Neutral Citation Number: [2023] EWHC 2608 (Admin)

Case No: CO/4583/2022 and CO/4830/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2023

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

THE KING (on the application of GREENPEACE LIMITED)	**CO/4583/2022 Claimant**
- and -	
(1) SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO **(2) OIL AND GAS AUTHORITY**	**Defendants**
- and -	
THE KING (on the application of UPLIFT)	**CO/4830/2022 Claimant**
- and -	
SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO	**Defendant**
- and -	
OIL AND GAS AUTHORITY	**Interested Party**

- -
- -

James McClelland KC, Gethin Thomas and **Alastair Richardson** (instructed by **Greenpeace**) for the **Claimant in CO/4583/2022**

Estelle Dehon KC and **Ruchi Parekh (**instructed by **Leigh Day Solicitors)** for the **Claimant** in **CO/4830/2022**

Richard Turney and **Ben Fullbrook** (instructed by The **Government Legal Department)** for the **Defendant**

The **Oil and Gas Authority** did not appear and was not represented at the hearing

Hearing dates: **25 and 26 July 2023**

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FINAL JUDGMENT

Mr Justice Holgate:

Introduction

1. These two claims for judicial review are concerned primarily with decisions taken by the Secretary of State for Business, Energy and Industrial Strategy (now the Secretary of State for Energy Security and Net Zero) in connection with the licensing by the Oil and Gas Authority ("the OGA") of further offshore oil and gas exploration and production, in particular the 33rd licensing round. A central issue is whether the Secretary of State acted unlawfully by not including in his assessment of the Plan downstream emissions of greenhouse gases ("GHGs") from the end use by consumers of oil and gas as a fuel. These are also referred to as "scope 3" emissions. The decisions of the Secretary of State under challenge were taken before the current incumbent was appointed on 31 August 2023. The OGA is a defendant in CO/4583/2022 and an interested party in CO/4830/2022.

2. The Secretary of State's policy for further licensing was contained in his non-statutory Offshore Energy Plan ("the Plan"). By the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No. 1633) ("the 2004 Regulations") he was required to carry out a strategic environmental assessment ("SEA") of the Plan. The assessment was referred to as OESEA4.

3. Greenpeace Limited ("Greenpeace"), the claimant in CO/4583/2022, is the UK branch of Greenpeace, a non-governmental organisation whose principal activity is to campaign to prevent harm to the environment. It has about 1.2m members in the UK. The international organisation operates in 40 countries and has about 2.8m supporters worldwide. The claimant has a long history of campaigning on the impact of, and taking action to prevent, oil and gas exploration, extraction and consumption, and impacts on climate change.

4. Uplift, the claimant in CO/4830/2022 is an unincorporated organisation. Its "mission" is to support "the movement for a just and fossil-free UK". It seeks "a just transition away from fossil fuel production that is commensurate with the scale of the climate crisis". Uplift has 17 members of staff who include campaigners, researchers and policy analysts and is supported by a steering group of external consultants with particular expertise in this area.

5. By s.1(1) of the Continental Shelf Act 1964 and s.2 of the Petroleum Act 1998 ("PA 1998") the rights to search and bore for and get petroleum in the territorial sea adjacent to the UK[1] and in the UK continental shelf are vested in the Crown. By s.3 of the PA 1998 the OGA may grant licences on behalf of the Crown to search and bore for and get such petroleum. Up until 1 October 2016 licensing functions were discharged by the Secretary of State, but on that date they were transferred to the OGA. The OGA is a company wholly owned by the Secretary of State, but s.1 of the Energy Act 2016 provides that it is not to be regarded as acting on behalf of the Crown. On 21 March 2022 the OGA adopted "North Sea Transition Authority" as a trading name.

[1] See s.1 of the Territorial Sea Act 1987

6. The Offshore Petroleum Regulator for Environment and Decommissioning ("OPRED") is a unit within the Department for Energy Security and Net Zero responsible for regulating environmental and decommissioning activity in the territorial sea adjacent to the UK and on the UK continental shelf. This includes managing the SEAs for the Secretary of State's plans for offshore energy projects in accordance with the 2004 Regulations.

7. The Department's Oil and Gas Exploration and Production unit ("OGEP") was responsible for developing the Climate Compatibility Checkpoint ("the Checkpoint") which is the subject of certain of the grounds of challenge.

8. There have been 32 licensing rounds between 1964 and 2020. UK waters are divided into "blocks". A licence is granted in respect of one or more blocks or part-blocks. In each licensing round the OGA invites competitive bids for the blocks on offer and selects the winning bid for each licence area. A "seaward production licence" grants exclusive rights to the licensee to search and bore for and get petroleum in the licensed area, subject to terms based on statutory "model clauses". Thus, after the exploration phase the licence holder must obtain the consent of the OGA before developing infrastructure or extracting oil or gas commercially. That consent is subject to the agreement of the Secretary of State, which may not be given unless and until any necessary environmental impact assessment ("EIA") is completed.

9. Following the 21st Conference of the parties to the United Nations Framework Convention on Climate Change ("UNFCCC"), the text of the Paris Agreement on Climate Change ("the Paris Agreement") was agreed and adopted on 12 December 2015. The UK ratified the Agreement on 17 November 2016. Article 2(1) seeks to strengthen the global response to climate change by holding the increase in global average temperature to well below 2°C above pre-industrial levels, and by pursuing efforts to limit that increase to 1.5°C.

10. In order to achieve the long term temperature goal in Art.2(1), Art.4(1) lays down the objective of "achieving" a balance between "anthropogenic emissions by sources" and "removals by sinks of greenhouse gases" in the second half of this century. This objective to achieve net zero emissions will be satisfied if the global level of any residual GHG emissions (following measures to reduce such emissions) is at least balanced by sinks, such as forests, which remove carbon from the atmosphere.

11. Article 4(2) of the Paris Agreement requires each party to notify to the UNFCCC and maintain successive nationally determined contributions ("NDCs") that it intends to achieve. The parties are then to pursue domestic measures "with the aim of achieving the objectives of such contributions". On 12 December 2020 the UK notified its NDC to reduce by 2030 national GHG emissions by at least 68% compared to 1990 levels.

12. Further in response to the Paris Agreement, s.1 of the Climate Change Act 2008 ("CCA 2008") was amended with effect from 27 June 2019 so that the Secretary of State is under a duty to ensure that "the net UK carbon account" for 2050 is at least 100% lower than the baseline in 1990 for carbon dioxide and other GHGs. This was in substitution for the 80% reduction originally enacted (see

the Climate Change Act 2008) (2050 Target Amendment) Order 2019 (SI 2019 No.1056). This is the UK's net zero target.

13. One of the issues which divides those in favour of or against the grant of further licences for oil and gas exploration and production is whether that would be compatible with achieving the net zero target. The court was referred to some of the literature on the subject but plainly this is a matter of judgment and not law.

14. In May 2021 the International Energy Agency ("IEA") produced a report, "Net Zero by 2050: A roadmap for the Global Energy Sector". They advised that there is no need for investment in new fossil fuel supply in their net zero pathway to 2050. But at the same time the report recognises that energy security is an important consideration for governments and those they serve. The reduced demand for oil and gas, and the increased diversity of energy sources, may reduce some issues, but those risks do not disappear. So, for example, the IEA predicts that oil and gas supplies will become increasingly concentrated in a small number of producers. OPEC's share of oil supply is projected to grow from 37% in recent years to 52% in 2050, the highest level in the history of oil markets (p.175).

15. On 20 October 2021 the United Nations Environment Programme ("UNEP") produced a report on "The Production Gap." It said that, viewed globally, governments plan to produce more than twice the amount of fossil fuels in 2030 than would be consistent with limiting global warming to 1.5°C.

16. Plainly these and other related issues are matters for individual governments to address. The scale of oil and gas production, domestic consumption, importation and energy security issues will vary from country to country. Their relative contributions to global GHG emissions also vary. The UK is said to contribute less than 1% of the global total.

17. From 1999 UK oil and gas production has been in decline. Current OGA projections show future UK production falling by up to 8% a year, even when new development and new licensing is taken into account (para.11 of submission to Secretary of State dated 7 September 2022). The Climate Change Committee ("CCC") has produced a "balanced net zero pathway" to 2050 which incorporates the declining, but continued UK demand for oil and gas over that period. OGA's projection of domestic supply to 2050 is substantially lower than that of demand throughout the period. The UK is therefore expected to remain a net importer of oil and gas. Officials also informed the Secretary of State that "even with continued exploration and development, the future decline in UK North Sea production, as projected by [OGA], is faster than the global average decline in oil and gas production required for the world to globally keep 1.5°C, as calculated by the UN Environment Programme (requiring a global annual reduction in production of oil and gas by 4% and 3% respectively)" (submission to the Secretary of State dated 15 September 2022).

18. To put the 33rd round into this context, it is helpful to refer to the timescales envisaged for the licences to be granted. According to OESEA4, the initial exploration term may last for up to 9 years (i.e. up to 2032). Thereafter, the

appraisal and field development term may last up to 6 years and then the development and production term a further 18 years (sections 2.4.3 and 5.12.3.2 of the Environmental Report for OESEA4).

19. Mr Richard Turney for the Secretary of State pointed out that it is also relevant for Government to consider the use of hydrocarbons for purposes not involving combustion as a fossil fuel, in particular as a feedstock in manufacturing processes (e.g. plastics).

20. The claimants and others may disagree with all or some of these points, but it is not for the court to determine the rights and wrongs of such matters. In so far as they lie within his remit, they were for the then Secretary of State, who is answerable to Parliament. I simply record how these matters have been addressed by the Secretary of State and his officials.

21. Judicial review is the procedure for ensuring that ministers and public bodies act within the limits of their legal powers and comply with their legal obligations and relevant procedures and principles. The court is only concerned with determining questions of law. It is not responsible for making political and socio-economic choices. Decisions on those matters have been entrusted by Parliament to the Secretary of State and OGA. The court is only concerned with the *legal* issues raised by the claimants which are said to show that the defendant(s) have acted unlawfully.

