Neutral Citation Number: [2025] EWCA Civ 669

Case No: CA-2024-002002

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
Mrs Justice Lieven
[2024] EWHC 2128 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2025

Before:

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

- -

Between:

THE KING (on the application of) ANDREW BOSWELL	**Appellant**
- and -	
THE SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO	**First Respondent**
-and-	
(1) NET ZERO TEESIDE POWER LIMITED (2) NET ZERO NORTH SEA STORAGE LIMITED	**Second Respondents**

- -
- -

Catherine Dobson, Isabella Buono and **Alex Shattock** (instructed by **Leigh Day**) for the **Appellant**
Rose Grogan (instructed by **Government Legal Department**) for the **First Respondent**
Hereward Phillpot KC and **Isabella Tafur** (instructed by **Freshfields LLP**) for the **Second Respondents**

Hearing dates: 4 and 5 March 2025

- -

Approved Judgment

This judgment was handed down remotely at 2pm on 22 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Sir Keith Lindblom SPT, Lord Justice Stuart-Smith and Lord Justice Holgate:

Introduction

1. At the heart of this case, and this appeal, lies a basic question bearing on planning decision-making under the regime for "nationally significant infrastructure projects" in the Planning Act 2008. Did the Secretary of State for Energy Security and Net Zero commit any legal error when assessing the significance of the greenhouse gas ("GHG") emissions likely to be caused by the operation of a proposed gas-fired electricity generating station with post-combustion carbon capture and storage ("CCS")? This is not a question that gives rise to any point of law new to this court.

2. The appellant, Andrew Boswell, appeals against the order of Lieven J made on 20 August 2024, by which she dismissed a claim for judicial review brought by Dr Boswell challenging the decision of the first respondent, the Secretary of State, on 16 February 2024, to grant the application of Net Zero Teesside Power Limited and Net Zero North Sea Storage Limited ("the second respondents") for a development consent order under section 114 of the Planning Act 2008 for a new gas-fired electricity generating station at Teesside with Carbon Capture Utilization and Storage ("CCUS").

3. Before the judge, there were four grounds of challenge, which she identified at [3] of her judgment. She rejected all four of them, for the reasons set out in her judgment given on 14 August 2024: [2024] EWHC 2128 (Admin).

The main issues in the appeal

4. In this court the appellant did not pursue the fourth ground, which challenged the Secretary of State's conclusion on the need for the project. Instead, he pursues three grounds of appeal, which effectively rehearse the remaining arguments pursued before the judge. Those grounds present us with three main issues:

    i) Whether the judge erred in deciding that the Secretary of State did not rely on the guidance issued by the Institute of Environmental Management and Assessment, entitled "Assessing Greenhouse Gas Emissions and Evaluating their Significance" ("the IEMA guidance"), in concluding that GHG emissions from the development would be a significant adverse impact, and so there was no inconsistency between this conclusion and the conclusion that the development supports the transition to net zero: see the judgment at [72]-[77] (ground 1);

    ii) Whether the judge erred in deciding at [81] of the judgment, that paragraph 5.2.2 of National Policy Statement EN-1 (2011) encapsulates the assessment of significance of GHG emissions for the purposes of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) ("the 2017 Regulations"), as well as the weight to be given to the assessment of significance as part of a planning balance exercise (ground 2); and

    iii) Whether the judge erred in finding at [72] of her judgment that the respondent was lawfully entitled to endorse the use of the IEMA guidance while at the same time assessing significance in a different way, and gave adequate reasons in relation thereto (ground 3).

Our approach to those issues

5. It is a truism to say, but worth repeating in a case such as this, that our task, like that of the court below, is only to establish whether the decision-making under challenge was lawful. Did the Secretary of State err in law as it is alleged she did, or not? That, and that alone, is what we must resolve.

6. As this court has recently emphasised, and not for the first time, in *Frack Free Balcombe Residents' Association v Secretary of State for Housing, Communities and Local Government* [2025] EWCA Civ 495 (see the judgment of Sir Keith Lindblom, Senior President of Tribunals at [8]), and in these proceedings too, we are not concerned in any way with the environmental, economic or social merits of the Government's energy policy, its ambition for a low carbon economy, or, in particular, its policy for attaining "net zero" within the timescale it has set for that endeavour. Nor are we concerned with the planning merits of the proposal for development with which this case is concerned. The "rule of law" as it bears on the legal protection of the environment – sometimes referred to nowadays as the "environmental rule of law" – relies on the independence and impartiality of the judiciary when deciding litigation in which it is at stake. The constitutional separation of functions requires that the courts are never drawn into the debate on the merits of policies adopted by the executive or legislation enacted by Parliament. That is not what we do. Personal opinions about the desirability of gas-fired electricity generation with CCS/CCUS as an element in the Government's strategy for combating climate change, including any views that we might conceivably have as citizens, those of counsel and, indeed, those of the parties themselves, are wholly irrelevant to our duty as judges and to the task before us here.

The legal framework

7. In *R (on the application of Friends of the Earth Ltd.) v Heathrow Airport Ltd.* [2020] UKSC 52; [2021] PTSR 190 at [19]-[38] the Supreme Court analysed the structure and main provisions of the Planning Act 2008. That need not be repeated here.

8. One of the objects of the Planning Act 2008 is that matters of national policy are to be settled through the designation of National Policy Statements ("NPSs"). Thereafter, representations which seek to challenge the merits of such policy may be disregarded by the Examining Authority and the Secretary of State when dealing with an application for a development consent order (sections 87(3), 94(8) and 106(1) of the Planning Act 2008).

9. NPSs are subject to an appraisal of sustainability (under section 5(3) of the Planning Act 2008) and strategic environmental assessment (under the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No.1633)). They are also subject to publicity and public consultation (under section 7) and to Parliamentary scrutiny (under sections 5(4) and 9). The Secretary of State may designate a NPS only if the House of Commons approves the document or that House has not resolved within 21 days of the NPS being laid before Parliament that it should not be proceeded with (section 5(4)).

10. Where a NPS has effect in relation to an application for a development consent order, the Secretary of State must decide the application having regard to that NPS (section 104(1) and (2)) and, save in so far as one or more of the exceptions in section 104(4) to

(8) applies, in accordance with that NPS (section 104(3)). Section 104(7) applies "… if the Secretary of State is satisfied that the adverse impact of the proposal would outweigh its benefits."

11. The relevant NPSs for the purposes of the Secretary of State's decision were EN-1 "Overarching National Policy Statement for Energy" and EN-2 "National Policy Statement for Fossil Fuel Electricity Generating Infrastructure". They were originally designated in 2011. The Secretary of State carried out a review of those NPSs under section 6 of the Planning Act 2008. She designated updated versions of those NPSs on 17 January 2024. The 2024 versions provide that the 2011 NPSs continue to apply to applications for a development consent order accepted for examination before that date.

12. Accordingly, both at the time when the Examining Authority submitted its report to the Secretary of State and when she made her decision to grant the order, the 2011 NPSs remained in force for the purposes of the Planning Act 2008, including section 104. Furthermore, the Examining Authority took into account as a material consideration the 2023 drafts of the updated versions of the NPSs, and the Secretary of State took into account as a material consideration the 2024 designated versions of those updates. The parties did not suggest that the issues in this appeal turn on any difference between the 2011 and the 2024 NPSs.

13. In this case, the Secretary of State considered that NPS EN-1 applied to the whole of the proposal and therefore section 104 of the Planning Act 2008 applied. She decided that the proposed development accorded with the relevant NPSs and that none of the exceptions in section 104(4) to (8) applied. In particular, she decided under section 104(7) that the benefits of the proposed development outweighed the harm that it would cause. In the alternative, the Secretary of State applied section 105 of the Planning Act 2008 on the assumption that section 104 was not applicable. She decided that on either basis the development consent order should be granted.

