*74 Regina (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
30 July 2021

Report Citation
[2021] EWHC 2161 (Admin)
[2022] P.T.S.R. 74

Queen's Bench Division

Holgate J

2021 June 23–25; July 30

Planning—Development consent—World Heritage Site—Strategic highways company applying for development consent order for nationally significant infrastructure project affecting World Heritage Site—Statutory expert panel recommending refusal of consent—Secretary of State granting development consent order—Whether decision unlawful—Whether failure to comply with and apply National Policy Statement for National Networks and local development plan policies—Whether material error of law in deciding that harm identified by panel as substantial should be treated as less than substantial—Whether unlawful approach to consideration of heritage harm—Whether national policy statement compliant with World Heritage Convention—Planning Act 2008 (c 29), s 104 — Infrastructure Planning (Decision) Regulations 2010 (SI 2010/305), reg 3 — Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572), reg 21(1) —National Policy Statement for National Networks, paras 5.131–5.134—Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), arts 4, 5

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The first interested party, a strategic highways company established under the Infrastructure Act 2015 , applied to the

Secretary of State for a development consent order under the Planning Act 2008 for a road scheme, being a nationally significant infrastructure project, involving the construction of a new 13 kilometre route to replace the existing A303 road through the Stonehenge, Avebury and Associated Sites World Heritage Site ("WHS"). The proposal included, inter alia, a 1 kilometre western cutting and a 3.3 kilometre tunnel through the Stonehenge part of the WHS, which contained 175 scheduled monuments, with other associated monuments outside it. The application was the subject of statutory examination before a panel of five planning inspectors. Having considered, among other matters, an environmental statement and heritage impact statement, and having considered an alternative longer tunnel option, the panel concluded that the scheme would cause substantial harm to the WHS and, having applied paragraphs 5.131 and 5.133 of the National Policy Statement for National Networks ("NPSNN"), recommended that development consent be refused. For the purpose of deciding the application the Secretary of State ***75** was provided, inter alia, with the panel's report but he did not have the environmental or heritage impact statements, or a summary of those documents, or any detailed briefing from officials about impacts on individual assets or groupings of assets. The Secretary of State concluded that less than substantial harm would be caused to the WHS as a whole, with the consequence that paragraph 5.134 of the NPSNN applied, and that the need for the scheme together with its other benefits, including the removal of the existing surface level A303, outweighed any harm. He therefore made the order under section 114 of the 2008 Act . The claimant sought judicial review of the Secretary of State's decision on the grounds, inter alia, that (i) by considering the impact on the historic environment as a whole, rather than assessing the impact on individual assets, the Secretary of State had unlawfully failed to comply with and apply the NPSNN and applicable local development plan policies and had, in any event, unlawfully failed to give adequate and intelligible reasons as to the significance of each of the affected heritage assets, the impact upon each asset and the weight to be given to that impact (ground 1); (ii) the Secretary of State had adopted an unlawful approach to the consideration of heritage harm under regulation 3 of the Infrastructure Planning (Decision) Regulations 2010 and under paragraphs 5.131–5.134 of the NPSNN (ground 3); (iii) the Secretary of State's acceptance that the scheme would cause harm, that was less than substantial harm, to the WHS involved a breach of articles 4 and 5 of the Convention Concerning the Protection of the World Cultural and Natural Heritage ("the World Heritage Convention") and he had therefore erred in law in concluding that section 104(4) of the Planning Act 2008 had not been engaged so that the presumption in section 104(3) , to decide the application in accordance with the NSPNN, ought not to have been applied in his decision letter (ground 4); and (iv) that the Secretary of State had failed to consider mandatory material considerations, including the existence of alternative tunnel options (ground 5). It was common ground that, by whatever means was employed, the decision-maker had to ensure that he had taken into account (a) the significance of each designated heritage asset affected by the proposed development and (b) the impact of the proposal on that significance.

On the application for permission to proceed and on the claim—

Held , granting permission to proceed and allowing the claim on parts of grounds 1 and 5 but otherwise refusing permission to proceed, (1) that in determining whether to grant a development consent order under the Planning Act 2008 the decision-maker had to adopt a sensible approach while giving due weight to every element of harm and benefit as material considerations in the overall balancing exercise; that the legislation on heritage assets did not prescribe any single, correct approach to the balancing of harm to those assets against any likely benefits of a proposal or other material considerations weighing in favour of the grant of consent, the same applying to policies in the NPSNN, subject to applying any specific policy test which was relevant; that requirements in the NPSNN that "great weight" be given to the conservation of an asset and "the more important the asset, the greater the weight should be" were matters left to the planning judgment of the decision-maker to resolve, the same applying to the application of the tests in paragraphs 195–196 of the National Planning Policy Framework ("NPPF") and paragraphs 5.133–5.134 of the NPSNN (post, paras 146–147).

(2) That notwithstanding regulation 21(1) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 , which obliged the Secretary of State to take into account the environmental information for the proposal, and the statement in his decision letter that he had done so, neither the environmental statement nor the heritage impact assessment had been before the Secretary of State when he had been considering the panel's report and determining the application for development consent, nor had he received an adequate précis of and briefing on the ***76** parts of those documents relating to

impacts on heritage assets which the panel had accepted but had not summarised in its report; and that, accordingly, the Secretary of State's decision that the harm identified by the panel as substantial should be treated as less than substantial had involved a material error of law and to that extent ground 1 of the claim succeeded (post, paras 172, 177–181, 182, 291).

R (National Association of Health Stores) v Secretary of State for Health The Times, 9 March 2005, CA, *R (Luton Borough Council) v Central Bedfordshire Council [2014] EWHC 4325 (Admin)* and *Revenue and Customs Comrs v Tooth [2021] 1 WLR 2811* , SC(E) applied.

(3) That paragraphs 5.133 and 5.134 of the NPSNN laid down the criteria for determining which of the policy tests was to be applied for dealing with harm to heritage assets (the "fork in the road decision"); that, in reaching that judgment, the decision-maker could take into account benefits to the heritage asset itself (referred to as an "internal balance") but was not obliged to do so; that, further, when assessing the impact of a project on a heritage asset it was permissible to combine both the beneficial and the adverse effects on that asset; that that was not so much a balancing exercise as a realistic appraisal of what would be the net impact of the project on the asset, viewed as a whole; that, moreover, if a scheme would cause harm to one asset and benefit to another that did not alter the judgment that the first asset would be harmed; that, instead, the benefit to the other was a matter to be weighed in whichever balance fell to be applied under the NPSNN or, indeed, paragraphs 195 or 196 of the NPPF; that a beneficial impact on a heritage asset might appropriately be taken into account in determining the net level of harm which that asset would sustain and therefore which policy test was engaged, and then again in the balancing exercise required by that test when all public benefits were weighed against all harm to heritage assets, and no improper double-counting arose; that there was no reason to think that the Secretary of State had, relying upon the views of the second interested party, Historic England, taken into account a wider range of heritage benefits than had been permissible for the purposes of deciding whether paragraph 5.133 or paragraph 5.134 of the NPSNN applied; and that, accordingly, ground 3 of the claim had to be rejected (post, paras 193–196, 199, 200–209).

City & Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government [2021] 1 WLR 5761 , CA applied.

(4) That the Secretary of State had been entitled to decide that the policy approach in paragraphs 5.133 and 5.134 of the NPSNN, read together with the surrounding paragraphs, was compliant with articles 4 and 5 of the World Heritage Convention, which Convention had not been incorporated into domestic law and did not impose an absolute requirement of protection of World Heritage Sites; that a balance could be drawn between the protection against harm of a WHS or its assets and other public benefits and, if judged appropriate, a preference given to the latter; and that, accordingly, ground 4 of the claim had to be rejected (post, paras 215, 217–220, 222).

(5) That the relative merits of the alternative tunnel options compared to that which had been proposed were an obviously material consideration which the Secretary of State had been required to assess and it had been irrational not to take them into account; and that, accordingly, the claim succeeded on that further freestanding fifth ground (post, paras 277–290, 291).

Per curiam . It is common ground that there is no material difference between paragraphs 5.133 to 5.134 of the NPSNN and paragraphs 195 to 196 of the NPPF. The antecedent policy in Planning Policy Statement 5 was to the same effect and contained a statement that the Government considered the policies it contained to be consistent with the United Kingdom's obligations under the World Heritage Convention. No legal challenge has been brought to the policies in question, for example, on the basis that they adopted an interpretation of the Convention which ***77** is incorrect on any tenable view. A legal challenge to the NPSNN would now be precluded by section 13(1) of the Planning Act 2008 . Under section 106(1) a

representation relating to the merits of a policy set out in a National Policy Statement may be disregarded by the Secretary of State (post, para 223).

The following cases are referred to in the judgment and Appendix 1:

Allen v Secretary of State for Communities and Local Government [2016] EWCA Civ 767 , CA
Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680 , CA
Australian Conservation Foundation Inc v Minister for the Environment [2016] FCA 1042; *251 FCR 308*
Banks (HJ) & Co Ltd v Secretary of State for Housing, Communities and Local Government [2018] EWHC 3141 (Admin); [2019] PTSR 668
Bath Society v Secretary of State for the Environment [1991] 1 WLR 1303; [1992] 1 All ER 28; 89 LGR 834 , CA
City & Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 320; [2021] 1 WLR 5761 , CA
Commonwealth of Australia v State of Tasmania [1983] HCA 21; *158 CLR 1*
Derbyshire Dales District Council v Secretary of State for Communities and Local Government [2009] EWHC 1729 (Admin); [2010] 1 P & CR 19
East Northamptonshire District Council v Secretary of State for Communities and Local Government [2014] EWCA Civ 137; [2015] 1 WLR 45 , CA
First Secretary of State v Sainsbury's Supermarkets Ltd [2007] EWCA Civ 1083; [2008] JPL 973 , CA
Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government [2020] EWHC 518 (Admin); [2020] PTSR 993 ; *[2021] EWCA Civ 104; [2021] PTSR 1450* , CA
Horada v Secretary of State for Communities and Local Government [2016] EWCA Civ 169; [2016] PTSR 1271; [2017] 2 All ER 86 , CA
Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; *162 CLR 24*
Mordue v Secretary of State for Communities and Local Government [2015] EWCA Civ 1243; [2016] 1 WLR 2682 , CA
R v Secretary of State for the Home Department, Ex p Launder [1997] 1 WLR 839; [1997] 3 All ER 961 , HL(E)
R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 1303 (Admin); [2020] PTSR 1709 ; *[2021] EWCA Civ 43; [2021] PTSR 1400* , CA
R (Corner House Research) v Director of the Serious Fraud Office [2008] UKHL 60; [2009] AC 756; [2008] 3 WLR 568; [2008] 4 All ER 927 , HL(E)
R (CPRE Kent) v Dover District Council [2017] UKSC 79; [2018] 1 WLR 108; [2018] 2 All ER 121 , SC(E)
R (European Roma Rights Centre) v Immigration Officer at Prague Airport [2004] UKHL 55; [2005] 2 AC 1; [2005] 2 WLR 1; [2005] 1 All ER 527 , HL(E)
R (Forge Field Society) v Sevenoaks District Council [2014] EWHC 1895 (Admin); [2015] JPL 22
R (Jones) v North Warwickshire Borough Council [2001] EWCA Civ 315; [2001] 2 PLR 59 , CA
R (Langley Park School for Girls) v Bromley London Borough Council [2009] EWCA Civ 734; [2010] 1 P & CR 10 , CA
R (Luton Borough Council) v Central Bedfordshire Council [2014] EWHC 4325 (Admin)
R (Mars Jones) v Secretary of State for Business, Energy and Industrial Strategy [2017] EWHC 1111 (Admin) ***78**
R (Mount Cook Land Ltd) v Westminster City Council [2003] EWCA Civ 1346; [2017] PTSR 1166 , CA
R (National Association of Health Stores) v Secretary of State for Health [2005] EWCA Civ 154 ; The Times, 9 March 2005, CA
R (Oxton Farm) v Harrogate Borough Council [2020] EWCA Civ 805 , CA
R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government [2020] EWHC 3073 (Admin); [2021] PTSR 553 , DC
R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] UKSC 3; [2020] PTSR 221; [2020] 3 All ER 527 , SC(E)
R (Save Stonehenge World Heritage Site Ltd) v Highways England [2021] EWHC 1642 (Admin)
R (Scarisbrick) v Secretary of State for Communities and Local Government [2017] EWCA Civ 787 , CA
R (Spurrier) v Secretary of State for Transport [2019] EWHC 1070 (Admin); [2020] PTSR 240 , DC; sub nom R (Friends of the Earth *Ltd) v Secretary of State* for Transport *[2020] UKSC 52; [2021] PTSR 190; [2021] 2 All ER 967* , SC(E)

R (Transport Action Network Ltd) v Secretary of State for Transport [2021] EWHC 2095 (Admin) ; *[2022] PTSR 31*
Revenue and Customs Comrs v Tooth [2021] UKSC 17; [2021] 1 WLR 2811; [2021] 3 All ER 711 , SC(E)
St Modwen Developments Ltd v Secretary of State for Communities and Local Government [2017] EWCA Civ 1643; [2018] PTSR 746 , CA
Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153; [1991] 2 All ER 10; 89 LGR 809 , HL(E)
South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953; [2004] 4 All ER 775 , HL(E)
South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141; [1992] 2 WLR 204; [1992] 1 All ER 573; 90 LGR 201 , HL(E)
Steer v Catesby Estates [2018] EWCA Civ 1697; [2019] 1 P & CR 5 , CA
Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (19876) 53 P & CR 293

The following additional cases were cited in argument or referred to in the skeleton arguments:

Ball v Secretary of State for Communities and Local Government [2012] EWHC 3590 (Admin)
CREEDNZ Inc v Governor General [1981] 1 NZLR 172
Ecotricity (Next Generation) Ltd v Secretary of State for Communities and Local Government [2015] EWCA Civ 657 , CA
Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117; [2005] LLR 571 , CA
National Trust's Application for Judicial Review, In re [2013] NIQB 60
Porter v Magill [2001] UKHL 67; [2002] 2 AC 357; [2002] 2 WLR 37; [2002] 1 All ER 465 ; *[2002] LGR 51* , HL(E)
R v Gough [1993] AC 646; [1993] 2 WLR 883 ; *[1992] 4 All ER 481* , CA; *[1993] AC 646; [1993] 2 WLR 883; [1993] 2 All ER 724* , HL(E)
R (Island Farm Development Ltd) v Bridgend County Borough Council [2006] EWHC 2189 (Admin) ; *[2007] LGR 60*
R (Juden) v Tower Hamlets London Borough Council [2021] EWHC 1368 (Admin)
R (Lewis) v Redcar and Cleveland Borough Council [2008] EWCA Civ 746; [2009] 1 WLR 83 ; *[2008] LGR 781* , CA
R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5; [2018] AC 61; [2017] 2 WLR 583; [2017] 1 All ER 593 , SC(E)
Trustees of the Barker Mill Estates v Test Valley Borough Council [2016] EWHC 3028 (Admin); [2017] PTSR 408
Whitby v Secretary of State for Transport [2016] EWCA Civ 444; [2016] JPL 980 , CA ***79**
Wholesale Mail Order Supplies v Secretary of State for the Environment (1975) 237 EG 185
Winchester City Council v Secretary of State for the Environment (1979) 39 P & CR 1 , CA
Lisle-Mainwaring v Carroll [2017] EWCA Civ 1315; [2018] JPL 194 , CA

CLAIM for judicial review

By a claim form the claimant, Save Stonehenge World Heritage Site Ltd, sought judicial review challenging the lawfulness of the decision of the defendant, the Secretary of State for Transport, dated 12 November 2020, to make a development consent order ("DCO") under section 114 of the Planning Act 2008 to authorise a scheme to replace the existing A303 road, involving the construction of a 13 kilometre long route, 3.3 kilometres of which would run in a tunnel through the Stonehenge part of the Stonehenge, Avebury and Associated Sites World Heritage Site ("WHS"). The application for the DCO had been made by the first interested party, Highways England, a strategic highways company established under the Infrastructure Act 2015 . The second interested party, Historic Buildings and Monuments Commission for England, was both a statutory consultee in relation to the application and the Government's statutory adviser on the historic environment. The claimant sought permission to bring the claim and, by way of relief, an order that the claim be allowed; a declaration that the impugned decision had been taken unlawfully; and an order that the decision be quashed.

The grounds of the challenge were that: (1) by considering the impact on the historic environment as a whole, rather than assessing the impact on individual assets (as the applicable policies required), the Secretary of State had unlawfully failed to comply with and apply the National Policy Statement for National Networks ("NPSNN") and the applicable local development plan policies and had, in any event, unlawfully failed to give adequate and intelligible reasons as to (i) the significance of each of the affected heritage assets, (ii) the impact upon each asset and (iii) the weight to be given to that impact; (2) the Secretary of State had disagreed with the assessment of his expert panel without any proper evidential basis, and providing unlawfully inadequate and unintelligible reasons for so doing; (3) the Secretary of State had adopted an unlawful approach to the consideration of heritage harm under regulation 3 of the Infrastructure Planning (Decision) Regulations 2010 and under paragraphs 5.131-5.134 of the NPSNN; (4) in accepting that the scheme would cause harm, that was less than substantial harm, to the WHS, the Secretary of State's approach had been in breach of articles 4 and 5 of the World Heritage Convention

administered by the United Nations Educational , Scientific and Cultural Organisation and, therefore, he had erred in law in concluding that section 104(4) of the Planning Act 2008 had not been engaged, thus the presumption in section 104(3) should not have been applied in his decision letter; (5) the Secretary of State had failed to consider mandatory material considerations, namely (i) the breach of various local policies, (ii) the impact of his finding of heritage harm which undermined the business case for the proposal and (iii) the existence of at least one alternative. It was common ground that, by whatever means was employed, the decision-maker had to ensure that he had taken into account (a) the significance of each designated ***80** heritage asset affected by the proposed development and (b) the impact of the proposal on that significance.

On 16 February 2021 Holgate J ordered that the question of permission to proceed with the claim be heard together with the substantive legal issues.

The facts are stated in the judgment, post, paras 1–4, 5–18, 25.

David Wolfe QC and *Victoria Hutton* (instructed by *Leigh Day*) for the claimant.

James Strachan QC and *Rose Grogan* (instructed by *Treasury Solicitor*) for the Secretary of State.

Reuben Taylor QC (instructed by *Pinsent Masons LLP*) for the first interested party.

Richard Harwood QC and *Christiaan Zwart* (instructed by *Shoosmiths LLP*) for the second interested party.

The court took time for consideration.

30 July 2021. HOLGATE J

handed down the following judgment.

Introduction

1. The claimant, Save Stonehenge World Heritage Site Ltd, seeks to challenge by judicial review the decision dated 12 November 2020 of the defendant, the Secretary of State for Transport ("SST"), to grant a development consent order ("DCO") under section 114 of the Planning Act 2008 ("the PA 2008") for the construction of a new route 13 kilometres long for the A303, between Amesbury and Berwick Down, which would replace the existing surface route. The new road would have a dual instead of a single carriageway and would run in a tunnel 3.3 kilometres long through the Stonehenge part of the Stonehenge, Avebury and Associated Sites World Heritage Site ("WHS").

2. The application for the order was made by the first interested party, Highways England ("IP1"), a strategic highways company established under the Infrastructure Act 2015 (" IA 2015 ").

3. The second interested party, Historic England ("IP2"), was a statutory consultee in relation to the application and is the Government's statutory adviser on the historic environment. IP2 has long been involved in the management of Stonehenge and since 2014 with the current road proposals.

4. The claimant is a company formed by the supporters of the Stonehenge Alliance, which is an unincorporated, umbrella campaign group, which co-ordinated the objections of many of its supporters before the statutory examination into the application.

5. On 16 November 1972 the General Conference of the United Nations Educational, Scientific and Cultural Organisation ("UNESCO") adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage ("the World Heritage Convention" or " the Convention "). The United Kingdom ratified the Convention on 29 May 1984. In 1986 the World Heritage Committee ("WHC") inscribed Stonehenge and Avebury as a WHS having "Outstanding Universal Value" ("OUV") under article 11(2).

6. In June 2013 the WHC adopted a statement of the OUV for the WHS which included the following: ***81**

> "The World Heritage property comprises two areas of chalkland in Southern Britain within which complexes of Neolithic and Bronze Age ceremonial and funerary monuments and associated sites were built. Each area contains a focal stone circle and henge and many other major monuments. At Stonehenge these include the Avenue, the Cursuses, Durrington Walls, Woodhenge, and the densest concentration of burial mounds in Britain. At Avebury, they include Windmill Hill, the West Kennet Long Barrow, the Sanctuary, Silbury Hill, the West Kennet and Beckhampton Avenues, the West Kennet Palisade Enclosures, and important barrows."

The WHS is said to be of OUV for qualities which include the following:

> "• Stonehenge is one of the most impressive prehistoric megalithic monuments in the world on account of the sheer size of its megaliths, the sophistication of its concentric plan and architectural design, the shaping of the stones, uniquely using both Wiltshire Sarsen sandstone and Pembroke Bluestone, and the precision with which it was built.
>
> • There is an exceptional survival of prehistoric monuments and sites within the World Heritage property including settlements, burial grounds, and large constructions of earth and stone. Today, together with their settings, they form landscapes without parallel. These complexes would have been of major significance to those who created them, as is apparent by the huge investment of time and effort they represent. They provide an insight into the mortuary and ceremonial practices of the period, and are evidence of prehistoric technology, architecture, and astronomy. The careful siting of monuments in relation to the landscape helps us to further understand the Neolithic and Bronze Age."

The phrase "landscapes without parallel" has featured prominently in the material before the court.

7. The Stonehenge part of the WHS occupies about 25 square kilometres and contains over 700 known archaeological features, of which 415 are protected as parts of 175 scheduled ancient monuments under the Ancient Monuments and Archaeological Areas Act 1979 (see para 6.11.1 of the Environmental Statement ("ES") for the project). For the assessment of impacts on heritage assets, either directly or upon their setting, the ES relied upon a primary study area up to 500 metres from the boundary of the proposed development. To address impacts on the setting of other high value assets a secondary study area was used extending to 2 kilometres from that boundary. There are 255 scheduled monuments within the 2 kilometre area, of which 167 fall entirely or partly within the WHS. Within that area there are also:

> 6 Grade I listed buildings
>
> 14 Grade II* listed buildings
>
> 209 Grade II listed buildings
>
> 8 conservation areas.

8. There are 1,142 known, non-designated heritage assets within the 500-metre study area, of which 11 would be directly

impacted by the scheme. These 11 are relevant to ground 1(i) of the challenge. ***82**

9. Paras 11.1.14 to 11.1.17 of the World Heritage Site Management Plan, adopted on 18 May 2015, describe the background to the problem concerning the existing A303. Para 11.1.14 states:

> "the A303 continues to have a major impact on the integrity of the wider WHS, the setting of its monuments and the ability of visitors to explore the southern part of the Site. The A303 divides the Stonehenge part of the WHS landscape into northern and southern sections diminishing its integrity and severing links between monuments in the two parts. It has significant impacts on the setting of Stonehenge and its Avenue as well as many other monuments that are attributes of OUV including a number of barrow cemeteries. The road and traffic represent visual and noise intrusion and have a major impact on the tranquillity of the WHS. Access to the southern part of the WHS is made both difficult and potentially dangerous by the road. In addition to its impacts on the WHS, reports indicate that the heavy congestion has a negative impact on the economy in the South West and locally and on the amenity of local residents."

