Neutral Citation Number: [2024] EWHC 339 (Admin)

Case No: AC-2023-LON-002495

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2024

Before :

THE HON. MR. JUSTICE HOLGATE

- -

Between :

The KING on the application of
(1) SAVE STONEHENGE WORLD HERITAGE SITE LIMITED
and
(2) ANDREW RHIND-TUTT

Claimants

- and-

SECRETARY OF STATE FOR TRANSPORT

Defendant

- and-
(1) NATIONAL HIGHWAYS LIMITED
(2) HISTORIC BUILDINGS AND MONUMENTS COMMISSION FOR ENGLAND ("HISTORIC ENGLAND")

Interested Parties

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- -

David Wolfe KC, Victoria Hutton and Stephanie David (instructed by **Leigh Day Solicitors)** for the **Claimants.**
James Strachan KC and Rose Grogan (instructed by **Government Legal Department)** for the **Defendant.**
Reuben Taylor KC (instructed by **Pinsent Masons LLP**) for **Interested Party 1.**
Richard Harwood KC (instructed by **Historic England**) for **Interest Party 2.**

Hearing dates: **12-14 December 2023.**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19/02/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr. Justice Holgate:

Introduction

1. On 30 July 2021 the High Court quashed the decision of the defendant, the Secretary of State for Transport ("the SST"), made on 12 November 2020 ("the first decision") to grant a development consent order ("DCO") under s.114 of the Planning Act 2008 ("the PA 2008") for the construction of a new dual carriageway section of the A303 13km long between Amesbury and Berwick Down, Wiltshire. The route crosses the Stonehenge part of the Stonehenge, Avebury and Associated Sites World Heritage Site ("the WHS"). The judgment is reported as *R (Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2022] PTSR 74 ("*Stonehenge 1*)".

2. The central section of the scheme would run past Stonehenge in a tunnel 3.3km in length. The western tunnel portals would connect to a cutting 1km long through the WHS, 7m to 11m deep and 35m to 60m wide ("the western cutting"). The road would then run through a new grade-separated junction with twin roundabouts connecting with the A360 and lying beyond the western boundary of the WHS ("the Longbarrow junction"). The eastern tunnel portals would connect to a cutting 1km long to join the existing A303 at a new grade-separate junction with the A345 ("the eastern cutting"). The scheme would replace the existing surface level, single carriageway section of the A303, the traffic on which is visible from and audible at the Stone Circle.

3. Following *Stonehenge 1* the application for the DCO fell to be redetermined. No material change was made to the scheme. In a second decision letter dated 14 July 2023, the Minister of State[1], acting on behalf of the SST, granted the DCO ("the second decision"). This second claim for judicial review is brought under s.118 of the PA 2008 to quash that decision. The application for permission came before me at a rolled-up hearing.

4. The first claimant ("C1") was the claimant in the first judicial review. It is a company formed by the supporters of the Stonehenge Alliance ("SA"), an unincorporated, umbrella campaign group, which co-ordinated representations from many objectors to the scheme during the processes which led to both the first and second decisions.

5. The second claimant ("C2") Mr. Andrew Rhind-Tutt, became the owner of a property known as Bowles Hatches, Amesbury in June 2021. At one point he said that his land is to be compulsorily acquired under the DCO. During the hearing that claim was challenged. Mr. David Wolfe KC, who appeared on behalf of both claimants, did not maintain that position. Instead, he said that land would be acquired over which C2 has a right of way and that he would have a claim for injurious affection for diminution in the value of his interest in land. On that basis he says that his rights under Article 1 of the First Protocol to the European Convention of Human Rights ("A1P1") are engaged. C2 was a registered interested party in the statutory Examination of the DCO. He also submitted written representations in the redetermination objecting to the scheme.

[1] However, for convenience this judgment will generally refer throughout to the Secretary of State rather than the Minister.

6. The application for the DCO was made by the first interested party, National Highways Limited ("IP1"), a strategic highways authority established under the Infrastructure Act 2015.

7. The second interested party, Historic England ("IP2"), was a statutory consultee in relation to the application for the DCO and is the Government's statutory adviser on the historic environment.

8. On 16 November 1972 the General Conference of the United Nations Educational, Scientific and Cultural Organisation ("UNESCO") adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage ("the Convention").

9. On 29 May 1984 the United Kingdom ratified the Convention. In 1986 the World Heritage Committee ("WHC") "inscribed" Stonehenge and Avebury as a WHS having "Outstanding Universal Value" ("OUV") under article 11(2) of the Convention.

10. The WHC's statement of the OUV for the WHS was set out in *Stonehenge 1* at [6]. An overview of the historic and archaeological features of the Stonehenge part of the WHS, which occupies about 25 sq. km, together with listed buildings and other heritage assets was set out at [7] to [8]. The World Heritage Site Management Plan describes the major impact of the current A303 on the integrity of the WHS, its landscape and setting [9]. Proposals for improving this section of the A303 have been under consideration since the 1990s [10].

11. The proposed DCO scheme, in particular the western cutting, western tunnel portals and the Longbarrow junction, have attracted substantial opposition.

12. In 2017 the WHC expressed concern that the shorter tunnel then proposed (2.9km long) and the western and eastern cuttings would adversely affect the OUV. They asked the UK to consider a non-tunnel bypass to the south of the WHS ("route F010") or a longer tunnel 5km in length, which would remove the need for any cuttings inside the WHS.

13. In the DCO scheme IP1 increased the length of the tunnel to 3.3km. In 2019 the WHC commended this increase, but was still concerned about the proposal for exposed dual carriageways within the WHS, particularly the western cutting, which would impact adversely on the OUV of the WHS, including its integrity. The Committee encouraged the UK not to proceed with the scheme in its current form and to pursue a longer tunnel "so that the western portal would be located outside" the WHS. But it no longer asked the UK to pursue the F010 option (*Stonehenge 1* at [13]).

14. The Examination of the DCO scheme by the Panel of five planning inspectors ran between 2 April 2019 and 2 October 2019. It considered an alternative option which omitted the western cutting and increased the length of the tunnel to 4.5km, so that the western portals would be located beyond the WHS. The Examination also considered another alternative which would cover 800m of the cutting westwards from the tunnel portals, instead of increasing the length of the tunnel bores. At that stage the longer tunnel option would have increased project costs by £578m and the cut and cover option by £264m. IP1 considered the longer tunnel to be unaffordable. It also rejected

both options because it considered they would provide "minimal benefit in heritage terms". IP1 also relied upon the fact that those alternatives had been addressed in an options appraisal when its preferred scheme had been selected for inclusion in the SST's Road Investment Strategy under the Infrastructure Act 2015. Although objectors criticised that appraisal and IP1's case in the Examination, the Panel declined to make any findings about the relative merits of IP1's scheme as against alternative options. The SST took the same approach (*Stonehenge 1* at [15] and [242] to [258]).

15. On 2 January 2020 the Panel submitted their report on the Examination of the application for the DCO to the Department for Transport. They said that the western cutting would introduce a greater physical change to the Stonehenge landscape than had occurred in its 6,000 years as a place of widely acknowledged human significance, a change which would be permanent and irreversible. Having reviewed the case as a whole the Panel recommended against the grant of the DCO. The scheme would significantly affect the OUV of the WHS, including its integrity and authenticity and, together with its impact upon the significance of the settings of heritage assets, would cause "substantial harm" in terms of national policy. The Panel considered that the benefits of the scheme would not be substantial and in any event would not outweigh that harm to the WHS. In addition, the totality of the adverse impacts of the scheme (including landscape character and visual amenity) would strongly outweigh its overall benefits (*Stonehenge 1* at [14] to [17]).

16. In his first decision the SST, preferring the views of IP2 to those of the Panel, said that the harm to heritage assets would be "less than substantial" and not "substantial". In reaching that conclusion he took into account the concerns about the western cutting, the western portal, Longbarrow junction and, to a lesser extent, the eastern cutting. The SST disagreed with the Panel's conclusion that the scheme would cause harm to the landscape carrying "considerable" negative weight. He found that landscape and visual impacts would have a neutral effect. Taken as a whole, the need for the scheme and its other benefits outweighed any harm (*Stonehenge 1* [18]).

17. *Stonehenge 1* referred to the case law which summarises the statutory framework for the designation of national policy statements ("NPS") and the making of a DCO under the PA 2008 [27]. It will be necessary to refer to certain provisions in more detail below.

18. The National Policy Statement for National Networks ("NPSNN") was summarised in *Stonehenge 1* at [37] to [48] and development plan policy at [49] to [52].

19. Key provisions relating to the Convention were summarised at [56] to [59]. In addition it will be necessary to refer below to Art.11.

20. The parties agreed a number of legal principles which were included as Appendix 1 to *Stonehenge 1*. Principles for dealing with a complaint that a Minister has failed to take a material consideration into account were summarised in the judgment at [62] to [65].

21. Relevant parts of the Environmental Statement ("ES") and the Heritage Impact Assessment accompanying the application for the DCO were summarised at [68] to [77].

22. The Panel's Report on the Examination was summarised at [87] to [121] and the SST's first decision letter at [129] to [144].

23. In the judicial review of the SST's first decision, C1 raised a large number of grounds (summarised in *Stonehenge 1* at [22]). Most of these were rejected as unarguable and permission to apply for judicial review was refused ([292]). On 18 May 2021 Waksman J refused an application for permission to add an additional ground 6. Undeterred, C1 renewed its application, which I refused at a hearing on 10 June 2021.

24. The first claim for judicial review succeeded on only part of ground 1 and part of ground 5. There was no appeal.

25. Under ground 1(iv) the Court held that the SST had failed to take into account and assess the impact of the proposal on the significance of all designated heritage assets [167] – [181]. Under ground 5(iii) the Court held that the SST had failed to consider the relative merits of the two alternative options for addressing the harm that would be caused by the western cutting and western portals, namely the extended tunnel 4.5km long and the covering of the western cutting for the first 800m [242] – [290].

26. This second claim for judicial review does not raise any grounds of challenge to the treatment in the second decision letter of the two issues upon which the first claim was successful. It is important to emphasise, that the court is only concerned with whether there was an error of law in the redetermination of the application for the DCO. The court has no involvement in considering the merits of the scheme proposed or alternatives to that scheme.

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

The redetermination process

28. On 30 November 2021 the SST wrote to IP1 and all interested parties pursuant to rule 20(2) of the Infrastructure Planning (Examination Procedure) Rules 2010 (S.I. 2010 No.103) ("the 2010 Rules" – see below) setting out the matters on which he invited further representations for the redetermination of the application ("the Statement of Matters"). They included:

    - Alternatives to the scheme, but not limited to the longer tunnel option or covering the western cutting;

    - Changes affecting the application of national or local policy;

    - The impact of the scheme on carbon budgets under the Climate Change Act 2008 ("CCA 2008"), including the sixth carbon budget, and the likely significant effects of the development on climate, including greenhouse gas ("GHG") emissions;

    - Whether any further updated environmental information was necessary;

    - Any other matters arising since the first decision letter which should be taken into account in the redetermination.

    IP1 was given until 11 January 2022 to respond.

29. The SST explained in his letter that he would take into account the Panel's report "any relevant responses received to this round of consultation and any subsequent consultation" and all previous material sent to the Planning Inspectorate and the SST before the first decision letter, all of which had been published on the National Infrastructure Planning website.

30. IP1 sent responses to the SST on 11 January and 8 February 2022. On 24 February 2022 the SST invited interested parties to respond to the SST's Statement of Matters and to IP1's representations by 4 April 2022.

31. On 3 April 2022 C2 submitted representations objecting to the effect of the proposed flyover at the A303/A345 junction, the impact of the scheme on *inter alia* heritage assets and insufficient consideration of alternative options.

32. On 4 April 2022 the SA submitted a number of representations. They contended that the Examination should be reopened, because an inquisitorial process and proper testing of evidence was required on such matters as the heritage impact of the scheme and alternative options. They referred to the WHC's Decision 44 issued on 31 July 2021, which indicated that if the scheme were to be approved in its current form the WHS was likely to be placed on the List of World Heritage in Danger under Art.11 of the Convention. The SA contended that if the scheme were then to go ahead it was probable that Stonehenge would lose its World Heritage status. They argued for a longer tunnel, the southern bypass (route F010) or a "non-expressway" option (see Ground 2 below) as preferable alternatives. The SA challenged the reliability of IP1's traffic forecasts and the adequacy of its updated baseline surveys for butterflies and great crested newts. The SA also raised other objections.

33. Mr. Richard Harwood KC, who appeared on behalf of IP2, helpfully explained how the WHC is administered and advised. The WHC is an inter-governmental committee, with members from 21 states elected by UNESCO's General Assembly. The WHC is assisted by a Secretariat known as the World Heritage Centre. The Committee receives advice from *inter alia* the International Council on Monuments and Sites ("ICOMOS"). ICOMOS may seek the views of its national committees, but any advice it provides to the WHC is independent of those committees. ICOMOS-UK is the relevant national committee.

34. On 4 April 2022 ICOMOS-UK submitted representations to the SST. It also expressed concerns about the risk of Stonehenge being delisted, drawing a parallel with WHC's decision in 2021 to delist Liverpool – Maritime Mercantile City WHS. In 2012 the WHC placed that WHS on the list of World Heritage in Danger. It then asked the UK to define a Desired State of Conservation ("DSOC"), that is a state needing to be achieved for the property so that it can be removed from the List of World Heritage in Danger. Because the WHC was not satisfied with the draft DSOCs submitted by the UK, it eventually decided to remove the property from the List of World Heritage Sites. The WHC has said that approval of the current A303 scheme would result in Stonehenge being placed on the List of World Heritage in Danger. ICOMOS-UK submitted that it is difficult to see how Stonehenge could be removed from that list unless the current scheme is cancelled. If that does not happen, the WHC could be faced with the type of situation which has previously led to removal of a site from the list of WHSs.

35. Historic England provided written representations to the SST on 4 April 2022. While it mentioned the assessment by IP1 of alternative routes, IP2 did not offer any view on the relative merits of the proposed scheme as against alternatives. It did say that SST should treat WHC's decision of 31 July 2021 as a "material consideration" in the redetermination of the DCO application. But it did not offer any advice on how the SST should consider the Committee's views. Otherwise, IP2 said that if the proposed

scheme should be approved, it would seek to ensure that the scheme would be designed and delivered in the best way possible for the OUV of the WHS.

