Neutral Citation Number: [2024] EWHC 2707 (Admin)

Case No: AC-2023-LON-003070

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 October 2024

Before:

THE HONOURABLE MR JUSTICE CHAMBERLAIN

- -

Between:

THE KING
(on the application of
(1) FRIENDS OF THE EARTH
(2) KEVIN JORDAN
(3) DOUGLAS PAULLEY) **Claimants**

- and -

SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS **Defendant**

- -

David Wolfe KC, **Nikolaus Grubeck** and **Margherita Cornaglia** (instructed by **Leigh Day**) for the **Claimants**

Mark Westmoreland Smith KC, **Charles Streeten** and **Stephanie Bruce-Smith** (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 23 and 24 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 25 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Chamberlain:

Introduction

The decision challenged

1 This case concerns the legality of the third National Adaptation Programme ("NAP3"), which was laid before Parliament and published on 17 July 2023. NAP3 sets out the Government's view, at the time when it was published, of what must be done to tackle the risks flowing from actual and predicted changes to the climate.

2 NAP3 was laid and published pursuant to s. 58 of the Climate Change Act 2008 ("CCA"), which imposes a duty on the Secretary of State to lay programmes before Parliament setting out the Government's objectives in relation to adaptation to climate change, its proposals and policies for meeting those objectives and the time-scales for introducing those proposals and policies.

The parties

3 The first claimant, Friends of the Earth Ltd, is a not-for-profit organisation. It undertakes campaigning and other work in furtherance of environmental objectives. It includes over 200 community groups and has over 300,000 supporters. It is concerned, among other things, with what it describes as the pressing need for action to be taken on climate change, to ensure a safe and just outcome to the climate emergency for current and future generations.

4 The second claimant, Kevin Jordan, lives in Hemsby. At the time the claim was filed, his home on the Norfolk coast was at risk due to coastal erosion. He was concerned that the failure to implement protection measures would further cut off access to Hemsby and about the absence of timely and clear data and information on risks. Since filing this claim, and following damage caused by Storm Ciaran on 30 November 2023, Mr Jordan was instructed to leave his home and find alternative accommodation. His home was demolished by the local authority a week later. Mr Jordan has now been accommodated elsewhere by the local authority.

5 The third claimant, Doug Paulley, is a wheelchair user who lives in a care home. He has long-term health conditions which make him particularly vulnerable to the effects of extreme heat, episodes of which have increased and are likely to continue to increase in frequency and intensity because of climate change. Mr Paulley is concerned about the absence from NAP3 of long-term planning and funding across the health and social sectors in two key respects: first, the lack of systematic temperature monitoring and plans to adapt his care home; second, the absence of proper funding for air conditioning units. Mr Paulley has had to pay for these units for his room. However, the absence of air conditioning units in communal areas at his care home has meant that he has become unable to socialise during periods of high heat, which has had a detrimental effect on his mental health.

6 The defendant is the Secretary of State for Environmental, Food and Rural Affairs, whose department ("DEFRA") is the lead department responsible for domestic adaptation to climate change and for discharging the adaptation obligations in the CCA.

The grounds of challenge

7 On the claimants' case, in preparing NAP3, the defendant:

(a) erred in law by misconstruing the requirement for "objectives" in s. 58(1)(a) CCA, which must be read in accordance with s. 3 of the Human Rights Act 1998 ("HRA") and the UK's positive obligations under Articles 2, 8, 14 and Article 1 of Protocol 1 ("A1P1") ECHR to have in place an effective framework addressing climate change, and specifically adaptation risks ("Ground 1");

(b) unlawfully failed to consider (let alone publish information relating to) the risks to delivery for the "proposals and policies for meeting those objectives" produced under s. 58(1)(b) ("Ground 2");

(c) unlawfully failed to discharge the public sector equality duty ("PSED") under s. 149 Equality Act 2010 ("EA 2010") ("Ground 3"); and

(d) acted contrary to the claimants' procedural and substantive rights under Articles 2, 8, 14 and A1P1 ECHR, and so contrary to s. 6 HRA. The claimants assert that they are victims of that breach within the meaning of Article 34 ECHR ("Ground 4").

The issues

8 The parties agreed the following list of issues:

Ground 1: Objectives

Did the defendant misdirect himself in law in respect of what was required of him by way of "objectives" under section 58(1)?

Ground 2: Risk of delivery

Was the defendant required to consider the risk of delivery of the policies and proposals set out in NAP3?

Ground 3: Public Sector Equality Duty

Issue 1: Did the defendant comply with his obligations under the PSED under section 149 EqA 2010 in relation to the publication of NAP3?

Issue 2: Should the Court refuse relief pursuant to section 31(2A) and/or (3C) of the Senior Courts Act 1981 ("SCA 1981")?

Ground 4: HRA

Issue 1: Is it open to the defendant to contend that the second and third Claimants are not "victims" for the purposes of s. 7 HRA?

Issue 2: Is the second claimant permitted to rely upon the Second Statement of Kevin Jordan dated 10 June 2024 and, if so, should the second claimant's assertion of the fact that "Kevin Jordan's home was recently demolished due to the treat of coastal erosion" be excluded from consideration?

Issue 3: Are the second and third claimants "victims" for the purposes of s. 7 HRA?

Issue 4: Are the rights relied upon by the claimants (Article 2, 8, 14 and A1P1 ECHR) applicable/engaged?

Issue 5: Did the defendant breach any of those Convention rights in adopting NAP3?

Procedure

9 On 9 February 2024, Sheldon J gave directions which resulted in the case being listed for a rolled-up hearing, which took place over two days on 23 and 24 July 2024.

The law

The Climate Change Act 2008

10 Section 1 of the CCA imposes on the Secretary of State the duty to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline. 100% was substituted for the previous figure (80%) by an amending instrument in 2019. Sections 4-10 make detailed provision for the setting of carbon budgets. Sections 13-15 make provision for proposals and policies for meeting carbon budgets. Section 13 provides materially as follows:

> "**13. Duty to prepare proposals and policies for meeting carbon budgets**
>
> (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)."

Section 14 provides materially as follows:

> "**14. Duty to report on proposals and projects for meeting carbon budgets**
>
> (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."

11 Section 32 of and Schedule 1 to the CCA establish the Committee on Climate Change ("CCC") as an independent, non-departmental public body. Section 36 requires the CCC to make reports on progress. Section 38 requires it to provide advice or other assistance at the request of a national authority.

12 Sections 56-60 provide for a repeating five-yearly cycle of climate change risk assessment followed by a national adaptation programme ("NAP").

13 Section 56(1) requires the Secretary of State to lay climate change risk assessment reports before Parliament containing an assessment of the risks for the United Kingdom of the current and predicted impact of climate change.

14 Section 57 requires the CCC to advise the Secretary of State on the preparation of each report under s. 56.

15 The provision at the heart of this litigation is s. 58, which provides materially as follows:

> "**58. Programme for adaptation to climate change**
>
> (1) It is the duty of the Secretary of State to lay programmes before Parliament setting out —
>
> (a) the objectives of Her Majesty's Government in the United Kingdom in relation to adaptation to climate change,
>
> (b) the Government's proposals and policies for meeting those objectives, and
>
> (c) the time-scales for introducing those proposals and policies, addressing the risks identified in the most recent report under section 56.
>
> …
>
> (3) Each programme under this section must be laid before Parliament as soon as is reasonably practicable after the laying of the report under section 56 to which it relates."

16 Section 59 requires each of the CCC's reports under s. 36 to contain an assessment of the progress made towards implementing the objectives, proposals and policies set out by the Secretary of State under s. 58. The CCC must publish its advice as soon as reasonably practicable after it has been given to the Secretary of State.

17 Under s. 56(5), the Secretary of State must take into account the advice of the CCC under s. 57 before laying a report before Parliament.

18 Section 59 requires the CCC, every second year, to include within its annual reports produced pursuant to s. 36 of the CCA "an assessment of the progress made towards implementing the objectives, proposals and policies set out in the programmes laid before parliament under section 58".

The domestic case law

19 *R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin), [2023] 1 WLR 225 *("FoE No. 1")* was a challenge to the Government's Net Zero Strategy laid and published in 2021. Holgate J dismissed an argument that the presence of a quantified target in s. 1 CCA requires 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; a qualitative analysis could in principle suffice: see at [193]. However, he went on to hold that the Strategy had not complied with s. 13(1) or s. 14(1) because it had not sufficiently addressed the risk to the delivery of individual proposals and policies and the impact of this risk on the duty to ensure that carbon budgets are met: see at [194]-[221] and [231]-[260]. The Secretary of State for Business, Energy and Industrial Strategy was ordered to submit a report to Parliament complying with s. 14 CCA 2008.

20 The Secretary of State revisited the issues and, on 31 March 2023, presented the Carbon Budget Delivery Plan to Parliament, in purported compliance with ss. 13 and 14 CCA. This was itself the subject of challenge in *Friends of the Earth v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995 (Admin) ("*FoE No. 2*"). There, Sheldon J held that the revised plan was also unlawful.

21 There was a dispute between the parties over the extent to which the principles in these cases, both of which concerned *mitigation* measures, are applicable in the current context, which concerns *adaptation*.

