IN THE HIGH COURT OF JUSTICE **CLAIM No. CO/4943/2014**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N

BLUE GREEN LONDON PLAN (AS GRAHAM STEVENS)	**Claimant**
-and-	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**First Defendant**
-and-	
SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Second Defendant**
-and-	
THAMES WATER UTILITIES LIMITED	**Interested Party**

SUMMARY GROUNDS FOR CONTESTING THE CLAIM ON BEHALF OF THE INTERESTED PARTY

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*References to paragraph numbers in the Claimant's Statement of Facts and Grounds ("**SFG**") are given as SFG (para no.) [e.g. SFG 2].*

Introduction

1 By a claim issued on 24 October 2014, the Claimant seeks permission to bring an application for judicial review of the decision made by the Defendants on 12 September 2014 to grant the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 (the "**Order**") under the Planning Act 2008 (the "**2008 Act**").

The Order authorises the construction, operation and maintenance of a nationally significant infrastructure project and associated development known as the Thames Tideway Tunnel ("**TTT**").

2 Thames Water Utilities Limited ("**TWUL**") has been served with the claim form as an Interested Party in these proceedings. TWUL was the applicant for the Order and at the present time is the sole beneficiary of the provisions of the Order.

3 In summary, TWUL's case is that:

(1) the claim form was filed outside of the statutory time limit under section 118(1) of the 2008 Act and the Court therefore has no jurisdiction to entertain the proceedings; and

(2) in any event, even if the claim had been brought in time, it would have disclosed no properly arguable grounds on which it could have been concluded that the decision; indeed, TWUL would have requested that the application be recorded as being 'totally without merit'.

Jurisdiction

4 Section 118(1) of the 2008 Act relevantly provides:

"*(1) A court may entertain proceedings for questioning an order granting development consent only if—*

(a) the proceedings are brought by a claim for judicial review, and

(b) the claim form is filed during the period of 6 weeks beginning with—

(i) the day on which the order is published, or

(ii) if later, the day on which the statement of reasons for making the order is published." (emphasis added)

5 The Order and the statement of reasons for making it were published on the same day, namely 12 September 2014. In calculating time for the purposes of section 118(1) there are three matters to consider, being;

(1) when does 'time' start to run;

(2) how long does 'time' run for; and

(3) when does 'time' end.

If a claim has been filed out of time there is then a fourth matter to consider being:

(4) can the Court extend 'time'.

These matters are considered in turn below.

6 Section 118(1) makes it clear that time runs from a period *"beginning with - (i) the day on which the order is published"* (emphasis added). As the Order and the statement of reasons were both published on 12 September 2014 then time starts on that day: see Hinde v Rugby Borough Council [2011] EWHC 3684 (Admin) at paras 6-35 and Barker v Hambleton District Council [2012] EWCA Civ 610 at paras 9-15.

7 It is equally clear that the period of 6 weeks means 6 times 7 days; that is 42 days: see the approach taken in Okolo v Secretary of State [1997] 4 All ER 242.

8 It is a matter of simply mathematics that time must, therefore, expire on 23 October 2014; being 42 days starting on 12 September 2014. The Claimant filed its claim form, however, on 24 October 2014. This was clearly outside of the time limit set out in section 118(1).

9 Where Parliament has set the period of time for challenge (as it has done in s.118(1)) then, absent some power in primary legislation:

(1) the time limits in the CPR do not apply to that period; and

(2) there is no power to extend or abridge time.

See Hinde at [24] applying Mucelli v Government of Albania [2009] 1 W.L.R. 276 (per Lord Neuberger at [73]-[75] and [78]).

10 Consequently, by virtue of section 118(1), the Court has no jurisdiction to entertain the proceedings and the claim must be struck out.

The Claimant's grounds of challenge

11 Notwithstanding the jurisdictional point above, even if the claim had been brought in time, it would have disclosed no properly arguable grounds on which it could have been concluded that the decision of the Defendants was unlawful.

