



Neutral Citation Number: [2019] EWHC 519 (Admin)

Case No: CO/3511/2018

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 06/03/2019

**Before :**

**MR JUSTICE DOVE**

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**Between :**

<b>Claire Stephenson</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>Secretary of State for Housing and Communities and Local Government</b>	<b><u>Defendant</u></b>

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**David Wolfe QC, Peter Lockley and Jennifer Robinson** (instructed by **Leigh Day**) for the  
**Claimant**  
**Rupert Warren QC and Heather Sargent** (instructed by **Government Legal Department**)  
for the **Defendant**

Hearing dates: 19<sup>th</sup>/20<sup>th</sup> December 2018  
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**Approved Judgment**

See Judge's note at foot of this judgment

## **Mr Justice Dove:**

### Introduction

1. The Claimant brings this claim on behalf of an organisation known as Talk Fracking. She does so as a supporter of that organisation's objectives. Talk Fracking is involved in campaigning on the dangers it considers the fracking industry poses to the environment, and also operates as a means of hosting a forum for informed debate on fracking and unconventional energy extraction. The nature of the technique involved in fracking, or hydraulic fracturing, is well known: for those unfamiliar with that technology it is described in paragraphs 8 and 9 of Preston New Road Action v Secretary of State for Communities and Local Governments [2017] EWHC 808; [2017] Env LR 33. Talk Fracking has been active in relation to these issues for around five years.
2. By this application for judicial review the Claimant seeks to challenge the adoption by the Defendant of paragraph 209(a) of the National Planning Policy Framework ("the Framework") on 24<sup>th</sup> July 2018. Under the heading "Oil, gas and coal exploration and extraction", paragraph 209(a) provides as follows:

"209. Minerals planning authorities should:

  - a) recognise the benefits of on-shore oil and gas development, including unconventional hydrocarbons, for the security of energy supplies and supporting the transition to a low-carbon economy; and put in place policies to facilitate their exploration and extraction."
3. This matter was directed to be heard as a "rolled-up" hearing by Holgate J on 22<sup>nd</sup> October 2018. The Claimant advances four grounds of challenge. Whilst these are dealt with in greater detail below, in order to introduce the issues the four grounds are as follows. Firstly, Ground 1 is the contention that the Defendant unlawfully failed to take into account material considerations, namely scientific and technical evidence, which had been produced following the adoption of a Written Ministerial Statement by the Secretary of State for Business and Energy and Industrial Strategy and the Defendant on 16<sup>th</sup> September 2015 ("the 2015 WMS"). Ground 2 is the Claimant's argument that the Defendant failed, in publishing the policy in paragraph 209(a) of the Framework, to give effect to the Government's long-established policy in relation to the obligation to reduce green-house gas emissions under the Climate Change Act 2008. Ground 3 is the contention that in adopting paragraph 209(a) the Defendant unlawfully failed to carry out a Strategic Environmental Assessment. The issues raised in relation to this ground of challenge are essentially identical to those being addressed in the case of Friends of the Earth v Secretary of State for Housing, Communities and Local Government [2019] EWHC 518 (Admin) and the Claimant in the present case accepts that, given the arguments are parallel, Ground 3 will be resolved by the conclusions reached in relation to the arguments raised in the Friends of the Earth case. Finally, by way of Ground 4, the Claimant contends that the Defendant failed to carry out a lawful consultation exercise in relation to the revisions to the Framework which were published on 24<sup>th</sup> July 2018.

4. This judgment is structured as follows. Firstly, the factual background to the publications of the revisions to the Framework will be set out chronologically, together with the accompanying evidence furnished as part of the litigation for the purposes of the hearing. Secondly, the relevant legal principles will be set out. Thirdly, the Claimant's grounds will be examined and evaluated. In accordance with the way in which the Claimant presented her case at the hearing that consideration starts with Ground 4 and Ground 1 (which the Claimant identified closely interact) before proceeding to Grounds 2 and 3.
5. I wish to place on record my thanks to counsel and the solicitors instructed in this case for their invaluable contribution to the preparation of the case for the hearing, and for the careful and focused submissions which I have received which have greatly assisted me in my task.

#### The Facts

6. On 16<sup>th</sup> September 2015 the Secretary of State for Energy and Climate Change along with the Defendant published the 2015 WMS in Parliament entitled "Shale Gas and Oil Policy". The statement was to "be taken into account in planning decisions and plan making". The 2015 WMS went on to observe as follows:

"The national need to explore our shale gas and oil resources

Exploring and developing our shale gas and oil resources could potentially bring substantial benefits and help meet our objectives for secure energy supplies, economic growth and lower carbon emissions.

Having access to clean, safe and secure supplies of natural gas for years to come is key requirement if the UK is to successfully transition in the longer term to a low-carbon economy. The Government remains fully committed to the development and deployment of renewable technologies for heat and electricity generation and to driving up energy efficiency, but we need gas- the cleanest of all fossil fuels- to support our climate change target by providing flexibility while we do that and help us to reduce the use of high-carbon coal.

Natural gas is absolutely vital to the economy. It provides around one third of our energy supply.

...

Meanwhile events around the world show us how dangerous it can be to assume that we will always be able to rely on existing sources of supply. Developing home-grown shale resources could reduce our (and wider European) dependency on imports and improve our energy resilience.

There are also potential economic benefits in building a new industry for the country and for communities.

...

We do not yet know the full scale of the UK's shale resources nor how much can be extracted technically or economically.

...

Shale gas can create a bridge while we develop renewable energy, improve energy efficiency and build new nuclear generating capacity. Studies have shown that the carbon footprint of electricity from UK shale gas would likely to be significantly less than unabated coal and also lower than imported Liquefied Natural Gas [9].

The Government therefore considers that there is a clear need to seize the opportunity now to explore and test our shale potential.”

7. The reference in footnote 9 related to the carbon footprint of shale gas generated electricity and it provided a cross-reference to research which had been commissioned by the Department for Energy and Climate Change from Professor David MacKay and Dr Timothy Stone (“the Mackay and Stone Report”). The MacKay and Stone Report, which is dated 9<sup>th</sup> September 2013, is entitled “Potential Greenhouse Gas Emissions associated with Shale Gas Extraction and Use”. The purpose of the study was to address concerns about the likely potential greenhouse gas emissions from the production of shale gas, and the compatibility of the use of shale gas (in the light of the available evidence) with the UK's climate change target. The conclusion which the MacKay and Stone report reached was that greenhouse gas emissions associated with shale gas exploration and production should represent “only a small proportion of the total carbon footprint of shale gas, which is likely to be dominated by CO<sub>2</sub> emissions associated with its combustion”. The overall calculations of the carbon footprint for production and use of shale gas was compared favourably by the MacKay and Stone Report to the carbon footprint of coal, and comparable to gas extracted from conventional sources whilst lower than the carbon footprint of Liquefied Natural Gas. This report therefore provided the support for the implicit conclusions in the 2015 WMS that the use of shale gas would be consistent with the Government's targets for climate change and greenhouse gas emissions, and would perform significantly better than other alternative choices in the form of coal or Liquefied Natural Gas. Shale gas therefore provided a potential source of energy to bridge the transition from the present to a future supported by renewable energy, it being recognised that it would take some time for renewable energy sources to come fully on stream.
8. On the 12<sup>th</sup> December 2015 the Paris Agreement on Climate Change was agreed. At around this time concern was intensifying in relation to whether or not the data which had been used to model greenhouse gas emissions from shale gas extractions was reliable, or was in fact seriously underestimating the emissions from extraction activities.
9. Under the provisions of the Infrastructure Act 2015 the Committee on Climate Change (the “CCC”) has been given a duty to report to the Government and advise on issues associated with meeting the UK's carbon budget and 2050 emissions reduction target

related to the Climate Change Act 2008. In March 2016 the CCC specifically reported on the compatibility of exploitation of UK onshore shale gas with meeting the UK's carbon budget. This March 2016 report recorded a summary of the conclusions of the CCC as follows:

“The implications for greenhouse gas emissions of shale gas exploitations are subject to considerable uncertainties, both regarding the size of any future industry and the emissions footprint of production. This uncertainty alone calls for close monitoring of developments. The Committee will report back earlier than its next statutory deadline five years from now should this be necessary.

The UK regulatory regime has potential to be world-leading but this is not yet assured. The current regime includes important roles for the Health and Safety Executive and the relevant environmental regulators (e.g. the Environment Agency in England), which will need to be managed seamlessly. Onshore petroleum exploitation at scale would have unique characteristics in the UK. This may ultimately necessitate the establishment of a dedicated regulatory body. It certainly requires that a strong regulatory framework is put in place now.

Our assessment is that exploiting shale gas by fracking on a significant scale is not compatible with UK climate targets unless three tests are met:

- Test 1: Well development, production and decommissioning emissions must be strictly limited. Emissions must be tightly regulated and closely monitored in order to ensure rapid action to address leaks.
- ...
- Test 2: Consumption- gas consumption must remain in line with carbon budgets requirements. UK unabated fossil energy consumption must be reduced over time within levels we have previously advised to be consistent with the carbon budgets. This means that UK shale gas production must displace imported gas rather than increasing domestic consumption.
- Test 3: Accommodating shale gas production emissions within carbon budgets. Additional production emissions from shale gas wells will need to be offset through reductions elsewhere in the UK economy, such that overall effort reduce emissions is sufficient to meet carbon budgets.”