22. This remainder of this judgment is set out under the following headings:

The process leading to the decisions under challenge

23. In July 2020 the then Secretary of State asked officials to carry out a review of whether future rounds of licensing for oil and gas exploration and production would be compatible with the UK's climate objectives. The review was referred to in the Energy White Paper: Powering our Net Zero Future (December 2020). The White Paper said that the use of "checkpoints" by the Secretary of State was being considered to ensure that any licensing would continue to be compliant with climate change objectives (p.142). The domestic oil and gas industry was said to play "a critical role in maintaining the country's energy security" (p.134). The review was described as "an opportunity for the UK to demonstrate that effective climate leadership can be compatible with maintaining a strong economy and robust energy security" (p.141).

24. The Secretary of State issued a Written Ministerial Statement on 24 March 2021. He announced that the Government had signed the North Sea Transition Deal with the oil and gas industry that day. The White Paper contained a commitment to make the UK Continental Shelf a net zero basin by 2050. The oil and gas industry would have a critical role in maintaining the country's energy security through that transition. The Deal sets targets for reductions in GHG emissions from offshore production of 10% by 2025, 25% by 2027 and 50% by 2030 against a 2018 baseline.

25. The Statement also referred briefly to the review of future licensing without revealing its conclusion. That only became public knowledge when the Department issued a document in December 2021 stating that the review had in fact been completed in March 2021. But the review has not been published.

Instead, the Department said that it had considered a wide range of factors including oil and gas production in the economy, energy security and the UK's ability to achieve net zero and had concluded that:

> "…the continued licensing for oil and gas is not inherently incompatible with the UK's climate objectives. However, it was acknowledged that this may not always be the case in future. To resolve this issue, it was recommended that a "checkpoint" be introduced, to ensure that the compatibility of future licensing with the UK's climate objectives is always evaluated before a licensing round is offered."

It may be thought surprising that this conclusion on compatibility was not mentioned in the Written Ministerial Statement and that the review has not been published. However, none of the grounds of challenge turn on these points.

26. But the Statement in March 2021 did announce the introduction of the Checkpoint for future oil and gas licensing rounds and said that its design was to be completed by the end of 2021, before the 33rd round. Lastly, the Statement announced that the Department was working on a new Offshore Energy Strategic Environmental Assessment, OESEA4, to "underpin future licensing rounds".

27. On 17 October 2021 the Secretary of State approved the Net Zero Strategy pursuant to his duty under s.13 of the CCA 2008 to prepare proposals and policies to enable the carbon budgets set under the statute to be met and with a view to meeting the net zero target in 2050. By that stage, six 5-year carbon budgets had been set, including the sixth carbon budget covering the period 2033 to 2037. The policies on oil and gas in the chapter on fuel supply were based upon the North Sea Transition Deal. The Strategy refers to abatement measures to reduce GHG emissions from production operations and the use by the OGA of a "net zero test" when considering operators' production plans (p.112). The Strategy also refers to the introduction of the Checkpoint for future licensing rounds (p.113).

28. At this point it is helpful to refer to an explanation of the three types of GHG emissions, scope 1, scope 2 and scope 3, provided in the witness statement of Victoria Dawe, Director of Energy Development at the Department (at paras. 25, 27 and 28):

> "25. Under the Greenhouse Gas Protocol (which provides a comprehensive global standardized framework for organisations to measure and manage GHG emissions), emissions are categorized into the following three scopes.
>
> a. Scope 1: "Direct GHG Emissions" covers direct emissions from sources owned or controlled by an organisation. In a company, these would be any emissions that are directly produced by the company's facilities (e.g., for a car manufacturer these would be emissions released during the manufacturing of the engine and body, as well as the final

assembly). For an oil and gas company, scope 1 emissions include those released when methane is flared on a platform, or from diesel burnt to power the platform.

b. Scope 2: "Electricity and Indirect GHG Emissions" covers indirect emissions from purchased electricity consumed by the company, steam, heating and cooling. In the case of a car manufacturer, scope 2 emissions would include GHGs created when the electricity used by the car manufacturer was generated by the electricity company. For an oil and gas company, scope 2 emissions would include emissions produced when the electricity that powers the company's facilities was generated. In both cases, these same emissions also count as scope 1 emissions for the electricity generator.

c. Scope 3: "Other Indirect GHG Emissions" are all other indirect emissions generated up and down the value chain, but not owned or controlled by the organisation. For a car manufacturer, these include emissions related to the sourcing of materials such as steel, the manufacture and delivery of the components to the factory (both upstream activities) and the use of the car by a consumer and its disposal (both downstream activities). In this example, the emissions produced when fuel is burnt to drive the car by a consumer constitute scope 1 emissions for the consumer who is using the car. However, these same emissions would also constitute scope 3 emissions for all other companies that are upstream of the consumer: the company that manufactured the car, the refinery that refined the crude oil, and the oil company that produced that oil.

…

27. Scope 3 emissions are further divided into emissions generated "upstream" and "downstream". Upstream emissions are the indirect emissions related to an organisation's suppliers, including the materials, products and services that the organisation has purchased. For an oil and gas company, this would include emissions generated in the manufacture and transport of the steel used in their oil rigs. Downstream emissions are the indirect emissions generated in the use and disposal of an organisation's products. For an oil and gas company this includes any emissions involved in the transport or refining / processing of the oil and gas once it has been sold.

28. The overwhelming majority of scope 3 emissions for oil and gas producers are the so called "end use emissions", ie the (downstream) emissions released when the produced oil or gas is burned. The two terms ("scope 3" and "end use" emissions) are frequently used interchangeably in relation to the oil and gas sector. During preparation of the Checkpoint (both internally and

> in the published documentation) the Department generally used the term "scope 3 emissions", consistent with the approach used by many NGOs when discussing emissions related to oil and gas. …"

29. In paras. 29 to 31 of her witness statement, Ms. Dawe goes on to explain the international conventions followed by the UK and other countries in reporting GHG emissions:

> "29. The UK follows the agreed international approach for estimating and reporting GHG emissions under the United Nations Framework Convention on Climate Change ("UNFCCC"), the Kyoto Protocol, and the Paris Agreement, which require countries to report emissions released within their territories. All UK domestic and international GHG emissions reduction targets are therefore based on territorial emissions. The CCC has recommended that this is the right basis for the UK's carbon targets.
>
> 30. Thus, from a cumulative emissions perspective at a national level (such as the Government's carbon budget commitments), scope 1 emissions are the only type of emissions that are counted at a sectoral level. Where scope 2 or scope 3 emissions are released within the UK, they are always accounted for as the scope 1 emissions of some other UK based entity and counted against the emissions for the sector relevant to that entity, and when the scope 1 emissions of all UK-based entities are summed, the result is the total territorial emissions for the UK. Counting any sector's scope 2 or 3 emissions would introduce double counting in the UK's territorial emissions and muddy the waters when seeking to measure progress.
>
> 31. Therefore, while scope 3 emissions are relevant in some policy contexts, for the purpose of the Government's Net Zero Strategy, as well as a range of other domestic and international obligations, there is no sector for which scope 3 emissions count towards the UK's Carbon Budgets for that sector."

30. On 29 March 2021 OPRED had published its consultation report on the proposed scope of the OESEA4 assessment. As with SEAs for earlier licensing rounds, the new assessment was not to include emissions from end uses. The Department received 28 consultation responses, but not from either claimant. Only two respondents said that OESEA4 should address those emissions.

31. The Government's Response to that consultation published on 22 November 2021 explained why end use GHG emissions would be excluded from the SEA (see [89] below).

32. On 17 March 2022 the Environmental Report for OESEA4 was published for consultation. The Secretary of State's draft plan was for further offshore licensing of renewable energy projects (in particular offshore wind projects), oil

and gas exploration and production, hydrocarbon gas importation and underground storage, carbon dioxide transport and storage, and offshore production and storage of hydrogen. Consultation on the report closed on 27 May 2022.

33. In the meantime, work on the Checkpoint had been proceeding. Ministers had decided that this should be a policy document separate from the statutory process relating to OESEA4. The results of applying the Checkpoint would be a matter which could be taken into account in relation to licensing.

34. Initially Ministers had considered the use of three tests in the Checkpoint:

> Whether the UK oil and gas sector has met its reduction targets in the North Sea Transition Deal historically and is projected to do so in the future;
>
> (i) The sector's performance in reducing the emissions intensity for oil and gas production relative to other oil and gas producing nations;
>
> (ii) The scale of current and future UK offshore oil and gas production relative to UK demand for oil and gas in a net zero scenario (assuming continued licensing and development). This will show whether the UK is projected to remain a net importer of oil and gas or become a net exporter.

35. In a submission on 6 October 2021 OGEP advised Ministers on the addition of three "potential tests" in a consultation on the design of the Checkpoint. Test 5 included downstream emissions from end uses. Ministers were also advised that the Checkpoint should not be put on a statutory footing. The OGA would be able to take into account the outcome of the Checkpoint in its licensing decisions, but not so as to override its "primary statutory function" of maximising the economic recovery of UK oil and gas.

36. The consultation on the design of the Checkpoint was launched on 20 December 2021. The document included the three original tests plus the three additional ones suggested. "Potential test 5" would consider whether scope 3 emissions from the combustion of UK oil are expected to fall in line with the 1.5°C temperature target if further licensing rounds are approved. Mr. Turney explained that UK end use emissions are accounted for in the UK's emissions statistics, applying the conventions described in [29] above.

37. With regard to test 5, the consultation document said:

> "This test has been proposed in conversations with stakeholders. However as of yet, a full proposal for how the test would work has not been presented.
>
> - Scope 3 emissions of UK produced oil and gas would depend on a number of factors, predominantly how the

> oil is used; burnt for fuel, used as feedstock for chemicals/plastics/aggregates, heavily refined etc.
>
> - Methodologies for tracking the Scope 3 emissions of UK produced oil and gas are in their infancy, and there is no universally agreed approach to doing this. It should be noted that some organisations are currently attempting to do this.
>
> - We are unaware of an agreed target pathway for reducing Scope 3 emissions of UK produced oil and gas that could be used as a reference for such a test."