12 The Claimant's 'Statement of Facts and Grounds for Judicial Review' ("**SFG**") raises a great number of largely non-specific and unsupported allegations broadly grouped as four grounds of challenge, which in essence appear to be that:

(1) the Environmental Statement ("**ES**") for the TTT was "wholly defective";

(2) the pre-application consultation for the TTT did not give an opportunity for members of the public to consider alternatives;

(3) the Defendants were unaware of the relevant law and did not properly apply the exceptions to deciding the application in accordance with the NPS provided by subsections 104 (4), (5) and (6) of the 2008 Act; and

(4) the proposals are in breach of the European Convention on Human Rights ("**ECHR**").

13 It is clear, however, that the Claimant's underlying complaint is that a tunnel is the wrong solution to the problem of sewage discharges into the tidal River Thames and that a "Blue Green solution" should be pursued instead [SFG 2, 3, 5 and 23] and, consequently, that the National Policy Statement for Waste Water, which was designated on 26 March 2012 (the "**NPS**") and which confirmed the need for the TTT is (in the Claimant's view) unlawful [SFG 4 and 12-15].

Summary response to the claimant's grounds

Ground 1

14 In essence this ground alleges that the ES for the TTT was "wholly defective in not disclosing environmental impacts according to the UWWTD", the Urban Waste Water Treatment Directive (1991/271/EEC).

15 This ground of challenge is difficult to understand, but appears to comprise a series of allegations that:

(1) the environmental information was "scattered";

(2) "Blue-Green technologies" were misrepresented;

(3) no 'Blue Green London Plan' has been carried out using 'Best Technical Knowledge Technologies Not Entailing Excessive Cost' ("**BTKNEEC**"); and

(4) the NPS was "unlawful" in preventing blue green technologies being examined and considered.

Allegation (1) – The environmental information was "scattered"

16 TWUL's application for development consent for the TTT, as submitted to the Defendants on 28 February 2013, was accompanied by an Environmental Statement (application doc ref 6.2) as required by section 37(3)(d) of the 2008 Act and regulation 5(2)(a) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (the "**Applications Regulations**"). The ES was prepared in accordance with the requirements of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (the "**EIA Regulations**").

17 The ES as submitted consists of 27 volumes (each of which has appendices), along with a separate 'Non-Technical Summary'. The number of volumes and the length of the ES reflects the complexity of the TTT and the fact that the development is proposed to take place on 24 distinct work sites, but is also a single project with the potential to have 'project-wide' environmental effects. Para 1.2.2 of Vol. 1 provides an outline of the structure:

> "*Vol 1 provides an introduction to the Environmental Statement, a high level summary of the proposed development, and information on the project alternatives considered. Vol 2 describes the environmental assessment methodology utilised. Vol 3 presents the project-wide effects assessment and Vols 4 to 27 presents the effects assessments for each of the 24 construction sites.*"

18 Recognising that the ES for the TTT is complex and large, TWUL included an explanation in Vol. 1 (paras 1.2.3 to 1.2.8) of the content and structure of the report in order to assist readers to navigate the document and to be able to easily identify information of interest and relevance to them. As explained in para 1.2.3:

> "*The Environmental Statement has been structured in such a way as to enable ease of use, whether the reader is considering the project as a whole, particular sites, or particular topics.*"

Paras 1.2.6 and 1.2.7 go on to explain that, to assist with cross-referencing, a consistent approach to section and topic numbering was used across the volumes containing the effects assessments. For example, in each of the site specific volumes and in the project-wide volume, the air quality assessment can be found in

section 4. Similarly, for all topic assessments (except those relating to water resources – flood risk), the proposed development relevant to that topic can be found in sub-section 2, the assessment methodology in sub-section 3, baseline conditions in sub-section 4, and so on. Plates 1.2.1 to 1.2.5 (pages 15 to 19 of Vol. 1) present the structure of the Environmental Statement diagrammatically.

