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Case No: AC-2023-LON-001856
AC-2023-LON-002005
AC-2023-LON-002008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2024

Before :

MR. JUSTICE SHELDON

- -

Between :

(1) FRIENDS OF THE EARTH **(2) CLIENTEARTH** **(3) GOOD LAW PROJECT**	**Claimants**
- and -	
SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO	**Defendant**

- -
- -

David Wolfe KC, Catherine Dobson, Nina Pindham (instructed by **Leigh Day**) for the **First Claimant**
Jessica Simor KC, Emma Foubister (instructed by **ClientEarth)** for the **Second Claimant**
Peter Lockley (instructed by **Good Law Practice**) for the **Third Claimant**
Jonathan Moffett KC, Christopher Badger, Robert Williams (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 20-22 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3 May 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 Sheldon :

1. This case concerns the statutory process that Parliament has prescribed for the United Kingdom to achieve net zero greenhouse gas emissions by 2050. Under the Climate Change Act 2008 ("the CCA 2008"), the relevant Secretary of State (now the Secretary of State for Energy Security and Net Zero, and the Defendant to these proceedings) is required to set carbon budgets for the United Kingdom in relation to successive five-year periods.

2. In a judgment handed down on 18th July 2022 in the case of *R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2023] 1 WLR 225 ("*FoE (No.1)*"), Holgate J decided that decisions taken by the Secretary of State for Business, Energy and Industrial Strategy ("BEIS") (the Minister who previously had responsibility under the CCA 2008) in 2021 failed to comply with the Secretary of State's duty under section 13(1) of the CCA 2008 to prepare such proposals and policies as he considered would enable relevant carbon budgets up to and including the sixth carbon budget (relating to the period 2033-2037) ("CB6") to be achieved, and failed to fulfil the Secretary of State's obligation pursuant to section 14(1) of the CCA 2008 to set out for Parliament his proposals and policies for meeting the relevant carbon budgets.

3. Holgate J ordered the Secretary of State for BEIS to lay before Parliament a report which was compliant with section 14 of the CCA 2008 by no later than 31st March 2023. The Secretary of State for Energy Security and Net Zero reconsidered matters and purported to comply with sections 13 and 14 of the CCA 2008. On 31st March 2023, he laid before Parliament the Carbon Budget Delivery Plan ("the CBDP"). In these proceedings, the Claimants contend that the Secretary of State failed to comply with sections 13 and 14 of the CCA 2008.

4. The hearing before me was for permission to be followed by a substantive hearing if permission was granted: a "rolled up" hearing.

Background

5. The general background to the requirement for the setting of carbon budgets can be found in Holgate J's judgment in *FoE (No.1)* at paragraphs 2-12:

> "2. In 1992 the United Nations adopted the United Nations Framework Convention on Climate Change ("UNFCCC"). Following the 21st Conference of the parties to the Convention, the text of the Paris Agreement on Climate Change was agreed and adopted on 12 December 2015. The United Kingdom ratified the Agreement on 17 November 2016.
>
> 3. Article 2 of the Agreement seeks to strengthen the global response to climate change by holding the increase in global average temperature to 2°C above pre-industrial levels, and by pursuing efforts to limit that increase to 1.5°C. Article 4(1) lays down the objective of achieving "a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases ["GHGs"] in the second half of this century."

That objective forms the basis for what is often referred to as the "net zero target", which will be satisfied if the global level of any residual GHG emissions (after measures to reduce such emissions) is at least balanced by sinks, such as forests, which remove carbon from the atmosphere.

4. Article 4(2) requires each party "to prepare, communicate and maintain successive nationally determined contributions ["NDCs"] that it intends to achieve". Each party's NDC is to represent a progression beyond its current contribution and reflect its "highest possible ambition" reflecting inter alia "respective capabilities" and "different national characteristics" (article 4(3)).

5. The UK responded to the Paris Agreement in two ways. First, section 1 of the Climate Change Act 2008 ("CCA 2008") was amended so that it became the obligation of the Secretary of State for Business, Energy and Industrial Strategy to ensure that "the net UK carbon account" for 2050 is at least 100% lower than the baseline in 1990 for CO2 and other GHGs, in substitution for the 80% reduction originally enacted (see the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019 No.1056)). That change came into effect on 27 June 2019. Second, on 12 December 2020 the UK communicated its NDC to the UNFCCC to reduce national GHG emissions by 2030 by at least 68% compared to 1990 levels, replacing an earlier EU based figure of 53% for the same year.

6. According to the Net Zero Strategy ("NZS"), the UK currently accounts for less than 1% of global GHG emissions (p.54 para. 31).

7. Section 4 of the CCA 2008 imposes a duty on the Secretary of State to set an amount for the net UK carbon account, referred to as a carbon budget, for successive 5 year periods beginning with 2008 to 2012 ("CB1"). Each carbon budget must be set "with a view to meeting" the 2050 target in s.1. The ninth period, CB9, will cover the period 2048-2052 for which 2050 is the middle year. Section 4(1)(b) imposes a duty on the Secretary of State to ensure that the net UK carbon account for a budgetary period does not exceed the relevant carbon budget. Thus, the CCA 2008 has established a framework by which the UK may progress towards meeting its 2050 net zero target.

8. The net UK carbon account referred to in s.1 and s.4 relates to carbon dioxide and the other "targeted" GHGs listed in s.24 (methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride). GHG emissions are expressed for the purposes of the Act in tonnes of "carbon dioxide equivalent" (s.93(1)). That term refers to either a tonne of CO2 or an amount

of another GHG with "an equivalent global warming potential" ("GWP").

9. The Secretary of State has set the first 6 carbon budgets. Each has been the subject of affirmative resolution by Parliament. CB6 came into force on 24 June 2021 (The Carbon Budget Order 2021 – SI 2021 No. 750) and sets a carbon budget of 965 Mt CO_2e (million tonnes of carbon dioxide equivalent) for the period 2033 – 2037.

10. The six carbon budgets and their relationship to the 1990 baseline are summarised below:

Carbon budget	Period	Target emissions Mt CO_2 e	Percentage reduction from 1990 level
1	2008–2012	3,018	25%
2	2013–2017	2,782	31%
3	2018–2022	2,544	41%
4	2023–2027	1,950	55%
5	2028–2032	1,725	60%
6	2033–2037	965	78%

Sources: NZS: p. 306 para.5 and p. 310 Table 1; *R (Transport Action Network Ltd) v Secretary of State for Transport* [2022] PTSR 31 at [50].

11. The UK overachieved CB1 by 36 Mt CO_2e and CB2 by 384 Mt CO_2e. It is on track to meet CB3 (NZS p.306 para.5 and endnote 4).

12. CB6 is the first carbon budget to be based on the net zero target in the amended s.1 of the CCA 2008. The previous budgets were based on the former 80% target for 2050. CB6 is also the first carbon budget to include emissions from international aviation and shipping attributable to the UK. It is common ground that the target in CB6 is substantially more challenging than those previously set."

6. In accordance with the statutory framework under the CCA 2008, in October 2021 the Secretary of State for BEIS approved proposals and policies which he considered would enable CB6 to be achieved, and on 19th October 2021 he laid before Parliament a report setting out those proposals and policies: the Net Zero Strategy ("the NZS").

7. In *FoE (No.1)*, the Claimants (who are the same parties as are before the Court in the present proceedings) challenged the NZS, and the decision to approve proposals and policies. Holgate J upheld the challenge, deciding that the Secretary of State for BEIS

had acted unlawfully with respect to his duties under both sections 13 and 14 of the CCA 2008. Holgate J made the following declarations:

> "3. In determining that the proposals and policies set out in the Net Zero Strategy will enable carbon budgets set under the Climate Change Act 2008 ('the Act') to be met, the Defendant failed to comply with section 13(1) of the Act by failing to consider
>
> (i) the quantitative contributions that individual proposals and policies (or interrelated group of proposals and policies) were expected to make to meeting those carbon budgets;
>
> (ii) how the identified c.5% shortfall for meeting the sixth carbon budget would be made up, including the matters set out at [216] of the judgment and
>
> (iii) the implications of these matters for risk to delivery of policies in the NSZ and the sixth carbon budget.
>
> 4. The Net Zero Strategy of 19 October 2021 failed to comply with the obligation in section 14(1) of the Act to set out proposals and policies for meeting the carbon budgets for the current and future budgetary periods
>
> (i) by failing to include information on the quantitative contributions that individual proposals and policies (or interrelated group of proposals and policies) were expected to make to meeting those carbon budgets and
>
> (ii) by failing to address the matters identified in [253] of the judgment."

8. Following Holgate J's Order, the Secretary of State looked again at the policies and proposals and produced the CBDP. As part of this process, it was necessary to identify the emissions savings that needed to be made in each of the periods for the fourth, fifth and sixth carbon budget periods: 2023-2027, 2028-2032 and 2033-2037. Essentially, the emissions limit for each of the budgetary periods was compared to a projection of net emissions for the relevant period, referred to as a "baseline". The difference between the "baseline" and the emissions limit represented the volume of additional emissions savings that needed to be made in order to meet the relevant carbon budget.

9. The projection of net emissions was based on the Government's Energy and Emissions Projections 2021-2040 ("the EEP"). This was published in October 2022, and set out a projection of future greenhouse gas emissions based on a variety of assumptions as to factors such as future economic growth, the prices of fossil fuels, the cost of electricity generation, and population growth. It also took account of policies that are likely to have an impact on greenhouse gas emissions, where those policies have already been implemented or are at a near final stage of design and funding for them has been agreed; the Government has a high degree of confidence that these policies will be delivered. This produced what is referred to as "the EEP baseline". The EEP baseline was adjusted

before the CBDP was finalised, as a result of various changes that were identified after its initial publication.

10. The adjusted EEP baseline was of 1,958 Mt CO_2e of greenhouse gas emissions across the five-year period of CB6. The emissions limit for CB6 is 965 Mt CO_2e. Accordingly, proposals and policies that would produce emissions savings of 993 Mt CO_2e (in addition to those projected to result from the EEP policies) needed to be identified by the Secretary of State to meet the budget for CB6.

11. A large number of civil servants were involved in the work that led up to the advice to the Secretary of State as to the proposals and policies for meeting the budget for CB6. These included officials referred to as "Sector Leads": policy officials within the Department for Energy Security and Net Zero ("DESNZ") with responsibility for specific sectors within which emissions savings are to be made (power, fuel supply, heat and buildings, transport, natural resources and waste, F-gases, and agriculture, forestry and other land use); and officials within "Sector Teams", who are teams of officials in different government departments who have primary responsibility for overseeing the decarbonisation of the sectors for which they are responsible and for devising, designing, implementing and maintaining the proposals and policies that result in emissions savings. In a witness statement for the present proceedings, Chris Thompson, the Director of the Net Zero Strategy Directorate in the Department for Energy Security and Net Zero, explained that the relevant Sector Teams and Sector Leads working together were well-placed to assess risk to delivery of a particular proposal or policy, and significant weight was placed on their judgments in making recommendations to the Secretary of State for his section 13 decision.

12. The Secretary of State who took the decisions that are in issue in these proceedings, the Rt Hon Grant Shapps MP, was appointed as Secretary of State for BEIS on 25th October 2022. On 8th November 2022, he was provided with an introductory brief for his new role in delivering net zero. He subsequently assumed the role of Secretary of State for Energy Security and Net Zero when that office was created on 7th February 2023.

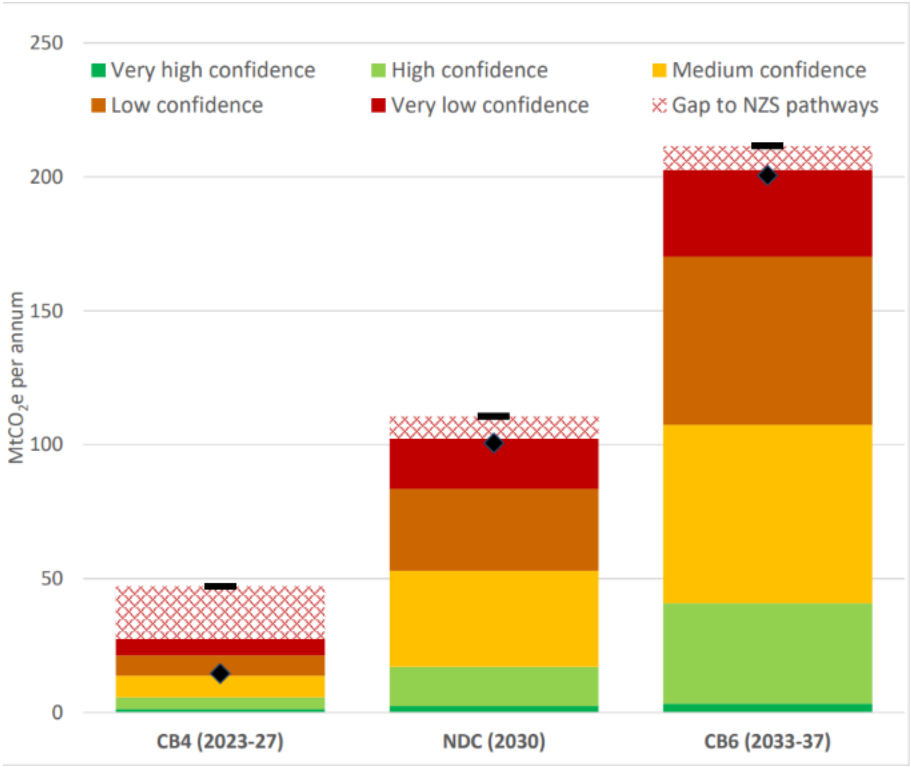
13. The introductory brief described the legally binding target to reduce greenhouse gas emissions to net zero by 2050. It explained that to ensure a phased and realistic transition towards that target, a system of carbon budgets in five-year blocks had been established. The Secretary of State was informed of his legal duties and was told about the outcome of the judicial review challenge: *FoE (No. 1)*. The Secretary of State was told that:

> "Last year the government published the Net Zero Strategy, which set out a detailed plan for achieving our emissions targets up to 2037, and a vision for a market-led, technology-driven transition with emphasis on growth, private investment, and going with the grain of consumer choice. Our most recent projections from August show **we have sufficient savings to meet carbon budgets and the NDC if all planned policies are delivered in full, but there are increasing delivery risks and little or no headroom to later targets** (Annex C). Further developments since August may have affected this position. We will provide further advice on the overall carbon picture."