22 The one case in which the legal duties applicable to adaptation measures was considered was *R (Plan B Earth) v Prime Minister* [2021] EWHC 3469 (Admin). There, the claimants challenged both the mitigation and the adaptation measures as failing to comply with ss. 13 and 58 CCA. Permission was refused on the papers and refused again after an oral hearing. Bourne J said this:

> "34. In my judgment, the contention that the 2008 Act has been breached does not get off the ground. Under section 13, the Third Defendant has prepared proposals and policies that he considers will enable the carbon budgets that have been set under the Act to be met. Under section 58, he has laid programmes before Parliament setting out objectives, proposals, policies and timescales regarding adaptation to climate change. Disagreement with the merits of those proposals and policies (etc.) does not give rise to an arguable case that there has been a breach of the statutory duties.
>
> It also seems to me that the claim overlooks an important part of the structure created by the 2008 Act. The Act created the CCC precisely for the purpose of providing independent advice and oversight to Government. The requirement of section 36 for the CCC to consider whether budgets and targets are likely to be met presupposes that the CCC may on occasion find that they are not. The advice to be given by the CCC is expressly not binding

> on the Government but the Government is expressly required to have regard to it.
>
> 36. Evidentially, the Claimants rely to a very substantial extent on criticism of Government contained in CCC reports. But that criticism, far from demonstrating that the 2008 Act is not being complied with, demonstrates that the 2008 Act is working as Parliament intended. Parliament plainly contemplated that the periodic provision of reports and responses would feed into an evolution of policy over many years while successive Governments grapple with the vast and unprecedented challenge of climate change."

23 Claims under Articles 2, 8 and 14 were also considered and dismissed, though Bourne J's analysis predates the important judgment of the Grand Chamber of the European Court of Human Rights ("the Strasbourg Court") in *Verein KlimaSeniorinnen Schweis v Switzerland,* App. No. 53600/20 *("VKS")*, handed down on 9 April 2024, on which the claimants rely.

The public sector equality duty

24 Section 149 of the EA 2010 provides (as relevant):

> "(1) A public authority must, in the exercise of its function, have due regard to the need to –
>
> > (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
> >
> > (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
> >
> > (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –
>
> > (a) remove or minimise disadvantage suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> >
> > (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
> >
> > (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to–

(a) tackle prejudice, and

(b) promote understanding."

25 In *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 McCombe LJ summarised principles relevant to an assessment whether the "due regard" duty in s. 149(1) has been met. At [27], he noted as follows:

"(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26]-[27] per Sedley LJ.

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23]-[24].

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:

(i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;

(ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

(iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

(iv) The duty is non-delegable; and

(v) Is a continuing one.

(vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74-75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77]-[78]:

"[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in Baker (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

[78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be

given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

(ii) At paragraphs [89]-[90]:

"[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (para [85]):

'….the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'

[90] I respectfully agree……." In *West Berkshire DC v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441, the Court of Appeal considered the implications of failing to address the public sector equality duty at the correct time. The Court acknowledged that, while proper and timely compliance with the PSED is crucial, the late preparation of an equality statement does not automatically necessitate quashing the decision. Laws LJ said this at [87]:

"Nothing we say should be thought to diminish the importance of proper and timely compliance with the PSED. But we have strong reservations about the proposition that the court should necessarily exercise its discretion to quash a decision as a form of disciplinary measure. During the course of argument, [counsel for the claimant] accepted that if an Assessment, subsequently carried out, satisfied the court, there would be no point in quashing the decision if the effect of doing that and requiring a fresh consideration would not have led to a different decision. We think this was a correct concession. The court's approach should not ordinarily be that of a disciplinarian, punishing for the sake of it, in these circumstances. The focus should be on the adequacy and good faith of the later Assessment, although the court is entitled to look at the overall circumstances in which that Assessment was carried out."

26 Since then, material amendments to s. 31 of the SCA 1981 have come into force. They provide as follows:

"(2A) The High Court—

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application, if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

…

(3C) When considering whether to grant leave to make an application for judicial review, the High Court—

(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and

(b) must consider that question if the defendant asks it to do so.

(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave."

Human Rights Act 1998

27 Section 3(1) HRA 1998 requires the court, so far as it is possible to do so, to read and give effect to primary legislation and subordinate legislation in a way which is compatible with the Convention rights. Section 6 of the HRA makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 7(1) provides that a person alleging a breach of s. 6 by a public authority can bring proceedings against the authority and rely on the Convention right or rights in any legal proceedings "but only if he is (or would be) a victim of the unlawful act". By s. 7(7), a person is such a victim only if he would be a victim for the purposes of Article 34 ECHR.

The *VKS* decision

28 Given the centrality of the *VKS* judgment to the submissions of the parties, it is necessary to summarise the Court's findings in some detail.

29 The application to the Strasbourg Court was brought by four Swiss senior citizens and VKS, a non-profit association established to promote and implement effective climate protection on behalf of its members, the general public and future generations. The complaint was that the Swiss authorities had failed to mitigate the effects of climate change, which were said to have affected the lives of the individual applicants and VKS's members, particularly through rising temperatures. The applicants relied on Articles 2, 6, 8 and 13 of the Convention to allege various omissions on the part of the Swiss authorities in relation to climate-change mitigation.

30 On the question whether the applicants satisfied the "victim requirement" in Article 34 ECHR, the Court noted at [487] that, in order to claim victim status in the context of complaints concerning harm or risk of harm resulting from alleged failures by the State to combat climate change, an applicant needs to show that he or she was personally and directly affected by the impugned failures. This meant that the applicant had to establish (a) that the applicant was subject to a high intensity of exposure to the adverse effects of climate change (i.e. that the level and severity of the risk of adverse consequences of governmental action or inaction affecting the applicant was significant); (b) that there is a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm. The Court added at [488] that "the threshold for fulfilling these criteria is especially high" and whether an applicant meets it will depend on "a careful assessment of the concrete circumstances of the case".

31 On the facts, the individual applicants were not victims for the purpose of Article 34 because they had failed to demonstrate the existence of a sufficient link between the harm they had allegedly suffered, or would suffer in the future, and climate change. The individual applicants' complaints under Articles 2 and 8 ECHR were therefore dismissed. However, at [497]-[499], the Court held that there had been an evolution in contemporary society as regards the recognition of the importance of associations in litigating issues of climate change on behalf of affected persons, which was often resource intensive. The Court therefore considered it appropriate "in this specific context" to acknowledge the importance of making allowance for recourse to legal action by associations, subject to conditions set out in [502].

32 The Court then considered the law relating to the positive obligations owed under Articles 2, 8 and A1P1.

33 At [513], the Court noted that, in order for Article 2 to apply to complaints of state action or inaction in the context of climate change, there had to be a "real and imminent" risk to life. But where an individual had established victim status applying the criteria in [487]-[488], it could be assumed that there was "a serious risk of a significant decline in a person's life expectancy owing to climate change" sufficient to trigger the applicability of Article 2.

34 As to Article 8, the Court noted that, in general, it was necessary to show an "actual interference" with the applicant's enjoyment of his or her private or family life or home going beyond a general deterioration of the environment: [514]-[515]. It was also necessary to show that the interference was serious in the sense that its effects on the applicants' well-being (though not necessarily their health) attained a certain minimum level, though exposure to a serious environmental risk may in some cases be sufficient to trigger the applicability of Article 8: [516]-[518]. At [519]-[520], the Court said that, drawing on these considerations, "Article 8 must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life". If the standing requirements set out at [487]-[488] (for individuals) or [502] (for organisations) were satisfied, Article 8 would apply.

35 Applying these principles to the facts of the case, the Court noted at [521]-[526] that the applicant organisation had 2,000 members with an average age of 73 and 650 members who were 75 or older, was committed to engaging in various activities aimed at reducing greenhouse gas emissions in Switzerland and addressing their effects on global warming

and acted not only in the interests of its members but also in the interest of the public and of future generations, including through legal action. That being so, the applicant organisation "represents a vehicle of collective recourse aimed at defending the rights and interests of individuals against the threat of climate change in the respondent state" and, bearing in mind that the individuals did not have standing in the respondent state, according standing to the organisation was in the interests of justice. This meant that Article 8 was applicable. This was so even though the individual applicants did not satisfy the test for standing: [527]-[536].

36 Since Article 8 was applicable, it was unnecessary to examine whether Article 2 might also apply: [537].

37 As to the positive obligations under Article 8, the Court noted at [541]-[543] that the State enjoyed a margin of appreciation. However, having regard to the scientific evidence as to the manner in which climate change affects ECHR rights, the global nature of the problem and State's generally inadequate track record of addressing it, "climate protection should carry considerable weight in the weighing up of any competing considerations". There was a distinction between the scope of the margin of appreciation as , on the one hand "the State's commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives in this respect" and, on the other hand, "the choice of means designed to achieve those objectives". As regards the former, the nature and gravity of the threat and the consensus as to the stakes involved led to a reduced margin of appreciation. As regards the latter (their choice of means, including operational choices and policies adopted in order to meet internationally anchored targets and commitments in the light of priorities and resources), the margin of appreciation was wide.

38 At [545]-[546], the Court held that the State's primary duty was "to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change" and "to put in place the necessary regulations and measures aimed at preventing an increase in [greenhouse gas] concentrations in the Earth's atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights".

39 At [547]-[548], the Court held that "each individual State is called upon to define its own adequate pathway for reaching carbon neutrality, depending on the sources and levels of emissions and all other relevant factors within its jurisdiction" and that "effective respect for the rights protected by Article 8 of the Convention requires that each Contracting State undertake measures for the substantial and progressive reduction of their respective [greenhouse gas] emission levels, with a view to reaching net neutrality within, in principle, the next three decades".

40 At [549], the Court held that, in order for this to be genuinely feasible, "immediate action needs to be taken and adequate intermediate reduction goals must be set for the period leading to net neutrality" and that such measures had to be incorporated into a binding regulatory framework at the national level and followed by adequate implementation. More specifically, the Court explained at [550] that in assessing whether a State has remained within its margin of appreciation, it would examine whether the competent authorities, whether at the legislative, executive or judicial level, had had due regard to the need to:

(a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future greenhouse gas emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;

(b) set out intermediate greenhouse gas emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national greenhouse gas reduction goals within the relevant time frames undertaken in national policies;

(c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant greenhouse gas reduction targets (see subparagraphs (a)-(b) above);

(d) keep the relevant greenhouse gas reduction targets updated with due diligence, and based on the best available evidence; and

(e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.

