Neutral Citation Number: [2024] EWCA Civ EWCA Civ 1227

Case No: CA-2024-000401

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
Mr Justice Holgate
[2024] EWHC 339

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2024

Before:

SIR KEITH LINDBLOM
(Senior President of Tribunals)
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE LEWIS

- -

Between:

THE KING
(on the application of SAVE STONEHENGE WORLD HERITAGE SITE LIMITED) **Appellant**

- and –

(1) SECRETARY OF STATE FOR TRANSPORT

(2) NATIONAL HIGHWAYS LIMITED

(3) HISTORIC BUILDINGS AND MONUMENTS COMMISSION FOR ENGLAND **Respondents**

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- -

David Wolfe KC, Victoria Hutton and **Stephanie David** (instructed by **Leigh Day**) for the **Appellant**
Nigel Pleming KC and **Rose Grogan** (instructed by **Government Legal Department**) for the **First Respondent**
Reuben Taylor KC (instructed by **Pinsent Masons)** for the **Second Respondent**
Richard Harwood KC (instructed by **Historic England)** for the **Third Respondent**

Hearing dates: 15, 16 and 17 July 2024

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Approved Judgment

This judgment was handed down remotely at 4:15pm on 16 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Senior President of Tribunals, Lord Justice Stuart-Smith and Lord Justice Lewis:

Introduction

1. Stonehenge is a monument of great international importance. Within its near surroundings are many other archaeological and historic features of significance, among them Bronze Age burial mounds and various Neolithic funerary monuments and earthworks, including Woodhenge. Together with its setting and with the Neolithic and Bronze Age monument at Avebury, it has the highest possible conservation status, as the Stonehenge, Avebury and Associated Sites World Heritage Site ("the World Heritage Site"). A short distance to the south of the monument, within the World Heritage Site, runs a single carriageway section of the A303 trunk road. This stretch of road is often heavily congested with traffic. Since the 1990s a number of schemes have been proposed for widening it to a dual carriageway, part of which would be tunnelled. This case concerns the most recent of these proposals, initially approved by the Secretary of State for Transport in November 2020 and, after a successful challenge in the High Court and subsequent redetermination, approved again in July 2023. The central question is whether that redetermination was properly and fairly carried out, and the decision itself lawful.

2. The appellant, Save Stonehenge World Heritage Site Limited ("Save Stonehenge"), appeals against the order of Holgate J., as he then was, dated 19 February 2024, refusing its application for permission to apply for judicial review of the decision of the first respondent, the Secretary of State for Transport ("the Secretary of State"), to grant the application of the second respondent, National Highways Limited ("National Highways"), for a development consent order under the Planning Act 2008 ("the 2008 Act") approving its proposals to improve the A303 between Amesbury in the east and Berwick Down in the west. The scheme involves the replacement of the existing single-carriageway road with a dual carriageway some 13 km in length, including a 3.3 km bored tunnel with 1 km cuttings at either end in a 5.4 km section of road. Save Stonehenge is a company formed by supporters of Stonehenge Alliance, a campaign group that has taken part in the development consent order process as an objector to the scheme.

3. The application for a development consent order was made in 2018. An examination was held in 2019. In January 2020 the examining authority submitted its report recommending against the making of the order. The Secretary of State's decision rejecting that recommendation and granting development consent was issued in November 2020. In July 2021, on a challenge to that decision by Save Stonehenge, it was quashed by Holgate J. (*R. (on the application of Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2022] PTSR 74, ("*Stonehenge I*"). Upon redetermination the scheme was approved again by the Secretary of State, in a decision letter dated 14 July 2023. On 24 August 2023 Save Stonehenge issued another claim for judicial review. Holgate J.'s judgment in the court below was handed down on 19 February 2024, after full argument at a "rolled-up" hearing lasting three days – 12, 13 and 14 December 2023. He refused permission to apply for judicial review on grounds 1 to 6 of the claim and refused permission to add a new ground, ground 8. Later, on 15 March 2024, he refused as "totally without merit" the remaining ground, ground 7, which had been stayed on 6 November 2023 pending the decision of the Court of Appeal on the appeal against the first instance decision in *R. (on the application of Boswell) v Secretary of State for Transport* [2023] EWHC 1710 (Admin). Permission to appeal to this court against the decision to refuse permission to apply for judicial review was granted by Lewison L.J. on all seven grounds of appeal on 16 May 2024.

Lewison L.J. also indicated that the appeal should proceed as a rolled-up hearing, so that if the appeal against the refusal of permission on any ground were to succeed the claim on that ground should be retained in the Court of Appeal and heard at the same time as the appeal itself.

4. The hearing took place some two weeks after a new national administration had come to power, and lasted three days – 15, 16 and 17 July 2024. On 29 July 2024 the Chancellor of the Exchequer, speaking in the House of Commons, announced that the Government did not intend to proceed with the project. In a letter dated 30 July 2024 the Government Legal Department wrote to the Civil Appeals Office, acknowledging that the Chancellor's announcement "[meant] that, in light of changes to government policy, the claim and appeal could now be treated as academic". However, on 9 August 2024, after discussion between the parties, the Government Legal Department wrote again to the Civil Appeals Office, stating:

> "…
>
> The Secretary of State maintains her position that the decision to grant the DCO was lawful and that the appeal should be dismissed. The Appellant maintains its position that the grant of the DCO was unlawful.
>
> The Parties agree that the appeal has not been rendered academic, in light of the Chancellor's announcement, as it is concerned with the question of whether the grant of the DCO was lawful and therefore invites the Court to deliver a judgment.
>
> …".

5. Having considered the parties' request that we continue to give our judgment and decide the appeal, even though the proposed development now seems unlikely to be constructed, we accept that we should do so. The development consent order remains extant, authorising the works, and the claim for judicial review and subsequent appeal have not been withdrawn. In the circumstances we are satisfied that the appeal before us is not merely academic.

6. Under the statutory code for planning in England most decision-making has been placed by Parliament in the hands of local and mineral planning authorities and is undertaken autonomously by them at the local level, guided by policies in their own development plans, in the light of advice from their own professional officers and, in relatively few cases, aided by an environmental impact assessment of the development proposed – a process within their control (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] PTSR 337, at [36]). This case, by contrast, concerns a specific category of planning decisions that the legislature has assigned to government ministers, steered by policy set nationally. It relates to an infrastructure project "of national significance". For such development a self-contained statutory consent procedure has been created under the 2008 Act. One of the aims of the legislation was to accelerate and bring greater coherence to the process of determination for major schemes of this kind, and so reduce the uncertainties and delays that used to impede decision-making. Within that statutory regime, this claim for judicial review brings into play well established principles of public law bearing on planning decision-making undertaken by ministers with the aid of their officials. Those basic principles do not change with the importance of the development under consideration (see the judgment of Lindblom L.J., as he then was, in *R. (on the application*

of Scarisbrick) v Secretary of State for Communities and Local Government [2017] EWCA Civ 787, at [19], [24] to [31], and [68] to [72]).

7. The subject matter here is of cultural importance on both the national and international plane. It is liable to generate controversy and debate. In that controversy and debate reasonable views may differ. So too, when the Secretary of State is determining an application for development consent, the scope for a reasonable exercise of planning judgment on the issues for him to resolve is broad. Perhaps especially in cases such as this, the court must be conscious of its proper role and take care not to exceed it. That role is simply to apply the law in reviewing the decision of the minister to whom it has been entrusted by Parliament, and to establish whether or not that decision was lawfully made. It is not to gauge the environmental or societal merits of the development proposed, or to second guess the decision-maker's exercise of planning judgment. Nor is it to consider whether a different determination might lawfully have been made by another decision-maker acting within the same legal framework, on the same evidence, with the benefit of the same advice from officials, under the same policies and guidance. The court is concerned only with the lawfulness of the decision actually made.

8. This judgment is long. That reflects in part the complexity of the issues dealt with in the decision letter, but also the diffuse and wide-ranging nature of the submissions made by Save Stonehenge in the course of a three-day hearing before us. We confirm, however, that where we have not dealt explicitly with a particular submission we should be taken to agree with the relevant conclusions of Holgate J. in the court below.

The main issues before the court

9. The seven grounds of appeal, on a proper analysis, give rise to five main issues:

   (1) whether the redetermination process was conducted properly and fairly – ground 3 of the appeal, alleging that the judge wrongly substituted his view for the Secretary of State's, and ground 4, asserting that a further examination ought to have been held;

   (2) whether the ministerial briefing given to the Secretary of State was legally adequate – ground 1 of the appeal, contending that the weblinks provided to the Secretary of State were inadequate, and ground 2, identifying matters that, it is said, the Secretary of State ought to have considered personally;

   (3) whether the Secretary of State's view on the scheme's compliance with the Convention Concerning the Protection of the World Cultural and Natural Heritage ("the World Heritage Convention") was legally sound – ground 6 of the appeal;

   (4) whether the risk of the World Heritage Site being delisted by the World Heritage Committee and the likely impact of delisting were adequately considered – ground 5 of the appeal; and

   (5) whether the Secretary of State's consideration of the then current review of the National Policy Statement for National Networks ("the NPSNN") in the light of the UK's "net zero" commitment was legally adequate – ground 7 of the appeal.

The World Heritage Convention

10. The World Heritage Convention was adopted by the General Conference of UNESCO on 16 November 1972. It was ratified by the UK on 29 May 1984. Its second and sixth recitals state:

> "*Considering* that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world.
>
> …
>
> *Considering* that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole."

11. Article 1 defines "cultural heritage" as including "monuments" and "sites" of "outstanding universal value". Under article 3, it is for each State Party to "identify and delineate the different properties situated on its territory mentioned" in article 1. Articles 4 and 5 state:

> "Article 4
>
> Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.
>
> Article 5
>
> To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:
>
> (a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
>
> (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
>
> (c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;

(d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and

(e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field."

12. The World Heritage Committee was established under article 8. Under article 11, it must establish a "World Heritage List" of properties it considers have "outstanding universal value" (article 11(2)). Article 11(4) states:

> "(4) The Committee shall establish, keep up to date and publish, whenever circumstances shall so require, under the title of "List of World Heritage in Danger", a list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under this Convention. The list shall contain an estimate of the cost of such operations. The list may include only such property forming part of the cultural and natural heritage as is threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; … . The Committee may at any time, in case of urgent need, make a new entry in the List of World Heritage in Danger and publicize such entry in the List of World Heritage in Danger and publicize such entry immediately."
>
> "Outstanding universal value" is assessed by criteria set out in the "Operational Guidelines for the Implementation of the World Heritage Convention" (July 2019).

The World Heritage Site

13. The World Heritage Site was inscribed under article 11 of the World Heritage Convention in 1986, in recognition of its "outstanding universal value". In June 2013 the World Heritage Committee adopted a statement of "outstanding universal value", which, under the heading "Brief synthesis", says this:

> "The World Heritage property Stonehenge, Avebury and Associated Sites is internationally important for its complexes of outstanding prehistoric monuments. Stonehenge is the most architecturally sophisticated prehistoric stone circle in the world, while Avebury is the largest. Together with inter-related monuments, and their associated landscapes, they demonstrate Neolithic and Bronze Age ceremonial and mortuary practices resulting from around 2000 years of continuous use and monument building between *circa* 3700 and 1600 BC. As such they represent a unique embodiment of our collective heritage.
>
> The World Heritage property comprises two areas of chalkland in Southern Britain within which complexes of Neolithic and Bronze Age ceremonial and funerary monuments and associated sites were built. Each area contains a focal stone circle and henge and many other major monuments. At Stonehenge these include the Avenue, the Cursuses,

> Durrington Walls, Woodhenge, and the densest concentration of burial mounds in Britain. …
>
> Stonehenge is one of the most impressive prehistoric megalithic monuments in the world on account of the sheer size of its megaliths, the sophistication of its concentric plan and architectural design, the shaping of the stones – uniquely using both Wiltshire Sarsen sandstone and Pembroke Bluestone – and the precision with which it was built.
>
> …
>
> There is an exceptional survival of prehistoric monuments and sites within the World Heritage property including settlements, burial grounds, and large constructions of earth and stone. Today, together with their settings, they form landscapes without parallel. …".

14. Under the heading "Integrity" it states:

> "…
> The presence of busy main roads going through the World Heritage property impacts adversely on its integrity. The roads sever the relationship between Stonehenge and its surrounding monuments … . Roads and vehicles also cause damage to the fabric of some monuments while traffic noise and visual intrusion have a negative impact on their settings. …".

15. On "Protection and management requirements" it says:

> "… Although substantial progress is being made, the impact of roads and traffic remains a major challenge in both parts of the World Heritage property. The A303 continues to have a negative impact on the setting of Stonehenge, the integrity of the property and visitor access to some parts of the wider landscape. A long-term solution remains to be found. …".

The 2008 Act

16. The 2008 Act sets the statutory framework for the consenting of "nationally significant infrastructure projects", as defined by section 14(1) (see the judgment of Lord Hodge and Lord Sales in *R. (on the application of Friends of the Earth Ltd.) v Secretary of State for Transport* [2020] UKSC 52, [2021] PTSR 190 ("the Heathrow third runway case"), at [19] to [38], and the judgment of Holgate J. in the court below, at [72] to [98]).

17. The Secretary of State can designate a national policy statement under section 5(1), and may review it whenever he thinks it appropriate to do so (section 6(1)). During such a review the Secretary of State may wholly or partly suspend a national policy statement (section 11(4)). National policy statements must be published and subjected to consultation (section 7), and to Parliamentary scrutiny and approval (section 9).

18. An application for a development consent order must be made to the Secretary of State (section 37). Under section 61 the Secretary of State must decide whether to appoint a "panel" or a single person to "handle" the application, performing the role of "the examining authority". Where a panel is appointed, its functions are "examining the application" and

"making a report to the Secretary of State on the application", setting out its conclusions and recommendations (section 74(2)). An examination by a panel must be "carried out in accordance with Chapter 4" of Part 6 of the 2008 Act (section 74(3)).

19. In Chapter 4 of Part 6, section 90(1) provides that the examining authority's "examination of the application is to take the form of consideration of written representations …". However, the examining authority must hold a hearing if it considers this necessary to consider oral representations about a particular issue, to ensure "(a) adequate examination of the issue, or (b) that an interested party has a fair chance to put the party's case" (section 91(1)). Other hearings may be called under sections 92 and 93. Section 94 governs the conduct of hearings. It provides that any questioning of a person making representations at a hearing should be undertaken by the examining authority, except where the examining authority considers that questioning by another person is necessary to ensure either adequate testing of any representations or that a person has a fair chance to put the person's case (section 94(7)). The examining authority must complete its examination within six months following the conclusion of the preliminary meeting and must complete its report within a further three months (section 98). Procedure at an examination is also subject to the Infrastructure Planning (Examination Procedure) Rules 2010 ("the 2010 Rules").

20. Section 104 of the 2008 Act applies to decisions, such as this one, where a "national policy statement has effect" (104(1)). Subsections (2) to (8) provide:

> "(2) In deciding the application the Secretary of State must have regard to –
> (a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),
> …
> (b) any local impact report … submitted to the Secretary of State … ,
> (c) any matters prescribed in relation to the development of the description to which the application relates, and
> (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.
>
> (3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.
>
> (4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.
>
> (5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.
>
> (6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.

> (7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.
>
> (8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met."

21. Under section 106 the Secretary of State may disregard representations, including evidence, if he considers that the representations "relate to the merits of policy set out in a national policy statement" (section 106(1)(b) and (2)).

Rules 19 and 20 of the 2010 Rules

22. Rule 19 of the 2010 Rules provides that where the Secretary of State is minded to disagree with recommendations of the examining authority because of new evidence or a new matter or fact, he must notify all interested parties of the disagreement and the reasons for it and give them the opportunity to make written representations on the new evidence or facts (rule 19(3)(b)(ii)).

23. The 2008 Act itself is silent on the procedure to be adopted for redetermination following the quashing of a development consent order. However, rule 20(2) provides:

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

The NPSNN

24. The NPSNN is the relevant national policy statement (see Holgate J.'s judgment in *Stonehenge 1*, at [37] to [48]). It was designated under section 5 of the 2008 Act on 14 January 2015. It describes, in [5.133] and [5.134], the approach to be taken to proposed development that would lead to harm to, or loss of the significance of, a heritage asset:

> "5.133 Where the proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, the Secretary of State should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm, …
>
> 5.134 Where the proposed development will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

25. In July 2021, having in mind the changes brought about by the net zero target for 2050 in the Paris Agreement, incorporated into the 2019 amendment to the Climate Change Act 2008 and the ensuing sixth carbon budget, the Secretary of State initiated a review of the NPSNN under section 6 of the 2008 Act. He decided not to exercise his discretion under section 11 of the 2008 Act to suspend the operation of the NPSNN during the review.

The "alternatives"

26. In 2017 the World Heritage Committee expressed its concern that the shorter tunnel then proposed, 2.9 km in length, together with the two cuttings, would harm the "outstanding universal value" of the monument. It asked the UK to consider the construction of either a bypass running to the south of the World Heritage Site ("route F010") or a longer tunnel, 5 km in length, which would avoid the need for cuttings inside the World Heritage Site. Holgate J. described these alternatives in his judgment in the court below (see [13] and [14]).

The first decision and the challenge to it

27. A full account of the process culminating in the Secretary of State's first decision to make the development consent order was given by Holgate J. in his judgment in *Stonehenge 1* (in [10] to [121]). We adopt that account.

