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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Date: Thursday, 15th February 2007

B E F O R E:

MR JUSTICE SULLIVAN

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THE QUEEN ON THE APPLICATION OF GREENPEACE LIMITED

Claimant

-v-

SECRETARY OF STATE FOR TRADE AND INDUSTRY

Defendant

- - - - - - -

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MR NIGEL PLEMING QC and **MS KASSIE SMITH** (**MISS JUSTINE THORNTON** appeared in place of Ms Smith for the purposes of judgment only) (instructed by Messrs Harrison Grant) appeared on behalf of the Claimant

MR RICHARD DRABBLE QC and **MR DAVID FORSDICK** (instructed by Treasury Solicitor) appeared on behalf of the Defendant

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J U D G M E N T

MR JUSTICE SULLIVAN:

Introduction

1. In this application for judicial review the claimant applies for a quashing order in respect of the defendant's decision, announced in "The Energy Challenge Energy Review Report 2006" to support nuclear new build as part of the United Kingdom's future electricity generating mix. The quashing order is sought on the ground that the consultation process leading to the decision was procedurally flawed and that therefore the decision was unlawful.

The evolution of energy policy

2. There are very many, often very lengthy, documents and what follows is, necessarily, the briefest summary. The story begins in June 2001 when the Prime Minister asked the Performance and Innovation Unit ("the PIU") at No. 10 Downing Street to review the strategic issues surrounding energy policy and to report to the Government. In February 2002 the PIU published "The Energy Review". Nuclear power was considered in some detail (see paragraphs 6.46-6.55 and 7.70-7.82). Under the sub-heading "Measures are needed to keep the nuclear option open ..." the Executive Summary to the document said:

> "Nuclear power offers a zero carbon source of electricity on a scale, which, for each plant, is larger than that of any other option. If existing approaches both to low carbon electricity generation and energy security prove difficult to pursue cheaply, then the case for using nuclear would be strengthened.
>
> Nuclear power seems likely to remain more expensive than fossil fuelled generation, though current development work could produce a new generation of reactors in 15-20 years that are more competitive than those available today. Because nuclear is a mature technology within a well established global industry, there is no current case for further government support. ...
> The main focus of public concern about nuclear power is on the unsolved problem of long-term nuclear waste disposal, coupled about perceptions about the vulnerability of nuclear power plants to accidents and attack. Any move by government to advance the use of nuclear power as a means of providing a low carbon and indigenous source of electricity would need to carry widespread public acceptance, which would be more likely if progress could be made in dealing with the problem of waste."

3. In May 2002 the Government published "Energy Policy — Key Issues for Consultation" ("the 2002 Consultation Document"). Section Two of the 2002 Consultation Document identified the "Main themes for consultation":

> "2.1 We would welcome views and comments on any or all of the following questions. These to a large extent derive from the PIU report and the policy objectives it describes. Links to the relevant sections of the PIU report and other documents are provided at the end of each section. In submitting views,

respondents are urged to consider carefully the interactions between economic, environmental, security and social issues including the implications for the costs for consumers of their suggestions. The PIU's view was that it is vital to maintain adequate levels of energy security at all points in time. They also proposed that where energy policy decisions involve trade-offs between environmental and other objectives, then environmental objectives will tend to take preference over economic and social objectives and that this should be reflected in a redefinition of DTI's energy policy objective so that it might become 'the pursuit of secure and competitively priced means of meeting our energy needs, subject to the achievement of an environmentally sustainable energy system'.

2.2 We hope that those responding to these issues will as far as possible seek to reconcile conflicting priorities and cover all relevant crosscutting aspects such as innovation.

2.3 Many of the issues raised also have an international dimension, for example, security of supply and innovation. Respondents are invited to consider these when replying to this document.

2.4 We are primarily concerned about decisions that we need to take over the next few years but these will have to be taken in the context of possible developments up to 2020 and beyond. Respondents are therefore asked to take into account the longer-term context when replying to questions: for example, whether decisions taken in the next few years would affect the UK's capacity to achieve carbon emissions reductions of the scale suggested by the RCEP (which proposed that the Government should adopt a strategy to put the UK on a path to reducing carbon dioxide emissions by some 60% from current levels by about 2050)."

4. Each of the main themes was then considered in a separate paragraph. Paragraph 2.11 dealt with "Nuclear" in these terms:

"The PIU recommended keeping the nuclear option open. How confident can we be that other low carbon options will be reliably available, in sufficient time and sufficient quantity, to ensure that we can continue on a path of reducing our carbon emissions as most existing nuclear stations close over the next 20 years? What steps would be necessary to 'keep open the nuclear option' in particular in terms of Research and Development, and sustaining the skills base? (In parallel the Government is consulting about handling the treatment of waste which is referred to in the links overleaf. The DTI will also be publishing a White Paper later in the year on the management of the nuclear legacy.) What minimum lead times should we realistically assume in

> keeping options open for the future? To what extent should industry's costs be internalised? What regulatory and/or other changes might be desirable to reduce the risk and uncertainty for investors? What would be the costs and the consequent impacts on prices and on carbon?"

Consultees were referred to the paragraphs in the PIU Report, and to other relevant reports.

5. Section Three of the 2002 Consultation Document explained "How we will be conducting the review". Paragraph 3.1 stated:

> "The Government's aim is that the consultation process should be as open and inclusive as possible. We believe that it is essential that we have people's views and inputs as we develop our energy policy."

6. It is common ground that the 2002 consultation exercise was thorough and well informed, and that the Government received a great deal of detailed evidence from a significant number of consultees.

7. The summary of responses to the 2002 consultation exercise noted that "Many respondents had strong views on the nuclear industry" (paragraph 8.1). The competing contentions of those who supported and those who opposed nuclear new build were summarised. For present purposes it is sufficient to note that whereas supporters considered that the nuclear industry provided "large amounts of safe, dependable and affordable base-load electricity capacity"; opponents "argued that nuclear energy is economically unviable and financially unstable despite several decades of public support ..." (paragraphs 8.3 and 8.4). In respect of waste, paragraph 8.14 of the summary said:

> "A large number of respondents commented on nuclear waste. Several considered it to be the key issue affecting new build. Some argued that there should be no new build until the waste issue is resolved. ... A key theme throughout was the need for public and stakeholder confidence in a nuclear waste management solution, and for proper consultation."

8. The Energy White Paper "Our energy future — creating a low carbon economy" was published on 24th February 2003 ("the 2003 White Paper"). Chapter 4 dealt with "Low carbon generation". Paragraph 4.3 said:

> "Although nuclear power produces no carbon dioxide, its current economics make new nuclear build an unattractive option and there are important issues of nuclear waste to be resolved. Against this background, we conclude it is right to concentrate our efforts on energy efficiency and renewables. We do not, therefore, propose to support new nuclear build now. But we will keep the option open."

9. Under the sub-heading "We do not propose new nuclear build ...", paragraphs 4.67 and 4.68 said:

> "4.67 As chapter 1 makes clear, our priority is to strengthen the

contribution that energy efficiency and renewable energy sources make to meeting our carbon commitment. We believe that such ambitious progress is achievable, but uncertainties remain.

4.68 While nuclear power is currently an important source of carbon free electricity, the current economics of nuclear power make it an unattractive option for new generating capacity and there are also important issues for nuclear waste to be resolved. This white paper does not contain proposals for building new nuclear power stations. However, we do not rule out the possibility that at some point in the future new nuclear build might be necessary if we are to meet our carbon targets. **Before any decision to proceed with the building of new nuclear power stations, there would need to be the fullest public consultation and the publication of a white paper setting out the Government's proposals**." (emphasis as in the original)

10. A review of the 2003 White Paper was announced in November 2005. Appearing before the House of Commons Environmental Audit Committee on 23rd November, the Secretary of State for Trade and Industry, Alan Johnson MP, said that there would be a wide-ranging energy review:

> "We are genuinely open-minded and there is no pre-determined outcome of this work. We will, of course, examine the question of civil nuclear power as well as emerging technologies like carbon capture and storage, wave and tidal energy and many other aspects. This is not a nuclear review; it is an energy review. The review will be objective and thorough, and I very much look forward to committed help and advice in securing a long-term and lasting energy sector."

11. In a speech to the CBI on 29th November, the Prime Minister said:

> "I can today announce that we have established a review of the UK's progress against the medium and long-term Energy White Paper goals. The Energy Minister Malcolm Wicks will be in the lead, with the aim of publishing a policy statement on energy in the early summer of 2006. It will include specifically the issue of whether we facilitate the development of a new generation of nuclear power stations."

12. On the same day the defendant said in a written statement to Parliament on the Energy Review that the review "will develop energy policy proposals during 2006", and that the Review Team "will report to the Prime Minister and the Secretary of State for Trade and Industry in the early summer". The terms of reference for the Energy Review were set out in an answer to a Parliamentary Question on 2nd December 2005:

> "The Government will review the UK's progress against the medium and

long-term Energy White Paper goals and the options for further steps to achieve them. The aim will be to bring forward proposals on energy policy next year. The Review will be informed by analysis and options drawn up by a Review team led by myself. This will be a team of Officials drawn from key relevant Departments and my right hon. Friend the Prime Minister's Strategy Unit. In drawing up the analysis and options, I will undertake extensive public and stake holder consultation. The Review will be taken forward in the context of the Government's commitment to sound public finances and will take account of all short-term, medium-term and long-term costs and liabilities both to the taxpayer and energy user. The Review team will report to my right hon. Friend the Prime Minister and my right hon. Friend the Secretary of State for Trade and Industry in early summer."

13. Answering questions about the Energy Review from the Trade and Industry Committee of the House of Commons on 6th February 2006, the defendant said "it is not a review of nuclear. Nuclear is a part of our review." He was asked about the conduct of the review:

"**Q6 Chairman:** The 2006 Energy White Paper was a much more extensive process, with lengthy consultation, committees of experts, a much more open and time-consuming process. Why do you think a team of civil servants, for whom I have the highest personal regard of course, working to a much tighter timetable can do as good a job as that last process?

Alan Johnson: Because it is not a 2006 Energy White Paper. It is a review, building on lots of the analysis and the information that guided the 2003 White Paper, lots of analysis which has come since. We are not trying to recreate the 2003 White Paper. Indeed, as I said in my opening statement, we are taking forward the policy which was set out in 2003 and it is useful to have a review to look at that again and, yes, whereas in 2003 we could leave the door ajar on nuclear, I believe that now, as part of this review, we have to decide whether to close it or open it.
Q7 Chairman: What will the output be from this new process? What will you actually do at the end of it?
Alan Johnson: Produce proposals.
Q8 Chairman: In what form?
Alan Johnson: I do not know what form yet. We said in 2003 that if we were to go down the nuclear route, we would publish another White Paper, so if we were going to go down that route, we would need to keep that promise that we made in 2003. If we are not going down that route, then there will not be a need for a White Paper in that context. We should have to see the result of the review and it is a very sensible process to take. Let us see what conclusions emerge, what proposals we shall be making and let us then decide whether that needs to have a White Paper, Green Paper, another form of consultation."

14. The consultation document which is at the heart of these proceedings "Our Energy Challenge — securing clean, affordable energy for the long term" was issued on 23rd January 2006 ("the 2006 Consultation Document"). Responses were sought by 14th April

2006. Since it is essential to consider individual passages in the context of the document read as a whole, it is necessary to set out the relevant extracts from the document at some length. The title page answered the question "Why is the government conducting this consultation?" as follows:

> "This consultation seeks views on the medium and long-term energy policy issues to be considered in the Energy Review.
>
> In the 2003 Energy White Paper — 'Our energy future — creating a low carbon economy' — the government set out its goals and long-term framework for energy policy. The Energy Review will assess progress against these goals and the options for further steps to achieve them. The Review has a broad scope and will consider aspects of both energy supply and demand focussing on policy measures for the medium and long term."