41 At [551], the Court said that the assessment would be of an "overall nature", so that a deficiency in one respect would not necessarily be fatal. Then, at [552], it said this:

> "Furthermore, effective protection of the rights of individuals from serious adverse effects on their life, health, well-being and quality of life requires that the above-noted mitigation measures be supplemented by adaptation measures aimed at alleviating the most severe or imminent consequences of climate change, taking into account any relevant particular needs for protection. Such adaptation measures must be put in place and effectively applied in accordance with the best available evidence (see paragraphs 115 and 119 above) and consistent with the general structure of the State's positive obligations in this context (see paragraph 538 (a) above)."

42 Finally, at [553]-[554], the Court noted that a State's procedural safeguards were to be taken into account when considering whether a State had remained within its margin of appreciation. In particular, it was important that the public had access to the conclusions of relevant studies, to allow them to assess the risk themselves, and that procedure be made available for the views of those affected or at risk of being affected by the relevant measures can be taken into account in the decision-making process.

43 At [555], the Court began to assess Switzerland's compliance with its duty to put in place, and effectively apply in practice, the relevant mitigation measures. This approach was justified as follows:

> "Failure by the State to comply with this aspect of its positive obligations would suffice for the Court to conclude that the State failed to comply with its positive obligations under Article 8 of the Convention without it being necessary to examine whether the ancillary adaptation measures were put in place (see paragraph 552 above)."

44 The Court then considered the legislative and executive action relied upon by Switzerland to demonstrate compliance with its positive obligations. It noted at [558]-[559] that the existing legal requirement for a 20% reduction in greenhouse gas emissions by 2020 compared to the 1990 baseline, had been shown by a study to be inadequate. In any event, even that target had not been met. This showed the inadequacy of Switzerland's past action. At [560]-[561], the Court noted that a further legislative proposal to set targets for the period 2020-2030 had been defeated at a referendum. The State had sought to address this lacuna but had left the period after 2024 unregulated. Thus, at [562], the court concluded:

> "These lacunae point to a failure on the part of the respondent State to fulfil its positive obligation derived from Article 8 to devise a regulatory framework setting the requisite objectives and goals (see paragraph 550 (a)-(b) above)."

45 At [563]-[566], the Court noted that there had been a further Act, post-dating the date of the application, but drew attention to other lacunae. One was that the legislation "sets out the general objectives and targets, but the concrete measures to achieve those objectives are not set out in the Act, but rather remain to be determined by the Federal Council and proposed to Parliament 'in good time'…" Another was that the period between 2025 and 2030 "still remains unregulated pending the enactment of new legislation". In those circumstances, the Court said at [567] that it had difficulty accepting that a mere legislative commitment to adopt measures "in good time" satisfies the State's duty to provide, and effectively apply in practice, effective protection of individuals within its jurisdiction from the adverse effects of climate change on their life and health". It followed that the new Act did not remedy the shortcomings in the legal framework: [568]. At [569]-[572], the Court relied also on the absence of carbon budgets form the legislative scheme. For all these reasons, there was a breach of Article 8: [573]-[574]. Because the applicant association did not enjoy standing before the national courts, there was also a breach of Article 6: [594]-[640].

46 In interpreting the effect of the judgment of the majority of the Strasbourg Court, some assistance may be derived from the impressively reasoned partly concurring and partly dissenting opinion of Judge Eicke. The discussion at [59]-[65] of that opinion shows that, in the view of the UK judge, the majority judgment represents a significant extension of the scope of the positive obligations owed under Articles 2 and 8. Judge Eicke noted at [66] that this is "a clear break with the Court's traditional approach in relation to 'difficult social and technical spheres'".

Factual background

47 Dr Lee Gilpin Davies's witness statement for the defendant contains an explanation of how NAP3 was prepared.

The Climate Adaptation Team

48 DEFRA's Climate Adaptation Team ("CAT") coordinate both the development of the NAP document every 5 years and the programme of activities between each document's publication. Addressing climate change risks as part of NAP3 involved many departments' portfolios. Individual departments are commissioned to design policy to address risk using templates that set out the required information. CAT's role is as a

"critical friend", testing the policies against various criteria, including feasibility. At each commissioning stage, the CAT reviewed and evaluated policy work done to address the risk in line with the agreed level of ambition, including that actions where possible should be specific, measurable, achievable, relevant and time-bound ("SMART").

49 Initially CAT sought proposals from individual departments in the form of pathways for each identified risk, setting out actions to be taken and outcomes to be met. The materials provided in these pathways was subsequently used by the CAT to draft a risk annex for each identified risk. These were ultimately published as Annex 1 to NAP3. The individual departments and their Ministers had the opportunity to review multiple iterations of the annex document, and the NAP3 sectoral chapters, before agreeing the final published version.

Events prior to NAP3

50 The first climate change risk assessment ("CCRA1") was laid before Parliament in January 2012 and covered a comprehensive assessment of climate risks for the UK. NAP1, which covered the period 2013 to 2018, responded to the risks identified. It was laid before Parliament in July 2013.

51 For the second such assessment, in 2017 ("CCRA2"), DEFRA asked the CCC to produce an evidenced report to assess the UK's key climate risks. The CCC advised that more focused priorities and specific and measurable objectives were required. NAP2, which covered the period from 2018 to 2023, set out the Government's response to CCRA2 and was presented to Parliament in July 2018.

52 In January 2022, the Secretary of State published CCRA3 pursuant to s. 56 CCA.

53 Between March and April 2022, Ipsos, a market research and consulting firm worked with the University of Leeds to conduct a Public Dialogue on Climate Adaptation. The aim was to gather evidence on how participants who live in and experience different physical landscapes vary in their views on climate risk and adaptation action, and to understand participants' views on what an England well-adapted to climate change should look like, their priorities regarding different climate risks and adaptation actions, their views on where responsibilities should lie, and public awareness of and initial response to climate risks and climate adaptation measures. The findings of the Public Dialogue informed NAP3.

54 Thematic workshops for stakeholders were held by the defendant in the summer of 2022. Two of these related to health, hosted by Department for Health and Social Care ("DHSC") and the built environment, hosted by the UK Green Buildings Council.

55 CCRA3 incorporated the CCC's prior technical work, as set out in its Climate Risk Independent Assessment ("CRIA"), published on 16 June 2021.

56 The CRIA identified 61 risks and opportunities to the UK resulting from climate change. These were grouped into five areas: natural environment and assets, infrastructure, health, communities and the built environment.

57 The defendant adopted the risks set out in the CRIA and the CRIA's urgency scoring in CCRA3.

58 CCRA3 noted that:

> "the UK government's ambition for NAP3 is to have a clear set of objectives for adaptation, and a systematic and robust set of policies, programmes and investments to meet those objectives, with measurable metrics, timelines and progress indicators, all linked to the sixty-one risks set out in our risk assessment."

59 On 29 March 2023, the CCC presented to Parliament its progress report under s. 59 CCA, focussing on the Government's progress towards meeting the objectives, proposals and policies in NAP2.

NAP3

60 The vision for adaptation underpinning NAP3 is "for a country that effectively plans for and is fully adapted to the changing climate". NAP3 explains that "Climate change adaptation refers to the adjustments needed in response to changes to our planet's climate. Adapting structures and systems, including critical infrastructure, the built environment, water use and food production, can all help to reduce the impacts of climate change".

61 NAP3 addressed each of the 61 risks and opportunities identified in CCRA3, grouping them into five chapters: (1) Infrastructure; (2) Natural Environment; (3) Health, communities and the built environment; (4) Business and industry; and (5) International dimensions.

62 NAP3 states that:

> "Each chapter is supported by an annex that includes objectives for addressing each risk and opportunity (risk reduction goals), and proposals and programmes to achieve those objectives (actions), in accordance with section 58 of the CCA 2008. Timescales for introducing these proposals and policies are set out under individual risk actions."

63 NAP3 makes clear that the "risk reduction goals" are the "objectives" referred to in s. 58(1)(a), the "actions" are the "polices and proposals" referred to in s. 58(1)(b) and the "timescales" are the time-scales referred to in s. 58(1)(c).

The "risk reduction goals" relevant to the position of the individual claimants

64 In relation to Mr Jordan, David Wolfe KC for the claimants focussed on risk reduction goal H4 under the heading "Health, communities and the built environment annex". It relates to "Risks to the viability of coastal communities from sea level rise (DEFRA and DLUHC)" and provides:

> "**Risk reduction goal**
>
> Improve the nation's resilience to future flood and coastal erosion risks, thereby reducing the risk of harm to people, the environment and the economy."

This goal is followed by 10 actions. The first is as follows:

> "**Actions**
>
> 1. Defra and the Environment Agency will invest £5.2 billion to build new flood and coastal defences to better protect communities across England by 2027. This will include projects which focus on better protection for coastal communities."

The actions are then followed by a list of 10 steps headed "How we will do it". For action 1, this will be done through the "Flood and coastal defence investment programme".

65 In relation to Mr Paulley, Mr Wolfe identified risk reduction goals H1 and H12, under the heading "Risks to health and wellbeing from high temperatures (Department for Levelling Up, Housing and Communities - DLUHC)". H1 provides:

> "**Risk reduction goal**
>
> Reduce the risk of high temperatures to health and wellbeing, through regulation, planning policy, retrofit, research and guidance. Department for Energy Security and Net Zero (DESNZ) will ensure that measures to deliver net zero and retrofit existing buildings, as described in the Heat and Buildings Strategy, will seek to minimise overheating risks and maintain temperatures conducive to good health. This will result in an existing building stock that is appropriately retrofitted to deliver net zero by 2050 and is more resilient to climate hazards."

