IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
[2024] EWHC 1572 (Admin)

No. AC-2024-LON-000626

Royal Courts of Justice

Wednesday, 22 May 2024

Before:

MRS JUSTICE LANG DBE

B E T W E E N :

THE KING
(on the application of ANDREW BOSWELL) — Claimant

- and -

SECRETARY OF STATE
FOR TRANSPORT — Defendant

- and -

NATIONAL HIGHWAYS LIMITED — Interested Party

MR D WOLFE KC (instructed by Leigh Day) appeared on behalf of the Claimant.

MR J STRACHAN KC and MISS R GROGAN (instructed by the Government Legal Department) appeared on behalf of the Defendant.

MR R TAYLOR KC (instructed by Womble Bond Dickinson) appeared on behalf of the Interested Party.

J U D G M E N T

MRS JUSTICE LANG:

1 This is a renewed application for permission to apply for judicial review of the defendant's decision made pursuant to section 114 of the Planning Act 2008 (“PA 2008”), on 12 January 2024, to make a Development Consent Order ("the Order") for extensive highway works on the A22 between junction 19 and junction 25, and the gas pipeline diversion ("the Scheme"). The decision required an examination under the PA 2008 which culminated in the Examining Authority's Report ("Ex AR").

2 The Scheme is a Nationally Significant Infrastructure Project ("NSIP"), to which the National Policy Statement for National Networks ("NPSNN") applies. The NPSNN is currently under review. A revised draft has been published but has not been adopted. The Energy National Policy Statements ("Energy NPS") apply to the gas pipeline diversion, which is in itself an NSIP. The Energy NPS has since been revised but the 2011 versions continue to have effect for this application.

3 The claimant actively participated in the examination as an interested party, through his consultancy which is called "Climate Emergency Policy & Planning ("CEPP").

4 Sir Peter Lane, sitting as a High Court Judge, refused permission to apply for judicial review, on the papers, on 11 April 2024. Ground 3 was designated totally without merit at the invitation of the parties, and time was extended for an appeal on ground 3. I am not concerned with ground 3 today.

5 The claimant has applied to amend grounds 4 and 5 in the light of the recent judgment in *Friends of the Earth v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995 (Admin), commonly referred to as "*Net Zero II"* in which the court found that the Secretary of State for Energy Security and Net Zero, whom I shall refer to as "The Secretary of State for Energy", made irrational assumptions about the delivery of the emissions reductions in her proposals for meeting the carbon budget put out in the March 2023 Carbon Budget Delivery Plan ("CBDP"), submitted to Parliament pursuant to sections 13 and 14 of the Climate Change Act 2008. The CBDP has not been quashed, but the court has ordered the Secretary of State for Energy to lay before Parliament a report, which complies with sections 13 and 14, no later than 2 May 2025. The court also made declarations as to its findings that the report did not comply with the requirements of section 13 of the Climate Change Act 2008.

6 *Net Zero (2)* followed on from the court's decision in *R (Friends of the Earth) v Secretary of State for Business Energy, Industrial Strategy* [2022] EWHC 1841 (Admin) when the court ordered publication of a lawful section 14 report, resulting in the March 2023 CBDP.

7 I shall consider the application to amend when I consider grounds 4 and 5.

Grounds of challenge

8 I refer to the statutory and policy framework set out in the Statement of Facts and Grounds, and also referenced in the Summary Grounds of Resistance filed by the defendant and interested party.

Ground 1

9 The claimant submits that the defendant erred in law by conflating a test relating to the impact of carbon emissions in paragraph 5.18 of the NPSNN with the test for assessment of

significance under the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations").

10 In my view this ground is unarguable for the reasons given by the defendant and the IP. The assessment of whether a scheme is likely to have significant effects on the environment for the purposes of the EIA Regulations 2017 is a matter of judgment for the decision maker, subject only to challenge on rationality grounds.

11 The Institute of Environmental Management and Assessment ("IEMA") has produced a Guide called “Assessing greenhouse gas emissions and evaluating their significance” ("IEMA Guidance") to assist in the assessment of GHG impact assessments for the purposes of the 27 Regulations. Its authors are experts in the field of GHG impacts and environmental impact assessment. The IEMA Guidance advises that:

> "The crux of significance therefore is not whether a project emits GHG emissions, nor even the magnitude of GHG emissions alone, but whether it contributes to reducing GHG emissions relative to a comparable baseline consistent with a trajectory towards net zero, by 2050."