36. The Consortium of Stonehenge Experts submitted representations on 4 April 2022 identifying four heritage assets in the WHS which, they said, would be destroyed in whole or in part under the scheme. They said these assets had equivalent significance to scheduled ancient monuments.

37. On 20 June 2022 the SST asked IP1 to confirm whether the heritage assets to which the Consortium referred had been addressed in its assessment and, if not, to provide the necessary assessment. IP1 was also asked to address the SA's criticisms of the baseline surveys it had carried out for butterflies and great crested newts.

38. On 12 July 2022 IP1 responded to the SST's request of 20 June 2022. It said that three of the assets had already been assessed in material it had provided to the examination, giving the references. They explained why these assets did not qualify for scheduling as ancient monuments and did not have equivalent significance. In relation to the fourth asset, IP1 accepted that it was of high or national importance. It identified those parts of the application documents and the Examination transcripts which considered the effects of the DCO scheme on that asset. IP1 said that the scheme would have no physical impact upon it and groundwater levels would not change. The current conditions that allow this asset to be preserved would continue. On 13 July 2022, the SST gave interested parties an opportunity to respond to IP1's representations.

39. On 3 August 2022 Historic England sent its response on the four heritage assets raised by the Consortium. It continued to endorse IP1's approach. The court was not shown any further response from any interested party criticising IP1's representations on this matter.

40. On 3 August 2022 the SA sent representations to the SST. It renewed its request for the Examination to be reopened in view of the amount of new information which had been submitted and, they said, the absence of important material. The Alliance also responded to IP1's representations in July 2022 and referred to harmful consequences if Stonehenge were to be delisted as part of the WHS.

41. On 25 August 2022 UNESCO's Advisory Mission published its Report to the UK Government assessing the A303 scheme and possible modifications in the light of the WHC's decision on 31 July 2021. The Government had invited the Mission to carry out this exercise. The Mission acknowledged that the scheme would remove the A303 from the central part of the WHS, but said that the dual carriageways in cuttings would adversely and irreversibly impact on the integrity of the WHS, through removal of archaeological features and deposits, disruption of the spatial and visual links between monuments and, overall visual impact. The Mission advised that the appropriate test is not whether there is a net benefit to the OUV of the WHS, but "rather how any adverse impact on OUV can be avoided." They said that if the scheme were to proceed, the minimum change required would be an extension of the underground section of the western approach at least to the western boundary of the WHS, whether in tunnel or cut and cover. The proposed Longbarrow junction should be relocated further to the west insofar as this is practically possible. The report concluded with 22 recommendations.

42. On 26 August 2022 the SST invited IP1 to comment on that report. IP1 did so on 9 September 2022. On 14 September the SST invited interested parties to respond to those comments. IP2 and ICOMOS-UK made representations.

43. On 24 May 2023 the SST was provided with a submission from his officials recommending that the DCO be granted. The briefing comprised a two-page note accompanied by six annexes.

44. Annex A provided the SST with a link to the website of the Planning Inspectorate containing all of the documents submitted: (1) with IP1's application, (2) during the Examination, (3) during post-Examination consultations by the SST and (4) during the redetermination process. Annex A specifically drew the SST's attention to "the responses to the consultations that have taken place during the redetermination process" and provided links to the application documents, the ES and its Annexes and in particular chapter 6 of the ES (dealing with heritage impacts), chapter 14 of the ES (dealing with climate impacts) and the Non-Technical Summary of the ES as a whole.

45. Annex B contained the draft decision letter. The court was told that the published version of the decision letter did not differ from that draft in any way material to the issues in this claim. The SST was also provided with the Panel's Report on the Examination. The decision letter contained cross-references to the Report, which in turn referred to documents on the Inspectorate's website.

46. Annex F provided a 20-page summary of the findings and recommendations of UNESCO's Advisory Mission in August 2022 and responses on their Report from IP1 and certain interested parties (including the SA) arranged under each of the 22 recommendations. Annex F was accompanied by a spreadsheet summarising the responses of other interested parties on the Report.

47. The Minister, acting on behalf of the SST, stated on 27 June 2023 that he agreed to the grant of the DCO for the reasons set out in the draft decision letter. The second decision letter was issued on 14 July 2023.

The second decision letter

48. The second decision letter is a detailed document 63 pages long and covering many subjects.

49. The decision letter stated that save where otherwise stated, the SST agreed with the Panel's findings and conclusions and their reasoning in support, as set out in their Report (DL 20).

50. The SST had regard to the NPSNN and the draft revision of that document published on 14 March 2023. He considered that any changes in that draft would not lead him to reach a different conclusion on the DCO application (DL 21).

51. The SST addressed the need for and benefits of the scheme at DL 22 to DL 35. There has been congestion on this section of the A303 for over 30 years. It is the first section of single carriageway on that road travelling westwards from London. At times traffic levels can be twice the design flow capacity (DL 22).

52. The Road Investment Strategy for 2015 to 2020 ("RIS1") stated that the A303 corridor needs to be improved. The scheme is one of three major improvements to the A303/A358 route identified in RIS1. The scheme is also supported in the subsequent strategy RIS2. The A303 has over 35 miles of single carriageway, resulting in congestion, delay and the risk of accidents. The Panel accepted that the removal of the bottleneck at Stonehenge would be a strategic benefit. The single carriageway causes significant delay and traffic to divert onto less suitable roads, with harmful consequences for those people living near to those routes (DL 26).

53. The scheme would contribute to the objectives of creating a high-quality route between the south-east and south-west of the country, enabling growth in jobs, tourism and housing. It would meet future traffic needs and result in reduced, more reliable journey times. The new route would be safe, helping to reduce collisions and casualties. It would reduce traffic using routes through local settlements (DL 28 to DL 29).

54. The SST considered adverse impacts of the scheme between DL 36 and DL 188 under headings which included:

- Agriculture
- Cultural heritage and the historic environment
- Landscape and visual effects
- Public rights of way
- Climate change (including carbon emissions and cumulative effects)
- Air quality
- Construction and operational impacts
- Noise and vibration
- Biodiversity and wildlife
- Flood risk
- Ground water protection
- Land contamination

55. The section of the decision letter dealing with cultural heritage and the historic environment may be sub-divided as follows:

- The assessment of impacts on every heritage asset, based on the ES, the Heritage Impact Assessment and responses to the Statement of Matters (DL 43 to DL 66)
- The conclusions of the Panel and SST on the level of harm to heritage assets (DL 67 to DL 82)

- New archaeological finds (DL 83 to DL 88)

- The Secretary of State's views on the re-opening of the Examination (DL 89)

- Issues arising from the Statement of Matters, including further assessments added to the ES and the Report of the Advisory Mission (DL 91 to DL 101)

- The SST's overall conclusions on heritage matters (DL 102 to DL 105).

56. I note that at DL 95 to DL 97 the SST summarised the representations on the four heritage assets referred to by the Consortium of Stonehenge Experts (see [36] to [39] above) and agreed with IP1's assessment of the effect of the scheme on those assets, relying upon advice from Historic England. Although the claimants made brief criticisms in their skeleton (paras. 14 and 20) of the handling by the SST of this subject, it was not pursued by Mr Wolfe in his oral submissions in support of the grounds of challenge. There is no arguable ground for legal challenge here.

57. Between DL 189 and DL 207 the SST summarised the "appropriate assessment" carried out for the scheme, to comply with The Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 1012). At DL 207 the SST concluded that the scheme would have no adverse effects on the integrity of any European site.

58. The SST considered alternatives to the proposed scheme at DL 208 to DL 233.

59. The SST set out his overall conclusions on the case for granting the DCO at DL 234 to DL 243. He concluded that the need for the scheme and its other benefits outweighed all the harm that had been identified.

The grounds of challenge

60. In summary, the claimants seek to raise the following grounds of challenge:

Ground 1

The SST failed to re-open the Examination into the application for the DCO in breach of the common law duty to act fairly and Article 6 of the ECHR.

Ground 2

Firstly, when assessing the F010 route as an alternative to the DCO scheme the SST failed to have regard to certain "obviously material considerations" and secondly, he failed to have regard to a "non-expressway" option.

Ground 3

In ascribing no weight to the risk of Stonehenge being delisted as a WHS for the reasons given in DL 101 the SST acted irrationally.

Ground 4

The SST adopted an unlawful approach to the Convention in finding that, because the scheme accorded with the NPSNN, the grant of the DCO would not involve any breach by the UK of its obligations under the Convention.

Ground 5

The SST failed to have regard to an obviously material consideration, namely the Carbon Budget Delivery Plan ("CBDP") and the Net Zero Growth Plan ("NZGP") both published in March 2023.

Ground 6

The SST failed to consider not applying the NPSNN under s.104(4), (5) or (7) of the PA 2008 and/or acted irrationally in not departing from the NPSNN in relation to climate change, given that that policy is being reviewed because it does not take into account current obligations under the CCA 2008.

Ground 7

The SST's approach to environmental impact assessment was unlawful in relation to the cumulative effect of GHG emissions from the DCO scheme and other committed road schemes.

61. During the hearing Mr. Wolfe confirmed on behalf of the claimants that they have abandoned the original ground 8 in the statement of facts and grounds.

62. I rejected ground 4 in *Stonehenge 1* at [210] to [223]. At paras. 74 to 83 of the statement of facts and grounds, the claimants argue that that decision was wrong, seeking to distinguish the subsequent decision of the Court of Appeal in *R (Friends of the Earth Limited) v Secretary of State for International Trade* [2023] 1 WLR 2011 at [50(ii)]. However, in his skeleton Mr. Wolfe does not ask me to revisit ground 4. Instead, he reserves his position to argue the matter if this case should proceed to a higher court. I would only add that even if the meaning of articles 4 and 5 of the Convention is a matter for determination by the court, rather than applying the "tenable view" test to the decision-maker's interpretation, ground 4 remains unarguable, as I explained in *Stonehenge 1* at [217].

63. On 23 October 2023 Sir Duncan Ouseley ordered that the application for permission to apply for judicial review should be adjourned to a rolled-up hearing.

64. On 6 November 2023 I agreed to grant IP1's unopposed application for a stay of ground 7 pending the decision of the Court of Appeal in the appeal against the decision of Thornton J in *R (Boswell) v Secretary of State for Transport* [2023] EWHC 1710 (Admin).

65. On 20 October 2023 the SST disclosed to the claimants the briefing provided to his Minister for deciding the DCO application. This led to an application by the claimants to amend the statement of facts and grounds by adding a new ground alleging that the briefing material had been legally inadequate, so that the decision-maker failed to take into account a number of obviously material considerations, contrary to the principles set out in, for example, *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154. I shall refer to this as ground 8. It was agreed at the

hearing that whether permission to amend should be granted depends essentially upon whether the court considers this ground to be arguable.

66. Like much of the statement of facts and grounds, the application to add ground 8 was diffuse. It suggested that the SST should have been briefed in some detail on the reasoning in *Stonehenge 1* and provided with an analysis of the underlying evidence to support many of the conclusions in the draft decision letter, so that the SST could form his own opinion on each such matter. Then it was submitted that the SST should have been briefed about the matters raised by all interested parties in their written representations in the redetermination process. The claimants relied upon a table setting out many points which the SA had made.

67. This approach was repeated in the claimants' skeleton, which was accompanied by a table 38 pages long containing a "summary" of some 50 different contentions under ground 8. Many, if not most, of those points could only be appreciated by trawling through the materials which had been submitted to the Planning Inspectorate during the Examination or to the Department after *Stonehenge 1*. The 3 day hearing which the parties had asked the court to provide would have been insufficient to address all this material and related submissions, as well as the original grounds of challenge.

68. The way in which this and some other parts of the claimants' challenge were presented to the court did not accord with CPR 1.3, the duty to help the court to further the overriding objective. Their approach was not proportionate. In addition, it is now well established that the duty of candour in judicial review applies not only to defendants but also to claimants. It is a continuing duty and includes an obligation to re-assess the propriety and/or viability of a claim or ground of challenge in the light of a defendant's responses (see *R (Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416 at [35]-[36] and [40]). This is linked to the duty to cooperate with the court. It is reiterated in para.15.2.4 of the Administrative Court Judicial Review Guide 2023.

69. It should also be borne in mind that the claimants have not yet been granted permission to apply for judicial review. It has not yet been determined that any of their grounds of challenge is arguable. A rolled-up hearing was ordered because the issue of whether permission should be granted needed to be dealt with at a hearing, which would have required substantial court time for pre-reading, oral submissions and any judgment. The claimants' obligation to advance their grounds of challenge in a proportionate manner and to keep their merits under review applies just as much where a rolled-up hearing is ordered, if not more so.

70. The approach taken by the claimants in this case brings to mind what was said by Simon Brown LJ in *R (Richardson) v North Yorkshire County Council* [2004] 1 WLR 1920 at [80]. Where a claimant pursues a challenge in a scattergun fashion, the court cannot be expected in its judgment to examine every pellet which has been fired. The concerns which lay behind the claimants' campaign against the road scheme did not reduce the need for them to comply with CPR 1.3.

71. I will analyse the statutory framework and then go on to consider the grounds of challenge in the following order: 1, 8, 2, 3, 5 and 6.

Statutory framework

72. The PA 2008 followed on from the White Paper published in May 2007 "Planning for a Sustainable Future" (Cm.7120). There had been concerns about the length of time being taken at public inquiries to consider proposals for national infrastructure projects. This related to the lack of national policy on the need for such projects and the procedure for assessing proposals. The White Paper proposed that the framework for decision-making should be set by NPSs, which would be subject to public consultation and Parliamentary scrutiny and approval. Public inquiries would not be expected to revisit policy issues that had been settled by a NPS (Supreme Court in *R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [20] to [23]).

73. Part 2 of the PA 2008 provides for the designation of NPSs by the Secretary of State (s.5). A proposal to designate an NPS must be the subject of a sustainability appraisal (s.5(3)), which includes strategic environmental assessment under the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No. 1633). The proposal must be publicised and subjected to consultation (s.7) and Parliamentary scrutiny and approval (s.9). The decision to designate may be judicially reviewed under s.13.

74. Part 3 of the PA 2008 defines what are to be treated as nationally significant infrastructure projects.

75. Part 4 of the PA 2008 deals with the requirement for "development consent." Section 31 provides that development consent under the Act is required for development which is or forms part of a nationally significant infrastructure project. To the extent that "development consent" is necessary, other statutory regimes, such as the requirement to obtain planning permission under the Town and Country Planning Act 1990 ("TCPA 1990"), are disapplied (s.33). Development consent can only be granted by a DCO (see e.g. ss.104-106 and 114).