H12 provides:

> "**Risk reduction goal**
>
> Minimise the impact of climate change on the quality, effectiveness, and timeliness of health and social care delivery."

These are similarly followed by a list of "actions" and an explanation of "how we will do it".

<u>The documents relied upon to evidence the defendant's compliance with the public sector equality duty</u>

66 DEFRA produced an Equalities Impact Assessment report ("EQIA1"), but it was not appended to the Ministerial submission of 10 July 2023, which invited approval of NAP3. The submission did request that the defendant "note the updated assessment on the Public Sector Equality Duty". It also explained that:

> "As we have previously set out, we have provided guidance to risk-owning departments on how to ensure their policies and actions within the NAP3 document pay due regard to the Public Sector Equality Duty. No departments have come back to indicate any issues with regard to this requirement."

67 Following the publication of NAP3, the Climate Adaptation Team produced a further comprehensive equality impact assessment ("EQIA2"), which detailed input from

individual departments and assessed the implications for the equalities objectives under s. 149 EA 2010 of all actions proposed by NAP3. It also established an approach to monitoring the equalities impacts of NAP3 as part of 6-month reporting on NAP3 for individual departments.

68 On 19 February, EQIA2 was attached to a Ministerial submission with the recommendation that the defendant carefully it and, having done so, approve a decision that NAP3 remain unchanged as published. On 5 March 2024, the defendant indicated that he had reviewed EQIA2 and that NAP3 was confirmed in its published form.

The assessment of NAP3 by the CCC

69 On 13 March 2024, the CCC published its independent assessment of NAP3. Its first key message was this:

> "**NAP3 falls far short of what is needed**. NAP3 lacks the pace and ambition to address growing climate risks, which we are already experiencing in the UK. It fails to set out a compelling vision for what the government's 'well adapted UK' entails, and only around 40% of the short-term actions to address urgent risks identified in the last Climate Change Risk Assessment are progressed. The lack of a measurable vision will prevent effective delivery of adaptation by public agencies, local authorities, and the private sector, as well as inhibiting a clear assessment of progress."

70 The CCC noted that in their 2023 progress report they made clear that coherent, specific, measurable goals and outcomes were needed to make adaptation tangible both inside and outside of government. The CCC's evaluation was that NAP3 did not meet this requirement as it "only contains a very high-level vision statement that is not operational, with no measurable goals or specific outcomes for any sector."

71 Speaking to the process of coordinating adaptation, the CCC were critical of the defendant's approach:

> "Adaptation policy is currently coordinated across government by the Department for Environment, Food and Rural Affairs (Defra). However, many of the risks that need to be addressed sit with other government departments and local authorities. Despite the best efforts of officials, the machinery of government has been ill-suited to ensure that adaptation reaches the top of other departments' priority lists and is sufficiently well understood and resourced in local government. This has been an important factor in the limited success of the NAPs conducted to date and without change it is difficult to imagine future NAPs breaking the cycle of underwhelming policy responses by fostering true ownership of risks across all departments."

Ground 1

Submissions for the claimants

72 Mr Wolfe for the claimants submits that, in setting the "risk reduction goals" in NAP3 (which correspond to the "objectives" referred to in s. 58), the defendant erred in law. Section 58 imposes a duty to set out objectives "in the form of substantive, specific and

measurable outcomes"; and that the risk reduction goals set out in NAP3 do not comply with that duty.

73 The starting point for interpreting s. 58 is that "the goal of all statutory interpretation is to discover the intention of the legislation … That intention is to be gathered from the words used by Parliament, considered in the light of their context and their purpose": *R (Black) v Secretary of State for Justice* [2017] UKSC 81, [2018] AC 215, [36] (Lady Hale). Reference was also made to *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 WLR 343, [29]-[43] (Lord Hodge).

74 The word "objectives" in s. 58(1)(a) must be construed by reference to s. 58(1)(b) and (c), which require the defendant to lay before Parliament policies and proposals "for meeting" those objectives and time-scales for introducing them, capable of "addressing the risks identified in the most recent report under s. 56". It makes no sense to say that the Secretary of State can address the risks of the impact of climate change merely by seeking to reduce those risks. The concept of "addressing" risks involves reducing (rather than increasing) those risks. The only way that requirement can be complied with in substance is by setting quantifiable targets which can be (and can be seen to be) either achieved or missed. Vague aspirations will not do.

75 The structure and framework of Part 4 of the CCA mirrors that of Part 1. Thus, under Part 4, just as under Part 1, the Secretary of State is required "to explain how his proposals are intended to remedy the problems encountered so as to meet the targets": *FoE No. 1,* [234]. This necessitates setting objectives in the form of clear, specific and substantive outcomes. Thus, as with mitigation, "the public are entitled to judge whether they think a plan is realistic or whether they think the policy measures adopted in a plan represent a fair balance as to where the benefits and burdens associated with" addressing adaptation risks fall: *FoE No. 1,* [246].

76 Evidence of how NAP3 was prepared supports this analysis. The Government initially adopted a "pathways" approach, which directed risk owners in individual departments to develop robust, measurable outcomes for each risk they identified. At least a third of the completed "pathways" returned to DEFRA were considered inadequate at various points, primarily due to their failure to set out measurable and robust approaches to reducing risk. Rather than address these serious shortcomings, the defendant decided to pursue further work on a subset of risks only. Shortly afterwards, it was decided that risk-specific indicators would be dropped completely, to be replaced with selective indicator "case studies". The result was that a large number of "risk reduction goals" are not in the form of measurable outcomes, as originally envisaged for NAP3. The claimants' understanding of s. 58 aligns with that of DEFRA officials, as expressed during Ministerial meetings.

77 Mr Wolfe sought to support his interpretation of s. 58 by reference to ordinary principles of statutory construction and also by applying s. 3 HRA, which requires the court to read and give effect to s. 58 compatibly with ECHR rights, as elucidated by the Strasbourg Court in *VKS*.

78 *VKS* significantly develops the Strasbourg Court's climate change jurisprudence. The State's positive obligations extend to adopting measures capable of mitigating the "existing" as well as the "future" risks of climate change and to setting climate targets and taking effective steps towards meeting them: see at [545]-[548]. This applies not only

to mitigation (the focus of the VKS decision itself) but also to adaptation. In relation to the latter, the obligation is to put in place and effectively apply adaptation measures in accordance with the best available evidence "and consistent with the general structure of the State's positive obligations in this context": [552]. Thus, there is a narrower margin of appreciation in relation to "the setting of requisite aims and objectives" and a wider one in relation to "the choice of means designed to achieve those objectives": [543]. The State's positive obligations also include procedural obligations to make information held by public authorities available to the public, and in particular those who may be affected the measures or the absence thereof, and to have procedure to enable the views of such persons to be taken into account: [554].

Submissions for the defendant

79 Mark Westmoreland Smith KC for the defendant submitted that s. 58(1)(a) gives the Secretary of State a broad discretion in relation to the way in which the "objectives" are set. The Secretary of State is politically accountable to Parliament for them. The nature, specificity and ambition of the objectives is a matter for the Secretary of State.

80 The claimants' submissions place an unjustified gloss on s. 58(1)(a). The word "addressing the risks" in s. 58(1)(c) qualify the programme as a whole. The timescales referred to in that paragraph are for introducing the proposals and policies, not for achieving the objectives. The words "for meeting those objectives" in s. 58(1)(b) do not limit the breadth of the discretion afforded to the Secretary of State in setting the objectives under s. 58(1)(a).

81 On the claimant's analysis, it is not obvious where the line should be drawn between an objective which contains a "clear, specific and substantive" outcome and one which involves "unspecified risk reduction". Section 58 must be broad enough to allow the Secretary of State to identify the need to address different risks as having different priorities and, therefore, to identify different objectives with different levels of specificity.

82 The analogy which the claimants seek to draw between Part 1 of the CCA (which concerns mitigation) and Part 4 (which concerns adaptation) is a false one. The policies and proposals under ss. 13 and 14 are all aimed at meeting a specific, statutorily defined and quantifiable target. They are aimed at securing quantifiable reductions in carbon emissions. The legislation could not and does not set any such quantified target in relation to adaptation. Thus, s. 56(1) does not constrain the Secretary of State's discretion in setting out objectives. Rather, it requires the CCC to assess and report upon the progress towards meeting the objectives, proposals and policies. Section 59 requires an assessment of the progress made under the programme laid before Parliament. It does not constrain the substance of that programme. In this respect, reliance is placed on Holgate J's judgment in *R (Wildfish Conservation) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 2285 (Admin); [2024] Env LR 15, at [224] and Bourne J's judgment in *Plan B* at [34].

83 As to the reliance on judgments made during the process of preparing NAP3, the claimants are wrong to say that the defendant decided not to address perceived shortcomings in the pathways developed at that stage. In fact, work to address gaps in the pathways and to improve climate risks annexes was not confined to category 1 risks but applied across all departments and all risk categories. Similarly, the claimants are

wrong to assert that risk-specific indicators were "completely dropped". In fact, work on risk-specific indicators was incorporated into the Monitoring and Evaluation Annex.

84 Section 3 HRA assists in choosing between two interpretations of a statutory provision only where one of those interpretations would be incompatible with rights guaranteed by the ECHR. So, to succeed, the claimants would have to show that the ECHR imposes an obligation on States party to it to adopt "substantive, specific and measurable objectives". The only authority to which the claimants refer to this proposition is *VKS*. But in that case the Strasbourg court held that the Swiss authorities had failed to set effective *mitigation* targets: see [545]-[548]. Adaptation was considered separately and the passages dealing with it were strictly *obiter*. In any event, [522] of the judgment shows that the duty to adopt adaptation measures is different from the duty to adopt effective mitigation measure. The former need only be aimed at alleviating "the most severe or imminent consequences of climate change".

