Transport North: ***Legal showdown - the DfT versus the Climate Change Act***
28th December 2024

Sources note

NB The author of this article is not a lawyer and has not benefited from legal advice or comment in developing its analysis. It may therefore need to be corrected or qualified in due course. Consequently (and with one exception) it does not comment on the arguments and merits of the judicial review cases it talks about, each of which will have been developed by expert legal teams of barristers and solicitors. Its perspective instead is that of a climate analyst/campaigner who is drawing attention to the contribution that legal challenges can make to decarbonisation campaigning; however greater awareness of that opportunity is dependent on access to the background legal papers for each case. The article recounts that it was only the unusual decision of Friends of the Earth - in its briefing on 3rd May 2024 about that day's judgement on its successful judicial review of the government's Carbon Budget Delivery Plan - to append online links to some of its background legal papers that opened the door to the article's line of thinking.

Court judgements: if a judicial review has been determined, always read the judgement (which you can search for on www.judiciary.uk) which will contain significant information about which you will not be aware, and also to test whether personally you agree with the positions presented by the claimant, defendant (the government), and the court's final decision.

Friends of the Earth judicial review of the government's Net Zero Strategy: judgement by Justice Holgate 22nd July 2022 - known as **FOE1**
Friends of the Earth judicial review of the government's Carbon Budget Delivery Plan Net Zero Strategy: judgement by Justice Sheldon 3rd May 2024 - known as **FOE2**
Global Feedback judicial review of the DEFRA food strategy: judgement by Justices Lindblom, Singh and Andrews 21st December 2023

Case Papers: One of the reasons why campaigners are not well-informed about the legal background is because the large volume of legal papers associated with any JR is usually not available; in addition court procedure limits their public disclosure or discussion before a hearing. The article references the unusual circumstance where Friends of the Earth chose to provide online links (**here** scroll down for the extensive 'related documents' section) to some of the papers and witness statements on the day that its successful FOE2 judgement was published. Another **briefing** in July 2023 described the specific grounds of their original FOE1 and intended FOE2. The legal papers for the Transport Action Network JR of the national networks national policy statement are **here** up to the 3rd December 2024 oral hearing; a judgement is expected in early 2025.

To the extent possible, claimant organisations should be encouraged to provide as much online access to the papers for their developing JR cases as they can. Should they not do so (maybe for good reason) you can contact them with a request for whatever documentation they are able to provide.

Extracts from DfT documents/ judgements/legal papers cited in the article
highlighted in grey

Example [1] 2014 NPS definition of how carbon impacts arising from road schemes should be assessed

NB this is from the original 2014 version of the National Networks NPS (not the 2024 revision *see next example*) but this version more clearly describes how the chosen wording limits, or actually prevents, carbon emissions increases from a proposed individual road scheme - or indeed from the roads programme as a whole - from being integrated into the decision-making process for the scheme. The 2024 version continues to apply this approach but in more opaque language.

'Carbon impacts will be considered [by] … an assessment of any likely **significant** climate factors in accordance with the requirements in the EIA Directive. It is **very unlikely** that the impact of a road project will, **in isolation**, affect the ability of Government to meet its **carbon reduction plan targets**. … applicants should provide … an assessment against **the Government's carbon budgets**. … Any increase in carbon emissions is not a reason to refuse development consent, unless the increase in carbon emissions resulting **from the proposed scheme** are **so**

significant that it would have a **material** impact on the ability of Government to meet its carbon reduction targets.' *2014 NNNPS 5.16-18, emphasis added*

Example [2] 2024 NPS definition of how carbon impacts arising from road schemes should be assessed

5.38 The Secretary of State must be satisfied that the applicant has as far as possible assessed the carbon emissions at all stages of the development. The Secretary of State for Energy Security and Net Zero regularly assesses whether the UK has sufficient policies and proposals overall to meet the UK carbon budgets, with a view to meeting the net zero target, in line with the duties under section 13 of the Climate Change Act 2008. …

