Case Name: *ClientEarth, R (on the application of) v Secretary of State for Business, Energy and Industrial Strategy & Anor* [2021] EWCA Civ 43 (21 January 2021)

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Commentary: This case heard by the Court of Appeal was an appeal by ClientEarth against the order of Holgate J, dismissing its claim for judicial review, of the decision of the Secretary of State for Business, Energy and Industrial Strategy to make the Drax Power (Generating Stations) Order 2019 (the "DCO") in October 2019. The DCO authorised the modification of two of the coal-fired generating units at Drax Power Station in North Yorkshire to become gas-powered generating units with a total capacity of up to 3,800 MW, this being a nationally significant infrastructure project ("NSIP"). The examining authority in respect of the DCO application had recommended that consent be withheld but the Secretary of State granted consent on the basis that the project would be in accordance with the relevant National Policy Statements ("NPS") and its benefits (particularly in terms of addressing the national need for such development) would not be outweighed by the potential adverse impacts.

Permission to appeal was granted on three grounds, raising the following issues: firstly, whether the Secretary of State misinterpreted the NPS for Energy ("EN-1") on the approach to assessing an energy NSIP's contribution to satisfying the need for the type of infrastructure proposed; secondly, whether the Secretary of State misinterpreted EN-1 on the approach to greenhouse gas emissions; and thirdly, whether the Secretary of State misapplied section 104(7) of the Planning Act 2008 (the "Act"). The appeal was dismissed.

In respect of the first ground, the appellant argued that the policy on need in EN-1 requires an assessment of the particular contribution a project will make to meeting the need for the relevant type of infrastructure. The Secretary of State was said to have erred in simply assuming that, because the proposal fell within one of the types of infrastructure for which a need was said to exist, it would necessarily contribute to that need and thus comply with policy in EN-1. It was argued that EN-1 required a "quantitative" assessment of need which was not provided. However, Lindblom LJ found that no attempt is made in EN-1 to describe in quantitative terms either the general need for the types of generating capacity within the scope of EN-1 or a specific need for any particular type, this approach being deliberate and explicit. EN-1 provides a presumption in favour of granting consent for energy NSIPs and establishes that substantial weight should be given to considerations of need. However, the weight due to such considerations is not immutably fixed and should be proportionate to the anticipated extent of the project's actual contribution to satisfying the need for the relevant type of infrastructure (the issue of what is proportionate not needing to be approached on a quantitative basis). In this case, it was held that the Secretary of State had proceeded on the correct interpretation of the relevant policies concerning need. She concluded, lawfully, that the presumption in favour applied, acknowledged the identified need for fossil fuel generation infrastructure and then assessed whether any specific and relevant NPS policies indicated that consent should be refused. In considering need, she concluded, lawfully, that the examining authority's findings did not diminish the substantial weight to be attributed to the identified need.

In respect of the second ground, the policy in EN-1 provides that CO2 emissions are not reasons to prohibit the consenting of projects and, in decision-making, it is unnecessary to assess individual applications in terms of carbon emissions against carbon budgets. The same policy, but specifically for fossil fuel generating stations, appears in the NPS for Fossil Fuel Electricity Generating Infrastructure. Lindblom LJ found that the force of the policy is not that CO2 emissions are irrelevant to a development consent decision, or cannot be given due weight in such a decision. It is simply that CO2 emissions are not, of themselves, an automatic and insuperable obstacle to consent being given for any of the infrastructure for which EN-1 identifies a need and establishes a presumption in favour of approval. The weight which should be given to CO2 emissions is for the decision-maker to resolve. The Secretary of State interpreted the policy lawfully; she gave weight to the significant adverse impact of the project in terms of CO2 emissions both in considering whether the presumption in favour of fossil fuel generation should be overridden by other more specific and relevant policies in the NPSs and in assessing the planning balance to determine whether the exception test set out in section 104(7) of the Act applied (as discussed below).

In respect of the third ground, section 104 of the Act governs the determination of an application for a development consent order where a relevant NPS has effect. The Secretary of State must decide the application in accordance with any relevant NPS except where, of relevance to this case and per section 104(7), the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits. Lindblom LJ explained that this involves a straightforward balancing exercise, setting "adverse impact" against "benefits". It is not expressed as excluding considerations arising from national policy itself and does not restrain the Secretary of State from bringing into account, and giving due weight to, the need for a particular type of infrastructure as recognised in an NPS, and setting it against any harm the development would cause. He found that the Secretary of State had concluded lawfully both that the proposed development was in accordance with EN-1 and that, on balance, the benefits of the proposed development outweigh its adverse impacts. While she took the relevant NPSs into account, her judgment did not indicate a slavish adherence to the relevant policies and she acknowledged her ability to depart from them.

Accordingly, the appeal was dismissed on all three grounds.

Case summary prepared by Victoria McKeegan