28. In its report to the Secretary of State dated 2 January 2020 the examining authority said "the current proposal for [the western] cutting would introduce a greater physical change to the Stonehenge landscape than has occurred in its 6,000 years as a place of widely acknowledged human significance", and "the change would be permanent and irreversible" ([5.7.225]). Deciding the application in accordance with the NPSNN "would not lead to the UK breaching its international obligations" ([10.2.5]), but in its view the application could not be approved in accordance with the NPSNN as "the effect of the Proposed Development on the OUV of the WHS would lead to substantial harm to the significance of the designated heritage asset" ([10.2.6]). It acknowledged the cultural heritage, transport, economic, community, and environmental benefits of the scheme [10.2.9], but concluded that "the adverse impacts of the Proposed Development would strongly outweigh its benefits" ([10.2.12]). It recommended against development consent being granted ([10.3.1]). Holgate J. described in [18] of his judgment in *Stonehenge 1* the Secretary of State's crucial reasoning on the effects of the proposed development on the World Heritage Site, and why he disagreed with the examining authority.

29. The judge allowed the claim for judicial review on two grounds: first, that the Secretary of State had failed to assess the likely impact of the proposed development on the significance of all designated heritage assets, having insufficient information to do so (ground 1(iv), dealt with in [167] to [181] of the judgment in *Stonehenge 1*), and secondly, that he had failed to consider the relative merits of two alternatives for avoiding the harm caused by the western cutting and portal – an extended tunnel, 4.5 km in length, and a scheme in which the cutting would be covered for the first 800 metres of its length (ground 5(iii), dealt with in [242] to [290]). His essential conclusion on ground 1(iv) was this:

> "180. … [The] SST was not given legally sufficient material to be able lawfully to carry out the "heritage" balancing exercise required by paragraph 5.134 of the NPSNN and the overall balancing exercise required by s.104 of the PA 2008. In those balancing exercises the SST was obliged to take into account the impacts on the significance of all designated heritage assets affected so that they were weighed … ."

and on ground 5(iii):

> "277. … The relevant circumstances of the present case are wholly exceptional. In this case the relative merits of the alternative tunnel options compared to the western cutting and portals were an obviously material consideration which the SST was required to assess. It was irrational not to do so. This was not merely a relevant consideration which the SST could choose whether or not to take into account. … ."

The World Heritage Committee's "Decision 44" of July 2021

30. The World Heritage Committee's "Decision 44" was published on 31 July 2021. It said that the World Heritage Committee:

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

> 12. Notes moreover that in the event that DCO consent was confirmed by the High Court, the property warrants the inscription on the List of World Heritage in Danger;
>
> 13. Finally requests the State Party to submit to the World Heritage Centre, by 1 February 2022, an updated report on the state of conservation of the property and the implementation of the above, for examination by the World Heritage Committee at its 45th session, with a view to considering the inscription of the property on the List of World Heritage in Danger if the A303 route upgrade scheme is not modified to deliver the best available outcome for the OUV of the property".

The Secretary of State's redetermination of the development consent order application

31. On 30 November 2021 the Secretary of State sent all parties a "Statement of Matters" under rule 20(2) of the 2010 Rules, inviting further representations on several matters. In summary, they were:

    (1) updates on the alternative routes considered by the examining authority (including the longer tunnel option), and any other information material to the merits of any alternatives;

    (2) changes in the development's consistency with planning policy;

    (3) updates to the assessment of the scheme's impact on carbon budgets to take account of the sixth carbon budget, and the direct, indirect, and cumulative likely significant effects of the development with other existing projects on climate;

    (4) the adequacy of the environmental information produced in support of the proposal and whether any further or updated environmental information was necessary; and

    (5) any other matters arising since 12 November 2020 that the interested parties considered material.

32. National Highways submitted its responses to the "Statement of Matters" in January and February 2022. On 24 February 2022 the Secretary of State invited "interested parties" to respond to the "Statement of Matters" and National Highways' response by 4 April 2022. More than 1,200 responses were duly submitted online.

33. On 4 April 2022 Stonehenge Alliance submitted a response covering, among other things, transport, carbon, cultural heritage and alternatives. It contended that "the nature of the new evidence is such that it cannot be fairly examined other than through a fresh examination or by way of an inquiry" (paragraph 9) and explained why it thought so (in paragraphs 9 to 26).

34. In its submission, also made on 4 April 2022, ICOMOS-UK, the advisory panel for the World Heritage Committee in the UK, said:

> "The UNESCO World Heritage Committee has already agreed that if the current A303 proposals are approved Stonehenge will be put on the World Heritage list in Danger and that means a DSOC would be requested. It is difficult to see how Stonehenge might then be removed from the List of World Heritage in Danger unless the A303 proposals that

triggered the Danger listing were cancelled. And if that could not be done, then the UNESCO World Heritage Committee could be faced with the same conditions that led to Liverpool's removal from the World Heritage List."

35. Historic England confirmed in its submission, also on 4 April 2022, that it "[remained] confident of the Scheme's potential to deliver benefits for the historic environment" through the reduction in sight and sound of traffic from Stonehenge, enhancement of the experience of solstitial alignments, and the reuniting of previously severed parts of the World Heritage Site.

36. On 20 June 2022 the Secretary of State issued a letter requesting further information from National Highways on various matters in the submissions made by interested parties. National Highways responded on 12 July 2022, and on 13 July 2022 the Secretary of State invited further comment from interested parties. Stonehenge Alliance responded on 3 August 2022, requesting that the examination be reopened and making representations on the "environmental information" – specifically carbon, traffic forecasting, alternatives, and cumulative impact.

37. The joint World Heritage Centre/ICOMOS/ICCROM Advisory Mission to Stonehenge, Avebury and Associated Sites met for three days in April 2022. Its report was published on 25 August 2022. In its "Findings" it stated:

> "…
>
> The tunnel proposed by the Scheme would remove the road from the central part of the WHS, but the construction of dual carriageway in cuttings at either end of the tunnel would adversely and irreversibly impact on the integrity of the WHS, through removal of archaeological features and deposits, through disrupting the spatial and visual links between monuments, and as a result of its overall visual impact. Because some of these changes would be permanent, their effect would be to add to cumulative adverse impacts on the OUV of the inscribed property.
>
> From the perspective that an objective of the Scheme is to minimize any harm to the OUV of the inscribed property, the Mission considers that additional weight should be afforded to avoiding impact on the property, in view of its 'Outstanding Universal Value' and the obligations of the State Party under the World Heritage Convention. The Mission considers that the appropriate 'test' is not whether there is a net benefit to OUV, but rather how any adverse impact on OUV can be avoided."

and under the sub-heading "The Scheme and its routing":

> "…
>
> The Mission accepts that the Scheme to upgrade the A303 with the dual carriageway passing through the heart of the WHS within a tunnel, is the result of methodical and detailed analysis of options to respond to a complex set of demands and needs including those of the communities and villages around the WHS. However, the major concern expressed by the 2018 Advisory Mission and in World Heritage Committee Decision 44 COM 7B.61 remains, namely that the Scheme (particularly at the western end) would:

"*impact adversely the Outstanding Universal Value (OUV) of the property, especially affecting its integrity*" and that: "*the scheme should be modified to deliver the best available outcome for the OUV of the property*". The Mission recalls the finding of the 2018 Mission that although surface routes outside the WHS to the south performed less well for transport and economy, environment and communities, they could have substantial benefits for the WHS.

Notwithstanding the invitation provided in the 'Statement of Matters' issued on behalf of the Secretary of State for Transport dated 30 November 2021, and recent decisions of the World Heritage Committee, no further consideration or analysis of alternatives has been offered by National Highways. Such alternatives would need to be considered in order to explore fully the available opportunities to avoid impacts on OUV.

An alternative route, which re-routes the A303 completely around the WHS, and enables the complete closure of the existing section of the A303 within the WHS, would provide the best option for minimizing any negative impact and enhancing positive benefits to the OUV of the property.

A tunnel beneath the entire length of the WHS would provide the next best option for the OUV of the inscribed property. Insofar as such a tunnel is not feasible, then the alternative should be to extend the underground section of the Scheme at least to the western boundary, with areas to be excavated subject to comprehensive archaeological investigation, salvage and mitigation.

…

If it is determined that removal of surface traffic of A303 from the WHS requires a route through the WHS, the proposed Scheme's alignment is appropriate and has been adjusted to avoid potential conflict with Normanton Barrows and the Stonehenge solstice alignment, moved away from the Winterbourne Stoke Barrow Group and informed by an extensive program of archaeological evaluation.

… ."

38. The advisory mission recommended substantial modifications to the scheme to avoid harm to the World Heritage Site, by extending the tunnel and locating the western portal and cutting further to the west (recommendations 3 to 6).

39. On 26 August 2022 the Secretary of State invited comments from Save Stonehenge. These were received on 9 September 2022. Stonehenge Alliance also responded, on 14 October 2022. They agreed with the advisory mission's recommendations, arguing that they had not been adequately answered by National Highways and that the view of the World Heritage Committee must be given significant weight.

40. On 24 May 2023 the Secretary of State received a ministerial submission recommending approval of the application. Attached to the submission were five annexes containing links to application documents and the environmental statement (Annex A), the draft decision letter (Annex B), the examining authority's report (Annex D), the draft Habitats Regulations Assessment (Annex E), and a summary of "interested parties"' responses to the joint advisory mission's report and Save Stonehenge's response to it (Annex F).

41. On 27 June 2023 the Secretary of State confirmed that he would make the development consent order for the reasons set out in the draft decision letter, and that he had considered all the annexes in reaching his decision. After amending the draft decision letter in the light of the decision of the High Court in *Boswell*, he granted the development consent order – as we have said – on 14 July 2023.

The Secretary of State's decision letter of 14 July 2023

42. The Secretary of State's decision letter runs to 274 paragraphs, over 63 pages. Under the general heading "Secretary of State's Consideration", he confirmed that in redetermining the application he had considered, among other things, the judgment in *Stonehenge 1*, the examining authority's report, the representations made in response to the "Statement of Matters", the representations submitted in response to his subsequent consultations in the redetermination process and late representations received outside the formal consultations during the redetermination period ([19]). He said that "[where] not otherwise stated, [he] can be taken to agree with the ExA's findings, conclusions and recommendations as set out in the ExA's Report and the reasons given for [his] decision are those given by the ExA in support of the conclusions and recommendations" ([20]).

43. He identified the NPSNN as the primary policy basis on which to decide development consent applications for projects of this kind, and went on to say:

> "21. … A review of the NPSNN is currently underway and a new draft version was published on 14 March 2023. It is in draft form and has not been designated for the purpose of section 104 of the 2008 Act. The Secretary of State has had regard to the draft NPSNN in deciding the application. Notwithstanding any proposed amendments to the assessment, mitigation or decision-making processes set out in the draft NPSNN, he does not consider that there is anything contained within the draft of the NPSNN documents that would lead him to reach a different decision on the application."

44. He described the need for and benefits of the proposed development, concluding:

> "28. The Secretary of State agrees with the ExA that the Proposed Development would, in principle, be in accordance with the Government's vision and strategic objectives set out in the NPSNN. It would contribute to the objective of creating a high-quality route between the South East and South West that would meet future traffic needs and result in journey times being more reliable and reduced. It would also be safer … .
>
> 29. The Secretary of State considers it important that a free-flowing, reliable connection between the South East and South West would also contribute to the objective of enabling growth in jobs, including tourism, and housing. …
>
> …
>
> 34. Overall, the ExA's conclusion on need is that the Proposed Development would contribute to meeting the need for the development of the national road network established in the NPSNN, noting there is also a presumption in favour of granting development consent for the application pursuant to paragraph 4.2 of the NPSNN. The

identified benefits fall to be weighed against the adverse impacts in the overall planning balance … . For the reasons above, the Secretary of State is satisfied that there is a clear need case for the Proposed Development and considers that the benefits identified weigh significantly in favour of the Proposed Development."

45. He then turned to the adverse impacts (in [36] to [188]). In a passage headed "The HIA" he said:

"72. It is the ExA's opinion that when assessed in accordance with NPSNN, the Proposed Development's effects on the OUV of the WHS, and the significance of heritage assets through development within their settings taken as a whole would lead to substantial harm [ER 5.7.333]. However, the Secretary of State notes the ExA also accepts that its conclusions in relation to cultural heritage, landscape and visual impact issues and the other harms identified, are ultimately matters of planning judgment on which there have been differing and informed opinions and evidence submitted to the examination [ER 7.5.26]. The Secretary of State notes the ExA's view on the level of harm being substantial is not supported by the positions of the Applicant, Wiltshire Council, the National Trust, the English Heritage Trust, DCMS and Historic England. These stakeholders place greater weight on the benefits to the WHS from the removal of the existing A303 road compared to any consequential harmful effects elsewhere in the WHS. Indeed, the indications are that they consider there would or could be scope for a net benefit overall to the WHS [ER 5.7.54, ER 5.7.55, ER 5.7.62, ER 5.7.70, ER 5.7.72 and ER 5.7.83].

73. The Secretary of State notes the differing positions of the ExA and Historic England, who has a duty under the provisions of the National Heritage Act 1983 (as amended) to secure the preservation and enhancement of the historic environment. He agrees with the ExA that there will be harm on spatial, visual relations and settings that weighs against the Proposed Development. However, he notes that there is no suggestion from Historic England that the level of harm would be substantial. Ultimately, the Secretary of State prefers Historic England's view on this matter for the reasons given [ER 5.7.62 – 5.7.69] and considers it is appropriate to give weight to its judgment as the Government's statutory advisor on the historic environment, including world heritage. The Secretary of State is satisfied therefore that the harm on spatial, visual relations and settings is less than substantial and should be weighed against the public benefits of the Proposed Development in the planning balance.

…

82. The Secretary of State has also carefully considered the ExA's concerns and the respective counter arguments and positions of other Interested Parties, including ICOMOS-UK, WHSCU, the Stonehenge Alliance, the COA and the CBA in relation to the effects of elements of the Proposed Development on the OUV of the WHS and on the cultural heritage taking into account the impacts of the Proposed Development on the significance of all heritage assets and the effects on the historic environment of the wider area raised during the examination. The Secretary of State notes in particular the concerns raised by some Interested Parties and the ExA in respect of the adverse impact arising from western tunnel approach cutting and portal, the proposed Longbarrow Junction and, to a lesser extent, the eastern approach and portal [ER 5.7.207]. He accepts there will be adverse impacts from those parts of the Proposed Development. However, on balance

> and when considering the views of Historic England and also Wiltshire Council, he is satisfied that any harm caused to the WHS when considered as a whole would be less than substantial and any harm caused to the significance of heritage assets would be less than substantial and therefore the adverse impacts of the Proposed Development should be balanced against its public benefits."

46. Rejecting the suggestion that the examination should be re-opened, the Secretary of State said:

> "89. Following the further consultations of 16 July, 20 August 2020, 24 February 2022 and 20 June 2022, the Secretary of State is satisfied that Interested Parties have been provided with adequate opportunity to scrutinise all relevant documents and make their views known on this matter both during and since the examination. Further, in response to the suggestion that the examination should be re-opened to consider this matter, or indeed any other matters, the Secretary of State notes that there is no express legislative provision that allows for the re-opening of the examination but acknowledges that the legislation imposes minimum procedural requirements and does not include any exclusionary rule in relation to any additional steps that might be required in order to satisfy the duty to act fairly in a particular case. He has therefore considered whether the examination should be reopened but considers that it is not necessary to do so in this case for the reasons given above."

47. He tackled the issues relating to the effects of the development on heritage value (at [92] to [105]). He noted the concerns of the Consortium of Stonehenge Experts about the effects on several sites ([95]), and National Highways' submissions in response, concluding that he was "content that these assets have been appropriately considered by the Applicant" ([96]).

48. In a section headed "Issues arising following the Statement of Matters", under the sub-heading "*ICOMOS Mission Report 19 to 21 April 2022*", he said:

> "100. The Secretary of State notes the Final Report on the joint World Heritage Centre/ICOMOS/ICCROM Advisory Mission to Stonehenge, Avebury and Associated Sites (c.373bis) ICOMOS report ("the Mission Report") dated 19 to 21 April 2022 and has considered the findings and recommendations presented. The Mission finds that additional weight should be afforded to avoiding impact on the WHS in view of its 'Outstanding Universal Value' and the obligations of the State Party under the World Heritage Convention. The Mission Report considers that the appropriate 'test' is not whether there is a net benefit to OUV but rather how any adverse impact on OUV can be avoided. The Secretary of State has taken into account the Mission's comments on the appropriate test, but does not agree that the test proposed is appropriate for the decision he is required to take under the Planning Act 2008 and applying the policies in the NPSNN. The NPSNN requires the Secretary of State to carry out a balancing exercise between the benefits of the Proposed Development and its adverse impacts, including any impacts on the OUV of the WHS. He agrees with the ExA that the protection and conservation of WHSs is integrated into the UK planning system, including for Nationally Significant Infrastructure Project applications. These policies have not been subject to any legal challenges on the grounds of non-compliance with the WHC or the Operational Guidelines. … [The] Secretary of State does not consider that a finding of harm (whether substantial or less than substantial) to the attributes of OUV would mean

that the grant of development consent for the Proposed Development would result in the UK being in breach of its international obligations under the WHC."

49. As for the risk of the World Heritage Site being delisted, he said this:

> "101. …
>
> Several respondents including the Stonehenge Alliance, the Consortium of Stonehenge Experts, and ICOMOS UK referred to the World Heritage Committee's power to delist properties and referred to the prospect of Stonehenge losing its status. The Secretary of State has taken this issue into account but given it no weight because if it were to happen it would happen as part of a separate process, the Secretary of State is satisfied that the Proposed Development is in accordance with the NPSNN and in granting consent, this would not lead to the UK being in breach of its World Heritage Convention ("WHC") obligations, and the Applicant will be working with advisory bodies when constructing the Proposed Development."