10. Proposals to improve the A303 date back to the 1990s when the process of identifying alternative routes began. In 2002 the then Highways Agency proposed a dual carriageway scheme with a tunnel, 2.1 kilometres long, running past Stonehenge. A public inquiry was held in 2004 (para 11.1.15). The inspector's report in 2005 recommended in favour of the scheme proceeding. But in view of increased tunnelling costs, the Government decided to review whether the scheme still represented the best option for improving the A303 and the setting of Stonehenge, as well as value for money. The Government concluded that, because of significant environmental constraints across the whole of the WHS, there were no acceptable alternatives to the 2.1 kilometre tunnel but the scheme costs could not be justified at that time. The need to find a solution for the negative impacts of the A303 remained a key challenge (para 11.1.16). In 2014 the SST adopted a road investment strategy ("RIS") for the purposes of the IA 2015 which identified the A303 corridor for improvements (para 11.1.17). This included the scheme which became the subject of the application for the DCO.

11. In summary, IP1's scheme comprises the following components, running from west to east:
- A northern bypass of Winterbourne Stoke
- A new grade-separated junction with twin roundabouts between the A303 and A360 to the west of, and outside, the WHS replacing the existing Longbarrow roundabout
- "The western cutting"—a new dual carriageway within the WHS in a cutting 1 kilometre long connecting with the western portals of the tunnel
- A tunnel 3.3 kilometres long running past Stonehenge
- A new dual carriageway from the eastern tunnel portals to join the existing A303 at a new grade-separated junction (with a flyover) between the A303 and A345 at the Countess roundabout, of which 1 kilometre would be in cutting ("the eastern cutting"). ***83**

The scheme includes a number of "green bridges." One bridge (150 metres in width) over the western cutting would be located 150 metres inside the western boundary of the WHS (which follows the line of the A360).

12. The proposals for the western cutting, western tunnel portals and the Longbarrow junction have attracted much opposition. In the current design, the cutting is about 1 kilometre long, 7–11 metres deep, about 35 metres wide between retaining walls and 60 metres wide between the edges of sloping grass embankments (Panel Report ("PR") 2.2.14 and 5.7.221).

13. In 2017 the WHC expressed concerns that the proposed tunnel (then 2.9 kilometres long) and cuttings would adversely affect the OUV and asked the UK to consider a non-tunnel bypass to the south of the WHS ("route F10") or a longer tunnel (approximately 5 kilometres in length) which would remove the need for cuttings within the WHS. In 2019 the WHC commended the increase in the length of the tunnel to 3.3 kilometres and the green bridge over the western cutting. However, it still expressed concerns about the exposed dual carriageways within the WHS, particularly the western cutting. The WHC

urged the UK to pursue a longer tunnel "so that the western portal is located outside" the WHS. But it no longer asked the UK to pursue the F10 option.

14. The application for a DCO was the subject of a statutory examination before a Panel of five inspectors between 2 April and 2 October 2019 ("the Examination"). The report of the Panel was submitted to the Department for Transport ("DfT") on 2 January 2020.

15. During the Examination the option of a longer tunnel of 4.5 kilometres was considered. This would omit the western cutting.

16. In its report the Panel made the following observation about the western cutting at PR 5.7.225, in contrast to the removal of a surface road such as the existing A303:

> "On the other hand, the current proposal for a cutting would introduce a greater physical change to the Stonehenge landscape than has occurred in its 6,000 years as a place of widely acknowledged human significance. Moreover, the change would be permanent and irreversible."

17. The Panel recommended that the DCO should not be granted (PR 7.5.25). In its final conclusions, the Panel said that the scheme would have a "significantly adverse effect" on the OUV of the WHS, including its integrity and authenticity. Taking this together with its impact upon the "significance of heritage assets through development within their settings", the scheme would result in "substantial harm" (PR 7.5.11). The Panel considered that the benefits of the scheme would not be substantial and, in any event, would not outweigh the harm to the WHS (PR 7.5.21). In addition, the totality of the adverse impacts of the proposed scheme would strongly outweigh its overall benefits (PR 7.5.22). Those impacts included "considerable harm to both landscape character and visual amenity" (PR 7.5.12). Nonetheless, in PR 7.5.26 the Panel said this:

> "the ExA recognises that its conclusions in relation to cultural heritage, landscape and visual impact issues and the other harms identified, are ultimately matters of planning judgment on which there ***84** have been differing and informed opinions and evidence submitted to the Examination." ("ExA" referring to the examining authority or Panel.)

The Panel acknowledged that the SST might reach a different conclusion on adverse impacts or the weight to be attached to planning benefits and, consequently, on the overall planning balance, which might result in a DCO being granted.

18. In his decision letter, the SST preferred the views of IP2 on the level of harm to the spatial, visual relations and settings of designated assets, namely that the harm would be "less than substantial" rather than "substantial" (DL 34). In DL 43 the SST specifically noted the concerns raised by interested parties and the Panel about the adverse impacts from the western cutting and portals, the Longbarrow junction and, to a lesser extent, the eastern approach. However, on balance, and taking into account the views of IP2 and Wiltshire Council, the SST concluded that any harm caused to the WHS as a whole would be less than substantial. In DL 80 the SST accepted advice from IP2 that the harm to "heritage assets, including the OUV", would be less than substantial. In DL 81 the SST disagreed with the Panel's views that the level of harm to the landscape would conflict with the National Policy Statement for National Networks ("NPSNN") and concluded that that harm would be outweighed by beneficial impacts throughout most of the scheme, so that landscape and visual impacts had a neutral effect rather than "considerable" negative weight, as the Panel had found. Ultimately, after weighing all the other considerations, the SST decided that the need for the scheme, together with its other benefits outweighed any harm (DL 87).

19. Plainly, this is a scheme about which strongly divergent opinions are held. It is therefore necessary to refer to what was said by the Divisional Court in *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government [2021] PTSR 553, para 6* :

> "It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully."

20. The present judgment can only decide whether the decision to grant the DCO was lawful or unlawful. It would, therefore, be wrong for the outcome of this judgment to be treated as either approving or disapproving the project. That is not the court's function.

21. I would like to express my gratitude to counsel for their helpful written and oral submissions and to the legal teams for the assistance they have given. In particular, the parties are to be commended for having produced a very helpful and comprehensive statement of common ground ("SOCG"). ***85**

22. The claimant raises five grounds of challenge, which it has summarised in para 7 of its skeleton argument:

> *Ground 1* : By considering the impact on the "historic environment" as a whole, rather than assessing the impact on individual assets (as the applicable policies required), the SST has unlawfully failed to comply with and apply the NPSNN and the applicable local development plan policies. The SST has, in any event, unlawfully failed to give adequate and intelligible reasons as to (1) the significance of each of the affected heritage assets, (2) the impact upon each asset and (3) the weight to be given to that impact.
>
> *Ground 2* : The SST disagreed with the assessment of his Expert Panel, without—unlawfully—there being any proper evidential basis for so doing. That happened, in part, because the SST misconstrued the advice of Historic England. In any event, the SST's reasons for disagreeing with the advice of his Expert Panel were unlawfully inadequate and unintelligible.
>
> *Ground 3* : The SST adopted an unlawful approach to the consideration of heritage harm under paragraphs 5.131–5.134 of the NPSNN.
>
> *Ground 4* : The SST's approach to the World Heritage Convention was unlawful.
>
> *Ground 5* : The SST failed to consider mandatory material considerations, namely: (i) the breach of various local policies, (ii) the impact of his finding of heritage harm which undermined the business case for the proposal and (iii) the existence of at least one alternative.

23. On 16 February 2021 I ordered that the application for permission to apply for judicial review be adjourned to a "rolled up" hearing at which both the question of permission and substantive legal issues would be considered. A case management hearing took place on 23 February 2021 at which the parties successfully co-operated in putting forward directions to enable the court to handle the issues, and the potentially large amount of material, fairly and efficiently.

24. On 7 April 2020 the claimant made an application for permission to amend the statement of facts and grounds to add ground 6, which alleged that the decision to grant the DCO had been vitiated by actual or apparent predetermination and for an order for disclosure in relation to that ground. The application was opposed and on 18 May 2021 Waksman J refused it on the papers. The claimant renewed its application to an oral hearing and the matter came before me on 10 June 2021. Like Waksman J, I found the proposed new ground to be wholly unarguable and so dismissed the application. The judgment is at *R (Save Stonehenge World Heritage Site Ltd) v Highways England [2021] EWHC 1642 (Admin)* .

25. The remainder of this judgment is set out under the following headings:

Planning legislation for nationally significant infrastructure projects

26. The proposed development is a nationally significant infrastructure project for the purposes of the PA 2008 . Accordingly, development consent is required under that legislation (section 31). The requirements to obtain other approvals, such as planning permission and scheduled ancient monument consent are disapplied by section 33 .

27. The statutory framework for the designation of national policy statements and for obtaining a DCO has been summarised in a number of recent cases and need not be repeated here (see eg *R (Scarisbrick) v Secretary of State for Communities and Local Government [2017] EWCA Civ 787 at [5]–[8]* ; *R (Spurrier) v Secretary of State for Transport [2020] PTSR 240 at paras 21–40 and 91–112* ; sub nom *R (Friends of the Earth Ltd) v Secretary of State for Transport [2021] PTSR 190, paras 19–38* ; and *R (Client Earth) v Secretary of State for Business, Energy and Industrial Strategy [2020] PTSR 1709, paras 26–52 and 105–116* ; *[2021] PTSR 1400 at paras 67–68 and 104–105*). None of the analysis in those passages was in dispute here.

28. Sections 66(1) and 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 do not apply to the determination of applications for a DCO but, instead, regulation 3 of the Infrastructure Planning (Decisions) Regulations 2010 (SI 2010/305) ("the 2010 Regulations") provides:

> "(1) When deciding an application which affects a listed building or its setting, the ***87** Secretary of State must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.
>
> "(2) When deciding an application relating to a conservation area, the Secretary of State must have regard to the desirability of preserving or enhancing the character or appearance of that area.
>
> "(3) When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the Secretary of State must have regard to the desirability of preserving the scheduled monument or its setting."

29. The project constituted environmental impact assessment ("EIA") development to which the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572) ("the EIA Regulations 2017 ") applied.

30. Regulation 4(2) prohibits the granting of a DCO "unless an EIA has been carried out in respect of that application". Regulation 5(1) defines EIA as a process consisting of (a) the preparation of an environmental statement, (b) compliance with publicity, notification and consultation requirements in the EIA Regulations 2017 on the application and the ES, and (c) compliance in this case with regulation 21 .

31. Regulation 21(1) imposed the following obligations on the Secretary of State:

> "When deciding whether to make an order granting development consent for EIA development the Secretary of State *must* — (a) examine the environmental information; (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary; (c) integrate that conclusion into the decision as to whether an order is to be granted; and (d) if an order is to be made, consider whether it is appropriate to impose monitoring measures." (Emphasis added.)

"Environmental information" is defined by r egulation 3(1) as including the ES, any further information added to the ES, and representations made by consultees or other persons about the effects of the development on the environment.

32. The EIA "must identify, describe and assess in an appropriate manner" "the direct and indirect significant effects of the proposed development" on inter alia "cultural heritage" (regulation 5(2)).

33. Regulation 14 defines what must be contained in an ES, including "the likely significant effects of the proposed development on the environment" (regulation 14(2)(b)) and also:

> "a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment." (Regulation 14(2)(d) .)

This is repeated in paragraph 2 of Schedule 4 (linked to regulation 14(2)(f)). Paragraph 3 of Schedule 4 requires the ES to contain a description of the relevant aspects of the current state of the environment, the "baseline scenario". As we shall see, the effects of the current A303 on the environment, including heritage assets, formed an important part of the assessment of the changes in environmental impact resulting from the proposed scheme.

34. Regulation 5(5) provides:

> "The Secretary of State or relevant authority, as the case may be, must ensure that they have, or have access as necessary to, ***88** sufficient expertise to examine the environmental statement or updated environmental statement, as appropriate."

This provision acknowledges that a minister or relevant authority may not themselves have "sufficient expertise" to examine the ES, particularly as such a document may cover a wide range of specialist topics. It is sufficient that the decision-maker has "access" to sufficient expertise for that purpose. That expertise will include the officials within the minister's department and also the Panel of inspectors reporting on its assessment of the environmental information and of the statutory examination of the application for a DCO.

35. Because, in this case, an NPS had taken effect, section 104 of the PA 2008 was applicable. Accordingly, by section 104(2) the SST was required to have regard to, inter alia, the NPSNN. Section 104(3) required the SST to "decide the application in accordance with" the NPSNN "except to the extent that one or more of subsections (4) to (8) applies". Section 104(4) to (8) provides:

> "(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.
>
> "(7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.
>
> "(8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met."

The legal issues in this case are particularly concerned with section 104(3), (4) and (7) . It is common ground that the World Heritage Convention was an "international obligation" falling within section 104(4) .

36. Section 116 of the PA 2008 imposes a duty on the SST to give reasons for a decision to grant or refuse a DCO.

National Policy Statement for National Networks

37. The NPSNN was published on 17 December 2014 and formally designated, under section 5 of the PA 2008 on 14 January 2015, following consideration by Parliament in accordance with sections 5(4) and 9 .

38. Paragraph 4.2 of the NPSNN sets out a presumption in favour of granting a DCO in these terms:

> "Subject to the detailed policies and protections in this NPS, and the legal constraints set out in the Planning Act , there is a presumption ***89*** in favour of granting development consent for national networks [nationally significant infrastructure projects ('NSIPs')] that fall within the need for infrastructure established in this NPS. The statutory framework for deciding NSIP applications where there is a relevant designated NPS is set out in section 104 of the Planning Act ."

39. Paragraph 4.3 provides:

> "In considering any proposed development, and in particular, when weighing its adverse impacts against its benefits, the Examining Authority and the Secretary of State should take into account:
>
> • its potential benefits, including the facilitation of economic development, including job creation, housing and environmental improvement, and any long-term or wider benefits;
>
> • its potential adverse impacts, including any longer-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts."

40. Paragraph 4.5 lays down a requirement for a business case:

> "Applications for road and rail projects (with the exception of those for SRFIs, for which the position is covered in paragraph 4.8 below) will normally be supported by a business case prepared in

> accordance with Treasury Green Book principles. This business case provides the basis for investment decisions on road and rail projects. The business case will normally be developed based on the Department's Transport Business Case guidance and WebTAG guidance. The economic case prepared for a transport business case will assess the economic, environmental and social impacts of a development. The information provided will be proportionate to the development. This information will be important for the Examining Authority and the Secretary of State's consideration of the adverse impacts and benefits of a proposed development."

This paragraph is relevant to ground 5(ii).

41. Paragraphs 4.26 and 4.27 deal with alternatives to a proposal:

> "4.26 Applicants should comply with all legal requirements and any policy requirements set out in this NPS on the assessment of alternatives. In particular:
>
> > • The EIA Directive [Parliament and Council Directive 2011/92/EU] requires projects with significant environmental effects to include an outline of the main alternatives studied by the applicant and an indication of the main reasons for the applicant's choice, taking into account the environmental effects.
> >
> > • There may also be other specific legal requirements for the consideration of alternatives, for example, under the Habitats and Water Framework Directives [Council Directive 92/43/EEC and Parliament and Council Directive 2000/60/EC].
> >
> > • There may also be policy requirements in this NPS, for example the flood risk sequential test and the assessment of alternatives for developments in National Parks, the Broads and Areas of Outstanding Natural Beauty (AONB). ***90***
>
> "4.27 All projects should be subject to an options appraisal. The appraisal should consider viable modal alternatives and may also consider other options (in light of the paragraphs 3.23 to 3.27 of this NPS). Where projects have been subject to full options appraisal in achieving their status within Road or Rail Investment Strategies or other appropriate policies or investment plans, option testing need not be considered by the examining authority or the decision-maker. For national road and rail schemes, proportionate option consideration of alternatives will have been undertaken as part of the investment decision-making process. It is not necessary for the Examining Authority and the decision-maker to reconsider this process, but they should be satisfied that this assessment has been undertaken."

42. Paragraphs 5.120 to 5.142 deal with the historic environment. Paragraph 5.122 explains the concepts of "heritage asset" and "significance":

> "Those elements of the historic environment that hold value to this and future generations because of their historic, archaeological, architectural or artistic interest are called 'heritage assets'. Heritage assets may be buildings, monuments, sites, places, areas or landscapes. The sum of the heritage interests that a heritage asset holds is referred to as its significance. Significance derives not only from a heritage asset's physical presence, but also from its setting."

43. The categories of designated heritage assets include not only listed buildings and conservation areas but also world heritage sites and scheduled ancient monuments (paragraph 5.123). But paragraph 5.124 provides that certain non-designated assets of archaeological interest should be subject to the policies applied to designated assets:

> "Non-designated heritage assets of archaeological interest that are demonstrably of equivalent significance to Scheduled Monuments, should be considered subject to the policies for designated heritage assets. The absence of designation for such heritage assets does not indicate lower significance."

This paragraph is relevant to ground 1(i).

44. Paragraphs 5.128 and 5.129 state that the Secretary of State should seek to identify and assess the significance of any heritage asset which, or the setting of which, may be affected by a proposed development, including the nature of that significance and the value of the asset. Paragraph 5.129 says:

> "In considering the impact of a proposed development on any heritage assets, the Secretary of State should take into account the particular nature of the significance of the heritage asset and the value that they hold for this and future generations. This understanding should be used to avoid or minimise conflict between their conservation and any aspect of the proposal."

45. Paragraph 5.130 states: ***91***

> "The Secretary of State should take into account the desirability of sustaining and, where appropriate, enhancing the significance of heritage assets, the contribution of their settings and the positive contribution that their conservation can make to sustainable communities—including their economic vitality."

46. Paragraphs 5.131 and 5.132 set out the following general principles:

> "5.131 When considering the impact of a proposed development on the significance of a designated heritage asset, the Secretary of State should give great weight to the asset's conservation. The more important the asset, the greater the weight should be. Once lost, heritage assets cannot be replaced and their loss has a cultural, environmental, economic and social impact. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. Given that heritage assets are irreplaceable, harm or loss affecting any designated heritage asset should require clear and convincing justification. Substantial harm to or loss of a grade II Listed Building or a grade II Registered Park or Garden should be exceptional. Substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, Scheduled Monuments, grade I and II* Listed Buildings, Registered Battlefields, and grade I and II* Registered Parks and Gardens should be wholly exceptional.
>
> "5.132 Any harmful impact on the significance of a designated heritage asset should be weighed against the public benefit of development, recognising that the greater the harm to the significance of the heritage asset, the greater the justification that will be needed for any loss."

47. Paragraphs 5.133 and 5.134 lie at the heart of much of the claimant's case under grounds 1 to 3. They set out what was described in argument as a "fork in the road" in the decision-making process. The policy test to be applied is more strict where a proposal would cause "substantial harm" to, or total loss of, the significance of a designated heritage asset, as opposed to "less than substantial harm." In the former case, "substantial public benefits" are required to outweigh the heritage loss or harm, which must also be shown to be necessary in order to deliver those benefits. In the latter case, the policy simply requires the heritage harm to be weighed against "public benefits":

> "5.133 Where the proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, the Secretary of State should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm, …
>
> "5.134 Where the proposed development will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

48. It is common ground for the purposes of this claim that there is no material difference between paragraphs 5.133 and 5.134 of the NPSNN and ***92*** their counterparts in paragraphs 195 and 196 of the National Planning Policy Framework ("NPPF") (SOCG at paras 63–64).

Development plan and other policies

Wiltshire Core Strategy

49. Wiltshire Council adopted the Wiltshire Core Strategy in January 2015 as part of the statutory development plan.

50. Core Policy 6 states: " *Stonehenge* The World Heritage Site and its setting will be protected so as to sustain its Outstanding Universal Value in accordance with Core Policy 59."

51. Core Policy 58 states:

" *Ensuring the conservation of the historic environment*

"Development should protect, conserve and where possible enhance the historic environment. Designated heritage assets and their settings will be conserved, and where appropriate enhanced in a manner appropriate to their significance, including:

i. nationally significant archaeological remains

ii. World Heritage Sites within and adjacent to Wiltshire

iii. buildings and structures of special architectural or historic interest

iv. the special character or appearance of conservation areas

v. historic parks and gardens

vi. important landscapes, including registered battlefields and townscapes.

"Distinctive elements of Wiltshire's historic environment, including non-designated heritage assets, which contribute to a sense of local character and identity will be conserved, and where possible enhanced. The potential contribution of these heritage assets towards wider social, cultural, economic and environmental benefits will also be utilised where this can be delivered in a sensitive and appropriate manner in accordance with Core Policy 57 (Ensuring High Quality Design and Place Shaping)."

52. Core Policy 59 states:

" *The Stonehenge, Avebury and associated sites World Heritage Site*

"The Outstanding Universal Value (OUV) of the World Heritage Site will be sustained by:

i. Giving precedence to the protection of the World Heritage Site and its setting

ii. Development not adversely affecting the World Heritage Site and its attributes of OUV. This includes the physical fabric, character, appearance, setting or views into or out of the World Heritage Site

iii. Seeking opportunities to support and maintain the positive management of the World Heritage Site through development that delivers

> improved conservation, presentation and interpretation and reduces the negative impacts of roads, traffic and visitor pressure
>
> iv. Requiring developments to demonstrate that full account has been taken of their impact upon the World Heritage Site and its setting. Proposals will need to demonstrate that the development will have no ***93** individual, cumulative or consequential adverse effect upon the site and its OUV. Consideration of opportunities for enhancing the World Heritage Site and sustaining its OUV should also be demonstrated. This will include proposals for climate change mitigation and renewable energy schemes."

The Stonehenge World Heritage Site Management Plan

53. This document contains a number of detailed policies. Policy 1d states: "Development which would impact adversely on the WHS, its setting and its attributes of OUV should not be permitted".

54. Policy 3c states: "Maintain and enhance the setting of monuments and sites in the landscape and their interrelationships and astronomical alignments with particular attention given to achieving an appropriate landscape setting for the monuments and the WHS itself."

55. Policy 6a states: "Identify and implement measures to reduce the negative impacts of roads, traffic and parking on the WHS and to improve road safety and the ease and confidence with which residents and visitors can explore the WHS."

The World Heritage Convention

56. Article 1 defines "cultural heritage" in terms of monuments (including elements or structures of an archaeological nature), groups of buildings and sites which are of "outstanding universal value".

57. Article 3 provides that it is for each "state party" to the Convention to identify properties within its territory falling within, inter alia, article 1. Each state party must submit to the WHC an inventory of all such properties (article 11(1)). From that inventory the WHC compiles and publishes a list of those properties which "it considers as having outstanding universal value" (article 11(2)).

58. Articles 4 and 5 lie at the heart of the claimant's ground 4. They state:

> " *Article 4*
>
> "Each state party to this Convention recognises that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in articles 1 and 2 and situated on its territory, belongs primarily to that state. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain."
>
> " *Article 5*

> "To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each state party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:
>
> "(a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes; ***94**
>
> "(b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
>
> "(c) to develop scientific and technical studies and research and to work out such operating methods as will make the state capable of counteracting the dangers that threaten its cultural or natural heritage;
>
> "(d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
>
> "(e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field."

59. The WHC has issued *Operational Guidelines for the Implementation of the World Heritage Convention* (July 2019). Paras 77–78 set out criteria for identifying whether an asset has OUV to merit inscription as a WHS. Para 78 states that a property "must also meet the conditions of *integrity* and *authenticity* and must have an adequate protection and management system to ensure its safeguarding". The concepts of authenticity and integrity are explained respectively in paras 79–86 and 87–95. Authenticity is concerned with the ability to understand the value attributable to a heritage asset (para 80). Properties meet the conditions of authenticity if "their cultural values … are truthfully and credibly expressed through a variety of attributes" which include location and setting (para 82). Integrity is "a measure of the wholeness and intactness of the natural and/or cultural heritage and its attributes" (para 88). Para 96 states that "Protection and management of World Heritage properties should ensure that their Outstanding Universal Value, including the conditions of integrity and/or authenticity at the time of inscription, are sustained or enhanced over time." The Panel summarised the concepts of integrity and authenticity in its report at PR 5.7.314 and 5.7.317–318.