14. The principles on the interpretation of policy in a NPS are well-established and were summarised in *R (on the application of Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787 at [19] and *R (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWCA Civ 43; [2021] PTSR 1400 at [56]. The grounds upon which a claim for judicial review may be brought under section 118 of the Planning Act 2008 to challenge a decision to grant a development consent order are also well-established.

15. In her submissions for the appellant on ground 1, Ms Catherine Dobson alleged that there was an inconsistency between, on the one hand, the Secretary of State's conclusion that the GHG emissions from the development would amount to a "significant adverse effect" on the environment and, on the other, her conclusion that the development would support or help deliver "the Government's net zero commitment". This was based upon the second type of irrationality identified by the Divisional Court in *R (on the application of the Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649 at [98], which includes flawed logic. However, Ms Dobson accepted on behalf of the appellant that this depends on a proper understanding of the reasons given in the decision letter. She went on to say that this was essentially a "reasons challenge". As it was argued before us, this was certainly so. We also note that ground 3 of the appeal is closely related to ground 1.

16. Section 116(1) of the Planning Act 2008 required the Secretary of State to give reasons for her decision to make an order granting the development consent. The principles governing the legal adequacy of such reasons were set out by the House of Lords in *South Bucks District Council v Porter (No.2)* [2004] UKHL 33; [2004] 1 WLR 1953 (see, in particular, the speech of Lord Brown of Eaton-under-Heywood at [36]).

17. By regulation 4 of the 2017 Regulations the Secretary of State must not make an order granting development consent unless an environmental impact assessment ("EIA") has been carried out. Regulation 5(1) defines EIA as a "process" consisting of a number of components, which include the steps the Secretary of State is required to take in accordance with regulation 21 when she makes a decision on whether to grant development consent. Regulation 5(2) provides that EIA must identify, describe and assess "the direct and indirect significant effects" of the proposed development on a number of factors, which include climate.

18. The breach of the 2017 Regulations alleged by the appellant relates to regulation 21(1), which provides:

> "(1) When deciding whether to make an order granting development consent for EIA development the Secretary of State must –
>
> (a) examine the environmental information;
>
> (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary;
>
> (c) integrate that conclusion into the decision as to whether an order is to be granted; and
>
> (d) if an order is to be made, consider whether it is appropriate to impose monitoring measures."

19. The appellant contends that the Secretary of State failed under regulation 21(1)(b) to reach a "reasoned conclusion" on the effect of the GHG emissions from the development on the environment, taking into account her examination under regulation 21(1)(a) of the "environmental information". That "information" included the developer's "environmental statement" (see regulation 3(1)). That statement was required to include a description of the "likely significant effects" of the proposed development on the environment and the information specified in Schedule 4, which includes "the impact of the project on climate" (paragraph 5). Regulation 30 required the Secretary of State's decision notice granting a development consent order to include *inter alia* her "reasoned conclusion" under regulation 21 on the significant effects of the development on the environment.

20. However, during the hearing Ms Dobson accepted on behalf of the appellant that, at least for the purposes of this appeal, those obligations on the Secretary of State in regulations 21 and 30 of the 2017 Regulations do not add anything to the obligation in

section 116 of the Planning Act 2008 to give reasons for the decision in accordance with the principles set out by the House of Lords in the *South Bucks* case. As Ms Dobson accepted, the appellant's case essentially revolves around a reasons challenge.

The National Policy Statements

21. Paragraph 5.2.2. of EN-1 (2011) states:

> "5.2.2 CO_2 emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology). However, given the characteristics of these and other technologies, as noted in Part 3 of this NPS, and the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS (see Section 2.2 above), Government has determined that CO_2 emissions are not reasons to prohibit the consenting of projects which use these technologies or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs (e.g. the CCR and, for coal, CCS requirements). Any ES on air emissions will include an assessment of CO_2 emissions, but the policies set out in Section 2, including the EU ETS, apply to these emissions. The IPC does not, therefore need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO_2 emissions or any Emissions Performance Standard that may apply to plant."

22. The corresponding text in EN-1 (2024) is in paragraphs 5.3.11 and 5.3.12, and is in similar terms.

23. Paragraph 2.5.2 of EN-2 (2011) states:

> "2.5.2 CO2 emissions are a significant adverse impact of fossil fuel generating stations. Although an ES on air emissions will include an assessment of CO2 emissions, the policies set out in Section 2.2 of EN-1 will apply, including the EU ETS. The IPC does not, therefore need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO2 emissions or any Emissions Performance Standard that may apply to plant."

24. In 2019 the target set by section 1 of the Climate Change Act 2008 was amended so that the UK is to become net zero by 2050. The updates of the NPSs which were designated in 2024 were based on that net zero target and strategy.

25. The Government's strategy continues to rely upon electrification in order to reduce GHG emissions in several sectors and a consequent need to increase electricity generation (EN-1 (2024) paragraph 2.3.7). There is therefore an urgent need for significant amounts of new large-scale energy infrastructure, which cannot be developed without significant residual adverse impacts (paragraphs 3.1.1 to 3.1.2). Paragraph 3.3.60 lists the types of development falling within the scope of EN-1, and

which are said to be required for energy security *and achieving net zero* (paragraph 3.3.61). They include electricity generation using natural gas, with or without CCS. Paragraphs 3.3.44 to 3.3.48 explain in more detail the need for additional gas-fired electricity generation. There is also an urgent need for new carbon capture and storage infrastructure to support the transition to a net zero economy in connection with energy generation from natural gas (paragraphs 3.5.1 and 3.5.2).

26. Section 4 of EN-1 (2024) sets out "assessment principles" for dealing with applications relating to energy infrastructure. There is a critical national priority for nationally significant low carbon infrastructure, which includes natural gas fired generation that is "carbon capture ready" (paragraphs 4.2.4 to 4.2.5). Paragraph 4.9.5 reiterates the Government's commitment to supporting at least one gas CCS power station in the mid-2020s. Its Net Zero Strategy reaffirmed the importance of deploying CCUS for achieving net zero by 2050.

27. Section 5.3 of EN-1 (2024) deals with GHG emissions. In particular, paragraphs 5.3.11 to 5.3.12 state:

> "5.3.11 Operational GHG emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology). Given the characteristics of these and other technologies, as noted in Part 3 of this NPS, and the range of non-planning policies that can be used to decarbonise electricity generation, such as the UK ETS (see Section 2.4), government has determined that operational GHG emissions are not reasons to prohibit the consenting of energy projects or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs (e.g. the CCR requirements). Any carbon assessment will include an assessment of operational GHG emissions, but the policies set out in Part 2, including the UK ETS, can be applied to these emissions.
>
> 5.3.12 Operational emissions will be addressed in a managed, economy-wide manner, to ensure consistency with carbon budgets, net zero and our international climate commitments. The Secretary of State does not, therefore need to assess individual applications for planning consent against operational carbon emissions and their contribution to carbon budgets, net zero and our international climate commitments."

28. Thus, the NPSs recognise that GHG emissions having a significant adverse impact cannot be avoided for certain necessary energy infrastructure, even if they provide CCS. For such projects operational emissions will be addressed in a managed, economy-wide manner to ensure consistency with carbon budgets, net zero and international commitments. In that context the NPS relies upon *inter alia* the UK's Emissions Trading Scheme. The NPS states that for these reasons there is no need to assess emissions against benchmarks such as carbon budgets or net zero in decisions on planning consent.