15. Having noted (*inter alia*) that "Fossil fuel prices have risen sharply, and projected prices are now much higher than at the time of the White Paper", the Executive Summary said:

> "The Review will assess options on both the supply and demand side for energy. It will look at the prospects both for existing and new low carbon technologies, and for more aggressive uptake of energy efficiency measures. It will examine the potential contribution of carbon sequestration to allowing continuing access to the world's coal and other fossil fuel resources. The Review will look at issues relating to innovation and skills in these areas, where required.
>
> In this context the Review will look again at the role of nuclear electricity generation. Nuclear currently provides around 20% of the country's electricity needs, but most of our existing nuclear power stations are scheduled to close over the coming twenty years or so. The 2003 Energy White Paper recognised that replacement nuclear build might be necessary if we are to meet our carbon targets, but concluded that its then current economics made it unattractive and that there were also important issues of nuclear waste to be resolved. The Review will examine whether recent changes in energy prices have changed that assessment and at the other issues that would be raised by building new nuclear power stations. These other issues include all the characteristics of nuclear, including its creation of long-term liabilities such as nuclear waste; and how these liabilities should be managed and paid for.
> The government is clear that, in making important decisions about energy policy including nuclear power, there should be the fullest public consultation. This consultation paper is part of that process. The government is not at this stage bringing forward policy proposals."

16. The key questions for the review were then set out:

> "**This consultation invites comments on the full range of issues it identifies, taking into account all the circumstances surrounding UK energy policy. These circumstances include the need to avoid damaging our**

competitiveness and prosperity and to take into account the impact of any proposals in terms of costs and contingent liabilities for government.

The key issues on which it may be useful to focus can be summarised as follows:

Q.1. What more could the government do on the demand or supply side for energy to ensure that the UK's long-term goal of reducing carbon emissions is met?

Q.2. With the UK becoming a net energy importer and with big investments to be made over the next twenty years in generating capacity and networks, what further steps, if any, should the government take to develop our market framework for delivering reliable energy supplies? In particular, we invite views on the implications of increased dependence on gas imports.

Q.3. The Energy White Paper left open the option of nuclear new build. Are there particular considerations that should apply to nuclear as the government re-examines the issues bearing on new build, including long-term liabilities and waste management? If so, what are these, and how should the government address them?

Q.4. Are there particular considerations that should apply to carbon abatement and other low-carbon technologies?

Q.5 What further steps should be taken towards meeting the government's goals for ensuring that every home is adequately and affordably heated?

Comments are also invited on the following issues, as described in the text:

i. The long term potential of energy efficiency measures in the transport, residential, business and public sectors, and how best to achieve that potential;

ii. Implications in the medium and long term for the transmission and distribution networks of significant new build in gas and electricity generation infrastructure;

iii. Opportunities for more joint working with other countries on our energy policy goals;

iv. Potential measures to help bring forward technologies to replace fossil fuels in transport and heat generation in the medium and long term."

17. Chapter 1 examined the context for the review and listed a number of changes since the 2003 White Paper, including the sharp rise in fossil fuel prices:

> "In the context of these changing circumstances, it is appropriate to re-visit the policies and programmes put in place to meet the White Paper goals. The White Paper sought to strengthen the contribution of energy efficiency and renewables; the Review will examine what further measures, if any, might be desirable to foster both. Cleaner coal technologies and carbon sequestration may well enable us to continue to access the world's ample coal reserves and the Review will also examine whether and in what ways to encourage them. On nuclear power, the 2003 White Paper recognised that new nuclear build might be necessary if we are to meet our carbon targets, but concluded that its then current economics made it unattractive. The Review will examine the impact of recent energy price rises on the desirability or otherwise of new nuclear build, taking into account all the issues relating to nuclear including long-term costs such as de-commissioning and waste. Separately, the Committee on Radioactive Waste Management is assessing options for long term management of the UK's higher activity radioactive waste so as to be able to recommend the best way forward.
>
> In assessing the UK's progress against the 2003 White Paper goals and the options for further steps to achieve them, the Review will take account of all short-term, medium-term and long-term costs and liabilities both to the taxpayer and to the energy user. The aim will be for the government, once it has assessed the conclusions of the Review, to bring forward proposals on energy policy later this year.
> ... The Review team will report to the Prime Minister and the Secretary of State for Trade and Industry in the early summer. ...
> The Review will take into account the work of a number of related exercises including but not limited to: [a number of reviews are then listed, including]
> • The Committee on Radioactive Waste Management. In November, 2003 the UK Government set up this independent Committee to oversee the review of options for the long-term management of the UK's higher activity wastes and to recommend a strategy. The Committee is due to report in July 2006."

18. Under the heading "Revised Projections and Assumptions" the document said:

> "DTI will publish revised emissions projections for the UK shortly together with updated assumptions for future fossil fuel prices (see Annex B for a summary). Comments will be invited on these projections and assumptions, which have been used to inform this consultation document."

19. Apart from a brief discussion of the amount of generating capacity that would be needed to replace "retiring coal and nuclear plant", and a table showing closures of existing nuclear plants by date, there is no further discussion of nuclear power in the main part of the 2006 Consultation Document.

20. Annex A to the 2006 Consultation Document contains an "Overview of Generating Technologies". Part 4 deals with "Nuclear Power Generation", and it is necessary to set it out in full:

> "Nuclear fission plants have contributed to electricity generation in the UK for the last 50 years. In 2004, nuclear plants generated 80 TWh of electricity, or 19% of the UK total. This is forecast to fall to 7% by 2020 as existing plants are retired. The world's most intensive user of nuclear electricity is France, where more than 70% of electricity is nuclear-generated. Other major users include Ukraine (45%), South Korea (36%) and Japan (27%). Sweden (46%) and Germany (29%) are currently committed to phasing out nuclear power
>
> generation.
> Increases in projected UK nuclear capacity could come from extensions to the current lifetimes of existing plant or from new build. British Energy recently announced a planned ten year extension to the life of its Dungeness B plant. It is uncertain whether it will be economically attractive or technically possible for British Energy to extend the lifetimes of its other reactors. It will not be possible to extend significantly the lifetimes of older Magnox reactors now owned by the Nuclear Decommissioning Authority. After a general global slowdown over the last 15 years, many countries are considering new nuclear build. Over 20 new plants are under construction globally, primarily in Japan, China, India and South Korea. A new plant is under construction in Finland. The last nuclear fission plant built in the UK was Sizewell B, which became operational in 1995. Planning permission was first sought in 1981. Like all UK nuclear plants, it was built by the public sector. We would expect any future plant to be built and run by the private sector, within the regulatory framework set by the government.
>
> Among the considerations bearing on the issue of new nuclear build in the UK are:
> *Carbon profile*. Nuclear power plants emit almost zero carbon, and could therefore contribute to the government's goal of reducing emissions. However the mining, refining and enriching of uranium, and plant construction and decommissioning, are carbon-intensive processes, especially when low quality uranium ore is being processed.
> *Reliable access to fuel*. Uranium is typically refined in source countries but enrichment is conducted at Capenhurst, near Chester. The UK has no commercial uranium resource but it could draw on its stockpile of separated plutonium to supply Mixed Oxide (MOX) fuel, enough for the lifetimes of two large reactors. The world's major exporters of uranium ore are Australia and Canada, and deposits are known to exist elsewhere. Known recoverable uranium reserves would last around 50 years at current levels of demand and a further 30 years is available from decommissioned plants and weapons. A global expansion of nuclear power stations would reduce this, but there has been little exploration for uranium since the mid-1980s and it is likely that further deposits exist. Today, mine expansions and new mines are planned in

Australia, Canada, Kazakhstan, Russia, Brazil and Namibia.

Flexibility. Nuclear power provides a significant share of the UK's base-load generating capacity. But it has the disadvantage that it cannot easily follow peaks and troughs in energy demand. Were it to provide more than around 30% of the UK's electricity, issues of overcapacity may arise at periods of low demand. The UK has only one electricity connection to Europe and so (unlike France) has very low scope to export surplus electricity in periods of low demand.

Safety and security. An independent safety regulator, the Nuclear Installations Inspectorate, has the authority to shut down a nuclear power station if it is not completely satisfied with standards of safety. However the potential consequences of a significant release of radiation, or of the theft of nuclear material, make the security of nuclear plants a very high priority. The security regulator, the Office for Civil Nuclear Security, is responsible for approving security arrangements within the industry and enforcing compliance. Before the construction of any new nuclear plant could start, the independent safety and security regulators would need to be completely satisfied that any proposed nuclear plant was safe and secure.

Proliferation risk. Current nuclear designs, operated within an effective security and safeguards framework such as the UK's, should create very little risk of proliferation. Safeguards are applied to civil nuclear material and activities in the UK according to the Treaty establishing the European Atomic Energy Community (Euratom), the UK's safeguards agreement with Euratom and the International Atomic Energy Agency (IAEA), and the Additional Protocol to that agreement. Such arrangements are put in place to provide assurance that any diversion from the UK's civil programme would be detected.

Waste. The Committee on Radioactive Waste Management (CORWM) has been set up to examine options for the long-term storage of radioactive waste. The UK has a historic legacy from its military and civil nuclear programmes; the government has created the Nuclear Decommissioning Authority as the body with responsibility for dealing with this legacy safely and efficiently. CORWM has confirmed that waste from a new build programme could be technically accommodated by the options it is considering. The issue of waste will be one of the important considerations relating to nuclear power in this Review.

Cost. Market investors would make their own calculations about the viability of new nuclear investment. As the analysis shows in Annex B, cost estimates for new nuclear build vary significantly. One reason for this is that, because of the large capital investment required, a change in the discount rate can have a significant impact on the total cost of construction. Further uncertainty is created by the planning and licensing process, which can take five years or more. Subsequent reactors are likely to cost less than the first of a kind in a series.

Decommissioning and long-term waste management. Taken together these

can add up to around 15% of the lifetime cost of a nuclear plant. Decommissioning and long-term waste management are also significant issues for the public. A report on the latter by the Committee on Radioactive Waste Management, is expected in July 2006.
Skills. The Government has established a Sector Skills Council to represent the needs of the nuclear industry. Cogent Sector Skills Council was launched on 2nd March 2004 and is taking a strategic view of the nuclear sector to ensure that the education and training base can meet current and future employment needs in the nuclear industry."

21. Annex B is "A Selection of Studies on The Comparative Economics of Different Forms of Generation". Key findings in four Government studies and four studies by other organisations are briefly presented. Annex B states:

> "The Government does not endorse the conclusions of studies published by other organisations. The studies all show a wide range of numbers from different sources and there is also some overlap between the ranges for different technologies. It is impossible to say unequivocally that one technology is cheaper than another because different assumptions about capital costs, fossil fuel prices and carbon prices all affect the relative competitiveness of different generating technologies."

22. The modelling work carried out for the 2003 White Paper was summarised and the point was made that since the publication of the 2003 White Paper "assumptions for fossil fuel prices would now be higher and this would affect the future cost of gas-fired generation".

23. For members of the general public a summary consultation paper entitled "Our Energy Challenge — Have Your Say" was published ("the Summary Document"). The Summary Document said:

> "The UK faces significant challenges in the way we source, produce and use energy in the medium and long term. Over the next few months, we are conducting a review of the options facing us.
>
> As part of this review we are launching a formal consultation. We want to give members of the public an opportunity to voice their views. This leaflet has been designed to set out the main facts and challenges and to explain how you can have your say."