50. Under the heading "The Secretary of State's Overall Conclusion" he concluded "[on] balance" that "any harm caused to the WHS when considered as a whole and to any heritage asset would be less than substantial and therefore the adverse impacts of the Proposed Development should be balanced against its public benefits" ([103]). And he was "satisfied whilst giving great weight to that harm, it would not outweigh the … traffic and transport … , community … , economic … , ecological … , and water environment … benefits of the Proposed Development that have been recognised by the ExA or the cultural and historic environment benefits of the Proposed Development identified above by the Applicant … , Wiltshire Council, Historic England, the National Trust, English Heritage Trust and DCMS" ([105]).

51. On "Carbon Emissions" he said that "the approach set out in the NPSNN continues to be relevant in light of international obligations and domestic obligations related to reducing carbon emissions that have come into force since the NPSNN was designated" ([149]). He went on to say:

> "153. Overall, the Secretary of State considers that: over time the net carbon emissions resulting from the operation of the Proposed Development will decrease as measures to reduce emissions from vehicle usage are delivered: the magnitude of the increase in carbon emissions resulting from the Proposed Development is below 0.03% of any carbon budget and therefore small; and there are policies in place to ensure these carbon budgets are met, such as the Transport Decarbonisation Plan and NH's own Net Zero Highway Plan published in July 2021. The Secretary of State is satisfied that the scheme is compatible with these policies and that the small increase in emissions that will result from the scheme can be managed within Government's overall strategy for meeting net zero. The Secretary of State considers that there are appropriate mitigation measures secured in the DCO to ensure carbon emissions are kept as low as possible and that the scheme will not materially impact the Government's ability to meet its net zero targets."

and under the heading "Cumulative Effects":

> "161. The Secretary of State notes the representations made by Mike Birkin on behalf of Friends of the Earth and the Stonehenge Alliance which raised strong objections to the Proposed Development on climate change grounds [REP3-052] on the basis that significance of the Proposed Development becomes very much larger when the cumulative impacts of transport investment decisions and transport policy as a whole are considered. The Secretary of State notes Stonehenge Alliance reaffirmed its position in their August 2022 response which considers the Applicant's analysis is inadequate for various reasons including inconsistency with the Transport Decarbonisation Plan and UK commitments under the Paris Agreement, misinterprets policy and guidance on the significance of transport emissions, and has not included regional or sectoral assessments including cumulative assessments. The Secretary of State also notes the post examination representations and consultation responses from the Stonehenge Alliance in relation to transport and climate change issues, including its comments calling for the need for reassessment of the future of the Road Investment Strategy 2: 2020-2025 ("RIS2") published in March 2020 and the A303 scheme following Covid-19 and the advisability of awaiting the outcome of the subsequent legal challenge to RIS2 by the Transport Action Network. Other responses to the 24 February 2022 consultation also considered that the Proposed Development was inconsistent with the need to reduce carbon emissions to combat climate change."

and under the heading "The Secretary of State's Conclusions":

> "167. The Secretary of State is aware that all emissions contribute to climate change. Whilst the Proposed Development will result in an increase in carbon emissions … , the Secretary of State considers that the Proposed Development is not inconsistent with existing and emerging policy requirements to achieve the UK's trajectory towards net zero. The Secretary of State therefore considers the Proposed Development's effect on climate change would be minor adverse and not significant and this assessment aligns with the IEMA guidance. The Secretary of State is satisfied that that the scheme complies with the NPSNN, will not lead to a breach of any international obligations that result from the Paris Agreement or Government's own polices and legislation relating to net zero."

52. In considering whether a decision to approve the scheme would be in breach of the World Heritage Convention, the Secretary of State reminded himself that section 104(3) of the 2008 Act required him, as he put it, "to decide an application in accordance with the relevant NPS, except where satisfied, amongst other things, that this would lead to the UK being in breach of its international obligations" [185]. Agreeing with the examining authority, he said:

> "186 … As the ExA has noted, an international treaty has no legal effect in domestic law unless implemented by domestic legislation. Designation of a WHS brings no additional statutory controls, but protection is afforded through the planning system. The relevant planning policies are contained in the NPSNN and the NPPF, which postdate the WHC and the ICOMOS Guidance and the ExA considers it is entitled to assume they were also taken into account in the formulation of those national planning policy documents. The ExA considers the protection and conservation of WHSs is thereby integrated into the UK planning system, including for Nationally Significant Infrastructure Projects applications. As the ExA notes, these policies have not been subject to any legal challenges on the grounds of non-compliance with the WHC or the Operational Guidelines [ER 7.3.39 – 7.3.40].

> 187. The Secretary of State agrees with the ExA and also does not accept that a finding of harm (whether substantial or less than substantial) to the attributes of OUV must inevitably mean that the grant of development consent for the Proposed Development would result in the UK being in breach of its international obligations under the WHC. … The Secretary of State is satisfied that the Proposed Development is in accordance with NPSNN and in granting consent, this would not lead to the UK being in breach of its WHC obligations [ER 7.3.43]."

53. In a section of the decision letter headed "Salisbury Plain SPA" ([200] to [205]) the Secretary of State considered the possibility of disturbance to the stone curlew, both during construction and operation, concluding:

> "205. In conclusion on the Salisbury Plain SPA, the ExA is satisfied that the Applicant has put in place mechanisms that would be secured in the DCO to provide certainty beyond reasonable doubt that the land for the proposed [stone curlew breeding] plots can be delivered and that suitable management and monitoring measures will be put in place in order for the Secretary of State to conclude no adverse effects on the integrity of the Salisbury Plain SPA alone and in combination with other plans and projects during the construction and operation of the Proposed Development [ER 7.4.4 and ER 7.4.6]."

54. Dealing with "Alternatives to the Proposed Development", he said:

> "208. … In redetermining the DCO application, the Secretary of State has … considered the proposed alternatives, including routes which avoid the WHS, which are discussed in further detail below at … [208 [sic] to 233].
>
> 209. As a result of the matters raised by the WHC about the western section of the Proposed Development, the Applicant studied the two longer tunnel options: first, the provision of a cut and cover section to the west of the proposed bored tunnel which would extend the tunnel to outside the WHS boundary and second, an extension of the bored tunnel to the west so that its portals would be located outside the WHS boundary [ER 5.4.18]. The Applicant also considered other surface routes that avoided the WHS entirely and non-modal alternatives such as rail improvements, but ruled these out at an early stage in the development of its proposals.
>
> 210. Further assessments and submissions were made during the examination and the ExA also convened an issue-specific hearing to deal with alternatives (ISH6). Alternatives are addressed in detail in the ExA's Report in section 5.4 … . The Secretary of State notes and has considered, amongst other things, the following documents submitted to the examination: Chapter 3 of the ES, the Applicant's response to First Written Question, the Applicant's response to Second Written Question 2, and the Applicant's Closing Submissions."

55. He went on to consider the relative merits of the two alternative tunnel options ([211] to [228]). Explaining his approach, he said:

> "216. The Secretary of State has considered the relative merits of the Proposed Development and the alternatives mentioned above (as optimised by the Applicant) and has also assessed those alternatives and representations received on them and reached a conclusion in respect of them. Moreover, the Secretary of State has considered other

> alternative proposals assessed by the Applicant. The Secretary of State has considered the cut and cover and bored tunnel alternatives in the context of six issues identified in the Applicant's response … but also taking into account all of the representations that have been received during and after the examination and the revisions to these alternatives set out in the Applicant's July Response.
>
> 217. The Secretary of State notes the Applicant's view that both alternative tunnel options would give rise to slightly more beneficial heritage effects than the Proposed Development overall. This view of the Applicant was reached in the context of the Applicant's position that the Proposed Development was overall beneficial to the Outstanding Universal Value of the WHS. However, as set out in paragraph 187 the Secretary of State disagrees with the Applicant's conclusion and considers that the Proposed Development will give rise to less than substantial harm to the OUV of the WHS and have the effects the Secretary of State has already identified. The Secretary of State has therefore considered for himself what he considers to be the comparative heritage effects of the proposed alternatives as compared against his assessment of the less than substantial harm arising from the Proposed Development before reaching any overall conclusion."

56. He then came to the cut and cover tunnel extension alternative (in [218] to [222]), concluding:

> "222. … Overall, having carefully considered the relative advantages and disadvantages and giving great weight to the potential reduction in harm to the heritage assets, including the OUV of the WHS, the Secretary of State does not consider that the significant extra cost, together with the delay, is justified to achieve the level of reduction of harm and any other benefits provided by this Cut and Cover Tunnel Extension alternative option."

57. On the bored tunnel extension alternative he concluded (in [223] to [228]):

> "228. … Overall, having carefully considered the relative advantages and disadvantages and giving great weight to the potential reduction in harm to the heritage assets, including the OUV of the WHS, the Secretary of State does not consider that the significant extra cost, together with the delay, is justified to achieve the level of reduction of harm and heritage benefits and any other benefits offered by the Bored Tunnel Extension alternative."

58. He turned next (in [229] and [230]) to "four other route options supported by Interested Parties and … discussed during the examination", concluding:

> "229. The Secretary of State has also considered four other route options supported by Interested Parties and which were discussed during the examination, namely: F010 Surface route option to the south, the Parker route (which would run to the south of the WHS and north of Salisbury), a new route to the south of Salisbury, proposed by Mr Rhind-Tutt, and a new route to the north of the WHS, proposed by Mr Barry Garwood. Having considered the representations in support of each of these options and the Applicant's assessment of each, the Secretary of State agrees with the Applicant's decision not to progress any of these alternatives for the reasons given by the Applicant and as further set out below.

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

59. In his "Overall Conclusions on the Case for Development Consent", he said:

> "234. For the reasons above, the Secretary of State is satisfied that there is a clear need for the Proposed Development and considers that there are a number of benefits that weigh significantly in favour of the Proposed Development … In respect of cultural heritage and the historic environment, the Secretary of State recognises that, in accordance with the NPSNN, great weight must be given to the conservation of a designated heritage asset in considering the planning balance and that substantial harm to or loss of designated assets of the highest importance, including WHSs, should be wholly exceptional. Whilst also recognising the counter arguments put forward by some Interested Parties both during and since the examination on this important matter, the Secretary of State agrees with the advice from his statutory advisor, Historic England, and is satisfied that the harm to heritage assets, including the OUV, is less than substantial and that the mitigation measures in the DCO, OEMP and DAMS will minimise the harm to the WHS … and other harm. Even so, the Secretary of State accepts that as there will be (less than substantial) harm as a result of the Proposed Development in relation to cultural heritage and the historic environment and that this should carry great weight in the planning balance.
>
> …
>
> 238. The Secretary of State notes the ExA's conclusion that climate change is not a matter that weighs against the Proposed Development [ER 7.2.30]. Amendments have since been made to the Climate Change Act 2008 by the Climate Change Act 2008 (2050 Target Amendment) Order 2019, which amends section 1 so that the target is for net zero greenhouse gas emissions (following an adjustment for trading in carbon units). However, in view of the small increase in greenhouse gas emissions identified as a result of the Proposed Development, which is negligible when assessed against national carbon budgets, the Secretary of State is satisfied that the Proposed Development would not have a material impact on the ability of the Government to meet its amended 2050 climate change targets[.] The Secretary of State attaches limited weight to the small increase in carbon emissions as a result of the Proposed Development … .
>
> …
>
> 240. The Secretary of State is satisfied that the Proposed Development is in accordance with the NPSNN and in granting consent, this would not lead to the UK being in breach of its WHC obligations … . In considering whether deciding the application in accordance with the NPSNN would lead [to] the UK being in breach of any of its

> international obligations or to the Secretary of State being in breach of any duty imposed by or under any enactment or whether it would be unlawful by virtue of any enactment to do so, the Secretary of State agrees with the ExA's conclusion that there would be no impediment to a decision made in accordance with the NPSNN pursuant to subsections (4), (5) and (6) of section 104 of the 2008 Act … .
>
> …
>
> 242. In light of the harm that is caused to heritage assets, including the OUV of the WHS, and other harm arising from the Proposed Development and the principles set out in the High Court Judgment [in *Stonehenge 1*], the Secretary of State has carefully considered alternatives to the Proposed Development, including the two alternative tunnel options that have been optimised. Whilst both alternative tunnel options would avoid some, albeit not all, of the less than substantial heritage harm to heritage assets, including the OUV of the WHS, the Secretary of State considers that the additional disadvantages of these alternatives, including in particular the significant extra costs and the delay in realising the social, economic and heritage benefits of the Proposed Development, are not justified to achieve the reduction in harm to heritage assets and other harms identified and the Secretary of State also considers that none of the other alternative options are preferable overall to the Proposed Development for the reasons summarised above. The Secretary of State therefore does not consider that there is any preferable alternative to the Proposed Development, and places neutral weight on the existence of alternatives in the overall planning balance.
>
> 243. In conclusion, when considering the impact of the Proposed Development as a whole and the mitigation measures to be put in place, the Secretary of State is satisfied that on balance the need case for the Development together with the other benefits identified outweigh any harm identified."

The first main issue – the fairness of the redetermination process

60. Before Holgate J. the second claimant, a local resident, alleged a breach of article 6 of the European Convention on Human Rights. That contention was apparently abandoned in oral argument, was rejected by the judge as untenable ([102] to [114] of his judgment), and has not been pursued on appeal. Holgate J. said that, to prove procedural unfairness, a claimant must "show that he has … suffered material prejudice" ([115]). He had "not been shown anything to suggest that the officials handling the redetermination were any less qualified than the Panel of inspectors to assess and "interrogate" those issues and the information provided" ([117]). He identified the main issue as being "whether reopening the Examination could have made a material difference procedurally, for example, if one or more issue-specific hearings had taken place with oral questioning" ([119]). He dealt with each of the factors relied upon to prove unfairness. On the need for a re-examination of the alternative options, he said "it would be perfectly sensible and proper for the Department to wait to see whether, in the light of representations actually made, fairness required the examination to be reopened", and "[none] of the issues or material [he had been] shown on the [F010 and "non-expressway] options was of such a nature as to call for the reopening of the examination" ([126] and [127]).

61. Grounds 3 and 4 of the appeal state:

"3. When it came to the impact of the issues raised by the appellant as to:
(i) fairness of the redetermination process, and (ii) the Minster's ignorance of relevant matters, the judge erred in law in:

(a) placing the burden of proof on the appellant (rather than on the respondents, by reference to [section 31(2A) and (3C) of the Senior Courts Act 1981], and
(b) considering for himself the substantive merits of the issues.

4. When evaluating the fairness of the determination process, the judge erred in law in his approach to the elements of an examination process as against the consultation subsequently carried out by the Secretary of State."

62. Mr David Wolfe K.C., with Ms Victoria Hutton and Ms Stephanie David, for Save Stonehenge, submitted that in this case procedural fairness required an inquisitorial process in which the issues were examined by an independent person with appropriate expertise, who would then provide a report to the Secretary of State. Mr Wolfe made it clear that he was not submitting there had to be an oral hearing of any issue. But the issues raised in the redetermination process had to be "interrogated" by an independent expert. This was consistent with the regime set out in the 2008 Act, which contemplated an examination by an examining authority who would submit a report to the Secretary of State. Whilst regulation 20(2) provided only for the making of written representations, that was not conclusive. The statutory procedural requirements were not exhaustive and could be supplemented if procedural fairness so required. Mr Wolfe relied on the judgment of Holgate J. in *Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 326 (Admin), [2022] Env. L.R. 4 (at [171] to [173]). It was significant here, he argued, that the examining authority had not considered the question of alternatives to the proposed development. That question had never been tested or examined by an independent, expert body. There were other contentious issues – for example, on archaeological remains, traffic forecasts, geology, ground investigation and groundwater monitoring and the business case for the proposed development. Those matters all required examination by an independent, expert body. Finally, Mr Wolfe submitted that the judge had wrongly put the burden on Save Stonehenge to demonstrate prejudice, contrary to section 31(2A) and (3C) of the Senior Courts Act 1981. And in any event it was not "highly likely that the outcome would not have been substantially different" if the evidence had been considered by an independent, expert body.

63. Mr Nigel Pleming K.C. and Ms Rose Grogan for the Secretary of State, with the support of Mr Reuben Taylor K.C. for National Highways, submitted that the statutory decision-making process involved an examination and the submission of a report. When the decision was quashed, the 2010 Rules provided for the Secretary of State to publish a written statement of the matters on which further written representations could be made. The Secretary of State had complied with that procedure. The common law principles governing procedural fairness did not require him also to provide an opportunity for representations to be examined by an independent expert, who would report on those matters, before he made a further decision. In this case those who had previously taken part in the process were given the opportunity to make written representations. Officials sought information and further representations from all interested parties, identifying areas where more information was required and seeking specific responses on matters raised during the redetermination process. This was enough to

ensure procedural fairness. None of the issues raised by Save Stonehenge required consideration by an independent expert. The judge was also right to hold that there was no such thing as a technical breach of natural justice, and that the question was whether in this case procedural fairness required the statutory procedure to be supplemented. This principle was not displaced by section 31(2A) or (3C) of the Senior Courts Act 1981.

64. We cannot accept Mr Wolfe's argument on these two grounds. In our view the judge was right to conclude as he did.

65. The requirements of procedural fairness depend on a number of things, including the nature of the decision, the statutory framework, and the facts (see the observations of Lord Mustill in *R. v Secretary of State for the Home Department, ex p. Doody* [1994] 1 A.C. 531, at p.560D-H, and of Lord Bridge in *Lloyd v McMahon* [1987] A.C. 625, at p.702).