(Emphasis in the original).

14. It was explained to the Secretary of State that the analysis on progress against carbon budgets had been subject to an assurance process. There were said to be "significant uncertainties" in the analysis. The Secretary of State was told that: "Policy design and delivery can affect savings, represented by 'delivery confidence' reflecting judgments of officials. Emission savings are also conditional on projections of GDP, population, fuel prices, and technology costs and availability."

15. At Annex C to the introductory brief, the Secretary of State was provided with a bar chart which showed the projected emissions savings from planned policies across all sectors of the economy, with carbon savings designated by level of delivery confidence, based on data as of August 2022. The bar chart related to quantified proposals and policies and did not take into account the effects of unquantified proposals and policies, or other factors that may improve or reduce the prospects of meeting the carbon budgets. The bar chart shows the following:



16. The bar chart - illustrated in colours: including red, amber and green - showed that just over 50% of the emissions savings that were required to meet CB6 were designated as "Very high confidence", "High confidence" or "Medium confidence". The remainder were rated as either "Low confidence" or "Very low confidence". The text accompanying the chart stated that "projected carbon savings would be sufficient to meet these carbon targets *if all planned policies were delivered in full*" (emphasis added).

17. A sectoral summary was also provided to the Secretary of State. This set out a description of the progress to date in each sector, as well as the key policies in development with the largest carbon impact. For the Industry sector, for example, it was stated that "Manufacturing and construction account for c.14% of UK emissions.

Government has increased ambition for over the 2030s, but we are starting to see slips in delivery which risk meeting those commitments in full."

18. A further submission was sent to the Secretary of State on 30th November 2022. This included the following advice:

> "There are also likely to be challenges in showing we are making sufficient emission savings towards our carbon budgets. Latest projections suggest you have sufficient savings to meet carbon budgets if all planned policies and proposals are delivered in full (Net Zero Strategy policies and subsequent policies changes such as BESS). But there are significant delivery risks and little or no headroom particularly for later carbon budgets. We also expect this position to worsen over the coming months with likely policy announcements that, while helpful in showing we are progressing on our plans, are not achieving the emission savings we originally expected, for example in CCUS, ZEV mandate and Environmental Land Management Schemes.
>
> At the time of the Net Zero Strategy, we had quantifiably secured 95% of the savings needed to reach carbon budget 6, which included many early-stage policies. We think this could slip closer to 85% due to anticipated changes in policy ambition, technical updates and delivery risk and delays. Whilst some of this is to be expected as we move from strategy to implementation, it highlights the dependencies on upcoming decisions. We will need to address the reduction in quantifiable savings in our response to the Court Order".

(Emphasis added).

19. The next briefing to the Secretary of State about the proposals and policies and the proposed CBDP was sent in early March 2023. In the meantime, officials had been reviewing the proposals and policies, assessing the risks to delivery and identifying the mitigating measures that could be put in place. The details of carbon savings by policy were collected through a mechanism known as a 'Policy Commission', which took place quarterly. For the March Policy Commission, officials were set a deadline to submit returns by 25th January 2023. They were asked to provide information on additional policies and proposals which could be 'quantified', as well as those which could be 'unquantified'. The former were to be preferred on the basis that "a greater reliance on unquantified policies carries increased legal risk".

20. With respect to delivery risks, it was explained that the judgment of Holgate J in *FoE (No. 1)* was clear that the Secretary of State "needs sufficient information on delivery risks to make an informed judgment about whether carbon budgets can be met. This must include qualitative explanation of risks and planned mitigations, in addition to Red Amber Green ratings, building on existing work on monitoring delivery risks."

21. Returns were to be provided on various templates. These needed to be cleared by members of the Senior Civil Service within the relevant government departments that were providing information. One of the tabs on the relevant template was to be used to

capture new information on policy-level milestones and RAG (that is, Red, Amber, Green) ratings to reflect progress against these. It was explained that "Collecting this information will allow the NZS Directorate to continue to track progress across the NZS policy portfolio and help identify where we can work across government to maintain ambition and mitigate risks". With respect to the RAG ratings, it was stated that:

> "This section captures a policy level assessment of the confidence of delivering the carbon savings to the same level of ambition and timelines assumed by the projected carbon savings. (n.b. if a policy does not have projected carbon savings then please provide the RAG rating on the basis of delivering the policy to the expected timelines assumed in your policy portfolio). Please refer to table 3 below for guidance on selecting RAG ratings.
>
> To meet the Court Judgment, we require **additional narrative detail** in this commission to support your carbon delivery confidence ratings at policy level. For all policies, this should:
>
> • Clearly set out any barriers to delivery i.e. technical, political, funding, resourcing, etc.
>
> • Provide an estimate of the impact these barriers have in the delivery of the projected savings, focusing on the impact on timing of delivery and effect on total carbon emissions delivered.
>
> **If your policy is rated Red, Amber/Red** or Amber this should also:
>
> • Explain why Ministers can still treat these projected savings as deliverable by setting out detail on a timebound 'return to Green plan' or mitigating actions and the expected impact on projected savings and delivery confidence. The lower the confidence rating and the higher the projected carbon savings the more detail is required.
>
> This is important because the Minister will need to have confidence that the package of policies and proposals will enable carbon budgets to be met, and how delivery risks will be mitigated."

(Emphasis added).

22. Examples were given as to how a Red, Amber-Red, or Amber Policy could be described:

> "Biomass (for illustrative purposes only, not accurate) Clearly set out the barriers to delivery: No funding was secured at SR21.

> Provide an estimate of the impact these barriers have in the delivery of the projected savings: This means that all savings have been pushed back, and the longer term for Biomass savings are more at risk. Delivering the projected savings is still possible and is dependent on future demand for domestically sourced biomass and the outcome of the Biomass Strategy.
>
> Explain why Ministers can still treat these projected savings as deliverable/set out a timebound 'return to green' plan: Continued engagement with BEIS through Biomass Strategy process required to obtain agreement on demand for biomass, and therefore the upscaling required. Further work is also required to test the feasibility of the biomass deployment metrics that underpin these figures. Provided these mitigations are delivered within X timeframe, delivery of these savings projections, although difficult remain possible to achieve".

23. The RAG ratings themselves were described as follows:

> "Green: Very high degree of confidence. Successful delivery of projected carbon emission savings . . . appears likely (**very high degree of confidence**) and there are no major outstanding issues that at this stage appear to threaten delivery of carbon targets.
>
> Amber/Green: High degree of confidence. Successful delivery of projected carbon emission savings . . . appears probable (**high degree of confidence**); however, there are potential risks. Continual monitoring required to ensure this does not materialise into wider issues threatening overall delivery of projected carbon savings.
>
> Amber: Medium degree of confidence. Successful delivery of projected carbon emission savings . . . appears feasible (**medium degree of confidence**) significant issues already exist, requiring attention. These appear resolvable at this stage and if addressed promptly, should not present … under-delivery of projected carbon savings.
>
> Amber: Low degree of confidence. Successful delivery of projected carbon emission savings is in doubt (**low degree of confidence**), with major risks or issues apparent, or the policy is at an early stage of development with a need for careful monitoring that we are achieving sufficient progress. Urgent action is needed to ensure these are addressed, but this may still result in under-delivery of carbon savings without mitigating actions.
>
> Red: Very low degree of confidence. Successful delivery of projected carbon emission savings appears potentially unachievable (**very low degree of confidence**). There are major issues, which do not currently appear manageable or resolvable,

> or the policy is at an early stage of development without clarity on how sufficient progress will be made. Significant action will be required to resolve these issues now or in the future, and without this there will be under-delivery of carbon savings, with a need for overall viability to be reassessed."

(Emphasis in original).

24. Responses were provided by various government departments. For the present proceedings the Secretary of State disclosed returns from one department: the Department for Environment, Food and Rural Affairs ("DEFRA"). This included a note dated January 2023, headed "Net Zero Pathway Commission Return". Reference was made in the note to the contribution from the Devolved Administrations (referred to as "DAs").

25. In the note, it was stated that the savings returned by DEFRA included a mix of UK-wide and England savings, and the distribution of savings had been calculated using "a range of bespoke scalers with no bespoke engagement with the DAs on whether and how they will be delivering their portions of the allotted savings." It was stated that the Devolved Administrations may choose to implement different policies across environment and farming sectors. It was stated that "Currently DEFRA is not resourced to track or monitor DAs' contributions to UK wide savings and thus the numbers provided should not be treated as either accurate or reliable. We welcome further guidance from BEIS on their strategy for assuring DA contributions across the whole economy."

26. The DEFRA return also stated that the department calculated a total gap of 13% between their Net Zero Strategy effort share (that is, the share of emissions which each relevant government department agreed that it would aim to contribute to the overall target) and the current quantified list for England in CB6, and a gap of 13% for the UK. 63% of the gap at UK level was accounted for by changes to their policy projections. DEFRA also stated that their emissions savings projections generally represented:

> "maximum feasible savings rather than a likely scenario. Delivery confidence is low for many of these emissions savings and scientific uncertainty limits precision. Key assumptions underpinning these numbers that are subject to high levels of uncertainty include land area that will be available for peatland restoration and afforestation; policy uptake rates by businesses, land managers and farmers; and sector-level economic growth projections."

27. In February 2023, Sector Leads were written to, asking them to provide a line-by-line delivery risk summary for the section 13 advice. It was explained that:

> "for the section 13 advice we need to explain the delivery risk of each individual policy in a way that most easily allows DESNZ SoS to understand the delivery risk of the package, at both a collective and individual policy level. This is necessary to ensure DESNZ SoS has the appropriate level of detail to make a rational

> decision on whether the package of policies and proposals is sufficient to enable carbon budgets to be met."

28. Sector Leads were commissioned, therefore, to draft this for their sector:

> "We need you to describe and explain the delivery risk for each individual policy and proposal, and then explain the mitigation we are taking to address this delivery risk and why that gives us the necessary confidence in delivery of our policies."

29. A guidance sheet was provided to assist with this process. The purpose of this guidance was explained as follows*:*

> "Describe and explain the delivery risk for each individual policy and proposal, and then explain the mitigation we are taking to address this delivery risk and why that gives us the necessary confidence in delivery of our policies. We are not seeking to 'categorise' policies in a uniform way. Instead we want to explain the delivery risk of each individual policy in a way that most easily allows DESNZ SoS to understand the delivery risk of the package at both a collective and individual policy level".

30. Sector Leads were given guidance as to how to set out the explanation for the delivery risks by a series of prompts. These would, it was hoped, enable the Secretary of State to understand the delivery risk when looking at the package of policies and proposals as a whole. The prompts were as follows:

> "For policies that are labelled green or green-amber in the commission returns, the new descriptions could start: 'We have high certainty in the delivery of this policy and confidence/certainty that the policy can be its associated carbon savings'. A single bespoke line should then be added to explain why.
>
> For policies that are labelled amber in the commission returns, please begin by describing the actual risks faced, with a couple of short lines. This could then be finished with a summary line such as 'These risks require attention, however appear resolvable based on the actions already underway.'
>
> For policies that are labelled amber-red or red in the commission returns, whose rating is not due to uncertainty, but real and present risks, please begin by describing the actual risks faced (with a couple of short lines) and then finishing with a summary sentence, such as: If not mitigated, these risks could materially affect the successful delivery of the savings in full associated with the policy.
>
> For policies that are labelled amber-red or red in the commission returns, whose rating is due to uncertainty, please begin by

> stating 'Uncertain delivery risk', and then list as many of the below reasons as applicable (and any others that may apply).
>
> a. Funding is subject to a future spending review round and therefore cannot be confirmed now, creating inevitable uncertainty.
>
> b. The policy has yet to be consulted on.
>
> c. The policy uses a technology that is nascent, creating inherent uncertainties and risk
>
> d. The policy relies on another part of the NZ system/another NZ policy that is also not completed
>
> e. The policy requires additional research to provide greater clarity on savings potential and to inform further policy development.
>
> f. The policy requires further appraisal of options"

31. With respect to "Delivery risks: mitigation", the guidance was as follows:

> "For green policies, leave blank
>
> For all amber and reds: please include short summaries of the Template 'route to green' data, with added line on why this gives us confidence/certainty that the policy can be delivered and deliver the associated carbon savings."

32. In his evidence, Mr Thompson stated that he was aware that one of the consequences of the requests for narrative text was that some specific risks that had been identified in the returns to the earlier December Commission might not be included in that text; this was a likely consequence of requesting that the information be presented in a more concise and digestible way. Mr Thompson explained that he did not consider that this was problematic, especially as not all of the risks identified in the returns to the December commission were material from a net zero perspective.

33. On 24th March 2023, a draft submission was sent by Mr Thompson to the Secretary of State on proposals and policies to enable the carbon budgets to be met. A further, slightly updated, version of the draft was sent on 27th March 2023.

34. The 27th March submission stated that it "sets out the current package of proposals and policies that, in our view, enable Carbon Budgets 4, 5 and 6 . . . to be met". The Secretary of State was told that he was required to make a judgment and be satisfied that this package will enable those Carbon Budgets to be met. He was also asked to approve the level of detail to be published in the CBDP, as well as a draft version of the CBDP.

35. The submission included the following:

> "Background

5. To meet the Court Order and fulfil your statutory duties under the Climate Change Act 2008, you have a duty to prepare a package of proposals and policies that you consider will enable Carbon Budgets to be met, with a view to meeting the 2050 net zero target.

