says that this is likely to be an overestimate or conservative (para. 58 of first WS).

103. The claimant's experts make the point that the figures summarised above do not relate to the cumulative emissions from the road schemes over the whole of the period between 2020 and 2050. But cumulative emissions would be greater not only from the 5 new road schemes but also from the whole of the road network. It is apparent from the year by year analysis carried out by DfT in April 2020 for the period 2023 to 2050 that the percentage contribution from the new schemes remains of the same low order in each year, typically 0.12% to 0.14%.

104. From the April 2020 analysis Mr. Andrews also says that the estimated cumulative emissions from the 5 new schemes over the period of CB5, 2028 to 2032, is 0.278 $MtCO_2e$ which is "an extremely small element" compared to the UK's carbon budget for that period of 1,725 $MtCO_2e$ (para 63. of his first WS), that is 0.016%.

105. None of the numerical analysis in January to March 2020 was placed before the SST in the briefing submitted to him on 6 March 2020. Most of that document was concerned with the giving of legal advice on the possible implications for RIS 2 of the judgment of the Court of Appeal in *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 on the legal challenge to the Airports NPS. Consequently, most of the text was redacted.

106. The part of the briefing note which is said to be relevant to this challenge appears in paragraph 7 and, as redacted, states:-

> "….. RIS is consistent with a major carbon saving required to deliver net zero, and ….. the RIS has assessed its carbon impacts through a comprehensive programme of analysis, over five years."

Mr. Wolfe QC accepted that this text referred to the analysis carried out by officials and by HE before 6 March 2020, as described by Mr. Andrews in his evidence, and to the net zero target in s.1 of the CCA 2008. In addition, the final draft of RIS 2 approved by the SST formed part of his briefing material.

Whether the Paris Agreement was an obviously material consideration

107. The focus of legal challenges relying upon the Paris Agreement has shifted over time. In the challenge to the Airports NPS (which had been designated before the amendment of s.1 of the CCA 2008 to refer to the net zero target), the criticism of the decision-maker was that he had failed to have regard to the new target in Article 2 of the Paris Agreement to restrict the increase in global average temperature to well below 2ºC above pre-industrial levels and to pursue efforts to limit the increase to 1.5ºC. Once that aspect had been addressed by the amendment of s.1 of the CCA 2008, the focus of legal challenges changed to Article 4 and a requirement to address the cumulative burden of carbon emissions in the period leading up to 2050, which is not only referred to in the Paris Agreement, but also reflected in the setting of 5 yearly carbon budgets for the period leading up to 2050 under Part 1 of the CCA 2008 (see e.g. *Packham* in the Court

of Appeal at [88] and [91]). Reliance was also placed upon the view of the Committee on Climate Change in its May 2019 report that CB4 and CB5 were "likely to be too loose." Part of the argument advanced was that the decision-maker had to assess how the impacts of projects on climate change would sit with the Paris Agreement and the domestic legal framework designed to carry it into effect. In *Elliot-Smith* at [32], [40] and [50] the claimant also referred to a requirement for urgent action to be taken in the short and medium term as a component part of article 4. Essentially the same approach to the Paris Agreement was advanced by Mr. Wolfe QC in this case, as in *Packham* and *Elliot-Smith.*

108. Mr. Wolfe QC also submitted that the effect of the Supreme Court's decision in *Friends of the Earth* was to leave intact the decision of the Court of Appeal in *Plan B Earth* that the Paris Agreement was an obviously material consideration. However, Mr. Wolfe QC accepted that, even if that analysis is correct, the decision of the Court of Appeal in *Plan B Earth* is not strictly binding on this court. That decision related to article 2 of the Agreement. The argument in this case now relates to the urgency argument based on article 4.