85 At any rate, *VKS* does not represent "clear and constant" jurisprudence as regards the content of adaptation measures, so cannot be used to show that the defendant's interpretation of s. 58, in accordance with the natural meaning of that provision, would be incompatible with the UK's positive obligations under the ECHR (in the sense in which that phrase is used in *Manchester City Council v Pinnock* [2011] 2 AC 104). There is no proper basis for departing from the conclusion of Bourne J in the *Plan B* case that the "insuperable problem" for any Article 2 or 8 claim based on the impacts of climate change is that "there is an administrative framework to combat the threats posed by climate change, in the form of the 2008 Act and all the policies and measures adopted under it" (see at [48]).

Discussion

The proper approach

86 In my judgment, the construction of s. 58 of the CCA should be addressed in two stages: first, by ascertaining the ordinary meaning of the provision by applying domestic principles of statutory construction; secondly, if that exercise does not lead to the construction favoured by the claimants, by asking whether the latter construction is required to achieve compatibility with ECHR rights and is "possible" in terms of s. 3 HRA.

87 This two-stage approach is important. Section 3 HRA is often relied upon in a case where there are two possible constructions of primary or secondary legislation and where one party favours a construction which, they submit, promotes the interests protected by the ECHR better than the other construction. But there is no general interpretive principle which requires the court to favour a construction which better promotes the interest which ground ECHR rights over one which promotes those interests less effectively. The obligation imposed by s. 3 HRA is of relevance only when one of the competing constructions is *incompatible* with Convention rights. A construction will only be incompatible with Convention rights if the construction means that the UK will breach the obligations concerned, even after applying whatever margin of appreciation is applicable.

The court's task

88 The critical conclusions of the CCC, as summarised at [69]-[71] above, played an important part in the submissions of the claimants. It is, however, important to bear in mind that the task of evaluating the effectiveness of NAP3 was given to the CCC, not the court. Indeed, the existence of a legislative framework which makes provision for authoritative public criticisms of the government's adaptation programme is itself relevant to the discharge of the positive obligations owed by the UK under the ECHR. The sole question for the court in a challenge such as this is whether NAP3 contains or evidences the alleged errors of domestic law relied upon by the claimants. That is a much narrower question than the one the CCC had to consider.

The construction of s. 58 of the CCA applying domestic principles of construction

89 I begin with an analysis of structure and content of the relevant provisions of the CCA, applying the approach to statutory interpretation set out by Lord Hodge in *R (O) v Secretary of State for the Home Department*, at [29], i.e. attempting to find the meaning of the words Parliament used, "in the context of the section as a whole and in the wider context of a relevant group of sections".

90 Part 1 of the CCA deals with carbon targets and budgeting. It contains the UK's legal framework for the measures that must be taken by way of mitigation of anthropogenic climate change. A structurally central feature of Part 1 of the Act is the duty imposed by s. 1(1) to "ensure" that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline. This was a legally unusual provision in that it set a single, precisely quantified benchmark, in line with the UK's international commitments, against which all other mitigation action required under Part 1 must be read.

91 The benchmark informs the obligations in ss. 4-10 to set carbon budgets and the obligation in s. 13(1) to prepare such "proposals and policies" as the Secretary of State considers will enable the budgets to be met. This was the foundation for the claimants' submission in *FoE No. 1* that, in preparing these "proposals and policies", the Secretary of State must 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. As noted above, the submission was rejected by Holgate J because – even when devising proposals and policies directed at a achieving single, precisely quantified benchmark – the CCA did not require quantification of the contribution of each such policy or proposal to achieving the benchmark.

92 Part 4 of the CCA deals with the impact of adaptation to climate change. Unlike in the field of mitigation, and subject to the arguments about the effect of the ECHR as interpreted in *VKS* (to which I shall come in a moment), there is no internationally binding quantified standard governing how States must adapt to climate change. It would be very difficult to devise any such standard because the risks of climate change differ widely from state to state (and indeed within states). In some places, the main risk may be from flooding, in other places extreme heat or drought. Elsewhere, there may be a combination of risks, which all have to be addressed but some of which are more urgent than others. Moreover, the profile of risks, and the priorities attached to addressing them, may change over time.

93 The duty imposed by s. 56 is, accordingly, not framed by reference to achieving any single, let alone precisely quantified, objective. It requires the Secretary of State to lay before Parliament reports containing "an assessment of the risks for the United Kingdom of the current and predicted impact of climate change" without specifying what those risks may be or with what degree of specificity they are to be described. Similarly, s. 58 imposes a duty to lay before Parliament "programmes" setting out three things: (a) "objectives"; (b) "proposals and policies" for meeting those objectives; and (c) the time-scales for introducing the proposals and policies. The aim of the proposals and policies is to meet the objectives. But s. 58 does not prescribe how ambitious the objectives must be, save to say that they must be objectives "addressing" the risks identified in the most recent report under s. 56. "Addressing" a risk does not mean "eliminating" or "minimising" it.

94 I accept that there is a difference between how *ambitious* and how *specific* an objective is. As a matter of principle, it is coherent to argue that, while Part 4 says nothing about how ambitious an objective should be, it does set limits on how specific it must be to count as an objective at all. But even focussing narrowly on the question of specificity, any such limit would have to be anchored in the language of the Act. And, as Mr Westmoreland Smith pointed out, the time-scales referred to in s. 58(1)(c) are for *introducing* the proposal or policy, not for achieving the objective. As a matter of ordinary language, neither of these aspects of the drafting of s. 58 tell one much about how specific the objective needs to be. That being so, it is necessary to ask whether the word "objective" itself imports any limits in this respect. In my judgment, it is capable of encompassing a wide range of specificities.

95 Take an example from everyday life: a personal objective designed to address the risk of contracting (say) heart disease. I might set a very specific objective, e.g. running 5 km in under 25 minutes. Equally, however, I might frame the objective in more open-textured terms, e.g. improving my general level of fitness. Both formulations could, in ordinary language, be described as "objectives". Similarly, if I had to devise a proposal for meeting the latter objective, the proposal could be framed more specifically (e.g. run for 30 minutes every day) or less specifically (e.g. exercise more regularly). No doubt the latter might be criticised as leaving too much "wiggle room", and for that reason as unambitious, but it would still be perfectly natural to describe it as a proposal "for meeting" the objective and to talk of a time-scale for introducing the proposal. Even the less specific objective, and the less specific proposal for meeting it, would be "addressing" the risk of contracting the disease.

96 The same reasoning applies in the context of Part 4 of the CCA. Parliament chose not to impose any express constraint on how ambitious or specific the objective must be (provided only that it can properly be described as an "objective"); and no such constraint can properly be implied. If an objective is thought insufficiently ambitious, the remedy lies in the ability of the CCC to say so and in the requirement in s. 57(4) to publish the CCC's report. The Secretary of State will then have to answer to Parliament, before which the programme must be laid. This is not surprising because, in the absence of any statutorily defined benchmark for adaptation measures, the setting out of objectives and proposals and policies for meeting them is likely to involve resource allocation choices which turn on political priorities. These are matters that normally fall within the purview of the political process, rather than being subject to adjudication by the courts.

Does compatibility with the ECHR require a different result?

97 Judge Eicke's partly concurring and partly dissenting opinion in *VKS* powerfully demonstrates what is in any event clear from a proper analysis of the majority judgment: the latter represents a significant development of the case law in relation to climate change, not only as regards the standing of associations to bring claims before the Strasbourg Court, but also as regards the scope and extent of the positive obligations of the State and the margin of appreciation to be accorded when assessing whether those obligations have been discharged.

98 However, at least in the present context, the significance of the judgment for the UK's climate change framework should not be overstated. With the exception of the comments in [552] (to which I shall return), the focus of the *VKS* decision was on the State's positive obligation to adopt mitigation measures. The reason why Switzerland was in breach of its positive obligations in this regard was that there was a series of lacunae in its domestic regulatory framework. In particular, an inadequate target had been selected for the period up to 2020 and even this target had not been met (see [558]-[559]); the period between 2025 and 2030 had been left wholly unregulated (see [560]-[562] and [566]); and later legislative initiatives were insufficiently specific to cure these deficiencies (see [563]-[572]). The references to the adequacy and specificity of mitigation measures must be read in the context of the target of carbon neutrality by 2050 set out in the Paris Agreement, which appears to have played a large part in the Strasbourg Court's analysis of the content and scope of the positive obligations imposed by Articles 2 and 8 ECHR.

99 The United Kingdom, by contrast with the position in Switzerland at the time under consideration in *VKS*, has an established legislative framework which sets a legally binding target of carbon neutrality by 2050 consistent with the Paris Agreement (s. 1(1) CCA) and also a rolling programme of carbon budgets set on each occasion for a five-year period (s. 4-10 CCA) and calibrated to meet the carbon neutrality target. The Act does not allow for "unregulated" periods such as gave rise to the lacunae criticised by the Strasbourg Court in *VKS*. The decisions of Holgate J in *FoE No. 1* and of Sheldon J in *FoE No. 2* show that the UK courts can and do supervise with some rigour compliance with the requirements imposed by ss. 13(1) and 14(1) to set out proposals and policies to meet these carbon budgets.

100 It is against that background that it is necessary to consider what the Strasbourg Court said at [552] about adaptation. I do not think it right to dismiss that paragraph as *obiter*, as Mr Westmoreland Smith sought to do. It is dangerous to apply common law concepts to the judgment of a court most of whose members come from different legal traditions. When the Grand Chamber of the Strasbourg Court self-consciously develops the law in a particular direction, it often does so by making general statements of principle, some of which may be strictly unnecessary to the case before it. The Court often cites and applies such statements in future cases without engaging in the common law exercise of asking whether they formed a necessary part of the reasoning in the previous case.