Factual background

29. The proposed development was concisely described by the judge at [16]-[17] of her judgment as follows:

> "16. The Scheme in question comprises a full chain Carbon Capture Utilization and Storage ("CCUS") project comprising a number of elements including:
>
> (1) A new gas-fired electricity generating station (with an electrical output of up to 860 megawatts) with post combustion carbon capture plant; gas, electricity and water connections (for the electricity generating station);
>
> (2) A carbon dioxide (CO_2) pipeline network (a 'gathering network') for gathering CO_2 from a cluster of local industries on Teesside; and
>
> (3) A high-pressure CO_2 compressor station and an offshore CO_2 export pipeline.
>
> 17. The power plant is described in the Examining Authorities' Report ("ExAR") as being "mid-merit", which means that it is capable of providing flexible generating capacity which can ramp up and down rapidly to meet demand. This allows the electricity grid to be stabilised and thus makes an important contribution to system operability and security of supply."

30. The need for mid-merit plant derives from the fact that demand for electricity must be simultaneously and continuously balanced by supply, whereas most renewable generation is intermittent. Mid-merit plant enables the active management of output to match supply with demand instantaneously. It is therefore an essential and integral component of the United Kingdom's strategy for achieving its net zero target despite the fact that the operation of mid-merit plant such as the development proposed in this case produces GHG emissions. CCS technology enables a high proportion of post-combustion carbon to be captured.

31. The evidence before the judge was overwhelmingly to this effect and is illustrated by the references she cited at [18]-[26] of her judgment, which showed consistent support in Government policy for CCS/CCUS in general and the proposed development in particular, including these:

> "19. The Relevant Energy NPS EN-1 and EN-2 were published in July 2011. There are numerous references in EN-1 (2011) to the potential importance of CCS, the benefits in terms of GHG emissions and the approach to be taken to such applications. Paragraph 5.2.2 is but one example: … [see [21] above]
>
> 20. In respect of the need for large scale energy infrastructure projects, EN-1 (2011) at paragraph 3.2.3 states:

> "This Part of the NPS explains why the Government considers that, without significant amounts of new large-scale energy infrastructure, the objectives of its energy and climate change policy cannot be fulfilled. However, as noted in Section 1.7, it will not be possible to develop the necessary amounts of such infrastructure without some significant residual adverse impacts. This Part also shows why the Government considers that the need for such infrastructure will often be urgent. The IPC should therefore give substantial weight to considerations of need. The weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure."

21. The support for CCS schemes is then repeated and strengthened 11 years later in EN-1 (2024), which was in draft at the date of the ExAR but designated by the time of the DL. Paragraph 3.5.2 states: "the Climate Change Committee states that CCS is a necessity not an option".

22. EN-1 (2024) provides specific support for the Scheme, see paragraph 4.9.5:

> "4.9.5. The government has made its ambitions for CCS clear – committing to providing funding to support the establishment of CCS in at least four industrial clusters by 2030 and supporting, using consumer subsidies, at least one privately financed gas CCS power station in the mid-2020s. In October 2021, the government published its Net Zero Strategy which reaffirmed the importance of deploying CCUS to reaching our 2050 net zero target and also outlines our ambition to capture 20-30Mt of CO_2 per year by 2030."

23. There are also a raft of non-planning policies which give support to CCS. These are summarised in the ExAR at Section 3.6. It should be noted that beyond the general support for CCS, there is specific reference to Teesside being identified as a key location for CCUS in the Clean Growth - the UK Carbon capture Usage and Storage Deployment Pathway – Action Plan (2018), see ExAR 3.614.

24. …

25. The Net Zero Strategy: Build Back Greener (October 2021), which set out the Government's proposals and policies for meeting Carbon Budgets is summarised in ExAR 3.6.33 as follows:

> "3.6.33. The Strategy states that it will deliver four CCUS clusters, capturing 20-30Mt CO_2 across the economy, including 6Mt CO_2 of industrial emissions, per year by 2030. This will be done by supporting industry to switch to cleaner fuels, such as low carbon hydrogen alongside renewable energy and CCUS. These clusters, including the East Coast Cluster, which includes Teesside, could have the opportunity to access support under the Government's CCUS programme. The Government has also set up the Industrial Decarbonisation and Hydrogen Revenue Support Scheme, to fund new hydrogen and industrial carbon capture business models."

32. The second respondents submitted their application for development consent for the proposed development on 19 July 2021. The Examining Authority opened the Examination of the application on 10 May 2022. On 10 February 2023, the Examining Authority submitted their report to the Secretary of State recommending that consent be granted. There then followed a series of further requests from the Secretary of State for information and further submissions. The appellant was closely involved in the process throughout, acting through his consultancy Climate Emergency Policy and Planning ("CEPP"). CEPP made submissions on errors in the Environmental Statement both during the Examination and subsequently in writing to the Secretary of State. One of the appellant's main concerns was the level of GHGs resulting from the development and how they should be estimated and assessed. His involvement led directly to the substantial upward revision of the estimates of GHG emissions, with the result that the Secretary of State ultimately accepted the appellant's figure of +20,450,719 tCO_2e for the development and offshore elements of the development. The Secretary of State also accepted that the cumulative whole-life GHG emissions would be a significant adverse effect, carrying significant negative weight in the planning balance.

33. Central to the issues before the judge and before this court was Dr Boswell's contention that the Secretary of State assessed the significance of the environmental impacts of the GHG emissions from the development in accordance with the IEMA guidance. It was common ground that the second respondents used the first edition of the IEMA guidance (published in 2017) in preparing the Environmental Statement and the parties used the second edition (published in February 2022) during the Examination and subsequent process.

The IEMA guidance

34. The second edition of the IEMA guidance was published in February 2022. It is intended to assist "GHG practitioners" with the assessment, mitigation and reporting of GHG emissions in EIA (section 1.1). It has not been adopted by the Secretary of State as policy guidance for decision-making. It "sets out areas for consideration at all stages of the assessment and offers methodological options that can be explored". It highlights some of the "challenges to the assessment", such as "establishing study boundaries and what constitutes significance". However, it is "not a prescriptive 'how to' guide …".

35. Chapter 5 of the guidance sets out principles for quantifying GHG emissions for the purposes of EIA and then a "framework" of six steps for carrying out that quantification.

36. For cases in which the GHG emissions that would be caused by a development have been estimated, chapter 6 of the guidance goes on to address how the significance of those emissions may be assessed.

37. In section 6.2 the "crux of significance" is said to be whether it contributes to reducing GHG emissions relative to a trajectory towards net zero by 2050, not simply whether a project will cause GHG emissions, or even the magnitude of those emissions. The guidance also recognises that the necessary rate and the level of GHG emission reductions will be unevenly distributed across different economic sectors, activities and types of project. It says that "Net zero for the UK in 2050 (and in the interim) will include some activities with net negative emissions and some with residual emissions greater than zero" (p.24).

38. Section 6.3 of the IEMA guidance is entitled "significance principles and criteria". It provides advice on how different levels of significance may be determined with reference to the whole life GHG emissions of a project and a UK trajectory compatible with the net zero target. The submissions for Dr Boswell relied upon IEMA's approach to identifying a "significant adverse effect" in this sentence:

> "A project that follows a 'business-as-usual' or 'do minimum' approach and is not compatible with the UK's net zero trajectory, or accepted aligned practice or area-based transition targets, results in a significant adverse effect."

39. But the IEMA guidance continues:

> "It is down to the practitioner to differentiate between the 'level' of significant adverse effects e.g. 'moderate' or 'major' adverse effects"

Pages 25 – 26 of the guidance state that Box 3 provides "an example" of such differentiation. It is important to note that Box 3 distinguishes levels of effect according to the degree of compliance with policy requirements for climate change. Footnote 36 states that levels of "significance" against a "UK net zero compatible trajectory" may "need to be evaluated qualitatively based on policy goals …" where a quantitative trajectory is not available.

40. Section 6.4 of the guidance provides advice on how a project's GHG emissions may be contextualised in order to see whether it supports or undermines a trajectory towards net zero.