5.39 S.1(1) of the Climate Change Act 2008 reflects and puts into effect the net zero target set in light of the temperature goal of the Paris Agreement. The target was increased from 80% emission reductions by 2050 to 100% emission reductions by 2050 in June 2019. Carbon budgets 1 to 5 were set to meet the 80% emission reduction target, but carbon budget 6 (2033-2037) has been set to meet the 2050 net zero target, so it is more stretching. The UK's current Nationally Determined Contribution … commits to reducing economy-wide greenhouse gas emissions by at least 68% by 2030, compared to 1990 levels, so it is more stretching than carbon budget 5. The UK's Nationally Determined Contribution is on the pathway to the 2050 net zero target. Where it provides useful context, applicants may wish to compare their scheme emissions against carbon budgets, net zero and the UK Nationally Determined Contribution. …

5.40 The Secretary of State should be content that the applicant has taken all reasonable steps to reduce the total carbon emissions at all stages of development. … However, given the important role national network infrastructure plays in supporting the process of economy wide decarbonisation, the Secretary of State accepts that there are likely to be some residual emissions from construction of national network infrastructure.

5.41 Operational carbon emissions from some types of national network infrastructure cannot be totally avoided. Given the range of non-planning policies aimed at decarbonising the transport system, government has determined that a net increase in operational carbon emissions is not, of itself, reason to prohibit the consenting of national network projects or to impose more restrictions on them in the planning policy framework.

5.42 Any carbon assessment will include an assessment of operational carbon emissions, but the policies set out in chapter 2 of this NPS, apply to these emissions. Operational emissions will be addressed in a managed, economy-wide manner, to ensure consistency with carbon budgets, net zero and our international climate commitments. Therefore, approval of schemes with residual carbon emissions is allowable and can be consistent with meeting net zero. However, where the increase in carbon emissions resulting from the proposed scheme are so significant that it would have a material impact on the ability of government to achieve its statutory carbon budgets, the Secretary of State should refuse consent.

Example [3] **FOE2 judgement 3rd May 2024**

24. Responses were provided by various government departments. For the present proceedings the Secretary of State disclosed returns from one department: the Department for Environment, Food and Rural Affairs ("DEFRA"). …

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

Paragraphs 8-55 in the FOE2 judgement provide a very detailed picture, not previously available, of the process within government by which the draft Carbon Budget Delivery Plan was prepared before publication at the end of March 2023. From this campaigners can understand that it is broadly that same process and timetable that

the Labour government will be undertaking at this very moment as they work towards the May 2025 court's deadline by which time a lawful climate plan has to be submitted.

Example [4] **Global Feedback judgement 22 December 2023**

92. In this case, for the reasons we have already indicated, the preparation of the Food Strategy by SSEFRA was not, in our view, activity within the duty of "the Secretary of State" under section 13. …

93. The submission that SSEFRA was performing the section 13 duty as it bore on his own department's responsibilities, and preparing under that section a proposal or policy that would enable his department's "share" of the carbon budgets, is, we think, wrong.

94. On this understanding of section 13, there was no failure by SSEFRA to comply with section 13 in the preparation by DEFRA of the Food Strategy. [Counsel for Global Feedback's] submissions to the contrary are mistaken. Section 13 did not apply to DEFRA's preparation of the Food Strategy.

101. In short, therefore, the preparation of the Food Strategy was not an activity within the reach of section 13 of the Climate Change Act. The duty in that section did not apply to it. This conclusion, in our view, is consistent with that of Holgate J. in his judgment in *Friends of the Earth*.

Rebuttal by government lawyers 24th November 2022 2022 of the Possible aviation JR

The rebuttal text is highlighted in grey interleaved with my annotations made on this text at the time of reading. As you consider this, remember that these are the **DfT's** initial arguments to reject the judicial review submitted by Possible. It is not a final judgement given by the courts, nor can it ever be because Ground 1 was subsequently withdrawn in response to the 'S.13 GF Vulnerability'.