109. It is necessary to begin by identifying what the issues in *Plan B Earth* were and what the Court of Appeal decided. Friends of the Earth raised two issues. First, it submitted that the SST had erred in law because he had acted on the basis that he was obliged to confine his consideration of climate change issues to the CCA 2008 and not take into account the Paris Agreement (in so far as it differed). Second, it submitted that even if the SST had considered whether to have regard to the Paris Agreement, the only rational view was that it was obviously material and so had to be taken into account ([234]). The Court of Appeal accepted both submissions. As to the second, they said at [237]:-

> "Secondly, and in any event, if he had appreciated he had any discretion in the matter, we agree that the only reasonable view open to him was that the Paris Agreement was so obviously material that it had to be taken into account. It is well established in public law that there are some considerations that must be taken into account, some considerations that must not be taken into account and a third category, considerations that may be taken into account in the discretion of the decision-maker (see, for example, the opinion of Lord Brown of Eaton-under-Heywood in Hurst, at paragraphs 57 to 59). As Lord Brown observed of that third category (in paragraph 58 of his opinion), there can be some unincorporated international obligations that are "so obviously material" that they must be taken into account. The Paris Agreement fell into this category. "

As I have explained, that decision related to the revised temperature target in article 2 of the Paris Agreement.

110. In *Packham* at [101] the Court of Appeal plainly stated that both of the two grounds referred to in [109] above had been freestanding errors of law. Two members of the constitution had also been a party to the judgment in *Plan B Earth*. Accordingly, in its appeal to the Supreme Court, Heathrow Airport Limited ("HAL") needed to obtain a decision overturning both of those grounds. Success on only the first ground could not have resulted in their appeal being allowed. Not surprisingly, therefore, HAL did appeal

in respect of both grounds. In relation to the second ground, they argued that the SST had had a discretion whether to take into account the Paris Agreement and had exercised that discretion lawfully (see [2021] PTSR 190 at [131]). In other words, they contended that the Agreement had not been an obviously material consideration which the SST had been obliged to take into account.

111. In their judgment Lord Hodge DPSC and Lord Sales JSC noted that the Divisional Court had held that (i) the PA 2008 did not require international obligations to be disregarded and (ii) the SST had had a discretion whether to take the Paris Agreement into account which had not been exercised irrationally (see [126] and [128]). The Supreme Court recorded that Mr. Wolfe QC on behalf of Friends of the Earth sought to uphold both grounds in the Court of Appeal's decision. He contended that (1) the SST had proceeded on the basis that he was not entitled to exercise any discretion with regard to the Paris Agreement and (2) it was obvious that it was a material consideration (see [127]). The Supreme Court noted that the Court of Appeal had accepted both submissions, expressly quoting from [237] of the latter's judgment.

112. At [129] the Supreme Court explicitly rejected both of the two contentions advanced by Mr. Wolfe QC. That has to include his attempt to uphold [237] of the Court of Appeal's judgment. Accordingly, Mr. Wolfe's submission that the Supreme Court managed to allow HAL's appeal whilst leaving intact [237] of the Court of Appeal's judgment is wholly untenable. The Supreme Court decided that the Paris Agreement was not an obviously material consideration and so the SST had had a discretion as to whether or not to take it into account. This analysis is not affected by [134] of the Supreme Court's judgment, upon which Mr. Wolfe QC sought to place heavy reliance. It may be that the principle set out in [120] of the Supreme Court's judgment (see [78] above) will, in some future case, be qualified in the case of unincorporated treaties. The Supreme Court said that that was not a straightforward issue and it heard no submissions about the matter. Mr. Wolfe QC did not address that aspect in this case. For present purposes none of this affects the Supreme Court's conclusion that the Paris Agreement was not an "obviously material" consideration.

113. At [132] the Supreme Court accepted that it had been rational for the SST to take the view that it was sufficient for him to have regard to obligations under the CCA 2008. This was on the basis that the CCA 2008 had not yet been amended from 80% to 100% of 1990 emission levels to reflect the revised temperature objective in the Paris Agreement. The Supreme Court accepted that the SST could seek to amend the relevant NPS under the PA 2008 if that should be necessary because of any inconsistency with the UK's obligations under the Paris Agreement. Even if the NPS were not to be amended, any revised carbon targets under the CCA 2008 could be taken into account in the determination of development consent applications.