19 Furthermore, at paras 1.2.8 to 1.2.13, there is an explanation of the relationship between the ES and other application documents containing environmental information. It is made clear that certain application documents are duplicated in the ES because they define the project that has been environmentally assessed (para 1.2.8), and where certain other documents and plans required under the Applications Regulations (for example the 'flood risk assessment') can be located within the ES (paras 1.2.9 to 1.2.13). This approach was adopted so that the environmental information submitted with the application was contained in one report (i.e. the ES), in order to ensure that the public and decision-maker were not required to engage in a 'paper chase' to piece the ES together.

20 In the course of the Examining Authority's ("**ExA's**") examination of the application for development consent, a number of interested parties made submissions on the potential environmental impacts associated with the TTT. The ExA asked various written questions concerning environmental impacts and these matters were considered at issue-specific and open floor hearings. Having regard to the submissions made by interested parties and matters raised by the ExA, TWUL proposed a number of changes to the application through the examination process. Those changes included certain minor modifications to the design of the proposed works at several sites and the provision of additional mitigation measures in order to address environmental impacts that had been identified in the ES. It was therefore necessary to update the environmental impact assessment reported in the ES as originally submitted with the application, in order to take into account the changes proposed to the scheme. The updated assessment was reported in an 'Environmental Statement Update Report' (application doc ref 208.01) submitted in final form to the ExA on 11 March 2014 ("**ES Update Report**").

21 Paragraphs 1.1.2 to 1.1.4 of the ES Update Report describe its purpose:

> "*1.1.2 The report presents the revised environmental assessment report findings taking into account the changes that have been made to the application for development consent (the 'application') through the examination process. These changes include some minor modifications to the design at several sites, as well as the provision of additional measures*

and related changes to several documents, including the Code of Construction Practice (CoCP) and the Design Principles.

1.1.3 It should be noted that this report does not propose any new changes or mitigation measures over and above these already made: it only reports the changes and measures already detailed in documents that have been submitted during the examination, and the environmental effects of those changes. These documents are referenced where applicable.

1.1.4 In order that all the environmental effects of the project, including effects in respect of sites where no changes or additional mitigation has been proposed, are recorded in one place, the update report also includes the individual topic summary assessment tables for sites in the application. These have been extracted from the original Environmental Statement (ES) and updated where appropriate and they are included in this report so that the information is presented in an accessible form in a single document. It is believed that this will be of assistance to the Examining Authority (the 'ExA') and all other interested parties."

Paragraph 1.2.1 also explains that the ES Update Report was prepared "*in order to satisfy a request from the ExA, made during hearings, to bring the ES up to date so as to 'sweep up' further mitigation offered during the course of the examination*".

22 It can be seen, therefore, that TWUL (and, indeed, the ExA) had in mind the need to ensure that the description of the environmental effects of the TTT taking into account changes proposed during the examination was not "scattered" around different documents, but rather was contained in a single report, namely the ES Update Report.

23 In the light of the approach taken by TWUL in producing the ES and the ES Update Report, as described above, there is simply no factual basis for the Claimant's assertion that the environmental impacts of the TTT "are to be found only by comparing the submitted EIA with scattered documents ... of objectors..." [SFG 9] and the implication that the public is required to engage in a 'paper chase' in order to piece the environmental statement together.

24 For the above reasons, this allegation is misconceived and unfounded.

Allegation (2) – "Blue-Green technologies" were misrepresented

25 The Claimant alleges [SFG 10] that certain statements relating to sustainable drainage systems ("**SuDS**") are misrepresentations of "Blue Green technologies". The Claimant has not provided specific references to these statements, but the context in which this allegation is made is the Claimant's argument that the section of the ES dealing with alternatives to the TTT was "wholly misleading". The Claimant appears to be asserting that Blue Green technologies comprise something different to SuDS ("more inclusive and integrated as a water collection system") and thus the statements in respect of SuDS that are referred to are "false" [SFG 11].