12 The IEMA Guidance goes on in section 6.3 to identify three potential conclusions which a decision maker might reach:

> (a) A project that follows a 'business-as-usual' or 'do minimum' approach and is not compatible with the UK's net zero trajectory, or accepted aligned practice or area-based transition targets, results in a significant adverse effect. It is down to the practitioner to differentiate between the 'level' of significant adverse effects e.g. 'moderate' or 'major' adverse effects.
>
> (b) A project that is compatible with the budgeted, science-based 1.5°C trajectory (in terms of rate of emissions reduction) and which complies with up-to-date policy and 'good practice' reduction measures to achieve that has a minor adverse effect that is not significant. It may have residual emissions but is doing enough to align with and contribute to the relevant transition scenario, keeping the UK on track towards net zero by 2050 with at least a 78% reduction by 2035 and thereby potentially avoiding significant adverse effects.
>
> (c) A project that achieves emissions mitigation that goes substantially beyond the reduction trajectory, or substantially beyond existing and emerging policy compatible with that trajectory, and has minimal residual emissions, is assessed as having a negligible effect that is not significant . . ."

13 Thus, the IEMA Guidance requires a judgment to be reached as to whether the emissions from a scheme are compatible with the trajectory to net zero. The only adopted trajectory is the one set by the national carbon budgets.

14 Accordingly, to apply the IEMA Guidance an assessment has to be made whether the Scheme emissions are compatible with that trajectory. That has been accepted by the courts

to be a lawful approach (See *R (Goesa Ltd) v Eastleigh Borough Council* [2022] EWHC 1821 (Admin)).

15 NPSNN paragraph 5.18 provides:

> "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."

16 The NPSNN thus requires a decision maker to determine whether the emissions for a Scheme would have a "material impact" on the ability of the Government to meet the current adopted carbon reduction targets by the carbon budgets and in zero time. That requires the same judgment which the IEMA Guidance requires i.e. whether the scheme emissions are compatible with the attainment of the adopted trajectory to net zero.

17 The Environmental Statement ("ES") explained that there is no set significance threshold for carbon, and referred to the IEMA Guidance and its approach and paragraph 5.18 of the NPSNN. An assessment was made, based on professional judgment, as to whether increases in GHG emissions, as a result of the Scheme could have a material impact on the ability of the UK Government to meet its carbon reduction targets and would therefore potentially be significant. The conclusion was that GHG emissions associated with the proposed Scheme were unlikely to have a material impact on the ability of the UK Government to meet its carbon reduction targets. They were compatible with the adopted trajectory to net zero, they fell within the second category of the IEMA Guidance, and so were not significant.

18 When the decision letter is read fairly and as a whole the defendant can be seen to have concluded that the emissions from the Scheme are compatible with the trajectory and are thus not significant. In that regard he agreed with the EXA. By asking himself whether the Scheme would have a material impact on the ability of the Government to attain the target set out in the carbon budget, the defendant undertook an assessment of the likely significance of the impact of the Scheme emissions in EIA terms, since he considered the compatibility of the Scheme emissions with the attainment of the adopted trajectory to net zero. In my judgment, the defendant's approach does not disclose any arguable error of law.

19 For these reasons permission is refused on ground 1.

Ground 2.

20 The claimant submits that even if (contrary to ground 1) the defendant was right to conflate the test in paragraph 5.18 of NPSNN with the term "significant" in the EIA Regulations, the defendant erred in interpreting the draft NPSNN and the extant and draft energy NPSs as if they supported this interpretation. The later Policies support the claimant's interpretation of paragraph 5.18 of NPSNN. They make a clear distinction between the in-principle question

whether emissions are a reason for refusing consent and the case specific question as to how emissions can and should be assessed.

21 I consider that this ground is unarguable for the reasons given by the defendant under both grounds 1 and 2.

22 In the decision at DL/87, the defendant concluded that:

> "The Secretary of State is satisfied that the Proposed Development complies with the NPSNN and will not lead to a breach of any international obligations that result from the Paris Agreement or Government's own polices and legislation relating to net zero. The Secretary of State has also considered the policies in the draft NPSNN, including changes in wording of the policies from the existing NPSNN, relating to climate change and carbon emissions and does not consider that the emerging policy requires any materially different approach to his consideration of the Proposed Scheme, particularly as the draft NPSNN also recognises that granting consent for road schemes which give rise to residual carbon emissions can be consistent with meeting carbon budgets."

23 Both the adopted NPSNN, at paragraph 5.18, and the draft NPSNN at paragraphs 5.35 to 5.37, require consideration of whether the Scheme emissions would be consistent or compatible with the attainment of the carbon budget. The defendant's conclusion at DL/70, DL/78 and DL/80 that the Scheme would not materially impact the Government's ability to meet its net zero targets were consistent with the policy approach in the draft NPSNN.