38. The consultation document identified the following disadvantages of test 5:

> "The methodology for accounting for emissions in this manner is potentially highly challenging.
>
> Scope 3 emissions from exported oil and gas produced in the UK are covered by the destination country's emissions accounting and targets, and therefore, depending on the test design, there is a risk of double counting.
>
> We would need to consider how the evidence would be gathered, reported and assessed in the absence of consensus on calculation and verification."

39. The consultation on the design of the Checkpoint closed on 28 February 2022.

40. On 20 July 2022 OGEP told the Minister that it was inclined to advise against the inclusion of test 5 for a number of reasons, which included the following:

> "21) Such a test seems difficult to apply; given the globally tradable nature of oil, which is a highly fungible commodity product. To have any meaningful effect, such a test would need UK producers to be able to identify – and control – the ultimate use of their oil with confidence – to be able to drive it towards relatively cleaner options. However, oil producers around the world sell to intermediaries and traders on open markets, who can then resell the oil, driven by changing prices and oil qualities – and have no realistic ability to influence the end user.
>
> 22) There are also challenges in sourcing reliable figures: tracking the ultimate destination (and hence emissions) of UK produced oil poses some practical challenges, when oil is sold around the world on an open market basis – however there are some methods for estimating the ultimate emissions of UK-produced oil and gas. UK-based companies operating globally are encouraged to report on their global emissions, although the situation with other users is less clear.

> 23) If other countries were to substitute UK-produced oil with another product, or with fossil fuels from a different source, it's difficult to see how this would affect overall global emissions. If the substitution was from countries with a poorer environmental record than the UK, this would lead to higher global emissions overall (See Annex B for further discussion of UK oil and gas emissions compared globally). We will continue to consider this over the summer, but at this stage we are inclined not to adopt this test. This argument is also explored in further detail in question 3 of Annex A."

On that question Annex A said:

> "However, there are several arguments against considering the UK as being responsible for the emissions of other countries, due to the origin of the oil and gas.
>
> - This approach is an optically easy accusation, but it does not make sense in practice. It would be difficult to reconcile with any reliable global accounting of emissions – as some emissions would be double counted, both at the point of production and at the point of consumption. This would weaken, rather than strengthen, moves towards global carbon accounting."

41. On 7 September 2022 a new Secretary of State was appointed. He received a submission that day advising him to adopt the Offshore Energy Plan as proposed to be amended and to approve the Government's Response to the consultation on OESEA4 and a written ministerial statement (to meet the requirement in the 2004 Regulations for a post-adoption statement). The Secretary of State accepted that recommendation the same day.

42. Also on 7 September 2022 OGEP made a submission to the Secretary of State asking him (a) to approve the final design of the Checkpoint and the Government's Response to the consultation on that issue and (b) to agree that that design be published and then applied ahead of the 33rd licensing round. The final design omitted test 5 because, although the consultation had asked how the test could fairly be designed, nothing had been proposed which in the view of officials would be compatible with the Government's position that the UK oil and gas sector is not responsible for end use emissions produced by consumers (whether domestic or international) using its products. The Secretary of State approved the Checkpoint design on 8 September 2022.

43. The final design for the Checkpoint contains only the three tests originally proposed. Test 1 considers whether the UK oil and gas sector has met its reduction targets historically and is projected to do so in the future (including reductions of 90% by 2040 and 100% by 2050). Test 2 compares the intensity of GHG emissions for the UK sector against other producing nations. Test 3 evaluates the scale of current and future UK offshore oil and gas production relative to UK demand "in a net zero scenario". The test considers whether the UK is a net importer or a net exporter of hydrocarbons. Ministers may also

consider the related question under test 2 whether the intensity of GHG emissions from UK production is lower than that of other producers.

44. The final design explains that the decision on whether to hold a new licensing round is for the OGA, not Ministers. A Checkpoint assessment is intended to provide information for Ministers considering whether to endorse or support the OGA in launching a new round. The Checkpoint does not contain "go/no-go" tests. Ministers may also have regard to other matters including:

- The contribution of the oil and gas sector to the UK economy, including employment, tax revenues and energy supply;
- The impact of not offering a licensing round on the investment climate for UK oil and gas;
- The additional level of energy security that a new licensing round could provide for the UK in the future.

45. On 15 September 2022 officials made a submission to the Secretary of State summarising the data used for the application of the Checkpoint tests and the outcome. They reiterated that the Checkpoint was intended to be informative and not decisive. They advised that a 33rd licensing round could be considered to be compatible with the UK's climate change objectives and invited the Secretary of State to decide whether he agreed with that conclusion. On 16 September 2022 he did so conclude.

46. The submission dated 15 September 2022 drew upon and annexed a Climate Compatibility Checkpoint analysis document. The Secretary of State requested that that document should not be published unless there was a legal obligation to do so. Officials received legal advice that there was no such obligation and so the analysis was not published. But it has been disclosed in these proceedings.

47. On 22 September 2022 the Department published the Government's Responses on the consultations on OESEA4 and on the design of the Checkpoint, the approved Checkpoint design and the Written Ministerial Statement (confirming the adoption of OESEA4 and the outcome of the Checkpoint). But the Plan was not published in a final form as ultimately amended.

48. The OGA proceeded on the basis that its launch of the 33rd licensing round was subject to the Secretary of State's decision, taking into account the outcome of the Checkpoint analysis (para.66 of Ms Dawe's witness statement). On 4 October 2022 the OGA decided to invite applications for licences under s.3 of the PA 1998, the 33rd round. The OGA published official notices announcing this decision on 7 October 2022. The period for making applications ended on 12 January 2023.

The decisions under challenge

49. Greenpeace challenges the following decisions:

(i) The Secretary of State's decision on 7 September 2022 to adopt the Offshore Energy Plan assessed in OESEA4;

(ii) The Secretary of State's decision on 8 September 2022 to omit test 5 from the Checkpoint as finally approved;

(iii) The Secretary of State's decision on 16 September 2022 that the 33rd licensing round is compatible with the UK's climate objectives, taking into account his Department's Checkpoint analysis;

(iv) The OGA's decision to invite applications for offshore oil and gas licences under s.3 of the PA 1998, taken on 4 October and announced on 7 October 2022.

50. In its Statement of Facts and Grounds Greenpeace had also sought to challenge the Secretary of State's decision to issue his Consultation Response on the OESEA4 assessment. But during the hearing Mr. James McClelland KC on behalf of Greenpeace confirmed that that part of the challenge is no longer pursued.

51. Greenpeace did not advance any separate grounds to justify challenging the OGA's decision to carry out the 33rd licensing round. Instead, Mr. McClelland submitted that if Greenpeace were to succeed on any of its grounds of challenge against the Secretary of State, then it would follow that the OGA's decision to proceed with the 33rd round was also unlawful. But he accepted that if these grounds should fail then Greenpeace advanced no freestanding argument to vitiate the OGA's decision. The OGA took no active part in the hearing, but I understood from correspondence sent to the court that they were content for Greenpeace's case against them to be determined on that basis.

52. Although expressed in slightly different language, Uplift challenges the same three decisions of the Secretary of State as summarised in [49] above. Uplift does not challenge any decision by the OGA.

53. The claimants placed some emphasis on the potential scale of the 33rd licensing round and the hydrocarbon reserves potentially involved. The OGA's invitation related to 898 blocks and part-blocks. They stated that it could lead to the grant of over 100 licences. To encourage production as quickly as possible the OGA identified 4 "priority cluster areas". In his witness statements Mr Daniel Jones, Head of Research and Policy at Uplift, relies on OGA information that there is more than 1000 billion cubic feet of gas in those priority areas and hundreds of millions of barrels of oil equivalent in another 55 "featured opportunities".

54. But there is no dispute that not all of the resources under the seabed are likely to be exploited. The Environmental Report on OESEA4 explains that while a high number of blocks are offered in each round, relatively few are applied for. Although several hundred licences have been granted in previous years, exploratory drilling tends to involve relatively few wells in a year and of those only a few may result in a commercial discovery and, of these, less again may result in development (p.42).

The grounds of challenge

55. At a hearing on 26 April 2023 Waksman J granted Greenpeace permission to apply for judicial review on grounds 3 and 4 in their Statement of Facts and Grounds but he refused permission on grounds 1 and 2. He granted Uplift permission to apply for judicial review on grounds 2, 3, 4 and 5 in their Statement of Facts and Grounds, but he refused permission on grounds 1 and 6. Because there was some overlap between the cases of the claimants, the judge directed them to co-operate so as to avoid duplication.

56. The parties agreed the following list of issues which are effectively the grounds I have to determine in respect of both proceedings:

> **Issue 1**
>
> The Secretary of State's decision not to assess in OESEA4 end use GHG emissions from further oil and gas licensing rounds was irrational and/or in breach of the 2004 Regulations.
>
> **Issue 2**
>
> In breach of the 2004 Regulations the Secretary of State failed properly to assess "reasonable alternatives", by failing properly to assess the alternative of not proceeding with further oil and gas licensing rounds.
>
> **Issue 3**
>
> The Secretary of State unlawfully failed to publish any reasons for deciding that a new licensing round would be compatible with the Climate Compatibility Checkpoint and the UK's climate objectives.
>
> **Issue 4**
>
> The Secretary of State's decision to approve the design of the Checkpoint was unlawful because it excluded test 5 for reasons which were unlawful and irrational.
>
> **Issue 5**
>
> The Secretary of State acted irrationally by relying upon the Checkpoint when deciding (a) to adopt the Offshore Energy Plan and (b) that the 33rd licensing round would be compatible with the UK's climate objectives.

57. It is convenient to deal with those Issues in the following order: 1, 2, 4, 5 and 3.

58. In relation to the OGA's decision to carry out the 33rd licensing round, Greenpeace advanced two issues:

> **Issue 6**
>
> The authority's decision was unlawful because OESEA4 was unlawful (see Issues 1 and 2)

Issue 7

The authority's decision was irrational because it relied upon the Secretary of State's adoption of the Checkpoint without test 5 (see Issue 4).

59. I am very grateful to counsel and the solicitors for their helpful submissions and assistance.

Statutory Framework

Climate Change Act 2008

60. Section 1 imposes a duty on the Secretary of State to ensure that the net UK carbon account (as defined) for the year 2050 is at least 100% lower than the 1990 baseline for net UK emissions of carbon dioxide and other relevant GHGs.