26 As part of its application for development consent for the TTT, TWUL submitted a 'Needs Report' (application doc ref 8.3). The Needs Report had been subject to the pre-application consultation undertaken during 'Phase One consultation' (September 2010 to January 2011) and 'Phase Two consultation' (November 2011 to February 2012). It set out the need for a solution to the problem of sewage discharges into the tidal River Thames, and included a section on 'Alternative approaches to the tunnel options' that considered, *inter alia*, 'sewer separation', 'real time control', 'screening' and 'sustainable drainage systems'. Extensive information on these alternatives was also contained in the appendices to the Needs Report.

27 SuDS were specifically considered at para 5.4.6 and Appendix E of the Needs Report. Appendix E is a report entitled 'Potential source control and SUDS applications: Land Use and retrofit options' dated 28 April 2010 that provided an assessment of the implementation of SuDS in three sub-catchment areas in the overall London Tideway Tunnels catchment area, the results of which could be extrapolated to evaluate the feasibility of SuDS as an alternative to a tunnel solution to address the problem of sewage discharges into the tidal River Thames. The conclusion reached (page 63 of the Needs Report) was that "*while it may be technically feasible to retrofit storm water disconnection using SUDS in some catchments, there are significant logistical, legal and regulatory impediments to their utilisation. Furthermore, the implementation of SuDS retrofit option does not achieve compliance with the UWWTD and only partially meets the required environmental benefits. Consequently the SUDS option is not a cost-effective solution which meets the need*".

28 The overall conclusion on alternatives set out in the Needs Report (para 5.4.7) was that "*None of the alternative options to the tunnel options are considered to constitute a suitable or cost effective alternative approach to the Thames Tunnel ...*".

29 The NPS also considered alternatives to a tunnel solution as described further below at paragraphs 67 to 73. In relation to SuDS, the NPS stated:

> "*2.6.27* ***Preventing the rainwater from entering the sewerage system***
>
> *The highly impermeable nature of the London urban area generates massive volumes of rainfall run-off which must be collected and disposed of quickly and efficiently to prevent flooding of properties. The existing mechanism is via drains and gullies into the sewerage system.*
>
> *2.6.28 Sustainable Drainage Systems can play a key role in increasing capacity and resilience in London's sewer network by reducing the volume entering sewers. However, in this instance simultaneous retrofit of all London's properties and the sewerage systems to the required level would be disproportionally expensive compared with a traditional drainage solution. It has also been demonstrated that retrofitting would not provide sufficient reductions in CSO spill frequency to meet the objectives for the Tideway and comply with the UWWTD."* (footnote omitted)

30 Furthermore, as required by the EIA Regulations, the ES that accompanied TWUL's application for development consent included an outline of the main alternatives studied and an indication of the main reasons for choosing the TTT, taking into account the environmental effects (see section 3 of Vol. 1 of the ES). This included an outline of the strategic alternatives to a tunnel solution, alternative tunnel routes and alternative sites. One of the strategic alternatives considered was 'Addressing the problem at source (Sustainable Urban Drainage Systems)' and in that respect the ES recorded (paras 3.3.4 to 3.3.6) that the SuDS alternative had been discounted because "*it would take many years to be implemented at a sufficient scale to represent a real alternative to the tunnel proposals*" and "*because of a lack of available space in London, the disruption that would be caused for any meaningful retro-fit of SUDS and the disproportionate cost even to provide a partial solution.*" The ES also made reference to the paragraphs of the NPS set out above.

31 It is clear, therefore, that strategic alternatives to the tunnel solution were properly considered in the Needs Report and the ES, as well as in the NPS, and this included (inter alia) consideration of SuDS. The conclusion consistently reached was that, although SuDS has a role to play in reducing the volume of sewage entering the sewerage system (which is recognised by TWUL), when compared to a tunnel solution SuDS would be a disproportionately expensive method to address the

"The Secretaries of State consider that the following matters in favour of granting consent to the proposed development are important and relevant and should be accorded significant weight:

...

- *Improved river water quality and the resultant contribution towards meeting the Urban Waste Water Treatment Directive and the Water Framework Directive during the operational phase of the project."*

37 There is no merit in this allegation which is, in effect, simply a challenge to the merits of Government policy in the NPS; an issue dealt with under a separate heading below.

