

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2008

Before :

THE HONOURABLE MR. JUSTICE McCOMBE

Between :

(1) **FRIENDS OF THE EARTH**

and

(2) **HELP THE AGED**

- and -

(1) **SECRETARY OF STATE FOR BUSINESS
ENTERPRISE AND REGULATORY REFORM**

and

(2) **SECRETARY OF STATE FOR ENVIRONMENT,
FOOD AND RURAL AFFAIRS**

Claimants

Defendants

Mr Michael FORDHAM QC & Mr Tom RICHARDS (instructed by **Friends of the Earth**) for the **Claimants**
Mr Jason COPPEL & Miss Joanne CLEMENT (instructed by Solicitor for the Department of Environment,
Food and Rural Affairs) for the **Defendants**

Hearing dates: 6-7 October 2008
(Final written submissions delivered 17 October 2008)

Judgment

The Honourable Mr. Justice McCombe:

(A) Introduction

1. This is a claim for judicial review brought by “Friends of the Earth” and “Help the Aged” against the Secretaries of State for Environment, Food and Rural Affairs and for Business, Enterprise and Regulatory Reform. (I shall call their departments “DEFRA” and “BERR” respectively.) As is well known, Friends of the Earth is a group concerned (broadly) with issues relating to the protection of the environment and Help the Aged is a charity working to relieve the problems of elderly people.
2. The claim is for judicial review of the Defendants’ alleged continuing failure to perform the duties of the Secretary of State under sub-sections 2(5) and (6) of the Warm Homes and Energy Conservation Act 2000 (“the Act”). The claim is for a declaration that the Defendants are unlawfully failing to perform those duties. A mandatory order for the performance of the duties was originally sought. However, it is now accepted by all parties that, if the claim is successful, the matter should be

remitted to the Defendants for reconsideration of their obligations in the light of the law as declared by this Court.

(B) The Act

3. The primary dispute between the parties is as to the nature of the duties imposed upon the Defendants by the Act. That is a point of construction of the Act itself, although, in my judgment, the arguments have tended to stray at times well beyond that point. It is important, in my view, to concentrate upon what the Act itself provides. It is a very short statute, by modern standards, containing only four sections. Its purpose, as set out in the preamble, is to “require the Secretary of State to publish and implement a strategy for reducing fuel poverty; to require the setting of targets for the implementation of that strategy; and for connected purposes”. By section 1(1) of the Act a person is to be regarded as living in fuel poverty if he is a member of a household living on a lower income in a home which cannot be kept warm at reasonable cost. It is undisputed that inadequate heating arrangements in such homes are sometimes responsible for health problems and, in some cases, avoidable deaths.
4. The relevant provisions of the Act provide as follows:

“2(1) It shall be the duty of the appropriate authority to prepare and publish, before the end of the period of twelve months beginning with the relevant commencement, a strategy setting out the authority’s policies for ensuring, by means including the taking of measures to ensure the efficient use of energy, that as far as reasonably practicable persons do not live in fuel poverty.”

(For present purposes “The appropriate authority” is the Secretary of State.)

“2(2) The strategy must –

- (a) describe the households to which it applies,
- (b) specify a comprehensive package of measures for ensuring the efficient use of energy, such as the installation of appropriate equipment or insulation,
- (c) specify interim objectives to be achieved and target dates for achieving them, and
- (d) specify a target date for achieving the objective of ensuring that as far as reasonably practicable persons in England or Wales do not live in fuel poverty.

2(5) The appropriate authority shall take such steps as are in its opinion necessary to implement the strategy.

2(6) The appropriate authority shall –

- (a) from time to time assess the impact of steps taken under subsection (5) and the progress made in achieving the objectives and meeting the target dates,
 - (b) make any revision of the strategy which the authority considers appropriate in consequence of the assessment,
 - (c) from time to time publish reports on such assessments.”
5. For present purposes, the Defendants’ duties only apply to England and Wales; for the rest of the United Kingdom the responsibilities are devolved. It will be seen that the primary duty of the Defendants is to prepare and publish “the Strategy”. They then have to take such steps as are, in their opinion, necessary to implement the strategy. They must also assess the impact of the steps taken and the progress made in achieving the objectives, make any necessary revisions to the strategy and publish reports on such assessments.