61. I refer to the analysis of the structure and relevant provisions of the CCA 2008 by the Supreme Court in *R (Friends of the Earth Limited) v (Secretary of State for Transport)* [2021] PTSR 190 at [39] to [47] and by the High Court in *R (Friends of the Earth Limited) v Secretary of State for Business, Energy and Industrial Strategy* [2023] 1 WLR 225 at [28] to [55].

Petroleum Act 1998

62. By s.3 the OGA is empowered to grant licences on behalf of the Crown to search and bore for and get petroleum beneath the territorial sea adjacent to the UK and in the UK continental shelf.

63. "Model clauses" prescribed in regulations made under s.4(1) may be incorporated into a licence. They enable the OGA to control the exploration, development and production phases of a project, and impose requirements for the Authority's approval to be obtained where appropriate. Furthermore, the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 (SI 2020 No. 1497) ("the EIA Regulations") impose requirements for additional approvals to be obtained. By reg.4(1) a developer may not commence a project without the Secretary of State's agreeing to the grant of consent by the OGA and that consent being granted by the Authority. By reg.4(2) the OGA may not grant consent without the agreement of the Secretary of State. He may not so agree unless any EIA required under the 2020 Regulations has been carried out (reg.4(3)) and he gives his conclusions on the "significant effects" of the project on the environment. Similar restrictions require the Secretary of State to carry out an appropriate assessment of any adverse effects on the integrity of protected sites, such as Special Areas of Conservation, under The Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 (SI 2001 No. 1754).

64. Part 1A of the PA 1998, entitled "Maximising Economic Recovery of UK Petroleum" and comprising ss.9A to 9I, was inserted by s.41 of the Infrastructure Act 2015 with effect from 12 April 2015. This legislation stemmed from the review by Sir Ian Wood and his final report "UKCS Maximising Recovery Review" published on 24 February 2014. The

background has been helpfully explained by Cockerill J in *R (Cox) v Oil and Gas Authority* [2022] EWHC 75 (Admin) at [12] to [45].

65. Section 9A(2) of the PA 1998 (as amended in 2016) requires the OGA to produce one or more strategies "for enabling the principal objective to be met". Section 9A(1) provides:

> "(1) In this Part the "principal objective" is the objective of maximising the economic recovery of UK petroleum, in particular through—
>
> (a) development, construction, deployment and use of equipment used in the petroleum industry (including upstream petroleum infrastructure), and
>
> (b) collaboration among the following persons—
>
> (i) holders of petroleum licences;
>
> (ii) operators under petroleum licences;
>
> (iii) owners of upstream petroleum infrastructure;
>
> (iv) persons planning and carrying out the commissioning of upstream petroleum infrastructure.
>
> (v) owners of relevant offshore installations."

This objective is often referred to as the "MER". A strategy may also relate to other matters (s.9A(3)).

66. Section 9B requires the OGA to act in accordance with the current strategy under s.9A when exercising specified functions. The Secretary of State's obligation in s.9BA to act in accordance with the strategy only applies to certain of his functions which did not apply in this case.

67. A licence holder (for example the holder of a licence granted in the 33rd round) or an operator under a licence must act in accordance with the strategy when planning and carrying out activities as a licence holder or operator (s.9C).

68. The relevant OGA Strategy came into force on 11 February 2021. Paragraph 1 refers to the requirement that the Strategy is to enable the principal objective in s.9A (the MER) to be met. In drafting the Strategy the OGA has had regard to *inter alia* how the Secretary of State may be assisted in meeting the net zero target. To that end the Strategy lays down a "Central Obligation" binding on "relevant persons". The term "relevant persons" refers to the persons listed in s.9A(1)(b) (see also the obligation in s.9C). There are also "Supporting Obligations" and "Required Actions" with which "relevant persons" must also comply, subject to "Safeguards". The Strategy states that the phrase "relevant persons" does not include the OGA or the Secretary of State. The OGA and the Secretary of State are only obliged to act in accordance with the Strategy when they act within the scope of their functions as defined in s.9B and s.9BA

respectively. In so far as the joint note by the claimants dated 26 July 2023 suggests otherwise, it is incorrect.

69. The central obligation is:

> "2. Relevant persons must, in the exercise of their relevant activities, take the steps necessary to:
>
> a. Secure the maximum value of economically recoverable petroleum is recovered from the strata beneath relevant UK waters; and, in doing so,
>
> b. Take appropriate steps to assist the Secretary of State in meeting the net zero target, including by reducing as far as reasonable in the circumstances greenhouse gas emissions from sources such as flaring and venting and power generation, and supporting carbon capture and storage projects."

70. In their written submissions the claimants say that this central obligation imposes on the petroleum industry both the MER and a duty to assist the Secretary of State in meeting the net zero target. The OGA also has to act in accordance with this central obligation. The claimants then say that, according to the OGA strategy, the "MER is therefore no longer an isolated objective, but rather has to be read together with [the] obligation to assist the Secretary of State to meet the net zero target." The claimants' formulation is capable of being misunderstood. On one reading the submission appears to suggest that, so far as the OGA is concerned, the status of the MER obligation in s.9A of the PA 1998 has been reduced. It has not.

71. The PA 1998 does not empower the OGA to adopt a strategy which amends that primary legislation. Under the statutory scheme the MER remains the "principal objective" for the purposes of Part 1A of the PA 1998. The mere fact that the net zero target in para.2(b) of the OGA's Strategy sits alongside the MER in para.2(a) as part of the "central obligation" in that Strategy, does not alter the status of the MER in the PA 1998 as the principal objective.

72. Section 9A(2) makes it clear that the OGA's strategy is for the purpose of "enabling the principal objective [the MER] to be met". Section 9B requires the OGA to act under *inter alia* the PA 1998 in accordance with its strategy "for the purpose of enabling the principal objective to be met". Those requirements have been respected in the drafting of the "central obligation" in the Strategy. Paragraph 2(a) simply summarises the MER. That obligation is defined more fully in s.9A(1) of the PA 1998. Paragraph 2(b) of the Strategy is prefaced by the words "in doing so". Thus, the obligation to assist the Secretary of State to meet the net zero target applies in the context of complying with the "principal objective" in s.9A, the MER.

73. In the same vein, the obligation in paragraph 2(b) of the OGA's Strategy refers to the taking of "appropriate steps", which involves an issue of judgment. That obligation includes reducing "as far as reasonable in the circumstances" GHG

emissions. The Strategy then gives examples of "sources" where that can be achieved, namely flaring, venting and power generation. Those sources assume that oil and gas extraction continues. Furthermore, para.2(b) of the Strategy requires the "appropriate steps" to include supporting carbon capture and storage projects, which does not impinge upon the MER obligation.

74. None of this analysis should come as any surprise. When in 2020 the OGA took the view that the net zero target should be "fully embedded" in its current Strategy, it also stated that "maximising economic recovery of oil and gas does not need to be in conflict with the transition to net zero". So, for example, in relation to both existing and new developments, relevant persons should consider options such as the electrification of production platforms and "apply good oilfield practice" (see *Cox* at [122] to [124]).

75. Lastly, Cockerill J helpfully pointed out in *Cox* that the concept of "economic recoverability", which was a matter appropriate to be defined in the Strategy, includes carbon costs. There is no tension or inconsistency within paragraph 2 of the Strategy or between that Strategy and the principal objective in s.9A of the PA 1998 (see *Cox* at [44] and [126] to [131]).

76. Although I have thought it appropriate to set out my conclusions on the claimants' submissions on the effect of the OGA's Strategy, the outcome of the claims for judicial review does not turn upon those matters. The claimants have not suggested that the OGA has acted in breach of s.9B of the PA or that a new licensing round does not accord with its Strategy under s.9A.

The 2004 Regulations

77. The 2004 Regulations were enacted in order to give effect to Directive 2001/42/EC. They are retained EU law. Article 6(2) of the SEA Directive provides that both the public authorities to be consulted and the public shall be given "an early and effective opportunity" to express their opinions on a draft plan and its accompanying environmental report before the plan is adopted. The CJEU has stated that SEA should be carried out at the earliest possible stage so that the results of that assessment are still capable of influencing any decisions. It is at that stage that the various elements of an alternative may be analysed and strategic choices made (Case C-671/16 *Inter-Environment Bruxelles ASBL v Brussels Capital Region* (7 June 2018) at [63]); Case C-160/17 *Thybaut v Region Wallone* (7 June 2018) at [62]).

78. Regulation 5 of the 2004 Regulations requires "the responsible authority", in this case the Secretary of State, to carry out, or secure the carrying out of, an environmental assessment under Part 3 of the Regulations.

79. Under reg.12(1) the responsible authority must have an environmental report prepared in accordance with reg.12(2) and (3) which provide:

> "(2) The report shall identify, describe and evaluate the likely significant effects on the environment of—
>
> (a) implementing the plan or programme; and

> (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> (3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of—
>
> (a) current knowledge and methods of assessment;
>
> (b) the contents and level of detail in the plan or programme;
>
> (c) the stage of the plan or programme in the decision-making process; and
>
> (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

80. Schedule 2 describes information for inclusion in an environmental report. Paragraph 6 refers to:

> "The likely significant effects on the environment, including short, medium and long-term effects, permanent and temporary effects, positive and negative effects, and secondary, cumulative and synergistic effects, on issues such as—
>
> …
>
> (i) Climatic factors
>
> …"

81. The claimants accepted that reg.12(3) allows the responsible authority to make a judgment on the extent to which a subject is to be addressed in an Environmental Report (see e.g. the words "as may reasonably be required"). But they sought to suggest that by contrast reg.12(2) imposes an absolute obligation on the authority to assess the likely significant effects on the environment of implementing the plan. For example, Ms. Estelle Dehon KC submitted on behalf of Uplift that reg.12(2) does not allow for the exercise of evaluative judgment.