10. In July 2016 the Government provided a response to the CCC report. In that response the Government reiterated the commitment to the use of shale gas as a bridge whilst old coal generation technology was phased out and renewable and nuclear energy developed alongside increased energy efficiency. The response engaged with the three tests which had been set out in the CCC's report. So far as meeting test 1 was concerned the CCC's test was accepted, and the Government expressed itself confident that the existing regulatory regime would ensure that the test was met. In respect of test 2, the test requiring gas consumption to remain in line with carbon budget requirements, the Government specifically referenced the MacKay and Stone Report as a basis for concluding that life cycle emissions from UK shale gas would be comparable to conventional sources or natural gas, and thus the test would be met. In relation to test 3, again, the Government was confident that this test could be met for the production stage of shale gas development.
11. Prior to the Government's response to the CCC report a public inquiry opened on the 9<sup>th</sup> February 2016 in relation to four appeals under section 78 of the Town and Country Planning Act 1990 pertaining to proposals for exploratory fracking and the monitoring of gas production at two sites in Lancashire. For ease of reference these appeals are referred to hereafter as the Preston New Road appeals. The promoters of the development which was the subject matter of the appeal relied upon the provisions of the 2015 WMS in support of their development. This was on the basis that the WMS expressly indicated that it was to be taken into account in development control decisions, and it was supportive of shale gas exploration proposals. Objectors to the proposals, and in particular Friends of the Earth, contended that substantially less weight should be given to the 2015 WMS. Two events were relied upon to support that contention: firstly, the fact that in a recent Autumn Statement the Chancellor of the Exchequer had abandoned investment in Carbon Capture Storage technology and, secondly, the signing of the Paris Agreement, which Friends of the Earth contended brought with it tougher targets for bearing down on climate change, leading to the inevitable conclusion that the WMS should carry less weight.
12. In her report to the Defendant dated 4<sup>th</sup> July 2016 the Inspector concluded in the following terms:

“12.50 Nonetheless, there has been no correction to the WMS issued by the Government in the light of the Chancellor's announcement in relation to the CCS. Neither has there been any statement from the Government since the Paris Agreement to suggest that its position in relation to shale gas, as stated in the WMS, has changed. It seems to me that the way in which the Government chooses to respond and adapt its various energy policies in the light of these two events is a matter to be considered by it and, if thought to be necessary, addressed through policy development. It is inappropriate and unhelpful in the context of these planning appeals to speculate as to what the eventual outcome of such national policy development might be in the future. There is nothing from the Government to indicate that the WMS no longer represents its position in relation to the need for shale gas exploration. I have given careful consideration to the evidence of Professor Anderson on behalf of FoE as to the

weight to be given to the Government's view as set out in the WMS. However, I do not consider that the factors identified by FoE undermine or materially reduce the weight to be attributed to the WMS."

Furthermore, in the Inspector's assessment of the submissions made in particular by Friends of the Earth through their witness Professor Anderson the Inspector concluded as follows:

"12.677 I have already given consideration to the weight to be attached to the WMS in the light of the Paris Agreement and the Chancellor's announcement in relation to CCS. As indicated above, I consider that the way in which the Government chooses to respond and adapt its various energy policies in the light of these two events is a matter it would need to consider and, if thought necessary, addressed through policy development. At present, the WMS represents the Government's position in relation to the need for shale gas exploration and the need for gas to support its climate change target. I agree with the Appellants that the issues raised by Professor Anderson as to how shale gas relates to the obligations such as those set out in the Paris Agreement, and the Intergovernmental Panel on Climate Change (IPCC) carbon budgets, are the matter for future national policy and not for these appeals. (2.19-2.21)"

13. The Inspector recommended to the Defendant that three of the appeals should be allowed and one dismissed. On the 6<sup>th</sup> October 2016 the Defendant, having considered the Inspector's report, reached a decision in relation to the appeals. In respect of the points raised in relation to national policy, and in particular the 2015 WMS, the Defendant reached the following conclusions:

"28. The Secretary of State has considered the weight that should be attached to the need for shale gas exploration and the WMS. For the reasons given at IR12.34-12.52, he agrees with the Inspector at IR12.50 that the factors identified by Friends of the Earth do not undermine or materially reduce the weight to be attributed to the WMS. He further agrees that the need for shale gas exploration is a material consideration of great weight in these appeals, but that there is no such Government support for shale gas development that would be unsafe and unsustainable (IR12.52). The Secretary of State also considers that the need for shale gas exploration set out in the WMS reflects, among other things, one of the Government's objectives in the WMS, in that it could help achieve secure energy supplies.

29. How the Government may choose to adapt its energy policies is a matter for possible future consideration. If thought necessary, this could be addressed through future national policy. These are not matters that fall to be considered in these appeals."

14. In February 2017 a report by Paul Mobbs, which had been commissioned by Talk Fracking, was published entitled “Whitehall’s “Fracking” Science Failure” (“the Mobbs Report”). In the report a number of detailed criticisms are made of the science underpinning the Government’s conclusions on the impacts on climate change of the development of shale gas, and the opportunity which it provided for the creation of a bridge between the present time and a low carbon economy supported by the development of renewable and nuclear energy. A key element of the Mobbs Report is its contention that there had been a significant change in the methods by which gas emissions from shale has operations could be measured and monitored. In the light of these changes in the techniques available, including the ability to equip aircraft to undertake gas monitoring from the air, rather than relying upon the measurement of emissions from ground level, a conclusion emerged that earlier data gathered on the basis of ground level emissions had significantly understated the extent of emissions occurring at shale gas extraction facilities. The Mobbs Report went on to contend that this had significant implications for the MacKay and Stone Report which underpinned the Government’s conclusions as to the likely implications for climate change of the development of a shale gas industry. In summary, the Mobbs Report concluded that whilst the methodology of the MacKay and Stone Report was not necessarily unsound, the data upon which it relied for fugitive emissions was a significant underestimate of the emissions from shale gas extraction operations which had now been measured in more recent studies. The Mobbs Report called for the MacKay and Stone Report to be withdrawn, and for there to be a moratorium on any fracking operations until the implications for fracking and climate change were properly understood.
15. In October 2017 the Department for Business Energy and Industrial Strategy (“BEIS”) published The Clean Growth Strategy. Whilst The Clean Growth Strategy covered policy in relation to power generation it made no reference to shale gas in its proposals.
16. By the summer of 2017 work had commenced on a review of the text of the Framework, and the potential need to publish and adopt amendments to several parts of the text of that document to reflect matters which had emerged since the Framework was originally published in March 2012. In a witness statement on behalf of the Defendant from Dr Michael Bingham it is clear that amongst the types of issue to which consideration was given in terms of amending the Framework were “amendments or policy emphases that had come about through Written Ministerial Statements, where these remained relevant”.
17. In March 2018 the Defendant published consultation proposals in relation to changes to the Framework. A draft text of the entirety of the proposed revised version of the Framework was published to accompany the consultation process. In particular, at paragraph 204(a) of that consultation draft the following text appeared:  
  
“204. Minerals planning authorities should:  
  
a) recognise the benefits of on-shore oil and gas development, including unconventional hydrocarbons, for the security of energy supplies and supporting the transition to a low-carbon economy; and put policies to facilitate their exploration and extraction.”



18. The proposed text of the revised Framework was accompanied by further a document entitled “National Planning Policy Framework: consultation proposals” (“The Consultation Proposals Document”). That document explained that the consultation was “open to everyone”. The scope of the consultation was described in the following terms:

“Topic of this consultation: This consultation seeks views on the draft text of the National Planning Policy Framework. The text has been revised to implement policy changes.

...

Scope of the consultation: The Ministry of Housing, Communities and Local Government is consulting on the draft text of the National Planning Policy Framework. It also seeks views on new policy proposals.”

The Introduction to the document went on to describe the process as follows:

“The draft new Framework implements the Government’s reforms to planning policy. Subject to this consultation, the Government intends to publish a final Framework before the summer. In developing the draft Framework the Government has incorporated:

- Proposals from the previous consultations listed at the start of this document, taking into account the views raised in the response to them;
- Changes to planning policy implemented through Written Ministerial Statements since publication of the first Framework in 2012 (Annex A);
- The effect of caselaw on the interpretation of planning policy since 2012; and
- Improvements to the text to increase coherence and reduce duplication.

...

The Government welcomes comments on the ways in which the draft Framework implements changes to planning policy on which the Government has previously consulted, and on the merits of the new policy proposals that it includes it now challenges developers, local authorities, communities, councillors and professionals to work together to ensure that great developments in line with the Framework are brought forward and to enable more people to meet their aspiration for a home of their own.”

19. In relation to paragraph 204 of the consultation draft of the Framework the Consultation Proposals Document provided the following, including a sequence of questions to be addressed by consultees:

“Chapter 17 Facilitating the sustainable use of minerals

The revised text proposes these policy changes:

This chapter has been shortened slightly, the intention being to incorporate the deleted text in guidance. Additional text on on-shore oil and gas development is included at paragraph 204, which builds on the Written Ministerial Statement of 16 September 2015 to provide clear policy on the issues to be taken into account in planning for and making decisions on this form of development.

As planning for minerals is the responsibility of minerals planning authorities, the Government is interested in views on whether the revised planning policy for minerals that we are consulting on would sit better in a separate document, alongside the Government’s planning policy for waste. In addition, we would welcome views on whether the use of national and sub-national guidelines on future aggregates provision remains a relevant approach in establishing the supply of aggregates to be planned for locally.

Q37 Do you have any comments on the changes of policy in Chapter 17, or on any other aspects of the text of this chapter?

Q38 Do you think that planning policy on minerals would be better contained in a separate document?

Q39 Do you have any views on the utility of national and sub-national guidelines on future aggregates provision?”

20. Talk Fracking provided a consultation response in particular to question 37 in the Consultation Proposals Document. The summary of their contentions was set out in paragraph 3 as follows:

“3. Talk Fracking considers that it is inappropriate and irrational to include within the NPPF policies previously in the WMS, and if anything to give them greater status in relation to planning applications in England, given material developments since the adoption of the WMS, including:

3.1 Scientific developments suggest that the climate impact of fracking was underestimated at the time of the WMS;

3.2 Wales, Northern Ireland and Scotland have implemented bans on fracking or a presumption against it;

3.3 The Government has failed to show that the WMS is compatible with its existing domestic obligations to reduce greenhouse gas emissions (“GHG”) under the Climate Change Act 2008 (“the 2008 Act”);

3.4 Specifically, it has failed to demonstrate whether and how it can meet the three tests that the Committee on Climate Change (“CCC”) consider must be met if fracking is to be compatible with meeting the targets under the 2008 Act.

...

3.5 The Government has recently asked the CCC to review whether the existing commitments under the 2008 Act are consistent with the level of ambition of the Paris Agreement: a process that is all but certain to lead to a tightening of the UK’s current GHG reduction targets (as the CCC has already made clear).

...