76. Part 5 of the PA 2008 deals with applications for a DCO. An application must be made to the Secretary of State (s.37).

77. Part 6 deals with the procedure leading up to the determination of an application for a DCO. The Secretary of State decides whether an application is to be examined by a panel of inspectors under Chapter 2 or by a single inspector under Chapter 3 (s.61).

78. Under s.74 a panel has the function of examining the application and making a report to the Secretary of State setting out the panel's findings and conclusions and their recommendations about the decision to be made on the application. A single inspector has the same functions (s.83). These functions are to be carried out in accordance with the examination process laid down in Chapter 4 of Part 6 (s.74(3) and s.83(3)). References in Chapter 4 to the Examining Authority ("ExA") are to the panel or to the single inspector as the case may be (s.86).

79. It is for the ExA to decide how the application is to be examined (s.87(1)). The ExA may disregard representations which *inter alia* it considers "relate to the merits of policy set out in a NPS" (s.87(3)).

80. Under s.88 the ExA must make an initial assessment of what it considers to be the principal issues on the application and must then hold a preliminary meeting to which

inter alia the applicant and any "interested party" must be invited. An "interested party" includes a party who has made a representation about the application in accordance with the deadline set by s.56(4) and (5) (see s.102(1) and (4)). Invitees may make representations on how the application should be examined (s.88(4)). In the light of the discussion at the preliminary meeting the ExA must make such procedural directions as it thinks appropriate (s.89(1)).

81. Section 90(1) lays down the important principle that the ExA's examination of the application is "to take the form of consideration of written representations about the application." That is subject to any requirement under ss.91, 92 or 93 for the ExA to hold a hearing (s.90(2)).

82. Firstly, under s.91 where the ExA decides that it is *necessary* for its examination of the application to include the consideration of oral representations about a particular issue at a hearing to ensure (a) adequate examination of the issue or (b) that an interested party has a fair opportunity to put their case, it must cause a hearing to be held (s.91(1) and (2)). Each interested party (including the applicant - s.102(1)) is entitled to make oral representations on the issue at that hearing, subject to the ExA's powers of control over the conduct of the hearing (s.91(3)).

83. Secondly, where an application seeks powers for the compulsory acquisition of land, or of an interest in or right over land, the ExA must hold a "compulsory acquisition hearing" if an "affected person" requests such a hearing within a specified deadline. The applicant and each affected person may make oral representations at the hearing about the proposed powers of compulsory acquisition (s.92). An "affected person" is a person whom the applicant has notified to the Secretary of State under s.59 as a person interested in the land (or part thereof) to which the compulsory acquisition relates (s.92(5) and s.59).

84. IP1 says that it is not acquiring any land belonging or leased to C2. Instead, it will acquire land over which C2 has a right of way. In that situation the acquiring authority will not normally acquire the dominant tenement served by the right of way or the right of way itself. That is unnecessary. C2 does not suggest otherwise. Instead, the statutory authority in the DCO for the scheme renders the right of way unenforceable and a claim for compensation for interference with that right, or injurious affection, may be made e.g. under s.10 of the Compulsory Purchase Act 1965 (*Clark v School Board for London* (1874) L.R. 9 Ch. App. 120 and *Kirby v School Board for Harrogate* [1896] 1 Ch. 437).

85. Accordingly, C2 has not shown that he is an "affected person" in relation to the land which is subject to his right of way or in relation to any other land. He was not therefore entitled to require a compulsory acquisition hearing to be held.

86. Thirdly, interested parties can require an "open-floor hearing" to be held, so that they may make representations to the ExA (s.93). The Planning Inspectorate's Advice Note 8.5 on the examination process says that such hearings are not issue-specific but tend to have a community focus. They provide an opportunity for individuals and community groups to speak directly to the ExA.

87. Section 94 contains general provisions for the conduct of those three types of hearing. It is for the ExA to decide how a hearing is to be conducted (s.94(3)). In particular, it

is for the ExA to decide whether any person making oral representations at a hearing may be questioned at the hearing by another person, and, if so, the matter to which that questioning may relate and the amount of time to be allowed (s.94(4)). Importantly, s.94(7) provides:

> "(7) In making decisions under subsection (4)(a), the Examining authority must apply the principle that any oral questioning of a person making representations at a hearing (whether the applicant or any other person) should be undertaken by the Examining authority except where the Examining authority thinks that oral questioning by another person is necessary in order to ensure—
>
> (a) adequate testing of any representations, or
>
> (b) that a person has a fair chance to put the person's case."

88. Thus, the examination process is inquisitorial not adversarial (*Halite Energy Group Limited v Secretary of State for Energy and Climate Change* [2014] EWHC 17 (Admin) [79]; *R (Suffolk Energy Action Solutions SPV Limited v Secretary of State for Energy Security and Net Zero* [2023] EWHC 1796 (Admin) [43]). The PA 2008 represents a deliberate move away from the model of a traditional planning inquiry under the TCPA 1990 with cross-examination by lawyers or participants. Typically any questioning in an examination is led by the inspector or inspectors.

89. At the preliminary meeting, or as soon as practicable thereafter, the ExA must set out the timetable for the examination, including the period within which it will ask written questions and seek written information (rule 8 of the 2010 Rules). Rule 10(6) and (7) enables the ExA to require a person who submits a written representation to respond to questions from the ExA about that material or to provide further information.

90. The ExA is under a duty to (a) complete the examination within 6 months from the day following the conclusion of the preliminary meeting under s.88, and (b) to complete its report with a further 3 months. The Secretary of State may extend these deadlines but, if he does so, he must make a statement to Parliament (s.98). The statutory objective of avoiding delay is clear.

91. Once the examination is concluded the ExA will not receive any further material. Post-examination representations or information are sent to the relevant Government Department for assessment by officials. Sometimes the ExA may say in its report to the Secretary of State that information on a particular topic is insufficient for them to resolve an issue and recommend that he pursues the matter further. In practice his officials will seek information and raise questions through correspondence. That is what happened on the important subject of the supply of potable water for the Sizewell C project (see *R (Together against Sizewell C Limited) v Secretary of State for Energy Security and Net Zero* [2023] EWCA Civ 1517).

92. Under the PA 2008 as originally enacted, the decision on whether to grant a DCO was to be made by the Infrastructure Planning Commission if there was an NPS applicable to the proposed development and otherwise by the Secretary of State (s.74(1) and (2) and s.83(2)). In the Localism Act 2011 Parliament disbanded the Commission. Now

under s.103 all decisions on whether to grant a DCO are taken by the Secretary of State. Parliament has decided that in all cases, an examination will be held, whether by one or several inspectors, followed by a process of decision-making by the Secretary of State on advice from his officials.

93. Mr. Martin Gilmour, Deputy Director of the Planning, Housing and Transport Division at the Department explains that a redetermination of a quashed DCO is handled by the Transport Infrastructure Planning Unit. The officials in that Unit include planners with qualifications and/or experience in infrastructure planning and qualified environmental managers. There was a strict barrier between the Unit and the rest of the Department during the redetermination process (witness statement para. 8).

94. Under s.104 where a NPS has effect in relation to proposed development, the application must be determined in accordance with that NPS (s.104(3)) subject to the exceptions in s.104(4) to (8). The Secretary of State may disregard representations which relate to the merits of a policy in the NPS (s.106(1)(b)). Under s. 116 the Secretary of State must prepare a statement of the reasons for deciding either to make a DCO or to refuse development consent (s.116). Such a decision may be challenged by judicial review (s.118).

95. Rule 20(2) of the 2010 Rules deals with the procedure following the quashing by a court of a decision on a DCO application:

> "(2) Where a decision of the Secretary of State in respect of an application is quashed in proceedings before any court, the Secretary of State—
>
> (a) shall send to all interested parties a written statement of the matters with respect to which further representations in writing are invited for the purposes of the Secretary of State's further consideration of the application;
>
> (b) shall give all interested parties the opportunity of making representations in writing to the Secretary of State in respect of those matters"

96. Similar provisions dealing with the quashing of a decision on a planning appeal expressly provide the Secretary of State with a discretion to re-open the public inquiry or to allow written representations to be made (see e.g. rule 19 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000 No. 1624). The fact that rule 20 of the 2010 Rules only refers to written representations reflects the general primacy given to reliance upon such representations in the Examination procedure (s.90(1) of the PA 2008).

97. However, procedural rules such as the 2010 Rules are not exhaustive of the public law requirements of the duty to act fairly. The requirements of natural justice are often fact-sensitive (*Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2022] Env. L.R.4 at [171] to [174]). Mr. James Strachan KC for the Secretary of State accepted that the SST has an implied power to re-open an Examination where the duty to act fairly so requires.

98. It is apparent from the statutory framework that:

(i) The application must be the subject of an examination and report before it may be determined by the Secretary of State;

(ii) That process, including the examination, is intended to be efficient, expeditious and fair;

(iii) Once the examination is concluded, issues, whether continuing or new, may be considered by officials using a written representations procedure and without requiring the examination to be reopened, before they provide advice to the Secretary of State on the determination of the application;

(iv) The same applies where a DCO is quashed by the court and the application has to be redetermined in a case where, as is common ground here, there is no requirement for the application process to go back to square one or for the examination process to be repeated as a whole;

(v) Even if an examination is reopened, it takes the form of considering written representations (s.90), unless the ExA decides that it is necessary for them to consider oral representations about a particular issue at a hearing to ensure that an issue is adequately examined or that an interested party has a fair chance to put his case;

(vi) Even if such a hearing takes place, it is for the ExA to decide whether any person is questioned and by whom. The ExA must apply the principle that they are to conduct any questioning unless they think that questioning by others is "necessary" to ensure adequate testing of representations or so that a party has a fair chance to put his case (s.94(4) and (7));

(vii) If an examination is not re-opened, the obtaining of written representations and the questioning of that evidence is conducted in writing by departmental officials rather than by one or more inspectors.

Ground 1

The issue

99. Mr. Wolfe said that the issue is whether the Examination should have been re-opened in relation to issues raised by the Statement of Matters and the representations submitted by participants in the process of redetermination. He submitted that an examination is an inquisitorial process which enables the inspectors to call for information and to test or interrogate the material supplied. Inspectors are able to conduct this process at hearings where they consider that appropriate. Otherwise the gathering and testing of evidence is by the inspectors receiving written representations and issuing written questions.

100. In the present case, where the Examination was not re-opened, the obtaining and questioning of evidence was carried out by departmental officials in writing. Mr. Wolfe accepted that, whichever model is adopted, decisions about the subjects to be considered in representations or questioning is a matter of judgment for the inspectors or the officials.

101. Mr. Wolfe made it clear that the claimants raise no complaint about the scope of the SST's Statement of Matters or the scope of the redetermination process. He confirmed that the claimants do not suggest that there was any need for the process to be "wound back" to an earlier stage. He said that the SST had been entitled to take up the reins again from the issuing of his Statement of Matters.

Legal principles: fairness and article 6(1) of the ECHR

102. Mr. Wolfe cited the well-known statement of principle by Lord Bridge in *Lloyd v McMahon* [1987] AC 625 at 702G-703A:

> "My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

103. Initially, Mr. Wolfe also relied upon Art. 6(1) of the ECHR and some of the related case law. He placed particular emphasis upon *R (Alconbury Developments Limited) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 and *Bryan v United Kingdom* [1996] 21 EHRR 342.

104. *Alconbury* concerned decisions by the Secretary of State on a road scheme promoted by his department through the Highways Agency, a planning application and a planning appeal. The planning matters had been "called in" or "recovered" by the Secretary of State [10]. The Secretary of State accepted that he was not an independent and impartial tribunal for the purposes of Art.6(1). Mr. Wolfe submitted that *Alconbury* accepted that independent consideration of evidence by planning inspectors is an important component of compliance with Art. 6(1), given that judicial review in the High Court does not involve a full merits review.

105. Mr Wolfe relied upon the speech of Lord Slynn, who took as a "starting point" the procedural safeguards which existed under the relevant statutory schemes. They included the opportunity at a public inquiry for objectors to call and cross-examine witnesses and the position of the inspector as an experienced professional making a report to the Minister with his recommendations. Lord Slynn also relied upon the

separation of functions within the Department of Transport between promoters of a scheme and the decision-maker [46]. Lord Clyde referred to the opportunity provided by a public inquiry before an Inspector for an exploration of the facts, including the need for, and desirability of, the proposal [157]. However, Lord Nolan did not refer to these matters, or treat them as necessary safeguards for the purposes of Art.6(1).

106. Counsel in *Alconbury* submitted that in *Bryan* the ECtHR's reliance upon the procedural safeguards and the independence of an inspector in an enforcement notice appeal formed a crucial part of its reasoning that there had been no violation of Art.6(1) in that case. But Lord Hutton disagreed. The safeguards had been relevant in relation to fact-finding but even then, the availability of judicial review was the more important consideration [186] to [189]. Furthermore, because the Secretary of State had a power to recover an appeal for his own decision, the independence of a planning inspector who is required to apply the Secretary of State's policies was not sufficient by itself to satisfy Art.6(1) (see also Lord Slynn at [33] and Lord Hoffman at [111]).

107. Lord Hoffman analysed the issues more fully. The independence of a tribunal depends upon the nature of the question it is called upon to decide. *Bryan* did not decide that, *whatever the issues*, the "safeguards" provided by public inquires before inspectors are necessary, so that when taken together with judicial review, Art.6(1) is satisfied. Enforcement notice appeals involve decisions on questions of *primary fact or fact and degree*, so that the sufficiency of the Inspector's independence in that respect, in combination with judicial review, satisfies Art.6(1). However, on matters of *policy* a planning inspector is no more independent than the Secretary of State. But policy is not something for which an inspector needs to be independent [110] to [116].

108. At [117] Lord Hoffmann said that where the question is one of expediency or policy, the "safeguards" are therefore irrelevant. For such matters, Art.6(1) does not require an Inspector (or the Secretary of State) to be independent. Judicial review is sufficient because of the respect for the decision of an administrative authority on questions of *expediency* (see *Zumtobel v Austria* (1994) 17 EHRR 116). A decision on how much weight to give to the importance of maintaining the Green Belt is an example of expediency [120]. It is only on findings of fact or the evaluation of facts, such as arise on an issue whether there has been a breach of planning control, that the safeguards are essential so that, with the limited review of fact in judicial review, Art.6(1) is satisfied [117] and [122].