(C) Outline Facts

6. The Strategy required by the Act was published in November 2001 and was revised in December 2002. It adopted a definition of the term “fuel poverty” as referring to a household that needs to spend more than 10% of its income on fuel in order to maintain a satisfactory heating regime. The targets required by section 2(2)(c) and (d) of the Act are set out in the December 2002 revision in the following terms:

“In England, the Government as far as reasonably practicable will seek an end to fuel poverty for vulnerable households by 2010.

Fuel poverty in other households in England will, as far as reasonably practicable, also be tackled as progress is made on these groups, with a target that by 22 November 2016 no person in England should have to live in fuel poverty.”

(The words “as far as reasonably practicable” did not appear in this context in the original version of the Strategy of November 2001.) described “Vulnerable households” are defined as those households including older people, families with children and householders who are disabled or suffering from long term illness.

7. No criticism is levelled by the claimants at the Strategy itself. It is accepted that the Strategy complies with the Defendants’ obligation under Section 2 of the Act. The complaint is as to the alleged failure to implement the Strategy. However, this is not a challenge to the rationality of any particular decision on *Wednesbury* grounds but simply on the basis that the Defendants have failed to meet their statutory duties under section 2(5) and (6) of the Act.
8. The government has initiated a series of measures designed to tackle the problem of fuel poverty. Some of these have been given “catchy” titles and are known as “Warm Front”, the “Decent Homes” programme, “Carbon Emissions Reduction Target”

(“CERT”). Some energy market measures have been adopted and winter fuel payments have been made to pensioners. By way of brief explanation of these initiatives the following may be helpful. “Warm Front” is a programme providing for the making of grants for household energy efficiency measures, energy advice and benefit entitlement checks. “Decent Homes” is a programme designed to set benchmarks for social housing in terms of heating and other standards. CERT is focused on energy suppliers, requiring them to fund measures to achieve energy savings by customers. Energy market measures have been directed to fostering competition to the benefit of consumers by seeking to encourage competitively low pricing. The Winter Fuel Payments provide an income supplement to all pensioners which, although granted because of perceived heating problems, take the form of direct cash grants which the recipients are free to spend as they wish.

9. The evidence indicates that fuel poverty fell from 1.7 million households in 2001 to 1.2 million in 2003 and 2004. However, the numbers have risen significantly since then up to 2.4 million vulnerable poor households in 2006 and 2.9 million “fuel poor” households as a whole. By 2010, as predicted by the government’s 5th Annual Report, 1.3 million vulnerable households will remain in fuel poverty. It seems that this decline in progress to the desired objective has resulted in a very large part from substantial fuel price increases in recent years. These prices have risen by 72% between 2000 and 2007, as compared with an increase in the retail price index as a whole of 21%.

(D) Construction of the Act

10. The claimants submit that section 2(5) of the Act gives to the Defendants a discretion “in selecting the route but not the destination”; they must “identify what is necessary, and what is suitable, to achieve the objective”. In contrast, the government took the view, at least as at September 2007, that it was already taking all measures which were reasonably practicable to meet the 2010 and 2016 targets set out in the strategy. Its thinking on this, as at September 2007, is summarised in paragraph 114 of the witness statement of Miss Wynne of DEFRA. Additional measures are there summarised but were estimated to cost an additional £11.5 billion up to 2010, over and above existing funding commitments in respect of fuel poverty. It is pointed out that DEFRA’s total budget for 2007/8 is £3.508 billion, rising to £3.96 billion by 2010. Miss Wynne says, at paragraph 138 of the same statement, that “...it is not considered reasonably practicable to take all of the measures that would be required to eradicate fuel poverty, as such measures are not necessarily cost effective and the resources are not available to pay for them all at the present time given the money available to [the Defendants’ departments] in the light of other spending commitments”. It is emphasised by the Defendants, however, that the September 2007 decision represented only a “snapshot” of the situation then and that the matter is kept consistently under review, further measures being announced only last month.
11. In their written argument the claimants described the Defendants’ approach to the statute as “[diluting] an imperative into a broad policy discretion with an inapt *Wednesbury* connotation”. In oral submission Mr. Fordham stated that he was not arguing that cost was an irrelevant consideration, nor that the Act imposed an absolute duty to achieve the outcome defined in the objectives or targets. He was arguing, he said, that cost effectiveness was a relevant factor but that budgetary restraint was not. He said that the concept of “reasonable practicability” involved a consideration of