24. Under the heading "How Can You Have Your Say?", the public was told:

> "More information, including a detailed consultation document,is available on our website [reference given] and you will also find links to other useful sources from this site.
>
> Over the next few months, we will be amassing evidence and listening to businesses, NGOs (Non Governmental Organisations) and other experts to help inform whether we need to take further action to meet our goals and if so, what those further actions could be.

We will welcome views not just from industry and specialists, but from members of the public and non-energy businesses too. The kind of questions the consultation document poses include:

Q.1 What more could the Government do to influence the way we produce or use our energy to ensure we meet our goal of reducing the carbon dioxide emissions that contribute to climate change?

Q.2 What further steps should the Government take, if any, to help ensure companies continue to deliver reliable energy supplies in the long term?

Q.3 Are there any particular questions the Government should consider when it re-examines the issues relating to possible nuclear new build?

Q.4 Are there any particular issues that should apply to the different types of technology that can help reduce the carbon dioxide emissions from the energy we use?

Q.5 What further steps should be taken towards meeting the Government's goal for ensuring that every home is adequately and affordably heated?"

25. Consultees were told that the closing date for responses to the consultation document was 14th April 2006, and the document added:

> "The review will explore the further options open to us, within our prudent approach to public finances and taking account of costs to business and consumers."

26. In addition to the 2006 Consultation Document and the Summary Document, there were seminars, conferences, receptions and other meetings. The topic for one of the nine "stakeholder seminars" was "Nuclear Regulation". The theme of one of the 13 round-table meetings was "Nuclear". On 6th March 2006 Mr Wicks had a round-table meeting with representatives of Green Alliance, RSPB, WWF-UK, Friends of the Earth and Greenpeace, at which nuclear power was one of the issues considered.

27. "The Energy Challenge Energy Review Report" ("the Energy Review") was published by the defendant on 11th July 2006. The Executive Summary said this, under the heading "Replacing nuclear power stations":

> "Nuclear power is currently an important source of low carbon electricity in the UK. The existing fleet of nuclear power stations will close in the years ahead. Our assessment is that higher projected fossil fuel prices and the introduction of a carbon price to place a value on CO_2 have improved the economics of nuclear as a source of low carbon generation.

We have concluded that new nuclear power stations would make a significant contribution to meeting our energy policy goals. For illustrative purposes, if existing capacity were replaced, then by 2030 our carbon emissions would be around 8 MtC lower — equivalent to total emissions from twenty two 500MW (Mega Watt) gas-fired power stations — than otherwise, and our gas consumption some 13% lower.

It will be for the private sector to initiate, fund, construct and operate new nuclear plants and to cover the full cost of decommissioning and their full share of long-term waste management costs. But in view of the potential benefits for our public policy goals, the Government proposes to address potential barriers to new nuclear build.

By early next year, the Health and Safety Executive will develop guidance for potential promoters of new nuclear power stations. This will explain how they can obtain assessment of possible reactor designs before committing significant sums to planning and construction.

On nuclear waste, the report of the Committee on Radioactive Waste Management, due later this month, following its interim report published in April, will provide the basis for a decision on the long-term management of waste by the Government and the Devolved Administrations.

We are also setting out a proposed framework for considering the relevant issues and context in which planning inquiries should be held. This would be set out in the Energy White Paper to be published around the turn of the year. To support preparation of this White Paper, we are consulting on the proposals outlined in annex A of this document.

For nuclear new build, considerations of safety and security will be paramount, as they are with the regulation of our existing nuclear plant."

28. Chapter 5 dealt with "Electricity Generation". Paragraph 5.9 was concerned with "Reducing policy uncertainty" and said:

"Given the long-term nature of investments in electricity generation, policy uncertainty creates a barrier to new investment. Policy uncertainty affects the economics of all new power stations, by raising the cost of the capital companies need to borrow to make new investments. It can disproportionately affect technologies that require higher levels of upfront capital investment, such as low carbon technologies. Submissions to the Energy Review consultation particularly emphasised the need for clarity on the Government's future policy direction on renewables and on nuclear. Therefore, in the following sections of this report, we will

• Confirm and strengthen our commitment to the Renewables Obligation; and
• Clarify our position on new nuclear build."

29. The "clarification" was in these terms, under the heading "Electricity — Nuclear":

"5.93 Nuclear power is a source of low carbon generation which contributes to the diversity of our energy supplies. Under likely scenarios for gas and carbon prices, new nuclear power stations would yield economic benefits in terms of carbon reduction and

security of supply. Government believes that nuclear has a role to play in the future UK generating mix alongside other low carbon generating options. Evidence gathered during the Energy Review consultation supports this view.

5.94 Consultation evidence highlighted regulatory barriers which are faced by many energy projects, including nuclear. In response to this, the Government is setting out a proposed framework for the consideration of the relevant issues and the context in which planning inquiries should be held. This framework would be set out in a White Paper to be published around the turn of the year. To support preparation of this White Paper, Government is consulting on the proposals outlined in Annex A of this document. Under this framework, Government will assess planning applications on their merits, taking into account the policy set out in the previous paragraph. ...

5.96 Any new nuclear power stations would be proposed, developed,constructed and operated by the private sector, who would also meet full decommissioning costs and their full share of long-term waste management costs. The Government does not take a view on the future relative costs of different generating technologies. It is for the private sector to make these judgements, within the market framework established by Government. The actual costs and economics of new nuclear will depend on, amongst other things, the contracts into which developers enter, and their cost of capital for financing the project.

5.97 However, for the purposes of this report, the Government has carried out a cost-benefit analysis of nuclear new build in order to inform its conclusions on the potential role of nuclear power and whether the Government should take facilitative measures to enable new build to come forward as a generating option. This analysis is based on a number of gas prices, carbon prices and nuclear costs, rather than a single projection."

A footnote refers to a summary of the cost-benefit analysis, together with other background information, being available on the DTI web site.

30. Under the heading "Nuclear is a potentially economic source of electricity generation", paragraph 5.98 said:

"5.98 The economics of new nuclear build depend on expectations about future gas and carbon prices, as well as expected costs of building, operating, decommissioning and dealing with the waste of a new nuclear plant. Based on a range of plausible

scenarios, the economics of nuclear now look more positive than at the time of the 2003 Energy White Paper. However, it will be for the private sector to make commercial decisions on investment in nuclear."

31. Paragraphs 5.100-5.102 deal with the "central gas price scenario", the cost of new nuclear power generation, including a high, low and central case, and the cost profile of nuclear power, respectively. "Nuclear Waste" is considered in paragraphs 5.113-5.116:

"5.113 The 2003 Energy White Paper noted that there are 'important issues for nuclear waste to be resolved'. Work is underway to tackle the legacy of nuclear waste. The Nuclear Decommissioning Authority (NDA) is setting a UK-wide strategy for more effective decommissioning and clean up of its sites. The Committee on Radioactive Waste Management (CoRWM) was established in the second half of 2003 to make recommendations on the best options for the long-term management of the UK's higher activity radioactive waste. It has evaluated the options in an open and inclusive manner and Government believes the approach they have taken will provide a sound basis for building future consensus.

5.114 CoRWM produced interim recommendations in April. In these, CoRWM concluded that deep geological disposal in a repository is the best available approach for the long-term management of waste, and that a programme of interim storage (already planned by the NDA as part of its strategy) is required. While CoRWM has no position on the desirability or otherwise of nuclear new build, CoRWM has however said that 'in principle' new build wastes could be incorporated within in their options, although this would raise practical issues about the size, number and location of facilities, which would need to be properly assessed. CoRWM's final report will be published at the end of July. The Government will respond in a formal statement to parliament as will the Devolved Administrations, setting out how work to manage long-term waste will be taken forward.

5.115 The UK has a historic legacy of nuclear waste that it is estimated will total 475,000m^3 (high and intermediate level). Similar to France, the UK's legacy nuclear wastes include a complex mix of waste forms from both the civil and military programmes which increases the technical challenges in conditioning them for ultimate disposal. Through the NDA, and the nature of the ownership of the current civil nuclear industry, the public sector is ultimately responsible for delivering and paying for a long term waste management solution. The private sector would pay

its full share of the costs of long term waste management arising from any new nuclear build.

5.116 Modern nuclear plants produce significantly less waste than early generations of nuclear reactors by volume. CoRWM's inventory study suggests that if the current level of nuclear capacity were replaced with new build, existing waste stocks would increase by about 10% by volume."

A footnote refers to CoRWM's draft recommendations.

32. Under the heading "Planning — Setting the Policy Framework for New Nuclear Build", paragraphs 5.136 and 5.137 say:

"5.136 In addition, Government is setting out a proposed framework for the consideration of the issues relevant to new nuclear build and the context in which public inquiries, as part of the planning process, should be held. This framework would be set out in a White Paper to be published around the turn of the year. To support preparation of this White Paper, Government is consulting on the proposals outlined in annex A of this publication.

5.137 We are seeking views on a policy framework in which national strategic and regulatory issues are most appropriately discussed through processes other than the public inquiry. The inquiry should focus on the relationship between the proposal, the local plans and local environmental impacts. The inquiry should weigh up these issues against the national strategic or regulatory material considerations, which will have already been established. The inquiry should also examine the local benefits of the development and how specific local impacts of the construction and operation of the plant can be minimised."

33. Paragraph 5.138 states that:

"Satisfactory arrangements will need to be established for dealing with the costs of decommissioning and waste from nuclear new build."

34. The principles to be applied to decommissioning and waste are set out in paragraphs 5.142 and 5.143 respectively. The latter states:

"• Delivering and paying for a long term waste management solution for legacy waste is a responsibility that falls to the public sector. Any long-term waste management solution developed by Government will factor in waste from new build.

• There will be an assessment of how new build affects the cost of delivering

the national waste management solution."

35. The position is summarised on page 124 of the Energy Review, under the heading "Nuclear Proposals":

> "• The Government believes that nuclear has a role to play in the future UK generating mix alongside other low carbon generation options.
>
> • Any new nuclear power station would be proposed, developed, constructed and operated by the private sector who would also meet decommissioning and their full share of long-term waste management costs.
> • We will undertake further assessment which will help developers in identifying the most suitable sites. It will be up to the potential participants of new build to discuss with the owners appropriate access to suitable sites. Government will monitor whether an appropriate market in suitable sites is developing.
> • Government has asked HSE to take forward proposals to introduce a pre-licensing, design authorisation procedure, and the Environment Agency to introduce a similar system of pre-authorisation.
> • Government is setting out a proposed framework for the consideration of the issues relevant to new nuclear build and the context in which planning inquiries should be held. This framework would be set out in a White Paper to be published around the turn of the year. To support preparation of this White Paper, Government is consulting on the proposals outlined in annex A of this publication.
> • We are seeking views on a policy framework in which national strategic and regulatory issues are most appropriately discussed through processes other than the public inquiry. The inquiry should focus on the relationship between the proposal, the local plans and local environmental impacts. The inquiry should weigh up these issues against the national strategic or regulatory material considerations, which will have already been established. The inquiry should also examine the local benefits of the development and how specific local impacts of the construction and operation of the plant can be minimised. ..."