6. When making this decision, you should consider the quantified and unquantified policies and proposals, particularly timescales and delivery risks (Table 2 of Annex B). As there is a gap between the total quantified emissions savings of our proposals and policies and what is required to meet Carbon Budget 6, you must also consider whether and how that shortfall will be made up (Annex B). Finally, you must take into account wider matters in connection with Carbon Budgets under section 10 of the CCA, the contribution of these proposals and policies to sustainable development . . .

Quantified savings to meet Carbon Budgets

7. Any emissions savings forecast contains inherent uncertainty due to the long-term nature of a 15 year transition and the complexity of the net zero system. Broader macroeconomic factors will determine the exact quantity of emissions savings required to meet Carbon Budgets meaning that we will continue to review and adapt the proposals and policies in this package, especially those at earlier stages of development.

8. Based on current projections, our view is that the package of proposals and policies that we can quantify will deliver sufficient quantified savings to meet CB4 and CB5, and 97% of CB6. This incorporates recent Budget announcements, comments from [redacted], and the response to Skidmore recommendations [this was a reference to the independent review of the Government's approach to delivering its net zero target, led by a former Minister for Energy and Clean Growth, which had reported its findings on 13th January 2023] . . .

9. The Technical Annex (Annex D) sets out the methodology for the quantification of policies and proposals. <u>You should note that this quantification relies on the package of proposals and Policies being delivered in full. Our advice is that it is reasonable to expect this level of ambition – having regard to delivery risk (see Annex B) and the wider context.</u>

Considerations in making up the shortfall (further detail in Annex B)

10.You must be satisfied that further, as yet, unquantified emissions savings can be made in CB6 to judge that the package will enable carbon budgets to be met. We are confident that further savings can be delivered through proposals and policies

> that will deliver emissions savings but cannot currently be quantified, e.g. by early-stage proposals and policies where the evidence is still being assessed. See Table 3 of Appendix B (Annex B).
>
> 11.The package is further strengthened through the inclusion of a range of cross-cutting proposals and policies which do not directly deliver emissions savings but enable and support our quantified proposals and policies – whether through leveraging the investment needed for technological growth or delivering the green jobs needed for the transition. This supports with de-risking delivery across the package. We can also expect that some of these areas could lead to additional carbon savings: for example our package of policies to drive innovation is likely to lead to new low-carbon technologies which may accelerate the transition.
>
> 12.Wider factors may also impact our ability to meet carbon budgets. Areas of uncertainty in our modelled projections could lead to delivery of emissions savings being faster or slower than expected. The package also does not fully reflect emissions savings from policies developed outside central government: such as in local councils and Devolved Administrations, nor does it reflect potential future shifts in consumer behaviour (see Annex B).
>
> Delivery risk and further considerations (further detail in Annex B)
>
> 13. To assess whether the proposals and policies are sufficient, you must consider the risks to delivery of the emissions savings that each of the proposals and policies carries, see Tables 2 and 3 of Appendix B (Annex B). We have included summaries of key delivery risks for each sector to aid your understanding in Appendix D (Annex B). A number of proposals and policies across sectors currently carry high delivery risk. This is expected given that many of these will be implemented over the next 15 years. We expect delivery confidence for many of these proposals and policies to improve as they are implemented (demonstrated by the high delivery confidence attached to significant savings already in delivery phase) and have suggested potential mitigations to improve delivery confidence outlined in Tables 2 and 3 of Appendix B (Annex B). …"

(Emphasis in original).

36. In his witness statement, Mr Thompson has sought to explain the underlined text at paragraph 9 of the submission. Mr Thompson stated that the underlined text was not intended to convey to the Secretary of State that he should conclude or assume, or otherwise proceed on the basis, that each and every proposal and policy would be delivered in full. Rather, the text was intended to make the point that the total volume

of quantified emissions savings (i.e. those projected to be achieved by the quantified proposals and policies) had been calculated on the basis that the package of proposals and policies would be delivered in full, i.e. the total figure represented the sum of all of the individual quantified emissions savings. Some of the proposals and policies might under-deliver, just as some might over-deliver and this was reflected in the overall sum.

37. In his witness statement, Mr Thompson also stated that quantifying and weighing risk for each and every policy, differentiating the relative risk of every policy proportionately, adjusting for the degree of systemic risk posed by each policy as well as each policy's upside potential that may deliver higher emission savings than planned, would be extraordinary in its complexity and in the additional resource that it would require.

38. A read-out of the Secretary of State's decision was sent on 28th March 2023. This stated the following:

> "He was content with the level of detail set out and, considering the legal advice, feels that it allows us to meet our obligations
>
> He feels he has sufficient confidence that the policies included in our energy and emissions projections are expected to deliver over 100% of the carbon savings needed for CB4 and >40% of the savings needed for CB6
>
> He has noted that quantified proposals would deliver 94% of the nationally determined contribution and 97% of CB6, and comments that this is very good to see
>
> He has considered the unquantified proposals and concludes that they should be capable of delivering significant further savings, with the usual understanding that potential and early stage proposals carry delivery risk
>
> He has further noted that the package does not fully reflect emissions savings from policies developed outside government, particularly local government
>
> He considered the other matters outlined in annexes A-F, including the equalities impact assessment and the risks explanations and mitigations
>
> Overall, he agreed with the advice that the package will enable carbon budgets 4-6 to be met".

39. A further submission was sent to the Secretary of State later on 28th March 2023. This contained some amendments, and asked the Secretary of State to confirm his earlier judgment that he was satisfied that the package of proposals and policies as a whole will enable carbon budgets through to CB6 to be met. The Secretary of State was also asked to approve the final version of the CBDP and associated Technical Annex to be laid before Parliament.

40. The further submission explained as part of the background that:

> "Since the submission of that advice, a number of changes have been incorporated into the package of proposals and policies following final analytical assurance and changes due to final cross government agreements. These are outlined at Annex C, alongside an assessment of their overall impact on the package of proposals and policies. These are largely naming changes and do not impact the quantified position against carbon budgets, nor, taking into account unquantified policies and wider factors, the ability to meet carbon budgets, as outlined in the advice of 27 March."

41. Under a heading "Confirming your decision", it was stated that:

> "We have continued to undertake analytical assurance across the full package of proposals and policies. We had prioritised your legal obligation under the CCA 2008 to prepare a package of proposals and policies that will enable carbon budgets through to CB6 to be met. This process has confirmed that the proposals and policies that we can quantify will deliver sufficient quantified savings to meet CB4 and CB5, and 97% of CB6, and therefore does not change our recommendation in the advice of 27 March."

42. With respect to the CBDP, the submission of 28th March 2023 stated as follows:

> "Level of detail included in the Carbon Budget Delivery Plan
>
> 9. We plan to lay the CBDP and Technical Annex before Parliament on 30 March. To meet the Court order and to fulfil your statutory duties under section 14 of the Climate Change Act 2008 (CCA), these documents set out:
>
> • The proposals and policies you have concluded enable carbon budgets to be met (see Tables 5 and 6 of the CBDP);
>
> • The timescales over which those proposals and policies are expected to take effect (see Tables 5 and 6 of the CBDP);
>
> • An explanation of how the proposals and policies set out in this report affect different sectors of the economy (see pp. 204-210 of the CBDP);
>
> • The implications of the proposals and policies as regards the crediting of carbon units to the net UK carbon account for each budgetary period covered by the report (see Section 1 of the Technical Annex).
>
> 10.The level of detail we recommend publishing in the CBDP reflects its function of promoting public transparency and

> enabling Parliamentary scrutiny of the Government's climate measures.
>
> 11.You agreed to publish sectoral summaries of delivery risk in the CBDP, rather than outlining delivery risks of each individual proposal or policy (see pp.190-200). This is because we do not consider it appropriate or necessary to set out information about specific delivery risks for each of the proposals and policies as we have for you in the advice of 27 March. That was to assist you to look at the contribution of each measure and associated delivery risk to make the judgement that the package of proposals and policies will enable carbon budgets 4, 5 and 6 (CB4, CB5 and CB6) to be met.
>
> . . .
>
> 13. The report relates to proposals and policies of Devolved Administrations and was prepared in consultation with those authorities as required by the CCA 2008. A copy of this report will be shared with those authorities following your approval of the CBDP."

43. Annex B to the Section 13 advice to the Secretary of State set out the various quantified and unquantified proposals and policies that would contribute towards the emissions savings required to meet the Carbon Budgets along with their delivery risks, as well as the consideration of factors under section 10 of the CCA 2008 and Sustainable Development factors.

44. Annex B stated that "Based on current projections, the package of proposals and policies that we can quantify will deliver sufficient quantified savings to meet CB4, significantly overperform for CB5 by 81Mt of savings, and we have quantified 97% of the emissions savings that will enable CB6 to be met". The conclusion set out in Annex B was that:

> "Our overall assessment, taking account of the uncertainty in wider trends and factors, is that the unquantified proposals and policies will enable Carbon Budget 6 to be met when considered alongside the quantified proposals and policies set out in Table 2, Appendix."

45. With respect to sustainable development, the submission contained a table which stated that "[t]here are both positive and negative capital impacts associated with emissions reductions policies but the overall contribution to sustainable development is likely positive". The table cross-referred the Secretary of State to the "natural capital" section of Appendix E to the section 13 advice and explained that other aspects of sustainable development were addressed in the sections of Appendix E addressing economic, fiscal and social factors. The introduction to that section stated that:

> "Sustainable development concerns the stability and prosperity of society, and its capacity to provide for future generations. Sustainable development also incorporates social, economic, and

> environmental dimensions of sustainability. The Climate Change Act requires that the proposals and policies we put in place to enable our carbon budgets to be met, taken as a whole, must be such as to contribute to sustainable development. The main outcomes of the proposals and policies in this report will have a positive impact on the UK's contribution to the global Sustainable Development Goals, in particular goal 7, targeting affordable and clean energy, and goal 13, targeting climate action. In this section, we set out how this package of policies and proposals will contribute to sustainable development. The social considerations section considers the impact on different social groups of climate policies and the net zero transition, and what mitigation the government is putting place, where necessary. The Natural Capital section considers the impact on the continuation and improvement of environmental functions, and stability and renewal of natural assets. This is most relevant to the Sustainable Development Goals 6, 14 and 15, which target protection of water and life on land and marine habitats."

46. Under the heading "social considerations", there was reference to energy prices, the transition from fossil fuels, energy consumption and fuel poverty. Under the heading "natural capital", the text explained that natural capital refers to "those elements of the natural environment which provide valuable goods and services to people". The text cautioned that further assessment of the implications for natural capital of proposals and policies would be required, but summarised the position as follows:

> "This package of proposals and policies is expected to have a significant net benefit to natural capital and thus sustainable development. Moving away from i) fossil fuels towards a greater share of renewable energy, ii) petrol and diesel cars towards lower-emissions alternatives such as electric vehicles iii) gas boilers to lower carbon heating sources and iv) high carbon land uses towards afforestation and other land-based carbon dioxide removals, are just a few examples that will provide significant benefits. However, some negative impacts to some natural capital stocks are likely to arise and impacts will likely be specific and localised. The impact from the significant land use change required to deliver proposals in this report and meet net zero will depend on how and where this change is enacted, with a systemic and spatial approach more likely to deliver on net zero while providing natural capital benefits. Further in-depth appraisal of the natural capital impacts of specific policies and policy mixes will need to be undertaken as proposals are developed following this report. This will be done through the normal channels of Impact Assessments and Business Cases, to ensure trade-offs are managed and impacts mitigated."

The text went on to address specific issues such as air quality, recreation, biodiversity, floods, the availability of water and water quality, raw materials, rare metals, and land use.

47. Annex B contained three tables: Table 1 (Policies captured in the Energy and Emissions Projections); Table 2 (Quantified proposals and policies); Table 3 (Unquantified proposals and policies). In Table 2, the Power sector proposals and policies were grouped together.

48. During the course of oral argument, I was referred to a number of specific proposals and policies by the parties. One example was number 159 in Table 2 of Annex B. The policy name was "Analyse manure prior to application to match crop requirements". The policy description was:

> "Analysing the nitrogen content of slurry, prior to application on crops and grassland, can improve nutrient management, ensuring nitrogen applications do not exceed crop requirements to minimise emissions of nitrous oxide (N2O). Increasing industry adoption is expected as part of a market-led take up of precision farming that is already occurring. Government will work with industry to identify the most appropriate mechanisms for change. We expect the Sustainable Farming Incentive (nutrient management standard) to contribute indirectly to this outcome."

The average annualised savings in CB6 was stated to be 0.00096 Mt CO_2e, and the timescale from which the policy takes effect was 2022. The delivery risks were explained as:

> "Delivery risk uncertain. Requires further analysis of actions under SFI [Sustainable Farming Incentive] to help deliver this".

49. The delivery risks mitigation was described as:

> "Identify whether the actions encouraged under the SFI (particular advisor visits) will partly mitigate delivery risks".

50. On 29th March 2023, a read-out from the Secretary of State's private office confirmed that the Secretary of State had fully considered the documents in considerable detail and was happy to confirm his decision.

51. In his witness statement, Mr Thompson discusses RAG ratings, and has sought to explain why they were not provided to the Secretary of State in the March submissions. Mr Wolfe KC, for Friends of the Earth, contended that Mr Thompson's explanation was not admissible as it amounts to *ex post facto* evidence, contrary to the principle in *R*(*United Trade Action Group Ltd) v Transport for London* [2021] EWCA Civ 1197, at §125. It was argued that Mr Thompson's evidence is not consistent with the contemporaneous evidence, and could be self-serving. I disagree.

52. It seems to me what Mr Thompson was seeking to do in his witness statement was to explain why he did not consider it appropriate to provide RAG ratings to the Secretary of State in advance of the March 2023 decision. This was not an *ex post facto* attempt to elaborate upon or elucidate reasons for a decision that was under challenge, which is generally impermissible as the Court of Appeal pointed out in *United Trade Action Group Ltd.* Rather, Mr Thompson was seeking to explain why he took a particular step in circumstances where that approach has been called into question in these

proceedings; he was not seeking to expand or elaborate upon his reasons for a public law decision that was under challenge. Furthermore, it does not seem to me that the explanation given by Mr Thompson is inconsistent with the contemporaneous evidence. Indeed, there is no contemporaneous evidence making it clear that the Secretary of State would be provided with RAG ratings. The contemporaneous evidence shows that RAG ratings were provided to the Secretary of State in November 2022, and at a later point Mr Thompson requested that a narrative explanation of risk should be provided. The contemporaneous evidence does not provide any clues for why the shift was made. To understand why that shift was made, it is entirely appropriate for Mr Thompson to seek to explain the factors involved.