101 Nonetheless, a degree of caution should be exercised in interpreting a general statement from the Strasbourg Court on a topic which did not arise on the facts of the case. It may well be more difficult to predict how the Strasbourg Court would interpret such a statement in future cases.

102 The judgment at [552] appears to indicate that the positive obligation imposed by Articles 2 and 8 extends to adopting and effectively implementing "adaptation measures aimed at alleviating the most severe or imminent consequences of climate change, taking into account any relevant particular needs for protection" and that this was "consistent with the general structure of the State's positive obligations in this context". The reference back to [538(a)] indicates that the State's positive obligations in this respect flow from the same source as the obligations in relation to mitigation, namely the obligation to "put in place the relevant legislative and administrative framework designed to provide effective protection of human health and life". This obligation entails, in particular, "an obligation to put in place regulations geared to the specific features of the activity in question, particularly with regard to the level of risk potentially involved," which "govern the licensing, setting-up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of the citizens whose lives might be endangered by the inherent risks".

103 What that means in the context of adaptation measures, however, is far from clear. It is right to say that – like mitigation – adaptation is also the subject of international agreements. However, in the field of adaptation measures, there is no equivalent of the internationally agreed quantitative target of carbon neutrality by 2050; and, therefore, no common framework by which to judge what is required. This is because what is required for adaptation in one State may be very different from what is required for adaptation in another and because, unlike in the mitigation sphere, a default by one State in the field of adaptation may have little or no impact on other States.

104 Because the issue did not arise on the facts, the judgment in *VKS* does not grapple with how these or other asymmetries between mitigation and adaptation would impact on the scope of the State's positive obligations with regard to adaptation or the breadth of the margin of appreciation to be applied by the Strasbourg Court in assessing whether the margin has been exceeded.

105 In my judgment, an analysis of the judgment as a whole makes it likely that, if the Strasbourg Court had in a future case to apply the reasoning in *VKS* to the adaptation context, it would say that:

(a) the narrow margin of appreciation in relation to the mitigation aims was justified by reference to the internationally agreed objective of carbon neutrality by 2050 and the impact of one State's default on other States;

(b) neither of these features applies in the field of adaptation; and

(c) accordingly, in the field of adaptation, States are to be accorded a wide margin of appreciation in setting the relevant objectives and a wider margin still in setting out the proposals and policies for meeting them (by analogy with the margin accorded to the State in setting the means for achieving the mitigation objectives).

106 On that basis, the interpretation of s. 58 which I have arrived at applying domestic modes of construction seems to me to fall comfortably within the UK's margin of appreciation under Articles 2 and 8 ECHR. It certainly cannot be said that that interpretation is contrary to any clear and consistent line of authority from the Strasbourg Court for the purposes of the domestic test in [29] of the Supreme Court's decision in *Pinnock*.

107 For these reasons I reject the submission that it is necessary to "read down" s. 58 in the way suggested by the claimants. In the light of that conclusion it is not necessary to say whether the suggested reading down would have been "possible" for the purposes of s. 3 HRA.

The "risk reduction goals"

108 Ground 1 was framed as alleging an error of law. I do not consider that the defendant's decision involved the error of law alleged as to the construction of s. 58 CCA. That being so, ground 1 must fail. However, I have nonetheless considered each of the three risk reduction goals to which Mr Wolfe referred in support of his case. In each case, the goal could certainly have been framed with greater specificity. However, in each case, the goal can in my judgment properly be described as an "objective", as that word is used in s. 58 CCA; and that interpretation involves no incompatibility with ECHR rights, as elucidated by the Strasbourg court in *VKS*.

Ground 2

Claimants' submissions

109 Mr Wolfe for the claimants submitted that, quite separately from ground 1, the Secretary of State was under a statutory duty to consider whether and to what extent the policies and proposals set out in NAP3 would be deliverable and capable of achieving either the risk reduction goals or the specific objectives set out in his section 58 report. The defendant could not lawfully conclude that the policies and proposals required under section 58(1)(b) would meet the stipulated objectives, without first obtaining, and assessing, further information on the risk to delivery of the policies and proposals in question. That was an obviously material matter which the defendant properly needed to consider when adopting NAP3. There is no evidence that the defendant obtained the requisite information or considered the risk to delivery to policies and proposals within NAP3.

110 In particular, the reasoning in *FoE No. 1* as to the centrality of delivery risk to Part 1 of the CCA applies by parity of reasoning to the scheme of Part 4 of the CCA. Under both Parts 1 and 4, the obligation was to set out the level of ambition for the policies and proposals to be formulated. Both parts require the proposals or policies be framed "with a view to meeting" or "for meeting" the objectives. The objectives under Part 1 are quantified; the objectives under Part 4 are not. But in each case, the statute requires the defendant to decide whether policies and proposals would secure the outcome he stipulated. See also *FoE No. 2*, [86]. *FoE No. 1*, at [204], shows that delivery risk is an "obviously material consideration" under Part 1. Section 58, if anything, gives a narrower discretion than s. 13 (which refers to the policies and proposals which "the Secretary of State considers" will enable carbon budgets to be met). Furthermore, Part 4 operates via 5-year adaptation cycles and, unlike s. 13, does not require predictive assessments long into the future.

111 On a fair reading of the papers, there is no evidence that the risk to delivery of individual policies and proposals within NAP3 was put before or considered by the defendant in any adequate manner. The only "risk to delivery" put to the decision maker was the risk to delivery of NAP3 *itself* as a result of the failure by risk owners to return properly completed adaptation pathways to Defra.

The defendant's submissions

112 Mr Westmoreland Smith for the defendant submits that the claimants' submission is predicated upon an inapposite analogy with s. 13 of the 2008 Act and [211] of Holgate J's judgment in *FoE No.1*. That case concerned the duty to prepare policies and proposals which the Secretary of State considers will enable the carbon budgets set under the CCA to be met. Those budgets are binding on the defendant by virtue of s. 4(1) CCA. By contrast, the objectives set under s. 58(1)(a) are not binding upon the defendant. Failure to achieve them would involve no breach of statutory duty.

113 The objectives are also different in nature from the quantitative targets set by sections 4(1) and 1(1). Indeed, section 58(1)(c) requires only that a programme produced pursuant to that section identify the time-scales for *introducing* the proposals and policies put forward under section 58(1)(b), rather than for achieving the objectives in 58(1)(a). It is not tenable to suggest that the use of the word "considers" in s. 13 (but not in s. 58) means that the defendant has "less discretion" under s. 58 than under s. 13.

114 In any event, on the facts, the risk to delivery of individual policies and proposals in NAP3 was considered by the defendant. In the first place, NAP3 addressed the delivery and monitoring of the plans and proposals on its face (see e.g. paras. 1.2.3, 1.5.2.3, the establishment of the Climate Resilience Board, the concept of adaptive management and Annex 3 (in particular para. 3.1.2)). In any event, as explained in detail by Dr Gilpin-Davies, factors related to delivery such as current policy status, funding, timeframes and constraints, and "achievability of actions" were considered throughout, including through the "*Pathways templates*". Annex 5 to the Ministerial Submission of 4 May 2023 specifically included delivery as one of the CCC's six "high level" requirements for NAP3, as set out in the CCC's progress report on NAP2. This cross referred to Chapter 1 of NAP3 and the paragraphs referred to above. The Secretary of State herself also reviewed a summary of the pathways information to inform what became Annex 3 to NAP3. The Annex was significantly developed and refined during that process.

Discussion

115 I accept, up to a point, Mr Wolfe's submission that there is a structural similarity between Part 1 and Part 4. In both, the proposals and policies required (in Part 1, by s. 13 and in Part 4, by s. 58(1)(b)) are directed to an aim which has been set by the time they are prepared. This makes superficially attractive the submission that what was said in *FoE No. 1* about the considerations which must inform the proposals and policies can be read across to Part 4.

116 In my judgment, however, the analogy breaks down on closer inspection. The cornerstone of Part 1 is the obligation in s. 1(1) to achieve net carbon neutrality by 2050 and the obligation in s. 4(1) to set quantified carbon budgets and ensure that they are met. These hard-edged obligations were central to Holgate J's reasoning about the centrality of delivery risk to consideration of the proposals and policies required by s. 13. By contrast, the "objectives" which the Secretary of State is required to set under s. 58(1)(a) are not required to be quantified or even quantifiable. Once one accepts that they can, as a matter of law, be set with greater or lesser specificity (as I have found under ground 1 above), it becomes much more difficult to read directly from the reasoning in *FoE No. 1* to the present case.

117 No doubt, if the Secretary of State chose to define the adaptation objectives in a specific and quantifiable way, rationality would dictate the same emphasis on delivery risk as is required under Part 1 when preparing proposals and policies "for meeting" those objectives. But, given that the law does not dictate that the "objectives" under s. 58(1)(a) must be set with at any particular level of specificity, the extent to which delivery risk must be considered will vary.

118 The structural dissimilarity between Part 1 (with its clear, quantified targets and hard-edged obligations to meet them) and Part 4 (which requires only that the objectives should "address" the risks set out in the report under s. 56 and which leaves the ambition and specificity of the objectives to the Secretary of State) is, in my judgment, much more significant than the difference in wording between s. 13 (which uses "consider") and s. 58((1)(b) (which does not). The latter seems to me to be a relatively unimportant feature of the language of the CCA. In the field of administrative law generally, there are plenty of examples of statutes which confer broad discretions on statutory decision-makers without using the word "considers" and plenty of examples of statutes which do use that word but where other features of the drafting have been held to constrain the relevant discretion in material respects.