Example [5] **relating to the Section 13 duty**-

Ground 1: Section 13 Climate Change Act 2008

23. This ground proceeds on a fundamental misunderstanding of the nature of the duty in s.13 of the CCA 2008 and is unarguable as against both *[SoS transport and SoS ES&NZ]*. The short point is that the duty in s.13 of the CCA 2008 does not apply to the JZS proposed by the *[SoS Transport]* in respect of aviation (a sub-sector of transport) in the way the Claimant suggests. It is the extant NZS *[Net Zero Strategy]*, which has been produced by the *[now SoS Energy Security & Net Zero]* in accordance with ss.13 and 14 of the CCA 2008, to which these provisions apply as the NZS is setting out the policies and proposals which the *[SoS ES&NZ]*considers will enable the CBs *[carbon budgets]*set under the CCA 2008 to be met. The CBs are not sector specific. It is axiomatic that the UK can seek to meet its CBs overall by a strategy which balances emissions generated or removed across the whole economy in all sorts of different sectors.

24. As stated by Holgate J in *R(Transport Action Network Ltd) v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at 127 when dealing with a legal challenge to the treatment of climate change in respect of *[SoS Transport's]* Road Investment Strategy 2: "… there is no sectoral target for transport or any other sector, and that emissions in one sector, or in part of one sector, may be balanced against better performance in others. A net increase in emissions from a particular policy or project is managed within the government's overall strategy for meeting carbon budgets and the net zero target as part of an "economy wide transition" The argument back to the DfT would have to be: 'what if it can't be 'balanced against better performance in others' because that is mathematically impossible since the size of the transport emissions sector is simply too large. In order to prevent future delivery risk being created, the ES&NZ secretary would have to demonstrate that the size of the transport sector 'effort share' which he has accepted is sufficient such that a lawful overall CBDP with manageable delivery risks can be developed. This is why he must be specifically advised of his responsibilities to do just this at the earliest stage in the 2024/25 process. ...

25. Section 13 of the CCA 2008 is a specific duty that relates to, and requires a high level, whole economy, judgement that can only be discharged by the Secretary of State with

overarching responsibility for climate change mitigation who is best placed to view the package of measures in its entirety (namely, the *[SoS ES&NZ]*, see below). It is not a duty that fell upon the *[SoS Transport]*, and it is not engaged by the preparation and publication of the JZS. But it would be if the SoS ES&NZ asked the SoS transport by requesting a larger transport 'effort share' The *[SoS ES&NZ]* will ultimately have to consider emissions generated from all sectors, including aviation, as a result of decisions, proposals or policies in those sectors, but that is the function of the NZS which is the responsibility of the *[SoS ES&NZ]*.

27 Section 13 imposes a duty to prepare 'proposals and policies' that the Secretary of State considers "will enable the carbon budgets that have been set… to be met". This duty is one that relates to the economy as a whole and which the *[SoS ES&NZ]* has sought to address through the publication of the NZS and production of the NZS to Parliament. The principal purpose of s.13 is thus to impose a duty (addressed by the *[SoS ES&NZ]* as the Secretary of State responsible for the functions under that part of the legislation) to prepare proposals and policies specifically in order to enable CBs to be met. This has been done by the NZS. … which includes policies and programmes relating to aviation.

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28. These mechanisms are ultimately intended to facilitate the *[SoS ES&NZ]* meeting the target for 2050, namely that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline (i.e. 'net zero'; s.1 of the CCA). Note that this rebuttal does not include any statements about the quantity of transport and then specifically aviation emissions, and then that the latter requires that there will be a substantial quantity of carbon removals required both before and after 2050 in order to balance out the continuing carbon emissions from aviation which in 2050 amount to 23Mt. And where is the demonstration of the certainty, and therefore the sufficient management of future delivery risks, at the present time/2024 that this represents an adequate treatment of those delivery risks?

31. The duties under ss. 13 and 14 were addressed by the *[SoS ES&NZ]* through the proposals and policies in the NZS and the reporting to Parliament of the NZS. This sets out the proposals and policies that the *[SoS ES&NZ]* considers will enable the carbon budgets to be met. Those duties under ss.13 and 14 continue to be addressed by the *[SoS ES&NZ]* as reflected in the Court's order *[FOE1]* requiring the *[SoS ES&NZ]* to produce a compliant report in light of those parts of the Court's Judgment where a partial failure to comply with those duties was identified.