82. The claimants' submission is contrary to the language of the SEA Directive, the 2004 Regulations and authority. Regulation 12(2) refers to "likely significant effects". That test involves matters of judgment. The same phrase appears in sched.2 para 6, to which effect is given by reg.12(3). The claimants accept that reg.12(3) involves the making of a judgment by the responsible authority. Indeed, reg.12(2) and 12(3) operate in conjunction. They have an overlapping effect. Similarly, the question of what is a "reasonable alternative" in reg.12(2)(b) involves matters of judgment. Accordingly, it is not possible to read reg.12(2) separately from reg.12(3) so as to treat the former as setting an absolute test. The Supreme Court has rejected the claimants' argument, largely by reference to provisions in the SEA Directive (see the Supreme Court in the *Friends of the Earth* case [2021] PTSR 190 at [57] to [59], [68] to [69] and

[141] to [142]). The 2004 Regulations have simply rearranged Arts.5(1) to (3) and Annex I of the Directive and so the effect is the same. The claimants' argument also runs counter to the decision of the Court of Appeal on the effect of the phrase "likely significant effect" when used in EIA legislation (see *R (Finch) v Surrey County Council* [2022] PTSR 958 at [40] and [141(v)]).

83. Regulation 13(2) requires the responsible authority to consult with specified public bodies and other consultees on the draft plan and its accompanying environmental report. Regulation 13(4) requires the responsible authority to make the documents available to the public so that they may make representations.

84. By reg.8(2) and (3) a plan may not be adopted before the responsible authority takes into account the environmental report and the opinions of consultees and of the public under reg.13(2) and (4).

85. As soon as reasonably practicable after the adoption of a plan, the responsible authority must publish the plan as adopted, the accompanying environmental report, an adoption statement stating how environmental considerations have been integrated into the plan and the environmental report and consultation responses taken into account (regs. 16(1) and (4)).

86. The background to the SEA Directive and the relationship between SEA for plans and programmes and EIA for projects was described by Lord Reed JSC in *Walton v Scottish Ministers* [2013] PTSR 51 at [12] to [14]. As the Supreme Court stated in *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] 1 WLR 324 per Lord Sumption JSC at [120]:

> "The starting point is that the SEA Directive plainly does not require an environmental assessment to be carried out for all "plans or programmes" whose implementation would have a major impact on the environment. Even on the footing that a plan or programme is required (or regulated) by legislative, regulatory or administrative provisions within article 2(a) and has a "significant environmental [effect]" within article 3(1) , an environmental assessment is still not required unless the plan or programme in question "[sets] the framework for future development consent" within article 3(2)(a) ."

87. Mr. McClelland submitted (and Ms. Dehon agreed) that the Offshore Energy Plan fell within reg.5(2) of the 2004 Regulations. This was also accepted by Mr. Richard Turney on behalf of the Secretary of State. In other words, the Plan is to be treated as setting "the framework for future development consent of projects listed in Annex I or II of Directive 2011/92/EU" (the EIA Directive). In the *Buckinghamshire* case Lord Sumption explained at [122] why such a plan is subject to SEA:

> "122. The effect of Parliament and Council Directive 2011/92/EU ("the EIA Directive") is that subject to limited exceptions an environmental impact assessment is required before development consent can be granted for any specific

> project of a kind specified in the Annexes which is likely to have a significant environmental impact. The effect of the SEA Directive is that where the grant or refusal of development consent for a specific project is governed by a policy framework regulated by legislative, regulatory or administrative provisions, the policy framework must itself be subject to an environmental assessment. The object is to deal with cases where the environmental impact assessment prepared under the EIA Directive at the stage where development consent is granted is wholly or partly pre-empted, because some relevant factor is governed by a framework of planning policy adopted at an earlier stage."

In [123] he added that although to fall within reg.5(2) a plan need not be determinative of subsequent applications for development consent (or of issues relevant thereto), it must at least "operate as a constraint on the discretion of the authority charged with making the subsequent decision about development consent."

88. I refer also to the analysis of the SEA regime by the Supreme Court in the *Friends of the Earth* case [2021] PTSR 190 at [48] to [69].

Issue 1

The approach taken by the Secretary of State

89. The Government's Response to the Consultation on the Scoping Report for OESEA4 explained why end use GHG emissions would not be included in the assessment:

> "The downstream emissions from any future oil and gas production associated with further seaward licensing are not within the scope of the draft plan/programme being assessed. For clarity, the draft plan/programme covers objectives related to the exploration for and production of oil and gas from the UKCS from further licensing; the draft plan/programme does not include objectives which relate to the end use of hydrocarbons and such end uses are not therefore within the scope of OESEA4. Whilst an SEA assesses the environmental effects of a broader plan/programme rather than a specific project, the environmental effects in question are still those flowing from the implementation of development consents granted pursuant to the framework set by that plan/programme. This will not, however, include the end use of products made from extracted oil and gas, since much is exported as crude oil and sold into the worldwide market for refining and consumption in a variety of locations. As a result, OESEA4 will consider the environmental effects of further licensing in the context of those activities directly related to the offshore oil and gas industry, and any secondary or cumulative effects related to these. This will cover emissions from upstream oil and gas activities but downstream and end use

> emissions will not be assessed due to the inability to attribute any specific end use to a development that may take place under the draft plan/programme."

The document also stated that this approach was consistent with that taken for EIA development by the High Court in *R (Finch) v Surrey County Council* [2021] PTSR 1160 and by the Inner House of the Court of Session in *Greenpeace Limited v Advocate General* [2021] SLT 1303.

90. Section 1.5 of the Environmental Report for OESEA4 (17 March 2022) summarised the legal requirements governing the contents of that document. It set out the criteria in the 2004 Regulations for determining the likely significance of effects of the Plan on the environment, including the degree to which the Plan sets a framework for projects and other activities (see sched.1 para.1).

91. Section 3.6 dealt with the scope of the SEA. It addressed end use GHG emissions on p.72:

> "With respect to climate and meteorology, and as stated in the response to the scoping consultation dated November 2021, the SEA will not include an assessment of the environmental effects of the downstream emissions arising from the end use of extracted oil and gas. The draft plan/programme covers the exploration for and production of oil and gas from the UKCS. The Department has considered carefully whether the degree of connection between developments that might come forward pursuant to the draft plan/programme and end use emissions is sufficient to make those emissions a likely significant effect that needs to be included in the SEA. Hydrocarbons are sold to the domestic or worldwide market, and the end uses of these hydrocarbons are various and may be for fossil fuel and non-fossil fuel purposes including following a process of refinement. It is acknowledged that the processes and products associated with these end uses will result in greenhouse gas emissions, but these are likely to be far removed in both time and space from development that might take place pursuant to the draft plan/programme, and the nature, location and extent of such effects are therefore not sufficiently closely causally connected to implementation of the draft plan/programme to be taken into account in the SEA. These do not constitute a likely significant effect of implementing the draft plan/programme itself"

92. The submission to the Secretary of State on 7 September 2022 identified the question of whether end use GHG emissions should be included in the SEA as one of the main issues in the consultation and drew his attention to the proposed Response by the Government to that consultation.

93. The Government's Response to the consultation on OESEA4 (published on 22 September 2022) addressed the end use emissions issue in section 2.3:

> "One respondent challenged the reasoning behind not including downstream emissions of further oil and gas exploration and production in the scope of the assessment in the ER. As noted in Section 3.6 of the ER, the Department considered carefully whether the degree of connection between developments that might come forward pursuant to the draft plan/programme and end use emissions was sufficient to make those emissions a likely significant effect of the draft plan/programme that needed to be included in the SEA. For example, any hydrocarbons extracted as a result of any further seaward licensing round covered by the draft plan/programme would undergo various processing stages following their initial extraction. These may include blending and refining and lead to numerous potential fossil fuel and non-fossil fuel end uses both domestically and internationally and may also be subject to downstream processes which incorporate carbon capture and storage or blue hydrogen production. Whilst it is acknowledged that the processes and products associated with end use will result in greenhouse gas emissions, it was not considered that they were sufficiently closely causally connected to implementation of the draft plan/programme to be taken into account in the SEA and therefore do not constitute a likely significant effect of implementing the draft plan/programme itself."

A summary of the claimants' submissions

94. Mr. McClelland took the lead on Issue 1. He submitted that:

In carrying out the SEA, the Secretary of State was obliged to assess the likely significant effects of the Offshore Energy Plan on the environment;

(1) A central purpose of the Plan is to advance energy security by providing a secure energy supply for UK consumers of oil and gas;

(2) That use of oil and gas by UK consumers is not remote from the exploration for and extraction of oil in UK waters. It is an integral feature of the Plan;

(3) The oil and gas can only supply energy in so far as it is combusted;

(4) It is feasible to assess these end use GHG emissions;

(5) The Secretary of State did not assess end use emissions because in his judgment there was an insufficient causal connection between the Plan and those emissions;

(6) That judgment was irrational because:

(i) The use of oil and gas as an energy source was an integral feature of the Plan; and/or

(ii) The fact that that use of oil and gas was a clear and specific feature of the Plan means that there was a sufficient causal connection between the Plan and end use GHG emissions and so the Secretary of State was legally obliged to assess them in the SEA.

95. With regard to point 5, the Government's Response to the consultation on OESEA4 made it clear that the decision not to include end use emissions in the SEA was not based on any methodological grounds. It was acknowledged that it was possible to make an assessment.

96. In relation to the EIA regime the Court of Appeal decided in *Finch* that it is relevant to have regard to the nature and purpose of the development or project for which consent is sought (see [35]). Mr. McClelland submitted by analogy that under the SEA regime it is necessary to take into account the nature and purpose of a plan's policies in order to determine what are the likely significant effects of that plan, including the implementation of its policies. Applying that approach, the use of oil and gas is so integrated as part of the Offshore Energy Plan that it would be a nonsense to treat the effects of that use as separate from the Plan or insufficiently connected with it as to require assessment. The premise of the Plan and the SEA is that there will continue to be some domestic demand for, and some domestic consumption of, oil and gas and so there is no "causative distance" between extraction of oil and gas under the new licensing round and end use GHG emissions from combustion by consumers of the refined products.

