Case Name: *Together Against Sizewell C Ltd, R (On the Application Of) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 1526 (Admin) (22 June 2023)

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Commentary: The claimant sought to challenge by way of judicial review the decision by the Secretary of State for Business, Energy and Industrial Strategy (the "SoS") to make the Sizewell C (Nuclear Generating Station) Order 2022 (the "Order"). The order grants development consent for the construction, operation, maintenance and decommissioning of the Sizewell C Nuclear Generating Station. One central point of background is that the Order was made before a permanent supply of potable water was identified for the generating station.

Each of the claimant's seven grounds failed, however they provide useful summaries of existing case law and, as such, are taken in turn below:

- Ground 1 – the claimant submitted that in breach of Regulation 63 of the Conservation of Habitats and Species Regulations 2017 (the "Habitat Regulations") the SoS failed to make an appropriate assessment of the implication of the "project" for European Sites because he wrongly excluded from the project the permanent potable water supply solution without which the generating station is complete and cannot function. Distinguishing the facts of this case with previous case law on this matter Holdgate found that the SoS hadn't relied upon the "difficulty" of carrying out an assessment of the water supply option or the mere lack of detail of any option, there was simply no option to address. There is no obligation to assess a hypothetical scheme. The SoS was entitled to take into account the fact that the permanent water supply had not formed part of the application for development consent and would be dealt with under a subsequent separate process. The judge went on to state that the approach taken by the claimants would lead to a "sclerosis in the planning system which it is the objective of the legislation and case law to avoid".

- Ground 2 – On the assumption that the SoS was entitled to treat Sizewell C and the provision of a permanent water supply as separate projects, the claimant argued that the SoS acted in breach of Regulation 63 of the Habitat Regulations by failing to address the cumulative impact of both. Holdgate J held that although Sizewell C cannot be operated without a permanent water supply (a) it is not dependent on the provision of any particular form of supply and that is currently unknown and (b) the cumulative impact will have to be assessed properly in accordance with the legislation without any bias or distortion. Accordingly, Ground 2 was rejected.

- Ground 3 – the claimant alleged that the SoS had failed to comply with the line of authority which indicates that the decision maker is expected to give significant weight to the views of an expert body, in this case Natural England, and to give

"cogent reasons" for disagreeing with their views. This ground was firmly rejected by the judge who held that the SoS had sufficiently explained why he disagreed with the bare assertion of Natural England and gave a salutary warning that this ground illustrated the inappropriateness of relying upon statement in the R (Akester) v Department for Environment, Food and Rural Affairs line of authority "as a mantra, rather than looking properly at the materials in any given case in context".

- Ground 4 – as the SoS had concluded that the Order would result in some harm to marsh harriers the claimant contested that he needed to be satisfied that there were no "alternative solutions" to the project and that these should have included alternatives to nuclear power. The judge held that the Government has clearly expressed in policy documents that new nuclear power is an essential component of the move to clean energy and net-zero. Accordingly, there can be no legal challenge to the approach taken by the SoS which excluded alternative technologies as alternative solutions. It is not the role of the claimant, or the court, to re-write Government policy or to airbrush objectives of that policy of "central", or "core, or "essential" importance.

- Ground 5 – the claimant submitted that the SoS took into account irrelevant consideration and/or one that was "unevidenced", namely that the project would contribute to achieving the objective of reducing GHG emission by 78% by 2035 from the UK's 1990 baseline. Holdgate J found that the material before the SoS was legally adequate to entitle him to reach that conclusion and the ground failed.

- Ground 6 – the claimant contended that the SoS had acted irrationally in concluding that the Sizewell C site would be clear of nuclear material by 2140 and/or failed to give legally adequate reasons for rejected the claimant's case on this subject. Holdgate J stated that it is well-established that an enhanced margin of appreciation is to be afforded to a decision maker relying on scientific, technical and predictive assessments. It is obvious that the issue of how far into the next century spent fuel will need to remain at Sizewell C is subject to uncertainty, but this ground is a classic example of the failure of the claimant to read the decision letter fairly and as a whole and the SoS relied as he was entitled to do, upon the normal assumption that those other regulatory regimes will operate properly.

- Ground 7 – This ground related to an alleged failure of the SoS to assess the operational GHG emissions of Sizewell C. The judge found that this ground was utterly hopeless and should be rejected.

Case summary prepared by Juliet Munn