Since there is no evidence that fracking is compatible even with existing targets, it would be deeply irresponsible to pursue it at a time when targets are being tightened.”

21. The Talk Fracking consultation response developed the point raised in relation to changes in the state of scientific knowledge about the impact from fracking on climate change in the following terms:

“Developments in the science

10. Since 2015 there have been significant and material developments in the understanding of the GHG emissions arising from fracking (summarised in a report commissioned by Talk Fracking by Paul Mobbs, “How The Government Has Misled Parliament And The Public On The Climate Change Impacts Of Shale Oil And Gas Development In Britain”, May 2017 “Mobbs Report”) for example:

10.1 Methodological improvements in measuring emissions: The ability to measure the emissions from oil and gas infrastructure has been limited by the accuracy and reliability of mobile gas monitoring equipment. As a result, two general forms of environmental sampling have arisen in order to produce an estimate of emissions from the industry: ‘bottom-up’ or ‘inventory’ analysis; and ‘top-down’ or ‘instrumental’ analysis. As set out in the Mobbs Report, the debate on fugitive emissions “has tended to be over the numerical results of individual studies, not the difference in numerical results which is the inevitable consequence of using two different analytical methods. Thus the ‘quality’ or ‘accuracy’ of each approach is ignored” (Mobbs Report, p 9). The WMS is based upon a 2013 report by Professor David MacKay and Dr Tim Stone, commissioned by the Department of Energy and Climate Change (DECC) (“MacKay/Stone report”). The MacKay/Stone report was based primarily on inventory analysis and relied upon data from another report (“the Allen report”), which has since been shown to have been

inaccurate, with growing concern about the accuracy of this method and its tendency to under-estimate emissions (see Mobbs Report, [49]).

10.2 Global warming potential and methane: The Mackay/Stone report assumes that methane is 25 times more potent a greenhouse gas than carbon dioxide over a 100 year period (abbreviated, ‘GWP100’). This is not the approach taken within Howarth’s calculations, which considers both 20-year (‘GWP20’) and 100-year ‘global warming potentials’ (GWPs). Methane is more significant in the short term because it exacerbates the progress of climate change towards tipping points, meaning limiting the release of methane is essential. In 2014, Howarth later updated his earlier papers and outlined how the case for higher methane emissions had become more certain as a result of further ‘top-down’ environmental sampling and considered research released in the interim from the Intergovernmental Panel on Climate Change (IPCC) which had made the case that studies should use the GWP20 in assessments, as well as GWP100, to reflect the time-sensitive impact of emissions (Mobbs Report, [56]-[59]).”

In a footnote to paragraph 10.1 of the consultation response a link was provided to the Mobbs Report.

22. The consultation response from Talk Fracking went on to observe, firstly, that the inclusion of the 2015 WMS was not merely a tidying up exercise but would give the 2015 WMS “formal status as a material consideration in planning applications”. Secondly, observations were made by Talk Fracking in relation to consultation in relation to the points which they raised. They observed as follows:

“34. Give the importance of the issues set out above, it is unacceptable that the Government is seeking to reinforce existing policy on fracking without carrying out any meaningful consultation.

35. This failure is particularly stark given that – astonishingly – there has never been any public consultation in England about the benefits and disbenefits of fracking. The WMS was not the product of any form of consultation.”

23. The consultation period had closed on 10<sup>th</sup> May 2018. On 17<sup>th</sup> May 2018 a Written Ministerial Statement was made by BEIS jointly with the Defendant in relation to energy policy (“the 2018 WMS”). The 2018 WMS, so far as relevant to these proceedings, provides as follows:

“My Rt. Hon. Friend James Brokenshire, the Secretary of State for Housing, Communities and Local Government, and I wish to reiterate the Government’s view that there are potentially substantial benefits from the safe and sustainable exploration and development of our onshore shale gas resources and to set out in this statement to Parliament the actions we are taking to support our position. This joint statement should be considered in planning decisions and plan-making England.

...

*Planning policy and guidance*

This Statement is a material consideration in plan-making and decision-taking, alongside relevant policies of the existing National Planning Policy Framework (2012), in particular those on mineral planning (including conventional and unconventional hydrocarbons).

Shale gas development is of national importance. The Government expects Mineral Planning Authorities to give great weight to the benefits of mineral extraction, including to the economy. This includes shale gas exploration and extraction. Mineral Plans should reflect that mineral resources can only be worked where they are found, and applications must be assessed on a site by site basis and having regard to their context. Plans should not set restrictions or thresholds across their plan area that limit shale development without proper justification. We expect

Mineral Planning Authorities to recognise the fact that Parliament has set out in statute the relevant definitions of hydrocarbon, natural gas and associated hydraulic fracturing. In addition, these matters are described in Planning Practice Guidance, which Plans must have due regard to. Consistent with this Planning Practice Guidance, policies should avoid undue sterilisation of mineral resources (including shale gas).

The Government has consulted on a draft revised National Planning Policy Framework (NPPF). The consultation closed on 10 May 2018. In due course the revised National Planning Policy Framework will sit alongside the Written Ministerial Statement.”

24. As set out above, in July 2018 the final version of the revised Framework was published. Alongside its publication the Defendant published a document entitled “Government response to the draft revised National Planning Policy Framework consultation: a summary of consultation responses and the Government’s view on the way forward”. In the Foreword to the document it was noted that “all responses have been considered carefully”. In respect of question 37 the document recorded the following in relation to the consultation response and the Government’s reaction to it:

“There were 975 responses to this open question. Points raised include:

- Respondents from most sectors supported the need to facilitate security of supplies, but there were concerns about the dropping of the word ‘essential’ to describe minerals. They highlighted the need to safeguard not only minerals reserves, but also the infrastructure needed to distribute them, and sought amendments to wording on landbanks.
- Individuals and some environmental organisations considered that more emphasis should be placed on renewables.
- Individuals and some interest groups disagreed with policies relating to oil and gas development, including unconventional hydrocarbons.

These groups considered that these policies should be omitted due to disagreement with the principle of fossil fuels, shale development, and fracking.

- Some individuals considered policy to be unbalanced towards the economic benefits of mineral development and stated that equal weight should be given to economic, social and environmental considerations. There were some calls to provide a clear position on coal.
- There were calls for references to underground exploration and extraction operations to be omitted from paragraph 205, as ensuring their integrity and safety was the remit of the regulators, principally the Health and Safety Executive, rather than mineral planning authorities.

### *Government response*

There was limited support for the inclusion in the Framework of policies for the exploration and extraction of oil, gas and unconventional hydrocarbons (which includes shale), with most responses objecting to potential shale development as a matter of principle. However, shale gas, which plays a key role in ensuring energy security, is of national importance. The Government is committed to explore and develop our shale gas resources in a safe and sustainable way. We have therefore carried forward this policy in the Framework, which would apply having regard to the policies of the Framework as a whole.”

As set out above the final text of the policy, which reflected the policy text of the consultation draft, was contained in paragraph 209(a) of the final version of the Framework.

25. What has been set out above (perhaps with the exception of the contents of the Talk Fracking Consultation Response) presents that which was in the public domain in relation to the consultation exercise for the revision of the Framework. Dr Bingham provides some further information in relation to the thinking and the processes which were occurring behind the scenes and within the Defendant’s department at the time of the revisions to the Framework. Firstly, he provides the following commentary on the genesis of the text in paragraph 204(a) of the draft revised Framework:

“22. This text was drafted in discussion with the shale policy team in the Department to reflect the high-level policy in the 2015 Written Ministerial Statement, and beyond this do no more than carry it forward into a consequential (and logical) expectation that authorities should develop their own policies to facilitate exploration and extraction. In doing so, authorities would, as explained above, need to take into account all relevant aspects of the revised NPPF, including its chapter on meeting the challenge of climate change and various environmental safeguards set out elsewhere in the minerals chapter (at paragraphs 200 and 201 of the draft revised NPPF). As with the original NPPF, the draft policy referred to on-shore oil and gas

development as a whole, including unconventional hydrocarbons, as the considerations that it sets out were felt to be equally applicable to other (non-shale) forms of on-shore oil and gas development.

23. Because paragraph 204(a) of the draft revised NPPF reiterated, at a high level, an important and long-established policy position (the relevance of which had been reaffirmed in the manifesto for the incoming Government), I understand that officials in the Department's shale policy team did not review detailed evidence relating to the merits of shale gas development as part of its drafting, as they felt that this was unnecessary.

24. More generally, in the context of revising the NPPF as a whole, detailed reviews of evidence relating to the policies that are led elsewhere in government would have been inappropriate as well as impractical. For example, the Department for Business, Energy and Industry Strategy ("BEIS") has led responsibly for national policy on shale, while the range of matters covered by the revised NPPF means that it would not have been feasible for all of the evidence behind wider government policies to be explored afresh as part of the NPPF's drafting. Close contact was, however, maintained with officials in other Government departments as drafting progressed to ensure that its content reflected wider government policy positions where it was appropriate to do so, such as the Clean Growth Strategy published by BEIS in October 2017. This took place both through bilateral conversations between relevant policy leads and a series of roundtable discussions with other departments as the drafting progressed."

26. In relation to the consideration of consultation responses, and in particular the consultation response provided by Talk Fracking, Dr Bingham provides as follows:

"35. The Claimant's representations on the draft revised NPPF asserted that a number of reports produced since the 2015 Written Ministerial Statement showed that the climate change impacts of shale gas development had been underestimated, and for this reason (and others) it was not appropriate to reflect the Written Ministerial Statement in the revised NPPF. The representations placed particular emphasis on the report that Talk Fracking had themselves commissioned from Paul Mobbs (the "Mobbs Report"). I understand that the team in the Department with shale gas policy had not been aware of the Mobbs Report when preparing the draft revised NPPF, nor of the other detailed research studies cited in the Claimant's representations as having been referred to the Mobbs Report. This is unsurprising: as noted in paragraph 24 above, in revising the NPPF it would have been both impractical and inappropriate to review detailed evidence relating to policy priorities established elsewhere in Government.