Allegation (4) - the NPS was "unlawful" in preventing blue green technologies being examined and considered

38 This allegation states that the NPS was "unlawful" in preventing blue green technologies being examined and considered.

39 The statutory framework for determining an application for development consent is set out in section 104 of the 2008 Act, which provides, inter alia, that

"(2) In deciding the application the Secretary of State must have regard to—

(a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),

[...]

(3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies."

40 The allegation [SFG 12-15] reveals, therefore, that this claim amounts, in reality, to a direct challenge to Government policy as set out in the NPS. This issue is dealt with under a separate heading below.

41 In the premises, ground 1 discloses no properly arguable grounds on which it could be concluded that the decision of the defendants is unlawful and, indeed, ground 1 is totally without merit.

Ground 2

42 This ground alleges in essence that public consultation on TTT contravened the Aarhus Convention and the 2008 Act because there was no proper consultation on alternatives. The pre-application consultation requirements in the 2008 Act are set out in Part 5 (principally sections 42, 47 and 48) of that Act.

43 This allegation is completely misconceived having regard to the factual context and, in particular, the consultation actually undertaken by TWUL in relation to the TTT and by the Secretary of State in relation to the NPS. Indeed, it is notable that the Claimant's Statement of Grounds and Facts for Judicial Review says nothing about the actual consultation undertaken in relation to the TTT or, indeed, the NPS. A proper understanding of the factual context is, however, fatal to the claim.

44 The TTT underwent extensive (indeed, it might be said, unparalleled) pre-application consultation pursuant to Part 5 of the 2008 Act. The principal stages of that consultation comprised 'Phase One consultation' (September 2010 to January 2011) and 'Phase Two consultation' (November 2011 to February 2012); although there were also other stages in the consultation including 'section 48 publicity' (July 2012 to October 2012). The consultation was undertaken with local authorities, prescribed persons, landowners and local communities, as required by sections 42, 47 and 48 of the 2008 Act. The consultation was reported in consultation feedback reports after each phase of consultation and, as required by section 37 of the 2008 Act, by a Consultation Report that accompanied the application for the Order.

45 The Phase One consultation included the sending of 186,266 letters to consultees as well as public notices, exhibitions, meetings and other forms of communication. For Phase Two consultation the number of letters to consultees was some 172,162; again, there were other means of communication including public notices, exhibitions and meetings.

46 The Phases One and Two consultation materials included the 'Needs Report' that set out the need for a solution to the problem of sewage discharges into the tidal River Thames. The Needs Report included a section on alternatives as explained at paragraphs 26 to 28 above.

47 Consultees were given an opportunity to comment on this issue at both Phase One and Phase Two consultation and, indeed, were asked specific questions about alternatives. The Phase One Consultation Feedback form asked (question 2) *"Taking into account all the possible solutions, please tell us whether you agree that a*

tunnel is the right way to meet the need, and why." The Phase 2 Consultation Feedback form asked (question 10) *"At Phase One consultation we identified four possible solutions to the need to reduce the amount of sewage entering the tidal River Thames. Taking into account all the possible solutions, do you have any comments on our decision that a tunnel is the right way to meet the need?"*

48 The Consultation Report records that during Phase One consultation some 1,495 respondents provided feedback of whether the tunnel was the right solution (para 7.10.1) and that during Phase Two consultation some 3,387 respondents and one petition provided feedback on this issue (para 7.12.1).

49 Thamesbank, referred to at SFG 5/7/17, made representations about whether there should be a tunnel solution at both Phase One and Phase Two consultation; indeed, Thamesbank also appeared at Issue Specific Hearings during the examination of TWUL's application for development consent for the TTT. The Claimant did not respond to either Phase One or Phase Two consultation despite having an opportunity to do so.