41. On page 27 the guidance advises that "the assessment process for GHG emissions will … require a review of the current and the emerging policy/regulatory position …". Table 1 provides sources of contextual information against which GHG emissions can be evaluated, including national policy as well as carbon budgets and sectoral budgets. Where a decision-maker chooses to apply the approach in section 6.3, the guidance

makes it plain that policies and their objectives are relevant to the relationship between GHG emissions from a development and trajectories for achieving the net zero target.

The Examining Authority's report

42. The Secretary of State's decision letter relied heavily on the Examining Authority's report, both by direct quotation and by reference. As we shall explain in more detail below, the decision letter also referred to the IEMA guidance, the dispute between the parties being about whether those references demonstrate that the Secretary of State used a form of shorthand to incorporate a specific meaning of the phrase "significant adverse impact" derived from section 6.3 of the guidance.

43. In dealing with the assessment of GHG emissions at paragraph 5.3.13 of their report, the Examining Authority relied upon draft policy which became paragraphs 5.3.11 to 5.3.12 of EN-1 (2024). They returned to that policy at paragraph 5.3.46 and concluded that the quantum of GHG emissions would represent a "significant adverse effect."

44. The Examining Authority concluded in paragraph 5.3.43 of their report that the proposed development would be resilient to the effects of climate change, such as rising sea levels and flood risk, referring to guidance from IEMA on that subject. That was a different issue from the effect of GHG emissions from the development on the environment.

45. In paragraph 5.3.44 the Examining Authority referred to the IEMA guidance on assessing the significance of GHG emissions, but this was simply in the context of estimating the scale of those emissions and the requirements for the Environmental Statement.

46. The Examining Authority considered that the scale of the GHG emissions would represent a significant adverse effect, despite accepting that they would form only a "very small part" of the UK's carbon budget (paragraph 5.3.46). They went on to consider "benchmarking", or "contextualisation" (in paragraphs 5.3.50 to 5.3.52), and concluded that the second respondents had followed section 6.4 of the IEMA guidance. They explained why a comparison of GHG emissions from the development with a local or regional context would be inappropriate, but accepted that on a sectoral basis those emissions would have a "significant adverse effect". The substance of these conclusions was repeated in paragraph 5.3.57 of their report.

47. It is clear that this analysis by the Examining Authority did not involve applying the significance criteria in section 6.3 of the IEMA guidance (pp.24 to 27) upon which the argument in ground 1 of the appeal depends. Moreover, the Examining Authority did not apply those criteria in any other part of its report. Instead, the Examining Authority returned, in paragraph 5.3.53 of their report, to what became paragraphs 5.3.11. to 5.3.12 of EN-1 (2024) (see [27] above). They accepted that because the emissions would be managed in an economy-wide manner to ensure consistency with carbon budgets and net zero, there was no need to assess the proposal against those measures.

48. In their conclusions on climate change the Examining Authority accepted, having regard to EN-1, that the GHG emissions should be treated as having a significant adverse effect, but gave that factor moderate weight. They judged that "the emissions would not measurably harm the Government's ability to meet its national targets or

have a significant effect on the UK's Carbon Budgets" (paragraph 5.3.57). These conclusions were also reflected in section 7.3 of the Examining Authority's report dealing with the "planning balance".

The Secretary of State's decision letter

49. In paragraph 3.3 of the decision letter the Secretary of State said that she should be treated as agreeing with the Examining Authority's findings and conclusions unless otherwise stated.

50. The decision letter addressed the issues of need and climate change sequentially.

51. Her conclusions on the need for the development were set out at paragraphs 4.11 and 4.30 of the decision letter:

> "4.11. The ExA considered that the Proposed Development would address the urgent need for new electricity capacity as set out in EN-1, the use of natural gas for energy generation (EN-1 and EN-4) and the urgent need for gas-fired electricity generation with CCS (Carbon Capture Storage) infrastructure as set out in the draft 2021 EN-1 [ER 5.2.125]. The Secretary of State notes that this urgent need is also set out in the draft 2023 and 2024 EN-1 and that the Proposed Development would help deliver the Government's net zero commitment by 2050. The ExA consider that by providing CCS the Proposed Development would be in line with Government's wider policy statements on energy and climate change, including those listed in section 3.6 of the ExA report, which constitute important and relevant matters. The UK Marine Policy Statement and the North East Marine Plan are supportive of the deployment of CCS/CCS in the UK Marine Area and local RCBC and STDC policies support the move to a low carbon economy and a CCUS network in the area [ER 5.2.125]. The Secretary of State notes that designated 2024 EN-1 further strengthens the support for the Proposed Development by making nationally significant low carbon infrastructure, including natural gas fired electricity generation which is CCR, a critical national priority. The Secretary of State also acknowledges that the full chain CCUS nature of the Proposed Development elevates it considerably above other CCR projects as it will be required to capture a minimum of 90% of carbon when operating at full load throughout its operation, and will seek to achieve a capture rate of at least 95% (see 4.22 et seq. below). This further contributes to the strong positive weight accorded to the need for the Proposed Development.
>
> …
>
> 4.30. The Secretary of State agrees with the ExA's assessment of need for this type of energy infrastructure and has taken into account that the Proposed Development, as CCGT with CCS, attracts strong policy support and would support the UK's

> transition towards the net zero target. The Secretary of State agrees with the ExA that weight should be given to the benefit of the creation of a CO_2 gathering network and ascribes this moderate positive weight. The Secretary of State agrees that the Proposed Development is CCR, that an appropriate approach has been taken in respect of the Offshore Elements and that the issue of alternatives has been appropriately addressed. She agrees with the ExA's position that appropriate controls would be in place through Requirement 31 and the necessary Environment Permits for the CCGT and carbon capture plant. In accordance with paragraph 3.2.3 of EN-1 and paragraphs 3.1.1-3.1.2 of the draft 2021, draft 2023 and designated 2024 NPSs the Secretary of State attributes substantial positive weight to the contribution that the Proposed Development would make towards meeting the national need."

52. The Secretary of State took essentially the same approach on climate change as the Examining Authority. She dealt with this subject primarily in paragraphs 4.31 to 4.58. She relied upon the parts of the Examining Authority's report to which we have referred above, including their conclusions based upon EN-1 (2024) (see paragraphs 4.32 to 4.41).

53. In paragraph 4.36 the Secretary of State referred to IEMA's view (in section 6.1 of the IEMA guidance) that all GHG emissions have the potential to be significant as all such emissions contribute to climate change. At no point, however, did she make any reference, direct or indirect, to section 6.3 of the IEMA guidance in which the Institute discussed their "significance principles and criteria". She agreed with the Examining Authority that the scale of the GHG emissions from the development would involve significant adverse effects.

54. In paragraphs 4.38 and following, the Secretary of State relied on the Examining Authority's conclusions and post-Examination representations on "contextualisation". In paragraph 4.39 she relied on the policy in EN-1 for the management of the GHG emissions in an economy-wide manner to ensure consistency with carbon budgets and net zero, so that it was unnecessary to assess the proposal against those measures. At this point the Secretary of State referred to paragraph 5.3.12 of the recently designated update of EN-1 (see also paragraph 8.8 of the decision letter).

55. In paragraph 4.40 the Secretary of State relied on the Examining Authority's finding that GHG emissions had been assessed from all stages of the proposed development, including upstream and downstream emissions, and that the assessment of likely significant effects satisfied the 2017 Regulations. Those emissions would not measurably harm the Government's ability to meet its national targets or have a significant effect on UK Carbon Budgets (paragraph 4.41).