66. The starting point in this case is the statutory process for considering an application for development consent for a nationally significant infrastructure project, set out in the 2008 Act and the 2010 Rules. The 2008 Act places responsibility for taking the decision, within the context of nationally determined policy, with the relevant government minister. The statute provides for examination of an application by an examining authority appointed by the minister. Section 90(1) of the 2008 Act provides that the examining authority's "examination of the application is to take the form of consideration of written representations", but the examining authority must hold a hearing on a specific issue if it considers it necessary to do so. The examining authority then makes a report to the minister. The process is intended to ensure that individuals know what the issues are and have the opportunity to make written representations on those issues. It is not equivalent to litigation (see *R. (on the application of Dawes) v Secretary of State for Transport* [2024] EWCA Civ 560, at [42] to [43]).

67. The process following the submission of the examining authority's report is governed by the 2010 Rules. Rule 20 deals with the situation where a decision granting the application for development consent has been quashed. That rule makes it clear that the process is one in which the minister notifies the interested parties, by a written statement, of the matters on which further written representations may be made and interested parties must be given the opportunity to make written representations "to the Secretary of State" (rule 20(2)). This is also reflected in the provisions of rule 19 (see *Dawes*). Again, the process after the report is submitted essentially consists of the consideration by the minister of written submissions, including cases where there is new evidence or fact.

68. We do not accept the submission that the Secretary of State must necessarily ensure that there will be an inquisitorial process carried out by an independent expert who will consider the issues, any submissions, and any new evidence or facts, and then report to him. To impose such a requirement in all cases would be inconsistent with the statutory framework.

69. The critical question is whether, given the facts, the nature of the issues raised and the statutory requirements of the decision-making process, further procedural steps need to be taken to ensure procedural fairness in the particular case. It is important to consider the issues said to require the appointment of an independent expert to test or "interrogate" those issues and to report to the Secretary of State. As Holgate J. said (at [119]), "[an] important consideration is whether the claimants can show that there was a significant issue in the redetermination which ought, as a matter of fairness, to have been the subject a hearing under

section 91" or, we would add, which necessitated the appointment of an independent expert to conduct an inquisitorial process to assess the issue.

70. As for the question of "alternatives", the interested parties, including Save Stonehenge, were well able to make written representations to the minister. And the minister, and his department, were well able to, and did, consider those representations and seek further information where necessary. That is what the judge found (at [117]), and we agree. Although the examining authority had not itself considered alternatives when it prepared its report, this does not mean that the minister is required to create an equivalent inquisitorial process when he comes to determine, or redetermine, an application. Procedural fairness does not require that, either generally or on the facts of this particular case.

71. Mr Wolfe took us through the documentary material on other issues which he said raised unresolved issues that needed to be resolved, and which, as a matter of fairness he submitted, could only be resolved by the appointment of an independent person with suitable expertise to "interrogate" the issues and report on them to the Secretary of State. Some, such as the written representations on traffic forecasts, carbon emissions and the business case were considered by the judge, who concluded (at [131] to [137]) that procedural fairness did not require more than was provided for by the 2010 Rules. We agree with the judge's relevant conclusions and reasoning.

72. Mr Wolfe referred to a submission made in written representations by the Consortium of Stonehenge Experts, that the proposed development would cut through a Beaker-period settlement with burials, which, it was said, met the criteria for designation as a scheduled ancient monument but whose importance had not been appreciated by National Highways. In fact, officials wrote to National Highways asking whether that site had been included in the assessment and, if so, where this had been done. National Highways responded, explaining that it had considered the value of this heritage asset and referring to the relevant material. The Secretary of State considered this matter in his decision letter (at [95] to [99]). This example falls short of establishing there was an issue that needed to be resolved using an inquisitorial process carried out by independent experts. It demonstrates the error of treating the process as if it were litigation, pointing to "issues" to be resolved by expert adjudication. That is not what the statutory process, nor the common law principles of procedural fairness in this context, require. Similar examples included the potential benefits of a longer tunnel for the stone curlew and matters concerning geology, ground investigation and groundwater monitoring.

73. It is not necessary to consider those or other examples one by one. It is enough to say that nothing we were shown, and none of the submissions made, demonstrated a need for an inquisitorial process by independent experts to assess any of the matters to which Save Stonehenge referred. In short, we regard the submission that the process was in some way procedurally unfair as untenable.

74. For completeness, we deal with the two further criticisms made of Holgate J.'s conclusions. First, it is said that he erred by placing the burden of proof on Save Stonehenge rather than the Secretary of State. The basis for this submission is that the judge said a claimant complaining about procedural fairness needed to show he had suffered material prejudice. It was submitted either that section 31(2A) or (3C) of the Senior Courts Act 1981 had replaced that principle or that those provisions applied in this case and placed the burden on the

Secretary of State to establish it was highly likely that the outcome would not have been substantially different if the conduct complained of had not occurred.

75. We consider that submission mistaken. The common law principles of procedural fairness are intended to ensure an individual is treated fairly. What procedures are required to ensure fairness will, as we have said, depend on a number of factors including the nature of the decision, the decision-making process, and the facts. And there will be no breach of the principles of procedural fairness even if a particular step has not been taken where that has not resulted in any prejudice to the individual (see *George v Secretary of State for the Environment and another* (1979) P. & C.R. 609). It is clear that the judge was doing no more at [115] and the following paragraphs of his judgment than summarising and applying the principles of procedural fairness, and that he did so accurately in the light of the case law. We doubt that the position at common law has been altered by section 31(2A) or (3C), which deal with situations where the court must refuse a remedy, or refuse permission to apply for judicial review, if it appears highly likely the outcome for the claimant would not have been substantially different had the conduct complained of not occurred. The conduct complained of is the conduct said to amount to a public law error. Those subsections impose a duty on the court to refuse permission or a remedy in certain circumstances if the conduct in question does amount to a public law error. They are not addressed specifically to the issue of procedural fairness, and do not appear to have been intended to affect the relevant principles at common law. But in any event it is clear that the judge was simply and rightly concerned with the question whether particular steps needed to be taken to ensure procedural fairness in this case – as is apparent from what he said at [119] of his judgment. This did not involve the reversal of a burden of proof. It involved considering carefully, as the judge did, whether procedural fairness required any procedural steps to be taken in addition to those specified in the statutory process governing redetermination.

76. Secondly, we see no merit in the submission that the judge considered the substantive merits of the issues. He only considered the issues that arose for him in determining what, in the circumstances of this case, procedural fairness required.

77. We conclude therefore that the judge was right to refuse permission on ground 1 of the claim. We consider the arguments on grounds 3 and 4 of the appeal to be misconceived.

The second main issue – the adequacy of the briefing to the minister

78. Holgate J. stated his understanding of the law relevant to this issue:

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

And he continued:

> "150. There is a threshold question: were any of the points relied upon by the claimants in the proposed amendment to the statement of facts and grounds "obviously material", such that the SST's decision was irrational because they were not drawn to his attention in briefing, and he did not otherwise know about them. The test is not whether the court thinks that it would have been better for additional briefing to have been given to a Minister on a particular point …."

79. He also rejected the submission that even if a particular consideration is not obviously material so that the decision-maker is not legally obliged to take it into account, he nevertheless has a discretion whether to do so, which could not be exercised unless he received briefing covering the cases presented by interested parties:

> "152. I regret to have to say that this submission is misconceived. It is contrary to the clear principle laid down by the Supreme Court in [the Heathrow third runway case] at [120]. The decision-maker does not have to work through each and every consideration which could be regarded as potentially relevant to his decision and positively decide whether or not to take them into account in the exercise of his discretion. It follows that there is no legal requirement for officials to produce briefing which covers all such *discretionary* points. … ."

80. That submission, said the judge, was "impractical, unrealistic and unprincipled … [,] unnecessary and disproportionate", and "unsupported by any authority" ([153]). He observed that "a legal challenge to a decision of a Secretary of State which has any real merit can usually be argued on the basis of a failure to take into account a material consideration or to give adequate reasoning in the decision letter", on established public law grounds ([154] and [155]). In his view the "satellite" ground of challenge in this case concerning the hyperlinks in Annex A to the ministerial briefing had no significant bearing on the real merits ([156]). In most cases, he said, it was "only necessary to apply conventional principles of judicial review to the decision letter and the inspector's report" ([157]). He added that "[the] willingness of the courts to consider the legal adequacy of ministerial briefing has been sensitive to the legal and factual context [and the] court has only intervened in limited, very specific circumstances" ([158]).

81. Holgate J. saw no force in any of the points relied on to prove a breach of the duty in section 104(2). On the contention that the examination should be reopened, he concluded that the point "only goes at most to a possible exercise of discretion, not an obviously material consideration" [162]. On the assertions emphasising the benefits of a longer tunnel for the stone curlew, he concluded that "[it] is absurd to suggest that brief material of the kind put forward by the SA amounted to an obviously material consideration which as a matter of law had to be dealt with in the decision letter (or in any ministerial briefing)" ([164]). On route F010, he pointed to the consideration of that alternative during the examination ([166]), concluding that the Secretary of State "was entitled to accept the case put forward by [National Highways] on this point as summarised in [[230] of the decision letter]", and "[there] was no legal requirement for him to go back into the papers which had been before the Panel" ([168]).

82. The judge also rejected criticism of National Highways' traffic forecasts:

> "171. The fifth point relates to the SA's criticisms of [National Highways]'s traffic forecasts. This was addressed during the Examination and in the Panel's Report (e.g. PR 5.17.60 and 5.17.68). … The Panel recognised that future traffic levels might be lower than the central forecasts, but gave more weight to the continued importance of the A303 for motor transport and the need to remove longstanding problems of traffic congestion. The [Secretary of State] took the same approach … . Those judgments are not open to legal challenge. The [Secretary of State] did not fail to take into account an obviously material consideration."

83. On ground 2 of the claim, which alleges a failure by the Secretary of State lawfully to consider alternatives to the proposed development, the judge recorded four points in Stonehenge Alliance's written representations of April 2022 which Mr Wolfe submitted were "obviously material" considerations that the Secretary of State failed to take into account: first, the fact that National Highways had accepted that route F010 would bring greater benefits for the World Heritage Site than the proposed scheme, and F010 would have a "large beneficial effect"; second, that route F010 would be much less expensive than the proposed scheme; third, that Stonehenge Alliance continued to disagree with National Highways' suggestion that F010 would have a greater environmental impact overall than the tunnelled options and would generate higher levels of rat-running harmful to the quality of life in local communities; and fourth, "the opinion given by Professor Parker Pearson …". ([183])

84. The judge saw no force in this argument. His essential conclusions on it were these:

> "185. In relation to point (iii) the SA claimed that [National Highways]'s assertions were not substantiated by any firm evidence and that [National Highways] had failed to provide any assessments to support its "bald assertion" of "a greater overall environmental impact." But as Sullivan LJ stated in *R (Langley Park School for Girls) v Bromley London Borough Council* [2010] 1 P & CR 10 at [53], how much evidence should be produced on the degree of harm (or benefit) that would result from an alternative is a matter of judgment for the decision-maker. That is in line with the general principle stated in *R (Khatun) v Newham London Borough Council* [2005] QB 37 at [35] that a claimant must show that it was irrational for the decision-maker not to have obtained more information on a particular point.
>
> 186. Mr. Strachan and Mr. Taylor took the court to a number of documents which showed that there was ample evidence before the SST that F010 would have other, serious environmental effects, including adverse impacts on biodiversity, landscape and rural communities. Reference was made to the Technical Appraisal Report in September 2017, the ES, Response to Written Question – REP2-024 and [National Highways'] Deadline 3 submission. There would be adverse impacts on, for example, the River Avon SAC, a number of SSIs and the landscape of the Upper Avon Narrow Chalk River Valley and other character areas. DL 230 expressly referred to REP2-024. The claimants' criticism is hopeless.
>
> 187. Subject to a challenge on the grounds of irrationality, it was a matter of judgment for the defendant as to how much detail to go into, and how much weight to give to, the significant environmental impacts that would be caused by F010, including harm to villages and their conservation areas (*Langley*). He was not under any legal obligation to assess the effect of F010 on heritage assets one by one. He was not deciding whether to

grant a DCO for that alternative, but making a broad assessment as to whether it should be preferred.

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

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

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

191. This is not a factor which featured largely in the SA's case before the Panel or the SST. Before the Panel the SA stated that it did not support the F010 route. But the SA said that [National Highways] had dismissed it too quickly; it should have been taken to public consultation. The only issue which the Panel noted as having been raised by the SA was whether F010 would lead to more rat-running through local villages. It does not appear that in the Examination the SA relied upon the cheaper cost of F010 as such. Instead, they said that the economic appraisal of options did not support the decision to drop F010. The reduction in the benefits of F010 was broadly matched by the reduction in its costs, compared to the proposed scheme (PR 5.4.36). It appears that only one party, Mr. Garwood, supported F010 in the Examination (PR 5.4.38).

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

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

194. In these circumstances, the cheaper cost of F010 was not a factor which, as a matter of law, the decision letter had to refer to expressly. The SST had the Panel's report which made it clear that F010 was cheaper than the proposed scheme. There was no dispute that F010 was cheaper. In any event, the cheaper cost of that alternative would not have

provided any mitigation for the adverse effects of F010 upon which the SST based his decision not to prefer that option to the DCO scheme (DL 230). The SA does not suggest otherwise.

195. The claimants' argument that the SST did not assess a "non-expressway" option is hopeless. This refers to improving transport to the south-west by modes other than motor vehicles. Mr. Wolfe confirmed that the only long distance alternative to which this could sensibly refer was rail. But, in my judgment, this was not a genuine scheme in heritage terms, when in fact [National Highways]'s case was that F010 was preferable as regards impact on the historic environment and the WHS. The Technical Appraisal Report (para.18.3.62) had said that F010 would have a large beneficial effect overall for the historic environment and the WHS. [National Highways] claimed a neutral or slight/moderate beneficial effect for the proposed scheme. Plainly, [National Highways] accepted that F010 was preferable to the proposed scheme as regards the historic environment.

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

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

85. Grounds 1 and 2 of the appeal state:

"1. The judge erred in law in assuming the Minister considered documents available to him merely by provision of the examination library web links.

2. Given:

(a) the [section] 104(2)(d) Planning Act 2008 requirement for the Minister to decide relevance,
(b) the Minister's need to conscientiously consider consultation responses, and
(c) the Minister's need to consider evidence supporting his conclusions,

the Judge erred in law in holding the Minister needed personally to consider only what was in law "obviously material". Further, the Judge erred in law in concluding that the Minister's briefing did not omit obviously material considerations."

86. The submissions made on behalf of Save Stonehenge on ground 1 rest on the assertion that Holgate J. "assumed" the minister considered documents available to him and based that assumption solely on the fact that web links were provided to the examination library. The respondents reply that the judge made no such assumption.

87. On ground 2 the central contention made by Save Stonehenge is that the effect of section 104(2)(d) is to require the minister himself to consider not only "obviously material" matters but also any other matters that he himself considered "important and relevant" to his decision. We leave aside for the moment the question whether there is any real difference between

"obviously material" and "important and relevant". But if the contention is correct, two inescapable consequences follow. The first is that it would not be open to the minister to leave to his officials the task of deciding what materials are "important and relevant". And the second flows from the first. It is that the minister himself must review all materials submitted in support of, or in opposition to, the granting of the development consent order to determine whether he thinks they are both important and relevant to his decision or not. To put this in context, in the course of the redetermination process alone, over 1,500 new representations or documents were submitted by interested parties. These were in addition to the very extensive documentation submitted in the original process. When asked by the court where a line might be drawn short of requiring the minister personally to consider all the available information, Save Stonehenge was not able to provide a coherent response.

88. The second foundation for ground 2 is the proposition that, since the redetermination process did not involve a further examination, the minister was obliged personally to consider all responses or a proper summary of those submissions. It is said that he had done neither.

89. The third foundation for this ground is the proposition that there was a failure to provide the minister with sufficient evidence to support the bare conclusions he was being asked to adopt. The briefing he was given was therefore unlawful.

90. The respondents challenge the proposition that section 104(2)(d) imposes any obligation upon the minister beyond the familiar public law obligation to take into account all "obviously material" considerations. This remains so despite the attempted analogy with statutory consultations and the respondents' acceptance – and assertion – that the preparation of a briefing for a minister involves judgment on the part of officials about the extent of the material to be included. The test remains whether it was irrational for the minister not to take the information into account. And in this case, when the decision letter is read fairly and in its proper context, it can be seen that the minister gave proper consideration to all "obviously material" matters.

91. We should first mention the general principles that apply before considering the impact of Mr Wolfe's submissions upon them. The respective roles and responsibilities of governmental decision-makers and those who support them in the decision-making process are well established. It is sufficient to cite *R. (on the application of National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154. Sedley L.J. (with whom the other members of the court agreed) said:

> "26. … It would be an embarrassment both for government and for the courts if we were to hold that a minister or a civil servant could lawfully take a decision on a matter he or she knew nothing about because one or more officials in the department knew all about it. … To do this is to substitute for the *Carltona* doctrine of ordered devolution to appropriate civil servants of decision-making authority … either a de facto abdication by the lawful decision-maker in favour of his or her adviser, or a division of labour in which the person with knowledge decides nothing and the decision is taken by a person without knowledge.
>
> 27. … The reality, subject no doubt to occasional lapses, is that ministers (or authorised civil servants) are properly briefed about the decisions they have to take; that in the briefings evidence is distinguished from advice; and that ministers take some trouble to understand the evidence before deciding whether to accept the advice. …".

92. Turning to what was required of the minister, Sedley L.J. cited (at [29]) the decision of the High Court of Australia in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd.* [1960] H.C.A. 40, (1986) 162 C.L.R. 24, where Gibbs C.J. said:

> "3. Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department. No complaint could be made if the departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law."