53. In his witness statement, Mr Thompson explained that RAG ratings are a useful tool to convey information to a Secretary of State who is new to a brief or has little or no prior knowledge of the policy area and the complexities and challenges involved. In his view, they are not a useful way of conveying information to a Minister who is more experienced in the area and has a greater grasp of the complexities and challenges. As a result, Mr Thompson explained that it was his view (and that of other senior colleagues within the department) that RAG ratings were not an effective tool for the Secretary of State to have available to him when making an assessment as to whether a package of proposals and policies will enable the carbon budgets to be met, and could be misleading. Mr Thompson stated that:

> "RAG ratings necessarily group types of risks that are dissimilar in nature: a policy may be categorised as "red" for a range of reasons, such as because it is at an early stage of development, it relies on public funding in future Spending Reviews, it relies on further research and development, it requires consultation, or it relies on the adoption of a new technology. The Secretary of State might decide, however, that these different types of risk pose very different levels of risk.
>
> The RAG ratings do not take into account of the systemic relationships between different proposals and policies. The RAG ratings provided by Sector Teams do not differentiate between the risk attached to delivery of a specific policy and the wider risk posed to the delivery of emissions savings more generally.
>
> The proposals and policies vary significantly in their scope and complexity. Risk assessments of major infrastructure programmes will usually be a composite of tens of individual risks or more, and aggregating those risks into one summary category of risk is challenging. Other policies may be discrete and are either less complex or involve different types of risk.
>
> The fact that a particular proposal or policy might be given a "red" RAG rating by a Sector Team does not mean that it will not be delivered, or that it will not deliver the emissions savings attributed to it."

54. Mr Thompson also pointed out that by its very nature a RAG rating (or its equivalent) focuses on the potential negatives relating to a proposal or policy and does not account

for potential positives. In his view, it was important that Ministers consider a package of proposals as a whole, and that includes potential upsides as well as potential downsides. Instead of RAG ratings, Mr Thompson considered that the Secretary of State should be provided with narrative descriptions of delivery risk, together with sectoral summaries of risk.

55. With respect to the contents of the CBDP, Mr Thompson explained that the decision as to the contents of the plan was for the Secretary of State to take. The broad consensus amongst senior officials was to recommend to the Secretary of State that the narrative descriptions of risk to individual policies and proposals should not be included in the CBDP. The reasons for this recommendation were that (i) section 14 of the CCA of 2008 did not impose a legal requirement that descriptions of risk to individual policies and proposals should be included; (ii) to publish assessments of risk to delivery of such a varied range of proposals and policies, particularly those at an early stage of development, may compromise the space that is required to ensure that policy is developed (and risk is identified and addressed) to an appropriate level before it is subjected to public scrutiny. Mr Thompson expressed the view that there was a real risk that Sector Teams would be more guarded in their assessments of risk if they knew that they would be published; publication of an assessment of risk could itself create risk; and the Secretary of State is familiar with the context and will have background information that would not be available to, for example, a member of the public; and (iii) summaries of risk at a sectoral level were a more meaningful and helpful way of conveying risk, as they enable the identification of cross-cutting risks that potentially pose material risks to the emissions savings that the package of proposals and policies are intended to deliver.

56. In his witness statement, Mr Thompson also discussed the Devolved Administrations. In certain areas, in particular agriculture, land use, waste and building sectors, he explained that policy is devolved to the administrations in Wales, Scotland and Northern Ireland. Each of the Devolved Administrations has committed to achieving net zero, and their proposals and policies can contribute to the United Kingdom's emissions savings.

57. The Scottish Government has committed to achieving net zero by 2045 and has set interim binding targets of reductions in emissions of 75% by 2030 and 90% by 2040. The Scottish Government published its latest Climate Change Plan, which covers the period 2018 to 2032, in 2020. This plan covers all sectors of the economy, mirroring those set out in the CBDP, and outlines actions that the Scottish Government intends to take in order to make to meet its targets. They include actions to improve energy efficiency and introduce low carbon heating to buildings, and to restore peatlands, support afforestation and reduce emissions in agriculture.

58. The Welsh Government has committed to achieving net zero by 2050 and to achieving reductions in emissions of 63% by 2030 and of 89% by 2040. It has published *Net Zero Wales*, which is the emissions reduction plan for Wales for CB2, covering the period 2021 to 2025. The plan is cross-economy, and includes actions for the electricity and heat generation sectors, transport, residential buildings, industry, business and agriculture.

59. The Northern Irish Executive has committed to achieving net zero by 2050, with an interim target of at least a 48% net reduction in emissions by 2030. Sectoral targets

have also been set, including targets for 2030 of obtaining at least 80% of electricity consumption from renewable sources. The draft Green Growth Strategy sets out the Northern Ireland's vision for 2050, and a Climate Action Plan is being developed.

60. The specific information provided by the Devolved Administrations was limited. The Welsh Government shared what had already been published in *Net Zero Wales*. The Welsh Government was due to begin work to develop proposals and policies for the period 2025 to 2030. The Northern Irish Department of Agriculture provided information relating to 48 different proposals and policies, with a brief description of each of these and further information on the relevant sector and implementation status. The Scottish Government provided information relating to 228 "key emissions-reducing policies".

61. Mr Thompson acknowledged that the responses provided by the Devolved Administrations did not provide much detail. There was no quantification of projected emissions savings attributable to their proposals or policies. This was not unexpected as there was much less data of that kind available at the devolved level. Nevertheless, as the Devolved Administrations had committed to taking action to achieve net zero, it was considered that they would need to take further action to meet their commitments. It was decided that the best way of taking this into account was to "scale up" the emissions savings that would be delivered in the relevant areas. Mr Thompson considered that it was reasonable to use this approach, based on the assumption that the proposals and policies would have similar effects to those adopted by the United Kingdom government, that similar levels of uptake would be achieved and the emissions savings results would be similar. In total, 58 proposals and policies were scaled to provide an estimate for United Kingdom-wide emissions savings: about 5% of the total emissions savings. Mr Thompson considered that this was a conservative approach, as there were some sectors where no scaling was undertaken, and also the Devolved Administrations might also take action which achieves greater emissions savings than reflected in the scaling. In the final presentation of materials to the Secretary of State, the scaled contributions in the agriculture and land use, land use change and forestry sector and the waste sector were presented separately as quantified proposals and policies.

62. In a witness statement for the present proceedings, Paul Bailey, the Deputy Director for Strategic Energy and Climate Analysis in the Department for Energy Security and Net Zero has sought to explain the modelling process that was undertaken. He states that the modelled emissions savings represent their "best estimate" of the real-world outcomes and associated emissions savings that would be achieved by the proposals and policies. Where policies are in development, or still to be developed, modelling shows the emission savings that could be achieved with suitable policy action. Mr Bailey explained the reasons why proposals and policies – of which there were 143 – were unquantified: they may deliver indirect emission savings, via changes in social behaviour or technology uptake; analysis has not been completed in time and so could not be modelled; the evidence-base is not strong enough to estimate resulting emission savings robustly; and they include measures that do not lead to individual abatement but are integral to the delivery of quantified proposals and policies(referred to as "enablers").

63. Friends of the Earth, one of the Claimants, has produced for these proceedings an analysis of the risk tables that had been provided to the Secretary of State as an annex

to the submission (this is set out in the witness statement of Michael Childs, the Head of Science, Policy and Research). It is pointed out that 60 of the 191 quantified proposals and policies are expressed to be "uncertain"; and this represents at least 766 Mt CO_2e, or 47% of the total CB4-6 savings. For 65 of the 191 quantified proposals and policies, whilst information is included on delivery risks, contingencies, dependencies, barriers or similar, no information is included on either the degree of delivery risk (high/low) or on the confidence of the assessment (certain/uncertain). This represents at least 683 Mt CO_2e, or 42% of the total CB4-6 savings. For 25 of the 191 quantified proposals and policies, no information is included on either what the delivery risks there may be, or on the degree of delivery risk. This represents 27 Mt CO_2e, 2% of the total CB4-6 savings.

64. The delivery risks for 6 of the 191 policies are expressed as being significant, high or challenging. Total CB4-6 savings from these policies are calculated at to be least 18 Mt CO_2e (approximately 1% of the total). For the remaining 35 of the 191 policies, the delivery risks are expressed in terms of having high confidence or certainty. Total CB4-6 savings from these policies are calculated to be at least 135 Mt CO_2e (approximately 8% of the total).

65. Lord Deben, a former Secretary of State for the Environment, and the Chairman of the Climate Change Committee ("the CCC") from 2012 to 2023, has provided a witness statement on behalf of Friends of the Earth. Lord Deben explained that the CCC's Progress Report to Parliament was published on 28th June 2023. This report concluded that the CCC was even less convinced that the Government had a programme that would enable net zero to be achieved by 2050 than it had been previously. Whereas previously it had been possible for the CCC to give certain plans and proposals in the Net Zero Strategy the benefit of the doubt, this could not be done for the CBDP. The greater detail of the CBDP had removed possibilities that more general language had included.

66. Lord Deben explained that the government's programme for achieving net zero depends on assumptions, none of which can ever be 100% safe. However, the first assumption in the CBDP is that everything will go exactly as planned, and no contingency had been built in. The CBDP depends upon significant improvements in technology being realised, and yet it is not right to assume that such improvements will always be achieved within the necessary timeframe for achieving net zero targets or indeed achieved at all. Lord Deben also pointed out that there is also very little said about the timing for the delivery of policies, or how they will be achieved. This is important because there has been a history of significant delays in delivery.

67. Lord Deben commented on the absence of RAG ratings for each proposal and policy. He said that this was "surprising to me. Had the Secretary of State been provided with this information it is quite clear to me that he could not have formed a view that the policies and proposals will enable the statutory targets to be met when that depended on all policies and proposals being delivered in full - it being clear that the DEFRA itself had no confidence in that conclusion."

68. On 30th March 2023, the Secretary of State laid the CBDP before Parliament. The CBDP stated that it was being published to inform Parliament and the public of the Government's proposals and policies to enable carbon budgets to be met. The CBDP set out the policies captured in the EEP; it listed the various 'Quantified proposals and policies', and identified the emissions savings that they were each predicted to make,

and the timescale from which the policy would take effect; and it also set out the 'Unquantified proposals and policies' that were expected to deliver further emissions savings. The CBDP also provided "Sectoral summaries of delivery confidence": this set out the "Risks and mitigation" for each of the sectors. The CBDP was accompanied by a Technical Annex, which provided an overview of the methodological approach taken to the analysis in the CBDP.

The Climate Change Act 2008

69. The statutory framework is set out in considerable detail in *FoE (No. 1)* at §§28-55, and I agree with Holgate J's lucid exposition of the structure of the legislation. In the instant case, of especial relevance are sections 13 and 14 of the CCA 2008, which I set out in full.

70. Section 13 of the CCA provides that:

> "(1) The Secretary of State must prepare such proposals and policies as the Secretary of State considers will enable the carbon budgets that have been set under this Act to be met.
>
> (2) The proposals and policies must be prepared with a view to meeting—
>
> (a) the target in section 1 (the target for 2050), and
>
> (b) any target set under section 5(1)(c) (power to set targets for later years).
>
> (3) The proposals and policies, taken as a whole, must be such as to contribute to sustainable development.
>
> (4) In preparing the proposals and policies, the Secretary of State may take into account the proposals and policies the Secretary of State considers may be prepared by other national authorities."

Section 14 provides that:

> "(1) As soon as is reasonably practicable after making an order setting the carbon budget for a budgetary period, the Secretary of State must lay before Parliament a report setting out proposals and policies for meeting the carbon budgets for the current and future budgetary periods up to and including that period.
>
> (2) The report must, in particular, set out—
>
> (a) the Secretary of State's current proposals and policies under section 13, and
>
> (b) the time-scales over which those proposals and policies are expected to take effect.

> (3) The report must explain how the proposals and policies set out in the report affect different sectors of the economy.
>
> (4) The report must outline the implications of the proposals and policies as regards the crediting of carbon units to the net UK carbon account for each budgetary period covered by the report.
>
> (5) So far as the report relates to proposals and policies of the Scottish Ministers, the Welsh Ministers or a Northern Ireland department, it must be prepared in consultation with that authority.
>
> (6) The Secretary of State must send a copy of the report to those authorities."

71. It is also important for the present proceedings to note that the role of the CCC is set out at Part 2 of the CCA 2008. This includes laying before Parliament an annual report setting out its views on the progress made towards meeting carbon budgets, and whether these budgets and target are likely to be met: section 36(2). The Secretary of State is obliged to respond to the CCC's report annually: section 37.

The case law

72. Of considerable relevance to these proceedings is Holgate J's judgment in *FoE (No. 1)*. Both the Claimants and the Defendant relied on aspects of Holgate J's judgment to support their arguments. It is therefore necessary for me to set out Holgate J's analysis in some detail.

73. The case involved a challenge to the way in which the Secretary of State exercised his functions under sections 13 and 14 of the CCA 2008. It was contended that (i) the Secretary of State was not entitled to conclude under section 13 that the proposals and policies in the NZS would enable the carbon budget for CB6 (2033-37) to be met where the quantified effects of those policies were estimated to deliver only 95% of the emissions reductions required to meet that budget; (ii) the Secretary of State had failed to take into account relevant considerations which were obviously material to his decision under section 13, namely the risk to the delivery of individual proposals and policies and to the achievement of the carbon budgets; (iii) the Secretary of State had failed to include in the NZS the information legally required to discharge his reporting obligations under section 14, and it was not sufficient for him to merely tell Parliament what the proposals and policies were. Holgate J agreed with the Claimants on points (ii) and (iii), but rejected point (i).