109. In *R (Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] 1WLR 2515 Simon Brown LJ (with whom the other members of the Court of Appeal agreed) said that the application of judgment and discretion plays the predominant part for decision-making in planning cases. He also relied upon the distinction drawn by Lord Hoffmann in *Alconbury* between a determination of a planning application, as an administrative decision turning on questions of expediency, and an enforcement notice appeal, typically turning on questions of fact [17] and [21].

110. Lord Hoffman returned to this subject in *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430 in a judgment with which three other members of the court agreed. He narrowed the scope of his dictum in *Alconbury* at [117] that "the safeguards" provided by planning inquiries are essential for the acceptance of a limited form of appellate review in relation to decisions based on findings of fact,

such as whether a breach of planning control has occurred [39]-[40]. The statutory context in *Bryan* was important. There, the essentially factual determination by an inspector that the appellant had acted in breach of planning control was binding upon him in any subsequent criminal proceedings. That part of the enforcement notice appeal was "closely analogous to a criminal trial" [41].

111. That is very different from the making of findings of fact in the course of regulatory functions such as licensing and the determination of planning applications and appeals [42]. The appropriate scope of judicial review in relation to administrative action has regard to democratic accountability, efficient administration and the sovereignty of Parliament [43].

112. Lord Hoffmann said that *Bryan* had been an "exceptional case" in which the safeguards of a planning inquiry would be expected because of the possibility of criminal sanctions. In the normal case of an administrative decision, a fair procedure and rationality are sufficient [54].

113. At [58] Lord Hoffmann rejected the suggestion that the test for whether it is necessary to have an independent fact finder depends upon the extent to which the decision is likely to involve the resolution of factual disputes. The notion of a spectrum based on the relative degree of factual and discretionary content would be too uncertain. Instead, "the question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators. If so, it does not matter that there are many or few occasions on which they need to make findings of fact." The determination of whether planning permission should be granted falls "within recognised categories of administrative decision-making" ([59] citing *Adlard*). The upshot is that Art.6(1) does not require the determination of planning applications or appeals or DCO applications to be subject to an inquiry process before an inspector.

114. Ultimately, Mr. Wolfe accepted that Art. 6(1) of the ECHR and the related jurisprudence do not assist the court to resolve the highly specific procedural issue in this case, namely whether the examination had to be reopened in order to deal with the issues in the redetermination. Instead, that issue depends upon the requirements of fairness in the context of the scheme Parliament has enacted in the PA 2008, the character of the decision-making body, the issues which fall to be resolved and the representations made on those issues. Even where a Secretary of State's decision under the TCPA 1990 is quashed, there is no statutory right to have an earlier public inquiry reopened (see [96] above). Under the PA 2008 Parliament has decided to reduce the scope for oral testing of evidence where an examination is reopened. In this claim there is no suggestion that the DCO regime is incompatible with Art.6(1).

The allegations of unfairness

115. It is well-established that a claimant complaining about procedural unfairness needs to show that he has thereby suffered material prejudice (*Hopkins Developments Limited v Secretary of State for Communities and Local Government* [2014] PTSR 1145 at [49]). There is no such thing as a technical breach of the rules of natural justice (*George v Secretary of State for the Environment* (1979) 38 PC&R 609, 617).

116. It is relevant that an examination had already taken place before the Panel, who had produced a detailed Report for the SST with their assessment of the information provided and conclusions. We are now concerned with the more limited range of issues which arose in the redetermination.

117. The court has not been shown anything to suggest that the officials handling the redetermination were any less qualified than the Panel of inspectors to assess and "interrogate" those issues and the information provided. Officials considered the application documents, the material produced in the examination and the report on that process. They advised the Secretary of State on whether to agree or disagree with the Panel's conclusions and recommendations and/or the material before the Examination.

118. It is not suggested in this case that there was unfairness because no open floor hearing under s.93 was held during the redetermination. As I have explained, the claimants, particularly C2, have not shown that they were entitled to a hearing under s.92.

119. A key issue is whether reopening the Examination could have made a material difference procedurally, for example, if one or more issue-specific hearings had taken place with oral questioning. An important consideration is whether the claimants can show that there was a significant issue in the redetermination which ought, as a matter of fairness, to have been the subject of a hearing under s.91. Such a hearing would not take place unless considered necessary to ensure adequate examination of an issue or to ensure that an interested party has a fair opportunity to put their case. Similar considerations apply to whether an interested party would have an opportunity to cross-examine.

120. I turn to consider the factors relied upon by the claimants as showing that the decision not to re-open the examination in this case was in breach of the duty to act fairly.

121. First, the claimants rely upon the fact that IP1 is wholly owned by the SST and was applying his own policy. They contend that the examination needed to be reopened in order to provide the safeguards discussed in *Alconbury* in the context of Art.6(1).

122. The background to the Infrastructure Act 2015 and the statutory framework under which IP1 functions were analysed by the court in *R (Transport Action Network Limited) v Secretary of State for Transport* [2022] PTSR 31. Although the aim was to make IP1 more independent than the Highways Agency, IP1 is not wholly independent of the SST. For example, s.3(6) requires IP1 to comply with the Road Investment Strategy set under the Act. The SST has a power to give directions or guidance to IP1 (s.6). But one of the three cases considered in *Alconbury* was a claim brought by Legal and General Assurance Society Limited in relation to a road scheme promoted by the Highways Agency [8]. *Alconbury* and *Runa Begum* do not indicate that a public inquiry or examination is necessary for the purposes of Art. 6(1) of the ECHR because the promoter of a scheme is not independent of the decision-maker.

123. I do not consider that the common law duty of fairness required the examination to be reopened because of the status of IP1. The officials handling the redetermination and advising the SST acted separately from other parts of the Department and IP1 (see also *London Historic Parks and Gardens Trust v Secretary of State for Housing, Communities and Local Government* [2021] JPL 580). The key question is whether,

given the nature of the issues raised and the material deployed, it was necessary as a matter of fairness for any of those issues to be the subject of examination, in particular an issue-specific hearing.

124. Second, the claimants rely on A1P1, but this could only be relevant to C2, assuming that he will be entitled to make a claim for injurious affection. In *Thomas v Bridgend County Borough Council* [2012] QB 512 it was held that in order to engage A1P1 a claimant must show that an interference with his right is direct and serious. C2 has not done that. So at this stage we are only dealing with the possibility of A1P1 being engaged. In any event, what fairness required in this case depends upon the nature of the issues and material advanced during the redetermination process.

125. Third, Mr. Wolfe says that, by definition, the Panel did not express any conclusions on the merits of alternative options, or on the representations and materials submitted since the end of the Examination, or changes in policy, or subsequent decisions of the WHC.

126. The court previously determined that alternative options were an obviously material consideration, such that it was irrational for the SST (and also the Panel) not to have taken them into account on the merits of the DCO application. Therefore, at first sight there might appear to be some force in the submission that, in the redetermination, a panel should have been asked to consider alternative options and routes so that officials drafting the decision letter and providing advice, and ultimately the SST, would have the benefit of the panel's examination and conclusions on that subject. On the other hand, it would be perfectly sensible and proper for the Department to wait to see whether, in the light of representations actually made, fairness required the examination to be reopened. Similarly, when the court judges at the present stage whether a party has been unfairly deprived of an examination process, it is necessary to consider the nature of the issues and material advanced during the redetermination.

127. As I say under ground 2 below, the current challenge to the SST's handling of alternatives relates to route F010 and a "non-expressway" option, not the extended tunnel or the cut and cover options. None of the issues or material I was shown on the first two of those options was of such a nature as to call for the reopening of the examination so that, for example, an issue-specific hearing could be held. That material was capable of being handled fairly by way of written representations. Furthermore, I was not shown any material relating to the tunnel and cut and cover options which would lead to a different conclusion.

128. Fourth, Mr. Wolfe submitted that in the redetermination it was necessary not only for policy judgments but also findings of fact to be made, referring to *Runa Begum*. But, as we have seen, that decision rejected at [58] the spectrum analysis upon which Mr. Wolfe relied and decided that where the decision to be taken is administrative, as in the case of planning control, it does not matter in terms of Art. 6(1) whether there are a few or many findings of fact to be made [59]. Unlike *Bryan*, any factual findings which needed to be made in this case were in the context of regulatory decision-making, planning control, which called for the application of policy and judgment. Article 6(1) does not require such matters to be addressed by an independent tribunal. In any event, Lord Hoffmann made it plain in *Alconbury* that a planning inspector (and likewise an ExA) is not independent of the Secretary of State. But putting Art.6(1) to one side, and looking at the matter through the lens of the common law,

the application of the duty to act fairly still depends upon the nature of the issues and material advanced during the redetermination.

129. Fifth, Mr. Wolfe submitted that the redetermination by the SST was exceptional because of the findings he had made in the first decision that the scheme would cause significant harm to the WHS, including permanent and irreversible harm (*Stonehenge 1*). As a general point that, of course, is correct but it simply forms part of the context in which the real legal issue needs to be addressed.

130. Sixth, we are left with the examples relied upon by Mr. Wolfe to show that the nature of the material and the issues raised was such as to require the Examination to be reopened. I have already addressed the subject of alternatives to IP1's proposal.

131. The first example relates to the SA's criticisms of IP1's traffic forecasts. The SA said that they overestimate future traffic need. It identified two principal areas of concern. First, IP1 relied upon a single central case within a relatively narrow range of uncertainty (a point previously advanced in the Examination) and second, the forecasts did not incorporate changes in travel behaviour as a result of the Covid-19 pandemic. IP1 also relied upon the future impact of climate change policies as reducing vehicle usage. Mr. Strachan responded that much of the SA's material consisted of broad assertion (e.g. on the implications of the Covid-19 pandemic). In any event, both the Panel and the SST had concluded that while travel patterns and vehicle usage might change, the A303 remained an important corridor for vehicular transport and the longstanding congestion would continue without the scheme, even assuming lower traffic forecasts. This was addressed in the second decision, for example at DL 26 to DL 29, DL 35, and DL 161. It is therefore self-evident that IP1's case on the need for the scheme did not depend on its central case forecasts being accepted. The decision was based upon other matters of broad evaluative judgment. It did not depend on the resolution of the technical issues raised by the SA. In any event, as a matter of fairness that did not need to be considered again in a reopened examination, or at an issue-specific hearing.

132. The second example related to the SA's criticism that IP1 had not produced an updated business case in the redetermination. They referred back to the criticisms they had made of the business case during the Examination suggesting that it was very weak. In response, IP1 said that, in line with HM Treasury's Green Book and the Department's guidance, it had previously produced strategic and outline business cases and a full business case would not be required until later on, when seeking investment approval to start construction, a decision which would depend upon the prior grant of a DCO.

133. However, in July 2022 IP1 did produce a summary of an updated cost benefit analysis with an explanation for the changes made. In August 2022 the SA made representations criticising the brevity of some of the explanation provided and the robustness of certain assumptions.

134. I am surprised that this second example was relied upon at all. As I explained in *Stonehenge 1* at [232] to [241], the cost benefit analysis was not a proxy for the overall planning balance or judgment to be made by the SST. It formed part of a value for money exercise. It was not suggested to the court that the availability of funding had been in issue. I also note that the SA relied again on their criticisms of the

notional value attributed to heritage benefits, disregarding what was said in *Stonehenge 1*. At all events, the material advanced in the redetermination did not, as a matter of fairness, require to be considered in an examination, or at an issue-specific hearing.

135. The third example concerned the assessment of the significance of carbon emissions. In their representations in June 2022, the SA made criticisms of the approach taken by IP1. This included an alleged failure to assess the impact of such emissions at a local or regional level, as opposed to a national level, and the handing of cumulative emissions. Mr. Taylor KC for IP1 explained that the cumulative emissions point is the subject of the *Boswell* litigation (see [64] above). That was not disputed and so I will say no more about that aspect here.

136. Otherwise Mr. Wolfe did not suggest that the figures on scheme emissions compared to national targets, given by IP1 and accepted by the SST in his decision (see e.g. DL 135 to DL 137), were open to legal challenge. At DL 148 the SST explained why it was inappropriate to assess carbon emissions below the national level and, in any event, no interested party had suggested what the local or regional targets might be. Essentially the difference here was one of approach, which was capable of being dealt with fairly through written representations and did not require to be dealt with by a reopened examination, including an issue-specific hearing and oral questioning.

137. I will not lengthen this judgment by referring to other material filed by the claimants. The court is entitled to assume that they have put forward their best examples of issues requiring the reopening of the examination. In my judgment, they have failed to identify any issues which, as a matter of fairness, were required to be dealt with in that way and could not properly be addressed by written representations to the Department and questions from officials.

138. Despite the lengthy submissions advanced for the claimants, ground 1 is unarguable. Permission to apply for judicial review must be refused in relation to this ground.

Ground 8

Legal principles

139. Mr. Wolfe submitted that the SST had failed to take into account a number of considerations raised in the SA's representations. He accepted that none of these matters were expressly mandated by legislation to be taken into account. He therefore has to show that they were "obviously material" considerations, such that it was irrational for the SST not to have taken them into account (*Friends of the Earth* [2021] PTSR 190 at [116]).

140. Traditionally a ground of challenge of this nature involves an attack on the decision itself. But decision letters, and the report of an inspector or a panel, should be read reasonably flexibly or with appropriate benevolence, and not excessive legalism. Decision letters are written principally for parties who are taken to be familiar with the issues in an examination (and any redetermination) as well as the evidence and submissions deployed on those issues. Accordingly a decision letter does not have to rehearse every argument or address every material consideration raised (*St. Modwen Developments Limited v Secretary of State for Communities and Local Government*

[2018] PTSR 746 at [6] to [7]; *East Quayside 12 LLP v Newcastle upon Tyne City Council* [2023] EWCA Civ 359 [36] to [37]).

141. As in the determination of planning appeals, the Secretary of State has a duty under s.116 of the PA 2008 to give reasons for his decision to grant a DCO or to refuse the application for development consent. The duty is to give reasons on the "principal important controversial issues". A complaint that the reasons are inadequate cannot succeed unless it relates to such an issue and, even then, the court will only consider quashing the decision if it gives rise to a substantial doubt as to whether the decision-maker made a public law error (*Save Britain's Heritage v Number 1 Poultry Limited* [1991] 1 WLR 153 at 165-168; *South Buck District Council v Porter (No.2*) [2004] 1 WLR 1953 at [24]-[36]).