93. Later (at [60]) Sedley L.J. said that "[the] test is the familiar public law test: was something relevant left out of account by him in taking his decision?". He found "particularly helpful" the judgment of Brennan J. in *Peko-Wallsend*, including these passages of it:

> "61. A decision-maker who is bound to have regard to a particular matter is not bound to bring to mind all the minutiae within his knowledge relating to the matter. The facts to be brought to mind are the salient facts which give shape and substance to the matter: the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered.
>
> …
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> 65. The department does not have to draw the minister's attention to every communication it receives and to every fact its officers know. Part of a department's function is to undertake an evaluation, analysis and précis of material which the minister is bound to have regard to or to which the minister may wish to have regard in making decisions … . The consequence … is, of course, that the minister's appreciation of a case depends to a great extent upon the appreciation made by his department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of the ministerial function. A minister may retain his power to make a decision while relying on his department to draw his attention to the salient facts."

94. Sedley L.J. went on to say:

> "62. Given the constitutional position as this court now holds it to be, a minister who reserves a decision to himself – and equally a civil servant who is authorised by him to take a decision – must know or be told enough to ensure that nothing that it is necessary, because legally relevant, for him to know is left out of account. This is not the same as a requirement that he must know everything that is relevant. … What it was relevant for the minister to know was enough to enable him to make an informed judgment."

94. The basic approach to categories of consideration was described in the judgment of Lord Hodge and Lord Sales, with whom the other members of the court agreed, in the Heathrow third runway case (at [116] to [120]). They identified three categories of consideration: first, "those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had"; second, "those clearly identified by the statute as considerations to which regard must not be had"; and third, "those to which the decision-maker may have

regard if in his judgment and discretion he thinks it right to do so" ([116]). As for the third category, they said, "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] … would not be in accordance with the intention of the Act" ([117]). And the test of whether a consideration falling within the third category is "so obviously material" that it must be taken into account is "the familiar *Wednesbury* irrationality test" ([119]). Lord Hodge and Lord Sales went on to say:

> "120. It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. … There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion."

95. It follows that unless a matter falling within the third category is so obviously material that it must be taken into account, a failure to take it into account will not amount to an error of law that may vitiate the decision. It also follows that, as a general rule, it is lawful for a ministerial decision to be reached following evaluation by experienced officials in the department and a briefing that provides a précis of material to which the minister is "bound to have regard".

96. Subject to one gloss, therefore, we endorse the summary provided by Holgate J. in *R. (on the application of Friends of the Earth Ltd.) v SSBEIS* [2022] EWHC 1941 (Admin), [2023] 1 W.L.R. 225:

> "199. A minister only takes into account matters of which he has personal knowledge or which are drawn to his attention in briefing material. He is not deemed to know everything of which his officials are aware. But a minister cannot be expected to read for himself all the material in his department relevant to the matter. It is reasonable for him to rely upon briefing material. Part of the function of officials is to prepare an analysis, evaluation and précis of material to which the minister is either legally obliged to have regard, or to which he may wish to have regard.
>
> 200. But it is only if the briefing omits something which a minister was legally obliged to take into account, and which was not insignificant, that he will have failed to take into account a material consideration, so that his decision was unlawful. The test is whether the legislation mandated, expressly or by implication, that the consideration be taken into account, or whether the consideration was so "obviously material" that it was irrational not to have taken it into account … . In this regard, it is necessary to consider the nature, scope and purpose of the legislation in question."
>
> and also the corresponding passage of his judgment in these proceedings (at [149]).

97. The gloss we would add is that it is always open to a decision-maker to call for more information if he considers it necessary to enable him to make a proper decision, just as it is open to a decision-maker to have regard to information provided to him even if it has not been specifically drawn to his attention as being relevant or necessary to the decision.

98. Two examples illustrate the wide variety of circumstances that may arise. In *R. (on the application of Hunt) v North Somerset Council* [2013] EWCA Civ 1320 this court concluded that there was no evidence to support a finding that all the members had read the environmental information not included in the papers they were sent for the council meeting in question, and there had been nothing to indicate to them that they should. The court said:

> "84. … We have no difficulty, nor was the contrary suggested, in accepting that if council members are provided with a particular set of materials for the purpose of a meeting, they can, absent positive evidence to the contrary effect, be taken to have read all such materials and also to have read any additional materials to which they were expressly referred and to which they were told they needed to have regard for the purposes of the meeting. If, for example, they had been told that a key document was too bulky and expensive to copy and circulate, but was available at a given website address, and they were further told in appropriate terms that this document was required reading for the purposes of the meeting, we consider that they must be taken to have accessed and read it."

99. In *R. (on the application of Suffolk Energy Action Solutions) v SSESNZ* [2023] EWHC 1796 (Admin) a submission that there was no evidence of the Secretary of State having considered specific representations for himself was rejected. The draft decision letter drew his attention to a document providing a pathway to the specific representation, links were provided to relevant documents, and the draft decision letter said he had considered the documents to which links were provided. Assuming the same approach applied to the decision of a minister with the assistance of his officials, Holgate J. accepted the presumption in *Hunt* – that the materials in question had been read by the decision-maker.

100. We also consider it to be established that where the decision-maker has either been provided with materials on the basis, express or implied, that all of them are relevant to the decision or directed to particular materials or alerted to their potential relevance, or has said or implied that he has considered particular materials, the burden will shift to the party who seeks to contradict the suggestion that they have been considered by him.

101. The general principles to which we have referred suggest that the question here is whether the minister failed to take into account any matters that were "obviously material" within the meaning of the third category of considerations identified by the Supreme Court in the Heathrow third runway case. This was the approach adopted by Holgate J. in the court below (at [150]). It is, however, said by Save Stonehenge to be inapplicable in a case to which section 104(2)(d) of the 2008 Act applies. In such a case, Save Stonehenge submits, it is the personal responsibility of the decision-maker himself to decide whether any and all information is "important and relevant" or not, and the category of documents to be regarded as "important and relevant" may be wider than the category of documents that are "obviously material".

102. In our view both limbs of that submission are flawed. It is necessary to look first at the words of section 104(2)(d). On their face they mean no more than that if the Secretary of State considers there are matters he thinks "important and relevant to" his decision he must have regard to them. They neither say nor imply that the principles that allow officials to carry out their normal filtering function are abrogated, or that the Secretary of State personally must analyse all available information to discover which matters he thinks are "important and relevant" to his decision and which are not. Save Stonehenge's submission therefore falls at the first hurdle.

103. The position becomes still clearer when section 104(2)(d) is read in its immediate context. The first words of the subsection make plain that the purpose of section 104(2) is to identify those matters to which the Secretary of State must have regard in deciding the application. The list would be manifestly incomplete if it omitted those matters that the Secretary of State thought important and relevant to his decision. There is nothing in the structure of the provision to suggest that sub-subsection (2)(d) creates a new category of materials or a new obligation to identify materials rather than listing those matters which, on established public law principles, are necessary to proper decision-making.

104. Even without bringing into account the purpose of the statute, therefore, we would reject the submission that section 104(2)(d) requires the Secretary of State personally to analyse material to reach a decision about whether any other matters than those specified in subsection (2)(a) to (c) are both important and relevant to his decision.

105. Once regard is had to the purpose of the statute, the position becomes even clearer. The mischief that the 2008 Act was intended to overcome and the means by which it did so were described by Lord Hodge and Lord Sales in the Heathrow third runway case (at [19] to [38]). As they explained, the purpose of the 2008 Act was to reduce delays and uncertainties endemic in the previous system of policy and decision-making for major infrastructure projects because of the absence of a clear national policy framework. The 2008 Act introduced national policy statements to set the policy framework for decisions on the development of nationally significant infrastructure, the role of the Government being to set such policy. Public inquiries would no longer have to consider issues such as whether there was a case for infrastructure development or the types of development most likely to meet the need for additional capacity. The purpose of the 2008 Act was thus to streamline the decision-making process in cases involving national infrastructure and to reduce delay. Imposing an obligation upon a minister personally to consider all matters to decide whether he thinks they are "important and relevant" for his decision or not would run contrary to that purpose.

106. As he did before the judge, Mr Wolfe submitted to us that section 104(2)(d) showed, at least, that the Secretary of State had to take matters into account which he, in his discretion, thought "important and relevant", and that the proper exercise of the discretion to decide what was "important and relevant" required him to consider all the cases and submissions advanced by the parties.

107. Like the judge, we reject this argument as misconceived. It raises the question whether matters that are "important and relevant" within the meaning of section 104(2)(d) add to those matters that are "obviously material" as contemplated by Lord Hodge and Lord Sales in the Heathrow third runway case. Apart from the fact that the words are different, no principled reason has been put forward to explain why it should be necessary for the Secretary of State to have regard to matters that are not relevant to his determination – in the sense implied by the words "obviously material". On the contrary, there is good reason to uphold the principle that only a failure to consider matters within the category of being "obviously material" may constitute an error of law that vitiates a decision, since it is those matters that the Secretary of State is obliged to take into account. Equally, no reason has been put forward to support the submission that the existence of a discretion as proposed by Save Stonehenge should lead to an obligation upon the Secretary of State to consider every aspect of the cases and submissions presented to him, whether it is "obviously material" or not. We therefore agree with what Holgate J. said in *Pearce*:

> "11. Section 104(2)(d) allows the Secretary of State to exercise a judgment on whether he should take into account any matters which are relevant, but not mandatory, material considerations. This reflects the well-established line of authority which includes *CREEDNZ Inc v Governor General* [1981] N.Z.L.R. 172, 183; *Findlay, Re* [1985] A.C. 318, 333-334; *Oxton Farm v Harrogate BC* [2020] EWCA Civ 805 at [8]; and *Friends of the Earth* [2020] UKSC 52 at [116]-[120]."

And we also agree with the judge's conclusion in his judgment below at [152].

108. Turning to the second limb of Mr Wolfe's submission on ground 2, we do not think it appropriate to draw an analogy between a process requiring a statutory consultation such as in *Moseley v Haringey London Borough Council* [2014] UKSC 56, [2014] 1 W.L.R. 3947 and a redetermination conducted without a further examination. In the context of decision-making by central government, officials will have scrutinised the representations made and provided a précis or summary of matters to which the Secretary of State will have regard. That process should be sufficient to ensure the Secretary of State has regard to matters that are "obviously material", and if he does not the decision may be set aside. The reference to the way in which consultation is structured in the context of other public bodies such as local authorities is not helpful. In our view the interests of Save Stonehenge and other interested parties were fairly and suitably protected by the Secretary of State's obligation to consider matters that were "obviously material". The need for there to be evidence supporting the Secretary of State's decision-making does not in our view provide the basis for a submission that alters the scope of the enquiry to be undertaken by him, or his officials, or takes it beyond the categorisation described by the Supreme Court in the Heathrow third runway case. We agree with Holgate J. that Save Stonehenge's reliance on *Peko-Wallsend* and *National Association of Health Stores* is misplaced.

109. In our view, therefore, the judge was right to pose the "threshold question" that he did (in [150]). The obligation upon the minister was to consider what was in law "obviously material". The real question on ground 2 is whether the minister's decision was irrational because matters that were "obviously material" were not drawn to his attention in briefing, and he did not otherwise take them into account.

110. We come then to the four areas in which it is said that the judge erred in his conclusion that the minister's briefing omitted "obviously material" considerations. We shall refer to specific paragraphs of the decision letter relevant to the individual areas. However, we bear in mind throughout what was said in [18] to [21] of the decision letter, which serves as a general introduction to the specific matters addressed subsequently. Apart from expressing a degree of scepticism, Save Stonehenge has not challenged the accuracy of those paragraphs, and could not. The evidence of Mr Gilmour, the Deputy Director, Planning, Housing and Transport Division of the Department of Transport, explains how officials responsible for the redetermination considered the judgment in *Stonehenge 1*, having previously read the relevant material from the original application process including the examining authority's report, and drafted the "Statement of Matters" – those matters that the Secretary of State regarded as relevant to the redetermination – with a view to there being several rounds of consultation if further information was required to clarify responses and to ensure all parties were given an opportunity to comment on it. When received, representations were read and considered – to ascertain whether they contained matters material to the Secretary of State's decision, whether further clarification was required, and whether other parties should be given the opportunity to comment on them.

111. It is submitted that the minister was not briefed on the reasons why the examination should be reopened, that he had been asked to do so on the grounds of fairness, and that the extent and technical nature of the material generated by the redetermination required him to do so.

112. We reject that submission. The decision letter dealt expressly, and sufficiently, with the question of re-opening the examination (in [89]). This was the conclusion reached by Holgate J. (at [160] to [162]), and we are of the same view. Before us, Save Stonehenge essentially repeated the submissions made to Holgate J. In doing so, it failed to grapple with the relevant passages of the decision letter and the reasoning of the judge. It is clear from the decision letter that the Secretary of State did consider whether or not the examination should be re-opened. Mr Wolfe sought to persuade us that Stonehenge Alliance had asked the Secretary of State to appoint an independent expert, not to re-open the examination, and that he had not dealt with that. But on a fair reading of the submissions made by Stonehenge Alliance to the Secretary of State, it is clear that the thrust of the request was that the examination should be re-opened. Indeed, that was the basis of the claim for judicial review on this ground, and how the statement of facts and grounds described the requests. Secondly, and in any event, the question whether procedural fairness required the examination to be re-opened or, as it is now argued, the appointment of an independent expert to carry out an inquisitorial process, is ultimately a matter for the court, not the minister. For the reasons we have given on grounds 3 and 4 above, procedural fairness did not require that in this case. Since we uphold the judge in his conclusion that fairness did not require the re-opening of the examination, that is enough to dispose of this submission.

113. Mr Wolfe contended that the minister was not briefed, and should have been, on Stonehenge Alliance's submission that the longer bored tunnel would bring significant benefits to wildlife, including the stone curlew.

114. We see no force in that contention. The submission was set out at [5.2.9] of Stonehenge Alliance's response, dated 4 April 2022, to the Secretary of State's call for further representations in his "Statement of Matters", which referred to the relevant part of the examining authority's report, namely [5.5.38] and the following paragraphs. Save Stonehenge has not pointed to any evidence that casts doubt on the examining authority's assessment. Over four pages and 22 paragraphs, it examined closely the likely effects of the proposed development on the stone curlew. It listed the mitigation measures proposed by the Outline Environmental Management Plan to avoid the temporary indirect impacts of disturbance on breeding pairs of stone curlew and the submissions made by adjacent landowners and other interested parties ([5.5.40]). It recorded that the RSPB was "satisfied that the indirect disturbance impacts on breeding stone curlew can be avoided with the implementation of suitable working practices during the construction phase" ([5.5.51]). National Highways was proposing that "a new 1.2ha stone curlew breeding plot would be created under agreement with [Natural England], approximately 500m from the plot to be lost", and "[a] second stone curlew plot would be delivered on RSPB land within 4km of the SPA" ([5.5.55]). After referring to section 6 of its report, where "the HRA implications" of the development for the stone curlew were "fully addressed" ([5.5.56]), the examining authority concluded that "… the OEMP and the suite of documents that derive from it provide a robust framework for circumstances that require action to be formulated and implemented to protect the species from the potential impacts of construction and operation" ([5.5.60]). The Secretary of State referred (in [200] to [205] of the decision letter) to the potential impact on the stone curlew. He can be taken to have agreed with the examining authority's assessment.

115. We agree with the judge's conclusions on this point (at [163] and [164]). As he recognised, there was merely a brief assertion that National Highways had not made an adequate assessment of the asserted benefit. As a matter of fact, National Highways had accepted in their representations in January 2022 that the longer tunnel option would offer minor beneficial impacts for biodiversity. And as the judge held, it is impossible to conclude that this could qualify as an "obviously material consideration" requiring to be dealt with in the decision letter.

116. Mr Wolfe submitted that the minister "was kept entirely ignorant of" criticisms made by Stonehenge Alliance of revised traffic forecasts put forward by National Highways during the re-determination process. What this means, as we understand it, is that the minister was not specifically referred to those forecasts and therefore did not consider them.

117. This submission needs to be put in context. National Highways had advanced traffic forecasts during the original development consent order process, which Stonehenge Alliance criticised and the examining authority considered. In its report the examining authority recorded that Stonehenge Alliance was "particularly concerned that the Applicant's forecasting model has made use of a core growth scenario which assumes that the historic patterns of traffic growth, which have not applied over the last 15 years, will broadly reassert themselves" ([5.17.60]). Stonehenge Alliance considered it likely that growth in traffic would be below the "low" forecast included by National Highways. In response, National Highways acknowledged the existence of research carried out by the Department for Transport, which investigated sources of forecasting uncertainty in preparing their 2018 road traffic forecasts but maintained that they had followed current guidance. The examining authority concluded that National Highways' approach to modelling was robust and followed appropriate guidance, whilst acknowledging that travel patterns and vehicle usage may change in future in response to climate change and technological advances ([5.17.67] and [5.17.68]). But in the examining authority's view there was "a strong likelihood that the A303 will remain an important corridor for motorised transport and that congestion will continue to occur at this location without the Proposed Development, even assuming the lower growth forecasts assessed in the TA" ([5.17.68]).

118. In its responses to the "Statement of Matters", National Highways set out changes to its traffic forecasting. It was these changes that were the focus of Stonehenge Alliance's criticisms in [4.1] to [4.20] of its April 2022 response on transport, carbon and economics issues. At [4.6] Stonehenge Alliance repeated its criticism that National Highways' forecasting approach assumed continuing background growth in traffic; and at [4.7] it identified its two main areas of concern about the forecasts as being, first, that "National Highways' approach of developing a single Central Case set of forecasts, with a relatively narrow range of uncertainty around it, was always unreliable, and since 2018 has not been the approach advised by DfT", and secondly, "COVID-19 has led to major changes in travel behaviour and these have not been incorporated in the forecasts". The first of these two points mirrored Stonehenge Alliance's originally expressed concern, which had been considered by the examining authority. The second was not covered by the examining authority, whose report was produced just before the Covid-19 pandemic began. The concerns were repeated in Stonehenge Alliance's further response in August 2022. Meanwhile, in July 2022 National Highways had reiterated that its modelling accorded with the latest and current guidance.

