Neutral Citation Number: [2022] EWHC 611 (Admin)

Case No: CO/1418/2021

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

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 23 March 2022

Before :

SIR WYN WILLIAMS
Sitting as a Judge of the High Court

- -

Between :

THE QUEEN	**Claimant**
on the application of	
NATIONAL FARMERS' UNION OF ENGLAND AND WALES	
- and –	
WELSH MINISTERS	**Defendant**
NATURAL RESOURCES WALES	**Interested Party**

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- -

Hugh Mercer QC and Jane Russell (instructed by **JCP Solicitors**) for the **Claimant**
Gregory Jones QC and Annabel Graham Paul (instructed by **Welsh Government Legal Services**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing dates: 26 October, 27 October and 9 November 2021

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Approved Judgment

Sir Wyn Williams :

1. By a claim made on April 21 2021, the Claimant seeks to challenge by way of judicial review the legality of regulations made by the Defendant and known as the Water Resources (Control of Agricultural Pollution) (Wales) Regulations 2021 (hereinafter referred to as "the Regulations"). The Regulations were made on 21 January 2021 and laid before Senedd Cymru (hereinafter referred to as "the Senedd") on 27 January 2021.

2. The Regulations were made by the Defendant albeit that the Minister most concerned was the Minister for the Environment, Energy and Rural Affairs. In this judgment, I use the term Defendant when I am referring to the party named as the Defendant to this claim. When it is necessary to refer to the Minister for the Environment, Energy and Rural affairs, I use the phrase "the Minister". From time to time and when appropriate I also use the phrase "Welsh Government" to describe the body exercising devolved powers in Wales.

3. It is common ground that the Defendant was empowered to make the Regulations; it is also common ground that they were laid before the Senedd in accordance with prescribed procedure (referred to the papers before me as the "negative procedure").

4. Under the negative procedure members of the Senedd have a period of 40 days after the laying of regulations to object to the same. If an objection to regulations is made and sustained at the Senedd, the regulations are annulled; conversely, if an objection is made but is not sustained the regulations continue to have effect.

5. In this case a number of members of the Senedd objected to the Regulations. The consequence was that they were the subject of two debates in plenary meetings of the Senedd. On each occasion the majority of members who voted favoured the Regulations continuing to have effect.

6. For most of the life of these proceedings the principal remedy sought by the Claimant has been a declaration in the following terms as set out in a draft order provided to the court at the same time as the claim was issued and filed:-

> *"1 In deciding to introduce the [new regulations], the Defendant acted unlawfully and/or has acted unlawfully in so far as:*
>
> *The environmental 'at risk' zone applies to the entire territory of Wales;*
>
> *1.2 The derogation hitherto applied to those farmers with more than 80% grassland is not included;*
>
> *1.3 No reasonable transitional period is included."*

7. Some days prior to the commencement of the hearing before me, the Claimant applied to amend the claim for relief by adding a quashing order; it also sought more minor amendments to the draft order set out in the paragraph above. The application to amend to include a quashing order was put on alternative bases. The alternatives were that the

Regulations should either be quashed in their entirety or that Regulations 1, and/or 2, and/or 4 should be the subject of a quashing order.

8. The Defendant vigorously opposed the amendments sought by the Claimant as soon as the application for the amendment was made and continues to do so. I deal with the application and my conclusion upon the same as a discrete issue at the end of this judgment.

9. In order to understand the grounds of challenge and my conclusions upon them it is necessary to set out a significant amount of the background leading to the making of the Regulations. I propose to do that in the section of this judgment which follows immediately.

The Relevant Background

10. On 12 December 1991, the European Council issued Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (hereinafter referred to as "the Nitrates Directive"). Article 1 defined the objective of the Directive as being to reduce water pollution caused or induced by nitrates from agricultural sources and to prevent further such pollution.

11. The Nitrates Directive imposed a series of detailed obligations upon Member States of the European Union. They were obliged to identify waters affected by pollution and waters which could be affected by pollution in the absence of actions specified under the Directive – Article 3.1. Member States were obliged to designate specified areas of land within their territories as "vulnerable zones", save that such vulnerable zones were not mandated if Action Programmes complying with Article 5 were established and applied throughout the national territory of a Member State – Articles 3.2 and 3.5. Article 5.1 imposed an obligation upon Member States to establish Action Programmes in respect of designated vulnerable zones if the Action Programmes did not relate to the whole of the territory of a Member State. Member States were obliged to implement the Action Programmes within a specified time period and to include within the programmes specified measures – Article 4.4.

12. One of the two measures specified in Article 4.4 was that the Action Programme should include the measures specified in Annex III of the Directive. The salient parts of Annex III were as follows:-

> *"**MEASURES TO BE INCLUDED IN ACTION PROGRAMMES AS REFERRED TO IN ARTICLE 5(4)(a)***
>
> *1. The measures shall include rules relating to:*
>
> *i. periods when the land application of certain types of fertiliser is prohibited;*
>
> *ii. the capacity of storage vessels for livestock manure; …*
>
> *iii. limitation of the land application of fertilisers, consistent with good agricultural practice and taking into account the characteristics of a vulnerable zone concerned …*

> *2. These measures will ensure that, for each farm of livestock unit, the amount of livestock manure applied to the land each year, including by the animals themselves, shall not exceed a specified amount per hectare.*
>
> *The specified amount per hectare be the amount of manure containing one 170kg N. However:*
>
> *(a) for the first four-year Action Programme, Member States may allow an amount of manure containing up to 210kg N;*
>
> *(b) during and after the first four-year Action Programme, Member States may fix different amounts from those referred to above. …*
>
> *If a Member State allows a different amount under point (b) of the second sub-paragraph, it shall inform the Commission, which will examine the justification in accordance with the regulatory procedure referred to in Article 9(2).”*

13. At the time that the Nitrates Directive came into force, there was no devolved institution within Wales which was charged with the responsibility of giving effect to the Directive in domestic law. At that time, the Parliament of the United Kingdom (“the UK Parliament”) was responsible for transposing the Directive into the law of England and Wales.

14. In 1998, the National Assembly for Wales was created. Its powers were, at first, very limited, but the same were enlarged following the UK Parliament’s enactment of the Government of Wales Act 2006. In short, after the coming into force of that Act, the National Assembly for Wales was empowered to legislate in certain defined areas.

15. On 9 December 2008, the Nitrate Pollution Prevention (Wales) Regulations 2008 were laid before the National Assembly (the “2008 Regulations”). The explanatory note accompanying the Regulations explained that “in relation to Wales, these Regulations continue to implement Council Directive 91/676/EEC”.

16. Under Part 2 of the 2008 Regulations, certain areas of Wales were designated as “Nitrate Vulnerable Zones” (hereinafter referred to as “NVZs”).

17. Regulation 12 of the 2008 Regulations applied to agricultural holdings within NVZs. It provided:

> *“12. (1) The occupier of a holding must ensure that, in any year beginning 1 January, the total amount of nitrogen in livestock manure applied to the holding, whether directly by an animal or by spreading, does not exceed 170kg multiplied by the area of the holding in hectares.*
>
> *(2) …*
>
> *(3) …”*

18. On 14 January 2009, the Government of the United Kingdom submitted a request to the European Commission (hereinafter referred to as "the Commission") for authorisation to set the limit of nitrate application of livestock manure to grassland in a NVZ at 250kg per hectare, per year. In a Decision made on 29 May 2009 the Commission granted the authorisation in that, for the period 2009 to 31 December 2012, the maximum permitted limit for the application of livestock manure in a grassland farm (as defined in the Decision of the Commission) in a NVZ was set at 250kg per hectare per annum. This authorisation was and is commonly referred to as the "derogation" in published documents. In 2012, the Commission extended the derogation for a further period of four years ending 31 December 2016.

19. In 2013, the Defendant made the Nitrate Pollution Prevention (Wales) Regulations 2013 ("the 2013 Regulations"); these Regulations were amended in 2015. It suffices to say that the 2015 Regulations, as amended, laid down a detailed procedure whereby Welsh farmers could seek to take advantage of the derogation which had been granted by the Commission.

20. On 31 December 2016, the derogation granted by the Commission came to an end. By that date, the Referendum leading to the withdrawal of the United Kingdom from the European Union had taken place. I understand that no further derogation was sought by the UK Government from the Commission, notwithstanding that the UK remained a Member State of the European Union until 31 December 2019 and transitional arrangements existed between the European Union and the United Kingdom until 31 December 2020. Nonetheless, as I understand it, "derogations" continued to be granted to Welsh Farmers by the Minister/Welsh Government until 2019 (notwithstanding authorisation from the Commission had expired) when these "derogations" ceased following threatened infraction proceedings by the Commission.1

21. Notwithstanding that the derogation granted by the Commission expired on 31 December 2016 the word derogation continued to be used in documentation published thereafter to describe a state of affairs in which farms in Wales within NVZs which comprised 80% or more of grassland would be permitted to spread up to 250 kg of livestock manure per hectare per annum. As between the parties in this case that is how the word derogation has been used and that is how it should be understood henceforth in this judgment.

22. On 29 September 2016, the Welsh Government published a document entitled "Review of the Designated Areas and Action Programme to Tackle Nitrate Pollution in Wales" ("the Nitrates Review"). The review was a detailed consultation paper which invited responses to a significant number of questions. Importantly, in the context of this case, consultees were asked to express views upon whether the whole of Wales should be designated as a NVZ or whether NVZs should be confined to specific geographical areas within Wales. Additionally, a number of detailed questions were posed which addressed the issue of appropriate Action Programme measures within NVZs. It is common ground in this claim that the consultation made reference to the derogation and the Claimant draws attention to the following paragraph of the consultation paper:-

> *"It is not within the scope of this review to remove the basic measures … the basic measures include… the limitation of the*

[1] See witness statement of Spencer Conlon dated 20 October 2021.