Discussion

97. The claimants accept that they have to demonstrate that the reasoning of the Secretary of State was irrational.

98. It is convenient to begin with *Finch* and the judgment of Sir Keith Lindblom SPT. He said that the scope of the project for which consent was sought had to be understood broadly and realistically. In that case the project was to extract crude oil from the site for commercial purposes, in particular for export to refineries ([32]). The scope of a project is not predicated simply on that project's purpose. "The 'purpose' of a project does not in itself define what the project actually is, nor does it identify the environmental effects of that project requiring assessment under the legislation…". The physical and functional characteristics of a project are also relevant ([33]). Neither the subsequent refining of the crude oil extracted from the development site, nor the sale, distribution and ultimate use of the refined products, formed part of the extraction project ([33]).

99. It was also necessary to consider the purpose of the EIA regime. The EIA process is not an end in itself. It is a means of informing and strengthening a process for determining an application for planning permission for the relevant development. The EIA regime is not intended to regulate the environmental effects of economic or commercial activity, or of the use of land in general ([37). Thus, the EIA legislation only requires assessment of the environmental effects of the proposed project. Because it is intended to assist the overarching process for determining whether an application for development consent should be

granted, it must be commensurate with the project itself. An "indirect" environmental effect may be assessed in an EIA if it is truly an effect of the proposed development ([38]). That is a matter of evaluative judgment for the relevant planning authority ([40]). It is inappropriate to paraphrase or gloss that language, which derives from the legislation itself ([39]).

100. What has to be considered is "the necessary degree of connection that is required between the development and its putative effects" ([41]). Although in *Finch* it had been agreed that the eventual combustion of the refined oil products extracted at the development site was "inevitable", it was for the planning authority to determine whether, bearing in mind the intervening stages which would have to occur before combustion could take place, the GHG emissions from that end use were properly to be regarded as "indirect" effects of the proposed development ([42]). There is no general legal principle that the environmental effects of the consumption of an end product resulting (or even inevitably resulting) from a development must be treated as an indirect effect of that development ([49], [57] and [60]).

101. In *Finch* the planning authority had been entitled to decide as a matter of judgment that end use emissions from the combustion of the refined oil products were insufficiently connected to the proposed extraction development as to constitute indirect environmental effects of the latter. The crude oil would have to pass through several other distinct processes and activities (e.g. refining, onward transportation and distribution of refined products and eventual sale of fuel) producing GHG emissions in various places at various times. There was no suggestion that the environmental effects of the intervening stages should form part of the EIA of the development project ([65]). The environmental effects of the end use GHG emissions were far removed from that project and were not causally linked to it because of those intermediate stages, and the planning authority had been entitled so to conclude ([66]).

102. The EIA regime is concerned with the development of land and the environmental effects of that development and its operation. It does not ensure that every kind of impact on the environment, even an inevitable impact, is assessed in an environmental statement "regardless of any causal connection with a 'proposed development' for which planning permission is sought and an environmental impact assessment required." Such effects may subsequently fall to be assessed in relation to some further project for which consent is required. But the fact that a particular impact on the environment will not necessarily be assessed in the course of a future application process for a subsequent proposal does not mean that it must therefore be assessed in the EIA for the project currently under consideration ([68])

103. The claimants rightly point to differences between the EIA and SEA regimes. Here we are concerned with whether the GHG emissions from the end use of the refined products are a likely significant effect of a plan, not a project. Nevertheless, in my judgment the factual context and the two regimes are sufficiently analogous that important parts of the analysis in *Finch* are applicable to SEA in the present case.

104. It is necessary to consider whether end use emissions are an environmental effect of the Offshore Energy Plan in the context of the SEA regime and its statutory purpose. The 2004 Regulations do not require SEA to be carried out for all "plans or programmes" the implementation of which would be likely to have a significant effect on the environment. The Plan in this case qualifies for SEA because it sets the framework for future development consents in relation to projects falling within the EIA regime. The Plan does this in so far as it operates as a constraint on the discretion of the authorities responsible for making subsequent decisions on those consents. Here the object of the SEA regime is to address cases where EIA at the stage of granting development consent would be wholly or partly pre-empted because of the provisions of a plan which had previously been adopted (*Buckinghamshire* at [34] and [120]-[124]).

105. I accept Mr. Turney's submission that the Offshore Energy Plan only sets the framework for licensing oil and gas exploration and production (and the other offshore energy development referred to) within the geographical area it covers. It does not set a framework for decisions on development consents for downstream development such as refinement, storage and distribution, or electricity generation or other land uses involving the consumption of oil and gas extracted pursuant to a UK licence. Plainly it does not set a framework for the use of petroleum products in vehicles or for consents for development generating such traffic. This was sufficient to determine that the GHG emissions from the end uses of the extracted oil and gas are not "likely significant effects" of the Plan. The "framework" reason was given in the Government's Response to the consultation on the Scoping Report (see the beginning of the passage quoted in [89] above). The same point was summarised at the beginning of the passage from the Environmental Report for OESEA4 quoted in [91] above and in the passage from the Government's Response to the consultation on OESEA4 quoted in [93] above. It is impossible to say that there was any flaw in this reasoning, let alone that it was irrational.

106. The other reason relied upon by the Secretary of State in the contemporaneous documents for not assessing end use GHG emissions was that there was an insufficient causal connection between the Plan's policy for new oil and gas licensing and GHG emissions from end uses. Those emissions would not be a likely significant effect of implementing the Plan. The Secretary of State had regard to differences in functions and physical characteristics between oil production from a well and subsequent refining, distribution and the range of end uses, along with spatial and temporal differences.

107. The claimants did not contend that the issue of whether there would be a sufficient causal connection was an irrelevant consideration. That is unsurprising given the analysis by Sir Keith Lindblom in *Finch*. Instead, they argue that the judgment reached by the Secretary of State was irrational given the objectives of the Plan, in particular, the central purpose of promoting energy security for UK consumers of oil and gas, which assumes the combustion of those products.

108. OESEA4 is somewhat unusual in that there is no plan with its policies in a document separate from the SEA in the environmental report. Both the plan and

the environmental report are contained in the same document. Mr. Turney said that the draft plan is contained within section 2.3 of the environmental report, which sets out what is proposed for each type of energy source. For oil and gas exploration and production he said that the draft "plan" simply states:

> " – further Seaward Rounds of oil and gas licensing of the UK territorial sea and UK continental shelf (UKCS), subject to the outcome of periodic Climate Compatibility Checkpoints."

109. In fact, for the geographical extent of that policy or plan it is necessary to look elsewhere in the environmental report. When the Secretary of State adopted the Plan, that area was reduced and further mitigation measures were introduced, but the Department did not produce a final, revised version of the Plan. The public is left to read the environmental report published for consultation, together with the Government's Response to consultation on the environmental report and the Written Ministerial Statement made on 22 September 2022. Although permission has not been granted to challenge this approach, I would observe that it is not transparent or user friendly. Determining the legal status of certain parts of the environmental report is not altogether an easy task.

110. The Plan refers in several places to the objectives of Government policy and of the Plan as including the recovery of domestic hydrocarbons for security of supply and to provide for domestic consumption. Those same factors are relied upon as part of the need case or justification for further licensing rounds (see e.g. pp.74-5 of the environmental report). Mr. Turney submits that such objectives or purposes do not form part of the Plan or its policies. On that approach he says that those objectives cannot form an integral part of the Plan so as to provide a sufficient connection with end use GHG emissions.

111. I am not persuaded by this line of argument. By analogy with *Finch*, the purpose of a policy or plan may be relevant to defining its scope and effects, although that purpose may not *in itself* determine what the policy is, its scope or its environmental effects. In the case of SEA the relevance of the purposes of a plan or policy is reinforced by reg.12(2)(b) of the 2004 Regulations (see [79] above).

112. But the Offshore Energy Plan does not purport to say what should happen to oil or gas extracted under a licence granted in a new licensing round, including how much of that material should be consumed within the UK. It does not put forward policies relating to refinery or storage development, or for the distribution of refined products or for land uses which may give rise to UK demand for oil or gas products.

113. Furthermore, as *Finch* shows, the objectives or purposes of a measure, such as a policy or plan, do not override, or leave no room for, other considerations when reaching a judgment on whether a matter, such as end use emissions, is a likely significant effect of that measure. A decision-maker may conclude that even if the combustion of hydrocarbons by UK consumers falls within the objectives of a UK policy for the extraction of those hydrocarbons, the intervening stages involve physical and/or functional and/or temporal separation such that, as a matter of judgment, there is no sufficient causal

connection between that extraction and consumption. Those considerations are relevant even when hydrocarbons extracted in UK waters are consumed in the UK, rather than overseas. There is nothing irrational in the legal sense, no error of law, in reasoning which proceeds on that basis.

114. Matters such as physical, functional and temporal separation are not made irrelevant merely because an objective of a policy (or plan) is treated as being an integral part or specific feature of that policy (or plan). Certainly, the objectives on which the claimants rely in this case, security of supply for domestic consumption, did not have that effect.

115. Furthermore, the claimants' argument based on the objectives of a plan cannot be used to extend the scope of the legal obligation to carry out SEA for that Plan to cover the effects of development or activities which fall outside the framework for future development consents set out by the Plan. That would go well beyond a proper purposive interpretation of the SEA regime as explained, for example, in *Inter-Bruxelles*, *Walton* and *Buckinghamshire* (see [77], [86]-[87] and [104] above).

116. Because I have rejected the claimants' criticisms of the contemporaneous reasoning relied upon by the Secretary of State in the SEA process in relation to end use GHG emissions, their challenge under Issue 1 must be rejected.

Issue 2

117. Issue 2 is concerned with whether the Secretary of State complied with his obligation in reg.12(2)(b) of the 2004 Regulations to assess the likely significant effects on the environment of reasonable alternatives and to compare them with those of the Offshore Energy Plan, taking into account the objectives and the geographical scope of that Plan.

The approach taken by the Secretary of State

118. The Secretary of State identified reasonable alternatives to the draft plan in section 3.8 of the Environmental Report. He did so in the context of *inter alia* the objectives of enhancing security of energy supply and contributing to meeting the UK's carbon budgets (p.73). He took the view that the decline in UK hydrocarbon production, the need to enhance security of supply (whilst decarbonising the energy mix in keeping with *inter alia* targets for reducing GHG emissions) and the obligations in the PA 1998 and the CCA 2008 "clearly indicate a need for further leasing and licensing as outlined in the draft plan/programme" (p.75).