119. The Secretary of State's decision letter dealt with future traffic levels and carbon emissions in numerous passages, including [20], [26] to [29], [34], [35] and [161], only some of which it has been necessary to quote. As one would expect, he gave significant weight to the need

to address the problem of chronic congestion of the A303, and did so in the context of climate change policy. We should mention some of the main relevant themes in his assessment. First, the proposed development was one of three major improvements for the A303 corridor identified in the Road Investment Strategy for 2015/16-2019/20 (RIS1). Secondly, the subsequent Road Investment Strategy for 2020-2025 (RIS2), published in March 2020, confirmed the status of RIS1, recognising that the A303 had over 35 miles of single carriageway, which frequently suffered congestion and delay. Thirdly, the proposed development would satisfy the broad principles and meet the strategic aims as set out within the NPSNN by providing an upgraded carriageway on this part of the route. Fourthly, the Secretary of State agreed with the examining authority that the proposed development would, in principle, accord with the Government's vision and strategic objectives in the NPSNN. It would contribute to the objective of creating a high quality route between the South-East and the South-West, which would not only result in journey times being reduced but would also be safer. And it would bring about a significant reduction in traffic using routes through nearby settlements and the A360 north of Longbarrow Junction. Fifthly, transport costs would also be reduced and the improved connection between the South-East and the South-West would contribute to growth in jobs, including tourism, and housing. Sixthly, the Secretary of State agreed with the examining authority that realising the wider benefits in full would depend on all proposed improvements in the A303 corridor being implemented. And finally, the proposed development could be assessed on the basis of the NPSNN without conflicting with commitments in the Transport Decarbonisation Plan. In the course of his assessment the Secretary of State explicitly took into account Stonehenge Alliance's case that National Highways' "analysis [was] inadequate for various reasons …" and its "comments calling for reassessment of the future of [RIS2] and the A303 scheme following Covid-19", as well as the suggestion that the proposed development was "inconsistent with the need to reduce carbon emissions to combat climate change".

120. Holgate J. saw no legal shortcomings in the Secretary of State's treatment of National Highways' traffic forecasts and Stonehenge Alliance's argument that they overestimated future traffic need. As was submitted to the judge, both the examining authority and the Secretary of State had accepted that while travel patterns and vehicle usage might change, the A303 remained an important corridor for vehicular transport, and congestion would likely continue without the proposed development, even assuming lower traffic forecasts. National Highways' case on the need for the scheme did not depend on its central case forecasts being accepted. And the Secretary of State's assessment did not depend on a resolution of the technical issues raised by Stonehenge Alliance.

121. Save Stonehenge's argument on this point rests on two propositions: first, that the minister failed to have proper regard to the case put forward by Stonehenge Alliance on traffic forecasts, and secondly, that that case was "obviously material" so that a failure to take it into account would invalidate the decision. Like the judge, we cannot accept that either proposition is arguable. Once again, in our view, his relevant conclusions are accurate, including what he said in [171] of his judgment.

122. Mr Wolfe suggested that the minister could not decide whether National Highways' revised traffic forecasts were robust without giving detailed consideration to the argument that they were not. We disagree. The first point to be made here is that the minister was not kept in ignorance of Stonehenge Alliance's submissions. He referred to them in [161] of the decision letter. Secondly, it is clear that he took them into account in reaching his conclusions, and there is no irrationality challenge on that basis. Thirdly, as was made clear

to the judge, National Highways' case did not depend upon precise forecasting of traffic levels. It rested on the need, backed by established policy, to remedy the longstanding problems of congestion on the A303 corridor and on the single carriageway section beside Stonehenge in particular. Save Stonehenge evidently did not seek to demonstrate to the Secretary of State that the problems of congestion on the A303 would cease to exist if the lower levels of traffic for which they contended came about, nor has it attempted to persuade the court that the approach adopted by the examining authority in [5.17.67] and [5.17.68] of its report was irrational. The judge was right to conclude that National Highways' case did not depend upon its forecasts being accurate and accepted. It was recognised that they may be inaccurate, but this was not critical.

123. We come next to Mr Wolfe's argument on alternatives, with its greater focus now on route F010. Mr Wolfe submitted that the minister's consideration of alternative routes was unlawful because it left out of account matters capable of being "important and relevant". He also submitted that the minister was misled on the likely impacts of route F010. In its previous claim for judicial review Save Stonehenge criticised the failure of the Secretary of State to assess the relative merits of the extended tunnel and the cut and cover options at the western end of the scheme. The first decision was quashed on that basis. In his second decision the Secretary of State considered the relative merits of four alternatives, including route F010. The central argument on alternatives advanced by Save Stonehenge in *Stonehenge 1* was that the Secretary of State had failed to consider the relative merits of the two alternative tunnelling schemes – covering approximately 800 metres of the cutting or extending the bored tunnel (see [242] and [277] of Holgate J.'s judgment in that case). As we understand it, route F010 was not relied upon. This claim, however, does not allege that there was any error of law in the Secretary of State's conclusion that the extended tunnel and the cut and cover option were not to be preferred to the proposal in the development consent order. It criticises the judge's handling of route F010 and the "non-expressway" option.

124. The relevant background is fully set out in Holgate J.'s judgment in the court below (at [179] to [183]). We gratefully adopt that account and need not repeat it. Several other features in the history ought also to be noted.

125. By the beginning of 2017 eight potential corridors for the road had been reduced to three and ten route options in the preferred corridors assessed, as a result of which two partially tunnelled routes in what was known as "Corridor D" (routes D061 and D062) and one surface route in "Corridor F" (route F010) were selected for further consideration. In the light of that work (details of which are set out in the "Technical Appraisal Report" ["TAR"]), route F010 was dropped, mainly because it would have a larger footprint and greater environmental impacts overall than the tunnelled options. It was also considered that route F010 would leave higher levels of rat-running traffic affecting the quality of life in local communities. Only the two partially tunnelled routes were therefore selected for further development. They were taken to non-statutory consultation in early 2017.

126. The material considered by the examining authority included National Highways' May 2019 submission, answering a number of questions on alternatives (REP2-024). Question AL.1.11 focused on routes avoiding the World Heritage Site altogether, and National Highways' evaluation supporting its conclusions on route F010. Question AL.1.12 asked for details of the disadvantages of route F010 and justification for the decision to reject it as a preferred route for consultation. National Highways provided detailed responses to the questions, to which Stonehenge Alliance responded. The examining authority dealt with route F010 in its report, noting that Stonehenge Alliance, whilst not supporting that route,

argued it had been dismissed too quickly and should have been presented in the public consultation as an option avoiding the World Heritage Site ([5.4.37]). In the redetermination process, both National Highways and Stonehenge Alliance put in further submissions on the issue of alternatives. The main thrust of the argument now advanced by Stonehenge Alliance was that the decision not to take forward route F010 in 2017 was taken on the basis of inadequate analysis and that the range of options considered was too narrow. In its April 2022 "Covering Note and Legal Submission" it submitted that National Highways' assessment in and since the TAR was flawed because it both overstated the asserted disadvantages and underestimated the benefits, and that it failed to acknowledge that route F010 would be "far less expensive" than the proposed scheme ([5.3]).

127. As framed in the "Statement of Facts and Grounds", ground 2 of the claim is that the Secretary of State "failed lawfully to consider alternatives to the Scheme (in the context of the High Court's finding in the First DCO Case that the Scheme would cause significant adverse permanent and irreversible harm to the WHS)". The judge was wholly unpersuaded that this was an arguable basis for challenging the Secretary of State's decision. We have quoted his relevant conclusions (in [185] to [197] of his judgment). We have no doubt that what he said was correct, and in adding these observations of our own we seek only to reinforce it.

128. Before us, Mr Wolfe's argument on alternative routes comprised essentially the same submissions as were made to Holgate J., somewhat recast to allege that the minister did not have, and therefore did not consider, critical documents. It also alleges that "the sole "briefing" which [the minister] received on route F010 arising out of the re-determination process were the bare conclusions at [230] of the decision letter" and that "[the minister] was not advised of any of [Stonehenge Alliance's] representations on route F010", including that F010 was about £400 million cheaper than the proposed scheme.

129. Having reviewed the history of the development consent order process in its entirety and the redetermination process in particular, and having traced all of the submissions included in the material before us, we agree entirely with Holgate J.'s conclusion that ground 2 of the claim as presented to him was hopeless, for the reasons he gave in the passage of his judgment we have set out. For the same reasons, ground 2 of the appeal as presented to us is also hopeless. Save Stonehenge's submissions on this ground are not improved by their recasting to an argument that relevant material was not properly before the minister.

130. In the light of the principles governing the respective roles of officials and the decision-maker, there is no basis for questioning the statement in paragraph 8 of the ministerial briefing that "having reviewed all relevant information … including the responses to the consultations received during the redetermination period", the officials responsible for that briefing considered that the Secretary of State should grant consent. Equally, there is no basis on which to impugn the Secretary of State's statements in [18], [20], [40], [82], [91], [229] and [230] of the decision letter, and elsewhere in it, that he had considered the materials he identified; or the statement in an email of 27 June 2023 from his Assistant Private Secretary confirming that he had considered all the annexes in reaching his decision.

131. More specifically, there is no basis on which to impugn the statement in [229] of the decision letter that the Secretary of State had considered the representations in support of each of the four surface options, which on a fair reading must include those of Stonehenge Alliance. The many references in the decision letter to the various submissions made by Stonehenge Alliance provide strong support for the Secretary of State's confirmation that all

relevant submissions were taken into account. The fact that he did not agree with those submissions is irrelevant. This is not merely to make an "assumption" that he considered the relevant representations. Rather, it is to accept the positive evidence that all relevant representations were indeed considered. In the event, as he said in [229] of the decision letter, the Secretary of State preferred the submissions of National Highways. This was a view he was rationally entitled to adopt.

132. For these reasons, as well as those given by Holgate J., we reject as unarguable the submissions that the sole "briefing" that the Secretary of State received on route F010 arising out of the redetermination process equated solely to the succinctly stated conclusions at [230] of the draft decision letter, that he did not take into account Stonehenge Alliance's submissions on route F010, and that the ministerial briefing was misleading.

133. In support of ground 2 of the appeal Save Stonehenge also relied on its submissions on the risk of delisting and the review of the NPSNN. We address those submissions elsewhere in this judgment. They add nothing of substance to the argument on this ground.

134. For the reasons he gave and those we have added, the judge was right to refuse permission to apply for judicial review on grounds 2 and 6, and there is no arguable basis for granting permission to apply for judicial review on ground 8. We therefore dismiss ground 2 of the appeal, which challenges the refusal of permission to apply for judicial review on those grounds.

135. We can deal with ground 1 of the appeal shortly. The judge did not assume that the Secretary of State considered documents available to him merely by provision of library web links. First, to the extent that this ground rests on the proposition that the minister himself, rather than officials, must consider everything of potential relevance, it is, as we have said, unsustainable. Secondly, for the reasons we have just given, there is no basis on which to dispute the statements in the ministerial submission, the decision letter, and the email of 27 June 2023 from the Secretary of State's Assistant Private Secretary, or indeed the internal evidence, about what the Secretary of State or his officials considered. Thirdly, there is nothing in Holgate J.'s judgment to support an assertion that he assumed the Secretary of State had personally considered every document included in the annexes. What the judge concentrated on was whether it was shown that the decision-maker had failed to consider any obviously material matters (see [156], [162], and [175] to [177] of the judgment – some of which we have quoted). His approach was legally correct and did not depend on, or involve, any false assumption.

The third main issue – compliance with the World Heritage Convention

136. In his judgment below Holgate J. relied on his reasoning in *Stonehenge 1,* adding that "even if the meaning of articles 4 and 5 of the Convention is a matter for determination by the court, rather than applying the "tenable view" test to the decision-maker's interpretation, ground 4 remains unarguable" ([62]). In his judgment in *Stonehenge 1* he had observed that section 104(4) of the 2008 Act "refers to international obligations generally and not specifically to the World Heritage Convention" ([213]). Its effect was to make a breach of international obligations a ground for not deciding the application in accordance with the NPSNN, which might result in development consent being refused ([214]). The question whether a proposal is in conflict with international obligations was a matter of judgment for the decision-maker

([215]). Applying the "tenability" approach in *R. (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, Holgate J. had "no hesitation in concluding that the [Secretary of State] was entitled to decide that the policy approach in [5.133] and [5.134] of the NPSNN (read together with the surrounding paragraphs) is compliant with the Convention". And he would also reach that conclusion on his own interpretation ([217]). Articles 4 and 5 were, he said, "expressed in very broad terms" ([218]). Article 4 "recognises that the duty of protecting and conserving a WHS belongs primarily to the State, which "will do all it can to this end, to the utmost of its own resources"". This leaves the question of what constitutes the "utmost of its own resources", given the competing social, economic, and environmental needs, to individual State Parties ([218]). That is confirmed by the wording of article 5, which obliges states to endeavour "as far as possible", and "as appropriate" to comply with paragraphs (a) to (e) ([219]). The "broad language of these Articles is compatible with a State adopting a regime whereby a balance may be drawn between the protection against harm of a WHS or its assets and other objectives and benefits and, if judged appropriate, to give preference to the latter". The Convention "does not prescribe an absolute requirement of protection which can never be outweighed by other factors in a particular case" ([220]). As for the decision of the High Court of Australia in *Australia v Tasmania* [1983] HCA 21, Holgate J. pointed to the fact that the Convention had been incorporated into Australian law, and in any event the court had emphasised the discretion left to individual State Parties in the steps each would take and the resources it would commit ([221]).

137. Ground 6 of the appeal states:

> "6. When it came to the World Heritage Convention, the judge was wrong in law:
>
> (a) not to treat interpretation of the Convention as a matter for the court;
> (b) anyway, to hold that the Secretary of State's view on compliance with it here was tenable."

138. Central to this issue is the question of approach. Should the court seek merely to establish whether the Secretary of State's own understanding of the relevant provisions of the World Heritage Convention was "tenable" or should it attempt to establish for itself the proper interpretation of those provisions by applying orthodox principles of construction?

139. In *Corner House* a challenge was brought to the Director's decision not to pursue an investigation into suspected fraud in dealings between the government of Saudi Arabia and BAE Systems, a UK-registered company engaged in the manufacture of arms. Because of that investigation the government of Saudi Arabia threatened to withdraw from bilateral arrangements with the UK government for co-operation on counter-terrorism. In the ensuing litigation the House of Lords considered whether national and international security was a relevant factor under article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) ("the OECD Convention"), an unincorporated treaty.

140. Lord Bingham, with whom Lord Brown, Lord Hoffmann and Lord Rodger agreed, did not state a concluded view on the interpretation of article 5, as it was clear that the same conclusion would have been reached by the Director had there been a breach of that provision. However, he expressed unease at the prospect of the court undertaking the task of interpreting unincorporated international obligations without the benefit of substantial case

law as a basis for that exercise ([44] of his speech). Lord Brown, with whom Lord Rodger agreed, said this:

> "65. Although, as I have acknowledged, there are occasions when the court will decide questions as to the state's obligations under unincorporated international law, this, for obvious reasons, is generally undesirable. Particularly this is so where, as here, the contracting parties to the Convention have chosen not to provide for the resolution of disputed questions of construction by an international court but rather (by article 12) to create a Working Group through whose continuing processes it is hoped a consensus view will emerge. … For a national court itself to assume the role of determining such a question (with whatever damaging consequences that may have for the state in its own attempts to influence the emerging consensus) would be a remarkable thing, not to be countenanced save for compelling reasons."

141. In Lord Brown's view no such "compelling reasons" existed. First, there was an "absence of any jurisprudence whatever on the point", which was "a deep and difficult question of construction of profound importance to the whole working of the Convention". Secondly, in the case before the court the Director would have made the same decision if there had been a breach. As Lord Brown said, "[all] that [the Director] and the Attorney General were really saying was that they believed the decision to be consistent with article 5", and "[this] clearly they were entitled to say: it was true and at the very least obviously a reasonable and tenable belief" ([66]). He referred to an article by Philip Sales Q.C. (as he then was) and Joanne Clement (as she then was) arguing that the court should adopt a "tenable view" approach when scrutinising the Government's interpretation of unincorporated treaties ([68]). And he concluded:

> "68. … The article goes on to suggest that the [approach in *R. v Secretary of State for the Home Department, ex parte Launder* [1997] 1 W.L.R. 839] must indeed be subject to limitations, dependent perhaps upon "the intensity of judicial scrutiny judged appropriate in domestic law terms in the particular context". I have no doubt this is so and that the question will require further consideration on a future occasion. I have equally no doubt, however, that in this particular context the "tenable view" approach is the furthest the court should go in examining the point of international law in question and, as I have already indicated, it is clear that the Director held at the very least a tenable view upon the meaning of article 5."