114. In the present case, the net zero target has plainly been taken into account in the setting of RIS 2, in contrast to the position regarding the Airports NPS. Instead, the claimant relies upon the "looseness" of CB4 and CB5, because they were set on the basis of the former target of an 80% reduction in carbon emissions by 2050. But it has been decided not to amend CB4 or CB5 and Parliament has recently approved CB6. That decision postdates the setting of RIS 2. But the SST has a power to vary RIS2 if he considers it appropriate to do so. The commitment to the schemes in that Strategy under the IA 2015 is not absolute. Furthermore, for those projects, which will require approval through the development consent order procedure, or which will be subject to environmental impact

assessment, there is no reason why their impact on CB6, or any subsequent carbon budget, may not be taken into account, alongside any implications for CB4 or CB5.

115. Although s.10(3) of the PA 2008 required explicit consideration to be given to the mitigation of climate change, the Supreme Court concluded that the temperature target in the Paris Agreement was not an obviously material consideration. It is clearly implicit in the reasoning of the court that the "urgency" objective in Article 4.1 is not to be treated as an obviously material consideration. There is no reason for reaching any different conclusion in the context of the IA 2015. The legislation requires the SST setting an investment strategy to have regard to its effect on the environment, without any specific reference to climate change.

116. In *Packham* the Oakervee Review of HS2 had accepted that in the short to medium term the construction of the project would add to carbon emissions. But over the first 60 years of operation there would be an overall reduction in carbon emissions. Overall the project would be close to carbon neutral, but whether it would end up positive or negative largely depended on emissions during the construction phase ([32-4]). The Court of Appeal held that there had been no need for either the Review or the government to have gone any further, as the claimant had suggested, by considering the pattern and extent of emissions during the period before 2050. There was no support for that contention in the CCA 2008 or any policy statement ([84 to 99]).

117. Accordingly, I reject the submission that article 4.1 was an obviously material consideration, in particular as regards the urgency of making reductions in GHG, which the SST was obliged to take into account. The real issue raised by this challenge is whether the SST failed to take into account implications for the net zero target in s.1 of the CCA 2008 and carbon budgets leading towards that target, in the sense that these were obviously material considerations to which he was legally obliged to have regard.

Whether the Secretary of State failed to have regard to an obviously material consideration

The rival contentions

118. In summary, the claimant submits that the defendant was obliged to take into account a quantified assessment of the emissions from the programme in RIS 2 and to consider their impact on the ability of the UK to meet the net zero target in 2050 and the carbon budgets running to 2032. Mr. Wolfe QC refers to the likelihood that the UK will fail to meet CB4 and CB5.

119. The defendant submits, first, that the SST's knowledge of the relevant policy documents summarised above, RIS 2 and the briefing material formed a legally sufficient basis for the SST to be empowered to make a decision to set RIS 2 under the IA 2015. In other words, the SST did not fail to take into account any obviously material considerations. Second, the defendant submits that, in any event, the numerical analysis shows the emissions to be so small that the court should treat them as *de minimis*, or legally insignificant, and therefore not an obviously material consideration which had to be taken into account by the SST. On that second issue, the claimant's experts dispute the assumptions made in the analysis for the defendant in 5 areas. On that basis the claimant submits that the emissions resulting from RIS 2 were not *de minimis*, they

were an obviously material consideration and so the SST was obliged to have regard to them.

The context

120. It is necessary to draw the strands together from the earlier analysis of legislation and policy.

121. A road investment strategy under the IA 2015 is set in order to provide the framework for the relationship between the SST and a strategic highways company. It does so by laying down the objectives to be achieved by the company and the financial resources that government will provide. The SST must take into account the effect of the strategy on the environment and safety, but these matters need not form part of the objectives of the document. How far to go into such matters is for the judgment of the SST. Parliament has not indicated a requirement for the SST to take into account the effect of the strategy specifically on climate change, unlike, for example, s.10(3) of the PA 2008. There is nothing like s.19(1A) of the Planning and Compulsory Purchase Act 2004 (inserted by s.182 of the PA 2008) which requires the development plan documents for an area "to include policies designed to secure that the development and use of land …… contribute to the mitigation of, and adaptation to, climate change." A RIS is essentially a high-level strategy document providing for investment in the SRN.