36. Due to the volume of responses to the consultation, officials from across the planning directorate logged consultation responses and converted those not sent via the website using the ‘survey monkey’ platform into the same format. This enabled the analysts to view the information in one platform, and for the quantitative analysis to be completed digitally rather than manually. The lead for the logging process delivered training to all staff, including the need to include all information. Unfortunately, as with all manual processes there is the potential for human error. The person logging the Talk Fracking response did not include the footnote containing the link to the Mobbs Report when transferring information to the Survey Monkey format.

37. In considering the representations, I understand that the shale policy team in the Department considered that the references to the Mobbs Report had limited bearing on the high-level policy contained in paragraph 204(a). It was clear from the representations that it dealt with a contested area of science, and was taking a view based on various detailed academic studies. It was not feasible for the team to assess the veracity of the range of work referred to or the conclusions drawn, but nor was it necessary given the limited purpose of paragraph 204(a) – i.e. to carry forward existing policy at a high level, as a framework for plans and decisions at the local level (which would, necessarily, have to take into account any other material considerations identified as appropriate). I understand that in the context of this limited purpose of paragraph 204(a), it was also considered unnecessary to revisit the Government’s previous assessment of three tests set by the Committee on Climate Change, in the light of the representations received.”

27. Through his evidence Dr Bingham introduces the consultation response analysis summaries which were presented to Ministers in relation to question 37, in so far as it related to shale gas extraction. It is unnecessary to include for the purposes of this judgment the summary relating to local authorities, Neighbourhood Planning Bodies or private sector organisations. Those relating to other types of consultee were set out in the following terms together with the concluding summary in respect of all responses:

“Trade Associations/ Interest Groups/ Voluntary or Charitable Organisations

There were 62 comments, of which 1 was no comment. There is minimal support for the changes. The majority of disagreement was from interest groups who cited concerns to the policy on environmental and climate change grounds. In general, respondents indicated that the text should be omitted, stating that the NPPF should instead presume against the extraction of fossil fuels or should be revised to include further regulations to prevent perceived local impacts of developments. It was explained by some trade associations that further clarification



was needed to make clear the role of regulators when dealing with the technical aspects concerning subsurface issues.

#### Others

There were 30 comments from others. There is minimal support from others, which included campaign and local resident groups. The majority of disagreement to changes to the policy is on environmental and climate change grounds. Many believe that text should not be included to NPPF should instead presume against any extraction of fossil fuels. About a third of respondents believed that emphasis should instead be placed on the prioritisation of renewable energy.

#### Individuals

There were 414 comments. There is minimal support on the changes made in the oil, gas and coal exploration and extraction section of Chapter 17. The majority of disagreement to changes to policy is on environmental and climate change grounds. Many believe that text should not be included to support the planning for or extraction of oil, gas and coal. Many also believed that the NPPF should instead presume against any extraction of fossil fuels. About a third of respondents believed that emphasis should instead be placed on the prioritisation of renewable energy. Comments were also made highlighting views that technology for underground gas and carbon storage were not appropriate and possibly dangerous, therefore Mineral Planning Authorities should not encourage this activity. It was commonly suggested that when planning for on-shore oil and gas development, clearly distinguish between, and positively for, the full life cycle of well site rather than the 3 phases of development suggested.

#### Concluding summary

975 responses were received to Q37, of which 433 related to aggregated and industrial minerals; and 569 comments related to the oil, gas and coal exploration and extraction section in Chapter 17.

- Most sectors supported the need to facilitate security of supplies; more objected to the dropping of the word 'essential' to describe minerals; most highlighted the need to safeguard not only minerals reserves but also the infrastructure needed to distribute; and sought amendments to wording on landbanks.
- Individuals and some environmental organisations felt more emphasis should be placed on renewables.

- Individuals and some interest groups disagreed with policies relating to oil and gas development, including unconventional hydrocarbons. These groups believed that these policies should be omitted due to disagreement with the principle of fossil fuels, shale development and fracking.
- Some individuals considered policy to be unbalanced towards the economic benefits of mineral development; equal weight should be given to economic, social and environmental considerations.
- References to underground exploration and extraction operations should be omitted from paragraph 205, as ensuring their integrity and safety was the remit of the regulators, principally the Health and Safety Executive, rather than mineral planning authorities.”

It was against the background of these summaries presented to Ministers that the decision to approve the revised Framework was made.

#### The Law

28. The system of regulation that controls the development and use of land, the planning system, is a comprehensive statutory code. Within that statutory regime there are two key processes. The first is the formulation of plans containing policies and proposals to guide decision making in respect of future development. The second is the decision-making process on applications for development made to the relevant planning authority or, on appeal to the Defendant. When made and available, National Planning Policy of the kind represented by the Framework, plays a role in these two key processes. Section 19 of the Planning and Compulsory Purchase Act 2004 makes provision for the preparation of local development documents. In particular at section 19 (2) it provides as follows:

“(2) In preparing a development plan document or any other local development document the local planning authority must have regard to-

(a) national planning policies and advice contained in guidance issued by the Secretary of State.”

29. Within Schedule 4B of Town and Country Planning Act 1990 provisions are made in relation to the “basic conditions” required to be met by a neighbourhood development order or a neighbourhood plan before it can proceed to referendum. These “basic conditions” include as a test the question of whether or not it is appropriate to make the instrument having regard to national policies and advice issued by the Defendant. Provisions of this kind led Lord Carnwath to the conclusion in Hopkins Homes Limited v Secretary of State for Communities and Local Government and Others [2017] UKSC 37; [2017] 1 WLR 1865, at paragraph 19 of his judgment, that the power to issue national planning policy is derived either expressly or by implication from the statutory framework itself.

30. The provisions pertaining to the testing of a development plan document are contained within section 20 of the 2004 Act. This section requires a development plan document to be subject to independent examination and identifies the purpose of that independent examination as follows:

“(5) The purpose of an independent examination is to determine in respect of the development plan document-

(a) whether it satisfies the requirements of sections 19 and 24 (1), regulations under section 17 (7) and any regulations under section 36 relating to the preparation of development plan documents;

(b) whether it is sound, and

(c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation.”

31. There is no definition within the statutory framework as to the yardstick for whether or not a development plan document is “sound”. The Defendant has chosen to include that test within paragraph 35 of the Framework, which provides as follows:

“35. Local plans and spatial development strategies are examined to assess whether they have been prepared in accordance with legal and procedural requirements, and whether they are sound. Plans are ‘sound’ if they are:

a) Positively prepared- providing a strategy which, as a minimum, seeks to meet the area’s objectively assessed needs; and is informed by agreements with other authorities, so that unmet need from neighbouring areas is accommodated where it is practical to do so and is consistent with achieving sustainable development;

b) Justified - an appropriate strategy, taking into account the reasonable alternatives, and based on proportionate evidence;

c) Effective - deliverable over the plan period, and based on effective joint working on cross-boundary strategic matters that have been dealt with rather than deferred, as evidenced by the statement of common ground; and

d) Consistent with national policy - enabling the delivery of sustainable development in accordance with the policies in this Framework.”

32. Submissions were made by both parties in relation to the legal requirement placed upon policy makers in respect of the material considerations to be taken into account in policy making, and the scope of enquiry required by a policy maker when formulating policy. This question was considered by the Court of Appeal in R (West Berkshire District Council) v Secretary of State for Communities and Local Government [2016] EWCA Civ 441; [2016] 1 WLR 3923. That case concerned a challenge to a Written Ministerial Statement made in respect of planning obligations for affordable housing and social infrastructure contributions. Part of the challenge was a failure to take into account material considerations when the Written Ministerial Statement was being formulated.

In addressing that question Laws and Treacy LJ observed the following as to the scope of any duty to take account of material considerations when formulating policy:

“33. As we have said, in making planning policy the Secretary of State is exercising power given to the Crown not by statute but by the common law. In *R v (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697 Lord Sumption said this at paragraph 83: "A common law power is a mere power. It does not confer a discretion in the same sense that a statutory power confers a discretion. A statutory discretionary power carries with it a duty to exercise the discretion one way or the other and in doing so to take account of all relevant matters having regard to its scope. Ministers have common law powers to do many things, and if they choose to exercise such a power they must do so in accordance with ordinary public law principles, ie fairly, rationally and on a correct appreciation of the law. But there is no duty to exercise the power at all. There is no identifiable class of potential beneficiaries of the common law powers of the Crown in general, other than the public at large. There are no legal criteria analogous to those to be derived from an empowering Act, by which the decision whether to exercise a common law power or not can be assessed. It is up to ministers to decide whether to exercise them, and if so to what extent. It follows that the mere existence of a common law power to do something cannot give rise to any right to be considered, on the part of someone who might hypothetically benefit by it. Such a right must arise, if at all, in other ways, usually by virtue of a legitimate expectation arising from the actual exercise of the power..."

34. Mr Drabble relies upon this reasoning for the proposition that in exercising his common law power to make planning policy the Secretary of State was not obliged to have regard to this or that consideration, as he would be if his power were derived from a statute which told him what to consider; if he chose to make new policy he was bound, of course, by the core values of reason, fairness and good faith, but beyond that his choice of policy content was very much for him to decide.

35. Mr Forsdick's response is to insist that while the source of the Secretary of State's power is the common law, the context in which it is being exercised is a carefully drawn statutory regime; so that, for proper planning purposes, the considerations which the judge held were left out of account were indeed "obviously material".

36. We would certainly accept that the statutory planning context to some extent constrains the Secretary of State. It prohibits him from making policy which, as we have put it in dealing with the principal issue in the case, would countermand or frustrate the effective operation of s.38(6) or s.70(2). It would also prevent him from introducing into planning policy matters which were not proper planning considerations at all. Subject to that, his policy choices are for him. He may decide to cover a small, or a larger, part of the territory potentially in question. He

may address few or many issues. The planning legislation establishes a framework for the making of planning decisions; it does not lay down merits criteria for planning policy, or establish what the policy-maker should or should not regard as relevant to the exercise of policy-making.”