36. Annex A describes the proposed "Consultation on the Policy Framework for New Nuclear Build". Having referred to the 2003 White Paper and the promise of "the fullest public consultation", the introduction continues:

> "The Government has considered the role of nuclear generation. The consultation document 'Our Energy Challenge: securing clean, affordable energy for the long-term' set out information about nuclear power amongst other issues and asked whether there were any particular considerations that should apply to nuclear as the Government re-examines the issues bearing on new build, including long term liabilities and waste management, and if so how the Government should address them.
>
> After a period of public consultation and analysis, the Government has concluded that:

'Nuclear power is a source of low carbon generation which contributes to the diversity of our energy supplies. Under likely scenarios for gas and carbon prices, new nuclear power stations would yield economic benefits in terms of carbon reduction and security of supply. The Government believes that nuclear has a role to play in the future UK generating mix alongside other low carbon generating options. Evidence gathered during the Energy Review consultation supports this view.'
However, it will be for the private sector to take decisions on proposing new power stations, based on commercial considerations.
Having reached the position that nuclear has a future role, this document sets out how the Government intends to create a policy framework under which developers will be able to make proposals for new nuclear build, that will be published in a forthcoming Energy White Paper. This White Paper will set out the Government's policy on new nuclear build."

37. Annex A then states that "The Government is seeking views on the following proposal". The proposal set out in Box A1 is as follows:

> "A policy framework for new nuclear build should be developed. It would include a nuclear 'Statement of Need' and set out that national strategic and regulatory issues are most appropriately discussed through processes other than the planning inquiry. ..."

38. The deadline for responses to this consultation exercise was 31st October 2006, and annex A explained:

> "This document includes material that it is envisaged would be incorporated within the policy framework and the statement of need. In the light of the views received, the policy framework will be formalised in a White Paper and form a material consideration for future planning inquires into new nuclear build proposals. In finalising the text of the statement of need, the Government will, of course, take into account comments received during the consultation."

39. The policy framework is then described in more detail. The Proposed Statement of Need is set out in Box A3:

> "The Government believes that nuclear has to play a role in the future UK generating mix because of its contribution to increased diversity of energy supplies and its role as a source of low carbon generation. The Government believes that the evidence gathered during the Energy Review and the associated public consultation supports such a view."

40. The answer to the question "What impact should the Statement of Need have on the Planning Inquiry?" is:

> "Under this framework, the Government would assess planning applications on their merits, taking into account the policy framework set out above. We

would welcome views on this approach. It is important to note that any new nuclear power stations would be proposed, constructed and operated by the private sector.

The policy framework, including a Statement of Need, and formalised in a White Paper, would form a material consideration in future nuclear power station planning inquiries. The expectation is that planning inquiries should not consider whether there is a need for nuclear power. Any planning inquiry should then proceed on the basis that there has been public consultation on the relevant strategic issues and the outcome has been formalised in the White Paper. Planning inspectors would therefore have the ability to decide not to allow discussions of these issues at the inquiry, as they would have already taken place elsewhere.
An inspector would still be able to open up such issues if they felt that there were specific aspects of these issues that had not been considered, but the presumption would be that there should not be detailed oral evidence on these issues presented to the inquiry."

41. The further consultation process referred to in Annex A has concluded and the Government proposes to publish the White Paper referred to in the Energy Review next month. These judicial review proceedings were therefore expedited. The hearing took place on 7th-9th February, and a speedy resolution of the claimant's challenge is imperative.

The grounds of challenge

42. In summary, Mr Pleming QC on behalf of the claimant contends that the defendant, having promised in the 2003 White Paper that there would be "the fullest public consultation" before the Government reached any decision to change its policy "not ... to support new nuclear build now", failed to live up to that promise before deciding in the Energy Review "that nuclear has a role to play in the future UK generating mix".

43. Given the express promise that there would be "the fullest public consultation" the claimant (and other members of the public) had a legitimate expectation that there would be such consultation before a decision, such as that contained in the Energy Review, was taken by Government.

44. Two broad criticisms are made of the 2006 Consultation Document:

(1) It either was or appeared to be in the nature of an issues paper, seeking consultees' views as to which issues should be examined by Government (and the manner in which they should be examined) when deciding whether or not the new nuclear build option, which had been left open, should now be taken up; rather than the consultation paper on the substantive issue itself: should the new nuclear build option be taken up? The decision in July 2006 "leapfrogged the stage of carrying out proper consultation on the substantive issue".

(2) If it was not simply an issues paper, but was intended to be a consultation paper on the substantive issue, it was inadequate, and the overall consultation process was unfair because:

(a) consultees were not told in clear terms what the proposal was to which they were being invited to respond;
(b) consultees were not provided with enough information to enable them to make an intelligent response; and
(c) on many issues, including in particular the critical issues of the economics of new nuclear power and waste disposal, consultees were deprived of the opportunity to make any meaningful response because the relevant information on which the Government relied in making the decision that "nuclear has a role" was published after the consultation period had concluded.

The defendant's response

45. In summary, the defendant submitted that the promise of "the fullest consultation" had been met bearing in mind the purpose of the exercise which was a review, carried out against the background of the substantial amount of information which had been gathered in preparing the 2003 White Paper. It was understood by all those who might have had an interest in the subject matter (including the claimant) that the review would examine the issue of principle: whether in the light of changed circumstances new nuclear build should now be supported. As the defendant put it in answer to the House of Commons Environmental Audit Committee: the door having been left ajar on nuclear in the 2003 White Paper "we have to decide whether to close it or open it" (para.13 above). It was clear that the 2006 Consultation Document was inviting responses on this "in principle" issue, and the eventual outcome of the consultation process, that the door was to be opened for new nuclear build, was both foreseeable and foreseen, as demonstrated by the consultees' responses, including those of the claimant. The "proposal" being consulted upon was clear: whether the desirability of new nuclear build had changed since 2003 in the light of changed economic circumstances and the increasing importance of climate change issues, and consultees had sufficient information to enable them to make intelligent and in some cases, including that of the claimant, very lengthy and detailed responses. It was neither unusual nor unfair for the Government to take into account new information, reports, studies etc which emerged either during or after the consultation period and on which consultees had not had an opportunity to comment. The consultation process did not end in April 2006. As promised in Annex A to the Energy Review, the Government had consulted on whether or not the impending White Paper should contain a "Statement of Need." Consultees had been able to argue, and had argued, that there should be no such statement because there was no need for new nuclear build.

46. The defendant did not submit that the decision under challenge was not justiciable, although Mr Drabble QC formally reserved the defendant's right to pursue such a submission, if so advised, if the case went to appeal. Rather, it was submitted that the court should be very slow to intervene in respect of such a "high-level, strategic policy document" as the Energy Review. The defendant will be accountable to Parliament for the policies contained in next month's White Paper. Parliament will be entitled to consider both the merits of the policies themselves, and the fairness of the process by which they have been arrived at. In these circumstances it was submitted that the court should interfere with the process "only if something has gone clearly and radically wrong."

Discussion and conclusions

Justiciability

47. Since this decision may be the subject of an appeal it is sensible to indicate my views on the issue of justiciability. In the absence of detailed submissions a brief summary will suffice. The starting point is not in doubt:

> "Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so." (see per Laws LJ at paragraph 68 of R (Nadarajah and Abdi) v Secretary of State for the Home Department [2005] EWCA Civ 1363)

48. While the decision which is said to have broken the promise of "the fullest public consultation" is fairly described as one which was dealing with a "high-level, strategic issue", the promise itself was given at the highest level: in a Government White Paper. It would be curious, to say the least, if the law was not able to require the Government to honour such a promise, absent any good reason to resile from it.

49. Whatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive. The United Kingdom Government is a signatory to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention"). The Preamble records the parties to the Convention:

> "Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,
>
> Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,
> Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,
> Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns
> Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment, ..."

50. Article 7 deals with "Public Participation concerning Plans, Programmes and Policies relating to the Environment". The final sentence says:

> "To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment."

51. Given the importance of the decision under challenge — whether new nuclear build should now be supported — it is difficult to see how a promise of anything less than "the fullest public consultation" would have been consistent with the Government's obligations under the Aarhus Convention. Mr Drabble's submission that the decision in the Energy Review "that nuclear has a role to play in the future UK generating mix" was not a statutory decision, did not itself permit any new nuclear power station to be built and was but a step in the process of the formulation of Government policy, which was continuing, is true as far as it goes, but it ignores the fact that the decision is the critical stage in the formulation of Government policy in respect of new nuclear build. To use the defendant's own words: it opens the door, which had been left ajar in 2003. Absent the decision, and the consequential proposals for implementing it, as described in Annex A to the Energy Review, the question whether new nuclear power should have any role to play in the future UK generating mix would be addressed as a material consideration at any future planning inquiry into a proposal for a new nuclear power station (as was the case at the inquiry into the proposal to construct Sizewell B).

52. Once the suggested policy framework, including the "Statement of Need", is in place, the expectation will be "that planning inquiries should not consider whether there is a need for nuclear power" (see the extracts from Annex A above). However, as Annex A makes clear, the policy framework stems from the "in principle" decision that new nuclear build does have a role to play.

53. Even in the absence of a formal policy framework, the Government's decision that new nuclear build has a role to play would plainly be a material consideration to which both local planning authorities and the Secretary of State for Trade and Industry would have to have regard when determining applications for planning permission for new nuclear power stations under the Electricity Act 1989. While debate about the need for new nuclear power might not be altogether precluded at the inquiry in the absence of a formal Statement of Need, the inspector would inevitably be considering the issue, and the extent to which he would be prepared to permit detailed oral evidence to be given about it, against the background of a clear "in principle" decision by Government. It would be surprising if the procedural steps leading to a decision of such planning and environmental significance were immune from legal scrutiny, so that the Government could promise consultation in a White Paper and then renege on that promise in a subsequent policy document upon the basis that the latter was a "high-level" or "strategic" decision for which it was politically, but not legally, accountable.

54. I would readily accept the proposition that in the absence of any statutory or other well-established procedural rules for taking such strategic decisions it may well be very difficult for a claimant to establish procedural impropriety. Similarly, given the judgmental nature of "high-level, strategic" decisions it will be well-nigh impossible to mount a "Wednesbury irrationality" challenge absent bad faith or manifest absurdity: see R (London Borough of Wandsworth and others) v Secretary of State for Transport [2005]

EWHC 20 (Admin), paragraph 58 (the "Airports White Paper case"). These practical considerations do not mean that decisions such as those contained in the Energy Review are unreviewable by the courts simply because they are matters of "high policy". Such a submission was, in my judgment rightly, rejected by Maurice Kay J (as he then was) in R (Medway Council and others) v Secretary of State for Transport [2002] EWHC 2516 (Admin) ("the Medway case"), see paragraph 18; and was not pursued in the Airports White Paper case (see paragraphs 58-60). In the present case the absence of procedural rules does not pose any difficulty because the defendant accepts that there was a clear promise in the 2003 White Paper that there would be "the fullest public consultation" before a decision was taken to support new nuclear build, and it is not suggested that the defendant had any, let alone any good reason not to honour that promise.

Consultation

55. In R v North & East Devon Health Authority, *ex parte* Coughlan [2001] QB 213, Lord Woolf MR giving the judgment of the Court of Appeal said in paragraph 108:

> "108. It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168."