122. I therefore do not accept the submission made by Mr. Wolfe QC at one point that a RIS is an environmental decision-making document. That echoes the claimant's former ground 4, which argued that a RIS was a plan or programme required to comply with the SEA process, a contention that the Court of Appeal has rejected. Such a plan or programme is of a very different nature. The Supreme Court summarised the statutory framework for SEA in *Friends of the Earth Limited* [2021] PTSR 190 at [48] to [59] and [62] to [69]. The object is to provide a high level of environmental protection and to integrate environmental considerations into the preparation and adoption of plans and programmes. "Environmental assessment" comprises the preparation of an environmental report by the plan-maker, consultations, the taking into account of the report and the results of those consultations in decision-making, and a published explanation of how those matters have been taken into account and environmental considerations integrated into the plan or programme. Regulation 12(3) and schedule 2 to the 2004 Regulations define information which may reasonably be required to be included in an environmental report, including "climatic factors."

123. Where environmental impact assessment is required for an individual project, the environmental statement may be required to address the impact upon the climate including GHG emissions (see e.g. regulation 14 and schedule 4 to the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017-SI 2017 No 572).

124. There is nothing in the IA 2015 which remotely resembles environmental decision-making.

125. Mr. Wolfe QC submitted that the decision on whether to adopt RIS 2 provided the only opportunity for a decision-maker to consider the overall effect of the SRN programme on climate change targets and that this was therefore a powerful indicator that the issues raised by the claimant represented obviously material considerations for the purposes of s.3 of the IA 2015. I do not accept this submission. First, the issue of whether it

would be irrational not to have regard to a consideration has to be examined in the context of the legislation and its objectives. Second, even if it be right that an environmental factor would not otherwise be assessed, whether climate change or another issue, it does not follow that that legislation must be interpreted so as to fill that supposed gap. The Divisional Court did not accept a similar argument in the context of SEA legislation in *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 553 at [91]-[94]. Third, it is not right to say that the effect of the strategy in RIS 2 on climate would not otherwise be assessed. There are mechanisms in the CCA 2008 for the Committee on Climate Change and Ministers, in particular the Secretary of State for Business, Energy and Industrial Strategy, to monitor and consider the current and future performance of the road transport sector, indeed all sectors, against the targets in the CCA 2008 and for Parliament to consider the reports presented to it. Fourth, individual projects in RIS 2 whether authorised by a development consent order, ordinary planning permission or permitted development rights, may be the subject of EIA. At all events, where planning controls apply, policies on carbon emissions, such as those contained in the NPS (paras. 5.16 to 5.19), will fall to be applied.

126. In this connection Mr. Wolfe QC sought to lay emphasis on the requirement in s.3(6) of the IA 2015 for the SST and HE to comply with RIS 2. But that is a requirement of a general nature addressed to a strategy as whole. It promotes the delivery of the projects identified in a strategy, but it does not create an absolute obligation that each such project must be carried out. The strategy may be varied. RIS 2 itself is expressed in terms of the 5 year period during which construction is *expected* to start, but some schemes are not expected to start within that timescale. Furthermore, schemes which cease to be deliverable, for example by failing the process for obtaining planning approval or which cease to offer "sufficient value for money" will be reconsidered (p. 91). A scheme will only remain in the strategy if public investment is justified. Fundamentally, RIS 2 remains an investment strategy.

What the Secretary of State took into account

127. RIS 2 was not the first document of its kind. It followed on from RIS 1 adopted in December 2014. It was formulated so as to provide continuity, where appropriate, with that earlier document. In setting RIS 2, the SST must be treated as having had knowledge of RIS 1, the NPS and the policy documents referred to in [53 to 54] and [82 to 92] above. He must also be taken to have known about the framework of, and relevant targets in, the CCA 2008 (i.e. the net zero target in 2050 and CB4 and CB5). He must have been aware of the challenges facing the road transport sector regarding climate change, the 16 $MtCO_2e$ difference between the department's central projection and the 2032 Clean Growth Strategy, the matters not taken into account by the central projection (see [89] and [91] above), and the policy commitment to reduce GHG emissions in the transport sector overall "further, faster." The SST must also have been aware that there is no sectoral target for transport, or any other sector, and that emissions in one sector, or in part of one sector, may be balanced against better performance in others. A net increase in emissions from a particular policy or project is managed within the government's overall strategy for meeting carbon budgets and the net zero target as part of "an economy-wide transition" (see Dr Moran's WS at para.32; *Packham* at [85]-[87]; and [86] above).