> *land application of fertilisers, consistent with good agricultural practice, accounting for… the amount of livestock manure applied to the land each year must not exceed the amount of manure containing a 170kg of nitrogen per hectare, unless a Derogation has been granted."*
>
> [This quotation has been extracted from paragraph 23 of the Skeleton Argument presented on behalf of the Claimant]

23. The Claimant responded to the consultation, providing detailed answers to the questions posed.

24. On 13 December 2017, the Minister issued a Written Statement relating to the consultation paper to which I have just referred. Her Written Statement revealed that 256 responses from individuals and organisations had been received, and that 60% of the responses supported a "whole territory designation" for a NVZ.

25. The Minister's Statement contained the following paragraphs:-

> *"I have taken into account the consultation responses alongside the views of stakeholders from my Brexit Ministerial Roundtable and its Land Management Sub-Group and the Wales Land Management Forum Sub-Group on Agricultural Pollution.*
>
> *I want to ensure the people of Wales can continue to benefit from our natural resources. To achieve this, our waters need greater protection from agricultural pollution. I am minded to introduce a whole Wales approach to tackling nitrate pollution from agriculture. Over the coming months, I will work with stakeholders to get the right balance of regulatory measures, voluntary initiatives and investment. I intend to explore options to provide land managers with flexibility, where these would achieve the same or better outcomes than a regulatory approach.*
> *…*
>
> *I welcome the work being done by the Wales Land Management Forum Sub-Group on Agricultural Pollution and the willingness of the industry to work with us to tackle this problem. We will continue to work collaboratively with this group and by Ministerial Roundtable Land Management Sub-Group to ensure the regulatory regime is sufficiently robust to achieve the outcomes Wales requires, while offering flexibility."*

26. The Wales Land Management Forum had been set up in or about 2013. It was then, and continued to be in 2017, a forum through which various bodies, such as Natural Resources Wales and the Claimant, interacted in a formal setting in order to provide relevant information to the Defendant and, in particular, the Minister. In January 2017, the Wales Land Management Forum established a Working Group (referred to in the Ministerial Statement as "the Sub-Group") to focus on tackling agricultural pollution. The evidence adduced by the Claimant in these proceedings suggests that the purpose

of the Working Group was to achieve a more consensual approach to addressing the root causes of agricultural pollution – see Core Bundle page 159.

27. On 14 November 2018, the Minister issued a further Written Statement in which she outlined "a whole Wales approach" to tackling agricultural pollution.

28. On 10 January 2019, a document entitled "Details of the Initial Regulations" was issued by or on behalf of the Minister/Defendant. Under the heading "Fertiliser Applications", the following appeared:-

> "***Application Limits for Organic Manure***
>
> *Total amount of nitrogen from livestock manure applied to the spreadable areas of the holding must not exceed 170kg/ha. Standard figures will apply for N in livestock manure – figures provided below.*
>
> *250kg/ha limit for an individual field.*
>
> *250kg/ha limit entire holding for grassland farms upon application where additional measures take place to reduce risk of pollution. Additional measures will be to include phosphate in nutrient management plans, including soil testing, ensuring 80 percent of the holding is grassland, ploughing restrictions and seeding in terms of timings and N fixing properties."*

29. On 10 March 2019, the Welsh Government/Defendant issued a document entitled "Agricultural Pollution Measures". Under the heading "*Introduction*", the following paragraph appeared in bold and in capitals:-

> *"The details of the measures provided in this document are for information purposes only. The intended Regulations will not apply until 1 January 2020."*

30. The document made it clear that the Defendant intended to adopt a whole of Wales approach in any new regulations to tackling agricultural pollution. Under the heading "Fertiliser Applications", it contained precisely the same words as had been set out in the document entitled "Details of the Initial Regulations", set out at paragraph 28 above.

31. Five days later, on 15 March 2019, the Welsh Government/Defendant issued a further document in which details were provided of the measures proposed to be the subject of a Regulatory Impact Assessment which was then said to be underway. The document specified all the measures which were being assessed. Paragraphs 1, 2, 35 and 36 were as follows:-

> *"1. In any calendar year the total amount of Nitrogen in livestock manure applied to agricultural land, whether directly by the animals whilst grazing or by spreading, should not exceed 170kg/ha.*
>
> *2. Enabling the application of manure N from grazing livestock (cattle, sheep, goats, deer and horses) up to a higher*

limit of 250kg N per hectare per year on an individual farm if the farmer meets the conditions summarised below:

- *The farmer must submit an Application Form in each year they wish to have a derogation.*
- *At least 80 percent of the agricultural area of the farm must be grassland.*
- *Temporary grassland on sandy soils must only be cultivated in the spring.*
- *Ploughed grass must be followed with a crop with a high nitrogen requirement.*
- *Livestock manures must not be spread on grassland in the autumn before it is to be cultivated.*
- *Leguminous or other plants fixing atmospheric nitrogen must not be included in the crop rotation.*
- *Farmers must prepare a fertilisation plan and keep fertiliser accounts.*

…

35. The above measures will be assessed for the whole of Wales as well as for existing and proposed NVZs.

36. Introduce a spreading limit of 250kg N/h for part of the farms not within existing / proposed NVZs."

32. On 11 July 2019, RSK ADAS Ltd ("ADAS") produced a Draft Report which was described as being an "Impact Assessment of a potential policy change to implement measures to address agricultural pollution across the whole of Wales".

33. The Draft Report prepared by ADAS was provided to the Claimant. On 16 August 2019, the Claimant wrote to the Defendant to highlight "deficiencies" in the Draft Report. On or about 10 September 2019, the Claimant submitted to the Minister a document entitled "Available Evidence". On 17 October 2019, a second document entitled "Available Evidence Supplementary Paper" was submitted by the Claimant. On any view, the Claimant's evidence constituted a comprehensive and considered appraisal of the effect of the regulations which were then under consideration.

34. The Claimant was also a participant in the production of a document entitled "The Water Standard", which was published on 17 March 2020. The aim of the document, as explained in its introduction, was to provide farmers with a set of comprehensive and robust measures to be delivered on farms by which they could protect and enhance the water environment in Wales.

35. On 8 April 2020, the Defendant published a draft version of the Water Resources (Control of Agricultural Pollution) (Wales) Regulations 2020. On the same date, it published a document which provided information about the draft Regulations (referred to hereinafter as the "April Information document").

36. It is important that the April Information document is read as a whole. The document made it clear that the draft Regulations were being published "for information only" and that no definitive decision had been made as to whether the draft Regulations would be introduced and, if so, when that would happen.

37. Regulation 4(1) of the Draft Regulations published in April 2020 provided as follows:-

> "*4(1) The occupier of a holding must ensure that, in any year beginning 1 January, the total amount of nitrogen in livestock manure applied to the holding, whether directly by an animal or by spreading, does not exceed 170kg multiplied by the area of the holding in hectares.*"

Draft Regulation 5(1) provided:-

> *"5(1) Subject to paragraph (2), the occupier of a holding must ensure that, in any 12 month period, the total amount of nitrogen in organic manure spread on any given hectare on the holding does not exceed 250kg."*

38. In the April Information document, however, the limit specified in Draft Regulation 4(1) was set out, but then followed immediately with the following sentence:-

> *"It is anticipated a derogation or exemption from this limit would be available for farms with 80 percent or more grassland before this requirement applies."* (Trial Bundle Vol. 2 683)

39. The Regulations were made on 21 January 2021 and laid before the Senedd on 27 January. On the same date a separate document, entitled "Explanatory Memorandum" was also laid before the Senedd. The Explanatory Memorandum included a lengthy and detailed Regulatory Impact Assessment ("the RIA"). Prior to the making of the Regulations before the Senedd the Minister received detailed advice. That was contained in a document headed "Ministerial Advice" and it is dated 22 December 2020.

40. The Regulations themselves began with an *Explanatory Note* which describes the principal changes effected by the Regulations as compared with two earlier sets of Regulations which were revoked.[2] The *Explanatory Note* is not part of the Regulations. Nonetheless it is worth highlighting that one of the principal changes described in the *Explanatory Note* was that the provisions contained within the Regulations would apply to the whole of Wales as opposed to applying within NVZs in identified parts of Wales. It is also worth noting that the *Explanatory Note* also made clear that the Defendant's Code of Practice on the carrying out of Regulatory Assessments was considered in relation to the making of the Regulations and that as a result an RIA had been prepared "*as to the likely costs and benefits of complying with these Regulations*".