50 The conclusions to section 7 of the Consultation Report stated (para 7.15.1) that:

> *"During the pre-application process we considered the feedback received on the tunnel as the right solution. No feedback was received at any of the pre-application stages that led us to change the conclusions of the Needs Report, which confirmed that a tunnel is the most appropriate solution. This decision has been supported by the NPS."*

51 The central argument of the Claimant is, therefore, factually baseless. Not only were members of the public given an early and effective opportunity to comment on whether the tunnel, or some other approach, was the right solution to the problem of reducing sewage discharges to the tidal River Thames, but members of the public actually took that opportunity in large numbers.

52 The truth of the matter is that the Claimant just does not agree with TWUL's conclusions on this issue, but there is no possible basis for an allegation that the pre-application stages of the TTT had not complied with the public consultation requirements of the 2008 Act or, indeed, the requirements of the Aarhus Convention to allow early and effective consultation.

53 Furthermore, in respect of the assertion that the pre-application consultation breached the 2008 Act, the Secretary of State accepted the application pursuant to section 55 of the 2008 Act and, before so doing, was required under subsection

55(3)(e) to conclude that TWUL had complied with the requirements of Chapter 2 of Part 5 of the 2008 Act (being the pre-application consultation requirements).

54 In the premises, ground 2 discloses no properly arguable grounds on which it could be concluded that the decision of the defendants is unlawful and, indeed, ground 2 is totally without merit.

Ground 3

55 This ground appears to allege that the ExA and the Defendants were not sufficiently aware of the relevant law and thus did not properly apply the exceptions to the requirement to decide the application in accordance with the NPS under section 104 of the 2008 Act.

56 Section 104 relevantly provides:

> "*(3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.*
>
> *(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.*
>
> *(5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.*
>
> *(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.*
>
> *...".*

57 In relation to these provisions, paragraph 17 of the Defendant's decision letter (referred to at SFG 17) states that:

> "*With regard to the exceptions in section 104 sub-sections (4), (5) and (6) of the 2008 Act, the ExA considered (ER 21.6) whether deciding the Application in accordance with the NPS would: lead to the UK being in*

breach of any of its international obligations, including concerning protected sites and species or waste management, or be in breach of any duty imposed on the Secretaries of State by or under any enactment or be unlawful by virtue of any enactment. The ExA was not aware of any international obligations or other duties that would be breached if development consent were to be granted in accordance with the NPS by the Secretaries of State. Nor was the ExA aware of any other reasons why deciding to grant consent in this case in accordance with the NPS would be unlawful by virtue of any enactment. Having considered these matters, the Secretaries of State agree with these conclusions."

58 The ExA and Defendants clearly had regard to the provisions of subsections 104 (4), (5) and (6) in examining and deciding the application for development consent. The Claimant has not identified any specific international obligation or statutory or other legal duty which was breached by deciding the application in accordance with the NPS so as to make the decision unlawful. This ground is misconceived in that it appears to be based on a misunderstanding of both the operation of section 104 and the decision letter.

59 The Claimant also appears to suggest that the Defendants may have had an "ulterior purpose" [SFG 18] and were biased in making the Order in accordance with the NPS. This suggestion is evidently related to the policy at paragraph 2.6.34 of the NPS that "*the examining authority and the decision maker should undertake any assessment of the application for the development of the Thames Tunnel on the basis that the national need for this infrastructure has been demonstrated*". So much is clear from the Claimant's statements that "*The ulterior purpose for granting the DCO is to support the Tunnel against all the evidence*" [SFG 18] and that "*The ExA was statutorily biased in accepting the NPS instruction not to examine the Environmental benefits of Blue Green solutions to compare with the Applicant's claims*" [SFG 19].

60 This argument is entirely misconceived. As explained above, the decision was made in accordance with the NPS as required by section 104 of the 2008 Act. The ExA and the Defendants explained clearly the effect of section 104 and the regard had to paragraph 2.6.34 of the NPS concerning need and alternatives (see ExAR paras 3.5 to 3.20 and 4.6 to 4.15 and decision letter para 14). Moreover, the assertions made by the Claimant [SFG 18 and 19] reveal that this claim amounts, in reality, to a direct challenge to Government policy as set out in the NPS. This issue is dealt with under a separate heading below.