Legal principles

60. The parties have helpfully agreed in the SOCG a number of legal principles which it is appropriate to record in Appendix 1 to this judgment.

61. With regard to para 1e of the Appendix and the law on "obviously material considerations", *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2020] PTSR 1709, para 99* has been approved by the Court of Appeal in *R (Oxton Farm) v Harrogate Borough Council [2020] EWCA Civ 805 at [8]* . The principles have been set out more fully by the Supreme Court in *R (Friends of the Earth Ltd) v Secretary of State for Transport [2021] PTSR 190, paras 116–121* .

62. On the issue of whether, as a matter of fact, a minister did take into account a particular factor, it is well established that a minister only has regard to matters of which he knows or which are drawn to his attention, for example in briefing material or by a précis (see *R (National Association of Health Stores) v Secretary of State for Health [2005] EWCA Civ 154 at [26]–[38]* and *Revenue and Customs Comrs v Tooth [2021] 1 WLR 2811, para 70*). ***95**

63. However, the mere fact that a minister did not know about, or have his attention drawn to, a relevant consideration is insufficient by itself to vitiate his decision. A claimant needs to go further and demonstrate that relevant legislation mandated, expressly or by implication, that the consideration be taken into account. Otherwise, he must show that the consideration was so "obviously material" that a failure to take it into account would be irrational; it would not accord with the intention of the legislation. This is the familiar irrationality test in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223* (see *National Association of Health Stores* at paras 62–63 and 73–75; *Oxton Farm* at para 8; *Friends of the Earth [2021] PTSR 190, at paras 116–119*).

64. In *National Association of Health Stores* the Court of Appeal approved the following passages from the decision of the High Court of Australia in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24* . Gibbs CJ held at para 3 (pp 30–31):

> "Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department. No complaint could be made if the departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law. "

Brennan J held at para 18 (p 61):

> "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."

And at para 27 (pp 65–66):

> "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 précis 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 précis is, of course, that the Minister's appreciation of a case depends to a great extent upon the appreciation made by his Department. Reliance on the departmental appreciation is not 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 ***96** to the salient facts. But if his Department fails to do so, and the validity of the Minister's decision depends upon his having had 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 précis of the material relevant to that decision."

65. It is plain from these authorities that in considering the legal adequacy of the briefing provided to a minister, it is necessary to have regard to the nature, scope and purpose of the legislation in question, including any matters expressly required to be taken into account, and the nature and extent of any matter which has not been addressed. It is also lawful for a ministerial decision to be reached following evaluation and analysis by experienced officials in the department and a briefing which provides a précis of material which the minister is "bound to have regard to". To some extent, the preparation of a ministerial briefing involves judgment on the part of officials about the material to be included. In this respect, there is a broad analogy to be drawn with the approach taken by the courts to challenges to an officer's report prepared to brief the members of a local authority's committee on a planning application (see eg *R (Luton Borough Council) v Central Bedfordshire Council [2014] EWHC 4325 (Admin) at [91]–[94]*).

66. Regulation 5(5) of the EIA Regulations 2017 does not impinge upon the legal principles above on the extent of the matters which a minister may be taken to have known about when he reaches a decision. The adequacy of the expertise of inspectors or officials is not to be confused with the legal adequacy of the briefing materials made available to a minister to inform him of all the matters which he is legally obliged to take into account.

67. In the present case, it is common ground that the relevant briefing materials before the SST comprised the Panel's report and the draft decision letter prepared by officials, as well as the briefing notes they submitted from time to time. Mr James Strachan QC said, on instructions, that there was no material difference between the draft decision letter which accompanied the final briefing note and the formal decision issued on 12 November 2020, following final ministerial approval on 5 November. The claimant did not ask the court to require the draft to be produced and did not take issue with that position. In effect, the parties have been content to proceed on the basis that Mr Strachan's statement is correct.

The Environmental Statement

68. As the Panel reported (PR 5.7.18), chapter 6 of the ES with its appendices assessed the effect of the proposed development on the significance of designated and non-designated heritage assets (including the WHS) within the two study areas, either through physical impact or by affecting their setting. A separate Heritage Impact Assessment ("HIA") was provided to deal with the impact of the scheme on the OUV of the WHS. It addressed both designated and non-designated assets, both within and without the WHS, relevant to its OUV, together with impacts on the character of the setting of the WHS (PR 5.7.22) in accordance with guidance issued by the International Council on Monuments and Sites ("ICOMOS") (see ES paras 6.3.1 to 6.3.2). ***97**

69. Chapter 3 of the ES dealt with IP1's assessment of alternative options to the proposed scheme.

70. The ES described in a conventional manner the significance of the scheme's effects on assets, using criteria to assess the significance or value of the asset, the "setting contribution" and the magnitude of the impact, whether adverse or beneficial (PR 5.7.20).

71. Para 6.6.59 of the ES explains that for the assessment in the ES and HIA of both the baseline scenario (with the existing A303) and the impacts of the proposed scheme, the analysis identified some 39 "asset groupings" to reflect the disposition and significance of some of the monuments within the WHS and wider landscape. This was said to be an established approach, endorsed in a joint mission report by the WHS and ICOMOS in 2015. IP2 agreed with this approach in the present case. "The consideration of related assets as part of groups allows for the potential of different levels and types of impact on individual components of individual asset groups extending over large areas to be assessed" (paras. 6.10.6 to 6.10.8 of IP2's representations to the Panel in May 2019). In addition, the ES and HIA made assessments of the impacts on certain individual assets and their settings.

72. The ES arrived at a range of impacts on different assets from different parts of the scheme, some adverse, some neutral and some beneficial. In particular, this was not a proposal for an entirely new road. The scheme would *remove* the existing

A303 which, it is generally accepted, has its own detrimental impacts on heritage assets. Accordingly, it was unavoidable that, in assessing the impacts of the proposal on any particular asset or grouping of assets, the judgments expressed in the ES and HIA had to compare the effects of the existing A303 as part of the baseline. To do otherwise would have been unrealistic. That approach was not criticised during the hearing. In some instances the ES states that the proposed scheme would improve the existing position by reducing the level of net harm or producing a net benefit; in others the end result is assessed as harmful per se.

73. IP1's overall assessment was that the proposed development would not cause substantial harm to any designated heritage asset and, for many, the effects would be beneficial. It was then said that the substantial benefits of the scheme would outweigh the less than substantial harm caused to the significance of some heritage assets (PR 5.7.21).

74. The HIA assessed the proposed scheme in relation to the seven attributes of the OUV of the WHS:

> "(1) Stonehenge itself as a globally famous and iconic monument.
>
> "(2) The physical remains of the Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the landscape.
>
> "(3) The siting of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the landscape.
>
> "(4) The design of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the skies and astronomy.
>
> "(5) The siting of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to each other.
>
> "(6) The disposition, physical remains and settings of the key Neolithic and Bronze Age funerary, ceremonial and other monuments and sites of the period, which together form a landscape without parallel. ***98***
>
> "(7) The influence of the remains of the Neolithic and Bronze Age funerary and ceremonial monuments and their landscape setting on architects, artists, historians, archaeologists and others."

The HIA also assessed the effect of the development on the "authenticity" and the "integrity" of the WHS.

75. IP1 concluded that the scheme would have a slightly adverse effect on two OUV attributes but a beneficial effect on the remaining five. They also judged that the proposal would have a slightly beneficial effect on the authenticity and integrity of the WHS and thus, viewed overall, a slightly beneficial effect on all three criteria, OUV attributes, authenticity and integrity (PR 5.7.25).

76. Many of the impacts of the proposed development do not involve direct loss of assets. They are the subject of mitigation measures in the Outline Environmental Management Plan ("OEMP") and the Detailed Archaeological Mitigation Strategy ("DAMS"). The former effectively provides a code of construction practice and the latter a detailed framework for the preparation, approval and implementation of plans for site-specific investigation and archaeological method statements (PR 5.7.33). The OEMP and DAMS are themselves important documents which gave rise to significant issues during the Examination (see the Panel's "second main issue" at PR 5.7.151–5.7.205).

77. The Panel summarised IP1's case on the *overall* heritage benefits of the scheme at PR 5.7.29:

"• The removal of the A303 and its traffic will greatly improve the setting of the stone circle and numerous monuments and monument groups across the central part of the WHS. Visitors will be able to appreciate the stone circle and interrelationships with numerous monuments and monument groups without the sight and sound of traffic intruding on their experience. This will help to conserve and enhance the WHS and sustain its OUV.

• The Scheme will also remove the intrusion of vehicles and vehicle lights upon the mid-winter sunset solstitial alignment and restore the relationship between the stone circle and the Sun Barrow. It will also allow the removal of the lit junction at Longbarrow Roundabout, which currently results in night-time light spill and light pollution on the western edge of the WHS, contributing to improvements in the experience of dark skies.

• The removal of the A303 will reconnect the Avenue where it is currently severed by the existing road.

• The existing road as it passes through the WHS will be altered for use by NMUs allowing safer exploration of the WHS east to west.

• The Scheme would afford safer NMU connections using north-south Public Rights of Way, currently severed by the existing surface A303.

• Removal of Longbarrow Roundabout and the conversion of the A303 and part of the A360 to NMU routes, immediately adjacent to the Winterbourne Stoke Crossroads complex of burial mounds, will allow improvements to the immediate landscape context and setting of this important barrow group. ***99**

• The construction of the Scheme will improve visitor's enjoyment and experience of the WHS landscape as a whole and provide opportunities for improved interpretation and presentation of the WHS.

• The construction of the Scheme will require advanced archaeological works to record archaeological remains in advance of Proposed Development construction. This will present educational and community outreach opportunities working sensitively and in close collaboration with key heritage stakeholders."

Views of parties at the Examination

78. A number of parties strongly opposed the proposal. The claimant comprised a group of five NGOs, which included the British Archaeological Trust. They criticised the ES and HIA and supported the objections of the Consortium of Archaeologists ("COA") and the Council for British Archaeology ("CBA") (see eg PR at 5.7.105–5.7.128). The concerns and objections of the WHC and ICOMOS were summarised at, for example, PR 5.7.73–5.7.79 and 5.7.84–5.7.98.

79. Wiltshire Council, as the local planning authority, provided a local impact report under section 60 of the PA 2008 , addressing the impact of the scheme on the authority's area. The council considered that the removal of the existing A303 would be beneficial to the setting of Stonehenge and many groups of monuments, contributing to its OUV. The removal of the existing Longbarrow roundabout would also bring benefits to the Winterbourne Stoke group of barrows.

80. The council considered that the most significant negative impact would be from the dual carriageway, cutting and portals in the western part of the WHS. There would be harmful visual effects, impacts on the settings of key monument groups expressing attributes of the OUV and spatial severance, which would be difficult to avoid with the length of tunnel proposed.

The council accepted that the principles and commitments in the OEMP would enable the detailed design to accord with the aims and objectives of the WHS Management Plan and sustain the OUV. But the council remained concerned about the visual impact on monuments and their settings at the western end of the scheme. Although harm could be mitigated, to some extent, by the use of green infrastructure and other design solutions, the failure to reduce the impact by providing additional cover to the western cutting was a missed opportunity (PR 5.7.55–5.7.61).

81. A statement of common ground agreed between the council and IP1 noted that there was general agreement as to the likely extent of the impacts of the scheme and that the council agreed that there are no aspects which are likely to reach the level of "substantial harm" (DL 43). The council considered the proposal to be "in accordance with the large majority of policies" in the development plan, subject to appropriate mitigation being carried out by IP1 of potential harmful effects identified in the ES. By the end of the Examination, the council and IP1 agreed that there were no outstanding policy issues (PR 4.5.6 and 4.5.8).

82. The National Trust owns and manages 850 hectares of the Stonehenge landscape within the WHS. It welcomed the Government's intention to invest in a bored tunnel to remove a large part of the existing A303. If well designed and delivered with the utmost care for archaeology and the landscape, it could provide an overall benefit to the WHS. The Trust was satisfied that ***100*** design and delivery controls had been developed through the DAMS and OEMP to provide necessary reassurance and that other concerns had been overcome (PR 5.7.70–5.7.71).

83. The English Heritage Trust manages over 400 historic buildings, monuments and sites across the country, including the Stonehenge monument itself. In a statement of common ground agreed with IP1, the Trust said that it was supportive of the project, because it has the potential to transform the Stonehenge area of the WHS and make significant improvements to the setting of the Stonehenge monument (see SOCG in these proceedings at paras 34–35).

84. The position of IP2 at the Examination has been summarised in paras 24–27 of the SOCG agreed between the parties and by the Panel at PR 5.7.62–5.7.69.

85. In addition, I note that in its representations in May 2019, IP2 stated that it was supportive of the objectives of the scheme. It had been instrumental in securing the Government's commitment to invest in a bored tunnel at least 2.9 kilometres long. But a number of matters needed to be addressed to ensure the delivery of those objectives and potential benefits for the OUV of the WHS (paras 1.16–1.17, 4.9.2, 6.10.12 et seq and 8.11). IP2 focused primarily on the WHS and on those scheduled monuments affected by the scheme, whether contributing to the OUV or not, and whether inside or outside the WHS (para 3.9). But it had considered all parts of the ES relevant to cultural heritage as well as the HIA (paras 3.10 and 6.3). In November 2017 IP2 had specifically identified the need for the ES to address non-designated heritage assets (para 4.10.4). IP2's representations to the Examination identified those specific areas where it had concerns or further information was needed.

86. In PR 5.7.329 the Panel pinpointed the key difference between its overall assessment on the effect of the scheme on cultural heritage and that of IP2, namely it considered the harm to be substantial, whereas the latter considered it to be less than substantial. The Panel's explanation for this was the weight it placed on the effects of the western cutting and the Longbarrow junction (see PR 5.7.330).

The Panel's report

87. The Panel's report is over 500 pages long, covering many topics and issues. However, the court was asked to focus primarily on sections dealing with heritage impact and the overall balance. Even so, the section dealing with heritage impact alone runs to over 50 pages. The Panel's conclusions on heritage matters occupy some 30 pages, running from PR 5.7.129 to 5.7.333. But it is only necessary for this judgment to focus on certain of the issues which affect the claimant's grounds of challenge.

88. At the outset of its assessment the Panel identified five "main issues":
(1) whether the analysis and assessment methodology is appropriate;
(2) whether the mitigation strategy, and its effectiveness in the protection of WHS archaeology, is appropriate;
(3) the effects of the proposed development on spatial relations, visual relations, and settings;
(4) cumulative and in-combination effects; ***101***

(5) effects on WHS OUV and the historic environment as a whole.

89. It is primarily the Panel's conclusions on the third and fifth main issues which are relevant to grounds 1 to 3 of this challenge. However, it is convenient to summarise the Panel's conclusions on the other main issues first.

90. On the first main issue the Panel concluded, at PR 5.7.150:

> "The ExA considers the analysis and assessment methodology appropriate subject to the points of criticism set out. It does not necessarily agree with the Applicant's assessments. Particular points will be examined in the remainder of this section of the Report."

Although the second sentence in that paragraph is ambiguous, the SST and IP1 say that the third sentence shows that the Panel accepted the analysis in the ES and HIA, save for where the contrary is expressly stated. The position taken in those documents was that the scheme would not cause "substantial harm" to any designated asset (see eg PR 5.7.21).

91. Under the first main issue, the Panel considered that, subject to a number of concerns identified in its report, the HIA was generally comprehensive and provided a sufficient level of detail (para 5.7.138). But the Panel said that the HIA should have given more consideration to the effect of the Longbarrow junction on the setting of the WHS as a whole (para 5.7.139). Furthermore, the assessment of impact on settings had largely been concerned with "static views" rather than "the less tangible aspects of setting that relate to the WHS as a whole", including the overall significance of the site and "the succession of impressions which lead cumulatively to an overall sensory and intellectual construct of the site" which is important (paras 5.7.143 to 5.7.145). This last point was linked to a paper by D Roberts et al (2018) on the distribution of long barrows within the Stonehenge landscape (PR 5.7.144). The Panel substantially relied upon the thinking in this paper when it came to express its conclusions on the third main issue (see below).

92. In relation to the second main issue, the Panel judged the proposed mitigation strategy to be adequate, provided that issues relating to the sampling strategy for the investigation of archaeological features, together with other identified concerns, were resolved. Such matters were addressed in post-examination consultation carried out by the SST as the Panel had envisaged at PR 5.7.328. There is no legal challenge that the SST failed to address those matters properly.

93. On the fourth main issue, and leaving to one side its criticisms under the third and fifth main issues, the Panel agreed with the ES's overall conclusions on cumulative and in-combination effects (para 5.7.305).

94. On the third main issue, part of the Panel's analysis was concerned with the effect of the proposal on listed buildings and conservation areas. The Panel concluded that the effects of the proposed development on the settings of assets lying beyond "three main elements" would be acceptable (PR 5.7.296). Those matters are not relevant, therefore, to the difference between the Panel and the SST as to whether the proposal would cause "substantial" or "less than substantial harm" to the heritage assets.

95. The "three main elements" were identified in PR 5.7.207 as: (1) the western approach, cutting and portals; (2) the proposed Longbarrow junction; (3) "and to a lesser extent, the eastern approach and portal". It will ***102*** be recalled that it was the first two elements upon which the Panel relied when expressing its disagreement with IP2 that the harm would be "less than substantial" (PR 5.7.329–5.7.330).

96. In relation to each of these three elements the Panel set out its conclusions on its effects on the OUV of the WHS and on the settings of heritage assets. But before embarking upon that exercise, the Panel returned, in PR 5.7.212 to 5.7.215, to the paper by D Roberts et al. The landscape setting of long barrows is important to such matters as their alignment, intervisibility, relationship with other early neolithic monuments and evidence of routes for movement. The Panel subsequently referred to this very specific landscape concept as "the landscape settings of monuments" (similarly the reference to "an unparalleled historic landscape"), which should not be confused with the typical assessment of landscape and visual impact as part of a

general planning appraisal.

97. Dealing with the western cutting and portals, the Panel concluded that, in particular, attributes (3), (5), and (6) of the OUV of the WHS would be greatly harmed or would suffer major harm (PR 5.7.226–5.7.230). In relation to settings, the Panel emphasised the need to consider not only visual aspects but also contextual relationships, including the presence of archaeological features in the landscape; these aspects being similar to those considered when assessing the effect on the OUV of the WHS. Having regard to its earlier findings, the Panel considered that the western cutting and portals would cause "substantial harm" to the settings of designated assets (PR 5.7.233–5.7.236). Much of the Panel's reasoning concerned the visual effects of this part of the scheme and the impact on the landscape in which the archaeological features are set (see eg PR 5.7.219–5.7.224, 5.7.227, 5.7.229 and 5.7.232–5.7.234).

98. The Panel described the second element, the new Longbarrow junction, as being of motorway scale, albeit sunk into the ground with substantial earthworks. The pattern of the junction's landform would be at odds with the surrounding smaller scale morphology of small rectilinear fields and small groupings of traditional buildings. The junction, together with the western cutting and portals, would represent a single, very large, and continuous civil engineering work spanning the western boundary of the WHS. The effects of the junction on the OUV of the WHS would be similar to those of the western cutting and portal (PR 5.7.242–5.7.245). As with that first element, a good deal of the Panel's reasoning concerned the visual impacts of the junction and the impact on the landscape in which the archaeological features are set (see eg PR 5.7.243–5.7.245 and 5.7.247). At PR 5.7.247 the Panel concluded:

> "Also, the harm to the overall assembly of monuments, sites, and landscape through major excavations and civil engineering works, of a scale not seen before at Stonehenge. Whilst the existing roads could be removed at any time, should a satisfactory scheme be put forward, leaving little permanent effect on the cultural heritage of the Stonehenge landscape, the effects of the proposed junction would be irreversible."

They also found that the proposal would cause substantial harm as regards the OUV and settings (PR 5.7.248).

99. The Panel considered that the effect of the eastern cutting would be very much less severe than the western cutting (PR 5.7.254–5.7.255). The ***103*** Panel found that there would be harm to the landscape values of the OUV, but neutral or slightly positive effects for attribute (3) and for attribute (6) (PR 5.7.256–5.7.257). At PR 5.7.258–5.7.279 the Panel assessed harm caused to a number of heritage assets, ranging from negligible, slight or small to moderate in one instance (PR 5.7.259) and great harm from the flyover at the Countess Road junction (PR 5.7.274). The overall conclusion for the eastern approaches, including the Countess Road junction, was given at PR 5.7.280: "The effects of this element of the Proposed Development on OUV would be neutral or slightly positive. The effects on settings, taken as a whole, would be moderately adverse. Overall, a small degree of harm would arise."

100. It is, therefore, plain that the Panel's conclusion under the third main issue that "substantial harm" would be caused related solely to the western cutting and portals and to the Longbarrow junction. This is borne out by the Panel's overall conclusion at PR 5.7.297, read in context:

> "The ExA concludes overall on this issue that substantial harm would arise with regard to the effects of the Proposed Development on spatial relations, visual relations and settings. This is despite the assessment of more moderate effects with regard to the eastern approaches and settings of assets beyond the main three elements considered."

101. The Panel addressed the fifth main issue at PR 5.7.306 to 5.7.326. First, it found that the proposal would harm attributes (1) to (3) and (5) to (7) of the OUV (PR 5.7.306–PR 5.7.313). Under the third main issue the Panel had found that the western cutting and Longbarrow junction would only harm attributes (3), (5) and (6) (see paras 97–98 above). So it is plain that the judgment here was based upon the Panel's assessment of the scheme as a whole and was not driven simply by the effects of the works in the western section. For example, PR 5.7.308 referred to the tunnel and the potentially serious loss of assets through excavation works and PR 5.7.313 referred to the profound and irreversible aesthetic and spiritual damage that would be caused, even after allowing for the removal of the existing A303. By contrast, IP1's HIA had claimed a large or very large beneficial effect for attributes (1) and (4), slight beneficial effects for attributes (5), (6) and (7) and only slight adverse effects for attributes (2) and (3).

102. The Panel then concluded that the scheme would substantially and permanently harm the integrity of the WHS, pointing to the impacts of the Longbarrow junction and the western cutting (PR 5.7.315–5.7.316). The Panel reached the view that the development would seriously harm the authenticity of the WHS (PR 5.7.317–PR 5.7.320).

103. The Panel's overall conclusion on the fifth main issue was that the benefits *to the OUV* resulting from the scheme were outweighed by the harm caused and so "the overall effect on the WHS OUV would be significantly adverse" (PR 5.7.321). Because of this impact, the proposal did not accord with Core Policies 58 and 59 of the Wiltshire Core Strategy nor with Policy 1d of the WHS Management Plan (PR 5.7.324–PR 5.7.325). It is important to note the Panel's overall conclusion, at PR 5.7.326:

> "The ExA concludes that the effects of the Proposed Development on WHS OUV and the historic environment as a whole would be ***104*** significantly adverse. *Irreversible harm would occur, affecting the criteria for which the Stonehenge, Avebury and Associated World Heritage Site was inscribed on the World Heritage List* ." (Emphasis added.)

As IP2 has explained (para 42 of its skeleton argument), the assessment in an HIA of impact on a WHS is not expressed using NPSNN terminology of "substantial" or "less than substantial harm".