119 This does not mean that delivery risk is irrelevant to the preparation of proposals and policies under s. 58(1)(b) for meeting the adaptation objectives set under s. 58(1)(a). The touchstone, however, is rationality. In this area, as in other parts of administrative law, rationality operates both at the level of deciding what constitutes a material consideration (see e.g. *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2024] EWCA Civ 1227, [107]) and at the level of deciding what level of analysis should be undertaken at each stage (see e.g. *R (Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647, [70]).

120 In this case, the evidence establishes that "delivery risk" (in the sense of uncertainty in relation to whether particular proposals and policies would achieve what they set out to achieve) was considered at various stages. The material referred to by Mr Westmoreland Smith – in particular the material in relation to the development of Annex 3 and the "pathways templates" referred to by Dr Gilpin-Davies – seem to me to establish that the process by which NAP3 was prepared surmounts the low hurdle of rationality in this respect.

121 Ground 2 therefore fails.

Ground 3

Claimants' submissions

122 Mr Wolfe for the claimants submitted that the defendant failed to give any adequate consideration to the equality impacts of NAP3 prior to publication in July 2023, and thus failed to discharge his duty under s. 149 of the 2010 Act.

123 The mere production of EQIA1 did not discharge the defendant's obligations under the PSED. It was not even considered by the defendant. He was simply told:

> "As we have previously set out, we have provided guidance to risk-owning departments on how to ensure their policies and actions within the NAP3

> document pay due regard to the Public Sector Equality Duty. No departments have come back to indicate any issues with regard to this requirement."

124 In any event, EQIA1 only reported in the most general terms a "process" undertaken by risk owners around the departments, rather than considering any substantive equality impacts.

125 EQIA2 cannot cure the deficiency. In *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, the Court of Appeal held at [274] that public bodies to whom the public sector equality duty applies are required "to give advance consideration to issues of … discrimination before making any policy decision that may be affected by them". Reliance was also placed on *R (C) v Secretary of State for Justice* [2008] EWCA Civ 882, [2009] QB 657, at [49], among other cases. EQIA2 was produced in response to this litigation. a "rear-guard action, following a concluded decision" (*R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] EqLR 60, [26].

Defendant's submissions

126 In his skeleton argument, Mr Westmoreland Smith submitted that equality considerations were taken into account as part of the substance of NAP3 and that the Secretary of State was expressly referred in the ministerial submission dated 10 July 2023 to EQIA 1.

127 Despite its importance, the public sector equality duty is concerned with process, not outcome and the court should only interfere in circumstances where the approach adopted by the relevant public authority was unreasonable or perverse.

128 Even where a breach of the public sector equality duty is established, the Court of Appeal has made clear that "it is important that a court faced with an application for judicial review does not shirk the obligation imposed by Section 31(2A) [of the 1981 Act]": *Gathercole v Suffolk County Council* [2020] EWCA Civ 1179, [38] (Coulson LJ). Reliance was placed on the decision of Lieven J in *Hough v Secretary of State for Home Department* [2022] EWHC 1635 (Admin) at [113], where a quashing order was refused in similar circumstances because "a fresh decision is highly likely to be the same".

129 Here, as set out in Part VI of Dr Gilpin-Davies' Witness Statement at paras 126-133, following publication of NAP3, the CAT produced a further comprehensive equality impact assessment, with detailed input from all risk owners. It also established an approach to monitoring the equalities impacts of NAP3 as part of a six-monthly reporting on NAP3 actions for all risk owners. This assessment was placed before the Secretary of State by a ministerial submission dated 19 February 2024, with the recommendation that he "carefully review the EqIA and having done so approve a decision that NAP3 remain unchanged and as published". The Secretary of State agreed with this recommendation on 5 March 2024.

130 The Claimants have identified no criticisms whatsoever of the conclusions in EQIA2, let alone any substantive deficiency capable of resulting in a different overall conclusion. In those circumstances, section 31(2A) of the SCA 1981 applies. A detailed review of the equality implications of NAP3 has been undertaken, and the outcome was that no change was made to NAP3. It is thus not only highly likely but inevitable that the outcome would

not have been substantially different if the conduct relied upon by the Claimants (the earlier breach of s. 149 EA 2010) had not occurred.

Discussion

131 In my judgment, the materials before the court do not establish that the obligations imposed by s. 149 of the 2010 Act were discharged at the time of the publication of NAP3. The submissions in Mr Westmoreland Smith's skeleton argument are unpersuasive in this regard.

132 The relevant duty is upon the decision-maker (here, the Minister) personally and is non-delegable: see *Bracking* at [29(3) and 29(5)(iv)]. It must be satisfied at the time when the relevant function is exercised: *Bracking* at [29(4) and (5)(ii)]. Moreover, the duty must be "exercised in substance, with rigour and with an open mind"; and "general regard" to issues of equality is not good enough: *Bracking* at [29(5)(iii)] and (6)].

133 A general statement provided to the Minister that guidance had been provided to risk-owning departments about compliance with the public sector equality duty and that "no departments have come back to indicate any issues with regard to this requirement" was inadequate in two key respects. First, it did not contain anything like the degree of rigour required. A comparison between EQIA1 and EQIA2 (which was produced after the event) is instructive. The latter engaged substantively with the equality impacts of NAP3; the former did not. Second, and in any event, a "nil return" from risk-owning departments did not discharge the non-delegable duty on the Secretary of State to consider the equality impacts of the exercise of *his* function (i.e. the preparation of NAP3 on the basis of the inputs from the risk-owning departments). That function could not in principle be sub-contracted to any of the individual risk-owning departments on their own, because they had no remit to consider the overall picture.

134 Mr Westmoreland Smith sensibly concentrated in his oral submissions on arguing that I should refuse relief under s. 31(2A) or (3C) of the SCA 1981. Even before that provision came into force, there were dicta indicating that the court should be slow to quash decisions in circumstances where the duty had been substantively complied with after the event: see e.g. *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), [2012] HRLR 13, at [98]-[99] and [102] (Elias LJ and King J). In *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441, [2016] 1 WLR 3923, [87] Laws and Treacy LJJ, with whom Lord Dyson MR agreed, said this at [87]:

> "…we have strong reservations about the proposition that the court should necessarily exercise its discretion to quash a decision as a form of disciplinary measure. During the course of argument, [counsel for the claimant] accepted that if an assessment, subsequently carried out, satisfied the court, there would be no point in quashing the decision if the effect of doing that and requiring a fresh consideration would not have led to a different decision. We think this was a correct concession. The court's approach should not ordinarily be that of a disciplinarian, punishing for the sake of it, in these circumstances. The focus should be on the adequacy and good faith of the later assessment, although the court is entitled to look at the overall circumstances in which that assessment was carried out."

135 That can be taken as an authoritative statement of the principles governing the exercise of the court's remedial discretion in this area. However, since the coming into force of s. 31(2A), (2B), (3C) and (3D) of the SCA 1981, the position is no longer one of discretion. As Coulson LJ pointed out in *Gathercole* at [38], those provisions impose a duty, which the court cannot shirk.

136 Applying those provisions, the first question is whether it appears highly likely that the result for the claimants would not have been substantially different if the conduct complained of (the initial failure to comply with s. 149 of the 2010 Act) had not occurred. If so, I am obliged by sub-ss. (2B) and (3D) to refuse permission/relief unless I consider it appropriate to disregard the requirements in sub-ss. (2A) and (3C) for reasons of exceptional public interest.

137 In answering these questions, I consider that I should focus (as Laws and Treacy LJJ did in the *West Berkshire* case) on the adequacy and good faith of the later assessment. The earlier authorities urge caution in drawing too much from assessments completed as a "rearguard action" after the event. Nonetheless, it is important to bear in mind that, in most public law cases, the maximum relief to which a successful party will be entitled is an order requiring the decision-maker to re-take the challenged decision according to a process which cures the flaw in the initial decision. There is little utility in requiring that if the initial flaw has already been corrected.

138 In my judgment, that is the position here. I have carefully considered EQIA2 and the documents showing that the Secretary of State was invited to, and did, consider it. There is no basis on which I could properly doubt that the good faith of that reconsideration exercise. Nor is there any proper basis for concluding that EQIA2 was deficient in any material respect in terms of its compliance with s. 149 of the 2010 Act.

139 In those circumstances, if I were to quash EQIA1 and remit the matter to the Secretary of State, I would be requiring a re-run of a process which has already been undertaken. The outcome of the decision following consideration of EQIA2 shows that the result is highly likely to be the same. There would be no point in doing that. The fact that the Secretary of State is now a different individual does not affect the analysis: as a matter of law, the decision is that of the office-holder at the relevant time. In any event, the invitation to refuse relief was made after the General Election of 4 July 2024 by the current incumbent.

140 In relation to ground 3, I am therefore obliged by virtue s. 31(3D) to refuse permission to apply for judicial review.

Ground 4

The claimants' submissions

141 Mr Wolfe for the claimants submitted that all three claimants are "victims" for the purposes of Article ECHR and so have standing under s. 7(1) HRA to complain that the decision breaches their rights under s. 6 HRA. As to Messrs Jordan and Paulley, both are particularly affected by the level and severity of (the risk of) adverse consequences of governmental (in)action in response to climate change; and there is a pressing need to ensure their individual protection, owing to the absence or inadequacy of reasonable

measures to reduce harm. That being so, they qualify for standing, applying *VKS* at [478]-[488].

142 Mr Wolfe originally argued that Friends of the Earth is also a victim, satisfying the requirement for associational standing in [489]-[503] of *VKS*. However, at the hearing he indicated that he was no longer pursuing that argument.

143 As to the substance, due to the breakdown of the DEFRA-led process, the Secretary of State was not provided with a set of fully completed pathways. Consequently, NAP3 failed to set out effective (or lawful) objectives capable of addressing all 61 of the existing risks posed by climate change and identified in CCRA3. This amounts to a failure analogous to that of the Swiss government in *VKS* to set effective mitigation targets. There is a narrow margin of appreciation in this respect.