24 Turning to the Energy NPSs, the adopted NPS EN1 and the draft Energy NPSs which have since been adopted, are all consistent with the principle that residual carbon emissions arising from the development do not amount to a reason by itself to refuse the development. In my view, there was no arguable error in the defendant's interpretation of the draft NPSNN and the extant and draft Energy NPSs. The defendant's conclusions on significance were matters of evaluative judgment. It is relevant that at DL/68 the defendant found that emissions from the gas main diversion were negligible in comparison to the proposed development.

25 For these reasons permission is refused on ground 2.

Ground 4

26 On ground 4, the claimant submits that the defendant erred in law by failing to consider whether the Scheme would have a material impact on the Government's ability to comply with the Nationally Determined Contribution ("NDC").

27 Article 4(2) of the Paris Agreement provides that:

> "Each Party shall prepare, communicate and maintain successive nationally determined contributions (NDC) that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."

28 Pursuant to Article 4(2), the UK communicated an NDC with a target of a 68 per cent reduction of GHG emissions by 2030.

29 The NDC is a carbon reduction target that the defendant was required to consider under paragraph 5.18 of NPSNN and section 104 PA 2008.

30 The defendant concluded at DL/78 that he was satisfied that the development would not have ". . . a material impact on the ability of Government to meet the national carbon budgets and it will not lead to a breach of the UK's international obligations in relation to the Paris Agreement, or any domestic enactment or duties".

31 However, the claimant submitted that the defendant did not have sufficient information to assess the impact of the Scheme on the NDC because those obligations had not been fully translated into the existing carbon budget under the Climate Change Act 2008, and the defendant's statements to the contrary in DL/60 to 61 were wrong. The claimant therefore submits that the defendant failed to have regard to an obviously material consideration in seeking to discharge his duty under section 104 PA 2008 which rendered the decision unlawful. The NDC 2030 was clearly a relevant "carbon reduction".

32 Alternatively, the defendant's decision was inadequately reasoned on this point. It is impossible to tell from the DL how the defendant had considered the NDC 2030 and the impacts of the Scheme on it.

33 Further, and in the alternative, to the extent the defendant did consider this issue he did not do so rationally or, in the alternative, he proceeded on the basis of an error of fact, i.e. that achievement of the fifth carbon budget would result in the achievement of the NDC. This gave rise to unfairness, see *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 at [66].

34 The claimant also now seeks to amend this ground to add new paragraphs 86 to 88, which read as follows:

> "86 In any case the UK's '*domestic mitigation measures*' are those contained in CBDP. Even on its face the CBDP (i) only contains quantified measures to meet 92% of the NDC . . . and (ii) does not contain sufficient unquantified measures to close the gap – rather it relies on the promise that (at some unspecified time) government *'will bring forward further measures*' . . . In the absence of a set of identified measures to meet the NDC <u>in full</u>, it is hard to see how the UK could be said to be meeting its Article 4(2) obligation – even if the CBDP had lawfully complied with the requirements of section 13 CCA 2008.
>
> 87 But the picture is in truth even worse, the Court in *Net Zero II* held that in adopting the CBDP, the Secretary of State made the irrational assumption the quantified policies and proposals it contains could be delivered in full . . ; . alternatively, she had sufficient information rationally to conclude that over-delivery would at least balance under-delivery . . . Although the Court in *Net Zero II* was concerned with achievement of the statutory carbon budgets, the same flawed logic applied to the assessment of the contribution of quantified policies to meeting the NDC; any assumption that quantified policies would deliver 92% of the emissions reductions necessary to meet the NDC target was therefore rational.

> 88 Thus the true position, in law and fact, at the date of the Decision, was that the UK had no set of domestic mitigation measures that were lawfully geared to meeting the NDC target. That was a breach of international law, and permitting the Scheme, with its increase in carbon emissions, could only serve to exacerbate the breach."

35 I consider that this ground is unarguable for the reasons given by the defendant and the IP. The defendant expressly considered the issue of compliance with the Paris Agreement, and decided, in his judgment, that granting consent to the Scheme would not result in a breach of the UK's obligations.