[2] The 2013 Regulations and the Water Resources (Control of Pollution) (Silage and Slurry) (Wales) Regulations 2010 ("the 2010 Regulations")

41. Regulation 1 provides that the Regulations "*apply in relation to Wales*" and that they *"come into force on 1 April 2021"*. Regulation 2 contains transitional provisions for holdings not previously within a NVZ specifying that *"regulations 4 to 11, 15, 23, 27 and 33 to 43 do not apply until 1 January 2023 and [that] regulations 17 to 21, 25, 26 and 28 to 31 do not apply until 1 august 2024"*. Regulation 4 provides:-

> *"4(1) The occupier of a holding must ensure that, in any year beginning 1 January, the total amount of nitrogen in livestock manure applied to the holding, whether directly by an animal or by spreading, does not exceed 170kg multiplied by the area of the holding in hectares.*
>
> *(2) The amount of nitrogen produced by livestock must be calculated in accordance with Schedule 1."*

It is also worth highlighting Regulation 29. That provides:

> *"29(1) An occupier of a holding who keeps any of the animals specified in Schedule 1 must provide sufficient storage for all slurry produced on the holding during the storage period, and all poultry manure produced in a yard or building on the holding during the storage period.*
>
> *(2) The volume of the manure produced by the animals on the holding must be calculated in accordance with Schedule 1.*
>
> *(3) A slurry store must have the capacity to store, in addition to the manure, any rainfall, washings or other liquid that enters the vessel (either directly or indirectly) during the storage period.*
>
> *(4) …*
>
> *(5) For the purposes of this Regulation, the 'storage period' (all dates inclusive) is –*
>
> *(a) the period between 1 October and 1 April for pigs and poultry;*
>
> *(b) the period between 1 October and 1 March in any other case."*

42. The Regulations contain no derogation. That said, Regulation 44 obliges the Defendant to establish a monitoring programme to establish the effectiveness of the measures imposed by the Regulations as a means of reducing or preventing water pollution from agricultural sources and Regulation 45 provides as follows:

> *"45(1) If proposals for an alternative suite of measures for delivering the outcomes in Regulation 44(1) are received within 18 months of these Regulations coming into force, the Welsh Ministers must consider whether those measures would deliver*

> *the outcomes more effectively than the measures contained in these Regulations.*
>
> *(2) If the Welsh Ministers are satisfied that proposals submitted under paragraph (1) would be more effective in delivering the outcomes in Regulation 44(1), they must publish a Statement within two years of these Regulations coming into force, explaining what action will be taken."*

43. As I have said, the Regulations were the subject of debate in the Senedd on two separate occasions. On 24 February 2021, a motion was debated in the Senedd "to reverse the introduction of the Wales-wide Nitrate Vulnerable Zone". That motion was defeated. An amendment to the motion that the Senedd "supports the ambition of Welsh farming to be the most climate and nature friendly in the world, and joins with the farming unions in recognising one agricultural pollution incident is one too many" was passed. On 3 March 2021 a motion for the annulment of the Regulations was considered but defeated.

44. By letter dated 2 March 2021, the Claimant's solicitors sent a detailed pre-action protocol letter to the Defendant. The Defendant replied on 19 March 2021. These proceedings were issued on 21 April 2021 and permission to apply for Judicial Review was granted by Lang J. on 20 July 2021.

The Grounds of Challenge and List of Issues

45. As formulated in the Detailed Statement of Grounds and Facts (hereinafter referred to as "the Grounds") accompanying the Claim Form, the Claimant relies upon four discrete grounds. Very helpfully, the parties agreed a list of main issues for my determination. They are:

> *"**Ground 1: Legitimate Expectation.***
>
> *1. Whether the [Claimant] had a substantive legitimate expectation that a derogation would be included in the Regulations as made and, if so, whether it was breached.*
>
> ***Grounds 2 and 3: Wednesbury Unreasonableness***
>
> *2. Whether the Defendant relied on factual material which was based on a view of the evidence that could not reasonably be entertained and whether any of the statements made by the Minister were factually inaccurate and, if so, whether that matters in the circumstances.*
>
> *3. Whether the Defendant failed to analyse the matters which the Claimant says were not considered and, if so, if that matters in the circumstances.*
>
> ***Ground 4: Well-being and the Welsh Language***
>
> *4. In deciding to make the new Regulations:*

> *(a) Has the WG breached the well-being duty and / or the well-being goals of 'a healthier Wales', 'a Wales of cohesive communities' and 'a Wales of vibrant culture and thriving Welsh language' pursuant to S.3 and S.4 of the Well-Being of Future Generations Act (Wales) 2015 (the* ***'2015 Act')****?*
>
> *(b) Has the WG failed to promote Welsh language in breach of S.78 of the Government of Wales Act 2006 and Sections 3 and 4 of the 2015 Act?*
>
> ***Claimant's Amendment Application***
>
> *5. Whether the Claimant's Application for an Amendment, to include seeking a Quashing Order, should be allowed and, if so, upon what terms?*
>
> ***Relief***
>
> *6. If the Court identifies any errors of law, whether there should be a declaration and, if so, in what terms, and / or quashing of the Regulations in whole or in part."*

46. As well as the agreed issues, as set out above, the Defendant invites me to determine a further issue which is formulated as follows:-

> *"Whether the Claimant's pleaded case is different from the arguments in their Skeleton Argument and whether the Claimant should be allowed to argue points not previously raised without formally amending its pleadings and, if so, whether and upon what terms such an application should be determined."*

47. The issue raised by the Defendant as identified in the paragraph immediately above arises most acutely in respect of Issue 1 and to a lesser extent it permeates a number of the other agreed issues. Accordingly, to the extent that is necessary, I will consider this issue as part and parcel of the issues which have been agreed between the parties.

48. I turn to each of the issues in turn.

Ground 1 - Legitimate Expectation

49. At paragraph 38 of the Grounds the Claimant set outs the factual basis upon which it founds its claim that the Defendant created a legitimate expectation that the Regulations would contain a derogation. It relies upon written statements made in four discrete documents. At paragraph 38.1 the Claimant asserts that the "*Nitrates Review*" (i.e. the document referred to at paragraph 22 above), contains the derogation. At paragraph 38.2, the Claimant asserts that the derogation is referred to in proposed measures set out in documents produced by the Defendant for a meeting on or about 10 January 2019 (paragraph 28 above). Paragraph 38.3 asserts that the derogation is referred to in the materials provided for a regulatory meeting which took place on 21 March 2019 (see the documents referred to at paragraphs 29 to 31 above). At paragraph 38.4, the Claimant relies upon the fact that in an "*Explanatory Note*" issued along with the Draft

Regulations published in April 2020 there is a specific reference to the derogation. The document upon which the Claimant relied is the April Information document referred to at paragraphs 35 to 38 above.

50. The Defendant accepts that each of the documents to which I have just referred contain references to the derogation as alleged by the Claimant. Accordingly, the critical issue which arises for my determination is whether the words used in the documents, read in their proper context, are capable of creating and did in fact create a substantive legitimate expectation as the Claimant contends that they did.

51. It is common ground between the parties that the relevant authorities which bind me establish that a substantive legitimate expectation can be founded upon a statement which is clear, unambiguous and devoid of relevant qualification. It is also clear, in my judgment, that where a Claimant relies upon more than one statement to found the legitimate expectation, the statements in question can, and indeed should, be read together and as a whole.

52. Mr Mercer QC submits that, looked at individually or collectively, the statements relied upon by the Claimant are clear, unambiguous and devoid of relevant qualification and, accordingly, the Claimant has established that it had a legitimate expectation prior to the making of the Regulations that they would contain the derogation.

53. Mr Gregory Jones QC disagrees. In his submission, the words used in the documents referred to in paragraph 38 of the Grounds do not constitute clear and unambiguous statements which are devoid of relevant qualifications and which are to the effect that the derogation would be included in the Regulations. In particular, he submits that the words used in the documents published in 2016 and 2019 are contained in documents which were clearly and obviously part of a process of consultation. Statements made in such documents, he submits, cannot clearly and unequivocally specify what is to occur in the future since that would negate the whole purpose of consultation. He argues that the whole purpose of consultation is to seek views upon proposals which (following consideration of the views of consultees by the relevant decision maker) might change. The words used in the documents published in 2016 and 2019 were no more than provisional expressions of what <u>might</u> happen.

54. As to the April Information document, he submits that it must be considered in the context in which it was published. The draft Regulations which it accompanied did not contain the derogation. Further, and very importantly, there was a specific reference to the derogation in the *Explanatory Note* which was included as part of the draft Regulations. The statement in the *Explanatory Note* was as follows:-

> *"A Derogation to the application of livestock manure is no longer available as Commission Decision 2013/781/EC … granting a Derogation pursuant to Council Directive 91/676/EEC concerning the protection of waters against pollution by nitrates from agricultural sources has now expired."*

55. In the light of this unequivocal statement, submits Mr Jones QC, it is simply not possible to treat the statement in the April Information document as a clear and unambiguous representation which was devoid of any qualification and which, in effect, constituted a

promise that the Regulations would contain the derogation. Rather, he submits that when the statement in the April Information document is read alongside that which is contained in the *Explanatory Note* included within (although not part of) the draft Regulations the statement actually gives rise to very considerable uncertainty as to what might occur.

56. I have reached the clear conclusion that the words relied upon by the Claimant in the documents identified above cannot be described as clear, unambiguous and devoid of any relevant qualification and, in consequence the statements pleaded at paragraph 38 of the Grounds cannot found the substantive legitimate expectation for which the Claimant contends. My reasons for reaching that conclusion, essentially, are those which are advanced by Mr Jones QC and which I have just summarised in the paragraphs immediately above. In short, I reject the Claimant's pleaded case to the effect that it can rely upon a legally enforceable legitimate expectation that the Regulations would contain the derogation.