74. With respect to point (i), Holgate J held at §§177 and 193 that section 13(1) of the CCA 2008 did not require the Secretary of State to be satisfied that the quantifiable effects of his proposals and policies will enable the whole of the emissions reductions required by the carbon budgets to be met; the shortfall could be made up by unquantified policies. The first Claimant in these proceedings takes issue with this holding, and reserves the right to argue the point on another occasion.

75. In arriving at his finding on point (i) Holgate J made some important observations about the obligation under section 13. Holgate J noted a number of matters that were agreed

between the parties, including (at §167) that it was a matter of judgment for the Secretary of State to decide on the proposals and policies which should be prepared, and whether they will enable the carbon budgets to be met. Holgate J noted at §178 that the targets are quantitative in nature, and that section 13(1) involved the Secretary of State "making a predictive assessment many years into the future. Such predictions inevitably involve significant uncertainty, for example, in relation to future circumstances falling within section 10(2). There are uncertainties about economic growth, energy, prices, population growth, the impact of investment in technological innovation and the implementation of proposals. Even predictions expressed in quantitative terms involve subjective judgment". At §180, Holgate J explained that the exercise to be carried out "involves predictions of future conditions over many years in a changing socio-economic, environmental and technological landscape and therefore a good deal of uncertainty. The consideration of matters such as these depends upon the use of judgment, whether the analysis is quantitative or qualitative".

76. Holgate J acknowledged at §181 that to carry out "predictive, quantitative analysis", the Secretary of State's officials had to use a number of mathematical models, and the Courts had accepted that the use of such models involves expert judgment, and "decisions based on scientific, technical and predictive assessments should be afforded an enhanced margin of appreciation in judicial review", referring to *R (Mott) v Environment Agency* [2016] 1 WLR 4338, *Spurrier* [2020] PTSR 240 at §§176-[179; and *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 at §68 and §177.

77. Holgate J stated at §183 that the Secretary of State's decisions under section 13(1) on the preparation of proposals and policies were matters of judgment, which will be informed, but not circumscribed, by the quantitative analysis carried out. At §185, Holgate J commented that the greater the shortfall between the quantified effects and the emissions target, the more cogent the qualitative analysis would need to be.

78. With respect to point (ii), the legal sufficiency of the briefing to the Secretary of State, Holgate J stated at §195 that the nature and extent of the work that needed to be carried out to make the predictive assessment was a matter of judgment for the Secretary of State and his officials, subject to *Wednesbury* review. The approach that should be taken by the Court in carrying out that review needed to bear in mind a number of propositions:

> "198 A minister only takes into account matters of which he has personal knowledge or which are drawn to his attention in briefing material. He is not deemed to know everything of which his officials are aware. But a minister cannot be expected to read for himself all the material in his department relevant to the matter. It is reasonable for him to rely upon briefing material. Part of the function of officials is to prepare an analysis, evaluation and precis of material to which the minister is either legally obliged to have regard, or to which he may wish to have regard.
>
> 199 But it is only if the briefing omits something which a minister was legally obliged to take into account, and which was not insignificant, that he will have failed to take it into account a

> material consideration, so that his decision was unlawful. The test is whether the legislation mandated, expressly or by implication, that the consideration be taken into account, or whether the consideration was so "obviously material" that it was irrational not to have taken it into account. . . . In this regard, it is necessary to consider the nature, scope and purpose of the legislation in question".

79. Holgate J analysed the legislation at §202:

> "(i) Section 1 of the CCA 2008 was amended to incorporate the net zero target because of the recognition internationally and in the UK of the need for action to be taken to reduce GHG emissions more urgently;
>
> (ii) The UK's contribution to addressing the global temperature target in the Paris Agreement depends critically on meeting the net zero target for 2050 set by the CCA 2008 through the carbon budgets;
>
> (iii) The Secretary of State is responsible for setting the carbon budgets:
>
> (iv) The CCA 2008 imposes the obligation to ensure that the net UK carbon account meets those targets solely on the Secretary of State;
>
> (v) Under the CCA 2008 the preparation of proposals and policies under s.13 (and if necessary under s.19(1)) is critical to achieving those targets;
>
> (vi) The Act imposes solely on the Secretary of State the obligations to prepare such measures and to be satisfied that they will enable the carbon budgets to be met. There is no requirement for Parliament or the public to be consulted on those proposals and policies or for Parliament to approve them;
>
> (vii) The Secretary of State cannot properly and rationally be satisfied that his proposals and policies will enable the carbon budgets to be met without quantitative analysis to predict the effects of those proposals and policies in reducing GHG emissions ([176] above);
>
> (viii) The predictive quantitative assessment and any qualitative assessment put before the Secretary of State are essential to his decision on whether his proposals and policies will enable targets to be met which are expressed solely in numerical terms;
>
> (ix) Although a quantitative assessment does not have to show that quantifiable policies can deliver the whole of the emissions reductions required by the targets, any qualitative judgment or

> assessment to address that shortfall will have to demonstrate to the Secretary of State how the quantitative targets can be met;
>
> (x) The carbon budgets and the 2050 target relate to the whole of the UK economy and society and not to sectors. Achievement of those targets requires a multiplicity of policy measures addressing the UK as a whole, individual sectors, and factors falling within s.10(2). Those measures will be operative at different points in time. Some will apply in isolation and others in combination. Whether an overall strategy will enable the statutory targets to be met depends upon the contribution which each policy (or interrelated groups of policies) is predicted to make to the cumulative achievement of those targets;
>
> (xi) The merits of individual measures, their contributions and their deliverability, together with the deliverability of the reductions in GHG emissions required by s.1(1) and s.4(1), are all essential considerations for the Secretary of State, or the Minister in his place".

80. At §204, Holgate J found that "one obviously material consideration which the Secretary of State must take into account is risk to the delivery of individual proposals and policies and to the achievement of the carbon budgets and the 2050 net zero target. This is necessarily implicit in the statutory scheme. In turn, this must depend upon the relative contributions made by individual measures to achieving those targets". That had not been provided to the Secretary of State, even though it was available within the Department.

81. The same point was also made at §211:

> "Viewed in the context of the statutory scheme, I have no doubt that the quantification of the effect of individual policies was an obviously material consideration on which, as a matter of law, information had to be provided to the minister, so that he could discharge his functions under section 13 lawfully by taking it into account. The defendant's role in approving a package of policies so as to enable the statutory targets to be met is critical to the operation of the CCA 2008. Risk to the delivery of individual policies and of the targets is "obviously material"".

82. Holgate J held at §213 that "without information on the contributions by individual policies to the 95% assessment, the minister could not rationally decide for himself how much weight to give to those matters and to the quantitative assessment in order to discharge his obligation under section 13(1)". This was explained in more detail at §214*:*

> "The briefing to the minister did not enable him to appreciate the extent to which individual policies, which might be subject to significant uncertainty in terms of content, timing or effect, were nonetheless assumed to contribute to the 95% cumulative figure. This concern is all the more serious because the minister was told

> that that the assessment by BEIS was based upon the assumption that the quantified policies would be "delivered in full". The information which ought to have been provided to the defendant would have influenced his assessment of the merits of particular measures. It was crucial so that he could question whether, for example, the strategy he was being advised to adopt was overly dependent on particular policies, or whether further work needed to be carried out to address uncertainty, or whether the overall figure of 95% was robust or too high. If it was too high, then that would affect the size of the shortfall and his qualitative judgment as to whether unquantified policies could be relied upon to make up that gap with what he would judge to be an appropriate level of confidence. Information on the numerical contribution made by individual policies was therefore legally essential to enable the defendant to discharge his obligation under section 13(1) by considering the all important issue of risk to delivery. These were matters for the Secretary of State and not simply his officials."

83. Holgate J went on to find that there was further information about the 5% shortfall which should have been provided to the Secretary of State by his officials, as this was "obviously material" (§§216-7). As for the claimants' contention about information relating to the time scales over which the proposals and policies were expected to take effect, Holgate J held at §218 that it was a matter of judgment as to how much of this material needed to be included in the ministerial submission.

84. With respect to point (iii), whether or not the section 14 duty was complied with, Holgate J rejected the Secretary of State's submission that the duty to "set out" his proposals and policies amounted to little more than a requirement to publish those measures. Holgate J held at §233 that the Secretary of State was required "to explain the thinking behind the proposals and how they will enable the carbon budgets to be met". This requires a "quantitative explanation" being provided to Parliament (§235), although the Court accepted the Secretary of State's contention that "the legislation does not require the department's detailed workings or the modelling to be provided to Parliament".

85. Holgate J's reasoning was based in part on the "statutory objective of transparency". At §241, Holgate J explained:

> "Because the reports under sections 14, 19, 36 and 37 are required to be laid before Parliament, they will be published. The requirement is not simply to provide unpublished reports to, for example, a regulatory body. The statutory objective of transparency in how the targets are to be met extends beyond Parliament, to local authorities and other statutory authorities, NGOs, businesses and the general public. That transparency requires reports under section 14 to contain explanation and quantification. The purpose of a such a report is not limited to telling Parliament what the Secretary of State's proposals and policies are".

86. In considering whether the Secretary of State had complied with section 14 of the CCA 2008, Holgate J held at §245 that the adequacy of the report should not be "materially lower than that of a report issued for public consultation . . . In both instances, the legal object of the reports is to enable its readers to understand and assess the adequacy of the Government's policy proposals and their effects. Furthermore, a report under section 14 is also required in the interests of public transparency". This position was supported by the reasoning of the Supreme Court of Ireland in *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49, where the Court considered the obligation of the Irish Government under section 4 of the Climate Action and Low Carbon Development Act 2015.

87. Holgate J held that the NZS was not compliant with section 14 of the CCA 2008 because it did not look at the contributions to emissions reductions made by individual policies, or interacting policies, where these were assessed as quantifiable (§252). Other matters which were "obviously material" to the critical issue of risk to the delivery of the statutory targets, and which the Secretary of State was obliged to inform Parliament under section 14 were explanations:

> "(i) that the quantitative analysis carried out by BEIS (which related solely to quantifiable policies with a direct effect on emissions) predicted that those policies would achieve 95%, not 100%, of the reductions required for CB6, and had assumed "delivery in full" of those policies; "
>
> (ii) how it was judged that that 5% shortfall would be made up (see also para 216 above), including the judgment based upon comparing the 95% result with the projections of the implied performance of the delivery pathway;
>
> (iii) that tables 6—8 did not present the outcome of the department's quantitative analysis of emissions reductions predicted to result from NZS polices;
>
> (iv) how that quantitative analysis differed from the modelling of the delivery pathway".

(§§253-4).

88. At §256, Holgate J stated that it was the responsibility of the Secretary of State, and not his officials, to lay the report before Parliament; and the adequacy of the report was a matter for him, acting on the advice of his officials and with legally sufficient briefing. At §257, Holgate J concluded that:

> "A clearly presented report would not lead a reader to misunderstand predictions of the effects of each policy as "targets", or to fail to appreciate the uncertainties involved. Similarly, there is no reason why it could not be made clear to a reader that policies are at various stages of development and that current predictions should not be taken to undermine the need for future flexibility to respond to changes in circumstance. Indeed, these points are clearly explained in the NZS. Problems

> in publishing details of quantitative analysis of the effects of policies yet to be "fully developed" may raise matters of judgment for the defendant as to how much detail should be included in a report. But that cannot affect the legal principle that contributions from individual policies which are properly quantifiable must be addressed in the report. Here, they were not at all."

89. Holgate J's exposition of the section 13 duty was approved by the Court of Appeal in *R (Global Feedback Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWCA Civ 1549 at §79. The Court of Appeal also held that section 13 involved a "strategic" and a "whole-economy", or "economy-wide", judgment to be applied by the Secretary of State. It was also a "continuing" duty.

90. The Court of Appeal explained at §83 that the Secretary of State for Energy Security and Net Zero was "uniquely well placed to discharge the duty in section 13. He has an overview of the whole economy, is conscious of the likely levels of greenhouse gas emissions in all sectors of it for the budgetary period or periods in question, and is able to judge the potential for appropriate action to ensure the meeting of carbon budgets".

91. In *Global Feedback*, the Court of Appeal considered the relationship between the Secretary of State and the CCC, and in particular the extent to which the Secretary of State had to have regard to the advice of the CCC in relation to diet and climate change, as part of his section 13 obligations. The Court of Appeal held at §112 that in exercising his functions under section 13 of the CCA 2008, the Secretary of State was not under a duty to take the CCC's advice into account, let alone give it significant weight or to follow it unless there are cogent reasons for departing from it. In reaching this conclusion, the Court of Appeal observed at §114 that it was "telling" that Parliament had chosen not to impose an express duty on the Secretary of State to obtain or take into account the CCC's advice.

Grounds of Challenge

92. A compendious summary of the Grounds of Claim was described by the Secretary of State in his skeleton argument for these proceedings as follows:

93. Ground 1: The Secretary of State failed to take into account mandatory material considerations when purporting to comply with section 13 of the CCA 2008;

Ground 2: The Secretary of State proceeded on the basis of an assumption that all of the quantified proposals and policies would be delivered in full, and this assumption was not supported by the information as to risk to delivery with which the Secretary of State was provided;

Ground 3: The Secretary of State's conclusion that the proposals and policies will enable the carbon budgets to be met was irrational;

Ground 4: The Secretary of State applied the wrong legal test to section 13(3) of the CCA 2008 ("sustainable development");

Ground 5: The Secretary of State failed to include in the CBDP information that he was required to include.

94. In oral argument, the Claimants argued grounds 2 and 3 together on the basis that there was considerable overlap between the two. As the arguments were presented to me, it seemed to me that there was considerable overlap with ground 1 as well. In this judgment, therefore, I shall set out the arguments with respect to ground 1, and then grounds 2 and 3, and then set out my judgment with respect to the three grounds. I will then set out the arguments on ground 4, followed by my judgment on that ground; and finally, will set out the arguments on ground 5, followed by my judgment on that ground.