32. There is nothing surprising in that identification by the Court. As reflected in what is set out in the Court's Judgment, it is the officials who are reporting to the *[SoS ES&NZ]* that are in the position of collating and analysing up-to-date information on both anticipated emissions and performance of the whole economy (of which aviation is only one part) against the UK's CBs That is: these are the same ES&NZ officials who will need to assess whether the DfT have made a sufficient 'effort share' offer, in conjunction with the offers made by other sectors/departments; they will therefore be able to consider any overall effects and consider proposed actions across the whole economy to address emissions from all sectors. It is only those officials and the *[SoS ES&NZ]* who are in a position to consider the overall effects of all proposals and policies taken as a whole, across all sectors of the economy and all Departmental portfolios, and therefore to perform (or in the case of officials, assist in the performance of) the ss.13 and 14 duties under the CCA 2008. Yes it is their responsibility and duty to consider the adequacy of the DfT's proposed 'effort share'.

33. Other Secretaries of State can adopt specific or more detailed and targeted proposals or policies within specific sectors or sub-sectors for which they are responsible in the ordinary way which the *[SoS ES&NZ]* took account of in the NZS (as was done in this case for aviation), and of which he will no doubt take account in his continuing assessment of the NZS. However, development of such specific proposals or policies does not involve those other Secretaries of State in making judgements under s. 13(1) about policies for meeting CBs across the whole economy; other Secretaries of State would not be equipped to do that However surely the development of an adequate cross-government CBDP requires that the other secretaries of state work together in an effectively organised process, which we now know is the effort share allocation; except that the adequacy of that stage in the CBDP development process has not been transparently revealed or tested

35. By contrast, the JZS is concerned only with the aviation sector, a sub-sector of the transport sector. It is aligned with and is consistent with the NZS, but it is not the function of the JZS itself to enable the CBs as a

whole to be met; the NZS is the suite of proposals and policies that is directed to that function. But does that mean that the JZS can be as irresponsible as it chooses? In other words who set the parameters for the reasonableness of the JZS? It must be within the SoS ES&NZ's judgement about the reasonableness of the DfT effort share.

Example [6] relating to submissions made that the Jet Zero Strategy (JZS) consultation should have included the option of undertaking demand management measures

17. It has never been part of the *[SoS Transport's]* proposed JZS (either in terms of the draft strategy on which he consulted or the JZS that he published following that consultation) that there should be "direct demand management" of the ability for people to access aviation travel. To the contrary, the *[SoS Transport's]* proposed strategy is premised on providing people with the ability to access aviation travel to meet demand. The strategy ((on which the *[SoS Transport]* consulted) is about articulating the measures to achieve Jet Zero on the premise that people are able to access aviation travel, and therefore assuming that aviation capacity increases based on the modelled assumptions. Accordingly, it is a fundamental misconception and unarguable contention that the First Defendant was somehow legally obliged to formulate and consult upon some sort of **different** strategy to that which he has proposed, namely one premised on direct demand management that limits the ability to fly.

It is similarly flawed to suggest that the consultation process is somehow flawed because the *[SoS Transport]* did not have an open mind about having a different strategy to the one he was actually consulting upon. The Claimant simply fails to articulate any legal basis for suggesting that the *[SoS Transport]* was required to produce and consult upon a fundamentally different strategy to the one that he was actually proposing. As a matter of basic principle (particularly in the realm of the formulation of policy), the *[SoS Transport]* was entitled to formulate his strategy based on a principle of permitting people to fly without limiting the ability to do so; and consequently to consult on the measures he was proposing to achieve Jet Zero, reflecting that objective. The fact that bodies like the Claimant may disagree with that policy approach is not a proper basis for legal challenge, nor for criticising the consultation on the measures that the First Defendant was proposing to meet his proposed policy.