“feasibility of possible measures and the balance of benefit of those measures against cost”. It was further argued that budgets could not dictate the content of the duty; that was to “put the cart before the horse”. It was necessary to ascertain the content of the statutory duty and to allocate funds to secure compliance with the duty whatever that may be.

12. All this leads back to the question of what is the duty imposed by the Act on its true construction.
13. Clearly the primary obligation, arising under section 2, is to prepare and publish the strategy setting out the government’s policies for ensuring that so far as reasonably practicable persons do not live in fuel poverty. A few mandatory contents of the Strategy appear in section 2(2), including the identification of interim and final targets. Otherwise, the contents of it are left to the discretion of the Secretary of State. As already mentioned, it is not suggested that the published strategy fails to meet the statutory requirements. The obligation then follows for the Secretary of State to take such steps as are in his opinion necessary to implement the Strategy.
14. The Strategy is a lengthy document, couched not in the language of legislation but of policy. This is not surprising as the Act called for a document setting out “policies”. However, the statutory obligation is to take the steps that the Secretary of State considers necessary to implement those policies. To my mind the juxtaposition of policy and legal duty in this Act poses difficulties in the task of statutory construction.
15. With one exception mentioned first in oral argument (to which I shall return), the claimants do not identify any particular aspect of the measures set out in the Strategy that they contend has not been implemented. Instead they have focused their attack upon the anticipated failure to reach the interim and final targets and contend that this demonstrates the Defendants have not done and are not doing what is reasonably practicable to achieve them because of budgetary constraint in allocating funds to possible measures that might achieve the desired result. In doing so, it is argued, the Defendants have not properly understood the duty to implement the Strategy.
16. In the Defendants’ grounds of resistance to the claim, it was stated that:

“Pursuant to s. 2(5) of the Act, the Secretary of State is obliged to take such steps as are in his opinion necessary to implement the Strategy. It is accepted that s. 2(5) requires the Secretary of State, *inter alia*: (a) to take such steps as are in his opinion necessary to seek, so far as reasonably practicable, to end fuel poverty for vulnerable households by 2010; and (b) to take such steps as are in his opinion necessary to eradicate fuel poverty, so far as it is reasonably practicable to do so, 2016.”

In oral argument, Mr. Coppel for the Defendants submitted that there is no direct obligation to achieve the objective; there is a distinction, he argued, between failure to implement the steps identified in the Strategy and a failure to hit the desired target.

17. In my judgment, the obligation is to take the steps considered necessary to implement the Strategy - and that means all of the Strategy. Thus, where the strategy (as revised) requires the government “as far as reasonably practicable [to] seek an end to fuel

poverty for vulnerable households by 2010” and requires “fuel poverty in other households..., so far as reasonably practicable... [to] be tackled...with a target that by 22 November 2016 no person in England should have to live in fuel poverty”, the government must consider what steps are “reasonably practicable” to meet those objectives.