144 As the CCC's criticisms show, NAP3 perpetuated the Government's history of failure in climate adaptation and is therefore not capable of effectively protecting ECHR rights. Indeed, the CCC's critical view suggests the adaptation gap has widened further (or will do as a result). The Secretary of State has therefore failed "to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change": VKS, [545]. The challenged decision meant that inadequacies in the approach meant to address risks relevant to the protection of the claimants' rights were not resolved.

145 Finally, there was also a breach of the Secretary of State's procedural obligations in the following respects:

(a) The Secretary of State did not ultimately carry out an exercise which was open and available to the public at large so that those concerned could meaningfully engage on the development of NAP3. The public dialogue carried out in Feb. 2022 involved a mere 107 people selected for workshops, and a stakeholder event was not open to the public [CB/229-23]. Additionally, the public – and particularly at-risk members of the public – were not consulted on a package of proposed measures. Their views were not taken or fed back to the Defendant. Consequently, procedures "through which the views of the public, and in particular the interests of those affected or at risk of being affected by the relevant regulations and measures or the absence thereof, can be taken into account in the decision-making process" were not adequately put in place: see *VKS*, [554(b)].

(b) There was a breach of the requirement to make "information held by public authorities of importance for setting out and implementing the relevant regulations and measures to tackle climate change": see *VKS* [554].

(c) There has been no public explanation of how or why conclusions such as that cited by Dr Gilpin-Davies at §47 (that "retrofitting existing buildings would be difficult to achieve, as it can be expensive and burdensome") were arrived at – and whether cost and other relevant considerations were balanced in line with the ECHR proportionality test, let alone by the Secretary of StateS as decision-maker. The Claimants also were not provided with any of the expert reports and analyses that assessed the adequacy of the objectives, policies and proposals set out in NAP3.

Submissions for the defendant

146 Mr Westmoreland Smith for the defendant contends that the claimants should be refused permission to rely on the new evidence contained in Mr Jordan's second witness statement, because there was no timely application for permission to amend. In any event, the test articulated in *VKS* in respect of individuals requires (a) a high intensity of exposure to the adverse effects of climate change and (b) a pressing need to ensure the applicant's individual protection (*VKS,* [487]). The threshold for fulfilling these criteria is "especially high." In view of the exclusion of *actio popularis* under the Convention, whether an applicant meets that threshold will depend on a careful assessment of the concrete circumstances of the case. This will include consideration of the nature and scope of the applicant's Convention complaint, the actuality/remoteness and/or probability of the adverse effects of climate change in time, the specific impact on the applicant's life, health or well-being, the magnitude and duration of the harmful effects, the scope of the risk (localised or general) and the nature of the applicant's vulnerability (*VKS,* [488]). Neither of the individual claimants meets this high hurdle.

147 As to the substance, *VKS* was concerned with the State's obligation in the context of mitigation, identifying the existence of a primary duty "to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change" (see at [545]). There is no clear and constant jurisprudence of the ECtHR finding that such a duty applies equally or in the same way to adaptation, particularly where adaptation is addressed separately at [552]. In the absence of Strasbourg jurisprudence on point, it is not permissible to read across the duties found in the context of climate mitigation to climate adaptation: this goes far beyond permissible incremental development of clear and constant Strasbourg case law.

148 There are, moreover, clear distinctions between the actions of the Swiss government in *VKS* and the alleged failures of the defendant here. In *VKS*, the ECtHR found that there were "critical lacunae" in the Swiss authorities' process of putting in place the relevant domestic regulatory framework, including a failure to quantify, through a carbon budget or otherwise, national GHG emissions limitations and a previous failure to meet emissions reduction targets. By contrast, the UK has (and has had since 2008) a comprehensive legislative framework for mitigating climate change including a carbon budget and national emissions limitations under the 2008 Act. Part 4 of the 2008 Act also sets out a domestic legislative framework for climate change adaptation. Overall, therefore, the UK has in place a clear legislative strategy for addressing both climate change mitigation and adaptation.Further, the defendant's margin of appreciation in this regard is wide: see by analogy the reasoning in relation to the margin applicable to the "means of pursuing those aims": *VKS* at [549] and the case law cited at [538(a)] of the decision in *VKS*, to which [552] cross-refers.

149 In any event, even if the narrower margin of appreciation for which the claimants contend were to apply, the defendant did not breach any of the substantive obligations under Article 8 of the Convention:

(a) There was no breakdown of the DEFRA-led process.

(b) Critical views of the CCC about NAP3 does not demonstrate any breach of the Article 8 positive duties.

(c) Work to address gaps in the pathways and subsequently to improve climate risk annexes continued across all departments and all risk categories.

(d) Even if delivery risk had not been considered (the allegation made under ground 2), the claimants cite no authority for the proposition that the claimants' Article 8 rights require decision makers in adopting national adaptation plans to be briefed on delivery risk. Nor does anything in *VKS* support this proposition.

150 As to procedural obligations, there is no requirement on the part of the defendant to carry out a nation-wide consultation or anything like it. As is clear from *VKS* at [554(b)], the State must merely ensure that procedures are available through which the views of the public, and the interests of those affected, are taken into account. The nature of those procedures falls within a State's margin of appreciation. In this case, in developing NAP3, the Secretary of State carried out external stakeholder engagement, as set out in the Witness Statement of Dr Gilpin-Davies at paras. 45 and 55 – 56 and in his Part 18 Response (*passim.*) This satisfied the requirements of paragraph 554(b) and fell well within the Secretary of State's margin of appreciation.

151 The procedural requirements for public explanations in [554(a)] of *VKS* does not go as far as the claimants allege. It merely requires information held by the public authorities for setting out and implementing the relevant regulations and measures to tackle climate change to be made available to the public without specifying how. The scheme under Part 4 of the CCA provides a bespoke framework for achieving this.

Discussion

Standing

152 In general, and until *VKS*, it had generally been assumed that domestic law accords standing to associations to bring judicial review proceedings in appropriate circumstances, but s. 7 HRA and Article 34 ECHR made it necessary to identify an individual claimant for any ground alleging a breach of s. 6 HRA. The Strasbourg Court's analysis in *VKS* at [489]-[503] (on victim status for associations) appears to create a new *lex specialis* governing standing for associations in the field of climate change. That, however, is not a matter I need consider in this case, given the claimants' decision not to pursue the argument that Friends of the Earth has standing in relation to ground 4.

153 On one view, the Strasbourg Court's treatment of victim status for individuals at [478]-[488] appears, by contrast, to place new obstacles in the path of individual claims relating to climate change under s. 6 HRA. However, as I have already said, it must be borne in mind that the *VKS* judgment is focussed on challenges to state mitigation measures. It may be very difficult to establish that a failure to take particular *mitigation* measures has a "direct impact" on the applicant in the sense required by the Court at [486]-[488]. In the field of adaptation, however, the causal link between the lack of particular measures and the effect on the claimant may be easier to establish.

154 In this case, my provisional view is that it would be wrong to shut out either the first or the second claimant from bringing a well-founded human rights challenge against the government's failure to implement specific adaptation measures relevant to their particular circumstances if it could be established that the failure fell outside the State's margin of appreciation. As I said during the course of argument, if it could be shown that

there was (for example) an ECHR obligation on the UK to provide air conditioning for those in care homes with particular sensitivity to extreme heat, I would take a great deal of persuasion to say that the claimant – who on the evidence is such a person – has no standing to complain about the failure.

155 However, for the reasons which follow, I do not consider that either claimant has a well-founded human rights claim. That being so, it is not necessary to decide the individual standing point conclusively. Since the point may be important in other cases, I would prefer to leave it to be decided in a case where it matters to the outcome.

Mr Jordan's second witness statement

156 Equally, I do not find it necessary to determine conclusively whether Mr Jordan should have permission to rely on his second witness statement. I am prepared to assume in his favour that the evidence contained in that statement is admitted.

The substantive and procedural human rights claims

157 In my judgment, the substantive human rights claims under s. 6 HRA fail for essentially the same reasons that the argument under s. 3 HRA fails. It is not clear that the Strasbourg Court's reasoning on the breadth of the margin of appreciation in relation to mitigation measures can be applied *mutatis mutandis* to adaptation measures; it is likely that the Strasbourg Court would regard the decision to identify adaptation measures as more closely akin to the decision to select the means by which internationally agreed mitigation objectives are pursued and as therefore attracting a wide margin of appreciation: see [103]-[106] above. The CCC's criticisms, trenchant though they were, were the outcome of one part of the system of domestic scrutiny provided for by Parliament in the CCA. That system of scrutiny did not suffer from the regulatory lacunae identified in relation to Switzerland.

158 As to the procedural complaints, the domestic framework requires the Secretary of State to lay reports before Parliament on the assessment of risks of the current and predicted impact of climate change, with the benefit of the advice of the CCC (ss. 56 and 57), as well as to lay programmes before Parliament (s. 58). By virtue of s. 59 this is subject to public scrutiny in the form of the CCC's assessment of the progress made towards implementing the objectives, proposals and policies under section 36. The UK therefore has in place a specific statutory scheme for ensuring transparency in relation to its approach to climate change adaptation. These provisions, taken with the public's right to request environmental information under the Environmental Information Regulations 2004 (a right subject to enforcement before the First-tier Tribunal under conditions conforming to the international procedural obligations in the Aarhus Convention), in my view discharge the open-textured obligations referred to in [554(a)] of the *VKS* judgment.

159 For these reasons, ground 4 fails.

Conclusion

160 On grounds 1, 2 and 4, I shall grant permission to apply for judicial review but dismiss the claim. On ground 3, in the light of my conclusions at [132]-[139] above and pursuant to s. 31(3C) of the SCA 1981, I shall refuse permission to apply for judicial review.