128. These points are plainly set out in materials of which, it is common ground, the Secretary of State had knowledge when approving RIS 2. The fact that the court has not been shown any briefing material to the SST explicitly demonstrating these points is therefore nothing to the point. Mr. Wolfe QC rightly, did not suggest otherwise.

129. The SST will also have been aware of the approach taken in the NPS and RIS 1 to increases in carbon emissions from new projects for the SRN. The policy in paragraph 3.8 of the NPS states that the impact of road development on aggregate levels of emissions is "likely to be very small." These impacts "need to be seen against significant projected reductions in carbon emissions…… as a result of current and future policies to meet the government's legally binding carbon budgets …..". The programme envisaged in "Investing in Britain's Future" would add well below 0.1% of average annual carbon emissions allowed in CB4. Two points should be noted. First, the policy approved by Parliament considers it appropriate to compare the emissions from a roads programme with the UK as a whole, rather than a smaller sector. Second, the percentage given is an indicator of what may be considered as "very small" and not a matter of concern in terms of the UK's climate change policy.

130. Much the same approach was taken in RIS 1. It was estimated that the investment packages in the SRN would generate a slight increase in carbon emissions, amounting to 0.1% to 0.2% of those forecast for 2040. In that instance the comparison was made with a single year, rather than a carbon budget. Once again, it was stated that the increase would be much smaller than the reduction attributable to a shift to low emission vehicles.

131. It can be seen, therefore, that the numerical analysis carried out by HE and DfT officials in 2020 was of the same kind as had previously been carried out for the NPS and RIS 1 and with which the SST would already have been familiar. In 2020 NPS remained a current policy document for the determination of applications for development consent orders. The analysis carried out between January and March 2020 related carbon emissions from new schemes introduced by RIS 2 (originally 10 but then later reduced to the final 5) to emissions from the overall UK road network in 2031 or the reduction in emissions on roads in England between 2020 and 2050. The comparators chosen were more challenging than the total UK emissions used in the NPS. The analysis referred to the net zero target in 2050. A comparison was made with 2031 which fell within the scope of CB5.

132. One of the criticisms made by the claimant's experts is that the analysis in 2020 considered only the increase in emissions from new projects introduced by RIS 2 (whether 5, 9 or 10) and not also from the 45 projects rolled forward from RIS 1. However, those projects were not ignored in RIS 2. They were pre-existing commitments and treated as part of the baseline (see Mr. Andrews' second WS at para.46). They had previously been assessed in a broadly similar manner when included in RIS 1 and found to be acceptable for that purpose. RIS 1 was not the subject of any legal challenge. There has been no suggestion that the carbon assessment of emissions from the RIS 1 schemes had become inaccurate by 2020. I can see no legal basis upon which the approach adopted in the HE/DfT analysis in 2020 could be criticised as irrational. The figures showed the emissions not only from the new schemes but also from the sector including the RIS 1 schemes rolled forward. The estimates could be related to appropriate targets or measures.

133. It is accepted by the claimant that paragraph 7 of the briefing note to the SST on 6 March 2020 referred to the numerical analysis summarised above. The SST was told that the RIS was "consistent with a major carbon saving required to deliver net zero" and that this was based upon "a comprehensive programme of analysis." In my judgment the fact that the numerical analysis was not provided to the Minister does not render the decision to set RIS 2 open to legal challenge. The conclusion in the briefing note drawn from the analysis was consistent with the approach taken in the NPS and RIS 1. That conclusion was one which could rationally be drawn from that material. The briefing, albeit laconic, was a legally adequate precis of the analysis for the purposes of taking the decision to set RIS 2, in the context of the statutory scheme and the policy material of which the SST was already aware. The numerical analysis was not an obviously material consideration which had to be taken into account by the SST personally. The relationship between the analysis and the net zero target in the CCA 2008 was adequately summarised in the briefing.