Ground 1: *The failure to take into account mandatory material considerations when purporting to comply with section 13 of the CCA 2008*

The parties' arguments

95. Mr Wolfe KC and Ms Simor KC contend that the Secretary of State was not provided with, and so failed to take into account, key materials on the risk to the delivery of individual policies and proposals set out in the CBDP. They also argue that the officials within the Department for Energy, Security and Net Zero misrepresented the extent of these risks in the briefing materials they provided to the Secretary of State.

96. Mr Wolfe KC's essential contention was that the Secretary of State should have been provided with RAG ratings for each of the proposals and policies, or something which faithfully reflected the information that the RAG ratings would have contained. He makes three main arguments. First, he contends that the Risk Narratives that were provided to the Secretary of State did not provide him with mandatory material about the risk to delivery of each policy. As a result, the Secretary of State failed to consider this mandatory material about the delivery risk associated with each policy when approving the CBDP. Second, he submits that the information about the delivery risks in the Risk Narratives provided to the Secretary of State did not fairly and accurately summarise the information about delivery risks provided by other departments. Third, he argues that the briefing to the Secretary of State was deficient because it provided "no information" about the delivery risk to the Devolved Administration's policies and proposals as part of his briefing for CB6.

97. The focus of Ms Simor KC's arguments was that the Secretary of State was not provided with mandatory information *quantifying* the delivery risk for CB6, either on an individual policy level or taking CB6 as a whole. She makes five key arguments. First, that the quantification of emissions reductions forecast in CB6 should have been adjusted to reflect that some of these policies were unlikely to be delivered or achieved in full. This would have allowed the Secretary of State to appreciate the (significant) uncertainty associated with certain policies. Second, that the Secretary of State should have been provided with material summarising the cumulative risk to delivery across the policies and proposals. Without this information, he could not have reasonably understood the very significant extent of that risk. Third, that the Secretary of State was not given sufficient information in the Risk Narratives (or otherwise) about the risk to delivery in relation to individual policies and proposals that were described as having "uncertain delivery risk" but that had been rated as "low" or "very low" confidence in the RAG ratings. Fourth, that there were quantification errors in modelling the projected

emission reductions from 'non-EEP' policies and proposals. Fifth, that the Department erred by including some of the EEP policies and proposals in the high confidence CBDP baseline, when these policies and proposals had in fact been identified as having low delivery confidence. These errors meant the Secretary of State's understanding was that he could be confident in delivering the emissions reductions needed to meet CB6, which was wrong.

98. For the Secretary of State, Mr Moffett KC contended that the Claimants are operating under the false premise that the RAG ratings are the reliable, definitive description of delivery risks for each policy. He argued that the Risk Narratives, and not the RAG ratings, should be treated as the most reliable description of risks. He emphasises that the Risk Narratives were produced with input from the Sector Leads, who are those best equipped to assess the delivery risk associated with each policy: the RAG ratings were produced by the Sector Teams and not the Sector Leads. Mr Moffett KC submits that the RAG ratings do not always include an accurate description of the delivery risk for each policy. It is the Risk Narratives which summarise the delivery risks fairly and accurately, and it was justifiable (and not misleading) that the Secretary of State was presented with these narratives and not the RAG ratings in his March 2023 briefing materials.

99. Addressing Mr Wolfe KC's argument that the Secretary of State was not provided with mandatory material about risk to delivery from each of the departments, Mr Moffett KC submits that this argument must fail because Friends of the Earth have failed to show: (i) that officials took an irrational approach to the information provided to the Secretary of State; Mr Thompson's witness statement shows that the approach taken was rational; (ii) that the Secretary of State could not make a strategic and whole economy judgment in relation to the CBDP on the basis of the information that was available to him.

100. In response to Mr Wolfe KC's argument that Secretary of State was not provided with information on delivery risks for policies from the Devolved Administrations, Mr Moffett KC acknowledges that there was a lack of information about the policies and proposals pursued by the Devolved Administrations generally. Nevertheless, the Department proceeded on the basis that the Devolved Administrations would prepare policies and proposals that were materially similar to those pursued in England (an approach the Claimants do not challenge). Given this approach, it was realistic to assume that the substantive risks to delivery of the policies and proposals were similar for the Devolved Administrations as for England. There were no deficiencies in the information provided to the Secretary of State, who was informed that:

> "[The Department's] understanding of DA-specific risks is limited. However we understand that many of the risks to delivery of emissions savings will be common across all four Nations."

101. Responding to Ms Simor KC's first and second arguments that adjustments should have been made to the quantification of emissions savings for each policy to reflect delivery risk and that the Secretary of State should have been presented with cumulative delivery risk, Mr Moffett KC says that this is no more than a disagreement about how information was presented to the Secretary of State. He submits that ClientEarth have

failed to show that the Department acted irrationally by not presenting the information as Ms Simor KC proposes.

102. Mr Moffett KC also argues that there is no evidence to support ClientEarth's submission that red or red-amber RAG ratings for delivery were inaccurately described as policies for which delivery was "uncertain" in the Risk Narratives. Central to his arguments on this issue is his submission that RAG ratings should not be treated as the definitive assessment of risk. Mr Moffett KC also argues that the central question for the Court is rationality: in his submission, the Court cannot find that the approach of allowing the Sector Leads to draft the Risk Narratives is irrational.

103. As to ClientEarth's argument that the Department's modelling of emissions savings for each non-EEP policy or proposal was deficient as it was based on maximum technical potential, Mr Moffett KC submits that this is not a complaint about the information provided to the Secretary of State about the delivery risk but instead a complaint about the Department's modelling choices. He identifies that Holgate J's prior judgment found there was "*nothing objectionable*" in modelling based on theoretical potential (§77).

104. As to ClientEarth's argument that the Secretary of State was not notified that certain EEP policies had low delivery confidence, Mr Moffett KC submits that such uncertainties were taken into account when modelling the EEP baseline. Reference is specifically made to the explanation of the modelling approach in the Technical Annex to the CBDP, which explains: "*In our approach to modelling the assumptions we need to make, we have taken, on balance, a conservative approach to err on the side of caution, with the effect of either increasing the size of emissions savings required (as discussed above on the baseline) or of reducing the potential effectiveness of policies (for example by assuming slower take-up of technologies than recent evidence suggests)*".

Ground 2: *When taking the Decision under section 13(1), the Secretary of State proceeded on the basis of an assumption that all of the quantified proposals and policies would be delivered in full, and this assumption was not supported by the information as risk to delivery with which the Secretary of State was provided.*

Ground 3: *The Secretary of State's conclusion that the proposals and policies will enable the carbon budgets to be met was irrational.*

The parties' arguments

105. Mr Wolfe KC and Ms Simor KC argued that the Secretary of State expressly approved the CBDP on the assumption that all of the quantified policies and proposals relating to emissions savings would be delivered in full. They highlight the following paragraph which was included at paragraph 26 of the CBDP:

> "26. The calculated savings assume the package of proposals and policies are delivered in full. We consider it is reasonable to expect this level of ambition – having regard to delivery risks and the wider context, which give rise to both downside and upside risks (see further information on delivery risks below)."

106. Friends of the Earth and ClientEarth say that it was not open to the Secretary of State to make this assumption when approving the CBDP, based on the information available to the Secretary of State about the delivery risk.

107. Ms Simor KC seeks to rely on evidence from Mr Eames which shows that 90% of the emissions savings attributable to quantified policies were described in the Risk Narratives available to the Secretary of State as having "uncertain" or "high" delivery risk. Mr Wolfe KC highlights that the Department had available further information which highlighted the substantial risk to the delivery of individual policies, including:

    i) advice from DEFRA that the emissions savings projections it had provided "*by and large represent maximum feasible savings rather than a likely scenario*";

    ii) the fact that in November 2022 there was a concern that emissions savings achievable from quantifiable policies and proposals could slip to 85% of those required to reach CB6, but that the CBDP was signed off in March 2023 on the basis that the emissions savings it could achieve would be 97% of those required to reach CB6, despite there being no evidence for the increase in confidence in delivery; and

    iii) broader criticism from Lord Deben over a plan as significant as the CBDP being made on the basis of everything going smoothly, which Lord Deben describes as an "unsatisfactory" assumption.

108. In Mr Wolfe KC's submission, in the light of the degree of delivery risk associated with the policies and proposals relied upon to enable the carbon budgets to be met, the information provided to the Secretary of State did not provide a proper basis to conclude that all proposals and policies would be delivered in full. It was irrational for the Secretary of State to approve the plan based on this assumption.

109. If, in the alternative, the Secretary of State was not advised to assume that all policies and proposals would be delivered in full, Mr Wolfe KC submits that there would have been an even greater shortfall in the quantified effects of the proposed policies and a sufficiently cogent analysis would be required to demonstrate how this shortfall would be met. Nothing in the advice provided to the Secretary of State explained the basis on which he could conclude that the proposals and policies will enable the carbon budgets to be met if the proposals and policies are not delivered in full.

110. Ms Simor KC submits that that the conclusion that the policies and proposals would be delivered in full was not reasonably open to the Secretary of State having regard to (i) the level of risk and uncertainty assessed by her own officials; (ii) the expert analysis of the CCC in relation to CB6 and the NZS 2022; (iii) the scale and nature of the challenge of meeting CB6; and (iv) the levels of emissions savings to be delivered by EEP ready policies and proposals, compared to previous plans, and the fact that these too involved risks.

111. Ms Simor KC additionally identifies that the Secretary of State (through his Department) was presented with material stating that he could be confident that at best only 10% of the emissions reductions projected to derive from the non-EEP policies would be delivered. This showed a real risk of the CBDP under delivering in terms of emission reduction requirements. In these circumstances there was, in Ms Simor KC's

submission, no rational basis for the Secretary of State's conclusion that the "package of proposals and policies" would be "delivered in full".

112. As to the intensity of review that would be appropriate, Friends of the Earth and ClientEarth submit that it would be appropriate for the Court to scrutinise the Secretary of State's decision closely on the basis that climate change affects us all and requires us all to take action. It was noted that there was no precedent for the application of a higher degree of scrutiny in climate change cases. However, it was submitted that this was due to the relatively limited climate change litigation to date, and not because an enhanced standard of review should not apply.

113. Mr Moffett KC does not dispute that the Secretary of State (and his Department) could not assume that each and every policy and proposal would be delivered in full. However, relying on evidence from Mr Thompson, he argues that this is not the meaning of the text at paragraph 26 of the CBDP. He explains that this wording was intended to "*make the point that the total volume of quantified emissions savings (i.e. those projected to be achieved by the quantified P&Ps) had been calculated on the basis that the package of proposals and policies would be delivered in full, i.e. the total figure represented the sum of all of the individual quantified emissions savings*". Mr Moffett KC argues that this explanation is consistent with advice given to the Secretary of State, which expressly and repeatedly reiterated that delivery of individual policies and proposals carried risk. For example, he highlights that paragraph 15 of the CBDP explains: "*it is very likely that some proposals or policies will outperform expectations…Meanwhile, some other policies or proposals will under deliver compared to expectations*". Mr Moffett KC argues that these materials show that the Secretary of State cannot have based his decision on an assumption that every policy and proposal is delivered in full, and that this element of the case of Friends of the Earth and ClientEarth should fall away.

114. Mr Moffett KC argues that the Secretary of State did not act irrationally by assuming that the package of policies and proposals was sufficient to meet CB6. Mr Moffett KC submits that the Court cannot rely on Mr Eames' witness statement to make findings of fact because: (i) Mr Eames is an in-house solicitor who works for ClientEarth, and the statement should be treated as an assertion of his subjective opinion; and (ii) Mr Eames has adopted a narrow approach to assessing risk by reference to only some of the briefing materials that were before the Secretary of State.

115. Mr Moffett KC further argues that, even if the Court were to proceed on the basis that Mr Eames' statement was fact, that is insufficient to make out irrationality. Friends of the Earth and ClientEarth would need to meet an extremely high hurdle to show that the decision was irrational: given the decision involves a predictive judgment, on a strategic, whole economy issue reaching many years into the future that involves an assessment based on expert advice of social, economic and environmental and technological factors. Mr Moffett KC did not consider it appropriate for the Court to apply a different standard of review because the case relates to climate change: this is, in his submission, a classic example of a case in which the Court should apply only a low intensity of review.

Discussion

Grounds 1-3: *The Secretary of State's decision pursuant to section 13(1) of the CCA 2008*

116. It was common ground between the parties that, as Holgate J had held at §204 of his judgment in *FoE (No. 1)*, "one obviously material consideration which the Secretary of State must take into account is risk to the delivery of individual proposals and policies and to the achievement of the carbon budgets and the 2050 net zero target." Much of the argument (in writing through the skeleton arguments, and orally in the hearing before me) involved consideration of the way in which risk material was presented and the extent to which it was, or was not, sufficient for the Secretary of State to take a lawful decision under section 13.

117. There is no statutorily prescribed way in which the information about risk needs to be provided to the Secretary of State. There is also no free-standing obligation in public law that information about risk has to be presented in a particular way. Officials were not obliged, therefore, to provide the Secretary of State with information about risk by using RAG ratings, or by some other illustrative form. How the risk information should have been presented to the Secretary of State was plainly a matter for the officials, and could only be impugned by this Court if the content of what was provided to the Secretary of State did not enable him to carry out the statutory evaluation exercise lawfully. That would have been the case if, for instance, the information was misleading in that it did not reflect the real risk that officials had identified with respect to a specific proposal or policy, or if the information was incomplete in a material way.

118. The information about risk was presented to the Secretary of State in the narrative of the March 2023 submissions, with the detail of the risk to individual proposals and policies as well as at a sectoral level contained in Annex B to the submissions. In the submissions, the Secretary of State was told with respect to the "Quantified savings to meet Carbon Budgets" that "Based on current projections, our view is that the package of proposals and policies that we can quantify will deliver sufficient quantified savings to meet . . . 97% of CB6. . . . The Technical Annex (Annex D) sets out the methodology for the quantification of policies and proposals. You should note that this quantification relies on the package of proposals and Policies being delivered in full. Our advice is that it is reasonable to expect this level of ambition – having regard to delivery risk (see Annex B) and the wider context."