142. The "tenability" approach was considered again by Lord Sumption in *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62. In that case a Moroccan national living in the UK with permanent leave to remain had attempted to bring a claim in the Employment Tribunal after being dismissed as a domestic worker at the Sudanese Embassy in London. The question at issue was whether sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978, the effect of which was that Sudan was immune in the face of Ms Benkharbouche's claim, were consistent with article 6 of the European Convention on Human Rights and the European Union Charter of Fundamental Rights, which had direct effect. The Supreme Court had to consider whether, under customary international law on state immunity, state employers are entitled to absolute immunity. Lord Sumption recognised (at [35] of his judgment) that "[there] are circumstances in which an English court considering the international law obligations of the United Kingdom may properly limit itself to asking whether the United Kingdom has acted on a "tenable" view of those obligations". He gave three examples where he thought such an approach could be appropriate:

> "35. … [The] court may in principle be reluctant to decide contentious issues of international law if that would impede the executive conduct of foreign relations. Or the rationality of a public authority's view on a difficult question of international law may depend on whether its view of international law was tenable, rather than whether it was right. … Or the court may be unwilling to pronounce upon an uncertain point of customary international law which only a consensus of states can resolve."

However, he went on to say (in the same paragraph):

> "… But I decline to treat these examples as pointing to a more general rule that the English courts should not determine points of customary international law but only the "tenability" of some particular view about them. If it is necessary to decide a point of international law in order to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer. In the present cases, the law requires us to measure sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978 against the requirements of customary international law, something that we cannot do without deciding what those requirements are."

143. More recently, in *R. (on the application of Friends of the Earth) v Secretary of State for International Trade/UK Export Finance ("UKEF")* [2023] EWCA Civ 14, the Court of Appeal (Sir Geoffrey Vos M.R., Bean L.J. and Sir Keith Lindblom, Senior President of Tribunals) applied the test of "tenability" to the minister's interpretation of the Paris Agreement when deciding to provide government funding for a project to extract liquid natural gas in Mozambique. Giving the judgment of the court, the Master of the Rolls stated these conclusions on the "tenability issue":

> "40. …
>
> i) The Paris Agreement is pre-eminently an unincorporated international treaty that does not give rise to domestic legal obligations.
>
> ii) The question of whether funding the project was aligned with the UK's international obligations under the Paris Agreement is accepted to be justiciable.
>
> iii) The Paris Agreement was, however, only one of a range of factors to which the respondents decided to have regard in reaching the decision.
>
> iv) The question of whether it was an error of law for the respondents to have concluded that funding the project was aligned with the UK's obligations under the Paris Agreement must be judged by considering whether the decision-makers adopted a tenable view of that question.
>
> …
>
> vi) UKEF's view was indeed a tenable one, bearing in mind the huge complexities explained in the CCR.
>
> … ."

144. He distilled the reasons why the decision was to be judged by the "tenability" standard:

> "50. …
>
> i) We accept the respondents' submissions summarised at [26]-[30] above and reiterate our conclusions summarised at [40] above.
>
> ii) The respondents in this case chose, but were not compelled by domestic law, to take into account the UK's obligations under an unincorporated treaty that formed no part of it.
>
> iii) There is a lack of clear guidance as to how unincorporated treaties like the Paris Agreement should be construed as a matter of domestic law. The approach mandated by the VCLT does not remedy the absence of parameters that, for example, existed in the case of the ECHR in *Launder*, but do not exist here.
>
> iv) The Paris Agreement, therefore, was one of a range of factors to which the respondents decided to have regard in reaching the decision. It is not for the courts to allocate weight as between competing factors. Moreover, to make it necessary for the domestic courts definitively to construe unincorporated treaties every time the executive decided to have regard to them in making decisions would be problematic and unworkable for the reasons explained in *Corner House*.
>
> … ."

145. Ms Hutton relied on the decision of the Court of Appeal in *R. (on the application of EOG) v Secretary of State for the Home Department* [2022] EWCA Civ 307. That case concerned Chapter III of the Council of Europe Convention on Action against Trafficking in Human Beings 2005 – an unincorporated treaty to which the Government had given effect through policy, as mandated by section 49 of the Modern Slavery Act 2015. The court had to consider the meaning of the domestic policy guidance in order to give effect to Chapter III. In this case, however, the court is not being asked to interpret government policy or guidance in accordance with international obligations. It is being asked whether the Secretary of State adopted a lawful approach to the World Heritage Convention when considering, under section 104(3) and (4) of the 2008 Act, whether applying the relevant policy in the NPSNN would involve a breach of the UK's international obligations. The situation considered in *EOG* gave rise to a conventional challenge on established public law grounds to the decision-maker's application of policy.

146. In the light of relevant authority it seems clear that deciding whether the "tenability" approach is the appropriate means of reviewing the Government's understanding of an unincorporated international obligation will always depend on the circumstances of the individual case. The domestic courts have been inclined to caution in this area, heeding the constitutional and practical difficulties that can arise when the court sets about interpreting unincorporated treaties for itself (see the speeches of their Lordships in *Corner House*, at [44], [65], [66] and [68]; the judgment of Lord Sumption in *Benkharbouche*, at [35]; and the judgment of this court in *UKEF*, at [26], [29], [49] and [50].

147. Without seeking to lay down an exhaustive or definitive list, one can take from the case law some of the factors that the domestic courts have found significant. Seven considerations

emerge: first, any previous case law or guidance on the interpretation of the obligation in question (Lord Bingham in *Corner House*, at [44], and Lord Brown, at [66]; and the judgment of this court in *UKEF*, at [50 (iii)]); second, the effect the interpretation will have on the conduct of international relations (Lord Bingham in *Corner House*, at [44]; and Lord Sumption in *Benkharbouche*, at [35]); third, the availability of other means to derive the interpretation of the obligations in question (Lord Bingham in *Corner House*, at [45]; and Lord Brown, at [65]); fourth, the importance of the interpretation to the operation of the treaty or international obligation (Lord Brown in *Corner House*, at [66]); fifth, the difficulty of interpreting, or ambiguity in the terms of, the obligation (Lord Brown in *Corner House,* at [66]; and Lord Sumption in *Benkharbouche*, at h [35]); sixth, the question whether the correct interpretation is necessary to decide a justiciable issue (Lord Sumption in *Benkharbouche*, at [35]); and seventh, the question whether the decision-maker was compelled by domestic law to take into account the obligations in question (the judgment of this court in *UKEF*, at [40(iii)] and [50(ii)]).

148. Ms Hutton said the Secretary of State's contention that articles 4 and 5 of the World Heritage Convention allow for the kind of balancing exercise envisaged in [5.133] and [5.134] of the NPSNN was contrary to the proper interpretation of the Convention, and also that this was not a "tenable" construction. She submitted that Holgate J. was wrong to adopt the tenability approach in *Stonehenge 1*. A potential breach of the Convention was a mandatory consideration under section 104 of the 2008 Act. The discretion given to the Secretary of State in deciding whether such a breach has occurred did not relieve the court of its duty to make its own interpretation of the relevant provisions. This case can be distinguished from *Corner House* and *UKEF* on that basis. And none of the circumstances identified by Lord Sumption in *Benkharbouche* as a possible justification for the court limiting itself to the "tenability" approach arises here. The true interpretation of articles 4 and 5, Ms Hutton argued, is that while State Parties have a discretion as to the means by which they protect and conserve World Heritage Sites, there is no discretion as to their protection from any harm. Under the Convention the cultural value of the World Heritage Site overrides all other considerations. The Secretary of State wrongly conflated the test in paragraphs 5.133 and 5.134 of the NPSNN with the test under the Convention.

149. Relying on Holgate J.'s judgment in *Stonehenge 1* (at [210] to [223]), Mr Pleming and Mr Taylor submitted that the "tenability" approach should be adopted in this case. Mr Pleming and Mr Harwood emphasised the broad wording of articles 4 and 5 of the World Heritage Convention, which, they submitted, leaves much to the discretion of State Parties when creating policy to protect World Heritage Sites within their territories. On any sensible interpretation, articles 4 and 5 did not prohibit any harm whatsoever to World Heritage Sites, nor preclude the kind of balancing exercise envisaged in the NPSNN.

150. Sharing the conclusions of Holgate J. in the court below and his relevant reasoning in *Stonehenge 1*, we think the submissions made on this issue for the Secretary of State, National Highways and Historic England are correct. In our view the Secretary of State was right to take the view he did on the meaning and effect of articles 4 and 5 of the Convention, whether applying the "tenability" test – which we think is the correct approach here – or on a straightforward interpretation following orthodox principles of construction.

151. Section 104 of the 2008 Act does not explicitly require the Secretary of State to act in compliance with international law when determining an application for development consent. However, section 104(3) requires him to determine an application "in accordance with any

relevant national policy statement, except to the extent that … subsections (4) to (8) apply". Section 104(4) applies "if the Secretary of State is satisfied" that determining the application in accordance with a relevant national policy statement "would lead to the United Kingdom being in breach of any of its international obligations". Thus a consequence of the Secretary of State being satisfied that international law would in those circumstances be breached is that he is then free not to decide the application in accordance with the national policy statement in question.

152. On this understanding of the statutory provisions, and in the light of the relevant case law, we think the correct approach in this case is to apply the "tenability" test. As Holgate J. emphasised in his judgment in *Stonehenge 1* (at [212] to [215]), the World Heritage Convention has not been incorporated into domestic law. The provisions of section 104(3) and (4) of the 2008 Act do not give effect to any of the obligations in the Convention. Their effect is to make the Secretary of State's being satisfied that there is a breach of those obligations one of the statutory grounds for not having to apply policy in a relevant national policy statement.

153. The fact that under the regime for development consent in the 2008 Act the Secretary of State's consideration of the provisions of the World Heritage Convention has been placed on this statutory footing does not, in our view, distinguish this case materially from *Corner House* or *UKEF*. This, however, is not crucial in itself, and there are several other considerations favouring the "tenability" approach in this case. First, there is a dearth of domestic case law bearing on the interpretation of articles 4 and 5. Given the importance of those provisions to the operation of the World Heritage Convention as a whole, this consideration deserves significant weight. Secondly, articles 4 and 5 describe the duties, including the duty of "protection", that the Convention places upon a State Party. The meaning contended for by Ms Hutton could result in extreme consequences that cannot have been intended. To define the duty of "protection" in such a way would have major implications for the conduct of State Parties in their stewardship of World Heritage Sites. Thirdly, a specific interpretation of articles 4 and 5 is not necessary for deciding a justiciable issue in this case. The circumstances here are not analogous to *Benkharbouche*. The unincorporated obligations only have relevance through section 104(4) of the 2008 Act, which confers on the Secretary of State discretion to disapply a national policy statement.

154. Overall, we do not think there are compelling reasons in this case for the court to undertake its own interpretation of the contested provisions of the World Heritage Convention. Ms Hutton's argument relies largely on the absence of characteristics that in other litigation have been found convincing, rather than a positive and clear basis for putting the "tenability" approach to one side. Given the circumspection shown by the courts when faced with disagreements over the interpretation of unincorporated treaty obligations, and the principles applied, we think the "tenability" approach is appropriate here.

155. Was it tenable for the Secretary of State to construe and apply articles 4 and 5 of the World Heritage Convention as allowing the kind of balancing exercise envisaged by the NPSNN? In our view it was. And this, we think, was also correct on the proper interpretation of those provisions.

156. Articles 4 and 5 must be read together. Article 4 expresses each State Party's recognition of the general "duty", among other things, "of ensuring the … protection and conservation" of World Heritage Sites in its territory, and its commitment "to do all it can to that end, to

the utmost of its own resources …". Article 5 elaborates the specific steps that a State Party will "endeavor" to take to ensure that "effective and active measures are taken" for, among other things, the protection and conservation of World Heritage Sites in its territory.

157. Neither article 4 nor article 5 expresses an absolute prohibition on any heritage harm being allowed to occur to a World Heritage Site. The objectives and commitments they state are cast at a high level and in general terms. The broad language in them does not exclude the possibility that in particular circumstances, not defined, some harm to a World Heritage Site might be permissible. Article 4 expresses the commitment of the State Party to "do all it can … to the utmost of its own resources" to protect any World Heritage Site in its territory. This is not an unqualified requirement, either in its own terms or when read with article 5. The steps identified in article 5 as necessary to achieving such protection must be implemented "in so far as possible, and as appropriate to each country".

158. Contrary to Ms Hutton's submission, the concept in article 4 of a State Party doing "all it can … to the utmost of its own resources", taken in context, does not mean that the protection of a World Heritage Site must in every circumstance be given absolute priority over all other considerations – social, economic and environmental – and have unlimited resources committed to it, to ensure the total avoidance of harm. This might have been so if the requirement were simply an unqualified obligation for each State Party to do everything that might in theory be done, without limit of resources. But it is not. Article 4 implicitly recognises that there may be practical limitations on the extent to which a particular State Party can protect a particular World Heritage Site within its territory. It does not prevent State Parties from striking a balance of competing considerations in their decision-making affecting the conservation of that World Heritage Site. Those factors are not prescribed. According to the individual State Party's own circumstances, however, they may be taken to extend, for example, to the exigencies of economics or security, and to other environmental considerations, including the removal of existing adverse impacts upon the World Heritage Site itself. In allowing scope for the exercise of decision-making discretion, article 4 contemplates that there will be circumstances in which permitting some harm to a World Heritage Site may be judged necessary and justified in the public interest.

159. One sees similar latitude in the language of article 5, which also recognises the practical limitations that State Parties may face in discharging their commitments. Article 5 requires the State Party to "endeavor" to pursue the steps referred to "in so far as possible, and as appropriate for each country". What is "possible" and what is "appropriate" are left to the State Party itself. The same principle flows through the sub-paragraphs setting out the specific measures. Thus a State Party must endeavour to "take appropriate legal … measures necessary for the … protection" of a World Heritage Site in its jurisdiction (paragraph (d)).

160. Our understanding of articles 4 and 5 is not inconsistent with the purpose of the World Heritage Convention to protect cultural heritage of this importance. It does not diminish the commitment expressed in article 4 – for a State Party to do all it can to protect World Heritage Sites to the utmost of its own resources. To take an extreme example, it plainly does not mean – as Ms Hutton suggested at one stage in argument – that the UK Government could ever reconcile those obligations with the construction of a "motorway" through Stonehenge if it considered the public benefits of building such a road outweighed the catastrophic harm to cultural heritage. Approving infrastructure with anything approaching that kind of impact on a World Heritage Site would be utterly inconceivable, and far beyond the range of effects permissible without damaging the State Party's commitments in articles 4 and 5. It would

also be impossible to imagine how such a scheme could ever meet the high bar of "necessity" identified in paragraph 5.133 of NPSNN. We hardly need add that any balancing exercise conducted by a State Party in decision-making on a proposal for development affecting a World Heritage Site must recognise and give great weight to the need to safeguard its "outstanding universal value". Anything less would be liable to undermine the State Party's commitments in the Convention, and especially its commitment to "protection".

161. Save Stonehenge sought to rely on the decision of the High Court of Australia in *Australia v Tasmania* [1983] HCA 21. In that case the Commonwealth Government attempted to prevent the Tasmanian Government from building a hydro-electric dam in the Tasmanian Wilderness World Heritage Area, relying on federal legislation incorporating the World Heritage Convention into domestic law. In deciding whether the legislation introduced by the Commonwealth Government was lawful, six of the seven judges considered whether articles 4 and 5 of the World Heritage Convention imposed an obligation on the State Party.

162. Gibbs C.J. thought it was "impossible to conclude" that those provisions imposed a "duty to do what was reasonably possible and fitting in the circumstances" to protect a heritage site, given the onerous nature of such a duty ([69] of his judgment). They did not impose on any State Party an obligation to take any specific action ([72]). Mason J. referred to the "more qualified terms" of the duty in article 4 ([29]), but held that article 5 imposed "a series of obligations" ([30]). He observed that the qualification "in so far as possible" meant "in so far as is practicable", and that the words "as appropriate for each country" took account of different legal systems. The obligations imposed, he said, are "subject to the qualifications mentioned" ([31]). Murphy J. held that "the Convention, in particular Art. 5, imposes a real obligation" ([62]). Wilson J. said the second sentence of article 4 was "[at] most … a promise by each party to do what it can to advance the objectives of the Convention", and that "[there] is no resort to the language of obligation" ([18]). He was also unconvinced that article 5 imposed any binding commitments, concluding that "the objectives are of such general and wide-ranging content that they are properly described as aspirations" ([20]).

163. Brennan J. concluded that "the second sentence of Art. 4 and its expansion in Art. 5 specify the commitment of the State Party on whose territory the relevant property is situated" ([36]). He acknowledged the "non-specific" language used ([37]). However, he concluded:

> "41. … Each party is bound to "do all it can . . . to the utmost of its own resources" and the question whether it is unable to take a particular step within the limits of its resources is a justiciable question. No doubt the allocation of resources is a matter for each party to decide and the allocation of resources for the discharge of the obligation may thus be said to be discretionary, but the discretion is not at large. It must be exercised "in good faith", as Art. 26 of the Vienna Convention requires. If a party sought exemption from the obligation on the ground that it had allocated its available resources to other purposes, the question whether it had done so in good faith would be justiciable."

164. Dawson J. recognised that articles 4 and 5 established an "obligation" on parties ([36]), but went on to say:

> "40. What emerges from the Convention with clarity is the extreme care which has been taken to affirm the right of individual parties to determine not only what constitutes the cultural and natural heritage situated upon its territory which is deserving of international attention, but also the right to determine whether it is possible or appropriate to endeavour

> to take the measures suggested by the Convention for the protection, conservation and presentation of that heritage. The Convention recognizes plainly that in this field of endeavour there can be no absolute imperatives and that difficult decisions must be made which involve the compromise of environmental, social and economic values. Those decisions are left to the individual parties to the Convention with the exhortation that they should endeavour, in so far as possible, and as appropriate for each country, to identify and conserve their heritage. …".

165. None of those judgments goes against our own understanding of articles 4 and 5. Those of Mason and Dawson JJ. align well with it. Mason J.'s conclusion that "in so far as possible" means "in so far as is practicable" acknowledges the care taken by the authors of the World Heritage Convention to recognise the practical limitations of what State Parties can do to achieve the protection and conservation of World Heritage Sites.