56. After setting out in paragraphs 4.44 to 4.57 her views on the post-Examination written representations, which were largely to do with the quantification of GHG emissions from the development, the Secretary of State stated her overall conclusion on climate change in paragraph 4.58:

> "4.58. The Secretary of State has considered the ExA's report and consultation responses received. She considers that the Proposed Development would support the UK's transition towards a low carbon economy. The Secretary of State has considered the potential benefits which the Wider NZT Project would bring in reducing emissions but accepts the ExA's conclusions that over the lifetime of the Proposed Development, emissions would have a significant adverse effect. She does not, however, agree that this matter carries only moderate negative weight in the planning balance as GHG emissions are stated as having a significant adverse impact in both the 2011 and 2024 designated NPSs and draft 2021 and 2023 NPSs. Taking into account the post-examination inclusion of T&S unavailability emissions and the consequent increase in GHG emissions, the Secretary of State concludes that the cumulative whole life GHG emissions will be in the region of +20,808,127 tCO_2e. Also, the Secretary of State notes the resultant increase in the contribution of the Proposed Development to the power sector carbon budgets. She agrees with the ExA in giving more weight to the 2024 NPSs than a comparison with the UK carbon budgets for the assessment of significance but has taken this increase into account. Overall, she considers that cumulative whole-life GHG emissions are a significant adverse effect, carrying significant negative weight in the planning balance."

Although the Secretary of State agreed with the Examining Authority that GHG emissions from the development would have a "significant adverse effect" on the environment, she considered that that should carry significant negative weight in the planning balance, rather than the moderate weight which the Authority had applied.

57. It will immediately be noted that paragraph 4.58 does not mention the IEMA guidance. The appellant's case is that it is to be inferred and implied that the reference to "significant adverse effect" in the last sentence of the paragraph is invested with the specific meaning derived from the IEMA guidance and therefore means that the proposed development "locks in emissions and does not make a meaningful contribution to the UK's trajectory towards net zero".

58. In the section of the decision letter dealing with the planning balance, the Secretary of State said this at paragraphs 7.6 to 7.7:

> "7.6 Despite the future benefits the wider NZT Project could bring in terms of reducing CO_2 emissions, the ExA identified significant adverse effects in relation to the significant volume of GHG over its lifetime both when considered individually and cumulatively with the sector and ascribed this moderate weight in the planning balance. The Secretary of State, however, considers that the volume of GHG emissions carries significant adverse effects, in accordance with both the designated 2011 and 2024 and draft 2021 and 2023 NPSs (see para 4.56 above) and, therefore, ascribes this significant negative weight in the planning balance. Additionally, the development of the PCC Site

> would result in significant visual effects to recreational and PRoW users in a number of locations including Seaton Carew seafront, the England Coastal Path at Warrenby and Redcar seafront both during construction and when operational. The ExA, however, considers agreement of a high-quality final design and use of materials in accordance with the SPD and the principles of the Masterplan and Design Guide may assist in mitigation of such effects [ER 7.3.10].
>
> 7.7 Overall, the ExA considers that the Proposed Development would be in accordance with relevant NPSs and the benefits significantly outweigh the limited harms such that there is no conflict with s104(7) of the PA2008 [ER 7.3.12]. The ExA also notes that recent energy and climate change policy, including draft policy, constitute important and relevant matters which would justify the approval of the Specified Elements under section 105. The ExA concluded that the case for Development Consent is made [ER 7.3.13]. The Secretary of State agrees with the ExA that the benefits of the Proposed Development attract significant positive weight. She differs from the ExA in her conclusion that the adverse impact of GHG emissions attracts significant, rather than moderate, negative weight. She has considered and weighed the benefits and harms that have been identified and concludes overall that the benefits of the Proposed Development outweigh the harms. She notes that the Proposed Development would be in accordance with policy, including the NPSs. She agrees with the ExA that the case for Development Consent has been made."

59. In the section dealing with the Climate Change Act 2008 and the Net Zero Target, the Secretary of State said this at paragraph 8.8:

> "8.8 The Secretary of State has considered that the UK's sixth Carbon Budget requires a 78% reduction of emissions by 2035 compared to 1990 levels. This was proposed to deliver on the commitments the UK made by signing the Paris Agreement in 2016. On 22 June 2021, following advice from the Climate Change Committee, the UK Government announced a new carbon reduction target for 2035 which resulted in a requirement for the UK to reduce net carbon emissions by 2035 from 78% below the 1990 baseline. The Secretary of State notes the Energy White Paper states that National Policy Statements continue to form the basis for decision-making under the Planning Act 2008. The Secretary of State does not consider that the amendment to the Climate Change Act 2008 has lessened the need for development of the sort represented by the Proposed Development which is, therefore, still in accordance with the designated 2011 and 2024 NPSs. Operational emissions will be addressed in a managed, economy-wide manner, to ensure consistency with carbon budgets, net zero and our international

> climate commitments. The Secretary of State does not, therefore need to assess individual applications for planning consent against operational carbon emissions and their contribution to carbon budgets, net zero and our international climate commitments."

Grounds 1 and 3 of the appeal

60. It was agreed at the hearing that these grounds may conveniently be considered together.

61. Ms Dobson submitted that in concluding that the GHG emissions from the development would have a "significant" adverse effect, both the Examining Authority and the Secretary of State applied the IEMA's usage of the term "significant adverse effect" as quoted in [38] above.

62. Ms Dobson said it follows that the Secretary of State's conclusion in paragraph 4.58 of the decision letter assumed that the project was not compatible with the UK's net zero trajectory. Solely on that basis she then submitted that there is an internal inconsistency or flawed logic in the decision letter, in that when the Secretary of State addressed the subject of need, she concluded that the development would "help" or "support" the UK's transition towards the net zero target for 2050 (paragraphs 4.11, 4.30 and 4.58 of the decision letter).

63. The judge disagreed. In her view the Secretary of State made it clear in paragraph 4.58 of the decision letter that she was assessing significance in accordance with the NPSs, in particular EN-1 and EN-2. The Secretary of State would have referred specifically to the IEMA guidance if that had been the basis for her evaluation [73]. She did not. Paragraph 4.58 of the decision letter makes perfectly good sense as referring to EN-1 and EN-2 and the self-evidently substantial amount of GHG emissions which would be caused by the proposed development [74]. There was no justification for reading the decision letter as flawed by the internal inconsistency alleged. On the contrary, the Secretary of State weighed the absolute amount of GHG emissions from the development and then set that in the broader policy context [75]. Her reasoning accorded with national policy on the net zero trajectory and the need for CCS/CCUS [76].

64. Ms Dobson argued that the judge's conclusions involved a misreading of the decision letter. She made six points in support of the assertion that the Secretary of State applied section 6.3 of the IEMA guidance when addressing the significance of GHG emissions in her decision letter. First, the Environmental Statement produced by the second respondents relied on the IEMA guidance, albeit the earlier first edition, in order to assess significance. Secondly, during the Examination both the second respondents and Dr Boswell assessed the significance of GHG emissions relying on the IEMA guidance (second edition). Thirdly, the Examining Authority relied on that same guidance in the Examination. Fourthly, the parties continued to rely on the guidance in their written submissions to the Secretary of State after the conclusion of the Examination. Fifthly, the decision letter itself refers to IEMA guidance. Finally, the decision letter does not refer to any other source or method for assessing significance.

65. The Secretary of State and the second respondents supported the judge's conclusions. They submitted that it was plain that the Examining Authority and the Secretary of State had relied upon the NPSs in order to assess the significance of GHG emissions from the proposed development and had only referred to the IEMA guidance for other purposes.

66. On ground 3 Ms Dobson submitted that the Secretary of State failed to reach a "reasoned conclusion" in accordance with regulation 21 of the 2017 Regulations in that she did not assess the amount of GHG emissions against a benchmark, such as the projected contributions of either the fuel supply sector or the energy supply sector for the 6th Carbon Budget or the UK's Nationally Determined Contribution under the Paris Agreement (see Dr Boswell's submissions to the Secretary of State dated 6 September 2023 at paragraphs 144 to 148).