104. At PR 5.7.327 to PR 5.7.332 the Panel summarised its conclusions on the five main heritage issues. It said that it regarded the views of ICOMOS and the WHC as important, but not of such weight as to be determinative in themselves (PR 5.7.331). The Panel then summarised its view, in terms of paragraph 5.133 of the NPSNN, that the effect of the scheme on the OUV of the WHS and on "the significance of heritage assets through development within their settings," taken as whole, would lead to "substantial harm" for the purposes of the "fork in the road" decision (PR 5.7.333 and see also PR 7.2.33). However, the Panel left the application of that policy test to its overall conclusions later on in the report.

105. In the light of a submission in relation to ground 2 made by Mr Strachan (who, together with Ms Rose Grogan, appeared on behalf of the SST), it is necessary to summarise how the Panel dealt separately with landscape and visual impacts in section 5.12 of its report. They did so from a general planning perspective. PR 5.12.1 explains:

> "The integrity of the cultural heritage landscape was examined in a previous section of the Report. This section covers the potential impacts of the Proposed Development on existing landscape features and landscape and townscape character, together with potential impacts on visual receptors, including residents, visitors, and users of [public rights of way]."

As is common for a general assessment of this kind, the method used by IP1 was based on the *Guidelines for Landscape and Visual Impact Assessment* (3rd ed) published by the Landscape Institute and the Institute of Environmental Management and

Assessment (PR 5.12.14).

106. The Panel dealt with the landscape and visual impacts of the western cutting and Longbarrow junction once completed, at PR 5.12.112–5.12.119. The assessment in this part of the report focused on the effects of the proposal on landscape character and visual amenity and not on cultural heritage, which had already been dealt with in section 5.7 of the report. The overall impact of this part of the scheme was described as being "significantly harmful". These paragraphs formed but a small part of the assessment made by the Panel of each part of the scheme in PR 5.12.79–5.12.147. The assessment took into account broader planning considerations, including effects on tranquillity, connectivity, light pollution and the night sky.

107. The Panel set out its overall conclusions on the impact of the whole scheme on landscape and visual amenity at PR 5.12.148–5.12.152. They concluded that it "would cause considerable harm in the ways identified, and therefore it conflicts with the aims of the NPSNN".

108. At PR 5.17.121–5.17.128 the Panel set out its overall conclusions on traffic and transport which, in summary were: ***105**

(i) public transport would be incapable of delivering a decisive shift from private car transport for the majority of trips in the corridor;

(ii) the development would contribute to meeting the Government's objective of a high quality route between the southeast and the southwest, meeting also the future needs of traffic;

(iii) journey times would be reduced, with the benefits being greater in the summer months and other times of high demand;

(iv) the road would be safer, helping to reduce collisions and casualties;

(v) there would be a significant reduction in traffic through rural settlements, helping to relieve traffic and related environmental issues;

(vi) transportation costs for users and businesses would be reduced;

(vii) the scheme would help to enable growth in jobs and housing.

109. In section 7.2 of its report the Panel summarised its findings on the matters for and against the proposal which would be taken into account in the overall balance. As part of its conclusions on cultural heritage issues the Panel said, at PR 7.2.32–7.2.33:

> "7.2.32. The ExA recognises that the Proposed Development would benefit the OUV in certain valuable respects. However, it considers that the effects of the Proposed Development would substantially and permanently harm the integrity of the WHS. In addition, it would seriously harm the authenticity of the WHS. The ExA finds that permanent, irreversible harm, critical to the OUV would occur, affecting not only our own, but future generations. The fundamental nature of that harm would be such that it would not be offset by the benefits to the OUV. The overall effect on the WHS OUV would be significantly adverse. The Proposed Development would not therefore accord with Core Policies 58 and 59 of the Wiltshire Core Strategy or Policy 1d of the WHS Management Plan.
>
> "7.2.33. Assessed in accordance with the NPSNN, the effect of the Proposed Development on the OUV of the WHS, and the significance of heritage assets through development within their settings, taken as a whole, would lead to substantial harm. This harmful impact on the significance of the WHS designated heritage asset shall be weighed against the public benefits in the ExA's overall conclusions."

110. It is important to note the careful distinction drawn by the Panel between these two paragraphs. PR 7.2.33 expressly made the "fork in the road" decision, applying paragraph 5.133 of the NPSNN. PR 7.2.32 dealt separately with the Panel's conclusion about the effect on the OUV of the WHS. In that paragraph the Panel reiterated that the integrity of the WHS would be permanently and substantially harmed and its authenticity would be seriously harmed and that the benefits of the proposal to

the OUV would not outweigh the harm caused. The Panel weighed the benefits of the proposal to the OUV for the specific purpose of deciding what the net heritage effect would be on the WHS as a designated asset itself, just as they had previously done in PR 5.7.321 (see para 103 above). This should not be confused with the separate exercise carried out under paragraph 5.133 or 5.134 of the NPSNN.

111. The Panel considered landscape and visual impacts from a general planning perspective separately, at PR 7.2.53–7.2.55. ***106**

112. At PR 7.3.1–7.3.43 of its report the Panel considered whether the proposed scheme would result in a breach of the Convention and thus engage section 104(4) of PA 2008 , so as to displace the requirement in section 104(3) to decide the application for the DCO in accordance with the NPSNN. The argument during the Examination centred on articles 4 and 5 and is the subject of ground 4 in this challenge. Certain parties contended at the Examination that "any harm" to a WHS could breach those provisions. Others, including IP1 and IP2, argued that if a scheme complies with the policy tests in paragraphs 5.132 to 5.134 of the NPSNN there would be no breach of the Convention . The Panel followed the latter approach (PR 7.3.40–7.3.43).

113. At PR 7.3.65 the Panel concluded that the ES was fully compliant with the EIA Regulations 2017 . The SST accepted that conclusion at DL 67. There is no challenge to that part of the decision. But, by definition, it was impossible for the Panel to deal with the separate issue of whether the SST subsequently complied with regulation 21(1) of the EIA Regulations 2017 at the decision-making stage.

114. The Panel struck the overall balance in section 7.5 of its report. The Panel first set out its views on the benefits of the proposal (PR 7.5.5–7.5.9). It then did the same for the scheme's adverse impacts (PR 7.5.10–7.5.17).

115. The Panel regarded a number of factors as having limited or very limited weight, that is agriculture, the loss of a view of the stones for people passing on the A303 (moderate weight), impact on users of byways open to all traffic, and impacts on businesses and individuals (PR 7.5.13–7.5.17).

116. The Panel gave substantial or considerable weight to only two sets of adverse impact (PR 7.5.11–7.5.12):
(1) substantial weight for the effects of the proposal on the WHS OUV and on the significance of heritage assets through development within their settings (drawn from section 5.7 of the report); and
(2) considerable weight to the considerable harm to both landscape character and visual amenity (drawn from section 5.12 of the report).

117. On impact to the cultural heritage the Panel said, at PR 7.5.11:

> "The ExA considers that the effects of the Proposed Development would substantially and permanently harm the *integrity* of the WHS, now and in the future. In addition, it would seriously harm the *authenticity* of the WHS. The overall effect on the WHS OUV would be *significantly adverse* . The effect of the Proposed Development on the OUV of the WHS, and the significance of heritage assets through development within their settings, taken as a whole, would lead to *substantial harm* . The Proposed Development would not therefore be in accordance with Core Policies 58 and 59 of the Wiltshire Core Strategy or Policy 1d of the WHS Management Plan. This is a factor to which substantial weight can be attributed." (Emphasis added.)

This reflects the approach taken by the Panel in its conclusions in PR 7.2.32–7.2.33 (see paras 109–110 above).

118. On impact to landscape and visual impact the Panel said at PR 7.5.12:

> "In addition, there would be considerable harm to both landscape character and visual amenity, notwithstanding the mitigation proposed. There would therefore be conflict with the Wiltshire Core Strategy, Core ***107** Policy 51. The harms to landscape character and visual amenity are factors to which considerable weight can be attributed."

119. The Panel's striking of the overall planning balance was set out in PR 7.5.19–7.5.22:

> "7.5.19. Since the ExA has identified that there would be substantial harm to the WHS, paragraph 5.131 of the NPSNN applies to the determination of the application. This requires the [SST] to give great weight to the conservation of a designated heritage asset. Furthermore, substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, should be wholly exceptional.
>
> "7.5.20. In addition, paragraph 5.133 of the NPSNN provides that where the proposed development would lead to substantial harm to the significance of a designated heritage asset, the [SST] should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm.
>
> "7.5.21. The ExA disagrees with the Applicant as to the extent of the public benefits that would be delivered. In totality, it does not consider that substantial public benefit would result from the Proposed Development. In reaching that view, the ExA has had regard to all potential benefits including any long-term or wider benefits. In any event, those public benefits which have been identified, even if they could be regarded as substantial, would not outweigh the substantial harm to the designated heritage asset. In the light of NPSNN, paragraph 5.133, the substantial harm that would result to the WHS cannot therefore be justified.
>
> "7.5.22. In applying the NPSNN, paragraph 4.3, the ExA concludes that the totality of the adverse impacts of the Proposed Development would strongly outweigh its overall benefits. S104(7) PA 2008 applies and the NPSNN presumption in favour of the grant of development consent cannot therefore be sustained."

120. Thus, in PR 7.5.19–7.5.21 the Panel concluded that the proposal failed to meet the test in paragraph 5.133 of the NPSNN simply on the basis that the benefits of the scheme, even if assumed to be substantial, did not outweigh its harm. They did not go any further and apply the necessity test. It is to be noted that in striking the balance required by paragraph 5.133 of the NPSNN the Panel did not, of course, put into the disbenefits side of the balance any harm other than harm to cultural heritage. For example, harm to landscape and visual amenity was rightly not taken into account until the separate *overall* balance was struck in PR 7.5.22.

121. In Section 10 of its report the Panel summarised its overall findings and conclusions. In PR 10.2.6 the Panel summarised its separate conclusions on impacts to cultural heritage and to landscape and visual amenity. In PR 10.2.10–10.2.12 it repeated the separate balancing exercises carried out under paragraph 5.133 of the NPSNN and under paragraph 4.3 of the NPSNN and section 104 of the PA 2008 . The Panel recommended that the SST should not make an order granting development consent for the application. On the other hand, if the SST were to disagree and to grant a ***108** DCO the Panel recommended that he should seek clarification on a number of additional points, mainly relating to the OEMP and DAMS, as set out in Appendix E to the report.

The SST's decision letter

The process leading to the decision letter

122. The process has been described by Mr David Buttery, the senior official responsible for the handling of the application in the department.

123. On 27 March 2020 officials submitted a briefing note to the SST and the relevant minister responsible for determining the application for a DCO. Officials said that there were two options. First, the SST could accept the Panel's recommendation and refuse the application for a DCO. Second, officials could explore whether there was evidence to support the case for rejecting the recommendation and granting a DCO, on the basis, for example, that the development would result in less than substantial harm to the heritage assets. Officials drew attention to the Panel's statement that its views on cultural heritage, landscape and visual impacts were matters of judgment and were not shared by all consultees. Consequently, it might be possible to take a different view on the weight to be attached to the benefits and disbenefits of the scheme if there was sufficient justification to do so. Officials said that at that stage they had not yet identified sufficient evidence to justify an approval. In that context, they said that they would assess in detail the evidence provided by bodies such as IP2 to see whether it contained sufficient evidence to conclude that less than substantial harm would be caused. They also advised that if this second option were to be chosen, a consultation letter should be sent on the points raised in Appendix E to the Panel's report (see para 119 above).

124. The SST and the minister chose the second option. The consultation letter was sent on 4 May 2020.

125. On 6 July 2020 officials submitted a further memorandum to the ministers recommending that a further consultation be carried out on a recent archaeological find at the WHS. Ministers agreed and a consultation letter was sent on 16 July 2020. A third and final consultation letter, dated 20 August 2020, was sent allowing representations on the responses which had been received by the DfT.

126. On 28 October 2020 officials provided a further briefing note to the SST and the minister, advising that they considered that there was sufficient evidence to justify a decision that a DCO be granted and attaching a draft decision letter to that effect.

127. On 5 November 2020 the ministers responded that they approved the grant of a DCO. The decision letter was issued on 12 November 2020.

128. I note that at para 78 of its skeleton argument the claimant said that none of the consultation responses provided any material which could have supported the SST's decision to reject the Panel's recommendation and to grant the DCO. This is one of several points that were not pursued but, for the record, I note that it is not strictly correct. The responses to the consultation letter dated 4 May 2020 provided clarification on the issues set out in Appendix E to the Panel's report, which arose from its second main heritage issue, to do with the mitigation strategy, and were relied upon by the SST. He accepted the views of IP2 on the important subject of "artefact ***109*** sampling" and concluded that the updated OEMP and DAMS submitted on 18 May 2020 "would help minimise harm to the WHS" (DL 39, 48, 50 and 80).

The decision letter

129. DL 10 explained the approach taken in the decision letter to the Panel's report:

> "Where not otherwise stated, the Secretary of State can be taken to agree with the ExA's findings, conclusions and recommendations as set out in the ExA's Report and the reasons given for the Secretary of State's decision are those given by the ExA in support of the conclusions and recommendations."

130. At DL 12 to DL 22 the SST addressed the need for the scheme and the benefits it would bring, either in isolation or in conjunction with other improvements to the A303 corridor. The SST said that he was satisfied that there was a clear need case for the proposed development and that the benefits weighed significantly in its favour.

131. Turning to the adverse impacts of the scheme, the SST agreed with the Panel's views on issues relating to agriculture, views from the existing A303, public rights of way and harm to businesses and individuals (DL 23–24 and 57–60). He also agreed with the Panel that climate change was not a matter weighing in the balance against the proposal (DL 61) and that the matters listed in DL 63 were of neutral weight. He agreed with the Panel's assessment that granting consent by applying the heritage policies in the NPSNN would not involve a breach of the World Heritage Convention and would not engage section 104(4) (see DL 64–66).

132. The two issues on which the SST disagreed with the Panel were (a) landscape and visual impact and (b) cultural heritage impact (DL 25–56).

133. In relation to landscape and visual effects the SST noted the identification of various benefits and disbenefits by the Panel (DL 53) and adverse impacts by some interested parties (DL 54). He noted the views of Wiltshire Council on the permanent beneficial effects of the scheme for landscape and visual amenity and that overall it would deliver "beneficial effects through the reconnection of the landscape within the WHS and avoiding the severance of communities" (DL 54.) He then referred to the positive effects of the proposal identified by IP2 (significant reduction in sight and sound of traffic benefiting the experience of the Stonehenge monument and wider access to the landscape), English Heritage Trust and National Trust (DL 55). Drawing on that material, the SST considered that the design of the scheme accorded with principles in the NPSNN and that "the beneficial impacts throughout most of the WHS outweigh the harm caused at specific locations". Disagreeing with the Panel's judgment, the SST considered the landscape and visual impacts to be of neutral weight in the overall planning balance (DL 56). It is plain that the SST's treatment of this subject, like that of the Panel, did not address the landscape setting of monuments or the historic landscape, which had so influenced the Panel when dealing with the impact on cultural heritage.

134. DL 25 to DL 43 and DL 50 dealing with heritage issues are annexed to this judgment in Appendix 2. ***110**

135. The SST began his consideration of heritage issues by referring to the Panel's assessment, together with the differing views of a number of different parties at the Examination (DL 25).

136. At DL 26 the SST recognised the importance of the Panel's conclusion that the proposal would cause "substantial harm" to the OUV of WHS, how that would lead to the application of the test in paragraph 5.133 of the NPSNN and that substantial harm to a WHS should be "wholly exceptional."

137. The structure of the relevant part of the SST's reasoning is as follows:

(i) In DL 28 the SST summarised the views of the Panel on its fifth main issue, namely the effects of the scheme on the OUV of the WHS. There would be "permanent irreversible harm, critical to the OUV" affecting not only present but future generations. The benefits of the scheme to the OUV would be incapable of offsetting this harm and the overall effect would be "significantly adverse".

(ii) In DL 29 the SST summarised the views of the Panel on the first and second main issues.

(iii) The SST then referred, at DL 30, to the third main issue, effects on spatial relations, visual relations and settings. He took into account the Panel's judgment that the proposal would cause substantial harm and their recognition that that view differed from IP2 (PR 5.7.329). He identified the great weight placed by the Panel on the effects of the spatial division of the western cutting in combination with the Longbarrow junction, on the physical connectivity between monuments and the significance they derive from their settings (PR 5.7.330).

(iv) At DL 32 the SST summarised the Panel's conclusion on the fourth main issue.

(v) At DL 33 the SST summarised the Panel's overall conclusion (in PR 5.7.333) applying the NSPNN, that is, the effects of the scheme on the OUV of the WHS *and* on "the significance of heritage assets through development within their settings". The Panel's judgment, drawing on what they had already concluded under the third main issue (see DL 30), was that, taken as a whole, there would be "substantial harm".

(vi) The SST then relied, in DL 33, upon the Panel's acceptance that this was a matter of judgment upon which differing and informed opinions and evidence had been given to the Examination.

(vii) Still in DL 33, the SST drew upon the views of IP1, IP2, Wiltshire Council, the National Trust, English Heritage Trust and DCMS, placing greater weight on the benefits of the scheme to the WHS from the removal of the existing A303 compared to any harmful effects of the scheme elsewhere in the WHS. Those bodies did not agree that the level of harm would be substantial. Some said that there would or could be scope for a net benefit overall to the WHS (see eg the cross-references to PR 5.7.70, 5.7.72 and 5.7.83).
(viii) In DL 34 the SST referred to the third main issue again. He preferred the view of IP2 on the effect of the scheme on spatial and visual relations and settings, judging that it would be less than substantial, rather than substantial.
(ix) The SST then drew upon the views of a number of parties at the Examination who, to varying degrees, were supportive of the proposal: IP2, ***111** National Trust, English Heritage Trust and Wiltshire Council (DL 35 to DL 42).
(x) In DL 43 the SST said that he had carefully considered the Panel's concerns and those of other interested parties, including ICOMOS-UK, the claimant, the COA and the CBA in relation to both the effects of the proposal on the OUV of the WHS and also the cultural heritage and the historic environment of the wider area. He took into account, in particular, the concerns expressed by some interested parties and the Panel regarding the adverse impact from the western cutting and portal, the Longbarrow junction and, to a lesser extent, the eastern approach and portal. He accepted that there would be adverse impacts from those parts of the development. But the SST concluded, on balance, taking into account the views of IP2 and Wiltshire Council, that any harm to the WHS as a whole would be less than substantial.

138. The judgments expressed at DL 34 and DL 43 involved the SST taking the "fork in the road" decision with the consequence that paragraph 5.134 of the NPSNN applied, rather than, as the Panel had concluded, paragraph 5.133.

139. In DL 50 the SST stated that he had placed great importance on the views of IP2. He agreed with IP2 that the harm caused would not be substantial and accepted its view that the proposed approach to artefact sampling was acceptable, disagreeing with the judgment of the Panel on those matters. It is plain from DL 34, DL *43, DL 50* and DL 80 that the SST understood IP2 to have said that there would be "less than substantial" harm and he agreed with that view. It follows that the SST did not agree with those interested parties who had gone further by suggesting that the scheme would result in a net *benefit* to the OUV of the WHS. Accordingly, the SST did not depart from the Panel's view that the benefits of the scheme to the OUV of the WHS did not outweigh the harm that would be caused to OUV attributes, the integrity and the authenticity of the WHS (see paras 101–103 above).

140. In DL 80–87 the SST summarised his overall conclusions on the application for a DCO. He dealt with heritage issues and visual and landscape impacts at DL 80–81:

"80. For the reasons above, the Secretary of State is satisfied that there is a clear need for the Development and considers that there are a number of benefits that weigh significantly in favour of the Development (paras 12–22). He considers that the harm that would arise to agriculture should be given limited weight in the overall planning balance (paras 23–24). In respect of cultural heritage and the historic environment, the Secretary of State recognises that, in accordance with the NPSNN, he must give great weight to the conservation of a designated heritage asset in considering the planning balance and that substantial harm to or loss of designated assets of the highest importance, including WHSs, should be wholly exceptional. He accepts there will be harm as a result of the Development in relation to cultural heritage and the historic environment and that this should carry great weight. Whilst also recognising the counter arguments put forward by some Interested Parties both during and since the examination on this important matter, on balance the Secretary of State accepts the advice from his statutory advisor, Historic England, and is satisfied that the ***112** harm to heritage assets, including the OUV, is less than substantial and that the mitigation measures in the DCO, OEMP and DAMS will minimise the harm to the WHS (paras 25–51).

"81. The Secretary of State accepts there will be adverse and beneficial visual and landscape impacts resulting from the Development and recognises that the extent of landscape and visual effects is also a matter of planning judgment. He is satisfied the Development has been designed to accord with the NPSNN and that reasonable mitigation has been included to minimise harm to the landscape. He disagrees that the level of harm on landscape impacts conflicts with the aims of the NPSNN. Whilst he recognises the adverse harm caused, he considers that the beneficial impacts throughout most of

> the WHS outweigh the harm caused at specific locations and therefore considers that there is no conflict with the aims of the NPSNN. For these reasons, he considers landscape and visual effects to be of neutral weight in the overall planning balance (paras 52–56)."

141. In DL 87 the SST concluded that the need case for the development together with the other identified benefits outweighed any harm.

142. One potential issue was whether the SST's disagreement with the Panel that there would be substantial harm to heritage assets meant that he was also disagreeing with its specific findings on the impacts of the scheme upon which that conclusion had been based. Mr Strachan put it neatly in his oral submissions: the SST did not disagree with the Panel's findings on specific impacts on heritage assets but he did disagree with the Panel's categorisation of those impacts as involving substantial harm. I accept that submission.

143. In my judgment, there is nothing in the decision letter to indicate that the SST dissented from any of the Panel's specific findings on impact. The Panel's view that there would be substantial harm to designated assets related only to the effects of the western cutting and portals together with the Longbarrow junction. The SST's decision letter simply decided that that level of harm would be lower, without expressing any disagreement or doubts about the more detailed assessments made by the Panel (see eg PR 5.7.229–5.7.330 and DL 34, 43 and 50). It has to be borne in mind that the SST did not have the ES or HIA and he did not have any detailed briefing from officials about impacts on individual assets or groupings of assets. The Panel's report of IP2's views did not provide that information because IP2 had stated that they were not setting out for the Examination an assessment of that nature, albeit that they disagreed with IP1's appraisal of some impacts (which were not identified). Indeed, if it had been submitted by the SST, IP1 or IP2 that the decision letter should be read as if the SST had disagreed with the Panel's specific findings, and that submission had been arguable, I would have decided that the reasons given in the letter on such an important matter were legally inadequate and quashed the decision on that ground.

144. For similar reasons, I do not consider that the SST disagreed with the Panel on its conclusions that the proposal would harm attributes (1) to (3) and (5) to (7) of the OUV, as well as the integrity and authenticity of the WHS, or the specific findings on impact from which the Panel drew those conclusions. Similarly, he did not disagree with its view that benefits to the OUV of the WHS would not outweigh harm to OUV attributes, authenticity and integrity of the WHS. There is simply no reasoning in the decision letter ***113*** to indicate that the SST took that course. On an issue of such importance, both nationally and internationally, the SST would have been legally obliged to state clearly that those were his conclusions. As in para 143 above, if it had been submitted that the decision letter should be read as if the SST had rejected those specific findings, and that submission had been arguable, I would have decided that the reasoning was legally inadequate. The SST simply dealt with the question posed by the NPSNN of "substantial" or "less than substantial" harm which, as both he and the Panel made clear, was a judgment bringing together the overall effect of the proposal on designated assets as well as the WHS (see eg PR 5.7.333, PR 7.2.33 and DL 33 to 34 and 50).