56. In that case the Health Authority had sought and considered a report by Dr Clark on the opinions of local clinicians which was received well after the consultation period had ended. Rejecting the claimant's complaint that the authority had acted unfairly in considering the report, Lord Woolf said this in paragraph 112:

> "It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

57. A paper on ethical decision-making fell into the same category:

> "It was not a part of the proposal and not necessary to explain the proposal. The risk an authority takes by not disclosing such documents is not that the consultation process will be insufficient but that it may turn out to have taken into account incorrect or irrelevant matters which, had there been an

> opportunity to comment, could have been corrected. That, however, is not this case." (paragraph 115)

58. Coughlan was considered by Maurice Kay J in the Medway case. He acknowledged that the four requirements set out in Coughlan did not expressly adopt the language of fairness, but rejected the submission that fairness had ceased to be an aspect of a lawful consultation process:

> "It is an aspect of what is 'proper' - the word used in Coughlan (para 108). ... it is axiomatic that consultation, whether it is a matter of obligation or undertaken voluntarily, requires fairness." (paragraph 28)

59. The overriding need for fairness in any consultation process was confirmed by the Court of Appeal in R (Edwards and others) v Environment Agency and others [2006] EWCA Civ 877: see paragraphs 90-94 and 102-106. In paragraph 103 Auld LJ, with whom Rix and Maurice Kay LJJ agreed, said this:

> "103. In general, in a statutory decision-making process, once public consultation has taken place, the rules of natural justice do not, for the reasons given by Lord Diplock in *Bushell*, require a decision-maker to disclose its own thought processes for criticism before reaching its decision. However, if, as in *United States Tobacco* (see per Taylor LJ, as he then was, at 370-371, and at 376, per Morland J), and in *Interbrew* (see per Moses J at pp 33-35 of the transcript), a decision-maker, in the course of decision-making, becomes aware of some internal material or a factor of potential significance to the decision to be made, fairness may demand that the party or parties concerned should be given an opportunity to deal with it. See also the remarks of Schiemann J in *R v Shropshire Health Authority, ex p Duffus* [1990] 1 Med LR 119, at 223 as to the changing scene that a consultation process may engender and the consideration by Silber J in *R (Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640, at 39-44, of the possible need, depending on the circumstances, for further consultation on matters and issues that the initial consultation may have thrown up."

60. Mr Drabble submitted that Edwards was distinguishable on four bases. The context was entirely different, in Edwards the decision-maker (the Environment Agency) was concerned with a factual, local issue, namely whether emissions from a cement kiln were environmentally acceptable. The nature of the decision was different, the Environment Agency had discharged its statutory duty when it issued the necessary permit for the process. It was then functus, whereas the question whether new nuclear build has a role to play can be revisited if errors in the material relied on by the defendant in preparing the Energy Review are pointed out. The defendant will be answerable to Parliament for the White Paper. Finally, it was submitted that the unfairness in Edwards was obvious: the two ACQUA reports which had not been disclosed in the consultation process had revealed a hitherto unknown problem, which was a genuinely "new" factor.

61. I accept that there are clear factual differences between the decision-making process in the Edwards case and the present case. Given those differences it would not be appropriate to simply "read across" from Edwards to this case. Judgments are not to be construed as though they were enactments of general application, and the extent to which judicial dicta are a response to the particular factual matrix of the case under consideration must always be borne in mind. However, the overriding requirement that any consultation must be fair is not in doubt. What is fair, and in particular whether fairness demands that new material which has not been available during the consultation period should be made available to consultees so that they have an opportunity to deal with it before a decision is taken, must depend upon the particular circumstances of the case:

> " It is an accepted general principle of administrative law that a public body undertaking consultation must do so fairly as required by the circumstances of the case" see per Auld LJ at paragraph 90 of Edwards. (emphasis added)

62. Mr Pleming submitted that there was no support in the authorities for Mr Drabble's submission that the decision-making process in the present case should be interfered with by the court "only if something has gone clearly and radically wrong." This difference between the parties is one of semantics rather than substance. A consultation exercise which is flawed in one, or even in a number of respects, is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight it will almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon. That is most emphatically not the test. It must also be recognised that a decision-maker will usually have a broad discretion as to how a consultation exercise should be carried out. This applies with particular force to a consultation with the whole of the adult population of the United Kingdom. The defendant had a very broad discretion as to how best to carry out such a far-reaching consultation exercise.

63. In reality, a conclusion that a consultation exercise was unlawful on the ground of unfairness will be based upon a finding by the court, not merely that something went wrong, but that something went "clearly and radically" wrong.

64. Against this background I turn to consider the claimant's criticisms of the consultation process.

Issues Paper

65. In his skeleton argument, Mr Drabble emphasised the wide-ranging nature of the review of the 2003 White Paper, and submitted that it was clear to all parties that the review would address the question left open in 2003: whether in the light of changed circumstances new nuclear build now had a role to play in the UK's generating mix.

66. Mr Drabble referred to the terms of reference of the review and to the public statements of both the Prime Minister and the Secretary of State for Trade and Industry (paras 10-13 above). I readily accept that submission, but it does not answer the point made by the claimant: that the role of the 2006 Consultation Paper in the consultation process was that of an "issues paper", seeking consultees' views on the issues to be addressed before a

policy proposal as to new nuclear build could be formulated; and was not (at least on its face) that of the (one and only) consultation paper on the "in principle" question: should new nuclear build now be supported?

67. It is common ground that the 2006 Consultation Document must be read as a whole, against the background of all the surrounding circumstances. It must also be borne in mind that it is a consultation paper, not a document produced by and for lawyers. In my judgment the following features of the 2006 Consultation Document support the claimant's submission that, whatever its intended role in the consultation exercise may have been, in relation to nuclear power it had every appearance of being an issues paper, and no more.

(1) The consultation period of 12 weeks was the minimum period suggested for written consultation in the Cabinet Office "Code of Practice on Consultation", published with a foreword by the Prime Minister in January 2004. The explanation for the 3-month consultation period is contained in a witness statement of Mr McIntyre, the Head of the Energy Review Team in the Department of Trade and Industry ("DTI"), filed on behalf of the defendant. Ministers had asked for the review to report by early summer of 2006, around six months after the Prime Minister's announcement in November 2005. The review was not "starting from a blank page". In the context of new nuclear build it was considering whether the option left open in 2003 should be taken up. There was also a desire to minimise uncertainty for business and to minimise the risk of investment delays. While this reasoning is readily understandable, the public had been promised not merely consultation but the "fullest public consultation" in respect of the new nuclear build issue. As a matter of first impression, adopting the minimum recommended period for a very wide-ranging consultation of which the new nuclear power issue was but a part, would be more consistent with the 2006 Consultation Document being an issues paper rather than the substantive Consultation Paper itself. On its own, the short period of consultation is not conclusive, but it is part of the overall picture that was presented to consultees.

(2) The express purpose of the document, "This consultation seeks views on the medium and long-term energy policy issues to be considered in the Energy Review" (para 14 above), is entirely consistent with the document being an issues paper.

(3) The "key questions" on which consultees were invited to comment, when read in the context of the explanatory material in the remainder of the document, are also consistent with the document being an issues paper. The defendant emphasised the breadth of the question 1, but that question is so broad that it would not focus consultees' minds on the question whether the nuclear option should now be taken up, particularly bearing in mind question 3 which was the only question that specifically dealt with nuclear power.

All the key questions are set out above (para 16). For convenience, question 3 is repeated below:

"The Energy White Paper left open the option of nuclear new build. Are there particular considerations that should apply to nuclear as the government re-examines the issues bearing on new build, including long-term liabilities and waste management? If so, what are these, and how should the government address them?"

On its face, this question asks consultees to identify the issues ("particular considerations") that should be considered when the issues relating to nuclear new build are re-examined by the Government. It also asks how the identified issues should be addressed. The question is wholly consistent with the role of the 2006 Consultation Document being that of an issues paper. That impression is reinforced by the text immediately preceding the key questions, which tells consultees that:

> "The Review will examine whether recent changes in energy prices have changed ... [the assessment in the 2000 White Paper that current economics made it unattractive] and at the other issues that would be raised by building new nuclear power stations. These other issues include all the characteristics of nuclear, including its creation of long-term liabilities such as nuclear waste; and how these liabilities should be managed and paid for." (emphasis added)

In that context, question 3 is plainly asking consultees to identify the "other issues" which should be re-examined in the review.

(4) The passage in the text referring to "other issues" (above) is immediately followed by this statement:

> "The government is clear that, in making important decisions about energy policy including nuclear power, there should be the fullest public consultation. This consultation paper is part of that process. The government is not at this stage bringing forward policy proposals." (emphasis added)

This statement is entirely consistent with the 2006 Consultation Document being an issues paper (part of the consultation process) to be followed by "policy proposals", on which there would be further consultation (the remaining part of the consultation process). Mr Drabble submitted that "the proposal" on which consultees were being invited to comment was clear. I do not accept that submission. There were no proposals in relation to nuclear power in the 2006 Consultation Document. On the contrary, consultees were told in terms that proposals would be brought forward in due course.

I realise that there were also stakeholder seminars and round-table meetings, and it could therefore be said that the 2006 Consultation Document as the (one and only) Consultation Paper was nevertheless part of the consultation process. However, a straightforward reading of the explanation given in the document itself as to the role of the 2006 Consultation Document would leave consultees with the impression that since there were no proposals in the document, it was not the last word: in the remaining part of the consultation process they would be consulted on policy proposals.

(5) The matter can be tested in this way. If the Department of Trade and Industry had wanted consultees to answer the "in principle" question:

> "The Energy White Paper left open the option of nuclear new build, is it now appropriate in the light of changed circumstances to take up that option?"

or:

"In the light of changed circumstances does new nuclear build now have a role to play?"

why was such a question not asked? Mr McIntyre explains in his witness statement (paragraph 67) that the earlier parts of the question made it clear that the Government did not want to elicit "yes/no" answers, but wanted to know what issues consultees felt were important when considering the nuclear option. But these two objectives need not be mutually exclusive, as demonstrated by the "Nuclear" questions in paragraph 2.11 of the 2002 Consultation Paper (para 4 above). Those questions clearly invited consultees to comment on the PIU's recommendation that the nuclear option should be left open, and to give their reasoning in respect of a number of specific issues relevant to that recommendation.

(6) The 2006 Consultation Document must be read together with the Summary Document. The latter document refers members of the general public who seek more information to the former. It will be remembered that question 3 in the Summary Document asked members of the public:

"Are there any particular questions the Government should consider when it re-examines the issues relating to possible nuclear new build?"

That is a fair paraphrase of question 3 in the 2006 Consultation Document, and it is a question appropriate for an issues paper, not a final consultation paper.

(7) The amount of information provided in the 2006 Consultation Document, and in particular the level of detail, is consistent with the document being an issues paper, a preliminary stage in the consultation process. There is, effectively, no discussion of the "particular considerations that should apply to nuclear" in the main body of the document. The full text of Annex A to the 2006 Consultation Document is set out above (para 20). After three introductory paragraphs a non-exhaustive list of "the considerations bearing on the issue of new nuclear build in the United Kingdom" is provided on two pages of text. As a description of the issues already identified by the Government as requiring re-examination, the list contains sufficient information to enable consultees to answer the questions: are these issues being adequately addressed, are there any other issues that should be considered and, if so, how should they be addressed?

68. If, on the other hand, the 2006 Consultation Document is to be regarded as the final consultation paper, asking consultees the question "in the light of changed circumstances since 2003 does new nuclear build now have a role to play?", then the "thumbnail sketches" of the issues, in particular the two critical issues of economics ("cost") and waste ("including decommissioning and long-term waste management"), are so devoid of content that they could not realistically be said to have told consultees what the proposal was, much less to have told them "enough ... to enable them to make an intelligent response."

69. I will deal with the issues of cost and waste in more detail below. I describe them as the two critical issues because, whatever the views of the claimant may be as to the relative importance of the various issues mentioned in/omitted from the 2006 Consultation Document, the Government in the 2003 White Paper identified current unattractive

economics and important unresolved issues for nuclear waste as the two reasons why new nuclear build was not proposed at that time.