134. I gain no real assistance from the decisions cited by Mr Wolfe QC in *R (Hunt) v North Somerset Council* [2013] EWCA Civ 1320 and *Stephenson v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 519 (Admin) or from the authorities referred to in the latter. This body of case law was concerned with the level of information which must be provided to a decision-maker about the output from a consultation exercise or in order to comply with the public sector equality duty in s.149 of the Equality Act 2010. These areas of the law are concerned with very specific procedural rules or statutory obligations (see also *Packham* at [65]). They have nothing to do with the judicial review of the legal adequacy of briefing by officials to a Minister on a decision to approve a strategy document in a macro-political field. Adequate guidance for the present context is provided by the decisions in the *National Association of Health Stores* and *Peko-Wallsend*, together with the case law to which I have already referred on intensity of review.

135. Authorities in this area are sensitive to the legal and factual context. In *Peko-Wallsend* the legislation expressly required the Minister to consider whether the proposed land grant would cause detriment to others, for example their property interests. In that case it was not possible to satisfy such a specific legal requirement unless the decision-maker took into account correct information on the location of the valuable uranium deposit. *National Association of Health Stores* concerned a tension between harm to economic interests and the protection of the health of consumers. The court held that it had been sufficient for the Minister to have a precis of the dissenting opinion of one expert, rather than a fuller explanation, although that material went directly to the issue of risk which had to be assessed.

136. The present case is rather different. It involves the adoption of a national policy at a high strategic level for the purpose of public investment in the SRN. The SST was advised of the impact of the programme on the net zero target. He did not need to be shown the supporting numerical analysis. Some people might think that it would have been better if the SST had been supplied with at least some of that analysis and that that would not have involved overburdening the Minister. But as Sedley LJ pointed out in the *National Association of Health Stores* case at [59-62], that is not the test for a public law challenge.

What the Secretary of State did not take into account

137. Next, Mr. Wolfe QC submits that the analysis carried out before the briefing dated 6 March 2020 did not assess how the predicted emissions related to the carbon budgets, CB4 and CB5, the likelihood that they would not be met, and cumulative emissions. Accordingly, it is submitted that the SST could not have taken that factor into account. Once again, the issue is whether this was an obviously material consideration, such that it would be irrational in the context of s.3 of the IA 2015 for the SST not to have regard to that matter.

138. The claimant's case on this aspect, both in writing and in oral submissions, was, with respect, somewhat muddled. As I have indicated in [101 to 104] above, after RIS 2 had been set, the DfT carried out some further analysis in April 2020 which did estimate cumulative carbon emissions from the 5 new schemes introduced in RIS 2 and concluded that they would represent only 0.016% of the UK's carbon budget for CB5, 2028-2032. It is also necessary to bear in mind that what Mr. Wolfe QC frequently referred to as a "policy gap," namely the difference of 16 $MtCO_2e$ between DfT's central projection (which ignores, for example, the policy to end sales of diesel/petrol cars and vans) and the 2032 Clean Growth Strategy scenario, relates to the year 2032. However, by contrast, Professor Goodwin criticises the DfT's assessment because not all of the 5 new schemes would have been fully in operation during the period 2028 to 2032 (paragraphs 14 and 17). The DfT says that they would open between 2030 and 2035 (Mr. Andrews' second WS para.37). I do not see how the department could be criticised as acting irrationally in making this comparison, because CB5 was the latest carbon budget in existence when RIS 2 was adopted. CB6 was not made until 23 June 2021.

139. Instead, Professor Goodwin contends that the carbon analysis should have been based on the full 60 year appraisal period used for the individual assessment of schemes (paras. 15 and 22 of his WS and see also paras. 14, 16 and 18 of Professor Anable's WS). In oral submissions, it was clarified that the argument in fact relates to the 30 year period between 2020 and 2050. But as Mr. Andrews points out (para.47 of his second WS) this criticism surfaced in the claimant's evidence served in October 2020, whereas the criticism in the original Statement of Facts and Grounds had focused on the last year of CB5 (2032) and on 2050 and, I would add, CB4 and CB5 (see para. 68). The claimant's case has shifted, no doubt because it is recognised that the 5 new schemes in RIS 2 will not have a significant impact on CB4 or CB5.