33. In the course of his submissions Mr David Wolfe QC, who appeared on behalf of the Claimant, submitted that it was important to appreciate that the observations offered by the Court of Appeal in West Berkshire were in the context of the court considering that the Defendant was exercising prerogative powers when making this planning policy and not a power under statute. By contrast, since that judgment was handed down Lord Carnwath has clarified that when making national planning policy the Defendant is not exercising a prerogative power, but rather exercising an express or implied power under planning legislation (see Hopkins Homes Limited v Secretary of State for Communities and Local Government [2017] UKSC 37; [2017] 1 WLR 1865 at paragraphs 19-20). In the light of Lord Carnwath’s conclusion Mr Wolfe submitted that “obviously material” considerations would need to be taken into account if a policy was to be lawfully arrived at. On behalf of the Defendant, Mr Rupert Warren QC observed that whilst the Framework was produced pursuant to implied or express statutory powers under the statutory framework for planning, there were no specifically identified considerations by means of any express statutory provisions related to the production of national planning policy to explain what considerations were specifically material. Nevertheless, Mr Warren accepted that in order to arrive at a lawful policy it would be necessary for the Defendant to take into account “obviously material” considerations when establishing national planning policy.
34. This approach then raises the question of the nature of the enquiry required by the decision maker in order to identify the “obviously material” considerations so as to lawfully arrive at the policy. The nature of that duty was recently examined by the Court of Appeal in R (Jeyes) v Flintshire County Council and Hamilton [2018] EWCA Civ 1089; [2018] ELR 416 in which Hickinbottom LJ made the following observations in relation to the duty to take all reasonable steps in relation to achieving a properly informed decision:

“Although any administrative decision-maker is under a duty to take all reasonable steps to acquaint himself with information relevant to the decision he is making in order to be able to make a properly informed decision (Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1997] AC 1014), the scope and content of that duty is context specific; and it is for the decision-maker (and not the court) to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor (R (Khatun) v London Borough of Newham [2004] EWCA Civ 55; [2005] QB 37 at [35]). That applies to planning decision-making as much as any other (see, e.g., R (Hayes) v Wychavon District Council [2014] EWHC 1987 (Admin) at [31] per Lang J, and R (Plant) v Lambeth London Borough Council [2016] EWHC 3324 (Admin); [2017] PTSR 453 at [69]-[70] per Holgate J). Therefore, a decision by a local planning authority as to the extent to which it considers it

necessary to investigate relevant matters is challengeable only on conventional public law grounds.”

35. The next legal issue which needs to be examined is the requirements to be satisfied by a lawful consultation exercise. When a public authority has either as consequence of a statutory requirement or voluntarily undertaken a consultation exercise there are parameters which need to be observed in order to ensure that the consultation is one which is lawful. The justification for this approach, and the content of the legal requirements, were set out by Lord Wilson in a judgment (with which the majority in the Supreme Court agreed) in the case of R (Mosely) v Harringay LBC [2014] UKSC 56; [2014] 1 WLR 3947 in the following terms:

“23. A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illuminated by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in *R v Devon County Council, ex parte Baker* [1995] 1 All ER 73. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.

24. Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R (Osborn) v Parole Board* [2013] UKSC 61, [2013] 3 WLR, 1020, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested" (para 67). Second, it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel" (para 68). Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not "Yes or no, should we close this particular care home, this particular school etc?" It was "Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?"

25. In *R v Brent London Borough Council, ex p Gunning*, (1985) 84 LGR 168 Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said at p 189: "Mr Sedley submits that

these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third,... that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

Clearly Hodgson J accepted Mr Sedley's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly endorsed them, first in the *Baker* case, cited above (see pp 91 and 87), and then in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at para 108. In the *Coughlan* case, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated at para 112: "It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

The time has come for this court also to endorse the Sedley criteria. They are, as the Court of Appeal said in *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472, 126 BMLR 134, at para 9, "a prescription for fairness".

36. Some subsidiary points in relation to the content of the legal duties arising in a consultation exercise were alluded to in the course of submissions. Firstly, Mr Wolfe made submissions in relation to the quality and coverage of the material which was placed before the Defendant. In essence he contended that the material which the Defendant was presented with by his officials did not adequately reflect the response provided by Talk Fracking. The legal principles relating to the knowledge of a Minister reaching a decision and the correct approach to examining whether or not there has been a legal flaw in the process are to be derived from a sequence of authorities. These authorities start with the Australian case of Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others (1986) 66 ALR 299.
37. The case concerned an application made by Aboriginal groups in respect of land claims and an allegation that the Minister making the decision in relation to whether or not to make the grant of land did not have before him all of the relevant material that had been provided by those objecting to the application. In his judgment, Brennan J examined the principles in relation to both the significance of a matter which would need lawfully to be taken into account, and also the approach to be taken in respect of a decision-making Minister's knowledge as follows:

“(ii) Significant to a matter required to be taken into account

25. A decision-maker who is bound to have regard to a particular matter is not bound to bring to mind all the minutiae within his knowledge relating to the matter. The facts to be brought to mind are the salient facts which give shape and substance to the matter: the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered.

...

The Department and the Minister’s knowledge

The Department does not have to draw the Minister’s attention to every communication it receives and to every fact its officers know. Part of a Department’s function is to undertake an analysis, evaluation and precis of material to which the Minister is bound to have regard or to which the Minister may wish to have regard in making decisions. The press of ministerial business necessitates efficient performance of that departmental function. The consequence of supplying a departmental analysis, evaluation and precis is, of course, that the Minister’s appreciation of a case depends to a great extent upon the application made by the Department. Reliance on the departmental appreciation is not a tantamount to an impermissible delegation of ministerial function. A Minister may retain his power to make a decision while relying on his Department to draw his attention to the salient facts. But if his Department fails to do so, and the validity of the Minister’s decision depends upon his having regard to the salient facts, his ignorance of the facts does not protect the decision. The Parliament can be taken to intend that the Minister will retain control of the process of decision-making while being assisted to make the decision by departmental analysis, evaluation and precis of the material relevant to that decision.

Although the Minister is the repository of the power conferred by s 11(1) of the Act and although he may not delegate that power to his departmental officers, the Minister cannot be regarded in his exercise of power as unaware of information possessed by his Department. As Lord Diplock said in *Bushell v Environment Secretary* at p 95: “To treat the minister in his decision-making capacity as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone in the constitutional theory is accountable to Parliament is to ignore not only the practical realities but also Parliament’s intention. Ministers come and go; departments, though their name may change from time to time, remain. Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder



of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise."

38. This issue arose again in R (on the application of the National Association of Health Stores) v Department of Health [2003] EWCA 3133. In that case Crane J at first instance had acceded to a submission made on behalf of the Defendant that "information available to officials involved in advising a Minister is information that can properly be said to be information taken into account by the Minister". In giving the leading judgment in the Court of Appeal, Sedley LJ had regard to the decision of the Australian High Court in PEKO-Wallsend and reached the following conclusions as to what would be necessary to ensure that a Minister had legally adequate knowledge in order to reach a lawful decision in respect of the exercise of the discretion. In particular he disagreed with the conclusions which Crane J had reached and expressed his conclusions in the following terms:

"26. In my judgment, and with great respect to Crane J, this part of his decision is unfounded in authority and unsound in law. It is also, in my respectful view, antithetical to good government. It would be an embarrassment both for government and for the courts if we were to hold that a minister or a civil servant could lawfully take a decision on a matter he or she knew nothing about because one or more officials in the department knew all about it. The proposition becomes worse, not better, when it is qualified, as Crane J qualified it and as Mr Cavanagh now seeks to qualify it, by requiring that the civil servants with the relevant knowledge must have taken part in briefing or advising the minister. To do this is to substitute for the *Carltona* doctrine of ordered devolution to appropriate civil servants of decision-making authority (to adopt the lexicon used by Lord Griffiths in *Oladehinde* [1991] 1 AC 254) either a de facto abdication by the lawful decision-maker in favour of his or her adviser, or a division of labour in which the person with knowledge decides nothing and the decision is taken by a person without knowledge.

27. In contrast to *Carltona*, where the court gave legal authority to the practical reality of modern government in relation to the devolution of departmental functions, the doctrine for which Mr Cavanagh contends does not, certainly to my knowledge, reflect the reality of modern departmental government. The reality, subject no doubt to occasional lapses, is that ministers (or authorised civil servants) are properly briefed about the decisions that they have to take; that in the briefings evidence is distinguished from advice; and that ministers take some trouble to understand the evidence before deciding whether to accept the advice. I will come later in this judgment to the critical question

of how much of the evidence the minister needs to know; but I cannot believe that anybody, either in government or among the electorate, would thank this court for deciding that it was unnecessary for a decision-maker to know anything material before reaching a decision.

...

37. The serious practical implication of the argument is that, contrary to what the decided English cases take for granted, ministers need know nothing before reaching a decision so long as those advising them know the facts. This is the law according to Sir Humphrey Appleby. It would covertly transmute the adviser into the decision-maker. And by doing so it would incidentally deprive the adviser of an important shield against criticism where the decision turns out to have been a mistake.

38. The only authority Mr Cavanagh was able to produce which appeared to chime with his argument was a decision of Lord Clyde, sitting in the Outer House of the Court of Session, in *Air 2000 v Secretary of State for Transport (No 2)* [1990] SLT 335. Advice from the Civil Aviation Authority which by statute the Secretary of State was required to consider had been seen not by him but by an interdepartmental working party which advised him. Lord Clyde cited *Carltona* for the uncontroversial proposition that “what is done by his responsible official is done by [the minister]”. However, while rejecting as “too extreme” a submission that the mere physical delivery of the advice to the department was sufficient, Lord Clyde accepted that “if it is given to an official who has responsibility for the matter in question, that should suffice”. If by this Lord Clyde meant that such receipt would amount in law to consideration by the Secretary of State, I would respectfully disagree. For the reasons I have given, it would be incumbent on such an official to ensure that either the advice or a suitable precis of it was included in the submission to the minister whose decision it was to be.”

39. The practical implications of these principles were before this court in the case of R (on the application of Buckinghamshire County Council and Others) v Secretary of State for Transport and Others [2013] EWHC 481 when Ouseley J, considering this litigation at first instance, had to deal with an allegation that consultation responses provided by HS2 Action Alliance Limited had not been placed before the Minister, in particular in respect of contentions in relation to the blight and compensation scheme which was proposed in respect of the HS2 project. As Ouseley J identified, the point at issue when an allegation of this kind is made is whether or not the Minister has given conscientious consideration to the response to consultation. Having examined the material which was available to him in respect of that which was placed before the Minister he concluded that the decision which had been reached in the Review of Property Issues decision had been arrived at following a consultation process in which HS2 Action Alliance’s detailed response had in reality been “just brushed aside”. The consultation process had thus been so unfair as to be unlawful.