166. Applying our conclusions on the meaning and effect of articles 4 and 5 of the Convention, we think the Secretary of State was lawfully entitled to conclude that approving the proposed development in this case would not lead to a breach of those provisions. The scheme was directed at two significant problems, both of which had existed for many years – first, the high levels of traffic congestion on that stretch of the A303, one of the main transport arteries between London and the South-West of England, and second, the presence in the World Heritage Site of a major road on which the movement of vehicles is both visible and audible from the henge. The Secretary of State accepted that the scheme would overcome those two problems. He concluded that there would be "less than substantial harm" caused to the wider World Heritage Site, and that, while he gave "great weight to that harm", this was outweighed by the other public benefits. The lawfulness of that conclusion, as a matter of planning judgment, is not challenged in these proceedings. The Secretary of State also rejected the suggested "alternatives", which he found, again as a matter of planning judgment, might mitigate harm to the World Heritage Site itself but would either be prohibitively expensive or would have other disadvantages telling conclusively against them. Properly understood, articles 4 and 5 of the Convention did not require him to reject as impermissible the striking of a balance in which he gave appropriate weight to the "less than substantial harm" to the World Heritage Site and to the countervailing benefits, including advantages for cultural heritage, the meeting of transport need, and the economic considerations, including cost. Nor did they require him to strike that balance, contrary to his own planning judgment, against granting development consent.

167. On both a tenable understanding of the relevant provisions of the World Heritage Convention, therefore, and also in our view on the proper interpretation of those provisions in accordance with normal principles of construction, the Secretary of State could lawfully approve the project without offending or jeopardising the UK's international obligations. His decision to grant development consent, for the reasons he gave, was not at odds with the duty under article 4 of ensuring the protection and conservation of the World Heritage Site, nor with the UK's commitment to doing "all it can to this end, to the utmost of its resources …". Nor was it at odds with the UK's commitment in article 5 to ensure that the required measures were taken for the protection and conservation of the World Heritage Site, and to endeavour to take the specified steps, "in so far as possible, and as appropriate for" the UK. His decision letter shows a conscious adherence to the UK's commitments and obligations under the Convention, and a lawful understanding of them.

168. For those reasons, whilst we would have granted leave for ground 4 of the claim to be argued, we would reject it on its merits.

The fourth main issue – whether the risk of the World Heritage Site being delisted was adequately considered

169. On ground 3 of the claim for judicial review Holgate J. said (at [217] of his judgment) that the criticism of the Secretary of State's reasons for giving no weight to the risk of delisting in paragraph 101 of the decision letter "should be seen in the context of three points in the [parties'] statement of common ground":

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

170. The judge then considered the three reasons given in [101] of the decision letter. First, on the separate process for delisting, he said:

> "218 … [Any] question of delisting would be a separate process in which the key issue in the discussion between the WHC and the UK would be whether Stonehenge has *lost* those characteristics of OUV which determined its inscription as a WHS. Neither the SST nor the UK Government has accepted that those characteristics would be "lost". In my judgment, the SST was entitled not to second guess the outcome of any consideration by the WHC of delisting, if that separate process were to be put in train."

171. On the second reason, the judge observed that the reference in [101] of the decision letter to the NPSNN showed that the Secretary of State had "had in mind the approach approved in *Stonehenge 1*" and "his legally unimpeachable finding that the scheme would cause 'less than substantial harm'" ([219]). He went on to say:

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

172. On the third reason, Holgate J. recognised that "the scheme put forward in support of the DCO is to some extent in outline" and "[Historic England] attached importance to the

mechanisms in the detailed design stage for achieving improvements". He saw "no unlawfulness in the SST's reliance upon this third reason in combination with the first and second reasons" ([221]).

173. Ground 5 of the appeal states:

> "5. The Judge erred in failing to find that (a) the latest decision of the World Heritage Committee was a mandatory material consideration to be taken into account when considering the risk of de-listing of the [World Heritage Site], (b) having concluded that there was some risk of de-listing it was unlawful for the Secretary of State to fail to have regard to the consequences of de-listing of the World Heritage Site and (c) the Secretary of State's reasoning on this issue was irrational."

174. Ms Hutton made three main submissions on this issue. First, the Secretary of State ought to have considered "Decision 44" under section 104(2)(d), or else it was an "obviously material consideration". Its publication was the first occasion on which the World Heritage Committee had said that granting consent for the scheme could lead to the World Heritage Site's inscription on the List of World Heritage in Danger. Deletion from the World Heritage List was a potential next step. The World Heritage Committee would be responsible for taking that decision. The failure of the Secretary of State to consider "Decision 44" was therefore an error of law. Secondly, having identified the risk of delisting as a potentially material consideration, the Secretary of State was obliged also to consider the likely effects of delisting – such as national embarrassment and loss of tourism to the World Heritage Site. His failure to do so was unlawful. And thirdly, the Secretary of State's reasons for giving no weight to the risk of delisting were irrational. The fact that the decision to delist the World Heritage Site would be a separate process was immaterial. There was a direct link between granting consent for the scheme and the process of delisting. The scheme's compliance with the NPSNN and World Heritage Convention – as the Secretary of State had found – was also immaterial. Articles 4 and 5 of the World Heritage Convention did not identify criteria to be applied when a decision is being made whether to delist a World Heritage Site. And the Secretary of State's reliance on a continuing dialogue between National Highways and the World Heritage Committee's advisory bodies was negated by paragraph 10 of "Decision 44", which says "it is unclear what might be achieved by further engagement unless and until the design is fundamentally amended".

175. In response, Mr Pleming took us to Annex F of the ministerial briefing, and to the Secretary of State's full reasoning in [100] and [101] of his decision letter, which summarise the ICOMOS reports and show that he had been briefed on the risk of delisting. Both Mr Pleming and Mr Taylor argued that the World Heritage Site being placed on the List of World Heritage in Danger was not itself an outcome with which the Secretary of State had to concern himself – first, because that alone would not change the status of the World Heritage Site, and secondly, because the criteria for inscription on that list are different from the considerations on which a site can be removed from the World Heritage List. As for the reasons given by the Secretary of State in paragraph 101, all three respondents argued that he was entitled to take into account the fact that delisting was a separate process. Mr Harwood submitted that his reliance on the scheme not being in breach of the UK's obligations under the World Heritage Convention was lawful and indicated a much lower risk of delisting than Stonehenge Alliance feared. Mr Taylor submitted that the continuing dialogue between National Highways and the advisory bodies was also relevant. There was scope for changes

to be made to the scheme in the further stages of design, which could reduce its effects on the World Heritage Site.

176. In our view the Secretary of State's conclusion that "no weight" should be given to the risk of delisting was not irrational as a matter of planning judgment, nor did he take into account immaterial considerations.

177. The conclusions in [101] of the decision letter must be read in context. There are, we think, four points in the wider assessment that are relevant here, some in passages we have quoted, others not. The first is the Secretary of State's conclusion, in [82] of the decision letter, that the project will lead to "less than substantial harm" to the World Heritage Site. This followed a careful consideration of the examining authority's conclusions and the representations made by National Highways, Historic England, the National Trust, Wiltshire Council and other interested parties, including Stonehenge Alliance (see [60] to [82] of the decision letter). In [73] of the decision letter the Secretary of State said that while he "[agreed] with the ExA that there will be harm on spatial, visual relations and settings", he "[preferred] Historic England's view on this matter", and was "satisfied … that the harm on spatial, visual relations and settings is less than substantial". He relied on this conclusion in his later assessment.

178. The second point is the Secretary of State's acknowledgment, in [75] to [77] of the decision letter, of the possibility of further advice from Historic England during the detailed design stage, and the construction, operation and maintenance of the development to protect the "outstanding universal value" of the World Heritage Site.

179. Third is the Secretary of State's conclusion, in [100] and [185] to [187], that approving the scheme would not breach the UK's obligations under the World Heritage Convention, so that a decision to grant development consent would not be in breach of the World Heritage Convention. As we have said, this was a conclusion he was entitled to draw and on which he was entitled to rely.

180. Fourthly, much of the assessment in [100] and [101] of the decision letter deals with the specific recommendations of the ICOMOS Mission Report. Some of the recommendations in that report were also dealt with elsewhere in the decision letter. These included recommendations 3 to 8, to the effect that the tunnel should be lengthened to avoid disruption within the World Heritage Site's boundaries. Those recommendations were addressed by the Secretary of State when considering "alternatives". The penultimate bullet point in [101] rejects recommendations 21 and 22, to the effect that development consent should be withheld until the application had been modified to meet recommendations 3 to 8, in the light of "the reasons for granting development consent … detailed in this letter". The second, third, fourth, fifth, and sixth bullet points in [101] list the specific recommendations not dealt with elsewhere in the decision letter. The exercise undertaken in [101] answers the specific concerns raised in the Mission Report, addressing the deficiencies in the proposal identified by ICOMOS. By doing this, the Secretary of State was, in effect, answering the assertion that the status of the World Heritage Site was at risk.

181. It is in this context that the final bullet point of [101] must be read. The first sentence lists the relevant submissions, including those of Stonehenge Alliance and ICOMOS-UK, which had raised the risk of the World Heritage Committee removing the World Heritage Site from

the World Heritage List. The second sentence lists the reasons for giving that risk no weight. That sentence contains four reasons: first, the separate process for delisting; second, the proposal's compliance with the NPSNN; third, its compliance with the World Heritage Convention; and fourth, National Highways' continuing work with "advisory bodies".

182. The first reason acknowledges that the process of delisting is beyond the powers of the Secretary of State. But this must be read with the rest of the sentence. The Secretary of State's conclusion that no weight should be given to the risk of delisting recognised that while the outcome of a decision to delist the World Heritage Site was not in his control, he was nevertheless satisfied that the World Heritage Site had been adequately protected in accordance with both domestic policy and international obligations. It is grounded in his judgment that the proposed development would cause "less than substantial harm" to the World Heritage Site. Compliance with policy in the NPSNN and with the commitments in the World Heritage Convention went to reinforce the likelihood that the World Heritage Site would not be delisted. It was not irrational for the Secretary of State to rely on these considerations. The final reason is also valid. The Secretary of State accepted that continued advice as the scheme developed would serve to reduce adverse effects on the World Heritage Site. The fact that the World Heritage Committee's "Decision 44" said it was "unclear what might be achieved by further engagement unless and until the design is fundamentally amended" does not disturb that conclusion. This statement was made in the light of the committee's finding that granting development consent could result in the World Heritage Site being placed on the List of World Heritage in Danger. It did not anticipate delisting being the outcome unless the scheme was amended.

183. We do not accept that "Decision 44" was a mandatory material consideration for the Secretary of State, and that the absence of any treatment of it in the ministerial briefing was therefore an error of law. The significant question here was the risk of the World Heritage Site being delisted. The World Heritage Committee's decision that granting development consent would lead to the World Heritage Site being inscribed on the List of World Heritage in Danger was only relevant to the extent, if at all, that it affected the risk of delisting. We do not think "Decision 44" had to be seen as increasing the risk of delisting so that it was irrational for the Secretary of State not to consider it as an additional factor.

184. The risk of delisting was explicitly referred to at [8] in the ministerial briefing dated 23 May 2023, and the text that became [101] of the decision letter was drawn to the Secretary of State's attention. Annex F to the ministerial briefing summarises the interested parties' responses to the ICOMOS Mission Report. Annex F drew attention to the World Heritage Committee's power to delist (at [10]), and to the World Heritage Committee's then forthcoming 45th session, at which a final decision on inscription on the List of World Heritage in Danger would be made ([16] to [18]). The first bullet point in [101] of the decision letter contemplated delaying the decision until after the 45th session, but concluded that doing so would unnecessarily delay the benefits of the proposed development. Annex F and [101] of the decision letter both dealt with the recommendations in the Mission Report, and thus the reasons why the World Heritage Committee might exercise its power to delist.

185. It was not necessary for the Secretary of State to consider "Decision 44" separately. The only new information it would have provided was that the World Heritage Committee now considered that granting development consent would justify the World Heritage Site being placed on the List of World Heritage in Danger. The criteria for inscription on that list are not the same as those for delisting, nor is inscription on the list a pre-requisite to delisting.

Under the Operational Guidelines for Implementation of the World Heritage Convention, at [190] and [191], a consequence of inscription on the List of World Heritage in Danger is the carrying-out of regular reviews, which will enable the World Heritage Committee to decide on three options: requiring additional conservation measures, removing the property from the List of World Heritage in Danger, or removing it from the World Heritage List. The Secretary of State was plainly aware of that third option. The threat of inscription on the List of World Heritage in Danger did not increase the risk of delisting to the extent that it was unlawful for him not to consider "Decision 44" as a separate matter.

186. Once it is accepted that the Secretary of State was entitled to give no weight to the risk of delisting, it follows that he was entitled not to consider the effects of delisting. It would be surprising for a decision-maker in such circumstances to conclude that a risk should be given no weight but nevertheless to go on to give weight to the effects of that risk materialising.

187. The judge was therefore right to refuse permission on this ground.

188. None of this means that the Secretary of State's conclusion on this question was the only reasonable view. Another decision-maker might have reached a different, though equally lawful conclusion. In the sphere of land use planning, judicial review does not generally require that no other decision could rationally and lawfully have been made. It requires that the decision actually made by the body given the task of making it should be a rational and lawful decision for that decision-maker to make in the circumstances. The freedom allowed to a decision-maker in exercising evaluative judgment on the particular facts of the case in hand is vital in our planning system. It protects decisions from needless challenge, and ensures that the resources of the court are not wasted on proceedings that should never have been brought before it.

189. We should add that in the Government Legal Department's letter to the Civil Appeals Office dated 9 August 2024 we were told that UNESCO had, on that day, published the decision of the World Heritage Committee not to put the World Heritage Site on the List of World Heritage in Danger and to review the matter in the light of an updated "State of Conservation Report" in 15 months' time. This fact, coming after the event as it did, does not affect our conclusion on this issue.

The fifth main issue – the NPSNN review

190. On ground 6 of the claim Holgate J. held (in [250] of his judgment) that the Secretary of State "did have regard to the implications of the proposed scheme for the net zero target and the carbon budgets, including the sixth carbon budget, and did take into account the policies in the TDP" and concluded that the scheme "would not materially impact on the Government's ability to meet its statutory climate change objectives". As for the submission that the NPSNN policies might change because of the review, the judge pointed to the Secretary of State's conclusion in [21] of the decision letter that there was nothing in the draft NPSNN that would have led to a different conclusion ([253]). This was a judgment he was entitled to make ([254]). In Holgate J.'s view the relevant textual differences "do not begin to show that the SST's judgment in DL 21 was irrational" ([255]).

191. Ground 7 of the appeal states:

"7. The Judge erred in law in treating domestic climate change policy developments as sufficient to account for the NPSNN review for section 104(4) and (5) purposes such that:

(a) the NPSNN review meant there had been a significant change of circumstances for the purposes of the NPSNN policy test; and
(b) the draft NPSNN had been mandatory considerations for the Minister which he had not lawfully considered; alternatively, they were matters for [section] 104(2)(d)."

192. Mr Wolfe submitted that the reason for the review of the NPSNN – a change in international law brought about by the Paris Agreement – and the text of the draft NPSNN were "obviously material considerations" for the Secretary of State under section 104(4) and (5) of the 2008 Act, or matters he might personally have considered important and relevant in accordance with section 104(2)(d). The focus of the argument here was the omission of the trigger for the review from the briefing, and the contention that the Secretary of State failed to undertake the exercise required under section 104(4). Mr Wolfe argued that the policy set out in the NPSNN would have been materially different had it been drafted in line with the net zero target. Compliance with the extant NPSNN was not an answer to the need for compliance with the Paris Agreement. Where the outcome of a review is that a national policy statement must be amended, both the review and the reasons for it are "obviously material" considerations in ascertaining whether to grant development consent in accordance with the national policy statement would lead to a breach of domestic or international obligations.

193. Ms Grogan took us to several parts of the decision letter that show the decision was made in accordance with the new net zero target and the latest carbon budgets. The Secretary of State had answered the question in section 104(4). The new policy was in draft, and the Secretary of State had concluded it would not have made a difference to his decision. That conclusion was legally impeccable.

194. This issue can be dealt with briefly. In our view the Secretary of State's approach to the NPSNN review was unimpeachable. In [21] of the decision letter he referred to the draft NPSNN, concluding that it would not change his decision. Then, in the section dealing with "Carbon Emissions", he noted the UK's international obligations under the Paris Agreement, the resulting change to the Climate Change Act 2008, and the sixth carbon budget ([126], [127] and [165]). He considered the carbon emissions likely to be generated by the proposed development against the net zero target that had prompted the review ([134], [144], [147], [149], [152], [153], [167] and [238]) and found the scheme consistent with the "UK's trajectory towards net zero" ([167]). That assessment has not been criticised.

195. The Secretary of State considered the relevant policy objective behind the draft NPSNN – to attain net zero ([126] to [167]). He also satisfied himself that his application of the relevant policies of the extant NPSNN did not breach domestic or international law. He said so expressly ([167]). It does not matter that he did not explicitly link his consideration of the draft NPSNN with his consideration of the net zero target. He was not obliged to do that. Nor did he have to address the exact wording of the draft NPSNN and identify the changes made. It remained merely in draft when he made his decision. He concluded that it would not change his decision. The policy he was required to follow was in the extant NPSNN.

196. We therefore reject this ground as unarguable.

Conclusion

197. For the reasons we have given, we dismiss the appeal on grounds 1 to 5 and 7. On ground 6 of the appeal, we allow the appeal against the refusal of permission to apply for judicial review, grant permission on ground 4 of the claim, but dismiss the claim itself.