57. On or about 11 October 2021, Mr Mercer QC and Ms Russell filed and served a Skeleton Argument in readiness for the hearing before me. It is worth quoting paragraphs 16 to 21 in full:-

> *"16 As a general principle:*
>
> > *'Where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The Court is the arbiter of fairness in this context.'*
>
> [In a footnote, Counsel quoted paragraph 62 of the Decision in Re Finucane's Application for Judicial Review [2019] HRLR 7 as support for this uncontroversial proposition]
>
> *17. There are two sources of legitimate expectation: promise and practice:* ***R(Save Britain's Heritage) v Secretary of State for Communities & Local Government*** *[2019] 1 WLR 929 §35 per Coulson LJ. an implied representation can suffice:* ***R(Gallaher Group Ltd) v Competition & Markets Authority*** *[2019] AC 96 per Lord Carnwath at §37 and §40 (applied in* ***R(o/a Heathrow Hub Ltd) v Secretary of State for Transport*** *[2020] 4 CMLR 17 at §74) in which Lord Carnwath said at §40:*
>
> > *' ...the decision in Unilever was unremarkable on its unusual facts, but the reasoning reflects the case law as it then stood. Surprisingly, it does not seem to have been strongly argued (as it surely would be today) that a sufficient representation could be implied from the Revenue's consistent practice for over 20 years… .' (Emphasis added)*
>
> *18. In this case, the Derogation was applied, in practice, in Wales since 2009.*

> *19. A practice must 'give rise to a representation which is clear, unambiguous and devoid of any relevant qualification': **Heathrow Hub** at §69. Such clarity can be achieved by implied promise. It is possible to derive a legitimate expectation from an implied promise: **Gallaher** at §37. What is required is 'a promise although it need not be an express one as it may be implied': **Heathrow Hub** at §74.*
>
> *20. Context is important, as is 'how on a fair reading of the promise it would have been reasonably understood by those to whom it was made'.*
>
> *21. In this case, a practice was settled, from 1994, that the measures for the protection of water quality in Wales would contain the Derogation for grassland farms. The Annexe annexed to this Skeleton sets out chronology of this practice."*

58. In their Skeleton Argument in response, Mr Gregory Jones QC and Ms Paul do not suggest that the principles formulated by Mr Mercer QC and Ms Russell in the paragraphs quoted above are, in any sense, wrong. Rather, they complain that the Claimant has never pleaded a case for the existence of a substantive legitimate expectation based upon historic practice or implied promise and, in the alternative, they argue that there is no evidential basis upon which I can conclude that the practice/ implied promise "*give(s) rise to a representation which is clear, unambiguous and devoid of any relevant qualification*".

59. I accept that the Claimant's Grounds do not assert that the substantive legitimate expectation for which it contends arises by reason of a practice or implied promise. Indeed, no real attempt was made by Mr Mercer QC in his oral submissions to suggest that they did. Further, and apparently quite deliberately, the Claimant has chosen not to seek my permission to amend the Grounds so as to include such an assertion.

60. On this basis alone, I am struggling to see how it would be permissible for me to entertain this ground of challenge. I accept that the current approach in the Administrative Court militates against the granting of late amendments; the circumstances in which a new basis of claim may be advanced when it is not pleaded must be very rare. Such rare circumstances do not exist in this case and I decline to entertain this ground of challenge.

61. As it happens, however, I am completely satisfied that there is no evidential basis for the suggestion made on behalf of the Claimant that a representation has been made by the Defendant which is clear, unambiguous and devoid of any relevant qualification as a consequence of historic practice or implied promise. I accept that, originally, the UK Government and then, following devolution, the Welsh Government/Defendant applied for the derogation to the Commission at periodic intervals and that following each application the Commission granted the derogation. Throughout the relevant period the UK was a Member State of the European Union. It is not suggested by the Claimant (nor could it be) that the Commission was bound to grant the derogation following each application. The evidence available in the Trial Bundles suggests that on each occasion that an application was made the Commission determined it on its merits and for a

specified fixed period. It may be that it would be possible to conclude that prior to the end of 2016 there was a practice whereby the UK Government and then the Welsh Government applied for a derogation as earlier derogations reached their expiry point but all that changed at the end of 2016 following the result of the referendum and the need for the Defendant to consider what laws might apply in Wales once the UK left the European Union. At the end of 2016, as is clear from the chronology set out above, the Minister initiated the Nitrates Review which is described at paragraph 22 above and which made clear the possibility of a change of approach in respect of managing pollution caused by agricultural practices. I cannot regard the mere fact that the derogation was mentioned in that document (as set out above) evidences a historic practice or implied promise.

62. I acknowledge, of course, that, in practice, farmers in Wales who had qualified for the Derogation prior to 31 December 2016 continued to enjoy its benefits because of derogations granted by the Minister/Welsh Government. However, running side-by-side with that state of affairs was the consultation process which preceded the making of the Regulations and which, as I have said, began in earnest in September 2016 with the Nitrates Review. I do not consider that the derogations granted by the Minister/Welsh Government between 2017 and 2019 can be considered as part of a practice which had begun previously as a consequence of authorisations granted by the Commission in response to applications for derogations made in proper form. As I have said, the derogations granted between 2017 and 2019 were being sought and made available at a time when the Defendant was consulting about change.

63. In my judgement, therefore, Ground 1 stands or falls upon whether the written representations made by, or on behalf of, the Defendant, as particularised in paragraph 38 of the Grounds (set out above at paragraph 49 above) constitute clear and unambiguous statements devoid of any qualification. For the reasons I have explained above they do not.

64. In the circumstances, I do not propose to lengthen this judgment with an analysis of whether or not it would also be necessary for the Claimant to establish a detrimental reliance upon the representations identified and whether, as a matter of fact, there was such detrimental reliance in this case. No useful purpose would be served by such an analysis.

65. I should, however, mention two further points briefly. First, on 27 April 2020 the President of NFU Cymru wrote to the Minister asking for the detail of the draft Regulations issued in 2020 to be re-opened so that the Welsh Government and Industry could work together on a regulatory solution that would provide an alternative to *"whole territory NVZ."* Additionally, the letter asserted that *"The publication of the draft regulations, last month, provided clarity and it is now beyond doubt that the draft regulations introduce the EU Nitrates Directive across the whole of Wales"* I accept the point made on behalf of the Defendant that this expression of view is hardly consistent with the asserted legitimate expectation, especially since the expectation contended for would have come into existence by the date of this letter. Second, this ground of challenge (whether as formulated in the Grounds or in the Claimant's Skeleton Argument) did not feature, at all, in the Claimant's pre-action protocol letter. In that letter, the Claimant asserted that it had a legitimate expectation (based upon assurances by the Defendant between 8 April 2020 and 14 October 2020) that the Defendant would not make the Regulations "*until after the pandemic was over*". I do not suggest, of

course, that the failure to include Ground 1 in the pre-action protocol letter prevents the Claimant from arguing the same. Its omission from the letter, however, has, inevitably, made me more sceptical about the merits of arguments advanced on behalf of the Claimant in respect of Ground 1.

Grounds 2 and 3: Wednesbury Unreasonableness

66. Ground 2 as originally formulated was that the basis for making the decision to introduce the Regulations was unreasonable because the Minister relied on *"purported factual material which, on analysis, was based on a view of the evidence that could not be reasonably entertained"*.

67. At the hearing, the only aspect of Ground 2 which the Claimant pursued was the assertion made at paragraph 46 of the Grounds, namely, that on 1 February 2021 the Minister informed the Senedd that *"at least 50% of farms [were] not compliant with"* the then current Regulations - a reference to the 2010 Regulations (for their full title see footnote 2 above at paragraph 40). According to the Claimant, the Minister's statement was factually incorrect. There was no *"non-compliance"* with the 2010 Regulations since there was an exemption from compliance with those Regulations for slurry storage structures constructed prior to 1991 and, further, those Regulations did not require farms with such pre-1991 structures to have the capability to store slurry over a four month period. The Claimant argues that the Minister's error as to a material fact vitiates her decision to make the Regulations and lay the same before the Senedd. Both in writing and orally Mr Mercer QC argues that a public authority is open to challenge by way of judicial review if, in its decision-making process, it reaches a conclusion upon a relevant fact which is unsustainable. For that proposition he relies upon statements of principle made by Viscount Symonds and Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14 which are encapsulated in the following extract from the speech of Lord Radcliffe:

> *"It may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances … the Court must intervene."*

68. I do not understand this statement of principle to be controversial in general terms. Although Mr Jones QC and Ms Paul appear to argue in their Skeleton Argument (paragraph 30) that it is not for the courts to carry out a review of the accuracy of ministerial statements made in parliament which precede the making of statutory provisions they also appear to accept that if the statement made by a minister can be demonstrated to be irrational the court can intervene. [3]

69. In opposition to this ground of challenge the Defendant asserts (a) the statement was accurate (b) it was made after the Regulations had been made and in consequence it was not material to the Defendant's decision to make the Regulations and (c), in any event, following debates which took place in the Senedd on dates subsequent to the date when the Minister's statement was made the majority of members of the Senedd supported

[3] For that proposition they cite *Sharif v Camden LBC* (2013) UKSC 10 at paragraph 17

the continuation of the Regulations notwithstanding the disputed accuracy of the Ministerial statement.

70. I note that there is no witness statement from or on behalf of the Minister to substantiate the assertion that her statement to the Senedd was accurate. However, the Defendant argues that I do have evidence to that effect because the Defendant's Detailed Grounds for Resistance are signed by a solicitor (Mr Spencer Conlon) on behalf of the Defendant, immediately below a standard "Statement of Truth". At paragraph 14 of the Detailed Grounds, Mr Conlon asserts that the statement made by the Minister was accurate. The Defendant submits that the verification of the Detailed Grounds in the manner described is sufficient for me to conclude in the absence of contrary evidence that the Minister's statement was accurate. No doubt in many cases that would be correct and, therefore, that would be sufficient to dispose of the point made by the Claimant.

71. However, in that same paragraph of the Detailed Grounds for Resistance Mr Conlon accepts that the accuracy of the Minister's statement and, in particular, the accuracy of the expression "non-compliant" depends upon whether the interpretation of the 2010 Regulations relied upon by the Minister in making her statement was correct. In summary the Defendant justifies the Minister's statement on the basis that the 2010 Regulations did require farms with pre-1991 storage facilities to have storage capacity over a four month period. A closely argued justification for that view is contained within paragraph 14 of the Details Grounds for Resistance.

72. The Claimant appears to accept that the Minister's statement to the Senedd was correct in the sense that around 50 percent of farms surveyed did not meet the requirements of the 2010 Regulations in relation to slurry storage. However, as I have said, it disputes the suggestion that all of those farms were "non-compliant" with the requirements of the 2010 Regulations because some of that cohort benefitted from the exemption to which I have referred at paragraph 66 above. Ultimately, therefore, there appears to be common ground between the parties that the accuracy of the Minister's statement is dependent upon the proper interpretation of the 2010 Regulations.