    (Emphasis in the original).

119. There is a dispute between the parties as to what the underlined text meant and, therefore, what the Secretary of State was being told by his officials. Mr Moffett KC argued that the Secretary of State could not assume from this statement that each and every policy and proposal would be delivered in full. This argument was supported by the evidence of Mr Thompson, who has explained in his witness statement that that was not the intention of those drafting the submissions. On the other hand, the Claimants contend that this construction does not reflect the wording used in the submissions and the reasonable understanding that the Secretary of State would have had. I agree with the Claimants.

120. It seems to me that the reasonable interpretation of the underlined text, and therefore what the Secretary of State was being told by his officials, was that **each** of the

individual proposals and policies that form the package of measures would be delivered in full. There was no evidence before the Court to indicate that the Secretary of State interpreted the underlined text in the way suggested by Mr Thompson rather than on the basis of the reasonable interpretation of the meaning of the underlined text.

121. If it was intended for the underlined text to mean that not all of the proposals and policies would be delivered in full, then the sentence does not make sense: the package is made up of the sum of its parts, and so if the package was expected to be delivered in full, this would necessarily mean that each of the package's constituent parts would be delivered in full. There is no indication from the first sentence of the underlined text that some of the proposals and policies might not happen at all or would not deliver the full amount of the contribution to the budget assigned to them.

122. The second sentence of the underlined text deals with the ambition required to achieve this, and advises that this is "reasonable" having regard to delivery risk (Annex B) and the "wider context". Later in the submission (at paragraph 13), it is stated under the heading "Delivery risk and further considerations (further detail in Annex B)" that "To assess whether the proposals and policies are sufficient, you must consider the risks to delivery of the emissions savings that **each of the proposals and policies carries**". Annex B does not contain any reference to proposals and policies within the package not being delivered at all, or in full. The "wider context" cannot mean that either. The reference to Annex B and to the "wider context" reads as the explanation for why the Secretary of State can assume that each of the proposals and policies will be delivered in full: that is, there are delivery risks, but they can be overcome, especially when one considers the wider context.

123. This interpretation is also supported by the language used in the earlier submissions to the Secretary of State, where the underlying assumption was that all of the proposals and policies would be delivered in full. In the introductory brief submitted on November 8th 2022, the Secretary of State was told that "Our most recent projections from August show we have sufficient savings to meet carbon budgets and the NDC **if all planned policies are delivered in full**" (emphasis added). Similarly, in the submission made to the Secretary of State on 30th November 2022, it was stated that "Latest projections suggest you have sufficient savings to meet carbon budgets **if all planned policies and proposals are delivered in full**" (emphasis added).

124. It was suggested by Mr Moffett KC that the Secretary of State could not have understood the underlined text as meaning that each of the individual proposals and policies would be delivered in full as there was material in the Technical Annex that stated otherwise. Reference was made to the explanation in the Technical Annex that a conservative approach had been taken to modelling; and that "all else equal, there is likely to be more upside than downside risk, which could support meeting carbon budgets". That, however, is not an indication that individual proposals or policies might not be delivered in full.

125. It was also suggested by Mr Moffett KC that there was material in the CBDP, a draft of which was provided to the Secretary of State along with the March submissions, which would support the contrary interpretation. In the CBDP it was stated that "…it is very likely that some proposals or policies will out-perform expectations… some other proposals or policies will under deliver compared to expectations." However, the Secretary of State did not have his attention drawn to this provision in connection with

the underlined text in the submission, so it is difficult to see how the Secretary of State could have had this passage in mind when he was reading the underlined text.

126. If, as I have found, the Secretary of State did make his decision on the assumption that each of the proposals and policies would be delivered in full, then the Secretary of State's decision was taken on the basis of a mistaken understanding of the true factual position. Indeed, this is the Secretary of State's own case to this Court: Mr Moffett KC acknowledged that not all of the proposals and policies would be delivered in full.

127. As a matter of law, therefore, in making this assumption the Secretary of State made an irrational decision in the sense explained by Saini J in *R(Wells) v Parole Board* [2019] EWHC 2710 (Admin) at §33. In *Wells*, Saini J held that *Wednesbury* unreasonableness may be made out where there was an unexplained evidential gap or leap in reasoning which fails to justify the conclusion reached by the public law decision-maker. The Secretary of State's decision under section 13 was based on reasoning which was simply not justified by the evidence.

128. This otherwise irrational decision could only be saved if it could be established that the Secretary of State would have been highly likely to reach the same decision even if he had not made that assumption (section 31(2A) of the Senior Courts Act 1981). That proposition was not made on behalf of the Secretary of State at the oral hearing before me. Looking at the matter myself, I cannot see how the very high threshold set out at section 31(2A) could have been met.

129. In the first instance, the counterfactual that I am required to consider under section 31(2A) of the Senior Courts Act 1981 presupposes that the information available to the Secretary of State would have enabled him to reach the conclusion that the 97% emissions savings would be met by the quantified proposals and policies even if not all of the individual proposals and policies would be achieved in full. It is not possible for the Court to find that this was highly likely to have been the case, as the Secretary of State did not have sufficient information to enable him to make that decision. It is not possible to ascertain from the materials presented to the Secretary of State which of the proposals and policies would not be delivered at all, or in full. It was not possible, therefore, for the Secretary of State to have evaluated for himself the contribution to the overall quantification that each of the proposals and policies was likely to make, bearing in mind that this evaluation had to be made by the Secretary of State personally: he could not simply rely on the opinions of his officials. The section 13 decision was one for him to make.

130. None of the commentary – or the narrative risk – provided to the Secretary of State reads as if the policy will not happen at all, or in full. From the material provided, the Secretary of State could not work out, therefore, whether and which of the quantified policies were likely to miss the target by a small or a large amount, and he could not evaluate for himself whether, and if so the extent to which, any shortfall from the policies that under-delivered would be compensated for by those policies that over-delivered. To take the example of proposal number 159 from Table 2 to Annex B (slurry: see paragraph 47 above), it is simply not possible for the Secretary of State to have evaluated from himself whether this proposal would miss the target, and if so by how much.

131. The material in the draft CBDP that there would be over-delivery and under-delivery was vague and unquantified, and so did not provide the Secretary of State with sufficient information to make his own evaluation or assessment. Furthermore, although there was reference in the submissions (and in the "read out" of the Secretary of State's decision) to the fact that the package does not fully reflect emissions savings from policies developed outside government, particularly local government, there is no information available to the Secretary of State from which he could evaluate what level of savings those additional policies might be able to generate within the relevant time-frame. The Secretary of State would not have been able to determine therefore, whether those additional policies would offset the shortfall from the quantified policies that did not meet their targets in full.

132. If I am wrong about the assumption made by the Secretary of State, and he did not consider that each of the proposals and policies would be delivered in full, then his decision under section 13 of the CCA 2008 is flawed and would therefore have been unlawful because he was not provided with sufficient information as to the obviously material consideration of risk to the individual proposals and policies. As already explained, the Secretary of State had no way of knowing which proposals and policies might not be delivered, or delivered in full; he could not calculate therefore what "over-delivery" was required from the other quantified proposals and policies, and whether those other quantified proposals and policies would meet the shortfall.

133. In reaching the latter (alternative) decision, I do not consider that it was necessary for the commentary or narrative risk provided to use the same language as used in the descriptors from the RAG ratings – "low confidence" or "very low confidence". It was appropriate for the officials to use a proxy for this, such as "uncertain delivery risk" accompanied by a narrative description of the risk and the proposed mitigations.

134. I also do not consider that the information provided to the Secretary of State was, as Mr Wolfe KC put it, "Panglossian"[1], or that it was provided on the basis of letting the Secretary of State know what the officials thought he wanted to hear. I also do not consider that the information was misleading. A clear description was provided to the Secretary of State about the risks involved with a particular proposal and policy and the kinds of mitigation measures that would or could be applied. However, the information provided was incomplete. It was necessary to say more if the Secretary of State was to work out for himself whether the proposal or policy was likely to miss the target by a small or large amount and if so by how much.

135. I do not consider that, as a matter of principle, it was necessary for the Secretary of State to be provided with advice or information as to the cumulative risk affecting the various proposals and policies, so long as he had sufficient information to work this out for himself. Nevertheless, the failure to identify which, and by how much, individual proposals and policies were likely to miss their targets, meant that the Secretary of State could not work this out for himself.

136. In his witness statement, Mr Thompson set out the difficulties in quantifying and weighing risk for each and every policy, stating that to do so would be extraordinary in its complexity and would require additional resource. I do not underestimate the

[1] An allusion to the fictional character, Pangloss, the tutor of Candide in Voltaire's novel bearing the latter's name.

difficulties that may be involved in carrying out this exercise for each and every policy. However, that does not seem to be the task that the officials would have been required to carry out. It is clear from the officials' own assessments that many of the proposals and policies are most likely to be delivered. If so, then further estimation would not have been required for these. It is only those proposals and policies which were at most risk of not being achieved that would have needed further analysis. Mr Thompson's evidence did not address that.

137. Moreover, even if there were difficulties in providing the latter analysis, the material could have been presented in the way suggested by Ms Simor KC: that is, the quantification of emissions reductions forecast in CB6 could have been adjusted to reflect that some of the policies were unlikely to be delivered or achieved in full. This could have been accompanied by a further forecast reflecting the possibility that there would be "over-delivery" of some of the proposals and policies. The Secretary of State could then have compared the different forecasts, and made his own evaluation of what was likely to transpire.

138. I do not consider that the information presented to the Secretary of State about the Devolved Administrations was insufficient for him to make the section 13(1) decision. It is accepted that the information provided about the Devolved Administrations was limited. Further information was simply not available as to what would happen in each of the nations for the entire CB6 budget period. Rather than leave a gap in the analysis for what might happen in the nations outside of England, the officials adopted the approach of scaling up from the English experience where that was appropriate. This enabled the Secretary of State to make an assessment as to what contribution the Devolved Administrations would be likely to make to meeting the carbon budgets, including CB6. That assessment was not obviously irrational.

139. I also do not consider that the Secretary of State needed to be told specifically that certain EEP policies had low delivery confidence. As Mr Moffett KC has explained, such uncertainties were taken into account when modelling the EEP baseline. In this regard, I have in mind the explanation of the modelling approach in the Technical Annex to the CBDP, which states:

> "In our approach to modelling the assumptions we need to make, we have taken, on balance, a conservative approach to err on the side of caution, with the effect of either increasing the size of emissions savings required (as discussed above on the baseline) or of reducing the potential effectiveness of policies (for example by assuming slower take-up of technologies than recent evidence suggests)".

140. The Claimants made a number of other points challenging the rationality of the Secretary of State's decision under section 13(1) of the CCA 2008. These include that: (i) the Secretary of State's own officials, and those in DEFRA, had assessed some risk and uncertainty; (ii) the CCC had produced its own expert analysis in relation to CB6; (iii) the scale and nature of the challenge of meeting CB6 was considerable given that most of the "easy wins" or "low hanging fruit" had been picked; and (iv) the EEP-ready policies and proposals also involved risks. These points were powerfully made, but would not in my judgment come close to satisfying the threshold of irrationality had the error identified above not been made by the Secretary of State.

141. I agree with Mr Moffett KC that the Court should apply a low intensity of review to the section 13(1) assessment made by the Secretary of State. The Secretary of State's decision involved an evaluative, predictive judgment as to what may transpire up to 14 years into the future, based on a range of complex social, economic, environmental and technological assessments, themselves involving judgments (including predictive judgments), operating in a polycentric context. These are not matters in respect of which the Court has any real expertise or competence, whereas the Secretary of State will be able to rely on officials with considerable expertise across the various domains (social, economic, environmental and technological), and the Secretary of State will himself have an experience of what is practicable within the governmental and wider political context.

142. This is not to say that the subject matter of the Secretary of State's decision under section 13 of the CCA 2008 is not of considerable importance. It plainly is. Nevertheless, it is clear from the statutory framework that Parliament itself is the proper forum in which scrutiny and interrogation of the Secretary of State's proposals and policies is properly to take place, aided by the expert contributions made by the CCC: including through the CCC's annual reports under section 36 of the CCA 2008. Given the clear role for the CCC and Parliament set out in the legislation, there is no indication that Parliament intended the Court to do anything other than apply the ordinary - and not enhanced - supervisory jurisdiction of judicial review.

Ground 4: *The Secretary of State applied the wrong legal test to section 13(3) of the CCA 2008 ("sustainable development")*

Arguments

143. Section 13(3) of the Act states:

> "The proposals and policies, taken as a whole, must be such as to contribute to sustainable development."

144. Mr Wolfe KC argues that this provision imposed a mandatory statutory requirement on the Secretary of State to reach the conclusion that the proposals and policies for meeting CB6, taken as a whole, will contribute to sustainable development. He argues that the Secretary of State has failed to meet this requirement, because in the CBDP he states in relation to sustainable development only that:

> "*There are both positive and negative natural capital impacts associated with these proposals and polices but the overall contribution to sustainable development is likely to be positive.*"

(Emphasis added). Mr Wolfe KC submitted that a finding that the impact of the proposals is "*likely to be positive*" is clearly not the same as a finding that it *will* be positive.

145. On behalf of the Secretary of State, Mr Badger replies that section 13(3) of the Act does not impose a threshold of certainty. First, because such an approach would result in section 13(3) imposing a higher standard than the section 13(1) duty, despite the fact that it is plainly ancillary to the section 13(1) duty. Second, because it cannot be realistic that the statute imposes such a duty, in circumstances where there is inherent

uncertainty involving a predictive judgment. Third, Mr Badger argues that the use of "must" in section 13(3) is not intended to connote a threshold of certainty, but instead to identify that the Secretary of State is under a duty to conduct an evaluative assessment that the proposals are expected to contribute to sustainable development.