40. These factors again arose in the recent Divisional Court decision in R (on the application of Kohler) v Mayor's Office for Policing and Crime [2018] EWHC 1881. The case concerned a challenge to the Defendant's decision to close a police station at Wimbledon (along with other police stations). The case was based upon, amongst other matters, the failure of the Defendant to conscientiously consider responses which were made during a consultation process in respect of the closures. The Claimant had responded to the consultation process on behalf of the Merton Liberal Democrats', and one of the points which was made in that consultation response was that it was premature to take a decision to close Wimbledon police station pending an evaluation on the impact of new technology. Having considered the evidence in the case Lindblom LJ and Lewis J concluded as follows as to the extent to which the Merton Liberal Democrats consultation response had been conscientiously considered in the decision-making process:

“67. We are also satisfied on the evidence, however, that there was one matter raised in the consultation responses relating to Merton that was not discussed or considered at the meeting. This was the proposal advanced by the Merton Liberal Democrats that it was premature to take a decision to close Wimbledon police station, and that any decision to do so should be postponed pending an evaluation of the impact of new technology. That was a clear theme of the document, as appears from paragraphs 2,6 and 7. It undoubtedly fell within the scope of the consultation exercise, and it has not been suggested otherwise. The questions asked invited comments about the opportunities to contact the police as an alternative to via a front counter and asked about the extent to which those responding agreed with the proposed changes of location for five front counters.

69. The summary of consultation responses did not refer to that proposal or suggestion. On the evidence, we cannot be satisfied that the deputy mayor herself read the Merton Liberal Democrats' submission. The three options relating to alternative sites were discussed at the meeting. Whilst there are general references to discussing the feedback, there is no evidence that this proposal was specifically discussed. This is in contrast to the options relation to alternative sites, where the evidence does not establish that those matters were discussed. We conclude, therefore, that this aspect of the claimant's consultation response was not addressed by the deputy mayor in the course of making her decision. And we are in no doubt that it ought to have been. This amounts, in our view, a clear error of law.”

41. The second subsidiary matter related to consultation relied upon by Mr Wolfe was the contention that, because the subject matter of the decision was environmental in character there was a need, in addition to the common law principles pertaining to consultation, to incorporate into the analysis the principles of the Aarhus Convention in relation to Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Article 7 of the Aarhus Convention

requires parties to the Convention to make appropriate practical and or other provisions for public participation in relation to plans and programmes relating to the environment. Article 6(8) provides as follows:

“6(8) Each party shall ensure that in the decision due account is taken of the outcome of the public participation.”

42. Mr Wolfe submitted that this provision of the Aarhus Convention augmented the requirements of the common law. He submitted that it was of significance that in Stichting Natuur En Milieu v European Commission (Case T-338/08) the CJEU had made reference to the Aarhus Convention Implementation Guide in its consideration of the application of the provisions of the convention. Moving to the provisions of the Aarhus Convention Implementation Guide pertinent to Article 6(8), whilst the Guide notes that the Aarhus Convention does not specify what taking “due account” or public participation means in practice, Mr Wolfe drew attention to the observation in the guide that “the relevant authority is ultimately responsible for the decision based on all the information available to it, including all comments received, and should be able to show why a particular comment was rejected on substantive grounds.” The guide goes on to observe that the requirement to take into account the outcome of public participation in the context of Article 6 “requires something more than “as far as possible”; rather, the paragraph should be strictly construed to require the establishment of definite substantive and procedural requirements.”

#### Submissions and Conclusions

43. Having considered the various submissions made across Grounds 1, 2 and 4 of the Claimant’s case, in my view it is convenient to commence an examination of the merits of the case with an enquiry into Ground 4. The reason for taking this approach is that at the heart of the dispute between the parties is the question of what the Defendant was doing when incorporating paragraph 209(a) into the Framework or, more particularly in relation to Ground 4, what a member of the public engaging in the consultation process and reading the publicly available material as a reasonable reader, would have concluded the Defendant was doing.
44. Whilst the Court’s attention was not drawn to any authority bearing specifically on the correct approach to examining the meaning of documents produced within a decision-making process related to the creation of policy (and in particular the consultation process accompanying it), it appears to me to be obvious that the documentation must be read and examined in the spirit of the purpose for which it is produced. It must be read and considered from the standpoint of a reasonable member of the public or reasonable reader. Mr Warren drew attention to the observation of Lord Carnwath in his judgment in the case of Trump International Golf Club Limited v Scottish Ministers [2015] UKSC 74 where at paragraph 34, when considering the words of a condition on a planning permission, he indicated that the court would ask itself “what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole.” He described that as an objective exercise in which the court would have regard to the natural and ordinary meaning of the words involved alongside the overall purpose of the consent and any other conditions, and that in doing so would apply common sense. Whilst the content of a condition on the planning consent is not the same as the content of material produced in the process of making a policy by some margin, in my view the same kind of

approach is necessary bearing in mind the nature and purpose of the exercise which is taking place. In relation to a consultation process the purpose of the documentation is to secure the engagement of the public and their contribution to the decision-making process on the issues which they are to be led to consider are the subject matter of the decision-making process, that is to say the issues within the scope of the decision-making process.

45. Mr Warren, on behalf of the Defendant, reliant upon the evidence provided by Dr Bingham, submitted that the exercise in relation to paragraph 209(a) was purely and simply an exercise of copying across, or cutting and pasting, the 2015 WMS into the Framework. Since all that was being done was that the 2015 WMS was being copied across to the Framework, without any intention to revisit or re-examine the validity of the policy, there was no purpose to be served by giving any consideration to any consultation responses bearing upon the merit of the policy or providing evidence in relation to it. Indeed, as Dr Bingham sets out in his evidence, responsibility for national policy on shale gas vested in BEIS and thus it was inappropriate and impractical for the Defendant to undertake any examination of evidence relating to the merits of shale gas development. The only issue under consideration therefore was the question of whether or not the 2015 WMS should be copied across into the provisions of the revised Framework, without any consideration of its substance.
46. As a result of this submission Mr Warren contends that the Claimant's allegations in relation to, in particular, Ground 4 are misconceived. Since all that was being undertaken was a cut and paste exercise, without any examination of the merits of the policy, there was no policy being formulated or revised and therefore the approach of the Defendant was not in breach of the first of the Sedley principles that consultation should occur at a stage when a policy is being formulated. Secondly, there was no intention to in any way examine the content of the policy. There was no need for any of the substance of Talk Fracking's responses on the merits of the policy (let alone the detail they furnished in relation to the disputed scientific evidence) to be placed before the Minister in order for him to reach a conclusion. The only decision that the Minister needed to make was whether or not to copy the substance of the pre-existing policy in the 2015 WMS into the Framework.
47. Mr Warren submits that any reasonable reader considering the materials which have been set out above would have been clear that all that was occurring was a cut and paste exercise. The reasonable reader or member of the public would have been clear that the content or substance of the 2015 WMS was not open to consultation. As part of the context to examine that proposition Mr Warren drew attention to the fact that the 2015 WMS has been published without consultation when it was produced.
48. By contrast Mr Wolfe, as foreshadowed by the observations above, contends under Ground 4 that the consultation exercise breached the first and fourth of the Sedley principles to be derived from Gunning. So far as the first principle is concerned, Mr Wolfe submitted that it is clear from Dr Bingham's evidence that the consultation exercise was not being undertaken at a stage when the policy was being formulated. The Defendant had a closed mind in relation to the substance of paragraph 209(a) and had no intention of entertaining any change to the policy.
49. Mr Wolfe accepted that it would have been perfectly lawful for the Defendant to identify in the consultation material that the content or substance of paragraph 204(a)

of the consultation draft of the revised Framework was excluded from the consultation process, and that the Defendant had no interest in hearing any observations about the merits of that paragraph. The difficulty, he contended, was that there was simply no indication in the public documentation that such was the Defendant's approach.

50. So far as the 4<sup>th</sup> principle was concerned Mr Wolfe contended that the summary of responses which was placed before the Minister in respect of question 37 in the consultation, to inform the decision in respect of paragraph 209(a), did not contain any of the substance of the contentions raised by Talk Fracking in their consultation response. Akin to the Buckinghamshire case, and the case of Kohler, the key points raised by Talk Fracking in terms of the scientific developments which had occurred since the 2015 WMS and the compatibility of the proposed policy with obligations under the Climate Change Act 2008 are simply not reported. In effect all that the Minister was told in relation to these responses was that there was an in principle objection to the exploitation and use of shale gas through fracking.
51. I have no difficulty in accepting, on the basis of Dr Bingham's evidence, that in fact there was no interest in reviewing or re-evaluating the substance of the policy of the 2015 WMS, or listening to any consultation engaged with the merits of the policy or the evidential and scientific issues associated with it. After all, the Defendant jointly engaged in the promulgation of the 2018 WMS prior to examining or evaluating the consultation responses in relation to the revised Framework (albeit shortly after the consultation period had closed). However, as Mr Warren was bound to accept, the issues in relation to Ground 4 and the consultation exercise cannot be disposed of by simply considering the Defendant's private intentions. It is the public documentation associated with the consultation process and its context which have to be examined, and if, as Mr Warren submitted, the reasonable reader would have discerned the Defendant's intention from that documentation then there would be substance in his submissions. However, as he accepted in the course of argument, if the reasonable reader would have concluded that the Defendant was inviting and intending to consider and evaluate consultation responses on the substance of the policy, then his submissions could not succeed and the court would be bound to hold that the consultation was unlawful. As he accepted, ultimately it is the view to be taken of what the public were told they were engaging in when they took part in the consultation exercise which is the key consideration.
52. When the consultation materials, and the documentation generated at the time of decision making, are examined I am unable to accept that a reasonable reader, or reasonable member of the public, would have been clear, or indeed have had any notion, that the substance or merits of the policy contained in paragraph 204(a) or the consultation draft of the Framework was outside the scope of the consultation, and that any observations they passed in respect of the merits of that policy were irrelevant to the exercise which the Defendant was inviting them to participate in. I have reached that conclusion for the following reasons.
53. Starting with the Consultation Proposals Document there is no suggestion either generally, or in the specific section of that document related to paragraph 204(a), that the merits or substance of that policy is outwith the scope of the consultation. The introductory section of the document, as it says in terms, seeks views on the draft text of the Framework. Whilst Mr Warren drew attention to the introductory text focusing to some extent "on the merits of the new policy proposals" contained in the revised

Framework, that observation needs to be seen in the context of the structure of the Consultation Proposals Document as a whole. Prior to setting out the sequence of questions which consultees were invited to address, the document made clear that “the sections below outline the main changes proposed to the Framework”. Then, chapter by chapter the Consultation Proposals Document provided a commentary in respect of those main changes proposed to the Framework together with a sequence of specific questions addressing the changes. No doubt this was a sensible means of focusing consultees upon the particular revisions about which comments were being sought, thereby avoiding consultees engaging in responding to aspects of the Framework which were not being revised or reconsidered.