140. Although the claimant has sought to emphasise the need for a cumulative assessment of emissions over the period 2020 to 2050, it has not suggested that there is any target expressed in *cumulative* terms over such a period (or anything similar) against which an assessment could be compared. There is currently no such target in the CCA 2008. The Paris Agreement does not identify targets for individual nations, and it is not suggested that the "nationally determined contribution" communicated by the UK refers to any such cumulative target. The only cumulative targets in the CCA 2008 are the carbon budgets which, at the time of the decision under challenge, did not run beyond 2032. Accordingly, the claimant's argument in this part of the case leads nowhere.

141. I should also reiterate that the claimant's case, whether as pleaded in the Statement of Facts and Grounds, or as extended in the witness statements of Professor Goodwin and

Anable, runs contrary to the reasoning of the Court of Appeal in *Packham* (see the judgment at [84 to 99]).

142. For these reasons, I reject the claimant's contention that the SST was legally obliged to take into account a numerical assessment of how the predicted carbon emissions from RIS 2 related to CB4 and CB5 or a cumulative assessment of emissions over a longer period. These were not obviously material considerations for the purposes of setting RIS 2. As to the difficulties faced by the UK in meeting CB4 and CB5 generally, that would have been well-known to the SST from the policy material which was within his knowledge.

The de minimis argument

143. As I have previously mentioned, it was common ground between the parties that the issue of whether carbon emissions from RIS 2 projects and their relationship with climate change targets was an obviously material consideration is a matter for the court to determine, on the basis of the material before the court, and not simply that which was before the SST in early March 2020. Accordingly, it is relevant for the court to have regard to the further analysis carried out by DfT in April 2020 (see [101 to 104] above).

144. The claimant asserts that because the projects committed by RIS 2 would generate a "significant increase in GHG emissions," the impacts of these emissions on carbon budgets and the net zero target were obviously material considerations (paras. 63, 66-8 and 72-3 of the Amended Statement of Facts and Grounds and paras. 26-29 of the claimant's skeleton).

145. The defendant contends that the emissions from the projects in RIS 2 are *de minimis*, not in isolation, but when compared to the targets in the CCA 2008 and indeed the Paris Agreement (see paras. 4, 10(1) and 48 of the defendant's skeleton).

146. The claimant challenges that contention, relying upon the witness statements of Professors Goodwin and Anable. They differ from Mr. Andrews and his colleagues on matters of technical judgment and expertise with regard to the modelling carried out and the comparisons with targets in the CCA 2008. In this context it is necessary to keep in mind the principles which (1) allow an enhanced margin of appreciation for decisions based upon technical and predictive assessments (*Mott* and *Spurrier*) and (2) address conflicts between expert witnesses in judicial review (the *Law Society* case) (see [59] and [80] above).

147. In short, I accept the defendant's submission that the claimant's experts have not identified an "incontrovertible error" in the evidence of Mr. Andrews. Their criticisms of the approach taken by DfT have been contradicted by his evidence which could not be described as irrational.

148. I have already rejected the claimant's criticisms that the emissions analysis covered only 5 new schemes, not all of the schemes in RIS 2, and that it ought to have assessed cumulative impacts over the period 2020 to 2050. I will now deal with the remaining issues briefly.

149. First, it is said that the DfT's figures do not include emissions arising from the construction phase, namely embodied emissions in the materials used, contractor's vehicles and land clearance involving loss of vegetation.

150. In summary, Mr. Andrews says that DfT has proceeded on the basis that tailpipe emissions account for 97% of all road transport carbon emissions. Consequently, the department did not seek to quantify emissions from other sources that were judged to be immaterial. They would not affect the end results when comparisons fell to be made with targets or pathways. In addition, embodied emissions are addressed under the UK ETS, contractor's vehicles are the subject of a performance indicator in RIS 2 to encourage reductions and land clearance was assessed as making a "negligible contribution" in the case of the 5 new schemes in RIS 2. There is no public law argument which would allow the court to prefer any of the opinions of the claimant's experts on these matters.