119. The Environmental Report considered as reasonable alternatives to the draft plan:

    (i) Not to proceed with further leasing and/or licensing;

    (ii) To restrict the areas offered for leasing and licensing temporally or spatially.

120. Alternative 1 was sub-divided into 5 sub-alternatives corresponding to the five energy sources proposed in the Plan. Alternative 1a was "not to undertake any further seaward oil and gas licensing rounds."

121. The alternatives were considered in section 5.17 of the Environmental Report in relation to each of the 13 "effects" addressed in sections 5.3 to 5.16 of the Report, including climate change. Each "effect" was assessed by reference to (a) sources of a potentially significant effect and (b) OESEA4 objectives (para.5.17.1). Issue 2 is concerned with the assessment of sources of climatic effects in relation to Alternative 1a. These were dealt with on pages 597 and 598 of the Environmental Report. The assessment was that Alternative 1 would have a neutral or a "potentially minor negative effect" as regards those sources.

122. In relation to contributions to net GHG emissions, the Report said this about Alternative 1a at p.597:

> "a: emissions from oil and gas exploration and production will make a minor contribution to the wider greenhouse gas emissions of the UK, and not adopting this aspect of the plan would limit these domestic emissions. In the absence of a corresponding change in demand for oil and gas, a greater proportion would need to be imported. It is therefore considered that alternative 1a would either be neutral, as it would have no effect on the demand for hydrocarbons in the UK, or potentially minor negative due to the higher emissions intensity of most imports (refer to Section 5.12 where this is discussed in greater detail)."

In relation to reductions in net GHG emissions, the Report said this about Alternative 1a at p.598:

> "a: the demand for oil and gas is being dealt with through a range of measures that are not considered in this SEA, however, projections of demand for hydrocarbons, and production of these from the UKCS, shows both a decline towards 2050 and a significant gap between the demand and production. If no further licensing was undertaken on the UKCS, and in the absence of any indication that demand will reduce more quickly than projected (and also recognising the need for hydrocarbons as feedstocks and not just fuel), the UK would need to import more oil and gas, with it being highly likely that these imports would have a higher upstream carbon intensity than that which would have been produced domestically (e.g. as the foundations for decarbonising upstream emissions have already been set for the UK in the NSTD, OGA Strategy, Net Zero Strategy etc., see Section 5.12). It is therefore considered that alternative 1a would either be neutral, as it would have no effect on the demand for hydrocarbons in the UK, or minor negative due to the higher emissions intensity of imports."

A summary of the claimants' submissions

123. Ms. Dehon took the lead on Issue 2.

124. First, the claimants submit that in rejecting end use emissions as a likely significant effect of the Offshore Energy Plan the Secretary of State assumed that additional UK oil and gas would be sold overseas in order to conclude that the connection between those emissions and the Plan was insufficient. However, when comparing reasonable alternatives, Alternative 1a (involving additional imports of overseas oil) was assessed as minor negative because the Secretary of State had assumed that the oil produced from further UK licensing would be consumed in the UK. The two approaches are inconsistent and therefore the assessment in OESEA4 of the Plan was irrational. If in relation to the "likely significant effects of the Plan" the Secretary of State had assumed that the additional UK oil and gas produced would be used, or predominantly used, in the UK then there would have been the necessary degree of connection between the Plan and end use emissions from combustion. Alternatively, if in relation to that issue it had been assumed that UK oil and gas traded in a global market with no requirement for consumption in the UK, then the assessment in OESEA4 of Alternative 1a was irrational.

125. Second, Ms. Dehon submitted that there were two points critical to the OESEA4 assessment of Alternative 1a. First, the Secretary of State assumed that in the absence of a change in UK demand for oil and gas, a greater proportion will need to be imported, which would involve a higher intensity of GHG emissions. Second, the Secretary of State's assessment assumes that the further licensing proposed by the Plan would involve no net increase in end use emissions compared to Alternative 1a. Ms. Dehon submits that the Secretary of State assumed that additional production of oil and gas in the UK would fully "substitute" or displace production elsewhere and net demand would not increase globally in the world. She says that approach has been discredited in a number of decisions in other jurisdictions. She also points to studies showing the converse, namely that where hydrocarbons are left in the ground in one region rather than being extracted, global consumption will reduce "over the longer term", albeit by something less than the amount of the reduction in oil and gas (see Uplift's representation to the Secretary of State in May 2022 and UNEP's 2019 Production Gap Report referenced by Sir Keith Lindblom in *Finch* at [71]).

Discussion

126. The claimant's first argument involves a misreading of the reasons given by the Secretary of State for concluding that there was an insufficient causal connection between end use emissions and the Plan for those emissions to be a likely significant effect of the Plan. The defendant's reliance on the functional, spatial and temporal separation between end uses and UK extraction was not confined to international consumption. It applied also to domestic consumption. The Scoping Report, SEA and Consultation Response did not draw a distinction between the two for the purposes of deciding that there was an insufficient degree of connection. The Secretary of State did not accept that there would be a sufficient causal connection between the Plan and end use emissions from UK

consumption. Furthermore, the Secretary of State's conclusion on the connection issue also relied upon the point that the Offshore Energy Plan does not set a framework for future development consents for the intervening stages in the handling of hydrocarbons (e.g. refining, storage and distribution) or for the consumption of those hydrocarbons (whether in the UK or overseas).

127. Accordingly, there was no internal inconsistency between the approach taken by the Secretary of State to whether end use emissions should be assessed as a likely significant effect of the Plan and his comparison of reasonable alternatives.

128. The claimants' second line of argument involved two criticisms (see [125] above). The second relates to an assumption which they say the Secretary of State made, namely that an increase in UK oil and gas production compared to Alternative 1a would not produce a net increase in end use emissions globally. I accept Mr. Turney's submission that the short answer to this criticism, even assuming that it raises a point of law, is that the Secretary of State decided that end use emissions should not be assessed in OESEA4 (the challenge to which has been rejected by the court under Issue 1).

129. Accordingly, it is wrong as a matter of fact for the claimants to assert that the Secretary of State assumed that the licensing proposed in the Plan would not produce a net increase in global end use emissions, or that he failed to take into account studies dealing with the "substitution" argument. The Secretary of State proceeded on the basis that end use GHG emissions would not be taken into account in the SEA, whether in relation to the proposed licensing or the reasonable alternatives. Consequently, the substitution issue did not arise. For the reasons already given under Issue 1, the Secretary of State's decision on the scope of the SEA was not unlawful.

130. In addition, Mr. Turney pointed out that the assessment of the Plan's policies and of reasonable alternatives proceeded on the basis that emissions downstream from the extraction of oil and gas would not be assessed. Only the emissions relating to that extraction and upstream emissions were taken into account. It was on that basis that the Environmental Report compared the proposed oil and gas policy in the Plan with the reasonable alternatives and considered UK demand if no additional licensing should take place. Following the international conventions described in [29] above, end use emissions from the combustion of hydrocarbons in the UK are accounted for in the sector in which that takes place, not the oil and gas sector.

131. By contrast, the first of the claimants' criticisms does focus on the GHG emissions relating to the production of UK oil and gas, and upstream emissions (but not downstream emissions). They complain that the Secretary of State was not entitled to assume under Alternative 1a that UK demand would not reduce more quickly than had been projected for the Offshore Energy Plan. Therefore, he was not entitled to assume that a greater proportion of oil and gas consumed in the UK would need to be imported. Ultimately, this was a matter of judgment for the Secretary of State. I accept Mr. Turney's submission that, notwithstanding the absence of any mechanism requiring oil and gas produced in the UK to be consumed domestically, the Secretary of State was entitled to

assume that *some* of the additional hydrocarbons produced in accordance with the Plan would be consumed within the UK, thereby reducing the need for imports. By the same token, he was also entitled to conclude that, by comparison with the Plan's proposal for additional licensing, Alternative 1a would involve an increase in imports. These were both matters of judgment, neither of which can be said to be irrational.

132. The claimants then say that the Secretary of State misunderstood the information before him as to whether imported hydrocarbons have a higher intensity of carbon emissions than hydrocarbons produced in the UK. Emissions intensity is expressed as kilograms of carbon dioxide per barrel of oil equivalent (kg CO_2/boe). At p.27 of its representations to the Secretary of State on OESEA4 in May 2022, Uplift briefly relied upon a study by Rystad Energy and said that UK production emissions "are only average by global standards", rather than worse. Uplift did not go further into the data.

133. OGA data shows that UK petroleum reserves and discovered resources comprise approximately 70% oil and 30% gas (expressed in "oil equivalent terms"). UK produced gas has a substantially lower emissions intensity (22.0 kg CO_2 /boe) than a weighted average of UK gas imports (40.6 kg CO_2 /boe) (briefing to the Secretary of State dated 15 September 2022). I note that the figures for individual countries vary widely. Whereas, gas imported from Norway by pipeline has an intensity slightly less than that of UK produced gas (19 kg CO_2 /boe), LNG imports have higher intensities – Qatar (60-80 kg CO_2 /boe), and United States (140-160 kg CO_2 /boe) (Environmental Report p.463).

134. The Secretary of State had data on oil emissions intensities from more than one source. Data from Rystad Energy for 2019 ranked emissions intensity of UK produced oil as 38 out of 66 (UK 25.9 kg CO_2 /boe compared to a weighted average of 20.4 kg CO_2 /boe). On the other hand, CCC analysis included in the Environmental Report (p.464) based on 2018 data showed UK produced oil to have a better emissions intensity than the global average. The Environmental Report also took into account the measures being taken to reduce venting and flaring and to introduce electrification for oil platforms. (see e.g. pp. 17, 19, 75, 451-2, 460 and 462). The Report concluded that these requirements to make emissions from new development compatible with the Net Zero Strategy have the potential to widen the gap between "native and imported product carbon intensity" (i.e. to reduce the UK level of carbon intensity still further below the global figures).