142. But ground 8 is not being advanced as a challenge of that traditional kind. Instead, Mr. Wolfe relies upon the principle that a Minister making a decision only has regard to those considerations of which he has personal knowledge, or which are drawn to his attention, for example in briefing material prepared by his officials (see *National Association of Health Stores* at [26] to [38] and *Revenue and Customs Commissioners v Tooth* [2021] 1 WLR 2811 at [70]). He then submits that the briefing to the SST in this case was legally inadequate because it did not refer to a number of points. Nevertheless, he accepts that the omission of a point from briefing material provided to the SST cannot form a ground for challenging the decision unless that point was something which legislation *mandated* should be taken into account or, if not, was an "obviously material consideration" (*National Association of Health Stores* at [62] to [63] and [73] to [75]).

143. The decision in the *National Association of Health Stores* drew heavily upon the judgments in the High Court of Australia in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] 162 C.L.R. 24; HCA 40. Those decisions were analysed in *Transport Action Network* at [60] to [73] and *Stonehenge 1* at [62] to [65].

144. In *Peko-Wallsend* Brennan J laid down the following principles:

> (i) A decision-maker who is legally required to have regard to a particular matter does not have to bring to mind all the details relating to that matter (p.61);
>
> (ii) Officials do not have to draw a Minister's attention to every communication they receive or every fact they know. Part of a department's function is to make *a precis of material to which the Minister is bound to have regard* or to which he may choose to have regard in making a decision. The press of Ministerial business necessitates efficient performance of that function (p.65);
>
> (iii) A Minister's appreciation of a case depends to a great extent upon the appreciation made by his department, that is the analysis, evaluation *and precis* of that material (p.65);
>
> (iv) A Minister's reliance upon that departmental appreciation does not amount to an impermissible delegation of his ministerial

function (p.66).

These principles were endorsed in *National Association of Health Stores*. I would add that the preparation of ministerial briefing by officials involves expertise and judgment on their part as to the extent of the material to be included (*Transport Action Network* at [73]).

145. In another case it may be necessary for the court to consider the legal implications of what Lord Mance DPSC in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.3)* [2018] 1 WLR 973 referred to at [47] as "collective decision-making" by a Minister and his officials. But there were no submissions on that passage and my decision does not rely on it.

146. The reasoning and decisions in *Peko-Wallsend* and other cases show that Mr. Wolfe is seeking to apply this line of authority too liberally. In *Peko-Wallsend* the Minister had to decide whether a land grant should be made to a trust to hold for the benefit of aboriginal people. The legislation set out a list of considerations which were required to be taken into account, including detriment to any person which might result from the land grant. A mining company had outstanding applications for the grant of mineral licences for highly valuable uranium deposits it had discovered. But the report to the Minister by a commissioner on an inquiry into the aboriginal land claims assumed that the company had not identified any uranium deposits within the relevant area. When the report was published, the company wrote to the Minister to point out that it was incorrect: the whole of the deposit fell within the area of the proposed aboriginal land grant. The Minister was not made aware of the letter and the briefing by his officials did not refer to this information. Not surprisingly, the court held that the Minister had been *mandated by the legislation* to take that detriment to the company into account and he had failed to do so.

147. The challenge in *National Association of Health Stores* was to two statutory orders made by a minister banning the sale of a herbal tranquiliser for medical purposes and use in foodstuffs. The Minister was obliged to consult with a commission comprising experts who were to advise him on the exercise of his powers. The Minister was given the commission's advice and his officials' briefing, which said that one of the members of the commission and a leading authority, Professor Ernst, opposed the prohibition, giving a short summary of his objection, but saying that after lengthy discussion the commission had concluded that the orders were justified. However, the Minister was not provided with or told about the Professor's "cogent" meta-analysis or its conclusions, nor was he told about his special expertise [2], [44], [51] and [57]. That analysis had simply formed part of the material taken into account by officials when formulating their advice to the Minister. The Minister was only told that Professor Ernst had opposed a ban because the benefits of the tranquiliser were real and the evidence of toxicity inconclusive.

148. The Court held that under the statutory scheme it was important for the decision to be taken at Ministerial level with the best information available. The close-run nature of the debate in this case made it more appropriate that the Minister should know that a distinguished expert had dissented and on what grounds [58]. It might have been better if additional information had been provided to the Minister about the Professor's standing, his meta-analysis and conclusions, but neither the statutory purpose of the scheme, nor the nature of the issue before the Minister, made this so

relevant that he could not take a lawful decision without knowing about those matters. The context was a departmental submission conveying to the Minister a view reached by the commission after a discussion initiated by Professor Ernst on his analysis. Whilst for the Commission his standing and "the quality of his paper" were significant, for the Minister they were only "part of the background" and not something about which he had to know in order to take his decision [64].

149. The decision in *National Association of Health Stores* illustrates how the principles in [144] above should be applied. Even if a particular subject qualifies as an obviously material consideration which a Minister is obliged to take into account, the law does not require all the information to do with that matter to be placed before him. A Minister may lawfully rely upon his officials to carry out an analysis of evidence or data relating to that consideration and to summarise that analysis for him. The summary may be brief. There is no general legal requirement that officials must also provide to the Minister the underlying information or data so that he can perform that exercise himself or check the analysis carried out by officials. The court must be careful not to intrude inappropriately upon the administrative relationship between Ministers and officials.

Implications of the claimants' argument

150. There is a threshold question: were any of the points relied upon by the claimants in the proposed amendment to the statement of facts and grounds "obviously material", such that the SST's decision was irrational because they were not drawn to his attention in briefing, and he did not otherwise know about them. The test is not whether the court thinks that it would have been better for additional briefing to have been given to a Minister on a particular point (*National Association of Health Stores* at [59]-[64] and *Transport Action Network* at [136]). I note that Mr. Wolfe asserted that each of the points he relied upon were "obviously material" without addressing the irrationality test. If the claimants do not satisfy that test, then the *Peko-Wallsend* line of argument fails. But even if they do get over that hurdle, the argument may still fail applying the principles summarised in [144] and [148]-[149] above.

151. But Mr. Wolfe also raised an alternative argument. He says that even if a particular consideration is *not* obviously material so that the decision-maker is not legally obliged to take it into account, he nevertheless has a *discretion* as to whether to do so. Mr. Wolfe submitted that the decision-maker could not exercise that discretion unless he received briefing which covered the cases put by interested parties.

152. I regret to have to say that this submission is misconceived. It is contrary to the clear principle laid down by the Supreme Court in *Friends of the Earth* [2021] PTSR 190 at [120]. The decision-maker does not have to work through each and every consideration which could be regarded as potentially relevant to his decision and positively decide whether or not to take them into account in the exercise of his discretion. It follows that there is no legal requirement for officials to produce briefing which covers all such *discretionary* points. Mr Wolfe's attempt to rely upon *R (Ashchurch Rural Parish Council) v Tewkesbury Borough Council* [2023] PTSR 1377 to bolster his submission also fails (e.g. at [33] and [67]). In that case the Court of Appeal followed *Friends of the Earth* at [120].

153. Mr. Wolfe's attempt to use *Peko-Wallsend* and *National Association of Health Stores* in this way is impractical, unrealistic and unprincipled. It would require officials to prepare voluminous briefing. The time and resources that would have to be devoted to the preparation of such material, and then its consideration by Ministers, would be unnecessary and disproportionate. The same would apply to any decision letter which had to describe this protracted process. The claimants' submission is unsupported by any authority. Indeed, it is inconsistent with the principles in *Peko-Wallsend* and with *National Association of Health Stores*, where the law was applied sensibly to the practical realities of decision-making by a Minister advised by officials. That process depends upon analysis and evaluation by officials of information or evidence, sometimes on a very large scale.

154. In any event, there is little need to apply *Peko-Wallsend* or *National Association of Health Stores* in planning cases handled by or on behalf of the Secretary of State. Most decisions are taken by inspectors. Only called-in planning applications or recovered appeals involve a decision by the Secretary of State and these form a small proportion of the total workload. All DCO applications are determined by a Secretary of State, but these relate only to nationally significant infrastructure projects. Whether a decision is taken by a Minister or by an inspector, the legislation specifies those considerations which are mandatory (typically development plans and NPSs) and all decisions are subject to procedural rules, including a duty to give reasons.

155. Accordingly, a legal challenge to a decision of a Secretary of State which has any real merit can usually be argued on the basis of a failure to take into account a material consideration or to give adequate reasoning in the decision letter. The law on what amounts to such a failure is well-established. Those legal principles have been applied satisfactorily for many years by reference to the content of a decision letter, together with the inspector's report, in the context of the material relied upon in the appeal or application process. Ordinarily, there is no need or justification for requiring disclosure of the briefing given to the Minister who decides the matter in addition to his decision letter. The issue of whether a Minister failed to take into account an "obviously material consideration", or whether he failed to give adequate reasons on a "principal important controversial issue", is determined straightforwardly by looking primarily at the decision letter and the inspector's report.

156. Similarly, there is generally no need in planning cases for the court to be involved in what seems to be becoming "satellite" ground of challenge. Not only is there argument as to whether the ministerial briefing disclosed was adequate, but also whether the hyperlinks in such briefing provided adequate signposting as to what, if anything, the Minister should read in other documents. Time was taken in this case on just such a point (i.e. the adequacy of Annex A to the ministerial briefing) when, in my judgment, it has no significant bearing on the real merits of the grounds of challenge, including ground 8.

157. In most cases it is only necessary to apply conventional principles of judicial review to the decision letter and the inspector's report. Accordingly, where a defendant says that it has complied with the duty of candour, a claimant who makes a contested application for disclosure of ministerial briefing will need to explain how the particular nature of any ground of challenge for which permission has been granted justifies such an order in the interests of justice.

158. The willingness of the courts to consider the legal adequacy of ministerial briefing has been sensitive to the legal and factual context (*Transport Action Network* at [135]). The court has only intervened in limited, very specific circumstances:

(i) In *Peko-Wallsend* the main issue was whether the legislation obliged the Minister to consider personally the representation from the mining company about its interest in the uranium deposits. The court held that he was so obliged, but he had not been told *anything* about that subject;

(ii) *National Association of Health Stores* concerned an application to quash delegated legislation. It did not involve a review of a decision letter subject to a duty to give reasons. In that case the relevant topic had been dealt with briefly in the ministerial briefing and the court refused to criticise the lack of any further detail ([62]-[64]);

(iii) Both *Transport Action Network* and *R (Friends of the Earth Limited) v Secretary of State for Business, Energy and Industrial Strategy* [2023] 1 WLR 225 involved decisions by ministers to adopt policy documents, unaccompanied by any obligation to give reasons in a decision letter;

(iv) *Transport Action Network* concerned the SST's adoption of the national, high level Road Investment Strategy. The court held that the briefing to the SST that the strategy was "consistent with a major carbon saving required to deliver net zero" and that this was based upon "a comprehensive programme of analysis" was legally adequate to address his statutory duty to have regard to the effect of the Strategy on the environment. There was no requirement for officials to provide the SST with the numerical analysis upon which that advice had been based, or even a numerical summary of that analysis ([133] and [136]);

(v) In *Friends of the Earth* it was necessarily implicit in the legislation that the Minister was required to address matters such as the estimated contributions of his policies to targets in the CCA and risks to the delivery of those targets, but the material given to him failed to deal with those matters *at all* ([202]-[204] and [211]-[214]);

(vi) In *Stonehenge 1* the issue of ministerial knowledge arose because of a mandatory legal obligation to take into account certain heritage impacts, which were not addressed *at all* in the Panel's report, the decision letter or the briefing, and where the Minister was not given access to the documents containing the necessary information (see [146], [170] and [172]-[180]).

Specific complaints in this case

159. I turn to the six points upon which the claimants rely in their proposed amendment to the statement of facts and grounds. Mr. Wolfe confirmed that he was content to argue ground 8 on this basis.

160. First, it is said that the SST did not take into account or receive briefing on an obviously material consideration, namely the requests from interested parties,

including C1, so that he could consider exercising a discretion to re-open the Examination.

161. I have rejected the allegation under ground 1 that the duty to act fairly required the examination to be reopened. So this part of ground 8 assumes that the SST has an implied power to re-open an examination where fairness does not so require.

162. Mr. Wolfe advanced the complaint on the basis of representations made by the SA. They made assertions about the statutory scheme which do not accord with the analysis I have set out under ground 1. They also relied on other points which I do not accept could justify requiring the examination to be reopened. In DL 89 the SST was told about the requests for the examination to be reopened. It is plain that he agreed that it was unnecessary for the examination to be reopened as a matter of fairness, a conclusion which cannot be impugned (see ground 1). In the light of *Friends of the Earth* [2021] PTSR 190 at [116] to [120], Mr. Wolfe's point only goes at most to a possible exercise of discretion, not an obviously material consideration. The SST was not required to consider the SA's representations on reopening the Examination in order to be able to make a lawful determination of the DCO application. Although it is unnecessary for me to go any further, I also note that the SST did have access to the representations through the links he was given. Alternatively, he was able to go back to his officials for further information if he so wished, but he was not obliged to do so.

163. The second point is that the SA contended that the longer tunnel option would bring potential benefits to wildlife including the stone curlew, a protected species (para. 5.2.9 of the representations dated 4 April 2022). This point relates to the construction phase of the project and was no more than a brief assertion that IP1 had not made an adequate assessment of that benefit. At 5.5.60 of their Report the Panel had previously concluded that IP1 had provided a robust framework for protecting the Stone Curlew from the potential impacts of the construction and operation of the proposed scheme. IP1 accepted in their representations in January 2022 that the longer tunnel option would offer minor beneficial impacts for biodiversity.

164. It is absurd to suggest that brief material of the kind put forward by the SA amounted to an obviously material consideration which as a matter of law had to be dealt with in the decision letter (or in any ministerial briefing).

165. The third point was the SA's reliance upon the opinion of Professor Parker Pearson that there was no evidence that the alternative route F010 would have "any notable archaeological significance at a local or even regional level" (para. 5.3.5 of the SA's representations in April 2022).

166. This was not a new topic. It had been considered during the Examination. Mr. Strachan and Mr. Taylor helpfully took the court through a number of references. IP1 relied upon data in records indicating that F010 would directly impact a number of enclosures and settlements. Despite the absence of systematic archaeological evaluation on F010, in contrast to the work carried out on the proposed scheme, that route was likely to contain previously unidentified prehistoric or later remains of national importance. Indeed, in a document produced in June 2019 for the Examination, the SA agreed with IP1 that "the F010 route lies within the setting of the WHS and could directly impact as yet unidentified archaeological remains that relate

to the OUV of the WHS". They went on to say that the impact of the DCO scheme was greater, but that is a different point.