67. Our conclusion overall is that there is no merit either in ground 1 or in ground 3. Ground 1 involves an obvious misreading of the Examining Authority's report and the Secretary of State's decision letter, and ground 3 improperly intrudes upon the Secretary of State's decision-making powers.

68. We begin by considering the nature of Dr Boswell's contention. Even assuming for the sake of argument that the Secretary of State had treated the GHG emissions as a significant adverse effect by applying the definition in section 6.3 of the IEMA guidance, and that finding was inconsistent with her view that the development would support delivery of net zero, there would be two ways of looking at that inconsistency. The first one, which Dr Boswell has selected for the purposes of ground 1, is that the application of section 6.3 undermines the conclusion based on EN-1 that the proposal supports the delivery of "net zero". But there is a second possibility which Dr Boswell ignores: the Secretary of State was entitled to find that the proposal accords with NPS Policy EN-1 and is compatible with the trajectory to "net zero" and, in relation to section 6.3 of the IEMA guidance, the Secretary of State should have assessed the GHG emissions as having a less than significant adverse effect.

69. The first explanation is untenable. It assumes that the Secretary of State has made a finding that the GHG emissions from the development would not be compatible with a "net zero" trajectory, so that they could be categorised as having a "significant adverse effect", according to the definition used in section 6.3 of the IEMA guidance. But no such finding was made, whether by the Examining Authority or the Secretary of State. Furthermore, Dr Boswell's explanation involves disregarding the IEMA's advice that the assessment of the compatibility of a development's GHG emissions with a "net zero" trajectory should take into account the degree of compliance with policies designed to achieve that target. His argument ignores the approach adopted in EN-1 of treating development of the kind proposed as compatible with the UK's "net zero" trajectory. As a matter of law the Secretary of State was entitled to rely upon that policy approach.

70. The second explanation is straightforward. On the basis that the Secretary of State was legally entitled to find that the proposal was compatible with the "net zero" trajectory, taking into account EN-1, a finding that the GHG emissions would amount to a "significant adverse effect" in the sense used in section 6.3 of the IEMA guidance would plainly have been in error. It would have involved a clear misapplication of that guidance.

71. This analysis indicates that Dr Boswell's selection of the first explanation on which to found his ground of challenge is bound up with his disagreement with the policies in EN-1 to support new gas-fired electricity generation with CCUS as part of the strategy for delivering the net zero target. The judge made essentially the same point in her judgment at [76].

72. There is, of course, another possibility, namely that the Secretary of State's finding that GHG emissions would have a significant adverse effect did not involve the application of section 6.3 of the IEMA guidance at all. In that event, ground 1 would simply evaporate and, of course, none of the problems we have identified in [68]-[71] above would arise.

73. Ms Dobson accepted that the Secretary of State was not obliged to apply the IEMA guidance and could adopt another approach. The status of the IEMA document is that it provides guidance to practitioners. It has not been adopted as part of any policy for the determination of applications under the Planning Act 2008, nor has it been adopted as part of any other government policy.

74. From the analysis we have set out above, it is plain that neither the Examining Authority nor the Secretary of State applied section 6.3 of the IEMA guidance when deciding that the GHG emissions from the development would have a "significant adverse effect". It is nothing to the point that the Examining Authority's report and the decision letter referred to the IEMA guidance when it is obvious that those references were to other sections of that document which are irrelevant to ground 1. The analysis of the Examining Authority's Report and the decision letter by Ms Rose Grogan for the Secretary of State demonstrated ground 1 to be fallacious. It is noteworthy that the reply by Ms Dobson made no real attempt to resuscitate that ground.

75. As Mr Hereward Phillpot KC correctly submitted on behalf of the second respondents, the parties took part in the highly structured decision-making process laid down by the Planning Act 2008, which recognises the statutory importance attached to the NPSs (section 104). The parties would have been well aware of the relevant provisions of those policies, including paragraph 5.2.2 of EN-1 (2011) and paragraphs 5.3.11 to 5.3.12 of EN-1 (2024). It is also a well-established principle that the court will read decision letters on the basis that they are addressed to parties who are familiar with the issues, the evidence and relevant policies.

76. On any fair reading of the Examining Authority's report and the decision letter, it is plain that both the Examining Authority and the Secretary of State evaluated the significance of the GHG emissions in absolute terms, by "contextualisation" and also by reference to the relevant policies in EN-1. The Secretary of State accepted that the emissions would not measurably harm the UK's ability to meet national targets or the UK's Carbon Budgets. The emissions will be managed in an economy-wide manner so as to ensure consistency with those measures. Furthermore, in paragraphs 4.11 and 4.30 of the decision letter the Secretary of State accepted that, in view of the policy approach in EN-1, the proposed development is necessary in order to support the UK's transition to the "net zero" target. None of these conclusions are open to legal challenge. There is no inconsistency within the decision letter.

77. Having set out that reasoning, there was no legal obligation on the Secretary of State to go on to resolve the issue that arose between the appellant and the second respondents

during the Examination on how the significance criteria in section 6.3 of the IEMA guidance would apply to the proposed development. The Secretary of State discharged her obligation to give reasons for her decision by adequately explaining the approach she took to the evaluation of GHG emissions. Accordingly, ground 1 of the appeal must be rejected.

78. Ground 1 depends upon the appellant interpreting the decision letter as if the Secretary of State did in fact apply section 6.3 of the IEMA guidance. That reading is wholly artificial, serving only to create a basis for that ground. Dr Boswell's approach is, we think, a classic example of the misuse of judicial review in order to continue a campaign against a development (and the policy in a NPS) once a party has lost the argument on the planning merits. Such an approach is inimical to the scheme enacted by Parliament for the taking of decisions in the public interest.

79. On ground 3 the appellant argues that if the Secretary of State did not rely upon section 6.3 of the IEMA guidance to assess the significance of the GHG emissions, she failed to comply with her obligation under regulation 21 of the 2017 Regulations to give a reasoned conclusion on the effect of those emissions on the environment, in this instance the climate. Ms Dobson said it was insufficient for the Secretary of State simply to describe the GHG emissions as having a "significant adverse effect". Instead, she was obliged to evaluate the significance of that effect, if not by reference to the IEMA guidance, then by comparison with a "benchmark" or by "contextualisation" (see [66] above).

80. In our view the evaluation of the significance of an estimated amount of GHG emissions and its acceptability is a matter of fact and judgment for the decision-maker. He or she may decide to choose benchmarks to help in arriving at that judgment. But that choice too is a matter of judgment for them. Any conclusion drawn on the acceptability of the GHG emissions in comparison with a benchmark is also a matter of judgment for the decision-maker. The 2017 Regulations do not determine how these matters should or may be approached (*R (on the application of Goesa Limited) v Eastleigh Borough Counci*l [2022] EWHC 1221 (Admin); [2022] PTSR 1473 at [122]-[123]; *R (Boswell) v Secretary of State for Transport* [2024] EWCA Civ 145; [2024] Env. L.R. 28 at [44], [53]).

81. Nor is there any legal principle which requires a public authority deciding whether to grant a development consent to "contextualise" the GHG emissions or to compare them with a benchmark. It is not unlawful for the decision-maker, for example, to conclude, as in this case, that the GHG emissions will be managed across the economy to ensure consistency with carbon budgets and the 2050 net zero target. In any event, in the present case the Secretary of State did "contextualise" the GHG emissions from the development by making a sectoral comparison, whilst also relying upon the policy in EN-1 that made this exercise unnecessary (see e.g. [46], [54], and [58]-[59] above).

82. These were all lawful and properly reasoned conclusions, evaluating the significance of the GHG emissions in this case. Dr Boswell does not put forward an irrationality challenge. It cannot possibly be said that the Secretary of State failed to give legally adequate reasons or otherwise acted unlawfully. Accordingly, ground 3 must therefore be rejected.