73. For the purpose of this ground of challenge I accept that a factual statement made by a decision maker prior to the making of the decision in question can be relied upon to vitiate a decision if that statement is based upon an irrational view of the relevant facts. In this case, however, the Defendant correctly points out that the Claimant's complaint is not, in truth, that the Minister irrationally misunderstood relevant facts. Rather it is a complaint that those advising her wrongly interpreted provisions within the 2010 Regulations.

74. Nowhere within the Grounds does the Claimant develop an argument as to the proper meaning of the relevant parts of the 2010 Regulations. Certainly, there is no such argument at paragraph 46 of the Grounds which appears to be the only paragraph dealing with this issue. Rather, in that paragraph, there is a reference to paragraphs within the witness statements of Ms Rachel Lewis-Davies and Mr Peter Danks (witness statements served on behalf of the Claimant). I confess that I have been unable to marry the paragraphs in those witness statements referenced in paragraph 46 of the Grounds with any material which would assist in the correct interpretation of the 2010 Regulations when read as a whole.

75. I have no doubt that on the basis of the evidence before me that the Minister believed upon proper grounds (legal advice received by her from advisors) that her statement to the Senedd on 3 February 2021 was accurate. No authority was cited to me to establish the proposition that if the legal advice which she had received in good faith erroneously led her to make an inaccurate factual statement that would be a proper basis for quashing any decision which had taken account of this factual inaccuracy. In the absence of clear authority in point I am not prepared to hold that the Claimant has made out this ground of challenge.

76. In any event, of course, the Regulations had been made prior to the making of the Minister's statement. The Claimant has provided no evidential basis upon which I could properly infer or conclude that the statement made on 3 February 2021 had been a material factor in leading the Defendant to the conclusion that the Regulations should be made and laid before the Senedd. Further, the Senedd debated the Regulations twice on dates subsequent to the making of the statement yet concluded that the Regulations should continue in force.

77. In all the circumstances I am satisfied that Ground 2 must fail.

78. I turn to Ground 3. As formulated in the Grounds the Claimant alleged that it was *unlawful, inconsistent with the [Environment (Wales) Act 2016] and Wednesbury unreasonable to (1) fail to take account of all relevant evidence, and, (2) to take account of irrelevant evidence before taking a final decision to introduce the ..Regulations.*

79. When Mr Mercer QC replied to the oral submissions of Mr Jones QC, he told me, without reservation or qualification, that Ground 3 was his strongest ground. He reformulated the pleaded ground as set out above by submitting that this ground consisted of an assertion that the Defendant failed to take account of material considerations when determining whether or not to make the Regulations, failed to properly consider and evaluate the evidence relating to some of those material considerations, and failed to grapple with material considerations raised by the Claimant and others which tended to militate against the making of the Regulations. Before dealing with the individual criticisms made of the Defendant's decision-making, it is as well to identify the legal basis upon which the Claimant relies for its arguments.

80. First, the Claimant points to an express statutory duty imposed upon the Defendant and contained within Section 4 of the Environment (Wales) Act 2016. This legislation was passed by the National Assembly for Wales with a view to promoting sustainable management of natural resources – see Section 1. Section 4 of the Act sets out what are called "*Principles of Sustainable Management of Natural Resources*". Paragraph (e) of Section 4 obliges those who are charged with applying the principles of sustainable management of natural resources to "*take account of all relevant evidence and gather evidence in respect of uncertainties*".

81. The Defendant does not suggest that this principle was not a relevant consideration when the Regulations were made.

82. The Claimant relies, next, upon the speech of Lord Wilberforce in the well-known case of *Secretary of State for Education & Science v Thameside Metropolitan Borough Council* [1977] AC 1014. That case was concerned with the proper ambit of Section 68 of the Education Act 1944, which permitted the Secretary of State for Education to give

Directions to the Education Authority if the Authority was "*proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under [the] Act*". During the course of his speech, Lord Wilberforce formulated three general propositions, the second of which is relied upon by the Claimant and is as follows:-

> *"(2) The Section is framed in a 'subjective form' – if the Secretary of State 'is satisfied'. This formal section is quite well known and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgement. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the Court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgement, however bona fide it may be, becomes capable of challenge…"*

83. Third, the Claimant relies upon a plethora of authorities in which decisions have been challenged and/or quashed on the basis that the decision-maker failed to grapple with material issues. In particular, the Claimant relies upon the judgment of Sales LJ (as he then was) in *Gladman Development Ltd v Daventry District Council and Anor* [2017] JPL 402 at paragraph 35 and the judgment of Hickinbottom LJ in *R(L) v Director of Public Prosecution* [2020] EWHC 1815 at paragraph 36.

84. Finally, the Claimant relies upon the *Wednesbury* principle to the effect that the Defendant's decision to make the Regulations can be challenged on the basis that no reasonable decision-maker, appraised and taking account of all relevant facts, would have made the Regulations.

85. Save for a submission with which I deal briefly at paragraph 137 below, the Defendant does not suggest that the Claimant's reliance upon the matters set out above is misplaced. Rather, the Defendant robustly defends the decision to make the Regulations on the basis that all relevant matters were considered, no irrelevant matters were taken into account, all contentious issues were grappled with and the Claimant has not begun to establish that no reasonable decision-maker would have made the Regulations given the facts and issues considered by the Defendant.

86. With that introduction, I turn to the individual criticisms made by the Claimant of the Defendant's decision-making process. In the Grounds, most of the criticisms levelled against the Defendant are to be found from paragraph 48 onwards under the heading "*Failure to take account of relevant matters*". I deal in turn with each of the allegations made by the Defendant, in the order that they are set out in the Grounds (save for those which were abandoned either before or in the course of the hearing).

Impact of Geographical Extension of Environmental 'At Risk' Zone – Paragraphs 54 to 56 of the Grounds

87. The 2013 Regulations applied only to agricultural holdings situated in designated NVZs. It is common ground that, in percentage terms, the zones constituted a very small proportion of the land making up agricultural holdings in Wales (2.4%). The Regulations, of course, apply to all agricultural land in Wales.

88. The Claimant makes a number of points in the Grounds about the decision-making leading to this obviously significant change. First, it suggests that the Defendant did not consider how much environmental benefit would be gained from the change. Second, it asserts that the Defendant did not consider the extent of the burden which would be placed upon those farmers affected by the change. Third, the Claimant contends that the Defendant failed to analyse the proportion of the reduction in nitrates which was to be derived from the areas of Wales where there was no evidence of a risk of excessive levels of agricultural derived nitrates. By way of example, the Claimant draws attention to the fact that there is (and was at the material time) no problem associated with nitrates in Snowdonia. More generally, it asserts that Welsh farming businesses are the backbone of the Welsh rural economy, that farming is the largest land-use activity in Wales, that it is Welsh farmers who actively manage much of the Welsh environment on a day-to-day basis and that a large part of the wider Welsh economy is dependent upon the success of Welsh farming. Either expressly or by implication, it suggests that these important issues were not considered or analysed appropriately.

89. In their Skeleton Argument, Mr Mercer QC and Ms Russell make those same points. In his oral submissions, Mr Mercer QC relied for more detail upon passages in the evidence which had been adduced by the Claimant from expert witnesses and, in particular, the evidence of Mr Peter Danks of Reading Agricultural Consultants. Mr Danks is an Agri-Environmentalist with very significant relevant practical experience, as described in Appendix 1 to his evidence. It is his view that *"the all-Wales approach"* unnecessarily imposes requirements which are intended to reduce risks to water from relatively intensive production units in fertile areas of Wales on low income, low intensity businesses in uplands and other areas. Further, his view is that this has come about because there has been a "*lack of robust scientific evidence to support the designation of selected areas as vulnerable to pollution and the implementation of effective measures leading to the reduction of pollution risks and events resulting in harm to waters*".

90. The so-called all-Wales approach was signalled as a possibility from 2016 onwards at the very latest in various documents as described above (see paragraph 22 et seq.). At first blush, therefore, it is difficult to accept that the criticisms made of the decision-making process can be correct, given the many steps in the decision-making process which occurred between 2016 and January 2021 and the information which was considered as part of that process, including evidence submitted by the Claimant in September and October 2019. Further, and perhaps more importantly, the Defendant argues that the all-Wales approach was the subject of appropriate scrutiny in two documents supplied to the Minister before the Regulations were made. They were the Ministerial Advice and the RIA which is contained in the Explanatory Memorandum which was laid before the Senedd at the same time as the Regulations – see paragraph 39 above.

91. The Ministerial Advice asked the Minister to consider four options, which were set out at paragraph 21. I quote:

> "*This advice considers four possible options, summarises each and provides a recommendation. The options are:*
>
> - *Option 1 – do nothing (2.4% of Wales remains designated as NVZs);*
> - *Option 2 – introduce Regulations across the whole of Wales, with a review clause to consider earned autonomy. This option would amalgamate measures which apply in existing NVZs with silage and slurry regulations which apply to all of Wales;*
> - *Option 3 – designate additional areas as NVZs (8% of Wales) only; and*
> - *Option 4 – introduce Regulations across the whole of Wales – 8% NVZ measures, with different measures elsewhere; with a review clause for earned autonomy.*
>
> A summary of the measures which would apply in each option are provided at doc 36."

92. The Ministerial Advice recommended the adoption of Option 2. The Defendant maintains that the advice provided to the Minister was comprehensive and that, in effect, it alerted the Minister to all the points which the Claimant now raises and provided the Defendant with the basis upon which such points could be taken into account, analysed and assessed. The Defendant points out, too, that the Advice was supported by very many documents so that the Minister had the opportunity, for herself, to read into the basis upon which the Advice was being provided to her.