61 In the premises, ground 3 discloses no properly arguable grounds on which it could be concluded that the decision of the defendants is unlawful and, indeed, ground 3 is totally without merit.

Ground 4

62 This ground alleges breach of the ECHR.

63 This ground adds nothing material to the Claimant's other grounds. The exercise of planning judgement required by section 104 of the PA 2008, and in particular subsection (7), inherently involves an exercise of considering the proportionality of any interference with the rights of residents and property owners caused by the adverse impacts of the scheme, having regard to the public benefits that would be delivered by the proposed development.

64 Reference to the ECHR makes no difference to the nature of the judgement that has to be struck, or to the role of potential alternatives.

65 In the premises, ground 4 discloses no properly arguable grounds on which it could be concluded that the decision of the defendants is unlawful and, indeed, ground 4 is totally without merit.

Challenge to the NPS

66 The Claimant's central theme that a tunnel is the wrong solution to the problem of sewage discharges into the tidal River Thames and that a "Blue Green solution" should be pursued instead is, in reality, nothing more than a direct challenge to the NPS that concluded (paragraph 2.6.34) that the national need for the Thames Tunnel (as the TTT was then known) had been demonstrated and that a tunnel solution is the only option to address the problem of discharging unacceptable levels of untreated sewage into the river Thames within a reasonable time at reasonable cost.

67 In November 2010, the Second Defendant published for public consultation a draft National Policy Statement for Waste Water ("**draft NPS**") together with certain supporting documents. The public consultation was held between 16 November 2010 and 22 February 2011. A process of Parliamentary scrutiny of the draft NPS was also undertaken at around the same time. The Environment, Food and Rural Affairs Committee of the House of Commons published a report into the draft NPS on 5 April 2012, and on the same day a debate was held in the House of Lords.

68 The draft NPS included, inter alia, discussion on alternative approaches to meeting the demand for new waste water infrastructure (section 2.4) and provided information on the assessment of strategic alternatives to the TTT that had been undertaken (section 4).

69 One of the documents that formed part of the public consultation materials in relation to the draft NPS was an '*Appraisal of Sustainability*' dated November 2010 (the "**AoS**"), incorporating the requirements for Strategic Environmental Assessment. The AoS included an assessment of reasonable alternatives both at a general level, in terms of whether the demand for new nationally significant infrastructure could be met in another way, and at project-specific level, in terms of alternatives to meet the particular need that would be addressed by the TTT.

70 A '*Consultation Document*' was also published by the Second Defendant in November 2010 which set out specific consultation questions, including questions about issues of need and alternatives. In relation to alternatives, the Consultation Document asked "*Do you believe that the appraisal identified the reasonable alternatives to the policy contained within the draft Waste Water NPS? If not, what others should have been considered and why?*" (Question 6.11).

71 On 26 March 2012, the Second Defendant designated the NPS for the purposes of the 2008 Act.

72 Paragraph 1.1.4 of the NPS explains that the NPS sets out a justification for new waste water infrastructure and also provides information on two potential nationally significant infrastructure projects, including the TTT (then known as the 'Thames Tunnel').

73 Section 1.4 of the NPS records that it was subject to the AoS, and at paragraph 1.4.6 says:

> "*The two potential schemes, since they have been specifically included in this NPS, have been subject, at a strategic level, to the appraisals and consultation carried out on the NPS, i.e. they have been:*
>
> - *subject to an Appraisal of Sustainability (AoS) that incorporates the requirements of the Strategic Environmental Assessment (SEA) Directive;*
> - *subject to a strategic level assessment under the Habitats Directive requirements; and*

- *will be the subject of public consultation and Parliamentary scrutiny through this NPS process."*

74 Part 2 of the NPS sets out Government policy on the need for waste water infrastructure. Section 2.4 considers alternatives to building new infrastructure, including sustainable drainage systems, separate sewer systems and decentralisation of waste water infrastructure. The general conclusions reached in that respect are set out at paragraph 2.4.15:

