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Friends of the Earth vs Secretary of State for Energy Security and Net Zero – High Court allows judicial review challenge to Secretary of State's performance of its duties under the Climate Change Act 2008 ... again!

On 3 May 2024 the Administrative Court gave judgment in Friends of the Earth v Secretary of State for Energy Security and Net Zero [2024] EWHC 995 (Admin), allowing a judicial review challenge brought by Friends of the Earth ("**FoE**"), Client Earth and the Good Law Project (the "**Claimants**") of exercise by the Secretary of State for Energy Security and Net Zero ("**SoSESNZ**") of its duties under ss. 13 and 14 of the Climate Change Act 2008 ("**CCA**").

The CCA

S1(1), CCA requires the Secretary of State ("**SoS**") to ensure that the net UK carbon account in 2050 is at least 100% lower than the 1990 baseline (being the aggregate amount of net UK emissions of (a) CO₂ for that year; and (b) other GHGs for their respective base years). By s.4(1) the SoS must set for each succeeding period of 5 years, beginning 2008-2012 ("**CB1**") a carbon budget, and ensure that the net UK carbon account for that period does not exceed the carbon budget set.

By s.13(1) CCA, the SoS "*must prepare such proposals and policies as [it] considers will enable the carbon budgets that have been set under this Act to be met*". By sub-section (3) "*The proposals and policies, taken as a whole, must be such as to contribute to sustainable development*".

By s.14(1), CCA: "*As soon as is reasonably practicable after making an order setting the carbon budget ... the [SoS] must lay before Parliament a report setting out proposals and policies for meeting the carbon budgets for the current and future budgetary periods up to and including that period*".

Facts

By an earlier judgment (*R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2023] 1 WLR 225 ("**FoE (No.1)**") handed down on 18 July 2022, the Court, upholding FoE's judicial challenge review, found that the SoS for Business, Energy and Industrial Strategy ("**SoSBEIS**") – the minister previously responsible – had failed to comply with his duties (a) to prepare such proposals and policies ("**P&Ps**") as he considered would enable relevant carbon budgets to be achieved, up to and including the Government's sixth carbon budget covering the period 2033-2037 ("**CB6**") under s.13(1); and (b) to set out for Parliament those P&Ps, under s.14(1).

In FoE No.1, Holgate J ordered the SoSBEIS to lay before Parliament a report compliant with s.14 CCA (the Carbon Budget Delivery Plan (the "**CBDP**")) by no later than 31 March 2023.

The SoSESNZ purported to comply with that order.

Grounds for Challenge

The Claimants applied for judicial review of the SoSESNZ's actions, on the basis that he had, too, failed to comply with sections 13 and 14 CCA. Five grounds of challenge were brought:

1. The SoS had failed to account for mandatory, material considerations when purporting to comply with s.13, CCA. Specifically, the SoS was not provided with key materials on the delivery risk of individual P&Ps set out in the CBDP, and those risks were misrepresented.
2. The SoS proceeded on the assumption that all quantified P&Ps presented to it would be delivered in full, which assumption was unsupported by the delivery risk information provided. Specifically, the CBDP stated that it was "*reasonable to expect*" that the P&Ps

would be delivered in full, but it was not open to the SoS to make this assumption.

3. Accordingly, the SoS's conclusion that the P&Ps would enable the carbon budgets to be met was irrational.
4. The SoS applied the wrong legal test to s13(3) CCA, insofar as the CBDP found only that "*the overall contribution to sustainable development [of the P&Ps] is likely to be positive*".
5. The CBDP did not contain required information, namely sufficient information on delivery risk in relation to individual P&Ps.

Administrative Court's decision

Sheldon J hearing both the application for permission, and the substantive hearing, in a "rolled up hearing" held that: (a) as to permission, each of the grounds of challenge were arguable, and so permission was granted for each; and (b) as a matter of substance, the Claimant's application for judicial review was allowed for Grounds, 1 - 4, but Ground 5 was dismissed. The following reasons were given:

1. The Court could only impugn the process by which information was provided to the SoS, if the content did not enable him to carry out his statutory evaluation exercise lawfully (including if it was incomplete in any material way). Information about risk was presented to the SoS in March 2023, and included the statement: "*the package of [P&Ps] ... will deliver sufficient quantified savings to meet ... 97% of CB6 ... this ... relies on the package ... being delivered in full. Our advice is that it is reasonable to expect this level of ambition – having regard to delivery risk ... and the wider context*". The reasonable interpretation of this statement was that each of the P&Ps would be delivered in full. This resulted in a mistaken understanding of the true factual position since in reality this was not the case.
2. The SoS was not provided with sufficient or complete information as to the "*obviously material consideration of risk to the individual policies and procedures*". Accordingly, it was not possible for him to ascertain which of the P&Ps would be delivered at all or in full, or which of the quantified policies were likely to miss the target, by how much, and whether and if so whether these would be compensated by other deliveries.

3. As a matter of law, Wednesbury Unreasonableness may be made out where there is an unexplained evidential gap or leap in reasoning which fails to justify the conclusion reasoned by the public law decision-maker. Accordingly, in making such an assumption the SoS's decision was irrational: (*R(Wells) v Parole Board* [2019] EWHC 2710 (Admin) applied). There was no evidence that the SoS would have been highly likely to reach the same decision, had that assumption not been made (s.31(2A Senior Courts Act 1981, considered).
4. The SoS's statement that the P&Ps were "likely" to contribute to sustainable development fell short of the much higher threshold mandated by s13(3) that they "must" so contribute.
5. The material in the CBDP complied with s.14(1) insofar as it satisfied Holgate J's judgment in FoE (No.1) (with which Sheldon J agreed) that the language of s.14(1) required that the CPDP should tell Parliament how (a) the SoS proposed to meet the carbon budgets by explaining his thinking behind the proposals and (b) they would enable those budgets to be met, but did not require the provision of risk data as to the specific policies or how those risks would be overcome.

Concluding his judgment, Sheldon J invited the parties to make submissions on an order, pursuant to which the government will be required to produce a second, revised and legally compliant climate action, anticipated within the next 12 months.

Comment

Sheldon J's decision confirms the increasing scrutiny that Courts are willing to place on the Government concerning its statutory duties to accurately monitor and limit domestic GHG emissions.

As the second successful challenge by FoE in 2 years, the decision also highlights a systemic flaw in the Government's current climate change policy.

The judgment (at [56]) notes that such policy is devolved to each of Wales, Scotland and Northern Ireland and express references are made to the Scottish Government's more ambitious commitment to achieving net zero by 2045, and that of the Welsh Government, by 2050 (at [57]-[58]).

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Contact us

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our maritime decarbonisation team below:



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