Ground 2

83. Ground 2 of the appeal contends that Lieven J erred in concluding that paragraph 5.2.2 of EN-1 "encapsulates the assessment of significance of GHG emissions for the purposes of the EIA Regulations as well as the weight to be given to the assessment of significance as part of a planning balance exercise".

84. In her judgment at [66], [74], [80] and [81] the judge said:

> "66. [It] is not clear to me how [*R (on the application of Finch) v Surrey County Council* [2024] UKSC 20; [2024] P.T.S.R 988] is said to be relevant to [this ground]. This is not a case where an environmental impact, GHG emissions, were not fully assessed for the purposes of EIA. Nor is it suggested that those impacts were not considered and weighed in the ultimate planning balance. Both stages of the process were undertaken, and the SoS weighed up the significant adverse impact of GHG emissions, in the ultimate planning balance. Therefore the case is analytically quite different from *Finch* and the dicta of Lord Leggatt does not impact on the alleged error of law here.
>
> …
>
> 74. Second and most importantly in my view, [DL [4.58]] makes perfectly good sense if the [Secretary of State] is assessing significance on the simple basis of EN-1 and EN-2, and through the clear, if perhaps a little simplistic, approach that 20,450,719 tCO2e is a very large quantum of GHG emissions. That related back to what had been said at DL 4.41 and in that context is itself clear.
>
> …
>
> 80. The Claimant has in my view erected a bright line distinction between matters that go to EIA and those that go to determination, which is both unjustified but also thoroughly unhelpful. As was said by Sullivan LJ in [*R (on the application of Blewett) v Derbyshire County Council* [2004] EWHC 2775 (Admin); [2004] Env. L.R. 29], EIA is not supposed to be an obstacle course for decision makers to trip over. The purpose of EIA is inter alia to improve environmental decision making, so the idea that the significance of an impact for assessment purposes is legally distinct from that for determination purposes creates precisely such an obstacle course and is therefore very unlikely to be correct.
>
> 81. In my view the language and guidance of EN-1 para 5.2.2 comfortably encapsulates both assessment of impacts for the purposes of EIA and for the consideration of weight to be attached in the determination stage."

85. In this court Ms Dobson largely repeated the submissions she made in the court below. Properly construed, paragraph 5.2.2 of EN-1 did not address the assessment of significance of GHG emissions for the purposes of the EIA Regulations. If, as the judge accepted at [74] of her judgment, the decision letter was to be read as showing that the Secretary of State relied on the policy in paragraph 5.2.2 of EN-1 that "CO_2 emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology)", or on the statement in the first sentence of paragraph 2.5.2 of EN-2 that "CO_2 emissions are a significant adverse impact of fossil fuel generating stations", to conclude that the GHG emissions would have a significant adverse effect, the policy in question did not amount to an assessment of significance for the purposes of the 2017 Regulations. A policy document could not deem or prescribe the level of significance of an effect on the environment. It can provide guidance. It can set out relevant factors. But it cannot predetermine, or stand in place of, the outcome of the assessment for an individual development. This would run counter to the purpose of the EIA process. The judge's conclusion at [81] was therefore wrong. The policy in question here, Ms Dobson submitted, went only to the weight to be given to the relevant adverse effects in the planning balance when the "reasoned conclusion" is incorporated into the decision under regulation 21(1)(c), not to the "reasoned conclusion" itself required under regulation 21(1)(b).

86. We cannot accept Ms Dobson's argument on ground 2. With great respect to her, it seems to us to be misconceived. It was, we think, entirely legitimate in principle and in the circumstances of this case, for the Secretary of State to draw upon national planning policy in the NPSs in forming her conclusions on the "significance" of GHG emissions, and to do so both for the purposes of EIA and for the purposes of what the judge referred to as the "ultimate planning balance". We see nothing amiss in the conclusions stated by Lieven J at [66], [74], [80] and [81] of her judgment.

87. In *ClientEarth*, Sir Keith Lindblom, Senior President of Tribunals, said at [85] that there was "no suggestion [in the policy in paragraph 5.2.2 of EN-I (2011)] that it removes or qualifies the general 'presumption in favour of granting consent to applications for energy NSIPs' in paragraph 4.1.2, which is founded on the 'level and urgency of need for infrastructure of the types covered by the energy NSIPs set out in Part 3' – including fossil fuel generating capacity". The Senior President went on to say at [87]:

> "87. The force of the policy, therefore, is not that CO2 emissions are irrelevant to a development consent decision, or cannot be given due weight in such a decision. It is simply that CO2 emissions are not, of themselves, an automatic and insuperable obstacle to consent being given for any of the infrastructure for which EN-1 identifies a need and establishes a presumption in favour of approval. If they were, the policy need and the policy presumption would effectively be negated for certain forms of infrastructure supported by EN-1, and those essential provisions contradicted. Paragraph 5.2.2 does not diminish the need for relevant energy infrastructure established in national policy or undo the positive presumption. But nor does it prevent greenhouse gas emissions from being taken into account as a consideration attracting weight in a particular case. How much weight is for the decision-maker to resolve. It follows that, in a

> particular case, such weight could be significant, or even decisive, whether with or without another "adverse impact". …".

88. The policy wording in both paragraph 5.2.2 of EN-1 (2011) and paragraph 2.5.2 of EN-2 (2011) is simple and pellucidly clear. It speaks for itself. Both policies state unequivocally that "CO_2 emissions are a significant adverse impact". But whilst they acknowledge that the effects of such emissions from some types of energy infrastructure are "significant", it is also clear from the language of the policies, read in their context, that this is not regarded by the Government as an automatic basis for the refusal of development consent. There is nothing in the policies to qualify their acknowledgment of the "significance" of CO_2 or GHG emissions by confining its relevance either to the EIA process alone or to the decision-maker's consideration of the proposed development on its planning merits when striking the planning balance and deciding whether or not development consent should be granted. And there is no need or justification for reading such a qualification into the policies. As the judge held, the policies are in sufficiently broad terms to encompass both the question of significance for the purposes of EIA and the part that any finding of significance will play in the question of whether to grant development consent.

89. We should say at this stage, lest there be any doubt on the point, that it is not open to Dr Boswell to use the present proceedings for the purpose of attacking policies in the NPSs themselves. The challenge in this claim is, and can only be, directed solely at the Secretary of State's decision on the application for a development consent order for the proposed electricity generating station. It cannot be widened to bring within its ambit the content of the national planning policy applicable to that project.

90. There is no legal or practical reason why national planning policy should not provide guidance on the question of the "significance" of environmental effects of one kind or another. And there is no reason in law why national planning policy in a NPS should not include guidance on the question of whether particular effects will be, or are likely to be, "significant" in the sphere of EIA. The Secretary of State was fully entitled to take into account as a relevant factor, and apply, the policies set out in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2. The judge's conclusions to this effect at [80] and [81] seem to us to be plainly right.

91. We unhesitatingly accept the submission made by Ms Grogan and Mr Phillpot, both in this court and in the court below, that the Secretary of State made no error in her interpretation, or understanding, of the relevant policies. No cogent or coherent allegation of misinterpretation has been put forward. Whether CO_2 or GHG emissions are "significant" in a particular case, and the degree of that significance, will depend on the application of the policies. That is not a matter of interpretation. It is a question of their application on the facts and in the circumstances of the particular case. In our view this was done impeccably. Like the judge, we can discern no irrationality or other species of public law error in the Secretary of State's conclusions. The policy does not predetermine the outcome, nor was the decision-making in this case tainted by predetermination.