93. I do not propose to quote large extracts from the Ministerial Advice. However, it is worth describing now the structure and content of the document since the Advice is relevant not just to the ground of challenge now under consideration but many of the other grounds advanced by the Claimant.

94. The document begins with necessary context and an overview of the chronology leading to the making of the Regulations. Paragraph 21 describes the options available to the Minister and is set out in full at paragraph 92 above. Paragraphs 22 to 34 provides the Minister with an overview of the information provided for her consideration and a summary of recently received evidence from stakeholders including evidence received from the Claimant. Between paragraphs 44 and 61 each of the four options set out above is assessed. At paragraphs 62 and 63, advice from the "*Chief Economist's Team*" is set out. Paragraphs 64 to 66 consist of a policy assessment of the options. Paragraphs 67 to 73 highlight implementation considerations relating to options 2 and 4 while paragraphs 74 to 80 consider the environmental considerations relating to those options.

95. Between paragraphs 81 and 85, specific consideration is given to an "*All Wales approach*". These paragraphs are worth quoting in full because they provide a reasoned justification for this approach.

> *"81. Continuing to implement measures only in designated NVZs will have limited impact. The larger spatially targeted approach is also unlikely to be successful in tackling agricultural pollution due to the complex distribution of point source and diffuse agricultural pollution issues affecting water bodies across the country (see DOCS 7 to 14 and 17).*
>
> *82. Targeting water bodies identified as failing specific standards (Nitrates Directive, Water Framework Directive or otherwise) would not prevent pollution in other areas until it is already a significant problem and is confirmed as such by an adequate monitoring programme. A spatially targeted approach would require different regulations to apply in different areas, which would need to be regularly reviewed, leading to considerable complexity and uncertainty.*
>
> *83. Rather than being targeted at specific areas of Wales, the proposed measures are targeted at activities which present a risk of pollution. This provides a proportionate, preventative approach, which will reduce losses of pollutants across Wales, in line with the Welsh Government's intended environmental principles and governance post-EU Exit.*
>
> *84. An all-Wales approach also supports the commitment to the Wellbeing of Future Generations Act. Each year in Wales, private water supplies fail to meet standards due to microbial and chemical parameters, which increases water treatment costs and presents a health risk for those on private water supplies. The proposal aims to enhance the environment, providing clean water for drinking and for play, improving opportunities for healthy activities in a safe environment in all areas of Wales.*
>
> *85. Reducing nutrient losses from agriculture to the environment will be beneficial in helping to reverse the decline in biodiversity and will enhance ecological networks. As well as reducing emissions contributing to climate change, a reduction in pollution as a result of the measures will lead to ecosystem improvements which will support climate change migration and adaptations."*

96. Self-evidently, the paragraphs of the Ministerial Advice just quoted justify an all-Wales approach by reference to environmental factors. That is not to say, however, that economic factors are not considered in the Advice. I have already referred to the part of the Advice which summarises the views from the Chief Economist's team. That advice referred to the analysis undertaken by ADAS (paragraph 32 above) which pointed to Option 4 as being preferred from "*a value for money perspective*". At paragraphs 91 to 94, the Ministerial Advice addresses, explicitly, the "*Resilience of the*

industry". Paragraph 91 and 92 consider the impact of the Covid-19 pandemic. Paragraph 93 commends the inclusion of transitional periods within the Regulations so as to provide farmers with the time to adjust to the introduction of new measures and paragraph 94 deals with some of the challenges which would be faced by Welsh farmers following the UK exit from the European Union. It is also to be noted that paragraph 93 makes specific reference to the RIA having made an assessment of the "*affordability*" of compliance with the Regulations.

97. It is to the RIA which I turn next. It runs to 112 pages. Given the nature of the Claimant's complaints, there is no option but to describe its structure and contents.

98. The RIA begins with an introduction which explains that it considers the impact of the four options which were identified in the Ministerial Advice. It is then divided into 4 sections which are followed by 6 appendices. Section 1 has 5 sub-sections. Section 1.1 is headed "*Methodology*" and, as the heading suggests, the sub-section explains the methodology used in the RIA. Section 1.2 is concerned with a description of the measures to be adopted in respect of each of the 4 options put forward in the Ministerial Advice. This is a detailed sub-section which runs to 19 pages. Section 1.3 describes the assumptions used for cost and benefit estimates. Section 1.4 provides very significant detail about the costs of implementing the measures in the four options considered and Section 1.5 explains that the costs and benefits of the policy scenarios are assessed over a period of 20 years and provides additional information relevant to the assessment of costs and benefits. Section 2 of the RIA is headed "*Results of Option Modelling*". There follow a number of sub-sections which include Section 2.3, headed "*Impacts of Options*", and Section 2.4, headed "*Overall Cost / Benefit Assessments*". One of the aspects considered in detail within Sub-Section 2.4 is "*affordability*". On any view, the text under that heading constitutes an appraisal of the financial impact likely to be suffered by various types of farms. Section 3 of the RIA is a summary of conclusions to be drawn from the previous sections. Section 4 is a list of appropriate references.

99. There then follow the appendices. Appendix 2 is a detailed description of the methodology and application of the modelling used in the RIA. Appendix 6 is a summary version of a document produced by Welsh Government and known as "the Integrated Impact Assessment". A proper understanding of the Summary (and, of course, the Integrated Impact Assessment itself) can only be gained by reading both documents as a whole. That said, and as will become apparent it is sufficient in this judgment to refer, as and when appropriate, to the Summary in Appendix 6. Hereinafter the phrase Appendix 6 is used to refer to the whole of that Appendix; the word Conclusion is used to refer to that part of the Appendix which follows under the heading *"Conclusion"*.

100. As I have said, the conclusion reached in the Ministerial Advice was that Option 2 was the option which the Minister should adopt. That was very much the conclusion, too, which is to be found in the RIA and supporting appendices.

101. In the light of the information provided to Minister and, through her, to the Defendant in the Ministerial Advice and the documents provided to her with that Advice and in the light of the information contained in the RIA and its Appendices, I do not consider that the Defendant can have failed to consider and / or take into account and / or grapple with the points made by the Claimant as summarised at paragraphs 88 and 89 above. In

short, I accept the submission made on behalf of the Defendant that there was no failure to take into account the impact or potential impact of the Regulations applying in relation to agricultural land within the whole of Wales. That view is justified, in my judgment, by the contents of paragraphs of 95 and 96 above.

102. I am fortified in that view, too by the contents of the Conclusion to Appendix 6 of the RIA. The extracts from the Conclusion set out below encapsulate why it was that the Defendant was persuaded to make regulations which applied to all agricultural land in the whole of Wales. These extracts are to be found at pages 359 and 360 of Bundle 1 of the Trial Bundles.

> "*The development of a proposal has been informed by a number of consultations including on the storage of sileage and slurry, the sustainable management of natural resources and on Nitrate Vulnerable Zones in Wales. Stakeholder engagement and the work of the Wales Land Management Forum Sub-Group on agricultural pollution has also been considered and taken into account. Welsh Government officials of relevant policy areas have been consulted during the development of the proposal to ensure coordinated approach with other policies, particularly in relation to water quality and the development of future land management schemes.*
>
> *The proposal has the potential to impact upon the people, culture, Welsh language, economy and environment of Wales. The most significant impacts relate to the effect of the proposals on businesses and the environment. Agricultural businesses have identified concerns regarding the implementation of regulatory requirements. There are many agricultural businesses operating to very high, environmentally sustainable standards of production. The burden of paperwork and the economic impact were raised as significant challenges. The greatest economic issues raised relates to the investment in achieving compliance with the proposed slurry storage standards. These costs vary from minor clean and dirty separation actions to replacement stores requiring substantial investment. This is a commercial decision for the farmer, but these types of capital investments can be financially supported through the Rural Development Programme. Where shortfalls in slurry storage exist, this investment is necessary to manage manures in a way which prevents pollution and replacement costs are inevitable when stores reach the end of their lifespan.*
>
> *When good practice guidance is already being followed and existing regulatory requirements are being met, the proposed measures will have minimal impact. A high level of non-compliance with regulatory standards relating to storage has been observed on farms producing slurry. Those businesses will face the greatest challenge as the most significant costs associated with the proposals relate to the additional storage needed by those not meeting existing requirements. Some tenant*

farmers may face particular challenges due to restrictive clauses in their Tenancy Agreements. The Welsh Government recognises this issue and is committed to modernising tenancy law to facilitate longer-term investments in sustainable land management practices and productivity improvements.

The other main cost attributed to the proposal is an annual reduction in yield due to the avoidance of spreading fertiliser at high risk times and in high risk areas. The economic impact will depend on the ability of farms to utilise nutrients more efficiently, to increase yields, such as through the use of precision spreading technology.

…

The proposal is expected to have a positive impact on public health more generally. The reduction of nutrients and faecal pathogen losses to the environment provides improved access to safe outdoor recreational activities, improved mental well-being and improved access to clean drinking water. There may be some negative consequences for health due to the cost implications for farm businesses, which has the potential to contribute to the detrimental economic conditions affecting health of individuals. The potential negative impact of additional regulatory requirements on mental well-being, particularly where other economic or health challenges already exist, is also recognised.

The natural environment is a key element of Welsh culture and heritage. It also provides significant opportunities for outdoor recreation. The health of the environment at landscape scale, catchment scale or individual waterbodies is crucially important in supporting enjoyment of the countryside. Reduced nutrient losses from agriculture to the environment will be beneficial in helping to reverse the decline in biodiversity. An all-Wales approach will enhance ecological networks. Ecosystem improvements will support climate change mitigation and adaptation.