70. For these reasons I reject Mr Drabble's submission that on any fair reading of the 2006 Consultation Document it invited responses on the issue of principle — should the new nuclear build option be taken up — and was not an issues or scoping paper. On a fair reading of the document as a whole, it appeared to be an issues paper. I would add that in a decision-making process which was dealing with a policy decision of such importance and complexity, raising many highly technical issues on which there were known to be widely-differing views, it could not be said that the publication of an issues paper, as the preliminary stage of "the fullest consultation process", would have been in the least unusual.

71. In reaching this conclusion I do not ignore the other elements of the consultation process. One of the stakeholder seminars was concerned with nuclear power, but the subject matter of the seminar was "nuclear regulation". If the consultation exercise was intended to address the issue of principle — should the nuclear option be pursued — it is curious that no seminar was devoted to that issue of principle and that "Nuclear" was the theme for only one of the 13 round-table meetings. The fact that those attending the seminars and meetings discussed "the nuclear issue" in general terms was not necessarily an indication that they understood that this would be their final opportunity to raise the matter before a decision was made. Indeed, the notes of the discussions indicate that this was not the case. Some participants plainly envisaged that there would be a "national debate" on the issue of principle.

72. In support of his submission that the 2006 Consultation Document could not reasonably have been regarded as an issues paper, Mr Drabble pointed to the proposed timetable which he said was clearly set out, for example by the Prime Minister who had stated that the aim was to publish a policy statement on energy in the early summer of 2006; by the defendant who had said that the Review Team "will develop energy policy proposals during 2006"; and in the terms of reference which stated in December 2005 that "The aim will be to bring forward proposals on energy policy next year." He submitted that these statements had to be considered against the background of the promise in 2003 White Paper: there would be "the fullest consultation and the publication of a White Paper setting out the Government's proposals." Thus consultees would, or should, have realised that the "proposals" which would emerge from the Energy Review would not be proposals for consultation, but decisions by Government to be put forward as proposals to Parliament in a White Paper. The 2006 Consultation Document had re-stated the Government's aim "once it has assessed the conclusions of the Review, to bring forward proposals on energy policy later this year." It was also stated that the Review Team would report to the Prime Minister and the Secretary of State for Trade and Industry "in the early summer".

73. Apart perhaps from the reference in the Prime Minister's speech to the CBI on 29th November 2005, none of the public statements relied upon by Mr Drabble as to the timing of the review was necessarily inconsistent with a consultation process which would firstly identify all of the issues which needed to be re-examined in relation to nuclear power, and then, those issues having been re-examined, would put forward proposals in a consultation

paper, those proposals being set out with sufficient clarity, and in sufficient detail, to enable intelligent comment by those consulted.

74. In the context of a consultation exercise (see Coughlan paras 55-57 above) "bringing forward proposals" is not to be equated with "making decisions". The former are consulted upon, whilst they are still at a formative stage; the latter are reached after the consultation process has concluded and in the light of the representations received. Consultation documents addressed to the general public should be clear as to their purpose. In ordinary language, particularly in the context of a public consultation, a "proposal" is not a "decision". There was an opportunity to resolve the potential confusion and make it clear to consultees that "bringing forward policy proposals" really meant "making decisions". Sadly that opportunity was not taken.

75. When the review was announced there was widespread concern that the outcome of the process was a foregone conclusion. To take but one example from the many expressions of concern in the papers produced by the claimant, the Chairman of the Sustainable Development Commission ("the SDC"), which advises Government on sustainable development, said in a press release announcing the SDC's response to the 2006 Consultation Document:

> "Instead of hurtling along to a pre-judged conclusion (which many fear the Government is doing) we must look at the evidence."

76. In a joint letter dated 12th January 2006, shortly before the 2006 Consultation Document was issued on 23rd January, the claimant and another organisation, Nuclear Free Local Authorities, wrote to the Minister heading the review, Mr Wicks MP. They explained that the "Purpose of the letter" was as follows:

> "We are seeking early confirmation that
>
> — further public consultation on detailed proposals in relation to nuclear power would be undertaken, if the Review were to recommend new nuclear build,
> — engagement with the public and stakeholders in the Review at this stage will adopt all those methods employed in the most recent consultation for the previous White Paper and the current consultation on the back-end of the nuclear cycle conducted by the Committee on Radioactive Waste Management (CoRWM)."

77. The letter then set out the "Background on the commitment to the fullest public consultation", referred to the 2003 White Paper and to departmental press releases announcing the review, and continued:

> "We assume from this that the consultation document will confine itself, as quoted, to the current evidence on the White Paper goals and will therefore not consult on detailed opinions, proposals or strong recommendations across the entire range of its subject matter. For the same reasons we assume that the consultation document will not include any specific detailed proposal or

> option on the narrower issue of whether to proceed with nuclear new build or any proposals whereby Government might facilitate such a proposal or option.
>
> This view is, it appears, strengthened by the terms of reference [which are then set out]."

The final sentence which is emphasised is as follows:

> "In drawing up the analysis and <u>options, the Energy Minister will undertake extensive public and stakeholder consultation</u>."

The letter continued:

> "We seek clarification that options will only be drawn up *after* the fullest consultation."

The final paragraph of the letter said:

> "We would be grateful for your assurance that the government's plans for engagement with the public and stakeholders for the review will include all those that have been employed in the most recent consultation for the previous White Paper and the current consultation on the back-end of the nuclear cycle conducted by CoRWM."

78. The Minister replied after the 2006 Consultation Document had been issued. Here was an opportunity to make it clear to the claimant and the co-signatory of the letter that the 12-week consultation period on the 2006 Consultation Document was "it", and there would be no further consultation before a decision was made as to whether the new nuclear build option should be taken up. The Nuclear Policy Manager at the DTI replied on behalf of the Minister:

> "As you will be aware, the Minister recently launched a 12-week consultation period on the Energy Review. I am sure you will wish to participate in the consultation, which you can do at the following web site ...
>
> The purpose of this consultation is to engage with stakeholders and the public and to encourage an informed debate. Energy policy is a complex and inter-related issue; there are no simple answers. As the Minister has made clear since the Review was announced, the outcome of the Review is not a foregone conclusion; the Government is keen to engage with people who are ready to have a serious debate around the facts and evidence. The consultation is wide ranging and views from the organisations you are representing would be most welcome, as would the views from industry, the public and all others with an interest or stake in the future of UK energy. Turning to your question relating to further consultation specifically on new nuclear build, I would like to assure you that the commitment given in the 2003 Energy White Paper that *'Before any decision to proceed with the building of new nuclear power plants, there would need to be the fullest*

public consultation and the publication of a white paper setting out the Government's proposals' is still applicable.
Detailed arrangements for any future consultation exercise are not yet determined. Such detailed arrangements would obviously depend on the outcome of the Review, and at this stage we cannot pre-judge what this might be. However, we have noted your suggestions for using best practice and lessons learnt from other consultations."

As an exercise in avoiding giving the claimant the clarification it had sought, the reply could not be improved upon.

79. That the lack of clarity was not simply a problem for the claimant is illustrated by the following extract from the Executive Summary of the Sixth Report of the House of Commons Environmental Audit Committee "Keeping the lights on: nuclear, renewables and climate change":

> "10. The nature of the current Energy Review is unclear — whether it is specifically fulfilling the Prime Minister's desire to make a decision on nuclear, whether it is a review of electricity generating policy, whether it is a wider review of progress against the Energy White Paper, or whether it is reopening the broad policy debate which the White Paper itself encompassed. We are also concerned that it does not appear to have resulted from a due process of monitoring and accountability, and that the process by which it is being conducted appears far less structured and transparent than the process by which the White Paper itself was reached.
>
> 11. If the Energy Review is focussed mainly on electricity generation and, in particular, a decision on nuclear, then it is unclear what the nature of such a decision could be and the Secretary of State himself was unable to explain this. ...
> 12. If, on the other hand, the Energy Review is a wider ranging review of policy it will fail to command the support of stakeholders, the public and politicians if what emerges is significantly different from the course that was charted in the Energy White Paper without a proper explanation of how circumstances have altered sufficiently to justify such a change and without further wide-ranging consultation on the nature of the change. ..."

80. The claimant has obtained a number of statements from other organisations. They include Friends of the Earth, which said in a letter dated 6th October 2006:

> "Finally, and for the avoidance of any doubt, we do not agree [with] the Secretary of State's assertion (described in your grounds) that the decision to support nuclear new build was a foreseeable and foreseen outcome of the consultation. The only question dealing with the issue of nuclear was Question 3 which simply asked for information as to the issues to be considered <u>before</u> such a decision could be made. Friends of the Earth's very brief response to that question within the consultation process indicates that we, at least, did not consider that the decision to support nuclear new build would be a foreseeable result of that consultation."

81. Mr Drabble pointed to the responses submitted by the various organisations and contended that they demonstrated that all of the organisations had not treated the 2006 Consultation Document simply as an issues paper. I readily accept that the organisations in their representations did address the issue of principle and not simply the questions posed in question 3, but I do not accept that Friends of the Earth's one-page response to question 3 would have been quite so brief if it had believed that question 3 was its one and only opportunity to address the issue of principle.

82. For these reasons, I do not accept that the outcome of the consultation exercise — a decision that new nuclear build had a role to play — would have been reasonably foreseeable by those consultees who took the 2006 Consultation Document at face value and relied upon it. I do, however, accept Mr Drabble's submission that the outcome was actually foreseen by very many, perhaps most, of the consultees who responded to the 2006 Consultation Document. To take the claimant as an example, it did not simply identify the issues which it considered should be re-examined by the Government when reaching a decision as to whether or not new nuclear build had a role to play. It made lengthy and very detailed representations in respect of the issue of principle. However, it also made it clear in Annex 15 to its representations that it had serious reservations about the consultation process. In the overview to its representations it said:

> "Greenpeace is concerned that <u>if</u> the consultation process is intended as the basis for a new policy proposal on nuclear power, then in our view it is wholly inadequate, hasty, uninformed and its outcome apparently prejudged (Annex 15)." (emphasis added)

83. Those concerns were amplified in Annex 15 to the claimant's representations, which said *(inter alia*):

> "In Greenpeace's view, insofar as this consultation is intended to be part of [the] process of public consultation and participation on the future of nuclear power, it is wholly inadequate.
>
> Before there is any change in policy in relation to new nuclear power stations, the building and operation of which will create such a significant and long term environmental hazard, there should be full public consultation on and participation in the decision. ...
> We are very concerned that the consultation period is only 12 weeks - the minimum considered acceptable by government for any consultation. This is clearly not enough for full consultation and participation on a weighty policy decision about the future of nuclear power.
> The process for the decision-making should be clear, transparent and fair and be accompanied by the information necessary for full public consultation and participation. Proper consultation on [the] future of nuclear power would include, for example providing full information to the public on alternatives, costs, safety, the extent and routes of the transport by road, rail or sea, of nuclear materials and nuclear wastes, plans for dealing with nuclear waste, vulnerability to terrorist attack, legal and other measures for nuclear

emergencies and the implications for nuclear proliferation. There should be sufficient time for consultees to respond and comment on the information and on other evidence.

This consultation clearly falls short of these requirements. We note, for example, that the consultation period closes before there is any recommendation for how to deal with nuclear waste. In the circumstances, the process cannot possibly serve as part of a genuine consultation process on the future of nuclear power.