Ground 1

145. The claimant raises four issues under ground 1, which it is convenient to take in the following order:

(i) the SST failed to apply paragraph 5.124 of the NPSNN (see para 43 above) to 11 non-designated heritage assets;

(ii) the SST failed to consider the effect of the proposal on 14 scheduled ancient monuments (ie designated heritage assets);

(iii) the SST failed to consider the effect of the proposal on the setting of the heritage assets, as opposed to its effect on the OUV of the WHS as a whole;

(iv) the SST's judgment that the proposal would cause less than substantial harm improperly involved the application of a "blanket discount" to the harm caused to individual heritage assets.

146. Underlying much of the claimant's case under ground 1 was the proposition that a decision-maker is obliged to consider in respect of *each* heritage asset its significance, the impact of the proposal and the weight to be given to that impact (see e g

paras 93–121 of the claimant's skeleton argument). The claimant relies upon regulation 3 of the 2010 Regulations (see para 27 above), paragraphs 5.128 to 5.133 of the NPSNN (see paras 41–43 above) and the decision of the Court of Appeal in *City & Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government [2021] 1 WLR 5761* , in particular the passage in the judgment of Sir Keith Lindblom SPT where he stated at para 79 that in the overall balancing exercise: "every element of harm and benefit must be given due weight by the decision-maker as material considerations …"

147. However, the court also added that the decision-maker has to adopt "a sensible approach" (para 80). The legislation on heritage assets does not prescribe any single, correct approach to the balancing of harm to those assets against any likely benefits of a proposal or other material considerations weighing in favour of the grant of consent (para 72). The same applies to policies in the NPSNN subject, of course, to applying any specific policy test which is relevant. Requirements in the NPSNN that "great weight" be given to the conservation of an asset and "the more important the asset, the greater the weight should be" are matters left to the planning judgment of the decision-maker to resolve (para 73). The same applies to the application of the tests in paragraphs 195–196 of the NPPF and paragraphs 5.133–5.134 of the NPSNN. The policies do not direct the decision-maker to adopt any specific approach as to *how* harm should be assessed or what ***114** should be taken into account or excluded in that exercise. "There is no one approach." (See para 74.)

148. In the present case, the ES upon which the planning assessments by the Panel and, ultimately, the SST were based, had to address a large number of heritage assets over a substantial area. The assessment for some individual assets was expressed separately for each one. But, in addition, a number of assets were collected together in groupings, an approach endorsed by the WHC, ICOMOS and IP2 (see para 71 above). The Panel made no criticism of that approach in its report. Indeed, it adopted it at various points in its reasoning, and the same is true of the decision letter. The presentation of an assessment by the use of groupings does not mean that assets have not been individually assessed. Instead, the technique enables such assessments to be collected together and expressed in relation to an appropriate grouping. Mr David Wolfe QC, who, together with Ms Victoria Hutton, appeared on behalf of the claimant, confirmed that the claimant makes no criticism of this approach.

(i) The 11 non-designated heritage assets

149. The claimant accepts that an assessment was made of the 11 non-designated heritage assets in the western section of the scheme. They are listed in table 6.11 of chapter 6 of the ES. They are not located in the WHS. Some of the assets would be lost because of the scheme. But others would not. For example, it was said that one asset might suffer damage from compression by overlaying of material. Another could not be found when a survey was carried out, or had ceased to exist because of plough damage.

150. The point taken by the claimant is that the Panel and the SST failed to apply paragraph 5.124 of the NPSNN by considering whether these 11 assets should be treated as having equivalent significance to scheduled ancient monuments, so that policies such as paragraphs 5.133 to 5.134 of the NPSNN might be applied.

151. With respect, there is nothing in this point. Mr Strachan, supported by Mr Reuben Taylor QC for IP1 and Mr Richard Harwood QC for IP2, pointed to the test which has to be satisfied for paragraph 5.124 to apply. A non-designated asset must be "demonstrably of equivalent significance to Scheduled Monuments". Accordingly, such a monument must be considered to be of national importance (section 1(3) of the Ancient Monuments and Archaeological Areas Act 1979). Decisions on national importance are guided by Principles of Selection laid down by the Secretary of State for Digital, Culture, Media and Sport (Annex 1 of *Scheduled Monuments* (October 2013)). IP2 has published a number of scheduling selection guides on eligibility under section 1(3) .

152. Table 6.1 of the ES stated that paragraph 5.124 of the NPSNN had been applied in the work carried out and cross-referred to table 6.2. The latter set out the criteria applied in the ES for determining the value of a heritage asset. A non-designated asset contributing to *regional* research objectives was assessed as having a "medium" value. A non-designated asset of comparable quality to a scheduled monument, that is one of *national* importance, was assessed as having a "high" value. None of the non-designated assets in table 6.11 were given a high value. All were treated as having a medium value. They were, therefore, treated by IP1 as not falling within paragraph 5.124 of the NPSNN. Appendix 6.3 to the ES gave detailed references to the ***115** source material, including surveys, relied upon for this evaluation. I therefore accept the SST's submission that this exercise was carried out transparently and in such a way that any interested party who wished to disagree, by demonstrating that any asset should be treated as equivalent to a scheduled monument, could do so.

153. The short point is that no objecting party attempted to carry out any such exercise. Accordingly, this was not an issue in the Examination, let alone a "principal important controversial issue", which the Panel was required to address in its report to the SST, or which had to be addressed in the decision letter (*South Bucks District Council v Porter (No 2) [2004] 1 WLR 1953, para 36*). I should also add that the Panel's report refers to paragraph 5.124 of the NPSNN and shows that it was applied to other assets, where judged appropriate (see PR 5.7.28 and 5.7.49). The Panel approved of the approach taken in the ES, save for where it explicitly identified any disagreement (see para 90 above). It did not criticise the handling of this part of the NPSNN.

154. The claimant relied upon some very brief passages in representations made to the examination about non-designated heritage assets. These passages were of a generalised nature. They did not pick out any item from table 6.11 of the ES to attempt to demonstrate that such a feature is of national importance, applying relevant criteria and drawing upon any source material.

155. The criticism made under ground 1(i) must be rejected.

(ii) Failure to consider 14 scheduled ancient monuments

156. Originally, the claimant suggested in its "First Reply" that the impact on 15 scheduled monuments had not been assessed by the Panel in its report and, likewise, had not been assessed by the SST in his decision letter. During oral argument the number of assets was said to be 14. It was submitted that the effect of the proposal on the *setting* of these assets had not been addressed. The HIA had simply considered the effect on the OUV of the WHS. Ms Hutton told the court that these assets are located in the vicinity of the proposed Longbarrow junction.

157. However, as Mr Strachan pointed out, the 14 designated assets were also dealt with in the "Setting Assessment", Appendix 6.9 to the ES. There the effect on the settings of each of the assets was addressed. The SST provided a detailed schedule showing where each asset was considered in the documentation. This has not been disputed by the claimant. The ES assessed the effects of the scheme on the settings as ranging from neutral, through slightly beneficial to moderately beneficial. In no case did the ES identify any substantial harm.

158. Here, again, the claimant has relied upon a few brief passages from representations made in the Examination. These passages do not contain anything like the level of detail or referencing contained in the ES or HIA, although it would appear that the document would have been prepared by expert archaeologists. The claimant has not shown that they gave rise to a principal important controversial issue which has not been addressed by the Panel in its report, for example, in its criticisms of the Longbarrow junction and its continuation of the western cutting.

159. Under its third main issue the Panel expressed its concern about the adverse impact of the western cutting and portals on the Wilsford/ ***116*** Normanton dry valley and the relationship between monuments on either side (see PR 5.7.227 and 5.7.229) which formed part of its finding of "substantial harm". In relation to the proposed Longbarrow junction, the Panel noted its effect on, inter alia, the Winterbourne Stoke Downs barrows, two individual scheduled monuments on Winterbourne Stoke Down and the Diamond Group (PR 5.7.239). The SST agreed with the Panel's report on these matters (see DL 10).

160. Accordingly, the criticisms made under ground 1(ii) must be rejected.

(iii) Failure to consider effect on the settings of heritage assets

161. It is plain from the review carried out above that the ES and HIA considered the effects of the scheme on both the OUV of the WHS and on the settings of heritage assets. It is also plain from its report that the Panel addressed, under its third and fifth main issues, the effect of the proposal on spatial relations, visual relations and settings in relation to the WHS and also heritage assets (paras 88 and 96–100 above). It then went on to consider effects on the OUV of the WHS and the historic environment as a whole.

162. However, the claimant submits that in his decision letter the SST failed to consider the effect of the proposal on the settings of heritage assets as well as on the WHS overall. It is said that he only considered the latter issue.

163. This criticism is untenable. It comes from a misreading of the decision letter and, to some extent, the Panel's report. The third and fifth main issues were not treated by the Panel as being in hermetically sealed compartments. Conclusions drawn under the third main issue on the project's effects upon the settings of assets, and upon the landscape containing these assets, also influenced the Panel's reasoning on the fifth main issue. This is plain, not only from the Panel's report but also the decision letter (see para 137 above). Mr Wolfe is incorrect to suggest that DL 34 did not refer to the third main issue and only considered the effect on the OUV as a whole. The language of DL 34 cannot be read in that way, particularly when it is considered in the context of the preceding parts of the decision letter and the Panel's report to which it responds.

164. There is equally no merit in the submission that IP2 had only addressed the impact of the proposal on the OUV of the WHS and, therefore, because DL 34 relied upon the opinion of IP2 that paragraph must be read as addressing only the WHS and not heritage assets. DL 30 had already referred to PR 5.7.329 to 5.7.330. From those paragraphs it was clear to the SST that the Panel understood IP2 to disagree with its view on substantial harm, in the context of the third main issue, which dealt with the effect of the development on spatial and visual relations and settings of *heritage assets* .

165. The decision letter was prepared by officials for consideration by the SST following their review of the representations which had been made in the Examination by IP2 and others. DL 33 reflects that exercise. IP2's representations in May 2019 (paras 3.9–3.10 and 6.3) made it plain that it had addressed scheduled monuments (and other assets), whether contributing to the OUV or not, and whether inside the WHS or not, and had considered all parts of the ES relating to cultural heritage issues as well as the HIA (see para 85 above).

166. Accordingly, the criticisms made under ground 1(iii) must be rejected. ***117**

(iv) Whether the SST took into account the impacts on all heritage assets

167. This is a challenge to the SST's judgment that the harm identified by the Panel as substantial should be treated as less than substantial. It has been put in more than one way.

168. First, it is said that that reduction in the level of harm was an improper "blanket discount" because the judgment is said to have been applied to a "significant number of designated and undesignated heritage assets" and yet the impact of the scheme was not the same for all the assets affected. Mr Wolfe also described the error of law here as a "composite approach," whereas, in accordance with *Bramshill* para 79 and the NPSNN (paragraph 5.129), a separate assessment of the impact on each individual heritage asset was required.

169. To some extent the argument has moved on since the claimant's pleadings and skeleton were prepared. The claimant accepts that the requirement for individual assessment can properly be addressed by an approach based on groupings (see para 129 above).

170. But what appears clearly from para 76 of the SOCG is that, by whatever means he employs, the decision-maker must ensure that he has taken into account (a) the significance of each designated heritage asset affected by the proposed development and (b) the impact of the proposal on that significance.

171. Mr Strachan submitted, supported by IP1 and IP2, that the SST complied with the principle in para 170 above. This is because, first, the ES addressed all relevant heritage assets. Second, the Panel identified in its report those impacts where it disagreed with the assessment in IP1's ES and must be taken as having agreed with the remainder (PR 5.7.150). Third, the SST stated in DL 10 that he is to be taken as having agreed with the findings and conclusions in the Panel's report save for where the contrary is stated. It is submitted that the SST must, therefore, be treated as having agreed with those parts of the ES and HIA with which the Panel did not expressly disagree.

172. The SST's argument essentially relies upon the starting point that all relevant assets were assessed in the ES (and HIA). So the question arises whether the SST's analysis is correct, given that neither the ES nor the HIA were before the SST at any stage. In this context, regulation 21(1) of the EIA Regulations 2017 is relevant (see para 31 above). The SST was obliged to take into account the environmental information for the proposal, which included the ES, and DL 11 states that he did this.

173. The ES concluded that no part of the scheme would result in substantial harm to any designated heritage asset. The Panel disagreed with that view in relation to the effects of the western cutting and portals and the Longbarrow junction. Nonetheless, the Panel recognised that that was a matter of judgment on which the SST might differ and that there had been differing opinions submitted to the Examination, not least that of IP2 (PR 7.5.26).

174. As I have said in para 137 above, the SST disagreed with the Panel's judgment that "substantial harm" would be caused by those parts of the scheme. It follows that he disagreed with the conclusions in PR 5.7.236, 5.7.248, 5.7.297, 5.7.329, 5.7.333, 7.5.11, 7.5.19, 7.5.21 and 10.2.10 that ***118** that level of harm would be substantial. However, the SST did not disagree with the more specific findings of the Panel upon which its "substantial harm" conclusion was based. The effect of DL 10 is that he agreed with those findings (see paras 142–144 above).

175. The agreed principle in para 170 above does not lay down a rubric as to how an assessment should be made or how reasoning should be expressed. It does not indicate that something akin to the analysis in an environmental statement is required. It is open to a decision-maker to accept the findings of an inspector or panel about the specific impacts that would be caused by a proposed development, or a part thereof, and then to say, as a matter of judgment, that those effects should be treated as less than substantial harm rather than substantial harm, particularly where that view is supported by the evidence and opinion of a specialist adviser such as IP2 in this case. It was not suggested that the judgment in the present case should be treated as irrational. That is hardly surprising given what the Panel had said at PR 5.7.26. So that part of ground 1(iv) which seeks to attack what is described as a "blanket discount" does not assist the claimant.

176. But the real issue remains whether the principle in para 170 above has been satisfied in the decision letter in the light of the explanation of the decision-making process given in para 171.

177. Notwithstanding regulation 21(1) of the EIA Regulations 2017 and the contents of DL 11, the SST's legal team informed the court that the ES and HIA were not before ministers when they were considering the Panel's report and the determination of the application for development consent. It is said that "the ES and HIA were considered by officials in providing their advice and the ES and HIA formed part of the examination library accessible from the examination website". However, as is clear from the case law cited in paras 62–65 above, what was within the knowledge of officials is not to be treated on that account as having been within the minister's knowledge, unless it was drawn to his attention in a briefing or précis.

178. That same case law suggests that in the real world a minister cannot be expected to read every line of an environmental statement and all the environmental information generated during an examination or inquiry process. But, nevertheless, an adequate précis and briefing is required. Depending on the circumstances, that requirement may be met, wholly or in part, by the report of a panel or an inspector (for example, where the Secretary of State agrees with the relevant parts of that report). It may also be provided in the draft decision letter which is submitted to the decision-maker for his consideration or in any additional briefing. That would be necessary in a typical case where only one or a small number of heritage assets are impacted. The requirement *to take into account* the impact on the significance of each relevant asset still applies in an atypical case, such as the present one, where a very large number of heritage assets is involved. It will be noted, however, that although regulation 21(1) requires the decision-maker to take into account the environmental information in a case, it does not require him to give his own separate assessment in relation to each effect or asset.

179. Here, the SST did receive a précis of the ES and HIA in so far as the Panel addressed those documents in its report. But the SST did not receive a précis of, or any briefing on, the parts of those documents relating to impacts on heritage assets which the Panel accepted but did not summarise ***119** in its reports. This gap is not filled by relying upon the views of IP2 in the Examination because, understandably, they did not see it as being necessary for them to provide a précis of the work on heritage impacts in the ES and in the HIA. Mr Wolfe is therefore right to say that the SST did not take into account the appraisal in the ES and HIA of those additional assets, and therefore did not form any conclusion upon the impacts upon their significance, whether in agreement or disagreement.

180. In my judgment, this involved a material error of law. The precise number of assets involved has not been given, but it is undoubtedly large. Mr Wolfe pointed to some significant matters. To take one example, IP1 assessed some of the impacts on assets and asset groupings not mentioned by the Panel as slightly adverse and others as neutral or beneficial. We have no evidence as to what officials thought about those assessments. More pertinently, the decision letter drafted by officials (which was not materially different from the final document—see para 67 above) was completely silent about those assessments. The

draft decision letter did not say that they had been considered and were accepted or otherwise. The court was not shown anything in the decision letter, or the briefing, which could be said to summarise such matters. In these circumstances, the SST was not given legally sufficient material to be able lawfully to carry out the "heritage" balancing exercise required by para 5.134 of the NPSNN and the overall balancing exercise required by section 104 of the PA 2008 . In those balancing exercises the SST was obliged to take into account the impacts on the significance of all designated heritage assets affected so that they were weighed, without, of course, having to give reasons which went through all of them one by one.

181. Accordingly, I uphold ground 1(iv) of the challenge.

Conclusion

182. For these reasons, I uphold ground 1(iv) of the challenge and reject grounds 1(i), (ii) and (iii).

Ground 2—lack of evidence to support disagreement with the Panel

183. The claimant submits that the SST disagreed with the Panel on the substantial harm issue without there being any proper evidential basis for doing so. Mr Wolfe advances this ground by reference to the SST's acceptance of the views of IP2 in DL 34, 43, 50 and 80. He submitted that IP2's representations did not provide the SST with evidence to support his disagreement with the Panel on "substantial harm" in two respects. First, he said that IP2 only addressed the spatial aspect of the third main issue and did not address harm to individual assets or groups of assets. Second, he submitted that SST had misunderstood IP2's position: it had never said that the harm would be less than substantial.

184. It should be noted that although the claimant had raised other more detailed criticisms, Mr Wolfe did not pursue them in oral submissions or invite the court to deal with them. No doubt he considered that ground 2 should stand or fall on the points that he chose to advance, as set out above.

185. The short answer is to be found in PR 5.7.329 to 5.7.330. The Panel understood that IP2 took the view that no substantial harm would be caused to any asset and that the reasons for the difference of view between the Panel and IP2 were concerned with the effects of the western cutting and portals and the new Longbarrow junction. Those passages would have reflected what ***120** took place during the hearings in which IP2 took part, as well as its written representations. IP2 has confirmed that the Panel's report at PR 5.7.329 to 5.7.330 accurately set out its position in the Examination (para 28 of the detailed grounds of defence). There is no proper basis for the court to go behind what was said by the Panel in its report on this subject. The SST was plainly entitled to rely upon that part of the report.

186. It is also apparent from PR 5.7.329 to 5.7.330 that the Panel was dealing with its overall finding of substantial harm under the third main issue. The claimant's attempt to confine the effect of those passages to effects on "spatial relations, visual relations and settings" overlooks the fact that PR 5.7.329 simply repeated the heading given for the third main issue when it was introduced in PR 5.7.129. It is plain from the section of the report devoted to the third main issue that the Panel considered both the spatial aspect and the harm to heritage assets and their setting. There is no reason to think that the shorthand they used in PR 5.7.329 was meant to suggest that IP2 had only considered the spatial aspect. This is a forensic, excessively legalistic argument of the kind which should not be advanced in the Planning Court.

187. In any event, on a fair reading of IP2's representations, it is plain that it did consider those parts of the ES and HIA which assessed impacts on individual heritage assets or groups of assets.

188. For these reasons, ground 2 must be rejected.

189. For completeness, I would add that I do not accept the submission of Mr Strachan that the SST's disagreement on the level of harm resulting from the western section of the scheme was supported by his conclusions in DL 52–56 on landscape and visual amenity impacts from a general planning perspective. Both the Panel and the SST treated those issues separately from the historic landscape matters which arose under the cultural heritage sections of their respective assessments. However, Mr Strachan's submission is not necessary for the court to reject ground 2.

Ground 3—double-counting of heritage benefits

190. The claimant submits that the SST not only took into account the heritage benefits of the scheme as part of the overall balancing exercise required by paragraph 5.134 of the NPSNN but also took those matters into account as tempering the level of heritage disbenefit. It is said that this was impermissible double-counting because those heritage benefits were placed in both scales of the same balance.

191. But the claimant also made a further submission, which is rather different. It was said that the SST relied upon heritage benefits in DL 34 and DL 43 as reducing the level of heritage harm when deciding whether less than substantial harm would be caused (ie whether paragraph 5.133 or 5.134 of the NPSNN should be applied), and then also took those heritage benefits into account when deciding whether the balance pointed in favour or against the scheme.

192. It is necessary to be clear about how the policies in the NPSNN operate, the process which was followed in the ES and HIA, and the chain of reasoning in the decision letter.

193. Paragraphs 5.133 and 5.134 of the NPSNN lay down the criteria which determine which of the policy tests is to be applied for dealing with harm to heritage assets (the "fork in the road decision"—see para 47 above). ***121** In the light of *Bramshill* at para 71 it is common ground that in reaching this judgment, the decision-maker *may* take into account benefits to the heritage asset itself (referred to as an "internal balance") but he is not obliged to do so (and see para 74).

194. In *Bramshill* at para 78 Sir Keith Lindblom SPT stated:

> "Cases will vary. There might, for example, be benefits to the heritage asset itself exceeding any adverse effects to it, so that there would be no 'harm' of the kind envisaged in paragraph 196 [of the NPPF]. There might be benefits to other heritage assets that would not prevent 'harm' being sustained by the heritage asset in question but are enough to outweigh that 'harm' when the balance is struck. And there might be planning benefits of a quite different kind, which have no implications for any heritage asset but are weighty enough to outbalance the harm to the heritage asset the decision-maker is dealing with."

For the purposes of the present case, two points may be drawn from that passage.

195. First, when assessing the impact of a project on a heritage asset it is permissible to combine both the beneficial and the adverse effects *on that asset* . That is not so much a balancing exercise as a realistic appraisal of what would be the net impact of the project on the asset, viewed as a whole and not partially. That approach was followed in the ES in this case. It was necessary to take into account the A303 as part of the existing baseline and to take into account the beneficial impact on an individual asset of removing that road as well as any harmful impact on that asset from the new scheme. The net outcome might be positive, neutral or negative.

196. Second, if a scheme would cause harm to one asset and benefit to another, that does not alter the judgment that the first asset will be harmed. Instead, the benefit to the other is a matter to be weighed in whichever balance falls to be applied under the NPSNN or, indeed, paragraphs 195 or 196 of the NPPF. Here again we see the distinction between deciding which of the two policy tests in those paragraphs is to be applied and the carrying out of the balancing exercise itself.

197. There is a tendency to use the term "double-counting" imprecisely, as if to say that it is necessarily objectionable whenever a particular factor is taken into account in a decision on a planning application more than once. That is too sweeping a proposition. Well-known planning policies contain examples where, legitimately, the same factor may have to be taken into account more than once. For example, in Green Belt policy some types of development are regarded as inappropriate if they would harm the openness of the Green Belt and/or conflict with the purposes of including land within it (paragraphs 145 and 146 of the NPPF). In those circumstances, the application of the "very special circumstances test" will also require that harm

to the Green Belt to be included in the overall planning balance. There is no improper double-counting. The same factor is being assessed twice for two different and permissible purposes.

198. Paragraph 11(d) of the NPPF provides another example. If, for example the presumption in favour of granting permission is engaged (eg because the supply of housing land is less than five years) the "tilted balance" in sub-paragraph (ii) may be applicable. If so, the extent to which the proposal complies with or breaches development plan policies ***122** may be taken into account in the balance required to be struck under paragraph 11(d)(ii). But it is also necessary to take into account those polices when striking the balance required by section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") . Those two balances may either be struck separately or taken together. Either way, there is no impermissible double-counting. Taking into account the same factor more than once is simply the consequence of having to apply more than one test (see *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government [2021] PTSR 1450, paras 62–67* and *[2020] PTSR 993, para 110*). The same considerations may apply where paragraph 11(d)(i) falls to be applied.