Sustainable farming is a crucial for food production……. Financial support through the Rural Development Programme has already been provided ….The Welsh Government will continue to support the agricultural industry through advice, guidance and capital investment.

The programme of measures will be reviewed every 4 years to ensure they are effective and reflect the latest evidence available. The process will involve consultation with affected individuals and representative organisations."

103. These paragraphs, of course, are directed to the Regulations as a whole. However, the all-Wales approach permeates the whole of the Regulations. It is clear, in my judgment, that the Defendant took account of all the important considerations relevant to adopting the all-Wales approach before the Regulations were made and laid before the Senedd.

Imposition of Limits on Nitrogen Applications to Land and Slurry Storage Requirements – Paragraphs 57 to 65 of the Grounds.

104. In the Grounds, the Claimant complains that the effect of Regulation 4 and Regulation 29 (in combination with Schedule 6) of the Regulations is to create a "*de facto*" stocking limit for individual farms. Regulation 4 imposes a limit on the spreading of slurry; Regulation 29 together with Schedule 6 creates obligations in relation to the provision of storage capacity for slurry. It is said that for many Welsh farmers compliance with these regulations can only be achieved if stock is reduced, which, in turn, has the effect of threatening the viability of those farms. According to the Claimant, a large number of farms will become unviable as a consequence of these regulations and this was not taken into account by the Defendant before making the Regulations.

105. By way of an additional, or perhaps alternative, submission, the Claimant also argues that Welsh farmers who have slurry systems will be forced to increase the capacity of their slurry storage systems. In turn, the creation of increased capacity will force farmers to incur very significant capital expenditure within a comparatively limited period of time, i.e. before 1 August 2024. At paragraph 62 of the Grounds, the Claimant asserts that Welsh Government has estimated the total necessary capital expenditure for Welsh farmers would be of the order of £360,000. Such an expenditure will inevitably have a huge impact on farm viability argues the Claimant and this consequence was not taken into account by the Minister when the Regulations were made.

106. In the Detailed Grounds of Resistance, the Defendant advances a specific explanation for the decision to limit the application of slurry to 170kg per hectare. According to the Defendant, the limitation upon the application of slurry was directly linked to the decision of the Commission to grant a Derogation in 2016. I find myself unable to assess the validity of this argument. I was not shown the decision of the Commission upon which the Defendant relies and/or any documentation which underpins it although I am aware, of course, of earlier decisions of the Commission which contained such a limitation. Further, I am unclear how the suggested existence of a decision subsisting between 2016 and 2019 (which presumably contained a Derogation) is consistent with other evidence adduced on behalf of the Defendant, which tends to suggest that no derogation was authorised by the Commission after December 2016.

107. Be that as it may, the issue for me is not an evaluation of why the Regulations contain regulation 4 or for that matter regulation 29 but whether or the Defendant took account of the potential adverse impacts of these Regulations as identified by the Claimant in paragraphs 105 and 106 above.

108. At paragraph 32 of the Detailed Grounds of Resistance, the Defendant asserts, as a matter of fact, that the impact of Regulation 4 was taken into account. I have already said that the Detailed Grounds of Resistance are signed by the Defendant's solicitor below a standard Statement of Truth. Although there is no Witness Statement from the Minister which demonstrates that she took account of the impact of Regulation 4, I would be disposed to accept that she did (given the assertion in the Detailed Grounds of

Resistance) unless there was cogent evidence to the contrary. In fact, in my judgment, a fair reading of the Ministerial Advice, the documents supporting that Advice, the RIA and the appendices thereto demonstrate that the potential adverse effects of Regulation 4 were considered. In particular, I am satisfied that the economic impact of those Regulations upon individual farmers, and the farming industry more generally, were taken into account.

109. Mr Jones QC and Ms Paul also take issue with some of the factual assertions made in paragraphs 61 to 65 of the Grounds which are used to underpin the Claimant's submissions. I take two examples. The Claimant asserts that the impact of Regulations 4 and 29 will be to require all Welsh farms with slurry storage systems to significantly increase their slurry storage facilities. The Defendant disputes this, pointing to an assessment carried out by Natural Resources Wales which demonstrated that a significant proportion of dairy farms surveyed had greater slurry storage capacity than would be required by the Regulations. The Defendant asserts, correctly in my judgement, that this was demonstrated by graphs updated to the end of November 2020 which were submitted to the Minister, together with the Ministerial Advice.

110. The Defendant also asserts that the Claimant was wrong to suggest that the Welsh Government accepted that total up front capital costs for the creation of appropriate storage facilities would be of the order of £360 million. In their Skeleton Argument, Mr Jones QC and Ms Paul suggest that the RIA identified a range of potential costs associated with capital investment as being between £52 million and £311 million. That is correct - see Bundle 1, page 296 at paragraph 2.2.2, although it is to be noted that that same paragraph raises the possibility of the overall capital costs reaching £360 million in one scenario – see Table 2-5 at Bundle 1, page 298.

111. As I have said, the issue for me is whether the Defendant took account of the impacts of Regulations 4 and 29, and, in particular, the economic impacts identified by the Claimant before reaching the decision to make the Regulations. In my judgement, the evidence demonstrates that the Defendant did just that.

Farm Viability – Paragraph 66 of the Grounds

112. The argument in support of this ground of challenge is to be found in one sentence at paragraph 66 of the Grounds. I quote:

> "*The introduction of the new Regulations threatens the viability of farming in Wales and the issue of future farm viability was simply not analysed by the Minister when she took the decision to regulate for the whole of Wales.*"

113. The Defendant's Response is equally succinct. Farm viability was assessed in the RIA under the heading "*Affordability*" (see Bundle 2 page 311to 313) and, according to the Defendant, in the context in which the word affordability is used, it bears the same meaning as viability. I agree. In my judgment there is no basis upon which to conclude that the assessment of affordability within the RIA can be impugned on the ground that it failed to grapple with the impact which the Regulations would have upon the economic wellbeing of farms in general or particular types of farms. In this context, too, it is worth remembering the extracts from the Conclusion to Appendix 6 of the RIA which are set out at paragraph 102 above. Within those paragraphs there is a clear

acknowledgement that the Regulations are capable of impacting adversely upon farming finances and, in my judgment, it is clear that this aspect was given appropriate consideration by the Defendant before the Regulations were made.

The Position of Tenant Farmers – Paragraph 67 of the Grounds

114. The Claimant asserts that approximately one-third of agricultural land in Wales is rented and that tenant farmers are more vulnerable to economic impacts than farmers who own their agricultural holdings. Further, the Claimant submits that there is a risk that tenant farmers would not be able to extend slurry storage capacity and that tenant farmers with short-term tenancies would find it more difficult to secure appropriate lending for capital or other expenditure. According to the Claimant, none of these issues, and other problems facing tenant farmers, were analysed by the Defendant before the Regulations were made.

115. Prior to the making of the Regulations, the Tenant Farmers Association of Wales submitted a letter to the Welsh Government officials in which they aired their concerns about proposals for reform to the Regulations as they stood at that time. Additionally, the Claimant submitted evidence in September 2019 to Welsh Government which dealt with difficulties facing tenant farmers. Those documents were provided to the Minister, together with the Ministerial Advice, prior to the making of the Regulations. Mr Jones QC and Ms Paul correctly point out that the weight to be attached to the observations made by the Tenant Farmers Association and the Claimant was for the Defendant to determine. There is nothing to suggest, however, that the Defendant paid no attention to the problems which had been raised. I refer, again, to the extracts from the Conclusion to Schedule 6 of the RIA, set out at paragraph 103 above, in which specific reference is made to potential problems for tenant farmers.

Planning Permission – Grounds, paragraph 68

116. The complaint here, in effect, is that the Regulations require farmers who need to obtain planning permission for slurry systems and then construct all necessary infrastructure to complete those tasks within the period ending 1 August 2024. That is the combined effect of Regulations 2 and 29. The Claimant argues that this timeframe is wholly unrealistic. According to the Claimant, the Defendant failed to take this into account when making the Regulations.

117. The Defendant's response is to argue that the timescale for obtaining planning permission was not unrealistic; in all the circumstances, submits the Defendant, a reasonable period was afforded to those who needed to apply for and obtain planning permission and implement that permission.

118. In respect of this issue, I have to determine whether the time period afforded should be categorised as unreasonable thereby constituting the legal basis for calling into question the legality of the Regulations. In my judgement, the Claimant cannot establish that high threshold. The circumstances in which planning permissions are made and/or determined can vary very substantially. The Regulations were made on 21 January 2021. By virtue of Regulation 2, Regulation 29 does not apply until 1 August 2024. Essentially, therefore, farmers were given more than 3 years and 6 months to organise themselves (late January 2021 to 1 August 2024). Such a period, on any view, is a substantial period of time in which to make an appropriate planning application and then

implement it. A planning application, once made, must be determined within a specified time limit in accordance with the prevailing planning legislation and, in the absence of a determination by the planning authority, an applicant has an unfettered right of appeal (as it happens) to the Defendant. The Defendant was entitled to proceed on the basis that farmers would not unnecessarily delay making planning applications and that planning authorities and planning Inspectors would not unnecessarily delay decisions on those applications.

119. In any event, however, the Regulations provide for a regulatory regime which confers a discretion upon the regulator as to when to take action for any breaches of Regulation 29 and a right of appeal against enforcement action to the Defendant (see Regulation 30). In practice that means that significant further time would or at least might be afforded to famers with genuine reasons for an inability to comply with Regulation 29 by 1 August 2024.

120. In my judgement, the Claimant has failed to demonstrate that the period afforded to farmers for obtaining and implementing necessary planning permissions is unreasonable.

