Case Name: *R (on the application of Andrew Boswell) v The Secretary of State for Energy Security and Net Zero* [2025] EWCA Civ 669 (22 May 2025)

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Commentary: Andrew Boswell appealed the order of Lieven J by which she dismissed his claim for judicial review of the decision of the first respondent, the Secretary of State for Energy and Net Zero, to grant the application of the second respondents, Net Zero Teeside Power Limited and Net Zero North Sea Storage Limited for a development consent order ("DCO") under section 114 of the Planning Act 2008 for a new gas-fired electricity generating station with Carbon Capture Utilization and Storage ("CCUS").

The appellant pursued three grounds of appeal, all of which failed, and were as follows:

1. That Lieven J erred in deciding that the Secretary of State did not rely on the guidance issued by the Institute of Environmental Management and Assessment ("the IEMA guidance") in concluding that GHG emissions from the development would be a significant adverse impact, and so there was no inconsistency between this conclusion and the conclusion that the development supports the transition to net zero;
2. That Lieven J erred in deciding that paragraph 5.2.2 of the National Policy Statement EN-1 encapsulates the assessment of significance of GHG emissions for the purposes of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) ("the 2017 Regulations"), as well as the weight to be given to the assessment of significance as part of a planning balance exercise. And
3. That Lieven J erred in finding that the respondent was lawfully entitled to endorse the use of the IEMA guidance while at the same time assessing significance in a different way, and gave adequate reasons in relation to this point.

The Court of Appeal also offered useful guidance on the wider import of the Supreme Court's reasoning in *Finch* in the context of other climate-related judicial review proceedings.

After setting out the relevant statutory and policy frameworks and the factual background to the appeal, the Court of Appeal proceeded to set out the relevant sections of the IEMA guidance, the Examining Authority's report, and the Secretary of State's decision letter.

Grounds 1 and 3

During the hearing, it was agreed that these grounds could conveniently be considered together. Counsel for the appellant submitted that in concluding that the GHG

emissions from the development would have a "significant" adverse effect, both the Examining Authority and the Secretary of State applied the IEMA's usage of the term "significant adverse effect." This, it was submitted, demonstrated that the Secretary of State's conclusion in the decision letter was that the project was not compatible with the UK's net zero trajectory. On that basis, there was therefore an internal inconsistency or flawed logic at the decision letter when the Secretary of State, when addressing the subject of need, concluded that the development would "help" or "support" the UK's transition to net zero. Lieven J had held that this was not the case, and that the Secretary of State was assessing significance in accordance with the NPSs, particularly EN-1 and EN-2, and not in accordance with the IEMA guidance.

Counsel for the appellant made six points in support her submission. First, the Environmental Statement produced by the second respondents relied on the IEMA guidance, albeit the earlier first edition, in order to assess significance. Secondly, during the Examination both the second respondents and Dr Boswell assessed the significance of GHG emissions relying on the IEMA guidance (second edition). Thirdly, the Examining Authority relied on that same guidance in the Examination. Fourthly, the parties continued to rely on the guidance in their written submissions to the Secretary of State after the conclusion of the Examination. Fifthly, the decision letter itself refers to IEMA guidance. Finally, the decision letter does not refer to any other source or method for assessing significance.

On Ground 3, Counsel for the appellant submitted that the Secretary of State failed to reach a "reasoned conclusion" in accordance with regulation 21 of the 2017 Regulations in that she did not assess the amount of GHG emissions against a benchmark, such as the projected contributions of either the fuel supply sector or the energy supply sector for the 6th Carbon Budget or the UK's Nationally Determined Contribution under the Paris Agreement.

The Court of Appeal rejected Grounds 1 and 3. Ground 1 was deemed to involve an obvious misreading of the Examining Authority's report and the Secretary of State's decision letter, while Ground 3 improperly encroached upon the Secretary of State's decision-making powers. Ground 1 depended upon the appellant interpreting the decision letter as if the Secretary of State did in fact apply the relevant section of the IEMA guidance, a reading described by the Court as "wholly artificial." References in the Examining Authority's report and Decision Letter to the IEMA guidance were to other sections of the document, which were irrelevant to Ground 1. Both the Examining Authority and the Secretary of State evaluated the significance of the GHG emissions in absolute terms, by "contextualisation" and also by reference to the relevant policies in EN-1. The Secretary of State accepted that the emissions would not measurably harm the UK's ability to meet national targets or Carbon Budgets. Furthermore, the Secretary of State accepted that, in view of the policy approach in EN-1, the proposed

development is necessary in order to support the UK's transition to the "net zero" target. None of these conclusions were open to legal challenge, and Ground 1 was rejected.

On Ground 3, Counsel for the Appellant argued that if the Secretary of State did not rely upon section 6.3 of the IEMA guidance to assess the significance of the GHG emissions, she failed to comply with her obligation under regulation 21 of the 2017 Regulations to give a reasoned conclusion on the effect of those emissions on the environment.

The Court of Appeal dismissed this submission. The evaluation of the significance of an estimated amount of GHG emissions and its acceptability was a matter of fact and judgment for the decision-maker, who may decide to choose benchmarks to help in arriving at that judgment. But that choice too is a matter of judgment for them, as is any conclusion drawn on the acceptability of the GHG emissions in comparison with a chosen benchmark. The 2017 Regulations do not determine how these matters should or may be approached. The Secretary of State's conclusions were lawful and properly reasoned ones, evaluating the significance of GHG emissions, and so Ground 3 was also rejected.

Ground 2

Counsel for the appellant submitted that, properly construed, paragraph 5.2.2 of EN-1 did not address the assessment of significance of GHG emissions for the purposes of the EIA Regulations. A policy document could not deem or prescribe the level of significance of an effect on the environment, and the policy only went to the weight to be given to the relevant adverse effects in the planning balance when the "reasoned conclusion" is incorporated into the decision under regulation 21(1)(c), not to the "reasoned conclusion" itself required under regulation 21(1)(b).

The Court did not accept this argument. It was entirely legitimate in principle and in the circumstances for the Secretary of State to draw upon national planning policy in the NPSs in forming her conclusions on the "significance " of GHG emissions, and to do so for the purposes of the EIA and the "ultimate planning balance." Counsel also sought to rely on observations of Lord Leggatt in *Finch*, but the Court of Appeal dismissed this too. This was not a case in which there had been a failure to fully assess a particular environmental impact, nor was it suggested that those impacts were not considered in the ultimate planning balance.

For these reasons, the appeal was dismisseds.

Case summary prepared by Gregor Donaldson