199. The policies in paragraphs 5.133 to 5.134 of the NPSNN are similar in nature to the first of those examples. These paragraphs determine which of the two tests for decision-making on heritage policy are to be applied, before arriving at the overall planning balance. A beneficial impact on a heritage asset may appropriately be taken into account in determining the net level of harm which that asset would sustain and therefore which policy test is engaged, and then again in the balancing exercise required by that test when *all* public benefits are weighed against all harm to heritage assets. The same factor is taken into account at two different stages for different and permissible purposes. There is no question of improper double-counting. Ultimately, in his reply Mr Wolfe accepted this analysis.

200. Accordingly, the real issue under ground 3 has come down to whether the SST, when striking the balance, put the same benefits in both scales, for and against the proposal (see para 190 above).

201. The ES and HIA assessed the impacts of the proposal on individual assets and groups of assets and arrived at the conclusion that no asset would be substantially harmed. On that basis the test in paragraph 5.134 would fall to be applied. I accept the submission of the SST and IP1 that that series of separate judgments did not involve any off-setting of net benefit to one asset against net harm to another. The claimant did not identify any material to the contrary.

202. The Panel disagreed with that assessment in relation to the impacts of two elements of the scheme, the western cutting and portals and the Longbarrow junction. They judged that there would be substantial harm to assets or groups of assets and to the OUV of the WHS in certain locations (see eg PR 5.7.219, 5.7.224, 5.7.228 to 5.7.229, 5.7.231 to 5.7.232, 5.7.239, 5.7.241, 5.7.245 and 5.7.247). The Panel's judgment was based upon its assessment of the scale and design of the civil engineering works together with the mitigation proposed and their effect upon the setting of assets and the landscape in which they feature. In reaching its judgments the Panel appropriately took into account the removal of the A303 because that, in itself, affects the impact on relevant assets, as well as the mitigation proposed for those elements of the scheme (see eg PR 5.7.236 and 5.7.248). There is no evidence that when it made its judgment on the "fork in the road" between paragraphs 5.133 and 5.134 of the NSPSNN, the Panel introduced off-setting between different assets or had regard to the broader (or generic) heritage benefits of the entire scheme (eg as set out in PR 5.7.29—see para 70 above). The Panel performed the overall balancing exercise separately in section 7.5 .

203. In DL 34 and DL 43 the SST set out his conclusion on which of the policy tests in paragraph 5.133 or 5.134 of the NPSNN should be applied. ***123** Having decided in favour of paragraph 5.134, the SST then applied that test in DL 51. There, the SST simply weighed benefits from the overall scheme ("the public benefits") against the harm he had already identified. They included the overall or generic scheme benefits for cultural heritage identified at PR 5.7.29. The benefits in PR 5.7.29 were put into the correct scale. There is no indication that the SST put the positive effects on each *individual* asset or asset grouping attributable to the western section of the proposed scheme in both sides of the balance.

204. In DL 80 the SST drew upon his earlier conclusions in DL 34 and DL 43 that the proposal would cause less than substantial harm but there is no suggestion in DL 80 that that judgment was tainted by improperly taking into account heritage benefits from the scheme overall, rather than the way in which the contentious elements of the western section of the scheme affected relevant assets. That judgment had previously been reached in DL 34 and DL 43.

205. Ultimately, ground 3 came down to an attack on the way in which the SST reached his conclusions on less than substantial

harm in DL 34 and DL 43. In my judgment, they contain no indication that the SST took into account *overall* benefits of the scheme rather than effects of the scheme on *individual* relevant assets, so that this resulted in improper double-counting, either in DL 51 or in DL 80 to DL 87.

206. The claimant's submission was also advanced on the basis that the SST had relied upon the views of IP2 and that the latter had taken that broader approach. I reject that submission. In PR 5.7.229 to 5.7.330 the Panel stated that IP2 had taken the view that less than substantial harm would be caused to assets affected by the western cutting and Longbarrow junction. The Panel gave no indication that that involved a different and broader approach to the assessment of that harm, one which took into account overall or generic scheme benefits, as compared with its own approach. Instead, the Panel said that it was simply a difference of professional judgment on the evidence. The claimant's submission on this point is not supported by any of the documents shown to the court

207. The claimant sought to criticise the relationship between DL 33 and DL 34 in order to suggest that impermissible double-counting was introduced into DL 34. I disagree. Part of DL 33 addressed the Panel's conclusion on the effect of the overall scheme on the WHS. It was in that context that the SST referred to the views of IP2 and others that greater weight should be given to the beneficial effects of removing the existing A303 from the WHS rather than the harmful effects of part of the new scheme on part of the WHS. Indeed, some contended that there would be a net benefit overall. This approach was entirely proper because, it was necessary to consider the WHS as a whole and, correctly, it involved treating the WHS as a designated heritage asset in itself. Thus the benefits relevant to that asset would necessarily relate to the scheme as a whole. That approach is entirely consistent with the second and third sentences of para 78 in *Bramshill* (see paras 194–196 above).

208. But in DL 34 the SST also brought in the third main issue and did so in the context of what he had already said in DL 30. The difference between IP2 and the Panel related to the effect of the western cutting and the Longbarrow junction on heritage assets and also the OUV of the WHS. Here, there is no reason to think that the SST, relying upon the views of IP2, took into account ***124** a wider range of heritage benefits than was permissible for the purposes of deciding whether paragraph 5.133 or 5.134 of the NPSNN applied (see para 206 above).

209. For these reasons, ground 3 must be rejected.

Ground 4—whether the proposal breached the World Heritage Convention

210. The claimant contends that the SST's acceptance that the scheme would cause harm, that is less than substantial harm, to the WHS involved a breach of articles 4 and 5 of the Convention and therefore the SST erred in law in concluding that section 104(4) of PA 2008 was not engaged. It was engaged and so, it is submitted, the presumption in section 104(3) should not have been applied in the decision letter.

211. The claimant's case as set out in its skeleton (see eg para 242) appeared to be that any harm, or at least any significant harm, to the WHS would, if allowed, involve a breach of articles 4 and 5 of the Convention , irrespective of whether the benefits of the scheme were judged to have greater weight. That appears to have been the case presented in the Examination and which IP1 successfully persuaded the Panel to reject. In his oral submissions Mr Wolfe shifted the case significantly. He accepted that the Convention allows for a balance to be struck between harm to the WHS and benefits, but contended that only heritage benefits, in particular benefits to the WHS, its OUV and attributes, could be taken into account in that balance. Thus, he submitted, the balance required to be struck by either paragraph 5.133 or 5.134 of the NPSNN conflicts with the Convention .

212. The first issue is whether the Convention has been incorporated into UK law, or the law applicable in England and Wales, so that its construction is a matter of law directly for this court. Although the Convention had been ratified by the UK, it is common ground that it has not been incorporated into our domestic law by legislation. Instead, Mr Wolfe submitted that an international treaty may be treated by the court "as for all practical purposes as incorporated into domestic law," citing Lord Steyn in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport [2005] 2 AC 1, para 40* et seq. However, that decision does not assist the claimant. Lord Steyn was not prepared to treat a provision in the Immigration Rules not requiring any action to be taken contrary to the Refugee Convention (Convention and Protocol relating to the Status of Refugees (1951) (*Cmd 9171*) and (1967) (Cmnd 3906)) as incorporating that Convention into English law. The Rules were insufficient for that purpose. But because the same principle was later enacted in primary legislation, it was that measure which was held to have been sufficient to achieve incorporation (see paras 41–42).

213. In the present case the claimant merely points to section 104(4) of the PA 2008 . But that refers to international obligations generally and not specifically to the World Heritage Convention. As Mr Taylor pointed out, on the claimant's argument section 104(4) would have the effect of incorporating *any* international obligation into our domestic law, but *only* for the purposes of determining an application for a DCO. There is nothing in the language used by Parliament to indicate that it intended to achieve such a strange result.

214. Instead, all that section 104(4) does is to make a breach of an international obligation one of the grounds for not applying section 104(3) . ***125** But, as Mr Wolfe accepted, where section 104(4) is met that does not automatically result in the refusal of an application for a DCO. Accordingly, Mr Wolfe accepted that the highest that he could put the incorporation argument is that section 104(4) treats the issue of whether a proposal would comply with the Convention as a mandatory material consideration, and not that Parliament requires a proposal to comply with the Convention as a matter of law.

215. I am not persuaded that Mr Wolfe's revised analysis provides a sufficient justification for concluding that an international obligation has been incorporated into domestic law. Mr Wolfe has not shown the court any authority where that has been accepted. Indeed, if the Convention is simply being treated as a material consideration, rather than as an instrument with which a proposal must comply, the issue of whether a proposal is in conflict with the Convention is essentially a matter of judgment for the decision-maker, subject to review on the grounds of irrationality. That is especially so given the very broad, open-textured nature of the language used in articles 4 and 5. The position would not be materially different from the second authority cited by Mr Wolfe, *R v Secretary of State for the Home Department, Ex p Launder [1997] 1 WLR 839* , where the Secretary of State took the Convention on the Protection of Human Rights and Fundamental Freedoms into account and the grounds of challenge were dealt with under the law on irrationality (see pp 867E–869B).

216. On the basis that the Convention has not been incorporated into domestic law, the relevant principles on the interpretation of that instrument were set out by Lord Brown of Eaton-under-Heywood in *R (Corner House Research) v Director of the Serious Fraud Office [2009] AC 756, paras 67 to 68* . The court should allow the executive a margin of appreciation on the meaning of the Convention and only interfere if the view taken is not "tenable" or is "unreasonable." This approach allows for the possibility that, so far as the domestic courts are concerned, more than one interpretation, indeed a range, may be treated as "tenable." The issue is simply whether the decision-maker has adopted an interpretation falling within that range.

217. I have no hesitation in concluding that the SST was entitled to decide that the policy approach in paragraphs 5.133 and 5.134 of the NPSNN (read together with the surrounding paragraphs) is compliant with the Convention . That is a tenable view. If I had to decide the point of construction for myself, I would still conclude that those policies are compliant with the Convention .

218. Although articles 4 and 5 refer to matters of great importance, they are expressed in very broad terms. By article 4 each state party has recognised that the duty of protecting and conserving a WHS belongs primarily to that state, which "will do all it can to this end, to the utmost of its own resources". Resources are, of course, finite and they are the subject of competing social, economic and environmental needs. The Convention does not further explain the meaning and scope of the language used in article 4. This must be a matter left to individual party states.

219. In any event, article 4 has to be read in conjunction with the slightly more specific provisions in article 5, and not in isolation. There, the obligation on each state is to endeavour "as far as possible", and "as appropriate" for that country, to comply with paragraphs (a) to (e). They include the taking of the "appropriate" legal measures necessary to protect and conserve the heritage referred to in articles 1 and 2. ***126**

220. The broad language of these articles is compatible with a state adopting a regime whereby a balance may be drawn between the protection against harm of a WHS or its assets and other objectives and benefits and, if judged appropriate, to give preference to the latter. The Convention does not prescribe an absolute requirement of protection which can never be outweighed by other factors in a particular case. Nor does the Convention use language which would limit such other factors to heritage benefits or benefits for the WHS in question. I also note that in its "Guidance on Heritage Impact Assessments for Cultural World Heritage Properties", ICOMOS accepts that a balance may be drawn between the "public benefit" of a proposed change and adverse impacts on a WHS (para 2-1-5).

221. The Australian authorities cited (*Commonwealth of Australia v State of Tasmania (1983) 158 CLR 1* ; *Australian Conservation Foundation Inc v Minister for the Environment (2016) 251 FCR 308*) need to be read carefully. Those cases were concerned with circumstances in which the Convention had been incorporated into Australian law by legislation and any observations on interpretation should be understood in the context to which the decisions were addressed. Having said that, I do not see my conclusion as conflicting with any of the observations in those decisions. They do not lend any support for the interpretation which Mr Wolfe said must be given to the Convention . Indeed, the observations in the High Court of Australia in the Tasmanian Dam case, upon which Mr Wolfe principally relied, emphasise the discretion left to individual state parties as to the steps each will take and the resources it will commit (see eg Brennan J at *158 CLR 1, 224–225*).

222. For these reasons, ground 4 must be rejected.

223. Although it is not necessary for my decision on ground 4, I would add one further point. As I have noted, it is common ground that there is no material difference between paragraphs 5.133 to 5.134 of the NPSNN and paragraphs 195 to 196 of the NPPF. The antecedent policy in Planning Policy Statement 5 (PPS5) was to the same effect and contained a statement that the Government considered the policies it contained to be consistent with the UK's obligations under the Convention . No legal challenge has been brought to the policies in question, for example, on the basis that they adopted an interpretation of the Convention which is incorrect *on any tenable view* . A legal challenge to the NPSNN would now be precluded by section 13(1) of the PA 2008 . Under section 106(1)(b) a representation relating to the merits of a policy set out in a NPS may be disregarded by the SST (see also *Spurrier* and *ClientEarth*).

Ground 5

224. The claimant raises three contentions under ground 5:

(i) the SST failed to take into account any conflict with Core Policies 58 and 59 of the Wiltshire Plan and with policy 1d of the WHS Management Plan;

(ii) the SST failed to take into account the effect of his conclusion that the proposal would cause less than substantial harm to heritage assets on the business case advanced for the scheme;

(iii) the SST failed to consider alternative schemes, in accordance with the World Heritage Convention and common law. ***127***

(i) Failure to take into account local policies

225. It is plain from, for example, DL 11 and DL 27 that the SST had regard to the Wiltshire Core Strategy and the WHS Management Plan.

226. In PR 5.7.322 to 5.7.325 of its report the Panel stated, in a section devoted to its fifth main issue, that in view of its conclusions on the impact of the scheme on the OUV of the WHS the proposal would not accord with Core Policies 58 and 59 of the Core Strategy, nor with policy 1d of the WHS Management Plan. The Panel clearly thought that the language used in PR 5.7.324 was apt to cover impact upon the settings of designated heritage assets, the subject of Core Policy 58. The Panel carried that conclusion regarding conflict with those three policies through to its summary of the adverse impacts of the scheme within section 7.2 dealing with the planning balance. At PR 7.2.32 the Panel restated the conflict they perceived with the three local policies in terms of harm to the WHS and its OUV. There is no reason to think that in that paragraph the Panel excluded the broader consideration addressed in PR 7.2.33. In any event, at PR 7.5.11 the Panel restated its conclusion on breach of the three policies in terms of both harm to the OUV of the WHS and harm to "the significance of heritage assets through development within their settings". Plainly the Panel did not think these differences in wording were important for a true understanding of their reasoning on local policies.

227. In DL 28 the SST stated:

> "The ExA concludes the Development would benefit the OUV in certain valuable respects, especially relevant to the present generation. However, permanent irreversible harm, critical to the OUV would

> also occur, affecting not only present, but future generations. It considers the benefits to the OUV would not be capable of offsetting this harm and that the overall effect on the WHS OUV would be significantly adverse [PR 5.7.321]. The ExA considers the Development's impact on OUV does not accord with the Wiltshire Core Strategy Core Policies 59 and 58, which aim to sustain the OUV of the WHS and ensure the conservation of the historic environment [PR 5.7.322–5.7.324], and that the Development is also not consistent with Policy 1d of the WHS Management Plan [PR 5.7.325]. It considers this is a factor to which substantial weight can be attributed [PR 7.5.11]."

228. The claimant complains that this failed to address the breach of Core Policy 58 as a result of harm caused to the settings of a number of designated assets (para 262 of its skeleton argument). But the SST's summary in DL 28 accurately and fairly reflects the language used by the Panel themselves to cover the issues raised by both Core Policies 58 and 59. The criticism is wholly untenable.

229. The second complaint is that the SST disagreed with the Panel on the level of harm that would be caused to heritage assets (ie from the western cutting and from the Longbarrow junction) and so cannot be taken to have accepted, in accordance with DL 10, that that lesser degree of harm still involved conflict with the three local policies. But the language used in those policies does not indicate that "less than substantial" harm could not involve any conflict therewith and the SST said nothing to the contrary. The only ***128** rational inference is that the SST accepted that there remained a conflict with those policies. The second criticism is no better than the first.

230. There is nothing in the decision letter to indicate that the conflict with local policies was disregarded by the SST. In any event, and as Mr Strachan submitted, the local policies do not refer to any balancing of harm against the benefits of a proposal, as required by the NPSNN. The NPSNN was the primary policy document to be applied under the PA 2008 according to section 104(3) , which may be contrasted with section 38(6) of PCPA 2004 (see also para 91 of the SST's skeleton and *Bramshill* at para 87).

231. For these reasons ground 5(i) must be rejected.

(ii) The alleged error regarding the business case for the scheme

232. This complaint arises from paragraph 4.5 of the NPSNN (see para 40 above). An application is normally to be supported by a business case prepared in accordance with HM Treasury Green Book principles (*The Green Book: Central Government Guidance on Appraisal and Evaluation* (2020)). It provides the basis for investment decisions and will also be important for the consideration by the examining authority or by the Secretary of State of the adverse impacts and benefits of a proposal. However, the NPSNN does not suggest that such a business case should put a monetary value on every factor which goes into a planning balance or a balance carried out under paragraphs 5.133 or 5.134 of the NPSNN.

233. Nonetheless, the claimant submits that the SST's decision was flawed because he did not take into account his conclusion that two elements in the western section of the scheme would result in less than substantial harm to heritage assets.

234. The point is said to arise in this way. The cost benefit analysis for the scheme placed a monetary value of £955m on the benefit of removing the existing A303 from the WHS. This was, by far, the greatest monetary benefit ascribed to the scheme, being approximately three quarters of its overall benefits. The costs of the scheme were said to be between £1.15bn and £1.2bn (tables 5–6 of IP1's "Case for the scheme and NPS accordance"). So, without the sum attributed to the removal of the A303 the analysis would be heavily negative. That is hardly surprising. The construction of a 3.3 kilometre tunnel, the cuttings and the junctions are expensive works.

235. The figure of £955m was arrived at by a public attitude survey which asked people to put a monetary value on their willingness to pay for the perceived benefit of removing the existing A303 and its traffic from the immediate vicinity of Stonehenge; or to put a monetary value on their willingness to accept a payment as compensation for the loss of amenity to

travellers on the existing A303, through no longer being able to see Stonehenge while travelling. The survey was targeted at three groups: visitors to Stonehenge, road users and the general population (PR 5.17.94).

236. A number of criticisms were made of this approach during the Examination (see eg PR 5.17.96–5.17.99). IP1 accepted that it was unusual for cultural heritage assets to be given a monetary value in the appraisal of a transport scheme but here the enhancement of the cultural heritage was so significant that it formed an integral part of the objectives of the scheme and it was therefore considered appropriate to make an attempt at quantification of that factor (PR 5.17.100). However, it is plain that the exercise did not attempt to monetise all positive or negative impacts upon cultural heritage or ***129** all factors going into the planning balance. IP1 submitted at the Examination that the two should not be confused (PR 5.17.112). The cost benefit analysis formed part of a value for money exercise. It was relevant, for example, that funding was in place, given that compulsory purchase powers needed to be granted as part of the DCO.

237. The National Audit Office pointed out that, although IP1 had used approved methodologies to arrive at the figure of £955m, calculating benefits in that way was inherently uncertain and decision-makers were advised to treat them cautiously (PR 5.17.108).

238. The Panel took a realistic attitude to this debate (PR 5.17.117):

> "The ExA makes no specific criticism of the manner in which the study has been undertaken, or the methodology adopted. It appears to the ExA a genuine attempt undertaken to put a value on heritage benefits as described in the survey material. However, the ExA recognises that this is hedged with uncertainty and endorses the cautious approach advocated by the NAO and the DfT itself. The ExA notes the concerns of SA and others that the visual information provided to survey participants did not fully represent the impact of the Proposed Development on the WHS and recognises that participants could not be expected to have the detailed knowledge of impacts that the Examination process has allowed. The ExA also understands that participants might, if presented with choices about what their taxes would be spent on, adjust the priority given to otherwise desirable heritage outcomes."

239. The whole of the Panel's report was before the SST. The Panel accepted that respondents to the survey could not be expected to have detailed knowledge about impacts on cultural heritage that had been discussed in the Examination. It did not suggest that this component of the economic or investment analysis should be adjusted, in some way, whether quantitatively or otherwise, according to the judgments reached on heritage impacts, for example, from the western section of the scheme.

240. The SST did not disagree with the Panel's approach. Given the nature and purpose of the cost benefit analysis, the view taken on the level of heritage benefits or disbenefits attributable to parts of the scheme was not an "obviously material consideration" which the SST was obliged to take into account as altering the business case.

241. Accordingly, ground 5(ii) must be rejected.

(iii) Alternatives to the proposed western cutting and portals

242. The focus of the claimant's oral submissions was that the SST failed to consider the relative merits of two alternative schemes for addressing the harm resulting from the western cutting and portal, firstly, to cover approximately 800 metres of the cutting and, secondly, to extend the bored tunnel so that the two portals are located outside the western boundary of the WHS.

243. The Panel dealt with the issue of alternatives in section 5.4 of its report, before it came to deal with impacts on the cultural heritage in section 5.7. On a fair reading of the report as a whole, there is no indication that the substantial harm it identified in section 5.7 influenced the approach it had previously taken to alternatives. The same is true of section 7.2 ***130** of the report,

which brought together in the planning balance the various factors which had previously been considered. PR 7.2.25 summarised the Panel's overall conclusion on the treatment of alternatives in section 7.4. After dealing with biodiversity and climate change the Panel summarised its conclusions on cultural heritage issues at PR 7.2.31 to 7.2.33. The reason for this would appear to be the way in which the Panel applied the NSPNN.

244. It is important to see how the Panel approached the issue of alternatives in section 5.4. They directed themselves at the outset by reference to paragraphs 4.26 and 4.27 of the NPSNN (see para 41 above) (see PR 5.4–5.4.2). Those policies framed the Panel's conclusions at PR 5.4.56–5.4.75.

245. IP1's case, applying paragraphs 4.26 to 4.27 of the NPSNN, was that the only consideration of alternatives relevant to the Examination were: (i) "to be satisfied that an options appraisal has taken place", (ii) compliance with the EIA Regulations 2017 in relation to the main alternatives studied by the applicant and the main reasons for the applicant's decision to choose the scheme, and (iii) alternatives to the compulsory acquisition of land (PR 5.4.3 and 5.4.60).

246. At PR 5.4.56 the Panel stated that IP1 had correctly identified all legal and policy requirements relating to the assessment of alternatives. It accepted that alternatives did not have to be assessed under the Conservation of Habitats and Species Regulations 2017 (SI 2017/1012) ("the Habitats Regulations 2017 ") or the Water Framework Directive (Parliament and Council Directive 2000/60/EC) (PR 5.4.57–5.4.58). In relation to policy requirements, the Panel accepted that IP1 had satisfied the sequential and exception tests for flood risk and that no part of the scheme fell within a national park or an area of outstanding natural beauty (PR 5.4.59). However, the Panel did not consider any policy requirements relating to cultural heritage impacts which might make it appropriate or even necessary to reach a conclusion on the relative merits of IP1's scheme and alternatives to it. That is all the more surprising given that a significant part of the Panel's report was devoted to the representations of interested parties about alternatives to avoid or reduce the harm to the WHS and heritage assets that would result from IP1's scheme (see PR 5.4.35–5.4.55).

247. The Panel summarised IP1's case on options for a longer tunnel at PR 5.4.16–5.4.27 and the representations of interested parties on that issue at PR 5.4.45–5.4.49. As a result of the concerns expressed by the WHC about the western section of the project, IP1 had studied two longer tunnel options: first, the provision of a cut and cover section to the west of the proposed bored tunnel and second, an extension of that bored tunnel to the west so that its portals would be located outside the WHS. The former would increase project costs by £264m and the latter by £578m (PR 5.4.18–5.4.19). In the HIA IP1 stated that the options involving 4.5 kilometre tunnels were assessed as having "significantly higher estimated scheme costs that were considered to be unaffordable and were not considered further in the assessment" (para 7.3.12) However, in the Examination IP1 said, in addition, that it had rejected both of these options not purely on the grounds of cost but also because they would provide "minimal benefit in heritage terms" (PR 5.4.20).