54. Against the background of that general approach, specific text and questions were provided under chapter 17 as set out above. That specific text provides no suggestion that the substance of paragraph 204(a) is outside the scope of the consultation, or that commentary upon it would be irrelevant. Indeed the text suggest that paragraph 204(a) as drafted “builds on the Written Ministerial Statement of the 16<sup>th</sup> September 2015 to provide clear policy on the issues to be taken into account in planning for and making decisions on this form of development”. There is nothing in that to suggest that the Defendant was entirely uninterested in considering the substance of paragraph 204(a) and its support in principle for exploration for and exploitation of on shore shale oil and gas, or only interested in comments upon a cut and paste exercise.
55. This point is further reinforced, and perhaps critically so, by the text of question 37 itself which it will be recalled provided as follows:

“Q37- Do you have any comments on the changes of policy in chapter 17, or in any other aspects of the text of this chapter?”

The text of question 37 itself makes clear that all aspects of paragraph 204(a) are within the scope of the consultation and matters about which the Defendant wished to receive views in order to inform his proposals. I am unable to find any support for Mr Warren’s proposition that the reasonable reader considering the Consultation Proposals Document would have been clear that the Defendant had no interest in observations on the merits of paragraph 204(a) and all that was being undertaken was an extremely narrow consultation solely on the question of whether or not the 2015 WMS should in substance be copied across into the Framework. Indeed, the report on the Consultation exercise describes question 37 as “this open question”.

56. The position is further reinforced when the Ministerial summary of the consultation responses is examined. Again, nowhere is it suggested when evaluating those responses that those addressed to the substance or merits of the policy, and a disagreement with support for on shore shale gas extraction and fracking in principle, were irrelevant and outside the scope of the consultation and therefore to be disregarded. Indeed, by contrast, all of those observations were reported to the Minister as though they were valid responses to the consultation exercise which had been undertaken. Further illumination of the point can be obtained from the report on consultation which was put into the public domain at the time of publishing the revised Framework. As set out above that document provided some analysis of the 975 consultation responses, but in doing so did not suggest that those engaging with the substance of the policy in paragraph 204(a) had done so as a result of a misconception as to the scope of the consultation exercise. Indeed, the Government response provided by the Defendant,

having noted that there were many objections to potential on shore shale gas development as a matter of principle went on to observe as follows:

“However, shale gas, which plays a key role in ensuring energy security, is of national importance. The Government is committed to explore and develop our shale gas resources in a safe and sustainable way. We have therefore carried forward this policy in the Framework, which would apply having regard to policies of the Framework as a whole.”

This response reads quite plainly as a response addressing the substance of the policy, as well as its incorporation into the Framework. It does not suggest that the arguments in principle in relation to shale gas development were not intended to be any part of the consultation process.

57. All of this documentation, in my view, presents a clear and consistent message to the reasonable reader, examining the documents as a member of the public at whom the consultation was directed, that the contents and substance of paragraph 204(a) of the draft revised Framework were matters which were within the scope of the consultation, and about which the Defendant was interested in hearing responses. The documentation is inconsistent with the suggestion that the substance and merits of the policy were outside the scope of the consultation exercise, and a matter irrelevant to it and about which the Defendant had no interest in entertaining responses. I am unable to accept Mr Warren’s submission that the reasonable reader would have known that all that was being undertaken was a cut and paste exercise in which the merits of requiring minerals planning authorities to recognise the benefits of on shore oil and gas and consequentially put in place policies to facilitate their exploration and extraction, and that the substance of that in principle support was a matter that the Defendant had no interest in hearing about.
58. It follows, as he accepted in his concession set out above, that if he was wrong about what the reasonable reader would have concluded from the publicly available documentation then the consultation exercise was legally flawed as contended by the Claimant under Ground 4. By contrast with what the reasonable reader would have discerned from the publicly available material, the Defendant had a closed mind as to the content of the policy and was not undertaking the consultation at a formative stage. The Defendant had no intention of changing his mind about the substance of the revised policy. Further, the Defendant did not conscientiously consider the fruits of the consultation exercise in circumstances where he had no interest in examining observations or evidence pertaining to the merits of the policy. This had the effect of excluding from the material presented to the Minister any detail of the observations or evidence which bore upon the merits of the policy. Given my conclusion as to what the reasonable reader would have concluded from the publicly available documentation the consultation exercise which was undertaken was one which involved breaches of common law requirements in respect of consultation and which was therefore unfair and unlawful. In the light of that conclusion in relation to the common law principles there is no need to examine the further subsidiary submissions made by Mr Wolfe related to the application of the requirements under the Aarhus Convention.
59. Before leaving these issues, it is necessary to address a number of additional points raised by Mr Warren, mainly in relation to the context of the consultation exercise.



Firstly, he drew attention to the fact that the 2015 WMS had been issued without consultation and contended that this was part of the context and, as a consequence, the reasonable reader or member of the public could not have anticipated that consultation on the substance of the inclusion of the same policy within the revised Framework would occur. I do not consider that there is any force in this submission. The manner in which the 2015 WMS had been produced and promulgated did not fetter or constrain the way in which the Defendant was producing the revisions to Framework. In my view the reasonable reader or member of the public would have had regard to the documentation produced in respect of the consultation on the revised Framework as being definitive to in relation to that consultation process. In circumstances where, as I have found, the reasonable reader or member of the public would have been clearly of the view that the consultation process was open to receive observations on the merits of the substance of the policy there would be no reason for that person to conclude that the consultation was somehow by inference fettered or constrained by an earlier policy-making process.

60. Secondly, Mr Warren submitted that in the light of Dr Bingham's evidence that the lead Ministry in respect of this policy was BEIS, the reasonable reader or member of the public would conclude that it was obvious that the content of the policy was not part of the consultation process. Again, that is a submission which I am unable to accept given the clear terms of the Consultation Proposals Document and the other publicly available material. Whilst I have no reason to doubt Dr Bingham's contention that the lead Ministry in producing the 2015 WMS was BEIS, nevertheless on its face that document is a joint document from that department and also the Defendant's department. Furthermore, in the Consultation Proposals document it will be recalled that the explanation for paragraph 204(a) of the revised Framework is "to provide clear policy on the issues to be taken into account in planning for and making decisions on this form of development". This text does not suggest in any way that the policy which is the subject of consultation is not the Defendant's policy, or that the Defendant simply lacked the technical expertise to deal with contentions about the substance or evidence base of the policy which the Defendant is proposing to adopt. No mention is made of the internal division of labour between the Ministries jointly producing the 2015 WMS, or that as a consequence of those arrangements the Defendant is unable or ill-equipped to address objections to the substance of the policy.
61. Finally, Mr Warren draws attention to the observations made by Talk Fracking in their consultation response where at paragraphs 34 and 35 they make complaint about the failure to carry out meaningful consultation in relation to fracking. This, he submits, makes clear that Talk Fracking themselves did not consider that the exercise in which they were engaging incorporated consultation about the merits of the substance of the policy. In my view there are three reasons why this submission is of little avail to Mr Warren. Firstly, it is clear from the consultation response that these paragraphs and what follows after them are simply intended to emphasise the importance of consultation being engaged in relation to fracking. Secondly, the observations have, in any event, to be read in the light of the fact that the consultation response commences with a detailed engagement with the merits of the policy and why it is inappropriate and unjustified in substance. Thirdly, it is clear from the report on the consultation responses generally that consultees clearly considered that it was within the scope of the consultation to express views on the merits of the policy itself and whether in principle the exploration and exploitation of unconventional carbons should be supported.