36 Under the Paris Agreement the obligation upon the UK is to pursue domestic mitigation measures with the aim of achieving the objectives of an NDC. There is no absolute obligation to meet the NDC. In the March 2023 CBDP, the Secretary of State for Energy explained:

> "28 The government is committed to delivering its information on commitments including the 2030 Nationally Determined Contribution ("NDC"). Under the Paris Agreement. The UK will report to the United National Framework Convention on Climate Change on progress towards meeting the 2030 NDC from 2024 and will report on progress every 2 years.
>
> 29 We have quantified emissions savings to deliver 88 Mt or 92% of the NDC. We are confident the delivery of emissions savings by unquantified policies detailed in this package will largely close this gap and the government will bring forward further measures to ensure that the UK will meet its international commitments if required."

37 At DL/60 the defendant expressly considered the UK's obligations under the Paris Agreement. He explained at DL/61:

> "The Climate Change Act requires five-yearly carbon budgets to be set 12 years in advance so as to meet the 2050 target. Six carbon budgets have been adopted . . . Achieving net zero will require further greenhouse gas ('GHG') emissions to be aligned with these and any future new or revised carbon budgets that may be set out by Government to achieve the 2050 target. Compliance with the Climate Change Act 2008 . . . would provide a route towards compliance with Nationally Determined Contributions as set out in the Paris Agreement."

38 At DL/78 the defendant stated:

> ". . .
> The Secretary of State notes that the Carbon Budget Delivery Plan sets out the quantified impact of policies and proposals across all sectors with respect to meeting carbon budgets and also relies on unquantified policies, which together form the basis of the Secretary of State for Energy and Net Zero's conclusion that they have in place

> policies and proposals which will enable carbon budgets to be met. The Secretary of State considers that it is appropriate for him to take into account the Net Zero Strategy and that the question of delivery risk does not affect his conclusions on the impacts of the Proposed Development. . .
>
> The Secretary of State is satisfied that in light of the net construction and operation emissions that have been identified, that consenting the Proposed Development will not affect the delivery of the Net Zero Strategy, or net zero in principle, nor will it have a material impact on the ability of Government to meet the national carbon budgets and it will not lead to a breach of the UK's international obligations in relation to the Paris Agreement or any domestic enactments or duties."

39 At DL/86 the defendant stated:

> "The Secretary of State is satisfied that the Proposed Development is compatible with these policies and that the very small increase in carbon emissions that will result from the Proposed Development can be managed within the Government's overall strategy for meeting net zero and the relevant carbon budgets. The Secretary of State considers that the Proposed Development will not materially impact the Government's ability to meet its net zero targets."

40 The defendant went on to confirm at DL/87:

> "The Secretary of State is satisfied that the Proposed Development complies with the NPSNN and will not lead to a breach of any international obligations that result from the Paris Agreement or Government's own policies and legislation relating to net zero . . ."

41 The defendant did not limit his consideration to national carbon budgets as the claimant alleges. The defendant relied upon the Government's own quantified carbon reduction policies as indicated in the CBDP.

42 In my view, on a fair reading of the DL, it is unarguable that the defendant did not have regard to the NDC as it was expressly referred to. I also consider it is unarguable that the reasoning in the DL did not meet the required legal standard. The reasoning was adequate, intelligible and addressed the principal controversial issues.

43 The defendant's judgment that the very small increase in emissions associated with the Scheme would not materially affect the ability to meet the NDC under the Paris Agreement, and would not lead to a breach of it, was not arguably irrational. I do not consider it is arguable that he proceeded on the basis of an error of fact in relation to the achievement of the NDC. As I have already stated, he also relied upon the Government's unquantified carbon reduction policies.

44 Turning now to the proposed amendment, at the time of the decision the Secretary of State's stated policy as set out in the CBDP, was that he intended to comply with the NDC and the Government would adopt additional unquantified policies to meet the NDC should that be required. The defendant was entitled to rely on that general approach and he was not required to examine the detail of the CBDP which was the responsibility of a different

Secretary of State. Moreover, the stated policy and general approach of the Secretary of State for Energy has not changed and is not affected by the decision in *Net Zero II*.

45 The revised and hopefully this time lawful CBDP is to be submitted to Parliament by May 2025. A planning decision maker is entitled to assume that a separate regulatory regime will operate effectively: see *Frack Free Balcombe Residents Association v Secretary of State for Levelling Up, Housing and Communities & Ors* [2023] EWHC 2548 (Admin). Applying that principle here a decision maker determining an application for a DCO is entitled to assume that the Government will take the necessary steps to comply with the regime under the Climate Change Act 2008 and meet the carbon targets. It is not a process for a different decision maker to undertake each time he grants or refuses permission for a development.

46 In regard to paragraph 88 of the amended Statement of Facts and Grounds, there was no finding in *Net Zero II* that the Secretary of State for Energy or the Government was in breach of the Paris Agreement. As the IP submits if the claimant's submission was correct it would have a surprising consequence that no development which gave rise to any additional carbon emissions could now be consented.