Necessary Length of Transitional Period Not Analysed – paragraphs 69 to 71 of the Grounds

121. The Regulations are expressed to come into force on 1 April 2021. However, as set out at paragraph 41 above and referred to in paragraph 117 above, Regulation 2 contains transitional provisions applicable to holdings which were not previously within a NVZ. To repeat, Regulations 4 to 11, 15, 23, 27 and 33 to 43 do not apply until 1 January 2023, and Regulations 17 to 21, 25, 26 and 28 to 31 do not apply until 1 August 2024. The Claimant complains that the Defendant undertook no assessment or analysis of whether those transitional provisions allowed for sufficient time for compliance with the Regulations.

122. The only reference to transitional provisions contained within the Ministerial Advice is to be found at paragraph 93, which asserts that "*the inclusion of increased transitional periods will provide further opportunity for the industry and farm businesses to prepare for the introduction of many of the measures and further mitigate against the potential impact of exiting the EU and resurgence of the pandemic as far as possible*". There is also a reference to transitional provisions within Appendix 6 of the RIA (Trial Bundle 1 page 358). The relevant paragraph reads:

> "*The Covid-19 pandemic has been considered carefully as part of the proposal, to ensure the industry is able to implement the necessary changes with minimal disruption. As the risks associated with the impact of the pandemic can change at any time, transitional periods have been proposed to ensure the burden of implementation is spread over a number of years, providing a balance of providing positive environmental outcomes, whilst giving farmers time to understand and comply with the requirements*."

Within the Conclusion section of Schedule 6, there is a further relevant sentence which reads:

> "*The inclusion of increased transitional periods will further minimise the initial impact of the Regulations and mitigate against the potential impacts associated with exiting the EU and the pandemic*."

123. I acknowledge that there is no specific reference within the Ministerial Advice or the RIA to practical problems, such as obtaining relevant planning permissions, within the transitional period. Nonetheless, it is clear that the Defendant's choice of the period specified in Regulation 2 was not arbitrary, but based upon factors which the Defendant considered appropriate.

124. Both in the Detailed Grounds of Resistance and in the Skeleton Argument presented on behalf of the Defendant, the point is made that transitional periods are at the discretion of the Defendant (which must be correct), but also subject to the Level Playing Field requirements of the EU - UK Trade Incorporation Agreement. The Defendant appears to suggest that there would be a breach of that agreement should any transitional period extend beyond four years, since that would fall foul of EU requirements under the Nitrates Directive.

125. This issue was not debated (at least to any extent) during the course of oral argument and I can find no evidential basis in the documents before me upon which I could properly conclude that this formed part of the Defendant's decision making process prior to the making of the Regulations.

126. I do accept, however, that the Defendant is correct to assert (paragraph 59 of the Defendant's Skeleton Argument) that the purpose of the Regulations is to reduce the incidence of agricultural pollution and that extending transition periods beyond those specified in the Regulations might, at the very least, result in negative environmental consequences. On any view, the major thrust of the reasoning justifying the Regulations, as evidenced by the Ministerial Advice and the RIA, is the avoidance of adverse environmental consequences. I can properly infer that the Defendant took into account that longer transitional periods would have given rise to a risk of more prolonged adverse environmental consequences and that in the circumstances the length of the transition periods specified in Regulation 2 was reasonable.

Position of Farms Under Bovine TB Restriction – Paragraph 72 of the Grounds

127. The parties appear to agree that bovine TB affects 5.5 percent of cattle herds. The Claimant submits that farms with bovine TB are particularly affected by the Regulations because they face restrictions on movements of cattle, which mean that more cattle remain in the farm which, in turn, means that more slurry is produced and more storage is required. The Claimant alleges that this was not considered by the Defendant prior to the making of the Regulations.

128. At paragraph 33 above, I have referred to the Claimant's document, entitled "*Available Evidence*", which the Claimant submitted to the Minister on or about 10 September 2019. The point now under consideration was then raised for the consideration of the Minister. When the Ministerial Advice was submitted to the Minister immediately prior to the making of the Regulation, it was accompanied by the Claimant's document of 10 September 2019. In these circumstances, I can properly infer that this was an issue

which the Minister considered. That being the case, there is no substance to this ground of complaint.

The Combined Impact of the New Regulations and Brexit – Paragraph 73 of the Grounds

129. The Claimant complains that there was no assessment of how the Welsh farming industry (by sector or at all) might cope with increased regulation and costs just at the point where it was having to deal with different trading scenarios with the EU and plummeting export volumes.

130. The Defendant responds by arguing that the Regulations ensure continued tariff-free access to EU markets through equivalence of standards. Further, the absence of the Regulations might risk breaching the level playing field requirements of the EU Trade and Cooperation Agreement with a consequent risk that access to EU markets might be denied. Additionally, submits the Defendant, there is clear evidence that the Defendant's original intention was to bring forward regulations in or around January 2020 but, ultimately, chose the later date of 21 January 2021 so as to ensure that the immediate impact of Brexit and the pandemic were better understood.

131. These arguments, advanced on behalf of the Defendant at paragraphs 62 and 63 of the Skeleton Argument are, in my judgement, compelling and, accordingly, I do not accept that the Defendant failed to have regard to or assess the potential impact of Brexit upon the Welsh farming industry.

Conclusion on Ground 3

132. Despite the breadth and detail of the points raised by the Claimant under the umbrella of Ground 3, I can find no basis upon which it would be appropriate to find illegality in the making of the Regulations, either considered as a whole or confined to Regulations 1, 2 and 4. In my judgment, the arguments raised under Ground 3 are, classically, merits-based arguments as opposed to arguments which would have the effect of undermining the lawfulness of the Regulations. I have no doubt that the Claimant feels strongly that its merits-based arguments have considerable force, but that is no basis upon which I can find that the Defendant has acted unlawfully.

133. There are two other issues to which I can turn conveniently at this stage.

134. At paragraph 42 above I mention Regulation 44 and I quoted (in full) Regulation 45. In my judgment the significance of those regulations was not explored as fully as it might have been in the arguments (written and oral). Regulation 44 obliges the Defendant to establish a monitoring programme to assess the effectiveness of the measures imposed by the Regulations as a means of reducing or preventing water pollution from agricultural sources and makes it obligatory, too, for the Defendant to review the effectiveness of the measures every four years. Regulation 45(1) permits Welsh farmers to propose *"an alternative suite of measures"* for reducing or preventing water pollution from agricultural sources and in the event that such measures are put forward the Defendant must consider whether they would deliver reduction in/prevention of water

pollution more effectively. In the event that the Defendant so concludes Regulation 45(2) applies.[4]

135. Mr Jones QC did not suggest that these regulations prevented the Claimant from relying upon a challenge on the basis articulated under Ground 3. I do wonder, however, how the Defendant can be acting unlawfully in making regulations on the basis that it has failed to take account of material considerations or failed to grapple with such considerations when the Regulations under review have an in-built mechanism for review and, potentially, amendment in the light of representations made by interested persons.

136. The second issue is a separate, but in some ways similar, point. At paragraph 11 of their Skeleton Argument Mr Jones QC and Ms Paul refer to short passages in the decisions of Kruse v Johnson [1898] 2 QB 91 and *McEdowney v Ford* [1971] AC 632 which in effect suggest that a court should be slow to interfere with the wide powers conferred upon a legislature or minister to make regulations. They stopped short of suggestion that the Claimant was precluded from mounting a challenge on the basis of the arguments deployed under Ground 3 but suggested that I should exercise "judicial restraint" in considering those arguments and in reaching conclusions upon them.

137. Had time permitted I would have welcomed more detailed arguments about whether the challenge under Ground 3 (and for that matter Grounds 2 and 4) was permissible given that the Regulations were made under the negative procedure which permitted the Senedd to annul the Regulations after a full debate during which, no doubt, all the criticisms of the Defendant's decision making process would have been deployed if thought appropriate.

138. As with the first issue raised at paragraph 135 above, I do not intend to offer a resolution to this issue given the absence of detailed argument. I raise both points simply so that if this claim proceeds to an appeal consideration can be given as to whether those issues should feature more fully in the argument.

Ground 4 – Well-Being and the Welsh Language

139. In their Skeleton Argument Mr Mercer QC and Ms Russell assert (correctly) that the Welsh Government has an obligation to take account of well-being goals by virtue of section 3 of the Well-Being of Future Generation (Wales) Act 2015. Section 4 of the Act specifies the well-being goals which include maximising *"mental well-being"* creating *"viable communities"* and creating a society that *"promotes and protects culture, heritage and the Welsh Language".* Counsel argue that the Defendant did not take account either of well-being or the promotion of the Welsh language.

140. The short answer to this point is that these issues were considered in Schedule 6 to the *RIA.* The relevant extracts from the Schedule are to be found at paragraph 102 above.

141. It follows from the conclusions which I have reached that I reject each ground of claim relied upon by the Claimant and that I must dismiss the claim. That being so, strictly,

[4] For the text of that sub-regulation see paragraph 42 above.

Issues 5 and 6 fall away. Since, however, they were argued before me I should deal with them albeit briefly.

Issues 5 and 6

142. I refuse the application for an amendment to the prayer for relief. This claim was initiated in April 2021 and the application to include a quashing order was made no more than days before the first day of the hearing. No proper reason has been advanced for the very long period of time which elapsed before the application to amend was made. The Regulations have been in force (subject to the transitional provisions) since 1 April 2021.

143. In any event I am satisfied that no particular purpose would be served by granting the amendment. Had I found any illegality on the part of the Defendant I have no reason to doubt that action would be taken to cure the same in the light of my judgment and appropriate declaratory relief. Mr. Jones QC and Ms Paul said as much in terms – see paragraph 67 of their Skeleton Argument.