18. However, it must be recalled that the document is a policy document, although the Act imposes a legal duty to take the steps considered necessary to implement the policy. This is a distinction when compared with most other government policies which impose political rather than legal duties. So, while adopting a flexible approach to a construction of a policy document, there remains to my mind a duty upon the government (through the Defendants) to take such steps as it considers necessary to “seek” (i.e. to “try”) “as far as reasonably practicable” to end fuel poverty in vulnerable households by 2010 and “so far as reasonably practicable” to “tackle” fuel poverty (i.e. “try to eliminate it”) in other households, with a “target” of ending fuel poverty in other homes by 2016.
19. This is the language of “effort” to achieve targets, rather than of guarantee that targets will be reached. However, the obligation remains to take the steps considered necessary to make these efforts as far “as reasonably practicable”. To this extent, the language of policy has been translated into the language of statutory duty and the court can be guided by the use of similar language in relation to other statutory duties, and in particular duties imposed upon government.
20. In considering this question, I must recall that this case does not involve any challenge on rationality grounds to any particular decision or decisions of the Defendants. Mr Fordham’s submission was that the challenge is to what he contends is an error of law in the Defendants’ approach to the government’s statutory duty under section 2(5) of the Act. He submits, in my view rightly, that the court can intervene, by way of judicial review, in a case where it can be demonstrated that a public authority is acting (or failing to act) owing to a misunderstanding on its part of its legal duties.

(E) “Reasonably Practicable”

21. It is necessary, therefore, in considering the government’s/the Defendants’ approach to the duty imposed by section 2(5), to consider what is meant by the term “reasonably practicable” as descriptive of the efforts that must be made to achieve the desired ends specified in the strategy.
22. In their written argument the claimants relied upon certain statutes and cases where the words “reasonably practicable” have arisen in the context of duties directed to health and safety, for example in places of work. The Defendants argued that it is important to have regard to the context of each particular enactment and that statutes imposing duties on public authorities should be carefully distinguished from other Acts dealing with matters such as health and safety. While the claimants maintained the submission that well-known statutory phrases, such as “reasonably practicable”,

do gradually acquire an established meaning, wherever they appear, in the end it was recognised that, in this case, the most help was to be derived from cases arising in a public law context. Attention was focused in particular on two cases concerning the duties of local authorities under the Housing Act 1996 s. 206 and s. 208: *R (Sacupima) v LB Newham (Dyson J)* [2001] 33 HLR 1 and *R (Calgin) v Enfield LBC (Elias J)* [2006] 1 All ER 112.

23. In the *Sacupima* case, the court considered the question of resources in the context of the authority's duty to provide suitable accommodation under s. 206 of the 1996 Act. That section did not contain the qualification that the accommodation should be suitable "so far as reasonably practicable"; it simply had to be "suitable". Mr Justice Dyson's conclusion on the relevance of resources in defining the duty under that section was as follows:

"The question nevertheless remains, to what extent can lack of resources be taken into account in determining suitability? I agree with what Collins J. said in *R v Newham LBC, ex p. Ojuri (No. 3)* (1988) 31 H.L.R. at 452 at 461. Although financial constraints and limited housing stock are matters that can be taken into account in determining suitability, "there is a minimum and one must look at the needs and circumstances of the particular family and decide what is suitable for them, and there will be a line to be drawn below which the standard of accommodation cannot fall". If the accommodation falls below that line, and is accommodation which no reasonable authority could consider to be suitable to the needs of the applicant, then the decision will be struck down, and an appeal to the resources argument will be of no avail.

It follows that any authority which fixes in advance the resources that it will make available for the provision of suitable accommodation must ensure that there is sufficient flexibility in its arrangements to avoid being constrained to provide accommodation which falls below the minimum level of suitability. If in the judgment of the authority accommodation does not meet the minimum housing needs of the applicant, it is not open to say that it does meet those needs solely on the grounds that there are no resources available to provide anything better."

24. The *Calgin* case was concerned with the obligation of a local authority, in discharging its absolute duty under s. 206 to provide "suitable" accommodation, so to provide it in its own district "so far as reasonably practicable". The initial submission of the claimant was that resources were irrelevant in that context, but this was modified to acknowledge that a council could be justified in finding accommodation outside its area where the cost was likely to be disproportionate, but that this was only likely to arise where the accommodation was only required for a short period, where the application for housing was an emergency one and where there was unpredictably heavy demands upon the authority: see [2006] 1 All ER p. 118 f to h.

25. On this question Mr Justice Elias rejected the relevance of the health and safety cases: p. 118 j. He referred to the decision of Sir Donald Nicholls V-C (as he then was) in *Jordan v Norfolk CC* [1994] 1 WLR 1353, 1357 where it was said that,

“there is very little nowadays which is not physically feasible if enough money is spent. Hence in this context the phrase is apt to include financial considerations.”