248. It is important to see IP1's case in context. First, it did not consider that any of the elements of the western section of its proposal would cause substantial harm to designated heritage assets (para 73 above). Second, it ***131*** considered that there would be a beneficial effect on five attributes of the OUV, only a slightly adverse effect on two attributes and a slightly beneficial effect looking at the OUV, authenticity and integrity of the WHS overall (para 75 above).

249. The Panel recorded the position of IP2 as having been satisfied, that IP1 had undertaken "an options appraisal in relation to the alternatives to the route of a highway in place of the A303" (PR 5.4.55). Once again, "options appraisal" referred to the term used in paragraph 4.27 of the NPSNN. IP1 also asks the court to note PR 5.4.54 and 5.4.63 where the Panel recorded that IP2 had said that they were satisfied that the EIA had addressed alternatives, relying also upon the HIA, including the text quoted in para 247 above from PR 7.3.12. However, it was not suggested that IP2 addressed the issue whether the relative merits of alternatives needed to be considered by the SST in order to meet common law or policy requirements under the NPSNN for the protection of heritage assets and their settings. Nor has the court been shown any assessment by IP2, which was before the Panel or SST, agreeing with IP1's additional contention that the extended tunnel options would bring only minimal benefits in heritage terms.

250. In its conclusions the Panel said that it was satisfied that IP1 had carried out a "full options appraisal" for the project in achieving its selection for inclusion in the RIS [6] [7] as referred to in paragraph 4.27 of the NPSNN. The Panel also relied upon IP2's view that "the EIA has addressed alternatives" and that IP1 had carried out an options appraisal on alternatives for the route of a highway to replace the A303 as it passes through the WHS (PR 5.4.63). The Panel stated that the criticisms made by

interested parties of the appraisal process and public consultation did not alter its view that a full options appraisal had been carried out by IP1 (PR 5.4.67). Importantly, the Panel referred expressly to IP1's case that because the scheme retained its status in the RIS, "further option testing need not be considered by the [Panel] or by the [SST]" (PR 5.4.68). The Panel also referred to the "full response" which IP1 had given on the alternatives referred to by interested parties, noting that IP1 had "explained" its reasons for their rejection and the selection of the scheme route. The Panel said that it found "no reason to question the method and approach of the appraisal process that led to that outcome" (PR 5.4.69).

251. After noting the views of the WHC (PR 5.4.70), the Panel then reached this highly important conclusion at PR 5.4.71:

> "However, in so far as the options appraisal is concerned, the ExA is content that the Applicant's approach to the consideration of alternatives is in accordance with the NPSNN. It is satisfied that the Applicant has undertaken a proportionate consideration of alternatives as part of the investment decision-making process. *Since that exercise has been carried out, it is not necessary for this process to be reconsidered by the ExA or the decision-maker* ." (Emphasis added.)

This simply restated paragraph 4.27 of the NPSNN.

252. The Panel addressed the EIA requirement for assessment of alternatives in PR 5.4.72–5.4.73. Its conclusions focused on the adequacy ***132** of the description in the ES of IP1's study of alternatives. Consistent with what it had just said in PR 5.4.71, the Panel did not make its own appraisal of the relative merits of the proposed scheme and alternatives, in particular the longer tunnel option, despite the fact that subsequently in section 5.7 of its report, the Panel went on to make a number of strong criticisms of the proposed western section which subsequently drove its recommendation that the application for development consent be refused.

253. In PR 5.4.74 the Panel addressed alternatives, in the context of compulsory acquisition. But it is not suggested that that addressed alternatives to, for example, the western cutting. Instead, the Panel referred to land required for the deposit of tunnel arisings.

254. The Panel's overall conclusions at PR 5.4.75 were: "The ExA concludes that there are no policy or legal requirements that would lead it to recommend that development consent be refused for the Proposed Development in favour of another alternative."

255. Similarly, at PR 7.2.28 the Panel concluded:

> "The ExA is satisfied that the Applicant has carried out a proportionate option consideration of alternatives as part of the investment decision-making process which led to the inclusion of the scheme within RIS1. It concludes that the Applicant has complied with the NPSNN, paragraphs 4.26 and 4.27. There are no policy, or legal requirements that would lead the ExA to recommend that consent be refused for the Proposed Development in favour of another alternative."

256. In his decision letter the SST merely stated that the impacts of a number of factors, including alternatives, were neutral (DL 63). In relation to alternatives the SST relied upon section 5.4 of the Panel's report and PR 7.2.28. He said that he saw "no reason to disagree with the [panel's] reasoning and conclusions on these matters".

257. Accordingly, both the Panel and the SST considered alternatives on the same basis as IP1, in that it was necessary to

consider alternatives, but only in relation to whether an options appraisal had been carried out, whether the ES produced by IP1 had complied with the EIA Regulations 2017 and whether compulsory acquisition of land was justified. Although regulation 21(1) of the EIA Regulations 2017 required the SST to take into account the "environmental information", which included the representations made on the ES (see para 31 above), the Panel and the SST did not go beyond assessing the adequacy of the assessment of alternatives in the ES for the purposes of compliance with that legislation. Neither the Panel nor the SST expressed any conclusions about whether the provision of a longer tunnel would achieve only "minimal benefits" as claimed by IP1 in its evidence to the Examination (PR 5.4.20), taking into account not only the costs of the alternatives but also the level of harm to heritage assets which would result from the proposed scheme.

258. Accordingly, the approach taken by the Panel and by the SST under the EIA Regulations 2017 did not go beyond that set out in PR 5.4.71. Yet these were vitally important issues raised in relation to a heritage asset of international importance by WHC, ICOMOS and many interested parties, including archaeological experts. It is also necessary to keep in mind the nature of the western section of the proposal which had given rise to so much controversy. The Panel pithily described it as the greatest physical change ***133*** to the Stonehenge landscape in 6,000 years and a change which would be permanent and irreversible, unlike a road constructed on the surface of the land (PR 5.7.224–5.7.225 and 5.7.247). Does the approach taken by the Panel and adopted by the SST disclose an error of law?

259. It is necessary to return to the NPSNN. Paragraph 4.26 begins by stating a general principle, that an applicant should comply with "all legal requirements" and "any policy requirements set out in this NPS" on the assessment of alternatives. The NPSNN goes on to set out requirements which should be considered "in particular", namely, the EIA Directive (Parliament and Council Directive 2011/92/EU) and the Water Framework Directive and "policy requirements in the NPS for the consideration of alternatives". But those instances are not exhaustive. "Legal requirements" include any arising from judicial principles set out in case law as well as the Habitats Regulations 2017 . Similarly, the references in paragraph 4.26 to developments in National Parks, the Norfolk Broads and Areas of Outstanding Natural Beauty and flood risk assessment are given only as examples of policy requirements for the assessment of alternatives.

260. But the Panel and, by the same token, the SST applied paragraph 4.27 of the NPSNN, which states that where a project has been subject to full options testing for the purposes of inclusion in a RIS under the IA 2015 it is *not necessary* for the Panel or the decision-maker to reconsider this process; instead, they should be satisfied that the assessment has been carried out. On a proper interpretation of the NPSNN, I do not consider that where paragraph 4.27 is satisfied (ie there has been full options testing for the purposes of a RIS) the applicant does not need to meet any requirements arising from paragraph 4.26. As the NPSNN states, a RIS is an "investment decision-making process". For example, p 91 of the current RIS, *Road Investment Strategy 2: 2020–2025* , explains that the document makes an investment commitment to the projects listed, on the assumption that they can "secure the necessary planning consents." "Nothing in the RIS interferes with the normal planning consent process." [8]

261. A few examples suffice to illustrate why paragraph 4.27 of the NPSNN cannot be treated as overriding paragraph 4.26. First, a scheme may require appropriate assessment under the Habitats Regulations 2017 and the consideration of alternatives by the competent authority, following any necessary consultations (regulations 63 and 64). Those obligations on the competent authority (which are addressed in paragraph 4.24 of the NPSNN) cannot be circumvented by reliance upon paragraph 4.27 of the NPSNN.

262. Second, even if a full options appraisal has been carried out for the purposes of including a project in a RIS, that may not have involved all the considerations which are required to be taken into account under the development consent process or there may have been a change in circumstance since that exercise was carried out. In the present case, p 3-3 of chapter 3 of the ES stated that the options involving a 4.5 kilometre tunnel (ie a western extension) all involved costs significantly in excess of the available budget and so had not been considered further. During the Examination IP1 stated, in a response to questions from the Panel, that it also considered that extending the tunnel to the west would provide only "minimal benefit" in heritage terms (PR 5.4.20). That was an additional and controversial issue in the Examination which fell to be considered by the Panel. ***134***

263. Third, the options testing for a RIS may rely upon a judgment by IP1 with which the Panel disagrees and which, therefore, undermines reliance upon that exercise and paragraph 4.27 of the NPSNN. In the present case, IP1's assessment that the extended tunnel options would bring minimal benefit in heritage terms cannot be divorced from its judgments that (i) no part of its proposed scheme would cause substantial harm to any designated heritage asset (para 71 above) and (ii) there would be

a beneficial effect on five attributes of the OUV, only a slightly adverse effect on two attributes and a slightly beneficial effect looking at the OUV, authenticity and integrity of the WHS overall (para 75 above). By contrast, the Panel explained why it considered that (i) the western section of the proposal would cause substantial harm to the settings of assets (paras 97–98 above) and (ii) there would be harm to six attributes of the OUV (including great or major harm to three attributes), the integrity and authenticity of the WHS would be substantially and permanently harmed and its authenticity seriously harmed (paras 101–103 above). In such circumstances, it was irrational for the Panel to treat the options testing carried out by IP1 as making it unnecessary to assess the relative merits of the tunnel alternatives for themselves, a fortiori if there was a policy or legal requirement for that matter to be considered by the decision-maker.

264. The Panel's finding that substantial harm would be caused to a WHS, an asset of the "highest significance" meant that paragraph 5.131 of the NPSNN was engaged (see para 46 above). On that basis it would have been "wholly exceptional" to treat that level of harm as acceptable.

265. Furthermore, on the Panel's view paragraph 5.133 of the NPSNN was engaged. It would follow that the application for consent was to be refused unless it was demonstrated that the substantial harm was "necessary" in order to deliver substantial public benefits outweighing that harm. It is relevant to note that this policy also applies to the complete loss of a heritage asset. In such circumstances, it is obviously material for the decision-maker (and any reporting inspector or panel) to consider whether it was unnecessary for that loss or harm to occur in order to deliver those benefits. The test is not merely a balancing exercise between harm and benefit. Accordingly, relevant alternatives for achieving those benefits are an obviously material consideration. However, although in the present case the Panel made its vitally important finding of substantial harm, it simply carried out a balancing exercise without also applying the necessity test. In the Panel's judgment the proposal failed simply on the balance of benefits and harm, even without considering whether any alternatives would be preferable (see para 120). Because the Panel approached the matter in that way, the SST did not have the benefit of the Panel's views on the relative merits of the extended tunnel options compared to the proposed scheme.

266. The SST differed from the Panel in that he considered the western section of the scheme would cause less than substantial harm. Consequently, paragraph 5.134 of the NPSNN was engaged. That only required the balancing of heritage harm against the public benefits of the proposal without also imposing a necessity test. However, when it came to striking the overall planning balance, the SST relied upon the need for the scheme and the benefits it would bring (see paras 130 and 140–141 above).

267. Furthermore, the SST did not differ from the Panel in relation to the effect of the western section on attributes of the OUV and the integrity and ***135*** authenticity of the WHS. He also accepted the Panel's view that the beneficial effects of the scheme on the OUV did not outweigh the harm caused (see paras 139 and 142–144 above).

268. The principles on whether alternative sites or options may permissibly be taken into account or whether, going further, they are an "obviously material consideration" which must be taken into account, are well established and need only be summarised here.

269. The analysis by Simon Brown J (as he then was) in *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1986) 53 P & CR 293, 299–300* has subsequently been endorsed in several authorities. First, land may be developed in any way which is acceptable for planning purposes. The fact that other land exists upon which the development proposed would be yet more acceptable for such purposes would not justify the refusal of planning permission for that proposal. But, secondly, where there are clear planning objections to development upon a particular site then "it may well be relevant and indeed necessary" to consider whether there is a more appropriate site elsewhere. "This is particularly so where the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it." Examples of this second situation may include infrastructure projects of national importance. The judge added that, even in some cases which have these characteristics, it may not be necessary to consider alternatives if the environmental impact is relatively slight and the objections not especially strong.

270. The Court of Appeal approved a similar set of principles in *R (Mount Cook Land Ltd) v Westminster City Council [2017] PTSR 1166, at para 30* . Thus, in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant. In those "exceptional circumstances" where alternatives might be relevant, vague or inchoate schemes, or which have no real possibility

of coming about, are either irrelevant or, where relevant, should be given little or no weight.

271. Essentially the same approach was set out by the Court of Appeal in *R (Jones) v North Warwickshire Borough Council [2001] 2 PLR 59, paras 22–30* . At para 30 Laws LJ stated:

> "it seems to me that all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking—and I lay down no fixed rule, any more than did Oliver LJ or Simon Brown J—such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question."

272. In *Derbyshire Dales District Council v Secretary of State for Communities and Local Government [2010] 1 P & CR 19* Carnwath LJ emphasised the need to draw a distinction between two categories of legal error: first, where it is said that the decision-maker erred by taking alternatives into account and second, where it is said that he had erred ***136** by failing to take them into account (paras 17 and 35). In the second category an error of law cannot arise unless there was a legal or policy requirement to take alternatives into account, or such alternatives were an "obviously material" consideration in the case so that it was irrational not to take them into account (paras 16–28).

273. In *R (Langley Park School for Girls) v Bromley London Borough Council [2010] 1 P & CR 10* the Court of Appeal was concerned with alternative options within the same area of land as the application site, rather than alternative sites for the same development. In that case it was necessary for the decision-maker to consider whether the openness and visual amenity of metropolitan open land ("MOL") would be harmed by a proposal to erect new school buildings. MOL policy is very similar to that applied within a Green Belt. The local planning authority did not take into account the claimant's contention that the proposed buildings could be located in a less open part of the application site resulting in less harm to the MOL. Sullivan LJ referred to the second principle in *Trusthouse Forte* and said that it must apply with equal, if not greater, force where the alternative suggested relates to different siting within the same application site rather than a different site altogether (paras 45–46). He added that no "exceptional circumstances" had to be shown in such a case (para 40).

274. At paras 52–53 Sullivan LJ stated:

> "52. It does not follow that in every case the 'mere' possibility that an alternative scheme might do less harm must be given no weight. In the *Trusthouse Forte* case the Secretary of State was entitled to conclude that the normal forces of supply and demand would operate to meet the need for hotel accommodation on another site in the Bristol area even though no specific alternative site had been identified. There is no 'one size fits all' rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm."
>
> "53. Where any particular application falls within this spectrum; whether there is a need to consider

> the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. In the present case the members were not asked to make that judgment. They were effectively told at the onset that they could ignore Point (b), and did so simply because the application for planning permission did not include the alternative siting for which the ***137** objectors were contending, and the members were considering the merits of that application."

275. The decision cited by Mr Taylor in *First Secretary of State v Sainsbury's Supermarkets Ltd [2008] JPL 973* is entirely consistent with the principles set out above. In that case, the Secretary of State did in fact take the alternative scheme promoted by Sainsbury's into account. He did not treat it as irrelevant. He decided that it should be given little weight, which was a matter of judgment and not irrational (paras 30 and 32). Accordingly, that was not a case, like the present one [9] , where the error of law under consideration fell within the second of the two categories identified by Carnwath LJ in *Derbyshire Dales District Council* (see para 272 above).

276. The wider issue which the Court of Appeal went on to address at paras 33–38 of the Sainsbury's case does not arise in our case, namely, must *planning permission be refused* for a proposal which is judged to be "acceptable" because there is an alternative scheme which is considered to be more acceptable. True enough, the decision on acceptability in that case was a balanced judgment which had regard to harm to heritage assets but that was, undoubtedly, an example of the first principle stated in *Trusthouse Forte* (see para 269 above). The court did not have to consider the second principle, which is concerned with whether a decision-maker may be obliged to take an alternative *into account* . Indeed, in the present case, there is no issue about whether alternatives for the western cutting should have been taken into account. As I have said, the issue here is narrower and case-specific. Was the SST entitled to go no further, in substance, than the approach set out in paragraph 4.27 of the NPSNN and PR 5.4.71?

277. In my judgment, the clear and firm answer to that question is "no". The relevant circumstances of the present case are wholly exceptional. In this case the relative merits of the alternative tunnel options compared to the western cutting and portals were an obviously material consideration which the SST was required to assess. It was irrational not to do so. This was not merely a relevant consideration which the SST could choose whether or not to take into account [10] . I reach this conclusion for a number of reasons, the cumulative effect of which I judge to be overwhelming.

278. First, the designation of the WHS is a declaration that the asset has "outstanding universal value" for the cultural heritage of the world as well as the UK. There is a duty to protect and conserve the asset (article 4 of the Convention) and there is the objective inter alia to take effective and active measures for its "protection, conservation, presentation and rehabilitation" (article 5). The NPSNN treats a World Heritage Site as an asset of "the highest significance" (paragraph 5.131).

279. Second, the SST accepted the specific findings of the Panel on the harm to the settings of designated heritage assets (eg scheduled ancient monuments) that would be caused by the western cutting in the proposed scheme. He also accepted the Panel's specific findings that OUV attributes, integrity and authenticity of the WHS would be harmed by that proposal. The Panel concluded that that overall impact would be "significantly adverse", the SST repeated that (DL 28) and did not disagree (see paras 137, 139 and 144 above). ***138**

280. Third, the western cutting involves large scale civil engineering works, as described by the Panel. The harm described by the Panel would be permanent and irreversible.

281. Fourth, the western cutting has attracted strong criticism from the WHC and interested parties at the Examination, as well as in findings by the Panel which the SST has accepted. These criticisms are reinforced by the protection given to the WHS by the objectives of articles 4 and 5 of the Convention , the more specific heritage policies contained in the NPSNN and by regulation 3 of the 2010 Regulations .

282. Fifth, this is not a case where no harm would be caused to heritage assets (see *Bramshill* at para 78). The SST proceeded

on the basis that the heritage benefits of the scheme, in particular the benefits to the OUV of the WHS, did not outweigh the harm that would be caused to heritage assets. The scheme would not produce an overall net benefit for the WHS. In that sense, it is not acceptable per se. The acceptability of the scheme depended upon the SST deciding that the heritage harm (and in the overall balancing exercise *all* disbenefits) were outweighed by the need for the new road and *all* its other benefits. This case fell fairly and squarely within the exceptional category of cases identified in, for example, *Trusthouse Forte* , where an assessment of relevant alternatives to the western cutting was required (see para 269 above).

283. The submission of Mr Strachan that the SST has decided that the proposed scheme is "acceptable", so that the general principle applies that alternatives are irrelevant is untenable. The case law makes it clear that that principle does not apply where the scheme proposed would cause significant planning harm, as here, and the grant of consent *depends* upon its adverse impacts being outweighed by need and other benefits (as in paragraph 5.134 of the NPSNN).

284. I reach that conclusion without having to rely upon the points on which the claimant has succeeded under ground 1(iv). But the additional effect of that legal error is that the planning balance was not struck lawfully and so, for that separate reason, the basis upon which Mr Strachan says that the SST found the scheme to be acceptable collapses.

285. Sixth, it has been accepted in this case that alternatives should be considered in accordance with paragraphs 4.26 and 4.27 of the NPSNN. But the Panel and the SST misdirected themselves in concluding that the carrying out of the options appraisal for the purposes of the RIS made it unnecessary for them to consider the merits of alternatives for themselves. IP1's view that the tunnel alternatives would provide only "minimal benefit" in heritage terms was predicated on its assessments that no substantial harm would be caused to any designated heritage asset and that the scheme would have slightly *beneficial* (not adverse) effects on the OUV attributes, integrity and authenticity of the WHS. The fact that the SST accepted that there would be net harm to the OUV attributes, integrity and authenticity of the WHS (see paras 139 and 144 above) made it irrational or logically impossible for him to treat IP1's options appraisal as making it unnecessary for him to consider the relative merits of the tunnel alternatives. The options testing by IP1 dealt with those heritage impacts on a basis which is inconsistent with that adopted by the SST.

286. Seventh, there is no dispute that the tunnel alternatives are located within the application site for the DCO. They involve the use of essentially ***139** the same route and certainly not a completely different site or route. Accordingly, as Sullivan LJ pointed out in *Langley Park* (see para 273 above), the second principle in *Trusthouse Forte* applies with equal, if not greater force.

287. Eighth, it is no answer for the SST to say that DL 11 records that the SST has had regard to the "environmental information" as defined in regulation 3(1) of the EIA Regulations 2017 . Compliance with a requirement to take information into account does not address the specific obligation in the circumstances of this case to compare the relative merits of the alternative tunnel options.

288. Ninth, it is no answer for the SST to say that in DL 85 the SST found that the proposed scheme was in accordance with the NPSNN and so section 104(7) of the PA 2008 may not be used as a "back door" for challenging the policy in paragraph 4.27 of the NPSNN. I have previously explained why paragraph 4.27 does not override paragraph 4.26 of the NPSNN and does not disapply the common law principles on when alternatives are an obviously material consideration. But, in addition, the SST's finding that the proposal accords with the NPSNN for the purposes of section 104(3) of the PA 2008 is vitiated (a) by the legal error upheld under ground 1(iv) and, in any event, (b) by the legal impossibility of the SST deciding the application in accordance with paragraph 4.27 of the NPSNN.

289. I should add, for completeness, that neither the Panel nor the SST suggested that the extended tunnel options need not be considered because they were too vague or inchoate. That suggestion has not been raised in submissions.

290. For all these reasons, I uphold ground 5(iii) of this challenge.

Conclusions

291. The court upholds two freestanding grounds of challenge, 1(iv) and 5(iii). Permission is granted to the claimant to apply for judicial review in relation to those grounds.

292. Permission is refused to apply for judicial review in respect of all other grounds on the basis that each of them is unarguable.

293. There is no basis for the court to hold that relief should be withheld under section 31(2A) of the Senior Courts Act 1981 . It is self-evident from the nature of each of the grounds I have upheld that it cannot be said that it is highly likely that the application for development consent would still have been granted if neither error had been made.

294. The claim for judicial review succeeds to the extent I have indicated. The claimant is entitled to an order quashing the SST's decision to grant development consent and the DCO itself. ***140**

Catherine May, Solicitor ***150**

Order accordingly.

Appendix 1—Legal principles agreed between the parties

1. The general legal principles applicable to a judicial review of this kind are well established. Amongst other things:

(a) There is a clear and basic distinction between questions of interpretation of policy and the application of policy and matters of planning judgment. The court will not interfere with matters of planning judgment other than on legitimate public law grounds: see, for example, *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2020] PTSR 1709 at paras 101 and 103 [4/9/203–204]* , applying *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] PTSR 221* and *St Modwen Developments Ltd v Secretary of State for Communities and Local Government [2018] PTSR 746, para 7* .

(b) Decision letters should be read (1) fairly and in good faith, and as a whole; (2) in a straightforward and down-to-earth manner, without excessive legalism or criticism; and (3) as if by a well-informed reader who understands the principal controversial issues in the case: see *St Modwen* above and the principles in *Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153* , 164E–G).