47 For these reasons permission is refused on ground 4. Permission to amend ground 4 is refused on the basis that the proposed amended grounds are not arguable.

Ground 5

48 The claimant submits that, in applying paragraph 5.18 of NPSNN, the defendant failed to have regard to an obviously material consideration, namely the risks of non-delivery by the Government of its carbon reduction targets under its current policies and strategies.

49 The claim as originally pleaded raised the possibility that the CBDP would be found to be unlawful and therefore the defendant's reliance on it would be unlawful. That part of the pleading has now been replaced by a challenge based on the judgment in *Net Zero II*.

50 The claimant submits, in the light of *Net Zero II*, that the irrational assumptions made in the CBDP and the failure to undertake the proper assessment of underlying delivery risks, including in relation to transport policies, means that there has never been a lawful plan to meet Carbon Budget 6. Therefore there was no lawful or factual basis for the defendant's assumption that delivery risks had been assessed.

51 I consider that this ground is unarguable, for the reasons given by the defendant and the IP.

52 The defendant addressed the matter of delivery risk in the decision letter at DL/78 as follows:

> ". . . CEPP submitted that the 'delivery risk' in the proposals set out in the Net Zero strategy should be taken into account. The Secretary of State notes that the Carbon Budget Delivery Plan sets out the quantified impact of policies and proposals across all sectors with respect to meeting carbon budgets and also relies on unquantified policies, which together form the basis of the Secretary of State for Energy and Net Zero's conclusion that they have in place policies and proposals which will enable carbon budgets to be met. The Secretary of State considers that it is appropriate for him to take into account the Net Zero Strategy and that the question of delivery risk does not affect his conclusions on the impacts of the Proposed Development. The

> CBDP records in Appendix D that the Government has reasonable to high confidence in the delivery of the commitments in the Transport Decarbonisation Plan in any event. Further, the ExA concluded that the principle of constructing new roads did not conflict with the Net Zero Strategy or Transport Decarbonisation Plan [ER 5.5.58 and 5.5.59]. The Secretary of State is satisfied that in light of the net construction and operation emissions that have been identified, that consenting the Proposed Development will not affect the delivery of the Net Zero Strategy, or net zero in principle, nor will it have a material impact on the ability of Government to meet the national carbon budgets and it will not lead to a breach of the UK's international obligations in relation to the Paris Agreement or any domestic enactments or duties."

53 In my judgment, it was not arguably irrational or otherwise unlawful for the defendant to rely on the policies and proposals already in place to enable the carbon budgets to be met, including to look at risk. Delivering risk was not even arguably an obviously material consideration for the defendant's decision making.

54 The Climate Change Act 2008 creates a separate regulatory framework to the development control process set out in the Planning Act 2008. The Climate Change Act 2008 requires the Government to set targets and to adopt policies designed to achieve those targets. Part of that process requires an examination of delivery risk.

55 I refer to, and rely upon, my conclusions on ground 4. A planning decision maker is entitled to assume a separate regulatory regime will operate effectively: see the *Frack Free* case. A decision maker determining an application for a Development Consent Order is entitled to assume that the Government would put in place policies and proposals that will achieve the Government's carbon targets, and will review the delivery risk associated with those policies and proposals and, if necessary, respond to such risks by putting further policies and proposals in place in future thereby ensuring that the Government's carbon targets will be achieved. That process is for the Climate Change Act 2008 regime to regulate. It is not a process for a decision maker in a development control process to undertake each time a decision to grant or refuse permission for a development is taken.

56 Here the defendant was satisfied that the emissions arising from the Scheme would not prejudice compliance with carbon budgets even before taking into account non-planning policies such as the Transport Decarbonisation Plan. ("TDP") He said at DL/70:

> "….the Secretary of State is satisfied …. that the Proposed Development would be unlikely to materially impact the ability of the Government to meet its carbon reduction targets. As set out in more detail below, the Secretary of State also considers that the Applicant's assessments represent a conservative assessment and therefore, as recognised by paragraph 5.18 NPSNN, he considers that the impacts may ultimately be lower than those assessed given the range of non-planning policies adopted by Government which seek to reduce carbon emissions from road transport, as set out in the Applicant's TDP sensitivity assessment."

57 The defendant was entitled to rely on his own policies in the TDP which had not been the subject of any successful legal challenge.

58 For all these reasons permission is refused on ground 5. Permission to amend ground 5 is refused on the basis that the amended grounds are not arguable.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.