167. In DL 230 the SST essentially agreed with the judgment of IP1 on this issue, with which the SA had been in agreement up until its representations in April 2022. In the redetermination process C1 had simply relied upon a personal communication from Professor Parker Pearson in March 2022, which was presented as a very brief opinion without any detail or reference to supporting material.

168. In these circumstances, the SST was entitled to accept the case put forward by IP1 on this point as summarised in DL230. There was no legal requirement for him to go back into the papers which had been before the Panel. The SA's short representation in April 2022 (para.5.3.5) did not raise a principal important controversial issue engaging the duty to give reasons, still less an "obviously important consideration" which the SST was obliged to take into account.

169. The fourth point relates to certain of the reasons given by the High Court in *Stonehenge 1* (at [278] *et seq*) as to why, exceptionally, alternative options (at that stage an extended tunnel or cut and cover) were an obviously material consideration which the SST had failed to assess in the first decision letter. Mr. Wolfe accepted, however, that this point would fall away if ground 2 should fail. As I explain below, it does.

170. In any event, I accept Mr. Strachan's submission that the points in *Stonehenge 1* upon which the claimants rely essentially reflected what had already been said by the Panel in its report or the SST's conclusions in the first decision letter (as is clear from the judgment). Self-evidently these matters were before the SST for the purposes of the second decision and there is no arguable basis for saying that he failed to take them into account.

171. The fifth point relates to the SA's criticisms of IP1's traffic forecasts. This was addressed during the Examination and in the Panel's Report (e.g. PR 5.17.60 and 5.17.68). This point is no more arguable under ground 8 than it was under ground 1. The Panel recognised that future traffic levels might be lower than the central forecasts, but gave more weight to the continued importance of the A303 for motor transport and the need to remove longstanding problems of traffic congestion. The SST took the same approach (DL 20, DL 24 to DL 29, DL 35 and DL 161). Those judgments are not open to legal challenge. The SST did not fail to take into account an obviously material consideration.

172. The sixth point relates to concerns raised by the SA about the adequacy of baseline surveys of great crested newts and butterflies conducted for IP1. One short answer to this complaint is that there was no suggestion that the surveys were necessary for the decision being taken on the DCO application. As Mr. Strachan demonstrated, IP1's butterfly survey was produced to provide a baseline for future monitoring *if the DCO scheme should be approved and implemented*. Similarly, the great crested newt survey was part of a programme of pre-construction surveys intended to update baseline data, so that it could be used to inform *any application required during the construction period* for a European Protected Species licence from Natural England (e.g. for translocation). Those points were reinforced by some detailed passages in IP1's

representations in July 2022 which Mr. Strachan showed to the court. There was no further response from the SA.

173. This sixth point did not amount to an obviously material consideration which the SST had to address personally.

174. Here again the court is entitled to assume that the claimants have put forward in oral argument their best points capable of sustaining the proposed ground of challenge. On examination they turned out to be hopeless.

175. Lastly, in para. 14 of the application to amend, the claimants make a generalised point criticising the way in which heritage impacts of the proposed scheme were compared to those of the alternatives considered, including the extended tunnel and cut and cover options. It is suggested firstly, that the exercise during the redetermination was tainted by IP1 continuing to maintain that its proposal would be slightly beneficial to heritage interests, rather than accepting the SST's judgment in his first decision letter that it would cause less than substantial harm. However, as I have said, the claimants accept in the current proceedings that the error involved in ground 1(iv) of the first judicial review has been corrected. The SST has now had legally adequate briefing on, and access to, the information on the assessments of the effects of the proposed scheme on heritage assets and the historic environment to enable him to reach his own judgment that the overall harm to "significance" would be less than substantial. Mr. Wolfe never really attempted to explain how the SST's lawful handling in the second decision letter of ground 1(iv) could in some way have been tainted by the stance taken by IP1 in its representations. I cannot see how this point is arguable.

176. Secondly, the claimants complain that the SST was not provided with briefing on the impact of each alternative option on *each* heritage asset so that the comparative judgments in the decision letter were the result of his assessing the evidence directly himself. I note that it is not suggested that the material submitted with the DCO application, during the Examination and thereafter, was legally inadequate to enable such comparisons to be made. Nor is it suggested that the reasoning in the decision letter dealing with the subject was legally inadequate. Instead, the claimants' complaint is that the SST relied upon "brief summary judgments from unidentified officials without any evidence or analysis sitting behind them."

177. But the law is clear (see e.g. [144], [146] to [149] and [158] above). Both in the examination and decision-making processes, it was a matter of judgment as to how much evidence was obtained, how far the comparative exercise should go into that evidence, and how the impacts compare. There is no legal reason as to why officials rather than the SST could not make those assessments in order to assist the SST. He was entitled to rely upon "brief summary judgments" prepared by officials, without being obliged to consider the underlying evidence on which those judgments were based (see, for example, DL 218). In the usual way, the SST was able to ask for more detailed briefing on a particular point, or to look at specific documents if he so wished. In addition, the SST had access to the underlying material. Mr. Wolfe's contention would apply not only to this particular comparative exercise in the present case, but more generally to Ministerial decision-making in planning cases and the many of the varied issues which they raise.

178. For the above reasons, the new ground 8 is unarguable and so permission to amend the statement of facts and grounds to plead this point should be refused.

Ground 2

179. In the first judicial review, C1 challenged the failure of the SST to assess the relative merits of the extended tunnel and the cut and cover options at the western end of the scheme. The first decision was quashed on that basis. The SST went further in the second decision and considered the relative merits of four other routes: F010, the Parker route (running to the south of the WHS and north of Salisbury), a new route to the south of Salisbury proposed by C2, and a new route to the north of the WHS.

180. The claimants do not allege in this claim that there was any error of law in the decision not to prefer the extended tunnel and the cut and cover option to the DCO proposal. The current challenge relates to the handling of F010 and an additional "non-expressway" option.

181. IP1's case on route F010 in the Examination was considered by the Panel in its report at PR 5.4.11 to 5.4.15. They referred to specific parts of IP1's Technical Appraisal Report and also the ES. IP1 provided further information and explanation in response to written questions from the Panel. The SA challenged one of the reasons given by IP1 for rejecting F010, namely an increased potential for rat-running through villages. IP1 explained how this judgment was supported by its traffic modelling and added that there were "wider considerations" as to why F010 should be rejected, which had not been addressed by the SA. The Report gave the SST cross-references to the documents where IP1's analysis had been set out, including REP2-024.

182. In January 2022 IP1 responded to the SST's Statement of Matters. The document gave a summary of the reasons why route F010 should not be preferred, including the following at para. 5.2.2:

> "Key differentiators were F010 being a significantly longer route which would pass through a largely unspoilt, high quality, tranquil landscape with an additional crossing of the River Avon Special Area of Conservation (SAC). It would have a much larger footprint and a greater overall environmental impact, despite having greater benefits for the WHS. There would be disbenefits for road users having to travel on a longer F010 route, *offsetting lower construction costs*. F010 would also not interact effectively with the local road network, leaving higher levels of rat running traffic adversely affecting the quality of life in local communities. This summary can be found in paragraph 4.6.2 of the SAR [REP1-023] and is included in the entry for Options Identification, Stage 4 in Table 3.1 of ES Chapter 3 [APP-041]." (emphasis added)

Paragraph 5.2.3 signposted the more detailed evaluations by IP1, including the Technical Appraisal Report and REP2-024.

183. The SA responded in their written representations in April 2022 at paras. 5.3.1 to 5.3.6. That formed the basis for a large number of points in the claimants' skeleton,

but which Mr. Wolfe refined in his oral submissions. He referred to the following points in C1's April 2022 document which he submits were obviously material considerations that the Defendant failed to take into account:

(i) IP1 accepted that route F010 would bring greater benefits for the WHS than the proposed scheme. F010 would have a "large beneficial effect";

(ii) Route F010 would be far less expensive than the proposed scheme (providing a link to the Technical Appraisal Report rather than setting out any figures);

(iii) The SA continued to disagree with IP1's suggestion that F010 would have a greater overall environmental impact than the tunnelled options and would generate higher levels of rat-running adversely affecting the quality of life in local communities;

(iv) The opinion given by Professor Parker Pearson (see ground 8 above).

184. In DL 210 the SST said that he had considered *inter alia* the assessment of alternatives in section 5.4 of the Panel's Report, IP1's written responses to the Panel's questions and chapter 3 of the ES. In DL 229 the SST agreed with IP1's decision not to progress route options including F010 for the reasons given by IP1 "and as further set out below." DL 230 then stated:

> "230. With regard to route F010, while a surface route that bypasses the WHS in its entirety will avoid the less than substantial heritage harm to the WHS from the Proposed Development or the alternatives above, it will give rise to other environmental effects including heritage impacts. In particular, there will likely be direct physical impacts to the southwest corner of the WHS, impacts on as yet undiscovered archaeological remains that contribute to OUV of the WHS, impacts to the setting of the WHS and barrows within the WHS that contribute to OUV and harm to the settings of other scheduled monuments, Grade I listed churches and conservation areas (see paragraph 21 to 24 REP2-024). Because of those potential adverse effects of route F010, the Secretary of State does not prefer it to the DCO scheme."

185. In relation to point (iii) the SA claimed that IP1's assertions were not substantiated by any firm evidence and that IP1 had failed to provide any assessments to support its "bald assertion" of "a greater overall environmental impact." But as Sullivan LJ stated in *R (Langley Park School for Girls) v Bromley London Borough Council* [2010] 1 P & CR 10 at [53], how much evidence should be produced on the degree of harm (or benefit) that would result from an alternative is a matter of judgment for the decision-maker. That is in line with the general principle stated in *R (Khatun) v Newham London Borough Council* [2005] QB 37 at [35] that a claimant must show

that it was irrational for the decision-maker not to have obtained more information on a particular point.

186. Mr. Strachan and Mr. Taylor took the court to a number of documents which showed that there was ample evidence before the SST that F010 would have other, serious environmental effects, including adverse impacts on biodiversity, landscape and rural communities. Reference was made to the Technical Appraisal Report in September 2017, the ES, Response to Written Question – REP2-024 and IP1's Deadline 3 submission. There would be adverse impacts on, for example, the River Avon SAC, a number of SSIs and the landscape of the Upper Avon Narrow Chalk River Valley and other character areas. DL 230 expressly referred to REP2-024. The claimants' criticism is hopeless.

187. Subject to a challenge on the grounds of irrationality, it was a matter of judgment for the defendant as to how much detail to go into, and how much weight to give to, the significant environmental impacts that would be caused by F010, including harm to villages and their conservation areas (*Langley*). He was not under any legal obligation to assess the effect of F010 on heritage assets one by one. He was not deciding whether to grant a DCO for that alternative, but making a broad assessment as to whether it should be preferred.

188. As to point (i), the claimants suggest that the decision letter misunderstood IP1's position as being that F010 would be more harmful, or as harmful, as the proposed scheme in heritage terms, when in fact IP1's case was that F010 was preferable as regards impact on the historic environment and the WHS. The Technical Appraisal Report (para.18.3.62) had said that F010 would have a large beneficial effect overall for the historic environment and the WHS. IP1 claimed a neutral or slight/moderate beneficial effect for the proposed scheme. Plainly, IP1 accepted that F010 was preferable to the proposed scheme as regards the historic environment.

189. On a fair reading of the decision letter, DL 230 does not indicate any misunderstanding. The SST reiterated that he continued to take the view that the proposed scheme would have a significant adverse effect amounting to "less than substantial harm", to that extent disagreeing with IP1. His acknowledgment that F010 would have some heritage impact, thereby accepting the points put forward by IP1, and not accepting the opinion of Professor Parker Pearson, cannot be read as treating the heritage impact of F010 as being greater than, or at least as great as, that of the proposed scheme. The decision letter does not say that. It does not bear that meaning.

190. As to point (ii), Mr. Wolfe pointed out that in 2017 IP1 had estimated the most likely cost of F010 to be £966m, whereas the comparable figure for the proposed scheme was £1,385m. He says that the fact that F010 would be cheaper was not addressed in the decision letter.

191. This is not a factor which featured largely in the SA's case before the Panel or the SST. Before the Panel the SA stated that it did not support the F010 route. But the SA said that IP1 had dismissed it too quickly; it should have been taken to public consultation. The only issue which the Panel noted as having been raised by the SA was whether F010 would lead to more rat-running through local villages. It does not appear that in the Examination the SA relied upon the cheaper cost of F010 as such. Instead, they said that the economic appraisal of options did not support the decision

to drop F010. The *reduction in the benefits of F010* was broadly matched by *the reduction in its costs, compared to the proposed scheme* (PR 5.4.36). It appears that only one party, Mr. Garwood, supported F010 in the Examination (PR 5.4.38).

192. In the first judicial review C1 did not contend that the SST had been obliged to consider F010 as an alternative.

193. In its written representations to the SST in April 2022 the SA mentioned the cheaper cost of F010 only briefly. The SA's point to the Panel recorded in PR 5.4.36 had already made the point that FC010 was cheaper (see [191] above).

194. In these circumstances, the cheaper cost of F010 was not a factor which, as a matter of law, the decision letter had to refer to expressly. The SST had the Panel's report which made it clear that F010 was cheaper than the proposed scheme. There was no dispute that F010 was cheaper. In any event, the cheaper cost of that alternative would not have provided any mitigation for the adverse effects of F010 upon which the SST based his decision not to prefer that option to the DCO scheme (DL 230). The SA does not suggest otherwise.

195. The claimants' argument that the SST did not assess a "non-expressway" option is hopeless. This refers to improving transport to the south-west by modes other than motor vehicles. Mr. Wolfe confirmed that the only long distance alternative to which this could sensibly refer was rail. But, in my judgment, this was not a genuine alternative to IP1's proposal which seeks to fulfil the objectives of Government policy in the NPSNN and the Road Investment Strategy. The policy objective is to provide a high quality route for motor vehicles between the south-east and the south-west of the country using the A303. This objective includes replacing three relatively short single carriageway sections of the A303 with dual carriageway links. A decision-maker is not legally obliged to treat as an alternative to a proposed scheme a suggestion which does not meet relevant policy objectives (see e.g. *R (Friends of the Earth England, Wales and Northern Ireland Limited*) *v Welsh Ministers* [2016] Env. L.R 1 at [88], [113]; *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 at [334] et seq).