Mr Justice Elias continued:

“Furthermore, it must surely be assumed that Parliament would have been well aware of the intensive pressures on housing stock and, whilst favouring in-borough accommodation, would not have sought to impose undue or unnecessarily onerous financial burdens on local authorities who are taking a practical approach to the problem of matching the need for a range of suitable accommodation with a limited budget. As Ms Samek points out in her witness statement, it is not merely a matter of cost, although that is a highly material factor. The quality and the range of accommodation may be improved by going out of the borough.”

26. Mr Justice Elias then referred to The *Sacupima* case and he said,

“In a practical world the question of available resources must be as relevant to the discharge of the duty under s. 208 as it is to the duty under s. 206”.

He then concluded as follows:

“There is a minimum standard below which the council cannot fall, and lack of resources will not justify going below that standard, but ‘it is a matter of judgment for the local authority to decide what accommodation on the spectrum of suitable accommodation to select’ per Dyson J in *Sacupima’s* case (2001) 33 HLR at 11 (para.18). Similarly here; there will be a discretion given to the authority but there must be a proper evidential basis for determining that the provision of local accommodation is not reasonably practicable. And it is important that an authority bears in mind that the requirement is not simply what is reasonable but what is reasonably practicable, which is a higher test.

In my judgment it cannot be said that the decision to use this out of district accommodation for the relatively small proportion of those seeking accommodation, is *Wednesbury* unreasonable, even recognising that the test is one of reasonable practicability. The shortage of suitable accommodation in Enfield, coupled with the savings which it has been calculated can be secured for the budget overall – some of which at least may be used for other aspects of the

budget - justify the adoption of this policy. Given the financial constraints on the council, it was entitled to conclude that it would not be reasonably practicable to house these persons within the borough of Enfield.”

27. In *Calgin* the court was considering the duty to find suitable accommodation in its own district so far as reasonably practicable. The context was that of an absolute duty to provide “suitable accommodation”. Still cost and resources were relevant, within the constraint of a minimum obligation to provide “suitable” accommodation.
28. I am quite satisfied that, in this case, in framing s. 2(1) and (2) (d) of this Act Parliament would have taken as axiomatic that the pressures on budgets are intense and that government would have to take the necessary steps in the context of other pressing needs for funds. I cannot conceive that Parliament can be taken to have intended that, whatever the expense, so long as not disproportionate to the benefit, the government should be obliged to expend whatever funds might be necessary to eliminate fuel poverty in priority to all its other commitments.
29. Parliament obliged the Secretary of State to formulate a policy strategy to ensure, so far as reasonably practicable, the desired objectives. It required him to publish his aspirations by way of targets. It then required the government to take the steps which in its opinion were necessary to implement the policy strategy. Government took up the challenge by (amongst other things) specifying that it would try, so far as reasonably practicable, to achieve the targets. In doing so, it imported a statutory duty to make those efforts. It did not assume a statutory duty to achieve the desired results, whatever the cost.
30. This is not to say that resources are dictating the content of the legal duty. I entirely agree with Mr. Fordham that the court will not shrink from declaring government’s action or inaction unlawful, simply because to do so may have spending implications. I also agree that the court will uphold a challenge to the rationality of a decision, if made out in law, even if the consequences may be that the government is ordered to think again and may (in the end) have to make additional funds available: see *R (Gurung) v Ministry of Defence* [2002] EWHC 2463 Admin. The task for the court here is to determine the content of the duty and to decide whether, as in the Housing Act cases, that duty may import financial considerations. It is all a question of construction of the relevant statute in its context.
31. In my judgment, absent a rationality challenge or a demonstrated failure to implement an identifiable part of the Strategy’s provisions, I do not consider that it is open to the court to review the policy decisions of the Defendants as to the way they should go about the implementation of the Strategy. It is open to government to have regard to its overall budget and the other calls upon its resources in deciding what steps to take in implementation of the Strategy, including its requirement that efforts should be made to achieve the 2010 and 2016 targets as far as reasonably practicable. I agree with Mr. Coppel’s submission that the “minimum standard” to be attained in performance of the duty is implementation of the Strategy’s express provisions. In a written note of 16 October 2008, the Defendants say (for example) that the Act and Strategy would not (as presently formulated) permit the Government to eliminate