> *"Demand (or growth in demand) for waste water infrastructure may be reduced in the future by reducing domestic and industrial waste water loads and diverting surface water from sewerage systems. Small scale, de-centralised treatment approaches also exist for rural areas, and may be viable for urban fringe. However, the need for new waste water infrastructure projects will remain in some circumstances, for example to respond to demands placed on existing infrastructure due to climate change (through more extreme rainfall events), population growth (where this is heavily concentrated), or to meet existing or more stringent environmental standards (including where older infrastructure needs replacing."*

75 Section 2.5 is headed 'The need for new waste water infrastructure' and includes the following at paragraphs 2.5.3 and 2.5.4:

> *"2.5.3 The Government therefore considers that the need for new waste water treatment infrastructure will have been demonstrated if the Environment Agency has concluded that the project is necessary for environmental reasons and included it in its National Environment Programme.*
>
> *2.5.4 The projects which have been identified through the Environment Agency's NEP, and for which need should be considered to have been demonstrated, are discussed below. Should other, unforeseen projects come forward, they should similarly be considered as being needed if they satisfy the criteria in paragraph 2.5.3 above."*

76 The NPS briefly identifies the main strategic alternatives to a tunnel solution at paragraphs 2.6.26 – 2.6.32 of the NPS. Paragraph 2.6.30 specifically deals with sewer separation, stating that:

> *"Converting the combined drainage system to a separate drainage system*

This would involve the provision of a completely new network of sewers approximately 12,000 km in length and every existing property would require connection to the new system. Cost and disruption would be very high and might lead to large numbers of misconnections, which would create a legacy of problems, pollution and further work."

77 Section 2.6 of the NPS concluded that:

"Thames Tunnel conclusion on need

2.6.33 It is inappropriate to "do nothing": a sustainable long term solution is required to address the unacceptable levels of untreated sewage which are discharged into the River Thames and which have significant environmental, social and economic impacts. The Government considers that detailed investigations have confirmed the case for a Thames Tunnel as the preferred solution.

2.6.34 The examining authority and decision maker should undertake any assessment of an application for the development of the Thames Tunnel on the basis that the national need for this infrastructure has been demonstrated. The appropriate strategic alternatives to a tunnel have been considered and it has been concluded that it is the only option to address the problem of discharging unacceptable levels of untreated sewage into the river Thames within a reasonable time at reasonable cost."

78 Having been afforded an opportunity to comment on the draft NPS, it is clear that the Claimant simply does not accept Government policy as set out in the NPS as designated on 26 March 2012.

79 Furthermore, insofar as the Claimant seeks, in effect, to challenge Government policy as set out in the NPS that is a challenge that should have been brought within 6 weeks of designation (i.e. in April or May 2012).

80 Section 13 of the 2008 Act concerns legal challenges relating to national policy statements. Subsection 13(1) provides:

"(1) A court may entertain proceedings for questioning a national policy statement or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if—

(a) the proceedings are brought by a claim for judicial review, and

(b) the claim form is filed during the period of 6 weeks beginning with—

(i) the day on which the statement is designated as a national policy statement for the purposes of this Act, or

(ii) (if later) the day on which the statement is published."

The remaining provisions of section 13 establish the same six week time limit for questioning certain other types of decisions of the Secretary of State in relation to the process for review of national policy statements.

81 Any challenge to the NPS would clearly be well out of time and this claim is simply an attempt to challenge the NPS out of time by challenging the Defendants' decision to make the Order. In fact, and for the reasons set out above, the challenge to the decision to make the Order is itself out of time.

Conclusion

82 The claim is out of time and must be struck out.

83 Even if the claim had been brought in time, it would have disclosed no properly arguable grounds on which it could have been concluded that either the recommendation of the ExA or the decision of the Defendants were unlawful; indeed, TWUL would have requested that the application be recorded as being 'totally without merit'

84 Accordingly, TWUL seeks an order striking out the claim for being out of time.

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21 November 2014