196. The SST agreed with the Panel (see PR 5.4.5 and 5.4.66) that other modes of transport, including rail, would not provide a solution to the problems on the A303 between Amesbury and Berwick Down or meet the principal objectives of the proposed scheme (DL 20). That adequately dealt with the SA's point so as not to be open to legal challenge.

197. Permission should be refused to apply for judicial review in relation to ground 2 because it is unarguable.

Ground 3

198. In the claimants' pleaded case and oral submissions they contend that the SST acted irrationally by giving no weight to the risk of Stonehenge being removed by the WHC from the List of World Heritage Sites.

199. In *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759 Lord Hoffmann said at p.780 F-H that there is a clear distinction between the question

of whether something is a material consideration and, if so, the weight it is given in a particular case. Materiality or relevance is a question of law for the courts. Weight is a question of planning judgment entirely for the decision-maker, provided that that judgment is not *Wednesbury* irrational. This distinction between relevance and weight is one aspect of a fundamental principle of planning law, that the courts are only concerned with the legality, not the planning merits, of a decision.

200. I summarised the background to the WHC's involvement with the A303 scheme in [12] to [13] above. The committee's Decision 44 was published on 31 July 2021, the day after the judgment in *Stonehenge 1* was handed down. Paragraphs 7 to 13 of the decision state:

> "7. Reiterates its concern that, as previously advised by the Committee and identified in the 2018 mission report, the part of the A303 improvement scheme within the property retains substantial exposed dual carriageway sections, particularly those at the western end of the property, which would impact adversely the Outstanding Universal Value (OUV) of the property, especially affecting its integrity;
>
> 8. Notes with concern that, although consideration was given to extending the bored tunnel and to greater covering of the cutting, as requested by the Committee, it was determined by the State Party that the additional benefits of a longer tunnel would not justify the additional costs;
>
> 9. Reiterates its previous request that the State Party should not proceed with the A303 route upgrade for the section between Amesbury and Berwick Down in its current form, and considers that the scheme should be modified to deliver the best available outcome for the OUV of the property;
>
> 10. Notes furthermore the State Party's commitment to ongoing engagement with the Committee, the World Heritage Centre, and ICOMOS, but also considers that it is unclear what might be achieved by further engagement unless and until the design is fundamentally amended;
>
> 11. Regrets that the Development Consent Order (DCO) has been granted for the scheme; and therefore, further considers in conformity with Paragraph 179 of the Operational Guidelines that the approved A303 improvement scheme is a potential threat to the property, which – if implemented - could have deleterious effects on its inherent characteristics, notably to its integrity;
>
> 12. Notes moreover that in the event that DCO consent was confirmed by the High Court, the property warrants the inscription on the List of World Heritage in Danger;

> 13. Finally requests the State Party to submit to the World Heritage Centre, by **1 February 2022**, an updated report on the state of conservation of the property and the implementation of the above, for examination by the World Heritage Committee at its 45th session, **with a view to considering the inscription of the property on the List of World Heritage in Danger if the A303 route upgrade scheme is not modified to deliver the best available outcome for the OUV of the property**." (original emphasis)

201. As to paragraph 12 of the WHC's decision, it was not the High Court's function to decide whether the DCO should be confirmed. Rather, the court had to decide whether to allow C1's application for judicial review and to quash the DCO on the grounds of unlawfulness, which it did. Given that the application for the DCO has had to be redetermined, the WHC has not entered the WHS on the List of World Heritage in Danger.

202. In the briefing provided to the SST on 24 May 2023 officials advised that while the Final Report of the Advisory Mission (25 August 2022) had recommended that alternatives be pursued (notably a tunnel, or cut and cover, as far as the western boundary of the WHS), IP2 and the National Trust continued to be broadly in favour of IP1's scheme. The briefing drew the SST's attention to the part of the draft decision letter dealing with the possible loss of WHS status.

203. DL 101 dealt with a number of points arising from representations on the WHS status of Stonehenge. The last point was:

> "Several respondents including the Stonehenge Alliance, the Consortium of Stonehenge Experts, and ICOMOS UK referred to the World Heritage Committee's power to delist properties and referred to the prospect of Stonehenge losing its status. The Secretary of State has taken this issue into account but given it no weight because if it were to happen it would happen as part of a separate process, the Secretary of State is satisfied that the Proposed Development is in accordance with the NPSNN and in granting consent, this would not lead to the UK being in breach of its World Heritage Convention ("WHC") obligations, and the Applicant will be working with advisory bodies when constructing the Proposed Development."

It is this paragraph which the claimants seek to challenge.

204. Article 1 of the Convention defines "cultural heritage" by reference to monuments, groups of buildings and sites "which are of outstanding universal value." Article 2 defines what is to be treated as "natural heritage." Article 3 provides that:

> "It is for each State Party to this Convention to identify and delineate the different properties situated on its territory mentioned in Articles 1 and 2 above"

205. Articles 4 and 5 of the Convention were set out in *Stonehenge 1* at [58]. The court held that the SST was entitled to proceed on the basis that the policy approach in paras. 5.133 and 5.134 of the NPSNN (set out in *Stonehenge 1* at [47]) is compliant with arts. 4 and 5 of the Convention (*Stonehenge 1* at [217]). So where the Secretary of State is satisfied that a proposal satisfies whichever of paras. 5.133 or 5.134 is relevant, the grant of a DCO does not conflict with Arts. 4 or 5 of the Convention.

206. Part III of the Convention deals with the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, that is the WHC established under Art.8.

207. Article 11 deals with the World Heritage List (i.e. of WHSs) and the list of World Heritage in Danger:

> "**Article 11**
>
> 1. Every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article. This inventory, which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance.
>
> 2. On the basis of the inventories submitted by States in accordance with paragraph 1, the Committee shall establish, keep up to date and publish, under the title of "World Heritage List," a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which it considers as having outstanding universal value in terms of such criteria as it shall have established. An updated list shall be distributed at least every two years.
>
> 3. The inclusion of a property in the World Heritage List requires the consent of the State concerned. The inclusion of a property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State shall in no way prejudice the rights of the parties to the dispute.
>
> 4. The Committee shall establish, keep up to date and publish, whenever circumstances shall so require, under the title of "list of World Heritage in Danger", a list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under this Convention. This list shall contain an estimate of the cost of such operations. The list may include only such property forming part of the cultural and natural heritage as is threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use

> or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods and tidal waves. The Committee may at any time, in case of urgent need, make a new entry in the List of World Heritage in Danger and publicize such entry immediately.
>
> 5. The Committee shall define the criteria on the basis of which a property belonging to the cultural or natural heritage may be included in either of the lists mentioned in paragraphs 2 and 4 of this article.
>
> 6. Before refusing a request for inclusion in one of the two lists mentioned in paragraphs 2 and 4 of this article, the Committee shall consult the State Party in whose territory the cultural or natural property in question is situated.
>
> 7. ….. "

208. The parties referred to the Operational Guidelines for the Implementation of the World Heritage Convention as issued by the WHC on 31 July 2021. The Guidelines set out criteria and procedures for entering properties on the World Heritage List or the List of World Heritage in Danger (see Art.11(5) of the Convention).

209. Paragraph 77 of the Guidelines sets out criteria for OUV. A property must also meet the conditions of integrity and/or authenticity to be deemed to be of OUV (para. 78). "Authenticity" is defined in paras. 79 to 86 and "Integrity" in paras. 87 to 95. Paragraph 87 states that all properties on the World Heritage List must satisfy the conditions of integrity. Paragraph 88 explains that:

> 88. Integrity is a measure of the wholeness and intactness of the natural and/or cultural heritage and its attributes. Examining the conditions of integrity, therefore requires assessing the extent to which the property:
>
> (a) includes all elements necessary to express its Outstanding Universal Value;
>
> (b) is of adequate size to ensure the complete representation of the features and processes which convey the property's significance;
>
> (c) suffers from adverse effects of development and/or neglect
>
> This should be presented in a statement of integrity."

210. The WHC's Decision 44 in July 2021 expressed concern regarding the effect of the exposed dual carriageway sections of the proposed scheme, particularly the western cutting, on the integrity of the WHS. But the court has not been shown any detailed

consideration by the Committee of how the Guidelines should be applied to the proposal, e.g. para. 88. It is not suggested that any such material was sent to the Department. In any event, the criteria in para. 88 raise matters of degree and evaluative judgment.

211. Part IV of the Guidelines is concerned with monitoring of the state of conservation of WHSs. Paragraphs 177 to 191 deal with the List of World Heritage in Danger and paras. 192 to 198 deal with the "Procedure for the eventual deletion of properties from the World Heritage List."

212. Under para. 177 the WHC *may* enter a WHS on the List of World Heritage in Danger if "the property is threatened by serious and specific danger," "major operations are necessary for the conservation of the property" and "assistance" under the Convention has been requested ("assistance" may be limited to expressions of the WHC's concern, including entry on the List of World Heritage in Danger).

213. By paras. 178 and 179 a "cultural property", such as Stonehenge, may be entered on the List of World Heritage in Danger if *inter alia* there is "potential danger", that is "the property is faced with threats which could have deleterious effects on its inherent characteristics". These may include the threatening effects of regional planning projects and town planning. Paragraph 181 states that "the threats and/or their detrimental impacts on the integrity of the WHS must be amenable to correction by human action", including administrative action such as the cancellation of a major public works project. When considering the inscription of a WHS on the List of World Heritage in Danger, the WHC will adopt, in consultation with the State Party, a DSOC (see [34] above) for the removal of the property from that list (para. 183).

214. The WHC is to review each year the state of conservation of properties on the List of World Heritage in Danger, which will include any monitoring procedures (para. 190). On the basis of those regular reviews the WHC shall decide, in consultation with the State Party, whether *inter alia* to delete the WHS from the List of World Heritage in Danger if no longer under threat, or to consider the deletion of the WHS from that List and the World Heritage List if the property "has deteriorated to the extent that it has *lost* those characteristics which determined its inscription on the World Heritage List" (emphasis added) (para. 191). Likewise, the test in para. 9 of the Guidelines is whether the OUV of the property which justified its inclusion in the World Heritage List is "lost" (see also para. 192). That would be a matter for evaluative judgment.

215. In addition to the representations by ICOMOS-UK summarised in [34] above, the SA's representations in April 2022 made brief reference to the WHC's Decision 44 as a warning about the future status of the Stonehenge WHS (see paras. 1.6.1, 2.11 and 2.12). In their representations in August 2022 the SA set out some generalised comments in 10 lines on potential detriments for the UK if Stonehenge were to be delisted, such as harm to visitor numbers, research value, cultural value, and the UK's reputation in the world for compliance with the Convention.

216. Ground 3 turns on the criticisms made by the claimants of the reasons given in DL 101 for giving no weight to the power of the WHC to delist Stonehenge as a WHS and the prospect of their doing so.

217. The claimants' criticisms of DL 101 should be seen in the context of three points in the statement of common ground which the parties agreed for this hearing:

> (i) When the WHC reached its Decision 44 in 2021 it did not have evidence which was before the Panel and the SST, in particular additional assessments of the tunnelling options provided by IP1 as part of the redetermination process;
>
> (ii) The WHS is not on the List of World Heritage in Danger;
>
> (iii) At no stage has the WHC decided that if the proposed scheme proceeds, the WHS must be removed from the list of WHS, nor has it expressed any view as to the likelihood of this occurring.

218. The first reason given in DL 101 is:

> "If it were to happen it would happen as part of a separate process."

The claimants submit that this cannot amount to a rational reason for giving no weight to what they correctly refer to as a "risk of delisting." But the parties agree that the WHC has expressed no view on the likelihood of delisting. Read in context "it" in DL 101 simply referred to that risk. As we have seen, any question of delisting would be a *separate* process in which the key issue in the discussion between the WHC and the UK would be whether Stonehenge has *lost* those characteristics of OUV which determined its inscription as a WHS. Neither the SST nor the UK Government has accepted that those characteristics would be "lost". In my judgment, the SST was entitled not to second guess the outcome of any consideration by the WHC of delisting, if that separate process were to be put in train.

219. The second reason given in DL 101 is that the SST is satisfied that the proposed scheme accords with the NPSNN and the grant of consent would not lead to the UK being in breach of its obligations under the Convention. The claimants submit that this refers to compliance with arts. 4 and 5 of the Convention, which do not employ the same criteria as the provisions in the Guidelines dealing with delisting. I agree that the reference in DL 101 to the NPSNN shows that the SST had in mind the approach approved in *Stonehenge 1* (see [205] above) and, I would add, his legally unimpeachable finding that the scheme would cause "less than substantial harm."

220. Articles 4 and 5 of the Convention and the heritage policies in the NPSNN are aimed at providing an appropriate level of protection for a WHS. The SST's findings about the effect of the proposed scheme on the OUV are consistent with the view that the characteristics of OUV which led to Stonehenge becoming a WHS would not be "lost." The SST's conclusions in DL 101 that the proposed scheme accords with the NPSNN and to grant the DCO "would not lead to the UK being in breach of its World Heritage Convention … obligations" were matters of evaluative judgment for the SST. Looking forward from the decision letter, these are matters for the UK Government in any future discussions with the WHC about the status of Stonehenge under the Convention. The SST's second reason was neither irrelevant nor irrational.

221. The third reason in DL 101 is that IP1 will be working with advisory bodies when constructing the proposed scheme. Mr. Taylor explained that the scheme put forward in support of the DCO is to some extent in outline. The DCO contains requirements for the approval by the SST of more detailed designs. IP2 attached importance to the mechanisms in the detailed design stage for achieving improvements (see e.g. DL 75, 77 and 90). I see no unlawfulness in the SST's reliance upon this third reason in combination with the first and second reasons.

222. Even if the last paragraph of DL 101 could perhaps have been expressed more clearly, it is not irrational. Judicial review is not an exercise in awarding marks for draftsmanship.

223. Permission must be refused to apply for judicial review in relation to ground 3 because it is unarguable.

Ground 5

224. Mr. Wolfe submitted that the SST failed to have regard to obviously material considerations, the CBDP and the NZGP published in March 2023.