62. In summary, in relation to Ground 4, in the light of the evidence which I have set out above and having considered the various submissions raised I am satisfied that the consultation exercise involved breaches of the Sedley principles which are the requirements for a fair and lawful consultation exercise. I therefore grant permission in relation to Ground 4 and accept the submission that the consultation on the draft revised Framework paragraph 204(a) was so flawed in its design and processes as to be unlawful.
63. Turning to Ground 1 Mr Wolfe submits that the scientific material provided in the form of the Mobbs Report was an obviously material consideration which needed to be taken into account by the Defendant in deciding whether or not to incorporate the substance of the 2015 WMS into the Framework. As is obvious from the history of the matter set out above the 2015 WMS, and in particular its reliance on transition theory being consistent with climate change, relied upon the conclusions of the MacKay and Stone Report to establish that the deployment of shale gas to bridge the gap in energy supply prior to a low carbon future would not prejudice the achievement of climate change goals. Mr Wolfe made a number of submissions in this connection. Firstly, even if all that the Defendant was proposing in the light of Dr Bingham's evidence was the copying across of the 2015 WMS, it was still necessary for the Defendant to consider whether the evidence base for the 2015 WMS remained valid. He submits that it is clear from the evidence that the Defendant gave no consideration at all to the disputed scientific material, and therefore left out of account what was an obviously material consideration.
64. Secondly, Mr Wolfe relies upon the approach which was taken to scientific evidence disputing the in-principle support for shale gas extraction and its compatibility with climate change objectives in the decision on the Preston New Road appeals. He draws attention to the fact that when scientific evidence was placed before the Inspector and the Secretary of State which disputed the support in principle for fracking, and it was contended that the use of fracking would imperil or breach the UK's obligations under the Paris Agreement or other legal instruments, the answer which was provided was that issues bearing upon these in principle objections to shale gas extraction were in reality a challenge to national policy itself and could only legitimately be scrutinised in the context of a review of national policy. Mr Wolfe contends that the revisions to the Framework were that review of national policy and thus provided the forum for consideration of those issues.
65. Mr Warren in his submissions relied upon the position described by Dr Bingham, namely that as set out above the only decision which was being made by the Defendant was simply to carry over or cut and paste the 2015 WMS into the Framework. The Defendant was not undertaking a decision to revise or review the policy. Since all that the Defendant was seeking to do was in effect a tidying up exercise which did not engage with any of the substance of the policy, the disputed scientific evidence was not material to the decision and there was no need for the Defendant to take those matters into account bearing in mind the parameters of the decision which was being taken.
66. In my view Ground 1 is very closely allied to Ground 4. The starting point for seeking to resolve the issues is to identify the nature and scope of the decision which the Defendant indicated to the public that he was taking in relation to paragraph 204(a) of the revised draft of Framework. Having engaged in a consultation exercise, and assumed the responsibility for discharging the Sedley principles in relation to it, the

Defendant had, through that exercise, identified the nature and scope of the decision he was making and, therefore, the nature and scope of the considerations which would be obviously material to that decision. Dr Bingham states that all that it was intended to do was copy, or cut and paste, the 2015 WMS into national planning policy in the Framework. However, as I have already found, that was not the nature and scope of the decision which the public were led to believe was being made for the reasons which have already been set out in full above. The public were engaged in the consultation on the basis that the merits of the policy itself was included in the subject matter of the consultation.

67. What appears clear on the evidence is that the material from Talk Fracking, and in particular their scientific evidence as described in their consultation response, was never in fact considered relevant or taken into account, although on the basis of my conclusions as to what the reasonable member of the public would have concluded as to the nature and scope of the consultation, this material was relevant to the decision which was advertised, which included the substance and merits of the policy. On this basis it clearly was obviously material on the basis that it was capable of having a direct bearing upon a key element of the evidence base for the proposed policy and its relationship to climate change effects. As is clear from what is set out above, on the particular facts of this case the MacKay and Stone Report was an important piece of evidence justifying the validity of the policy in the 2015 WMS, and the need to avoid adverse consequences for climate change were an important aspect of whether or not to adopt the policy. Indeed, Mr Warren did not contend to the contrary and indicated in his submissions that the Defendant would be engaging with this scientific debate at a time when the substance of the policy in question was being considered.
68. The Defendant's evidence makes clear that this material was not considered. In my view on the basis of the particular facts of this case Ground 1 is made out. The Defendant left out of account obviously material considerations relevant to the decision which he had led the public to believe he was taking. Bearing in mind how the nature and scope of the decision had been clearly communicated it was not then open to the Defendant to take a different decision avoiding the need to take those considerations into account. This is related to the fourth Sedley principle, in that having conducted a consultation exercise in which the Talk Fracking material was clearly relevant to the questions posed and which that principle required the Defendant to give conscientious consideration to, that consultation response must amount to a material consideration in the decision that is subsequently taken. Against the background of the nature and scope of the decision in respect of paragraph 204(a) of the draft revised Framework set out above and to be derived from the publicly available documentation it was unlawful to leave that material out of account. The fact that the Defendant believed that he was taking a far more narrow and restricted decision from that which he had advertised to the public does not provide a basis for avoiding that conclusion.
69. It follows from the above that I am satisfied that Ground 1 is properly arguable and, for the reasons I have given, made out.
70. I turn then to Ground 2, by which the Claimant contends that the Defendant unlawfully failed to consider or explain the impact of the revision to the Framework through the incorporation of paragraph 209(a) on the Government's obligation under the 2008 Act in respect of greenhouse gas emissions. In relation to this Ground Mr Wolfe submits that the Defendant failed to revisit the question of compliance with the CCC's three

tests at the time when the revisions to the Framework were adopted. He draws attention to the fact that the Framework goes beyond supporting exploratory works but seeks to support extraction at scale as well. There is no evidence from any of the publicly available material or the material produced in the context of this litigation by the Defendant that the Defendant ever gave consideration to the question of whether or not the incorporation of this policy within the Framework would undermine the Government's ability to meet the three tests required by the CCC.

71. Mr Warren contends that the incorporation of paragraph 209(a) has no impact whatsoever on the pre-existing acceptance that the Government's obligation under the 2008 Act were to be mediated by the application of the CCC's three tests. The Defendant remains committed to meeting those three tests and nothing in the revision to the Framework alters the commitment to the tests being met. Prior to large scale extraction proceeding, he submitted, it would be necessary for those three tests to be passed. He further submitted that in the context of individual decisions by plan makers or decision takers it would be open to depart from the in principle support for fracking provided by paragraph 209(a) on the basis of the requirement, for instance in paragraphs 148 and 149 of the Framework in particular, for the planning system to take decisions which support reductions in greenhouse gas emissions and plan proactively for climate change. Thus, he submitted that in the context of individual decisions it would be open for the Claimant and other participants to place before the decision maker material like the Mobbs Report which supported the contention that shale gas extraction would have a deleterious impact on greenhouse gas emissions, and these could be weighed against the in principle support contained in paragraph 209(a) of the Framework.
72. In my view Mr Warren's submissions in connection with Ground 2 are clearly correct. Indeed, I am not satisfied that Ground 2 is properly arguable and in my view permission should be refused. Firstly, as Mr Warren points out, the revisions to the Framework have no bearing at all on the Government's commitment to satisfying the CCC's three tests. Those tests remain in place and will have to be passed in order for shale gas extraction to be consistent with the requirements of the 2008 Act. Nothing in the revisions to the Framework alters or diminishes the requirement to meet those tests and the Government's commitment to doing so.
73. As has been observed on many occasions, planning policies within local or national policy documents very commonly can be perceived to be pulling in different directions, often through recognising on the one hand the need for particular kinds of development to be met, and on the other the desirability of protecting the environment or safeguarding infrastructure capacity. The planning system exists to resolve those conflicts and seek to identify a decision best fitting the balance of considerations bearing in mind the interests that the planning system has to serve. I therefore accept Mr Warren's submission that in individual decisions on plans or applications the in principle support for unconventional hydrocarbon extraction, provided by paragraph 209(a) of the Framework, will have to be considered alongside any objections and evidence produced relating to the impact of shale gas extraction on climate change. These are conflicting issues which the decision-maker will have to resolve. There is, therefore, no substance to the complaints raised under Ground 2.
74. So far as Ground 3 is concerned as I set out above the arguments in connection with whether or not the revisions to the Framework should have been the subject of Strategic Environmental Assessment have been addressed in the case of Friends of the Earth v

Secretary of State for Communities and Local Government [2019] EWHC 518 (Admin)  
Whilst further discrete points were raised by Mr Wolfe in relation to the challenged paragraph 209(a) of the revised Framework I do not consider that any of the points raised take the arguments any further forward. Mr Wolfe drew attention to the support in principle for fracking contained in paragraph 209(a) as being a particular feature supporting the conclusion that Strategic Environmental Assessment is required. None of those submissions disturb the principle conclusion of the Friends of the Earth case that Strategic Environmental Assessment is not required on the basis that the Framework is not “required by law”.

75. In the light of the conclusions which I have set out above in my judgment it would be prudent to permit the parties time to consider the implications of my conclusions and, if they cannot agree, to make further submissions in relation to the appropriate relief in the circumstances. I shall therefore afford the opportunity for this to take place.



Neutral Citation Number: [2019] EWHC 519 (Admin)

Case No: CO/3511/2018

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14/05/2019

**Before :**

**MR JUSTICE DOVE**

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**Between :**

**Claire Stephenson**  
**- and -**  
**Secretary of State for Housing and Communities and**  
**Local Government**

**Claimant**

**Defendant**

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**David Wolfe QC, Peter Lockley and Jennifer Robinson** (instructed by **Leigh Day**) for the  
**Claimant**  
**Rupert Warran QC and Heather Sargent** (instructed by **Government Legal Department**)  
for the **Defendant**

Hearing dates: 19/20<sup>th</sup> December 2018

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**Approved Judgment**

**Mr Justice Dove :**

1. Following the handing down of the judgment in this matter I am very grateful to the Claimant and the Defendant for the work which has been undertaken in order to agree the terms of an order so far as possible. I endorse the agreement reached in relation to the order reflecting the grant of permission and the allowing of the claim under grounds 1 and 4 (and its dismissal under ground 3) together with the refusal of permission on ground 2. I also agree that the appropriate outcome includes the quashing of paragraph 209A of the Framework and the decision which led to its adoption. Costs have rightly been agreed to both the event, and are, subject to the costs cap of £35,000, to be awarded in the Claimant's favour. One outstanding issue is left which the parties are unable to agree and that is the question of whether or not I should make a mandatory order requiring the Defendant to conduct a fresh consultation exercise and then publish a new policy in relation to the subject matter of this claim.
2. Having considered the submissions made both by the Claimant and Defendant in writing I am entirely satisfied that it would be neither necessary nor appropriate for me to grant mandatory relief. Firstly, having quashed paragraph 209A and thereby effectively removed it from the Framework in my view it is entirely a matter for the Defendant to choose how he wishes to react to that decision, if at all. There are a range of potential responses available to the Defendant arising from the judgement and in my view it does not follow from the judgment either that I should compel the Defendant to undertake a consultation exercise any more than I should compel him to have a policy on fracking. Although in the submissions the Claimant contends that there is a legitimate expectation that consultation will take place in relation to this policy it should be recalled that this case was not argued on the basis that the material published by the Defendant gave rise to a legitimate expectation. I am therefore unpersuaded that the granting of mandatory relief necessarily follows from my judgement.
3. In the light of these conclusions I propose to proceed to make an order disposing of the claim on the basis of the matters which have already been agreed between the Claimant and the Defendant.