(c) Reasons given for a decision must be intelligible, adequate and enable the reader to understand why the matter was decided as it was: see, for example, *South Bucks District Council v Porter (No 2) [2004] 1 WLR 1953* . The question is whether the reasons given leave room for genuine, as opposed to forensic, doubt as to what was decided and why (*R (CPRE Kent) v Dover District Council [2018] 1 WLR 108, para 42*). Reasons can be briefly stated and there is no requirement to address each and every point made, provided that the reasons explain the decision-maker's conclusions on the principal important controversial issues. In circumstances where the Secretary of State disagrees with a recommendation from a planning inspector, there is no different standard of reasons: see *ClientEarth* High Court judgment at para 146 and *Allen v Secretary of State for Communities and Local Government [2016] EWCA Civ 767 at [19]* . However, "if disagreeing with an inspector's recommendation the Secretary of State is … required to explain why he rejects the inspector's view": see *Horada v Secretary of State for Communities and Local Government [2016] PTSR 1271, para 40* . Similarly, in the heritage context, the need to give considerable importance and weight to listed building preservation does not change the standard of legally adequate reasons for granting planning permission: see *Mordue v Secretary of State for Communities and Local Government [2016] 1 WLR 2682, paras 24–26* . Reasons do not need to be given for the way in which every material consideration has been dealt with (*HJ Banks & Co Ltd v Secretary of State for Housing, Communities and Local Government [2019] PTSR 668*).

(d) The judgment of Lewis J in *R (Mars Jones) v Secretary of State for Business, Energy and Industrial Strategy [2017] EWHC 1111 (Admin)* has applied the *South Bucks* standard of reasons to development consent decisions (at para 47). ***141**

(e) Where it is alleged that a decision-maker has failed to take into account a material consideration, it is insufficient for a claimant simply to say that the decision-maker has failed to take into account a material consideration. A legally relevant consideration is only something that is not irrelevant or immaterial, and therefore something which the decision-maker is empowered or entitled to take into account. But a decision-maker does not fail to take a relevant consideration into account unless he was under an obligation to do so. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account: see *ClientEarth [2020] PTSR 1709, at para 99* applying *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020]*

PTSR 221 .

(f) The interpretation of planning policy is a matter for the court. In *R (Scarisbrick) v Secretary of State for Communities and Local Government [2017] EWCA Civ 787* , the Court of Appeal considered the interpretation of national policy statement for nationally significant hazardous waste infrastructure under the Planning Act 2008 . See paras 5–8. Lindblom LJ (with whom the other Lord Justices agreed) held:

> "19. The court's general approach to the interpretation of planning policy is well established and clear (see the decision of the Supreme Court in *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening) [2012] UKSC 13; [2012] PTSR 983* , in particular the judgment of Lord Reed JSC at paras 17–19). The same approach applies both to development plan policy and statements of government policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd* and *Richborough Estates Partnership LLP v Cheshire East Borough Council [2017] UKSC 37; [2017] 1 WLR 1865 at [22]–[26]*). Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context (see para 18 of Lord Reed's judgment in *Tesco Stores v Dundee City Council).* The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in the end, a matter for the court (see para 18 of Lord Reed's judgment in *Tesco Stores v Dundee City Council).* But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning judgment is subject only to review on public law grounds (see paras 24–26 of Lord Carnwath's judgment in *Suffolk Coastal District Council*). It is not suggested that those basic principles are inapplicable to the NPS—notwithstanding the particular statutory framework within which it was prepared and is to be used in decision-making." ***142**

Heritage Assessment—The statutory duty

2. Regulation 3 of the [Infrastructure Planning (Decision) Regulations 2010] states:

> "(1) When deciding an application which affects a listed building or its setting, the Secretary of State must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.
>
> "(2) When deciding an application relating to a conservation area, the Secretary of State must have regard to the desirability of preserving or enhancing the character or appearance of that area.
>
> "(3) When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the Secretary of State must have regard to the desirability of preserving the scheduled monument or its setting."

3. The 2010 Regulations do not address World Heritage Sites, although they do address individual scheduled monuments, listed buildings etc within a World Heritage Site.

4. The equivalent sections applying to listed buildings and conservation areas in relation to planning decisions are in section 66(1) and section 72(1) Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act"). These state:

> (1) In considering whether to grant planning permission … for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."
>
> (1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

5. The case law concerning the wording of the statutory duties in the Listed Buildings Act refers to the decision-maker being required to give "considerable importance and weight" to the desirability of: (a) preserving listed buildings or their settings, (b) preserving or enhancing the character or appearance of a conservation area, (c) preserving scheduled monuments or their settings (see *East Northamptonshire District Council v Secretary of State for Communities and Local Government [2015] 1 WLR 45* the Court of Appeal (following *South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141* and *Bath Society v Secretary of State for the Environment [1991] 1 WLR 1303*)).

6. In *R (Forge Field Society) v Sevenoaks District Council [2015] JPL 22* Lindblom J (as he then was) stated in respect of duties in the Listed Buildings Act that: "There is a statutory presumption, and a strong one, against granting planning permission for any development which would fail to preserve the setting of a listed building or the character or appearance of a conservation area" (at para 45). The judge went on at para 49: ***143**

> "an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering."

7. The case of *South Lakeland* (above) confirmed that the concept of "preserving" under the Listed Buildings Act means "doing no harm" (per Lord Bridge of Harwich at pp 149–50).

8. Lindblom LJ provided further guidance in relation to the duty in relation to the settings of listed buildings under the Listed Buildings Act in *Steer v Catesby Estates [2019] 1 P & CR 5* . He highlighted that:

> (a) "the section 66(1) duty, where it relates to the effect of a proposed development on the setting of a listed building, makes it necessary for the decision-maker to understand what that setting is—even if its extent is difficult or impossible to delineate exactly—and whether the site of the proposed development will be within it or in some way related to it. Otherwise, the decision-maker may find it hard to assess whether and how the proposed development 'affects' the setting of the listed building, and to perform the statutory obligation to 'have special regard to the desirability of preserving … its setting …'" Para 28.
>
> (b) "though this is never a purely subjective exercise, none of the relevant policy guidance and advice prescribes for all cases a single approach to identifying the extent of a listed building's setting. Nor could it. In every case where that has to be done, the decision-maker must apply planning judgment

to the particular facts and circumstances, having regard to relevant policy, guidance and advice. The facts and circumstances will differ from one case to the next." Para 29.

(c) "the effect of a particular development on the setting of a listed building— where, when and how that effect is likely to be perceived, whether or not it will preserve the setting of the listed building, whether, under government policy in the NPPF, it will harm the 'significance' of the listed building as a heritage asset, and how it bears on the planning balance—are all matters for the planning decision-maker, subject, of course, to the principle emphasised by this court in *East Northamptonshire District Council v Secretary of State for Communities and Local Government [2015] 1 WLR 45 (at paras 26–29)* , [*Mordue v Secretary of State for Communities and Local Government [2016] 1 WLR 2682 (at paras 21–23)*], and [*R (Palmer) v Herefordshire Council [2017] 1 WLR 411 (at para 5)*], that 'considerable importance and weight' must be given to the desirability of preserving the setting of a heritage asset. Unless there has been some clear error of law in the decision-maker's approach, the court should not intervene (see [*R (Williams) v Powys County Council [2018] 1 WLR 439], at para 72*). For decisions on planning appeals, this kind of case is a good test of the principle stated by Lord Carnwath in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] 1 WLR 1865 (at para 25)* —that 'the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly'." Para 30. ***144**

9. The most recent judgment of the Court of Appeal addressing paragraph 196 NPPF is *City & Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 320; [[2021] 1 WLR 5761]* . In that case, the court confirmed that neither paragraph 196 NPPF nor section 66(1) Listed Buildings Act 1990 require an internal heritage balance to be conducted in order to arrive at the level of harm to an asset before weighing that harm against public benefits. The key passages of the judgment are at paras 71–81.

Appendix 2—Paras 25–43 and 50 of the decision letter

25. The Secretary of State notes the ExA's [Examining Authority's] consideration of cultural heritage and the historic environment in Chapter 5.7 of the Report and the differing positions on this matter among others of: Wiltshire Council [PR 5.7.55–5.7.61]; the Historic Buildings and Monuments Commission for England ("Historic England") [PR 5.7.62–5.7.69]; the National Trust [PR 5.7.70–5.7.71]; English Heritage Trust [PR 5.7.72]; International Council on 7 Monuments and Sites ("ICOMOS") Missions [PR 7.7.73–5.7.80]; Department for Digital, Culture, Media and Sport ("DCMS") [PR 5.7.81–5.7.83]; International Council on Monuments and Sites, UK ("ICOMOS-UK") [PR 5.7.84–5.7.98]; Stonehenge and Avebury World Heritage Site Co-ordination Unit ("WHSCU") [PR 5.7.99–PR 5.7.104]; the Stonehenge Alliance (comprising: Ancient Sacred Landscape Network, Campaign for Better Transport, Campaign to Protect Rural England, Friends of the Earth, and Rescue: The British Archaeological Trust) [PR 5.7.105–5.7.108]; the Consortium of Archaeologists and the Blick Mead Project Team ("COA") [PR 5.7.109–5.7.120]; and the Council for British Archaeology ("CBA") and CBA Wessex [PR 5.7.121–5.7.128].

26. Central to the Secretary of State's consideration of cultural heritage and historic environment is the question of the Development's conformity with the NPSNN and whether substantial or less than substantial harm is caused to the Outstanding Universal Value ("OUV") of the WHS. The NPSNN (paragraphs 5.131–5.134) states that substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, should be wholly exceptional and that any harmful impact on the significance of a designated heritage asset should be weighed against the public benefit of the development, recognising that the greater the harm to the significance of the heritage site, the greater the justification that will be needed for any loss. Where the Development would lead to substantial harm to or total loss of significance of a designated heritage asset, the Secretary of State should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm. Where the Development will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal.

27. The Secretary of State notes that the concept of OUV has evolved and been incorporated in the UNESCO document "The Operational Guidelines ("OG") for the Implementation of the World Heritage Convention", which have been regularly revised since 1977 (the latest update being in 2019). It is noted that the term OUV is defined in para 49 of the OG as meaning: "Outstanding Universal Value means cultural and/or national significance which is so exceptional as to transcend national boundaries ***145*** and to be of common importance for present and future generations of all humanity". The Secretary of State notes the UNESCO definitions of criteria for inscription of the WHS on the World Heritage List [PR 2.2.2] and the description of the attributes of OUV4 [PR 2.2.6] has been set out by the ExA. The WHS Management Plan that was adopted for the WHS in 2015 sets out the vision and management priorities for the WHS to sustain its OUV [PR 3.13.1–3.13.2]. The ExA has also considered the local Development Plan, National Planning Policy Framework ("NPPF"), and the Statement of Outstanding Universal Value that exists for the WHS as important and relevant matters [PR 5.7.13–5.7.17].

28. The ExA concludes the Development would benefit the OUV in certain valuable respects, especially relevant to the present generation. However, permanent irreversible harm, critical to the OUV would also occur, affecting not only present, but future generations. It considers the benefits to the OUV would not be capable of offsetting this harm and that the overall effect on the WHS OUV would be significantly adverse [PR 5.7.321]. The ExA considers the Development's impact on OUV does not accord with the Wiltshire Core Strategy Core Policies 59 and 58, which aim to sustain the OUV of the WHS and ensure the conservation of the historic environment [PR 5.7.322–5.7.324], and that the Development is also not consistent with Policy 1d of the WHS Management Plan [PR 5.7.325]. It considers this is a factor to which substantial weight can be attributed [PR 7.5.11].

29. In the ExA's overall heritage assessment [PR 5.7.327–5.7.333] the ExA considers the cultural heritage analysis and assessment methodology adopted by the Applicant appropriate, subject to certain points of criticism. These include poor consideration of the influence of the proposed Longbarrow Junction on OUV; inadequate attention paid to the less tangible and dynamic aspects of setting, as well as the absence of consideration of certain settings; and concerns regarding the consideration given to the interaction and overall summation of effects. The ExA took these points into account in its assessment [PR 5.7.327]. The ExA is also content overall with the mitigation strategy, apart from the proposed approach to artefact sampling and various other points identified. As set out in Appendix E to its Report the ExA recommends the Secretary of State considers resolving these matters if the decision differs from the recommendation [PR 5.7.328].

30. On the effects of the Development on spatial relations, visual relations and settings, the ExA concludes that substantial harm would arise. This conclusion does not accord with that of Historic England, but is based on the ExA's professional judgments, having regard to the entirety of evidence on cultural heritage [PR 5.7.329]. In particular, the ExA places great weight on the effects of the spatial division of the cutting, in combination with the presence of the Longbarrow junction on the physical connectivity between the monuments and the significance that they derive from their settings. This includes the physical form of the valleys, with their historic significance for past cultures, and the presence of archaeological remains [PR 5.7.330].

31. The ICOMOS mission reports and the WH Committee decisions, alongside the submissions of DCMS, in the context of the remainder of the evidence examined have been noted by the ExA and it regards the reports and decisions as both relevant and important, but not of such weight as to be determinative in themselves [PR 5.7.331]. ***146***

32. The Secretary of State notes the ExA's approach has been to integrate cumulative and in-combination effects into its assessment, where relevant and that the ExA agrees with the outcome of the Applicant's exercise that cumulative effects arising from the future baseline would not be significant, and that adequate mitigation has been arranged in respect of in-combination effects during construction and operation [PR 5.7.332].

33. It is the ExA's opinion that when assessed in accordance with NPSNN, the Development's effects on the OUV of the WHS, and the significance of heritage assets through development within their settings taken as a whole would lead to substantial harm [PR 5.7.333]. However, the Secretary of State notes the ExA also accepts that its conclusions in relation to cultural heritage, landscape and visual impact issues and the other harms identified, are ultimately matters of planning judgment on which there have been differing and informed opinions and evidence submitted to the examination [PR 7.5.26]. The Secretary of State notes the ExA's view on the level of harm being substantial is not supported by the positions of the Applicant, Wiltshire Council, the National Trust, the English Heritage Trust, DCMS and Historic England. These stakeholders place greater weight

on the benefits to the WHS from the removal of the existing A303 road compared to any consequential harmful effects elsewhere in the WHS. Indeed, the indications are that they 9 consider there would or could be scope for a net benefit overall to the WHS [PR 5.7.54, PR 5.7.55, PR 5.7.62, PR 5.7.70, PR 5.7.72 and PR 5.7.83].

34. The Secretary of State notes the differing positions of the ExA and Historic England, who has a duty under the provisions of the National Heritage Act 1983 (as amended) to secure the preservation and enhancement of the historic environment. He agrees with the ExA that there will be harm on spatial, visual relations and settings that weighs against the Development. However, he notes that there is no suggestion from Historic England that the level of harm would be substantial. Ultimately, the Secretary of State prefers Historic England's view on this matter for the reasons given [PR 5.7.62–5.7.69] and considers it is appropriate to give weight to its judgment as the Government's statutory advisor on the historic environment, including world heritage. The Secretary of State is satisfied therefore that the harm on spatial, visual relations and settings is less than substantial and should be weighed against the public benefits of the Development in the planning balance.

35. Whilst also acknowledging the adverse impacts of the Development, the Secretary of State notes that Historic England's concluding submission [Examination Library document AS-111] states that it has supported the aspirations of the Development from the outset and that putting much of the existing A303 surface road into a tunnel would allow archaeological features within the WHS, currently separated by the A303 road, to be appreciated as part of a reunited landscape, and would facilitate enhanced public access to this internationally important site [PR 5.7.62] and that overall it broadly concurs with the Applicant's Heritage Impact Assessment [PR 5.7.66]. Furthermore, it is also noted from Historic England's concluding submission that it considers the Development proposes a significant reduction in the sight and sound of traffic in the part of the WHS where it will most improve the experience of the Stonehenge monument itself, and enhancements to the experience of the solstitial alignments [PR 5.12.32]. It considers that, alongside enhanced public access, these are all significant benefits for the historic environment. ***147**

36. The Secretary of State also notes from Historic England's concluding submission made during the examination [Examination library document AS-111] that its objective through the course of the examination was to ensure that the historic environment is fully and properly taken into account in the determination of the application and, if consented, that appropriate safeguards be built into the Development across the DCO, OEMP and the Detailed Archaeological Mitigation Strategy ("DAMS") [PR 5.7.63]. Whilst it is also noted that Historic England identified during the examination a number of concerns where further information, detail, clarity or amendments were needed, particularly around how the impacts of the Development would be mitigated, their concluding submission states that its concerns have been broadly addressed. Historic England believe that the DCO, OEMP and DAMS set out a process to ensure that heritage advice and considerations can play an appropriate and important role in the construction, operation and maintenance of the Development. As a consequence of the incorporation of the Design Vision, Commitments and Principles in the OEMP, together with arrangements for consultation and engagement with Historic England, it considers sufficient safeguards have been built in for the detailed design stage and there are now sufficient provisions for the protection of the historic environment in the DCO. It is Historic England's view that the DAMS is underpinned by a series of scheme specific research questions which will ensure that an understanding of the OUV of the WHS and the significance of the historic environment overall will guide decision-making and maximise opportunities to further understand this exceptional landscape. It considers the DAMS will also ensure that the archaeological mitigation under the Site Specific Written Schemes of Investigation ("SSWSIs") will be supported by the use of innovative methods 10 and technologies and the implementation of an iterative and intelligent strategy, which will enable it to make a unique contribution to international research agendas.

37. Given the amendments and assurances requested and received during the course of the examination and the safeguards that are now built into the DCO overall, Historic England states in the concluding submission that it is confident of the Development's potential to deliver benefits for the historic environment.

38. The Secretary of State also notes that Historic England would continue to advise the Applicant on the detail of the design and delivery of the Development through its statutory role and its roles as a member of Heritage Monitoring and Advisory Group and of the Stakeholder Design Consultation Group. The ExA agrees with Historic England's view that this would also help minimise impact on the OUV, and delivery of the potential benefits for the historic environment [PR 5.7.69].

39. Historic England's response to the Secretary of State's further consultation on 4 May 2020 also indicates that its advice has addressed the need to avoid any risk of confusion which might impede the successful operation of the processes, procedures

and consultation mechanisms set out in the revised DAMS and OEMP designed to minimise the harm to the Stones and surrounding environment of the WHS.

40. Similarly, the Secretary of State also notes the National Trust's support for the Development and view that, if well designed and delivered with the utmost care for the surrounding archaeology and chalk grassland landscape, the Development could provide an overall benefit to the WHS. It also ***148** considers the Development could help to reunite the landscape providing improvements to monument setting, tranquillity and access for both people and wildlife. Following initial concerns about the lack of detail in relation to both design and delivery, it is now satisfied that sufficient control measures have been developed through the DAMS and OEMP and also in the DCO [PR 5.7.70–5.7.71]. English Heritage Trust support the scope for linking Stonehenge back to its wider landscape and making it possible for people to explore more of the WHS and welcomes the reconnection of the line of the Avenue [PR 5.7.72]. DCMS also expressed the view that the Development represents a unique opportunity to improve the ability to experience the WHS and its overall impact would be of benefit to the OUV of the WHS, primarily through the removal of the existing harmful road bisecting the site [PR 5.7.81–5.7.83].

41. The Secretary of State notes that whilst Wiltshire Council acknowledge that the most significant negative impact of the Development would be that of the new carriageway, cutting and portal on the western part of the WHS, the Council considers the removal of the existing A303 road would benefit the setting of Stonehenge and many groups of monuments that contribute to its OUV and the removal of the severance at the centre of the WHS caused by the road would improve access and visual connectivity between the monuments and allow the reconnection of the Avenue linear monument. It considers the removal of the existing Longbarrow Roundabout and the realignment of the A360 would also benefit the setting of the Winterbourne Stoke Barrow Group and its visual relationship to other groupings of monuments in the western part of the WHS and the absence of road lighting within the WHS and at the replacement Longbarrow Junction would help reduce light pollution. The rearranged road and byway layout to the east would remove traffic from the vicinity of the scheduled Ratfin Barrows [PR 5.7.55–5.7.57].

42. The Secretary of State also notes from the Statement of Common Ground agreed between Wiltshire Council and the Applicant [Examination library document AS-147] that Wiltshire Council's regulatory responsibility include managing impacts on Wiltshire's heritage assets and landscape, in relation to its statutory undertakings. These responsibilities include having regard to the favourable conservation status of the WHS. The document notes that the Development affects several built heritage assets, both designated and undesignated. However, all sites of interest along the route had been visited by the relevant Council officer with the built heritage consultant, and general agreement exists regarding the likely extent of the Development's impacts. Wiltshire Council agreed that there are no aspects that are considered likely to reach a level of 'substantial harm'.

43. The Secretary of State has also carefully considered the ExA's concerns and the respective counter-arguments and positions of other Interested Parties, including ICOMOS-UK, WHSCU, the Stonehenge Alliance, the COA and the CBA in relation to the effects of elements of the Development on the OUV of the WHS and on the cultural heritage and the historic environment of the wider area raised during the examination. The Secretary of State notes in particular the concerns raised by some Interested Parties and the ExA in respect of the adverse impact arising from western tunnel approach cutting and portal, the proposed Longbarrow Junction and, to a lesser extent, the eastern approach and portal [PR 5.7.207]. He accepts there will be adverse ***149** impacts from those parts of the Development. However, on balance and when considering the views of Historic England and also Wiltshire Council, he is satisfied that any harm caused to the WHS when considered as a whole would be less than substantial and therefore the adverse impacts of the Development should be balanced against its public benefits.

50. In conclusion on cultural heritage and the historic environment, the Secretary of State places great importance in particular on the views of his statutory advisor, Historic England and also sees no reason to doubt the expertise of those from Historic England or other statutory consultees that have advised on this matter (or indeed on other matters relating to the application). As indicated above, whilst he accepts there will be harm, there is no suggestion from Historic England that the harm will be substantial. The Secretary of State agrees with Historic England on this matter and is also encouraged by the continued role Historic England would have in the detailed design and delivery of the Development should consent be granted. Whilst also acknowledging some Scientific Committee experts are not content with the mitigation proposed and also that the ExA was not content with the proposed approach to artefact sampling, the Secretary of State accepts Historic England's views on this matter and is satisfied that the mitigation measures included in the updated OEMP and DAMS as submitted by the Applicant on 18 May 2020 and secured by requirements 4 and 5 in the DCO are acceptable and will help minimise harm to the WHS.

Footnotes

1 Planning Act 2008, s 104 : see post, para 35.

2 Infrastructure Planning (Decision) Regulations 2010, reg 3 : see post, para 28.

3 Infrastructure Planning (Environmental Impact Assessment) Regulations 2017, reg 21(1) : see post, para 31.

4 National Policy Statement for National Networks, paras 5.131–5.134: see post, paras 46–47.

5 Convention Concerning the Protection of the World Cultural and Natural Heritage , 1972, arts 4, 5: see post, para 58.

6 For a discussion of the statutory regime under which Road Investment Strategies are set see *R (Transport Action Network Ltd) v Secretary of State for Transport [2022] PTSR 31* .

7 *Reporter's note* . The superior figures in the text refer to the notes at the end of the judgment on pp 139-149.

8 See *R (Transport Action Network Ltd) v Secretary of State for Transport [2022] PTSR 31, paras 28–37 and 96* (vii).

9 Which is to do with a failure to assess the relative merits of identified alternatives.

10 It should be recorded that neither the Panel nor the SST considered exercising any discretion to consider the relative merits of alternative options for extending the proposed tunnel to the west, given PR 5.4.71 and their reliance upon para. 4.27 of the NPSNN.