Discussion

146. The term "sustainable development" is not defined in the CCA 2008. The Divisional Court in *R (Spurrier) v Secretary of State for Transport* [2019] EW HC 1070 (Admin) at §635 held that it was an "uncontroversial concept" which had been defined in the planning context as "meeting the needs of the present without compromising the ability of future generations to meet their own needs."

147. During the course of argument, I raised with Mr Badger the proposition that on its face section 13(3) did not appear to require an assessment or evaluation at all by the Secretary of State. Rather, that the statutory language was suggestive of a factual assessment: that is, whether in fact the proposals and policies contribute to sustainable development or not. This would not be a matter for the Secretary of State to determine, but would be a matter for the Courts if there is a challenge to the adequacy of the proposals and policies in contributing to sustainable development.

148. On its face, there is no reference within section 13(3) to the Secretary of State making an assessment, or considering anything, at all. This is in clear contrast with subsections (1) and (4) which refer specifically to the Secretary of State and what he may or must consider. Section 13(3) can also be contrasted with subsection (2). The latter subsection does not expressly refer to the Secretary of State, but it does state that "The proposals and policies must be prepared with a view to meeting" certain targets, and so it is implicit in this subsection that the Secretary of State's thought process is involved.

149. Mr Badger pushed back against this reading of the legislation, and argued that the whole structure of section 13 involved an evaluation by the Secretary of State. I agree. Section 13(3) needs to be read as forming part of the same evaluation or assessment as the Secretary of State is carrying out at subsection (1): will the proposals and policies enable the carbon budgets to be met. To decide otherwise would involve the Court engaging in a process for which it is not equipped, and for which it would have to rely on expert evidence. It would be surprising if Parliament had intended for the Court to have such a role.

150. As for what the term specifically means in the context of an evaluative assessment by the Secretary of State under section 13(3), I consider it connotes a degree of certainty that a particular outcome will eventuate. The term "must" is used elsewhere in section 13 (subsections (1) and (2)), and in both of those instances it is understood to mean that the Secretary of State has to carry out a particular exercise. He is obliged to do so. There is no obvious reason why the draftsman would have used the same term at subsection (3) if it was to bear a very different meaning.

151. As for Mr Badger's suggestion that section 13(3) is merely ancillary to subsection (1) and so could not impose a greater obligation on the Secretary of State, this does not necessarily follow. The two subsections are dealing with different targets or outcomes, and the assessment as to whether they will be achieved may require different thresholds. In section 13(1) the focus is on actually meeting the carbon budgets; the outcome or

target is absolute. In those circumstances, given that one is dealing with a predictive assessment, with so many imponderables, an evaluative assessment based on the likelihood that the outcome or target will be enabled makes sense. The focus of subsection (3) is on "sustainable development" and whether the proposals and policies will "contribute" to that target or outcome, not that there will actually be "sustainable development". As the target or outcome – to contribute – is lower, there is no reason why Parliament could not have intended for a greater degree of certainty that it would be achieved.

152. As for whether the Secretary of State's assessment did reach the required threshold under subsection (3), it was stated in the CBDP that the proposals and policies are "likely" to make that contribution. I understand that to mean that the Secretary of State considers that there is a greater than evens chance of the contribution being made, but not higher. The Secretary of State does not qualify the term with "highly" or "very", which would connote a higher degree of certainty. In the circumstances, I do not consider that the Secretary of State's assessment comes near to the much higher threshold that is mandated by section 13(3). On no reasonable view, could it be said that "likely" means "must".

153. In my judgment, therefore, the Secretary of State erred in making his decision under section 13(3) of the CCA 2008.

Ground 5: *did the Secretary of State fail to comply with s 14 of the Act because he failed to include in the CBDP information that he was required to include?*

Arguments

154. Mr Wolfe KC for Friends of the Earth, and Mr Lockley for the Good Law Project, argue that information on delivery risks qualifies as information "*obviously material to the critical issue of risk to the delivery of statutory targets*" and that, following Holgate J at §254, this should have been published under section 14 of the Act. They argue that the information on delivery risk included in the CBDP was insufficient, because it was limited to:

    i) A high level summary of the delivery risk to the packages of proposals and policies: which notes that policies and proposals in the EEP baseline "have high delivery confidence" but non-EEP policies and proposals "*vary in their delivery confidence …as we move towards Carbon Budget 6, a greater number of proposals and policies that are currently at an earlier stage of development will move into implementation and form part of the EEP baseline, giving higher delivery confidence*."

    ii) Sectoral summaries of the delivery risk picture included in Appendix D of the CBDP entitled "*sectoral summaries of delivery confidence*".

155. Neither of the above addresses the delivery risk associated with each individual policy. Mr Wolfe KC and Mr Lockley argue that individual delivery risk was a mandatory material consideration in the Secretary of State's decision-making process. They both argue that the Risk Narratives, or equivalent information, should have been published in order to comply with section 14 of the Act. Mr Wolfe also argues that the RAG tables, or equivalent information, should have been published.

156. Mr Wolfe KC relies on §245 of Holgate J's judgment which explained that the "*legal adequacy*" of a section 14 report is to be assessed by reference to its legal object, which is "*to enable its readers to understand and assess the adequacy of the Government's policy proposals and their effects*" and "*in the interests of public transparency*". Holgate J emphasised that this was important to the democratic process and the constitution as a whole. Mr Wolfe KC argues that, as a result of the failure to publish information on the risks to individual policies, neither Parliament nor the public was given the information necessary to form a judgment on the CBDP. Relatedly, Mr Wolfe KC submits, that the failure to publish this information impacted on the CCC's statutory function of providing independent scrutiny of the Secretary of State's plan as set out in a section 14 report.

157. Mr Lockley submits that it is mandatory under section 14 to publish information on anything that is a mandatory material consideration for the purposes of section 13 of the Act. He highlights paragraphs 202(xi); 204, 211, 214 of Holgate J's judgment, which support the case that information on individual risk is a mandatory material consideration for section 13 purposes. As to the interrelationship between section 13 and section 14: Mr Lockley identifies commentary at §77 of the *Feedback* case, which supports that section 13 and section 14 are twin duties. He also highlights examples from the planning law context which support the need for the Secretary of State to address, in his decision, the mandatory material considerations that were taken into account when reaching that decision.

158. In the alternative, Mr Lockley submits that even if the Secretary of State is not required to publish every section 13 mandatory material consideration in the section 14 report, he is required to publish details of individual risk because this information will always be central to the Secretary of State's conclusion that her policies and proposals will allow the carbon budgets to be met. He relies on §233 and 241 of Holgate J's judgment, which establish that the section 14 report must go beyond merely setting out policies and proposals, it must explain them and on §246-247 and 250 which establish the need to provide Parliament, the CCC and the public with information necessary to scrutinise the adequacy and realism of the proposals.

159. In the further alternative, Mr Lockley submits that the section 14 duty requires the Department to publish the Risk Narratives (or equivalent information pertaining to individual risk), in the particular circumstances of the CBDP. This is because the Secretary of State clearly based her overall section 13 conclusion – that the CBDP policies and proposals would be met – on the assumptions that quantified policies would deliver 97% of the reductions required to meet CB6 and this, in turn, rested on the assumption that the "package of policies and proposals are delivered in full". Even accepting the Secretary of State's position that by this, he meant that the net emissions reduction would be the same as if all policies and proposals were delivered in full, Mr Lockley submits that this was a very significant and optimistic assumption which required detailed justification in the CBDP.

160. Mr Moffett KC, for the Secretary of State, submits that the legal test against which the Claimants arguments must be assessed is: does the Plan set out an explanation as to why the Secretary of State reached the overarching judgement that the overall package of policies and proposals would enable the carbon budgets to be met? Mr Moffett submits that the CBDP and its Technical Annex do include information sufficient for this purpose. The granular information that the Claimants suggest should have been

published was not relevant to his decision. He submits that Friends of the Earth's contention that the RAG ratings should have been published is baseless. It is common ground that the Secretary of State did not have regard to these RAG ratings when making his section 13 decision, and he cannot be required to publish material to which he did not have regard.

Discussion

161. In my judgment, the material contained in the CBDP complied with the Secretary of State's duty under section 14 of the CCA 2008. The CBDP told Parliament how the Secretary of State proposes to meet the carbon budgets by explaining his thinking behind the proposals and how they will enable the carbon budgets to be met: this included a description of each of the proposals and policies, as well as the contribution that the quantified policies were expected to make to the emission savings, and how it was judged that the shortfall to be made up from unquantified policies would be met. This is precisely the information that Holgate J held should have been provided in the NZS, which was subject to challenge in *FoE (No. 1)*. I do not consider that it is possible to read Holgate J's judgment as supporting an obligation on the Secretary of State to provide risk data, however expressed or portrayed, as part of the section 14 report to Parliament.

162. The section 14 report that is subject to challenge in these proceedings did include summaries of risk at the sectoral level. It does not seem to me that that was required by the statutory language. In any event, I do not consider that section 14 required the Secretary of State to provide further risk information as to the specific policies, whether via the RAG table format or through a narrative description, and how the risks would be overcome. Requiring the Secretary of State to provide information about risk would unduly strain the statutory language of section 14.

163. The express statutory language does not call for any explanation or discussion of the risk factors and how they will be overcome. Nor is it implied or implicit. Holgate J rightly in my judgment held that the statutory language implicitly or impliedly requires the Secretary of State to explain "how" the proposals and the policies will enable the carbon budgets to be met, and that this calls for a description of the proposals and policies and the contribution that they will make to achieving the objective. What the risk factors are and how they are expected to be overcome or mitigated does not explain or describe the proposal or policy, but addresses the operational (whether by way of funding, legislation or otherwise) means by which the proposal or policy might be achieved.

164. The principle of transparency that is inherent in the legislation does not, in my judgment, call for that to be explained. Indeed, as a factual matter, it is clear that in June 2023 the CCC was able to fulfil its statutory role in commenting on the CBDP without having sight of the Secretary of State's risk analysis, or the analysis that was provided to him by officials.

165. As for the contention that the risk information needed to be provided in the CBDP because that information was "obviously material" to the Secretary of State's decision and so had to be included in the CBDP, I disagree. Holgate J's analysis of the statutory obligation did not depend on this. Holgate J's analysis of section 14 from §§ 231 to 241 makes no mention of "obviously material" information. At §249, where Holgate J uses

the term "obviously material [to the risk of delivery]", this is descriptive of "the contributions made by a multiplicity of proposals and policies adopted by the Secretary of State". Similarly, at §254, where Holgate J uses the term "obviously material [to the critical issue of risk to the delivery of the statutory targets]", this is descriptive of the various factors set out at §253 (see paragraph 87 above). I do not consider, therefore, that Holgate J was intending to say that any and all information that was "obviously material" to the decision-making of the Secretary of State under section 13 had to be published by means of the section 14 document.

166. I also reject the argument, made by Mr Lockley, that the CBDP needed to include all obviously material information by analogy with the duty to give reasons. Mr Lockley relied on *South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953, where Lord Brown summarised the authorities governing the proper approach to a reasons challenge in the planning context. At §36, Lord Brown stated that:

> "The reasons for a decision must be intelligible and they must be adequate. **They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved**. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. **The reasons need refer only to the main issues in the dispute, not to every material consideration.** They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

(Emphasis added).

167. It does not seem to me that the analogy to a decision in the planning context, or more generally to a decision in any form of litigation, is apt. The planning cases, or litigation, involve disputes between parties on issues of fact and/or law. It is necessary for the decision-maker to resolve those disputes and only fair for the parties, or litigants, to understand why they have won or lost, which involves some intelligible explanation for the conclusion reached. The CBDP is plainly not a matter of litigation; there is no dispute between parties. There are no sides which need to know why they have won or lost. Rather, the CBDP is a plan which explains to Parliament (and to wider

stakeholders) *how* the carbon budget is going to be met, and it is only right that Parliament (and wider stakeholders) understand those matters.

168. The risk information would not be required to be included by the Secretary of State if he had consulted on the CBDP before laying it before Parliament. The *Gunning* principles (see *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168), approved by the Supreme Court in *R (Stirling) v Haringey London Borough Council* [2014] 1 WLR 3947), require a consulting party to give consultees sufficient explanation and information to enable intelligent consideration and responses by the latter. As Holgate J. explained at §245 that would require sufficient information "to understand and assess the adequacy of the Government's policy proposals and their effects". That could be done without supplying the Government's risk analysis.

169. The risk information is not required to be included in the section 14 report on the basis that it is necessary to inform the annual report that the CCC has to make to Parliament under section 36 of the CCA 2008. The annual report must include the CCC's views on whether the carbon budgets are "likely to be met". It was contended that if detailed risk information is not provided in the section 14 report, the CCC cannot scrutinise the Secretary of State's proposals and policies, and so cannot meet their section 36 duties. This argument is misconceived. There is no explicit textual connection between sections 14 and 36 of the CCA 2008. Rather, the connection within the statute is the other way round: pursuant to section 37 of the CCA, the Secretary of State is required to respond to the CCC's annual report. If Parliament had intended the CCC's report under section 36 to respond specifically to the section 14 report, the direct linkage could have been made in the statutory text. Furthermore, the argument presupposes that the CCC does not have its own expertise to consider risk independently of the Secretary of State's evaluation. The CCC is an expert body, with their own ability to consider the question of risk. Indeed, that is what happened on the facts here.

170. It was suggested in oral argument that this reading of section 14 of CCA 2008 may mean that there is no right of the public to see the risk information. I am not asked to consider the impact here of the Freedom of Information Act 2000. However, I do note that Parliament may be able to call for the risk information, given that the report was provided to Parliament. Indeed, this was commented upon by Holgate J. at §242 "Parliament is well able to call for more information to be provided where it wishes to do so".

171. In the circumstances, therefore, this ground of challenge fails.

Conclusion

172. I consider that each of the grounds of challenge were arguable, and so permission is granted on each of the grounds. As a matter of substance, the application for judicial review is allowed on Grounds 1, 2, 3 and 4. Ground 5 is dismissed. I shall invite the parties to make submissions on the terms of the order that I should make.