Finally, it is widely believed and reported that the government decision to sanction or plan new nuclear power stations has already been made. We note, for example, Mr Blair's reported comments in Australia where he said 'Clean coal technology, carbon sequestration, renewable energy, the new generation of nuclear power, all of these things I think are going to be part of the mix that we use for our future energy requirements.'

No meaningful consultation process can be carried out and no good decision can be made if the issue has been pre-judged. On the basis of this hastily conducted and inadequate consultation process the government will not be in a position to form a view that nuclear power is necessary or desirable: to do so would confirm suspicions that the decision has already been made."

84. Mr Drabble submitted that the claimant was there recognising that the 2006 Consultation Document was not simply an issues paper and was complaining, for example, about the consultation period on the basis that the document was the, substantive, consultation paper and 12 weeks was an inadequate time in which to respond. In a witness statement Ms North, a senior nuclear campaigner for the claimant, explains why the claimant produced "as much information as it could" on the "other considerations" which it argued should be taken into account. The hope was that by giving a full response the Government would be persuaded to proceed no further at that stage. At the same time there was a fear that some ministers "had already made up their minds that they should favour new build", hence the observations in Annex 15 of the claimant's response.

85. For present purposes it is unnecessary to consider whether that fear was justified. It is sufficient to note that the documents before the court demonstrate that the fear was widespread among those environmental organisations which responded to the 2006 Consultation Document.

86. The following passage in the SDC's response is representative of many. Under the heading "Advice regarding next steps", the SDC said this:

> "4.1 Acting on the assumption that the current Review (*Our Energy Challenge*) is indeed a genuinely impartial process, dispassionately reviewing the evidence available to Ministers (including our own research) rather than rationalising a pre-determined decision with a tokenistic consultation exercise thrown in for good measure, we strongly recommend that one of the principal outcomes of the Review, as regards nuclear power, should be to formulate distinctive positions (broadly along the lines of the Commission's positions outlined above),

and then to indicate which of those positions the Government is minded to pursue in due course.

4.2 Given the critical importance of this decision, and regardless of which position the Government declares it is minded to pursue, systematic engagement with the general public should be seen as a precondition of transparent and effective policy–making in this area. The history of the nuclear industry is littered with hasty, partisan and secretive studies leading to expensive mistakes and public hostility.

4.3 Once the Review has been published, outlining the Government's broad intentions, at least nine months should then be set aside for a range of much more substantive consultative and engagement processes, carefully planned in advance and presided over by independent experts and advisors. Any attempt to force top-down solutions on the British public at this stage, with a process fixed by Government to fit pre-determined outcomes, will lead in all probability to widespread mistrust and hostility. ...

4.8 In conclusion, a proper transparent process is **all-important**. There are many siren voices urging Ministers to pursue a fast-track approach to this decision, dispensing with proper consultation, and short-circuiting a proper Parliamentary process. This would be extremely foolish, and would inevitably (and justifiably) result in a backlash against whatever the Government eventually decides is the right way forward for the UK at this critical time."

87. In these circumstances it is hardly surprising that many organisations opposed to new nuclear build made vigorous representations to the effect that the nuclear option should not be pursued. They did so not because the purpose of the 2006 Consultation Document was clear, but because its purpose was unclear and they feared (whether rightly or wrongly does not matter) that the consultation exercise was not genuine. Thus, the outcome of the exercise was indeed foreseen by many consultees who did not take the 2006 Consultation Document at its face value. Does it matter why the claimant made its very full representations? Has any potential procedural unfairness been cured by the fact that full representations were actually made?

88. In my view it does matter and the potential unfairness has not been cured, because this was not a consultation with an individual consultee, or a closed group of consultees, for example the residents of a particular care home, as in the Coughlan case. The promise of "the fullest public consultation" was extended to the adult population of the United Kingdom, hence the publication of the Summary Document. It is not enough that those who were thoroughly sceptical about the consultation process should have foreseen the outcome; the outcome should have been, but was not, reasonably foreseeable by any

interested organisation or member of the public who took the 2006 Consultation Document and the Summary Document at face value.

89. There has been no satisfactory answer to the point made in the claimant's grounds:

> "... that, quite apart from how Greenpeace responded to the question set out in the consultation, one cannot predict how others might have responded had the question been framed differently or, perhaps more importantly, whether there were others who might not have responded at all given the terms in which the question was framed and the inference that they reasonably could have drawn that this was only an initial question-setting stage of the Government's review of its policy on nuclear new build, rather than the last chance they would have to comment on the substantive issue of whether or not the Government should support nuclear new build."

Inadequate information/unfairness

90. If these conclusions are wrong, and it is assumed that any reasonable consultee would or should have realised that the 2006 Consultation Document and the Summary Document were not issues papers, but were the consultation paper inviting the public's responses to the issue of principle, two questions arise:

(1) was the information contained in the 2006 document enough to enable them to make an intelligent response on the issue of principle?

and, closely related to question (1):

(2) was it unfair for the defendant to take into account new information, which emerged after the consultation period had ended, without giving consultees an opportunity to comment upon it before the "in principle" decision was taken in the Energy Review?

91. The two issues are closely related because the more information that is disclosed at the consultation stage, the less likely it is, other things being equal, that consideration of further new information at a later stage will be unfair. On the other hand, if consultees are given very little information of substance on which to base their comments, and then a great deal of information emerges after the close of the consultation period, it may well be unfair to take all of that new information into account without first giving consultees the opportunity to comment upon it. In essence, the claimant contends that this is what happened in the present case. A number of reports commissioned by the defendant were published at the same time as, or shortly after, the publication of the Energy Review. The details are set out in the evidence of Mr McIntyre and Ms North. It is unnecessary to rehearse the detail because Mr McIntyre correctly summarises the position thus:

> "The Government published a substantial evidence base alongside the Energy Review."

92. In addition, CoRWM published its final report on 31st July 2006. Its draft recommendations had been published on 27th April 2006, after the end of the 12-week consultation period on 14th April 2006.

93. Although the claimant in its grounds complains about the lack of information during the consultation period and the extent of the post-consultation material relied on by the defendant in respect of a large number of issues, some of them touched on in the 2006 Consultation Document, some not, it is sensible to test this complaint by looking at the two critical issues identified in the 2003 White Paper: economics and waste.

Economics

94. It is possible to deal with this issue quite shortly because the disparity between the amount of information provided to consultees in the 2006 Consultation Document, and not merely the quantity but also "the quality" (in terms of technical detail etc) of the information taken into account after the close of the consultation period is very stark indeed. In the 2006 Consultation Document consultees were merely told that fossil fuel prices had risen sharply, that the review would examine the impact of recent price rises on the desirability or otherwise of new nuclear build, that comments were invited on the assumptions for fossil fuel prices summarised in Annex B, and that the analysis in Annex B showed that "cost estimates for new nuclear build vary significantly." For practical purposes, that was all the information on the topic of economics with which consultees were provided in the 2006 Consultation Document. The full text of the "cost" consideration in Annex A is set out above. It is not unfairly described as jejune.

95. The Energy Review concluded that "the economics of nuclear now look more positive than at the time of the 2003 Energy White Paper" (paragraph 5.98). That conclusion was reached on the basis of "a range of plausible scenarios" incorporating "expectations about future gas and carbon prices, as well as expected costs of building, operating, decommissioning and dealing with the waste of a new nuclear plant" (ibid). These issues were examined, in considerable detail, in "a cost-benefit analysis of nuclear new build" which the Government carried out for the purposes of the Energy Review "in order to inform its conclusions on the potential role of nuclear power ..." (paragraph 5.97). A summary of the cost-benefit analysis was published contemporaneously with the Energy Review. The cost-benefit analysis was underpinned by a number of specialist reports from a variety of consultants covering such issues as financial modelling, the relative costs of electricity generation technologies under different scenarios, the management and financing of long-term nuclear waste, the financing of decommissioning, etc.

96. On 15th May 2006 the claimant asked for copies of the supporting reports under the Freedom of Information Act. A holding reply was received from the DTI on 12th September 2006, stating that it was hoped that the claimant would have a response by 4th October. Some of the reports were provided under cover of a letter of 6th October 2006. Eventually, after a further exchange of correspondence, redacted copies of some, but not all, of the remaining reports were produced under cover of a letter dated 20th December 2006.

97. Mr McIntyre says in his witness statement that there is nothing unusual in the Government commissioning reports in parallel with a consultation exercise. I entirely accept that this is the case, and that fairness will not necessarily require the disclosure of each and every report of that kind. But the contrast between the paucity of the information provided to

consultees on the issue of economics in the 2006 Consultation Document and the wealth of highly-detailed information on the critical issue of cost-benefit analysis considered by the defendant but not published until after (and in some cases well after) the consultation period had closed, could not be more striking. This is an extreme example of the circumstances described in the Edwards case, where fairness demanded that consultees should have been given an opportunity to comment on at least some part (even if not all) of the mass of new material. It would be pointless to try and identify which reports might fairly have been withheld, since it is no exaggeration to say that, on the issue of economics, the 2006 Consultation Document presented consultees with little more than an empty husk. The kernel of the economics issue was contained in numerous reports which emerged only after the consultation period had expired. That was manifestly unfair.

98. Mr Drabble referred to the Airports White Paper case as an example of a Secretary of State taking into account new, technical material ("Passenger Forecasts — Additional Analysis"), which was not published until shortly after the White Paper was issued in December 2003 (paragraph 112). Despite the fact that the "Additional Analysis" was of critical importance to the economic case, it was not concluded that it was unfair for the Secretary of State to take it into account. The Airports White Paper case preceded the Court of Appeal's decision in Edwards, but much more important, the case turned very much on its own particular facts, and the reason why fairness did not require re-consultation on the revised forecasts with those who were challenging the White Paper's decisions in respect of Heathrow are briefly summarised in paragraph 116 of the judgment. That summary must be read against the background of the way in which the Heathrow challenge was being argued (see paragraphs 61-115 of the judgment). The implications of the new financial appraisal for the Stansted challenge were considered in paragraphs 259-269 of the judgment. In summary, the new information reinforced the claimants' contention that the policy in the White Paper relating to Stansted was unfairly prescriptive. Thus, the fairness of the Secretary of State's consideration of the "new" material was taken into account, albeit not as a free-standing issue.

99. Notwithstanding the factual differences between the two cases, a broad comparison between the Airports White Paper case and the present case is instructive. Both cases share this common characteristic: the publication of a statement of Government policy, one of whose purposes was to remove or curtail the scope for a detailed examination of the need for major controversial development at public inquiries. In the Airports White Paper case, the statement of principle under challenge was contained in the White Paper itself. In the present case the statement of principle has preceded the White Paper. Whether it is desirable for questions of need to be resolved by way of Government policy statements or through the inquiry process is plainly a matter for politicians to decide in Parliament. However, if it is desired to remove the public's opportunity to debate "need" from the public inquiry and substitute a statement of Government policy, then any process of doing so (including in particular any process of public consultation) must be conducted in a fair manner.

100. In the Airports White Paper case the amount of information provided to consultees as part of the consultation exercise was truly immense: see the summary in paragraphs 18-46 of the judgment. By contrast, the "new" material on which consultees in that case did not

have an opportunity to comment was relatively limited. Although the "Additional Analysis" was highly significant, it was just that: an addition to the very detailed analyses that were already available to consultees. In paragraph 311 of the judgment the overall process, including the extensive public consultation exercise, was described, subject to two qualifications, as "an impressive attempt to grapple with a difficult and complex issue." Even the most ardent admirers of the 2006 Consultation Document would be hard put to it to describe the two-page treatment of "some of the considerations bearing on the issue of new nuclear build" in Annex A as "impressive".