135. Reading the relevant material before the Secretary of State as a whole, it is impossible to say that his conclusion that oil and gas imports under Alternative 1a would have a higher emissions intensity than UK produced hydrocarbons was vitiated by any error of law. It was not irrational. Furthermore, it should not be forgotten that the comparison of Alternative 1a with the Plan was only assessed as neutral or potentially minor negative. The claimants appeared to be losing sight of the wood for the trees.

136. For all these reasons, the challenge under Issue 2 must be rejected.

Issues 4 and 5

The decision not to include test 5

137. The claimants challenge the lawfulness of the reasons given by the Secretary of State for not including test 5 in the checkpoint. It is necessary to consider the reasons set out in the Response to Consultation document in the context of the relevant material as a whole. That includes the consultation document on the design of the Checkpoint (see [37] to [38] above), the advice given to the Minister on 20 July 2022 (see [40] above) and the advice given to the Secretary of State on 7 September 2022 (see [42] above).

138. Question 18 in the consultation document had asked how could "Scope 3 emissions be measured and monitored in a comparable way?" Question 19 had asked "how would a test that takes into account Scope 3 emissions be designed?" Respondents were asked to give details of a proposed methodology and the projections that would be required. In the Response to Consultation the Government said that the questions on test 5 had been framed openly because "it was unclear what comparison Ministers would need to make in order to conclude whether to endorse a further licensing round." The Government acknowledged that there are a range of methods for estimating scope 3 emissions and that it would be possible to arrive at estimates of those emissions. But the problem was a different one:

> "However, given this information, it is not clear what action Ministers would take, as there is no *agreed target for the reduction of scope 3* emissions" (emphasis added)

The Response added:

> "…the Government's view is that scope 3 emissions are not directly relevant to the decision on whether to endorse [a] further licensing round. Including any estimate of scope 3 emissions in the checkpoint would add little value, and it is not clear how Ministers would take such a number into account."

139. The overall conclusion in the Response to Consultation was as follows:

> "Responses to questions 18 and 19 outlined a number of different methods for estimating the magnitude of scope 3 emissions from UK produced oil and gas. While there are many methods to choose from, the government acknowledges that estimation of scope 3 emissions is fundamentally feasible, and many oil and gas producing companies have applied these techniques to estimate their own scope 3 emissions levels which they publish openly.
>
> However, on balance, the government finds limited benefit to including an evaluation of scope 3 emissions in the checkpoint. Reasons for this include:

> - *The limited control that UK oil and gas producers have over scope 3 emissions of their production, beyond simply reducing their production.*
>
> - *The lack of clarity over what step a Minister should take given even perfect knowledge of what scope 3 emissions are.*
>
> The government will not be including a test on scope 3 emissions in the checkpoint." (emphasis added)

A summary of the claimants' submissions

140. The claimants' case treated the two reasons emphasised in the quotation set out in [139] above as though they were the only reasons relied upon by the defendant for deciding not to include test 5 in the final design of the Checkpoint. Then they submitted that the second reason was irrational. There was no lack of clarity as to the next step a Minister would take. The Checkpoint was to inform his decision on whether to support or not support a new licensing round, but with a proper understanding of the extent of the scope 3 emissions that would be generated.

141. The claimants then said that the only remaining reason for the decision to omit test 5 was the limited control of UK oil and gas producers over scope 3 emissions from end uses of the resulting products. They submitted that that single reason could not be determinative of the issue whether to include test 5 in the Checkpoint, applying the judgment of Sir Keith Lindblom in *Finch* at [70].

Discussion

142. It should be borne in mind that the Checkpoint is not a statutory plan or policy. It is an informative, non-binding document to assist Ministers in deciding whether to support or not support a further licensing round. It is common ground that the decision on whether in fact to launch a new round is a matter for the OGA. In these circumstances, the claimants do not suggest that the draft Checkpoint had to be subjected to SEA under the 2004 Regulations. Instead, the Government chose to carry out a process of consultation, to which common law principles were applicable (e.g. *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213). There was no statutory lexicon of matters which the Secretary of State had to take into account. The claimants have to show that it was irrational for the Secretary of State not to include test 5 (see e.g. the Supreme Court in the *Friends of the Earth* case [2021] PTSR 190 at [116]-[121]).

143. In relation to the control of UK producers over scope 3 emissions, in my judgment, by analogy with the decision in *Finch*, such control is a relevant consideration when a responsible authority determines under the 2004 Regulations whether scope 3 emissions from end uses of the refined products are a likely significant effect of a plan for licensing more UK oil production. It was in that context that the court said that control could not be decisive on that

statutory question. But here the issue was very different, namely the judgment of the Secretary of State as to whether test 5 should be included in his non-statutory checkpoint.

144. In any event, the Secretary of State did not treat the "control" of UK producers over scope 3 emissions as determinative of that issue. The Response document plainly stated that the reasons for the decision "included" the two matters set out in the concluding paragraph. More detailed reasoning was given in the preceding sections of the document. In addition, concerns had been expressed in the consultation document and/or ministerial briefing about the risk of double-counting and the view that UK oil and gas producers should not be treated as responsible for end use emissions produced by consumers.

145. A key part of the Secretary of State's reasoning was the absence of a suitable test or target for the reduction of scope 3 emissions which could be used by a Minister when deciding whether to endorse a further licensing round. In my judgment the more detailed discussion in the Response document preceding the concluding section clearly explains this position in a manner which cannot be impugned.

146. Ms. Dehon submitted that a suitable test had been suggested to the Secretary of State. She relied upon the representations made by Uplift in May 2022. Importantly, in response to question 19 dealing with the design of test 5, Uplift said this:

> "The purpose of any test for scope 3 emissions is to ensure the UK's production is consistent with the global carbon budget. This can also be done by assessing the required rates of decline for oil and gas in various climate scenarios and measuring UK production against these. This is, therefore, best incorporated into a single assessment of the UK's production against the global production. This would avoid dependence on company scope 3 reporting and could rely instead on production decline rates compatible with Paris. See answer to Question 20."

147. Question 20 was concerned with test 6. Uplift's position was that the scope 3 issue should be dealt with as a "production gap" test under test 6. No separate test for evaluating scope 3 emissions was suggested as a test 5. The representations by Greenpeace were to the same effect. But the Secretary of State decided separately against the inclusion of a production gap test and so omitted test 6. The claimants did not suggest any other scope 3 emissions test for adoption as test 5. The claimants did not refer the court to any other representations.

148. Originally Uplift had proposed to challenge the decision to omit test 6, but they were refused permission to proceed on that ground.

149. It was a matter of judgment for the Secretary of State as to whether he considered there to be an appropriate test or benchmark for taking scope 3 emissions into account on a decision whether or not to support a new licensing round. There is no basis upon which the court could say that the reasons given

by the Secretary of State for not including test 5 in the Checkpoint were irrational or tainted by any error of law.

150. Accordingly, the challenge under Issue 4 must be rejected. The claimants accept that, in those circumstances, they must also fail under Issue 5.

Issue 3

151. The claimants contend that the Secretary of State acted unlawfully by failing to publish any reasons for his decision that a new licensing round would be compatible with the Climate Compatibility Checkpoint and the UK's climate objectives. In order to found an obligation to give reasons Ms. Dehon relied upon the decision of the Supreme Court in *R (CPRE) v Dover District Council* [2018] 1 WLR 108 at [51] to [59]. There the court referred at [51] to *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 in which a principal justification for imposing an obligation to give reasons had been the need to reveal any public law error entitling the court to intervene, so as to make a right to challenge the decision in that case by judicial review effective (the Home Secretary's decision on the minimum term to be served by a person sentenced to life imprisonment).

152. Ms. Dehon also relies upon the following further factors by analogy with the *Dover* case at [52], [55] and [57]:

(i) The extraction of oil for commercial purposes resulting in end use emissions is likely to have a significant and long-term effect on the environment;

(ii) The decision on whether to endorse a new round of licensing gives rise to public controversy;

(iii) It is impossible to understand the defendant's decision on the application of the Checkpoint from documents in the public domain;

(iv) The principles of open justice and fairness require the Secretary of State to give reasons for his decision.

153. In the present case the document setting out the Secretary of State's reasons (the briefing to the Secretary of State dated 7 September 2022) has been disclosed in these proceedings, so the claimants have been able to see whether it reveals any public law error. The Secretary of State says that Issue 3 has therefore become academic. But the claimants say that it is important for the issue of principle to be determined because of the possibility that the Secretary of State will continue to use the Checkpoint, as was originally intended.

Discussion

154. Plainly enabling public law errors to be detected and making judicial review more effective, (see [151] above) is not a sufficient justification for the imposition of a common law duty to give reasons in any particular case. Were

it otherwise, our law would require reasons to be given by all local planning authorities when they grant planning permission and, indeed, when administrative decisions are made generally. But there is no general common law duty to give reasons for administrative decisions. Whether such an obligation may arise is highly sensitive to the specific context.

155. As I have said, the claimants chose to argue their case by relying upon the *Dover* case. Beyond that, they did not analyse the substantial case law in this area. It is unnecessary for the court to embark upon that exercise in order to determine Issue 3.

156. I agree with Mr. Turney that a key consideration is the nature of the decision taken when the Checkpoint was being applied.

157. The Checkpoint is a non-statutory test. The Secretary of State was under no obligation to produce the document and he is under no statutory obligation to apply it. The Secretary of State was not involved in the determination of anything akin to an application (as in the *Dover* case). The use of the Checkpoint did not involve any publicly accessible procedure. For example, there was no process of public consultation on the application of the Checkpoint to the 33rd licensing round. The claimants do not contend that there was any obligation to consult. No procedure was involved attracting the principle of open justice. Ms. Dehon did not suggest that the Secretary of State was involved in the determination of any civil rights or that Article 6(1) of the ECHR was in some way engaged. In all the circumstances, I am not persuaded that the factors upon which she relied support the imposition on the Secretary of State of a common law obligation to give reasons on the application of the Checkpoint.

158. Accordingly, the challenge under Issue 3 fails and it would be inappropriate for the court to give any declaratory relief.

Issues 6 and 7

159. As Greenpeace has accepted, it must follow that the challenges under Issues 6 and 7 also fail.

Conclusion

160. Both claims for judicial review are dismissed.