92. Ms Dobson sought to rely on observations made by Lord Leggatt in *Finch* at [151]-[152]:

> "151. … It is also necessary to recall that the aim of the EIA is to establish general principles for assessing environmental effects. UK national policy is clearly relevant to the substantive decision whether to grant development consent. But it is irrelevant to the scope of EIA. For reasons discussed earlier, the fact (if and in so far as it is a fact) that a decision to grant development consent for a particular project is dictated by national policy does not dispense with the obligation to conduct an EIA; nor does it justify limiting the scope of the EIA.
>
> 152. The second, related flaw is also fundamental. The argument made is a version of the claim that, if information about environmental impacts would make no difference to the decision whether to grant development consent (or on what conditions), it is not legally necessary to obtain and assess such information in the EIA process. Such a contention was resoundingly rejected by the House of Lords in *Berkeley*. It misunderstands the procedural nature of the EIA. The fact (if it be the fact) that information will have no influence on whether the project is permitted to proceed does not make it pointless to obtain and assess the information. It remains essential to ensure that a project which is likely to have significant adverse effects on the environment is authorised with full knowledge of these consequences."

93. In our view it betrays a serious misunderstanding of the decision of the Supreme Court in *Finch* to suggest that it provides any support for Ms Dobson's argument. As Lieven J pointed out (at [66] of her judgment), this was not a case in which there had been a failure to assess fully a particular environmental impact, here GHG emissions, "for the purposes of EIA". Nor was it suggested that those impacts had not been considered in the "ultimate planning balance". Both stages of the process had been undertaken, and the Secretary of State had weighed up the significant adverse impact of GHG emissions in that "ultimate planning balance". In this case there is, rightly, no contention that the scope of the EIA undertaken for the proposed development was deficient. It is not Dr Boswell's case, nor could it be, that any impacts that ought to have been assessed were omitted from that assessment, or that they were left out of the "ultimate planning balance".

94. As the judge recognised, the appropriate scope of an EIA is one thing; the judgment reached on the significance of particular environmental effects, such as GHG emissions, is another. The judge said that the present case was "analytically quite different" from *Finch* and "the dicta of Lord Leggatt [do] not impact on the alleged error of law here." We agree entirely with that conclusion. The decision in *Finch* has no resonance for the issues in this case.

95. As we understand the law in its present state, it can still safely be said that the question of whether emissions are "significant" for the purposes of the EIA legislation is a matter of judgment for the decision-maker (see the judgment of Lord Leggatt in *Finch* at [58]).

96. Similarly, the result of *Finch* and its reasoning do not disturb the basic and long-established principle, recently reaffirmed by the Supreme Court itself, that where a

public authority has the function of deciding whether to grant planning permission for a project calling for EIA under the relevant legislation, it is for that authority to decide whether the "environmental information" available is sufficient to meet the requirements of the legislation, and its decision is subject to review on normal *Wednesbury* principles (see the judgment of Lord Hodge and Lord Sales in *Friends of the Earth* [2020] at [141]-[147]).

97. The Secretary of State was evidently well aware, in accordance with the legislative regime, that it was necessary in this case for the environmental statement to include an assessment of the likely significant effects of the proposed development. Such an assessment was produced, and it was considered during the Examination, in the period after the Examination, and in the decision letter itself. This extended to the effects of GHG emissions from the proposed development. There is, it seems to us, no force in the suggestion that the scope of that assessment was curtailed, or its outcome prescribed by national planning policy. In accordance with the relevant legislation, the decision letter contains, as regulation 21(1)(b) of the 2017 Regulations required, a "reasoned conclusion on the significant effects of the proposed development on the environment", including the effects of GHG emissions. This conclusion was reached by the Secretary of State considering, as regulation 21(1)(a) required, the "environmental information" before her, which included a quantified cumulative estimate of those emissions over the whole life of the project, and by exercising her own judgment on their significance. In accordance with regulation 21(1)(c), the Secretary of State integrated that "reasoned conclusion" into the decision itself (paragraphs 4.58, 7.6 and 7.7 of the decision letter). The substance of that conclusion was that GHG emissions from the development would have a "significant adverse effect" (paragraph 4.58 of the decision letter).

98. The evidential basis for those conclusions is not in dispute in these proceedings. The Secretary of State's finding that the proposed development would produce "whole-life" GHG emissions of over 20m tCO_2e is not impugned. Nor is it suggested that it was wrong, let alone irrational or otherwise unlawful, for her to conclude, as a matter of planning judgment, that this would represent a "significant adverse effect". Ms Dobson did not submit that a different conclusion should have been reached on this matter. Neither the integrity of that conclusion, nor the further conclusion that this carried "significant negative weight in the planning balance" are vulnerable to any criticism in a legal challenge. There was no error of law.

99. We are strengthened in that conclusion by the submissions of Ms Grogan and Mr Phillpot. As they submitted, the Secretary of State did not "conflate" the impact of GHG emissions from the proposed development with the weight to be attributed to that impact. The judge was right to conclude, in effect, that it is artificial to distinguish rigidly between matters relevant to EIA and those pertaining to the determination of an application for development consent, or for planning permission. EIA is not an end in itself. It is a means to achieving better-informed decisions on individual proposals for development. It is meant to facilitate decision-making, not to hamper or impede it by setting up unnecessary obstacles (see *Blewett* at [41] and *R (Jones) v Manfield District Council* [2003] EWCA Civ 1408; [2004] Env. L.R. 21 at [58]). The relationship between the two processes, EIA and decision-making, is implicit in regulation 21(1)(b) and 21(1)(c) of the 2017 Regulations.

100. It is clear, we think, from what the judge said at [66] and [81] that she had well in mind the conceptual difference between the effects of the proposed development and the

weight to be given to those effects. She made no error in concluding that the Secretary of State had first assessed the impact of the GHG emissions from the development and found them to be significant within the sphere of EIA, and then given them significant weight in the planning balance, thus discharging both parts of the exercise. Ms Grogan and Mr Phillpot were right to submit that the policy in paragraph 5.2.2 of EN-1 (2011) provides guidance for the decision-maker, which, in part, goes to both significance and weight. To treat the policy as if it were statute, or had equal force to the provisions of statute, would be incorrect. It is simply a statement of policy, whose obvious purpose, in part, is to promote clarity and consistency in the consideration of "CO_2 emissions" in both the preparation of environmental statements under the legislation for EIA and decision-making on "individual applications" for relevant types of energy infrastructure.

101. Nowhere did the judge say that the assessment of significance for the purposes of EIA is legally indistinct from the assessment of weight to be given to such impacts in the making of a planning decision. What the judge did, rather, was to deprecate the drawing of a "bright line distinction" between things that may properly be taken into account in ascertaining the significance of an environmental effect and things that may properly be taken into account in establishing the weight to be given to those effects ([80]).

102. So far as it bears on the assessment of the significance and weight to be attributed to the "CO_2 emissions" likely to be produced by a particular development, the policy in paragraph 5.2.2 of EN-1 (2011) is not framed in mandatory or prescriptive terms. That is not how it was understood by the Secretary of State, nor how it was applied by her. To suggest that she fell into such an error is to misread the decision letter. The reality here is that, quite properly, she had regard to the policy in paragraph 5.2.2, understood it correctly, and applied it reasonably and lawfully. She was entitled to form her conclusions on significance and weight, in the light of the policy, and explicitly basing it, in part, on the estimated amount of GHG emissions likely to be produced by the proposed development – an estimate to the making of which Dr Boswell had contributed himself. She stated the reasons for her conclusions adequately and clearly. There is no hint at all of the Secretary of State having thought that her own conclusions on these matters were in any way prescribed, deemed or dictated by national planning policy. Her approach and the conclusions to which she came were, in our view, legally unimpeachable.

103. Ground 2 of the appeal must therefore be rejected.

Conclusion

104. For the reasons we have given, this appeal is dismissed.