101. In summary, the balance in the two cases between, on the one hand, the information which was placed before consultees and on which they could comment, and the later information upon which they had no opportunity to comment, could not be more different. In saying that I do not overlook the fact that the Energy Review was a review of the 2003 White Paper. That does not alter the fact that "the fullest public consultation" was promised in respect of what was to become the nuclear component of the Energy Review.

Waste

102. This topic was the subject of extensive submissions on behalf of the claimant. While I appreciate the claimant's strength of feeling on the issue, a lengthy discussion is not necessary for the purposes of this judgment. The starting point must be the information provided to consultees in Annex A. Consultees were told that the issue of waste "will be one of the important considerations relating to nuclear power in this Review", and that decommissioning and long-term waste management were "also significant issues for the public." Consultees were further told that CoRWM had been set up to examine the options for the long-term storage of radioactive waste and that it was expected to report in July 2006. It is difficult to see what informed response consultees could reasonably have been expected to make to this exiguous information, other than: "wait and see what CoRWM recommends." Unfortunately, the information in Annex A in respect of waste was not simply inadequate as the basis for anything other than a "wait and see" response until CoRWM reported, it was also seriously misleading as to CoRWM's position on waste from nuclear new build. Consultees were told that:

> "CORWM has confirmed that waste from a new build programme could be technically accommodated by the options it is considering."

103. That statement was true, but only as far as it went, and that was not far enough to give consultees a fair summary of CoRWM's true position. CoRWM had issued a "nuclear new build statement" on 16th December 2005. The short version was as follows:

> "CoRWM has no position on the desirability or otherwise of nuclear new build.
>
> We believe that future decisions on new build should be subject to their own assessment process, including consideration of waste.
> As we have noted before, the prospect of a new nuclear programme might undermine support for CoRWM from some stakeholders and citizens."

104. The substantive version was as follows:

> "CoRWM has no position on the desirability or otherwise of nuclear new build. Our primary task is to recommend the best option, or combination of options, for long-term management of wastes which now exist, or which will inevitably be created, for example as a result of decommissioning. As our terms of reference require us to, we have carried out work to establish the waste implications of new build decisions as part of a wide-ranging scenario exercise to establish whether or not our options could accommodate new build wastes. The results of this investigation published at para. 18 of our Phase 2 report (document 1210) are that solutions for existing and unavoidable future wastes would also be robust in the light of all reasonably foreseeable developments in nuclear energy and waste management practices.
>
> We believe that future Government decisions on new build should be subject to their own public assessment process, including consideration of waste, because such decisions raise different political and ethical issues when compared with the consideration of wastes which already exist. We have noted before that the prospect of a new nuclear programme might undermine support for CoRWM from some stakeholders and citizens and make it more difficult to achieve public confidence."

105. Put simply, CoRWM's answer to the new nuclear waste issue was, "Yes there is a technical solution, but ..." Such emphasis was laid on the "but" part of CoRWM's answer, that it had expressly said that it had no position on the desirability or otherwise of nuclear new build. In telling consultees that CoRWM's answer to the problem of waste was "yes" rather than "yes, but ,.." Annex A was seriously misleading. Waste was not simply one among a great many important issues. A large number of respondents had commented on nuclear waste in response to the 2002 Consultation Document. Several had considered it to be the key issue affecting new nuclear build (para 7 above). The fact that "important issues for nuclear waste" had not been resolved was one of the two factors which led to the decision not to propose nuclear new build in 2003. CoRWM was held out in Annex A as the body charged with resolving those important unresolved issues. It was therefore essential that its position should be accurately represented in Annex A. It was not.

106. Following the publication of the 2006 Consultation Document on 23rd January 2006, both the Chairman of the Committee and the Committee itself took vigorous steps to try to set the record straight. In March 2006 CoRWM reaffirmed the statement made on 16th December 2005, but added the following after stakeholder comment:

> "— We do not intend to give a positive or negative signal to new build in making our recommendations. New build wastes could in principle be accommodated within our options, but significant practical issues would arise, including the size, number and location of waste management facilities.
>
> — The public assessment process that should apply to any future new build proposals should build on the CoRWM process, and will need to consider a range of issues including the social, political and ethical issues (for example

the creation of further burdens on future generations) of a deliberate decision to create new nuclear wastes."

107. That remained CoRWM's public position until publication of its draft recommendations on 27th April 2006, after the close of the consultation period on 14th April 2006.

108. Pausing there, this was a draft of the recommendations which consultees had been told in Annex A would be addressing the unresolved waste issue. Since they had been told nothing else of substance in Annex A about this issue, it is difficult to understand how it could possibly be fair not to reopen the consultation to enable consultees to make informed comment, not merely on the manner in which it was proposed to resolve the issue, but also on the implications of the solution, insofar as they affected, for example, the economics of nuclear new build and the timing of any possible new nuclear build contribution to carbon emission targets.

109. Standing back from the detail, the question has to be asked: how could it possibly be fair for a public body consulting on an important proposal to say little more to consultees than, "we have appointed a committee to address one of the two major obstacles to the proposal and it will report in X months", and then to reach a decision on the proposal without inviting consultees' comments on the Committee's conclusions as to how the obstacle might be overcome?

110. CoRWM's draft recommendations are simply a two-page list of 12 recommendations without any explanation of CoRWM's reasons for adopting them. The very lengthy and detailed reasoning came later, in CoRWM's final report published on 31st July 2006, after publication of the Energy Review on 11th July.

111. In its claim form the claimant contended that CoRWM's final report should have been made available to consultees, to enable them to comment upon it, before any decision was taken in relation to nuclear power in the Energy Review. In reply to that complaint, Mr McIntyre said in his witness statement that it was of no consequence that the final report had been published after the Energy Review because CoRWM had publicly stated that the draft recommendations "were very unlikely to materially change." The fact that the recommendations were <u>draft</u> recommendations would not therefore have been a justification for not reopening the consultation to enable consultees to make representations about the desirability or otherwise of adopting the nuclear new build option in the light of the draft recommendations of the committee appointed by the Government to address the critical issue of waste. From the consultees' point of view half a cake (the recommendations only) would have been better than none. I say "none" because, as with the economics issue, there was nothing of substance on the waste issue in Annex A. It merely told consultees that CoRWM would be reporting. Unless consultees were given a proper opportunity to consider and make representations as to the implications of CoRWM's proposals for new nuclear waste, that part of the consultation exercise would be entirely devoid of substance.

112. I refer to the need to give consultees a "proper opportunity" to consider the implications of CoRWM's recommendations because Mr Drabble submitted that the claimant and other organisations with an interest in nuclear power had been well aware of the fact that

CoRWM's answer to new nuclear build had been a "yes, but..." answer, and that the Committee's position had been made clear by the Chairman and the Committee itself during the course of the consultation exercise. He further pointed out that many of the arguments raised in the claimant's representations had foreshadowed points that would subsequently be made in CoRWM's final report.

113. This is no answer to the lack of substance in Annex A. It would be important, for example, for the claimant to know the extent to which the arguments made in its representations on the waste issue were, or were not, endorsed by the committee set up by the Government to examine that very problem. Moreover, the consultation was directed not simply at environmental organisations, but at members of the general public, who, if they had followed the advice in the Summary Document and sought more information in the 2006 Consultation document, might well have been reassured by the bald statement that CoRWM had confirmed that there was a technical solution to the problem. If so, they would have been disappointed, if not disturbed, to read the statement at the end of CoRWM's draft recommendations, after the consultation period had closed:

> "CoRWM takes no position on the desirability or otherwise of nuclear new build. We believe that future decisions on new build should be subject to their own assessment process, including consideration of waste. The public assessment process that should apply to any future new build proposals should build on the CoRWM process, and will need to consider a range of issues including the social, political and ethical issues of a deliberate decision to create new nuclear wastes."

114. Whether or not fairness required that the defendant having given no indication in the 2006 Consultation Document as to how the Government proposed to address the issue of new nuclear waste, beyond telling consultees that CoRWM would be making recommendations about that topic, should have waited until consultees could respond to CoRWM's final recommendations, there can be no doubt whatsoever that, at the very least, fairness required that consultees should be given an opportunity to make representations in response to the draft recommendations, which became available shortly after the consultation period closed. The potential implications of CoRWM's recommendations were plainly relevant to the "in principle" question. To take but one example mentioned during the course of submissions: CoRWM's draft recommendations made it clear that its technical solution, geological disposal, should be achieved "on the principle of volunteerism, that is, an expressed willingness [by a community] to participate." Would volunteer communities come forward if they knew that in addition to "legacy waste", they might also have to accept "new waste"? If the technical solution was to be adopted on a voluntary basis, how long might that process take, what would be the effect of the longer timescales inherent in a voluntary approach on the economic analysis of new nuclear build, and on the timing of any contribution that new nuclear build might be able to make towards the reduction of carbon emissions, etc?

115. It is no answer to say that organisations such as the claimant were able to obtain copies of CoRWM's draft recommendations and make further representations if they wished to do so. At the risk of repetition: this was a consultation exercise on an issue of sufficient

importance to warrant an express promise of "the fullest public consultation" in a White Paper. The public, and not simply those who happened to be "in the know", were entitled to be given sufficient information about the issue of waste, and without even the draft recommendations of CoRWM they could not be expected to make any, let alone an informed, response to the issue as described in the 2006 Consultation Document.

Conclusions

116. For the reasons set out above, the consultation exercise was very seriously flawed. Adopting the test put forward by Mr Drabble, "something has gone clearly and radically wrong." The purpose of the 2006 Consultation Document as part of the process of "the fullest public consultation" was unclear. It gave every appearance of being an issues paper, which was to be followed by a consultation paper containing proposals on which the public would be able to make informed comment. As an issues paper it was perfectly adequate. As the consultation paper on an issue of such importance and complexity it was manifestly inadequate. It contained no proposals as such, and even if it had, the information given to consultees was wholly insufficient to enable them to make "an intelligent response". The 2006 Consultation Document contained no information of any substance on the two issues which had been identified in the 2003 White Paper as being of critical importance: the economics of new nuclear build and the disposal of nuclear waste. When dealing with the issue of waste, the information given in the 2006 Consultation Document was not merely wholly inadequate, it was also seriously misleading as to CoRWM's position on new nuclear waste.

117. On both the economics and the waste issues all, or virtually all, the information of any substance (the cost-benefit analysis and supporting reports, and CoRWM's draft and then final recommendations) emerged only after the consultation period had concluded. Elementary fairness required that consultees, who had been given so little information hitherto, should be given a proper opportunity to respond to the substantial amount of new material before any "in principle" decision as to the role of new nuclear build was taken. There could be no proper consultation, let alone "the fullest public consultation" as promised in the 2003 White Paper, if the substance of these two issues was not consulted upon before a decision was made. There was therefore procedural unfairness, and a breach of the claimant's legitimate expectation that there would be "the fullest public consultation" before a decision was taken to support new nuclear build.

118. It was not submitted on behalf of the defendant that relief should be refused as a matter of discretion if I reached the conclusion that the decision-making process was unlawful on these grounds. The application for judicial review of the policy decision in the Energy Review that new nuclear build has a role to play in the future UK generating mix therefore succeeds.

119. I will hear submissions as to the precise terms of the order.

120. Procedurally the better course in the case of a document of this kind is to grant declaratory relief rather than a quashing order. The declaratory relief will be to the effect that there was a breach of the claimant's legitimate expectation to fullest public consultation; that the

consultation process was procedurally unfair; and that therefore the decision in the Energy Review that nuclear new build "has a role to play ..." was unlawful.