151. Next, the claimant says that the DfT's analysis omits emissions from the operation of the roads, such as road maintenance, servicing and lighting. Mr. Andrews responds that the emissions would only be generated by HE and its contractors and were judged to be negligible (para.31 of his second WS). In addition, roadside lighting is accounted for under the UK ETS, it is addressed through the whole carbon economy approach and does not need to be accounted for additionally under RIS 2. Here again there is no legal basis for the court to reject the DfT's response as being irrational or based on incontrovertible error.

152. Then the claimant says that although DfT has allowed for "induced traffic" generated by the creation of new road capacity, that allowance is inadequate. Mr. Andrews explains that DfT commissioned a literature review to check the robustness of the approach to induced traffic used in its traffic modelling and applied this to RIS 2 (para. 34 of his second WS). There is no possible legal ground upon which the court could criticise the DfT's response. This is simply another difference of opinion between experts which, in proceedings for judicial review, the court is not in a position to resolve.

153. The claimant says that the consequential effects of new road capacity on development and activity patterns (e.g. housing, employment, storage and distribution and retailing) have not been taken into account in DfT's analysis. The department's response is that the evidence on this subject is not robust, there are many other influences, and any potential effects are gradual and long-term. The DfT judged that the probative value of the assessment suggested by the claimant would be "extremely low." On that basis it was not irrational for the department not to attempt to quantify this factor.

154. Professor Goodwin also says that the synergistic effect of road projects in combination have not been assessed by DfT. The department says that this was considered before RIS 2 was set. The 5 new schemes are too far apart for synergy between them to be a material factor. The interactive effects of new schemes in RIS 2 with surrounding roads (including those from RIS 1) were taken into account in regional traffic modelling and therefore considered.

155. The claimant's experts criticise the department's assessment for comparing RIS 2 emissions with predicted emissions for the whole of the UK economy or for the road

transport network. The first is criticised as being too wide and the second as being inappropriate because of the absence of a sectoral target.

156. There can be no criticism of the department's comparison with the figures for the UK as a whole. The claimant complains about a failure to assess the impact of emissions against targets in the CCA 2008 which apply to the whole of the UK and where there are no smaller sectoral targets. Such a comparison was made in *Packham* and also in paragraph 3.8 of the NPS. It is also the approach taken in paragraph 5.18 of the NPS. The thrust of the first criticism made by the claimant's experts is that a comparator smaller than the whole of the UK should have been used. But that is addressed by the additional comparison with the road transport network. The fact that there is no sectoral target for transport does not prevent a judgment from being made about significance, for example, the small effect upon the substantial reduction in carbon emissions between 2020 and those projected for 2050. Indeed, it is to be noted that Professor Anable advances a comparison of cumulative emissions from the RIS 2 schemes between 2020 and 2050 with cumulative emissions from all traffic on the SRN over the same period (para.18 of WS). Far from the department's approach being irrational or incontrovertibly erroneous, it is the criticisms which are unreasonable.

157. Professor Goodwin criticises the DfT's scenario 7 as not being net zero compliant (para. 28 of his WS). But as Mr. Andrews explains, the scenarios involve modelling assumptions and are not targets. More fundamentally, there is no requirement in the CCA 2008, or in government policy for carbon emissions, for all road transport to become net zero.

158. The upshot is that there is no basis for the court in a claim for judicial review to reject the analysis carried out by DfT.

159. I see no reason to question the judgment reached by the DfT that the various measures of carbon emissions from RIS 2 were legally insignificant, or *de minimis*, when related to appropriate comparators for assessing the effect on climate change objectives. I therefore accept the defendant's additional submission that the analysis carried out by officials was not an obviously material consideration which had to be placed before the SST for the purposes of setting RIS 2.

160. The defendant's evidence could be treated in an alternative way. Even if, for the sake of argument, it were to be assumed that the matters raised by the claimant were "obviously material," the defendant's evidence demonstrates that they were so insignificant in the context of setting RIS 2 under the IA 2015 that a failure by the SST to take them into account could not have materially affected the decision (*Peko-Wallsend* and *Hanks* at [64] above).

Conclusion

161. For all these reasons the application for judicial review must be dismissed.