225. Those documents were published by the Secretary of State for Energy Security and Net Zero (SSESNZ) as a result of the decision by the High Court in *Friends of the Earth* [2023] 1 WLR 225 in relation to the Net Zero Strategy ("NZS") previously published under ss.13 and 14 of the CCA 2008. Section 13 requires the SSESNZ to prepare proposals and policies which he considers will enable the carbon budgets set under the Act to be met and also the net zero target for 2050. Section 14 requires the SSESNZ to lay a report before Parliament setting out his proposals and policies for meeting those objectives. The High Court granted a declaration that the NZS was unlawful because the Secretary of State was not given any of the information within the Department on the relative numerical contribution to meeting the targets which had been assessed for each policy, the identification of those policies for which no quantitative assessment could be made and risks to the delivery of individual policies. The SSESNZ's duty under ss. 13 and 14 relates to his overarching duty in s.1 of the CCA 2008 to ensure that in 2050 the UK's net carbon account is at least 100% lower than the 1990 baseline. Friends of the Earth did not ask the court to quash the NZS, taking the view that much of its content is commendable [20]. Accordingly, the court made an order setting a time limit within which the SSESNZ had to comply with ss.13 and 14. The outcome was the NZGP and CBDP.

226. Paragraph 2 of the CBDP states that the approach in the NZS remains the right one. The NZGP and the Energy Security Plan provide an "update" to the NZS.

227. Paragraph 3 of the CBDP states:

> "This Carbon Budget Delivery Plan provides the detail, setting out the current package of proposals and policies prepared by the Secretary of State (as of March 2023) to enable the delivery of Carbon Budgets 4, 5 and 6. The proposals and policies reach far into the future, setting out our plans to the end of Carbon Budget 6 in 2037. This means that, whilst maintaining focus on delivering the proposals and policies, we must acknowledge

> that the package represents one of many routes to full decarbonisation of the UK economy by 2050. We expect the world to change between now and the end of Carbon Budget 6, so we expect that the package of proposals and policies will evolve to adapt to changing circumstances, new evidence, to utilise technological developments and address emerging challenges. This will enable us to maximise opportunities to drive growth, jobs and investment across the UK whilst reducing emissions."

228. Paragraph 4 of the CBDP explains the difficulties of forecasting the likely performance of policies, of which there are a large number, so far into the future. In any event, the policies are to be kept under review, updated and amended.

229. The bulk of the CBDP contains estimates of future savings in emissions from policies which have quantifiable effects. That addresses one of the legal errors identified by the High Court in the *Friends of the Earth* case (see [225] above). The claimants have produced small parts of that document and of the NZGP addressing risks to the delivery of certain transport-related policies. The question is: how does that material relate to the role of the SST in determining IP1's application for a DCO under the PA 2008 so as to give rise to any ground of challenge?

230. Mr. Wolfe began with the SST's Statement of Matters. The SST asked for updated information on *inter alia* the impact of the scheme on the UK's carbon budgets to take account of the sixth carbon budget and the likely significant effects of the proposal on climate change including GHG emissions.

231. He then referred to the NPSNN. Paragraph 5.18 states:

> "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."

A footnote indicates that successor documents to the Carbon Plan are also relevant, which would include the NZS, the NZGP and the CBDP.

232. I accept the submission of Ms. Rose Grogan for the SST that the key issue in para. 5.18 of the NPSNN for the determination of the DCO application was whether the projected increase in carbon emissions from the proposed scheme is so significant that it would materially impact on the ability of the Government to meet its carbon reduction targets (i.e. those set under the CCA 2008). Paragraph 5.17 of the NPSNN

states that "it is very unlikely that the impact of a road scheme will, in isolation, affect the ability of Government to meet its carbon reduction plan targets". Nevertheless, applicants are required to provide an assessment of the carbon impact of a proposed project against the UK carbon budgets. IP1 did so and the SST considered the assessment in his decision. No complaint is made about that assessment.

233. The decision letter summarised relevant parts of the CCA 2008 and the methods used in the ES to make projections of carbon emissions compared to the carbon budgets (DL 126 to DL 130). The Panel had noted that the assessment in the ES had been worst case, because it had *not* taken into account decarbonisation measures in the Government's climate change policies e.g. decarbonisation of the Grid and the transition to zero-carbon and ultra-low emission vehicles (DL131). The Panel concluded that the scheme's GHG emissions would have a negligible impact as a proportion of UK carbon emissions up to the fifth carbon budget (DL 132 to DL 133).

234. The second decision letter addressed the updated quantitative information from IP1 on the scheme's impact on carbon budgets including the sixth carbon budget (DL 135 to DL 137).

235. The SST noted the effect on projections of carbon emissions of the delay in the anticipated opening of the road scheme to 2029 (assuming construction began in 2023) and the assessment of the operation of the scheme over a 60-year period. He specifically noted that the assessment by IP1 did *not* take account of any changes in "vehicle fleet mix" such as any increase in the uptake of electric vehicles beyond 2030, and so was likely to be *conservative* (DL 141 to DL 143).

236. The decision letter stated that the majority of the scheme's operational emissions result from vehicle usage, but the Transport Decarbonisation Plan ("TDP") published in July 2021 contains a range of policies to reduce those emissions over time and to help ensure carbon reduction commitments are met. The NZS contains policies for decarbonising all sectors of the UK economy so as to meet the net zero target by 2050 (DL 144).

237. At DL 149 the SST applied para. 5.18 of the NPSNN. He said that the carbon budgets should meet the goals of the Paris Agreement as regards the UK's target for 2050, the scheme's contribution to overall carbon levels is very low and it will not have a material impact on the Government's ability to meet its legally binding carbon budgets. Those conclusions were reinforced by a further reference back to the findings of the Panel (DL 151).

238. At DL 152 the SST addressed the Government's climate change policy under the CCA 2008. He acknowledged the successful challenge to the NSZ, but said that the document had not been quashed. The SST referred to the new report which had been required to be produced as the result of the High Court's decision and the updating which had been carried out. But he said that the NZS still remained Government policy and concluded that the proposed scheme would not hinder the delivery of the strategy. In DL153 he added that the small increase in emissions resulting from the scheme can be managed within the Government's "overall strategy" for meeting net zero.

239. The SST set out his overall conclusions on climate change at DL 165 to DL 169. At DL 167 he reiterated that the proposed scheme is not inconsistent with "existing and emerging policy requirements to achieve the UK's trajectory towards net zero." The effect on climate change would be "minor adverse" but not significant. The scheme complies with the NPSNN and would not lead to a breach of any international obligations resulting from the Paris Agreement, or of the Government's own policies, or of legislation relating to net zero. Given the likelihood that those policies and the legislation will decrease carbon emissions over the lifetime of the scheme, the SST decided to give only "limited weight" in the planning balance to the harm from those emissions (DL 169).

240. As the SST and IP1 submitted, it was not easy to discern exactly what was the claimants' legal complaint. They have not said, for example, that the SST failed to take into account some relevant change in Government policy introduced in March 2023. None has been identified. What ground 6 seemed to come down to was this. The transport section of the NZS has policies promoting or relying upon, for example, zero emission vehicles (pp.24, 155 and 157). The SST has expressly referred in his decision letter to the NZGP, but not to the CBDP which provides analysis of the relative contributions to carbon reduction from policies with quantifiable effects and risks to delivery. In his oral submissions Mr. Wolfe focused on a passage in the CBDP which states that "risks to delivery are highest where there is reliance on nascent or immature technologies and associated markets, such as zero-emission vehicles or flight technologies or utilisation of lower carbon fuels." He submitted that the SST had failed to take into account this assessment prepared for the SSESNZ under the CCA 2008 of delivery risk to such policies.

241. There is nothing in this complaint. Reading the CBDP and NZGP extracts supplied to the court as a whole, alongside the NZS, it is plain that the Government has a number of policies for reducing carbon emissions in the transport sector, of which the transition to zero emission vehicles is one. As for the identified risks to delivery, the CBDP states "despite the intrinsic uncertainties of long-term sectoral emissions projections, we still have a reasonable to high level of confidence that the proposed policy package will deliver in line with what is needed to enable carbon budgets to be met." In those circumstances, I see no reason why the SST was legally obliged to address in his decision letter individual comments in the CBDP on risks to delivery of particular transport-related policies. Furthermore, that subject relates essentially to the duties of the SSESNZ under the CCA 2008 to achieve the statutory targets.

242. In his decision the SST rightly focused on the relevant policies in the NPSNN and, in particular, the issue of whether the proposed scheme satisfied the policy in para. 5.18. The SST decided that it did. The material relied upon by Mr. Wolfe provides no basis for undermining that conclusion. It is not otherwise open to legal challenge.

243. Permission to rely upon ground 5 is refused because it is unarguable.

Ground 6

244. Mr. Wolfe submitted that, given the SST's decision to review the NPSNN under the PA 2008 because it is out of date in relation to obligations under the CCA 2008, he failed to consider not applying policies on climate change in the NPSNN under

s.104(4), (5) and (7) of the PA 2008, and/or he acted irrationally by not departing from those policies.

245. Under s.104(3) the SST must decide an application for a DCO in accordance with the relevant NPS, in this case the NPSNN, except to the extent that one or more of subsections (4) to (8) applies. Section 104(3) is disapplied if and in so far as the SST is satisfied that deciding the application in accordance with the NPSNN would lead to the UK being in breach of any of its international obligations (s.104(4)), or any of *his* statutory duties (s.104(5)), or if the SST is satisfied that the adverse impact of the development would outweigh its benefits (s.104(7)).

246. This ground was presented on the basis that although the UK's relevant international obligations arise under the Paris Agreement, it was sufficient for the SST to address the targets set under the CCA 2008, that is the carbon budgets (leading towards the 2050 net zero target). It should be noted, however, that the Minister responsible for compliance with the duties imposed on the Secretary of State by the CCA 2008 is the SSESNZ, not the SST.

247. Mr. Wolfe points out that the NPSNN was adopted in 2014 and based upon the CCA 2008 as it then stood and the Carbon Plan 2011. At that stage the target in s.1 of the Act was to reduce the net UK carbon account by 80% by 2050 compared to the 1990 baseline. After the adoption of the NPSNN the UK ratified the Paris Agreement in 2016, s.1 of the CCA 2008 was amended to alter the 2050 target from a reduction of 80% to achieving net zero, the sixth carbon budget was set in April 2021, the TDP was published in July 2021 and the NZS in October 2021, followed by its progeny.

248. In July 2021 the SST decided to initiate a review of the NPSNN under s.6 of the PA 2008. He did so having regard to changes which had taken place since the adoption of the NPSNN, notably the introduction of the net zero target for 2050, the sixth carbon budget and the policies in the TDP. Mr. Wolfe contends that those reasons for the decision to carry out the review, indicating that the NSPNN was out of date, were obviously material considerations which the SST was obliged to take into account, by treating them as reasons to depart from the climate change policies of the NSPNN. He failed to do this.

249. However, the SST also announced that he would not exercise his power under s.11 of the PA 2008 to suspend the operation of the NPSNN (or any part thereof) pending the review of that policy statement. Accordingly, the NSPNN has remained in force under the PA 2008 and continues to be a NPS to which s.104(3) applies. Given the provisions in the PA 2008 which allow the SST to disregard arguments which challenge the merits of a NPS in force (e.g. s.106(1)(b)) and which allow for a NPS to remain in force although it is being reviewed (ss.6 and 11), I have serious doubts as to whether the claimants are entitled to pursue this ground, at least in relation to s.104(7) (*R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2021] PTSR 1400 at [104]-[105]). But the point has not been argued and I do not base my decision on it.

250. As we have seen, the SST did have regard to the implications of the proposed scheme for the net zero target and the carbon budgets, including the sixth carbon budget, and did take into account the policies in the TDP. In other words, the SST has taken into account the matters which led him to decide that a review under s.6 of the PA 2008 of

the NPSNN should be carried out. He concluded that the proposed scheme would produce such low carbon emissions that it would not materially impact on the Government's ability to meet its statutory climate change objectives. In the light of his findings, the SST decided that s.104(4), (5) or (7) did not apply (see e.g. DL 167). He also decided that there would be no conflict with the TDP (DL 35).

251. This raises the question: how do the claimants suggest under ground 6 that taking into account those very same factors upon which the decision to review the NPSNN was based, should or could have made a difference to the SST's decision-making on the DCO application? The only relevant answer given by Mr. Wolfe was that the policies in the NPSNN may change. Other points raised by the claimants were simply an attempt to entice the court outside the proper ambit of judicial review.

252. After carrying out his review the SST decided under s.6(5) of the PA 2008 that the NPSNN should be amended. On 14 March 2023 he laid before Parliament a draft revised version of the NPSNN. Section 6(7) required the consultation and Parliamentary procedures set out in ss.7 and 9 to be followed. The period for consultation responses did not close until 6 June 2023, not long before the second decision letter was issued by the SST.

253. In DL 21 the SST said that he had taken the draft NPSNN into account and concluded that there was nothing in that draft which would have led him to come to a different conclusion on the DCO application. That was a matter of judgment for the SST. It is common ground that the SST was referring to the version laid before Parliament in March 2023 before consultation took place. It is not suggested that any revised version of the draft post-consultation was available before the SST's decision on the DCO application.

254. The claimants have set out a few points of difference between the text of the two documents. But at the date of the decision letter the revised NPSNN was only a draft which had yet to complete the consultation and Parliamentary processes. It was not a designated NPS. The clear implication of DL 21 is that the SST took into account this obvious difference between the status of the two documents, as he was entitled to do.

255. I have considered the textual differences between the two documents upon which the claimants rely. They do not begin to show that the SST's judgment in DL 21 was irrational. In substance ground 6 is concerned with whether the proposed scheme would impact upon the Government's ability to comply with obligations under the CCA 2008, which give effect to the UK's obligations under the Paris Agreement. The carbon budgets have been set so as to lead towards the achievement of the 2050 net zero target. Paragraph 5.35 of the draft NPSNN continues to accept that it is sufficient to make an assessment of the scheme's carbon emissions against the carbon budgets. That is what has been done in the technical analysis placed before the SST and in the decision letter. The SST accepted that assessment and decided that those emissions are negligible and will not impair the UK's ability to meet the carbon budgets.

256. Permission to pursue ground 6 must be refused because it is unarguable.

Conclusion

257. For the reasons set out above, the application for permission to apply for judicial review in relation to grounds 1, 2, 3, 4, 5, and 6 and the application for permission to amend the statement of facts and grounds to add the new ground 8 are refused. Ground 7, the subject of the stay granted on 6 November 2023 (see [64] above), is the only outstanding part of this claim.