Winter Fuel Payments in their entirety or cut Warm Front funding to zero. The penalty (if any) for failure to achieve the desired results of the Strategy as published, because of errors in policy making (if such they be) should, it seems to me, be political rather than legal. This is subject, first, to one remaining concern (to which I return) and, secondly, to one specific area of the Strategy which Mr Fordham (somewhat belatedly) contended had not been properly implemented.

(F) Section 3 of the Act

32. In reaching these conclusions, it should be pointed out that neither the arguments nor this judgment ignore the provisions of Section 3 of the Act which provides as follows:

“There shall be paid out of money provided by Parliament –

(a) any expenses of the Secretary of State under this Act; and

(b) any increase attributable to this Act in the sums payable under any other Act.”

33. Mr. Fordham pointed out that this indicated that Parliament understood that the Act might have financial consequences but he did not contend that the section “got him home” on his primary submission on the significance of resources in understanding the content of the duty under s. 2(5).

34. The significance of such a statutory provisions is set out in *Craies on Legislation* 8th Edition (2008) paragraph 1.7.1 pp. 53-54 as follows:

“The most common form of financial provision in Acts is a proposition to the effect that expenditure of a Minister in connection with the Act shall be paid out of money provided by Parliament. Strange enough, despite its peremptory form a provision of this kind has no legislative purpose whatsoever. In particular, the proposition is not in itself sufficient to authorise release of funds from the Consolidated Fund: that must be done in the appropriate Consolidated Fund Act or Appropriation Act as described below.

The explanation for the inclusion of these ineffectual provisions can be found in the procedure of the House of Commons. When a Bill is introduced in that House, any provision which would involve the raising of money by way of taxation or the expenditure of money from the Consolidated Fund is printed in italics. The reason is that until the provision has been authorised by a money resolution or a ways and means resolution of the House, it is not authorised to form part of the Bill, and it is in effect printed only contingently on the assumption that it will in due course be validated by the passing of a resolution. The italics disappear when the Bill is next printed, which is normally when the Bill leaves Committee.

A Bill which gives rise to expenditure in a number of different places would need to contain italics in each of those places. And it could be difficult to identify all provisions of the Bill which would give rise to expenditure. So the practice has arisen of having what is referred to as a “sink clause”, amounting to a general proposition that expenditure under the Bill is to be paid out of money provided by Parliament. The convention is then to italicise the sink clause and to leave the rest of the Bill without italics, with the exception of any provision which contains an express mention of expenditure, such as a power to make grants or loans.

Because they have no legal effect, sink clauses are not found in Acts the Bills for which originated in the House of Lords, and are not reproduced when the provisions of the Act are replicated in a consolidation Act.”

35. If the author of this work is correct in this passage (and there is no reason to think that he is not) it might be helpful if the use of this type of provision in legislation is reviewed so as to avoid possible confusion in the future.

(G) The outstanding concern

36. The remaining concern (referred to above) is this. It is clear that the duty imposed by s. 2(5) of the Act is a duty imposed upon the Secretary of State, i.e. it is a duty imposed upon government as a whole. The responsibilities have been allocated administratively within government to the present Defendants. When one reads the witness statement of Miss Wynne, and in particular the opening words of paragraph 114 and paragraph 138, together with paragraph 23 of the Defendants’ written argument, it seemed possible that the decision as to what steps are reasonably practicable may have been determined at times not by reference to the resources of government as a whole but merely by reference to the budgets of DEFRA and BERR, the departments headed by the Defendants. If that was so then, as it seems to me, there might have been a potential breach of duty under the Act to that limited extent.
37. As part of his submissions on the main point of statutory construction Mr. Coppel relied upon the well known constitutional arrangements whereby Parliament votes moneys to individual departments by way of Appropriation Acts and argued that the present statute should be read in the light of the understanding that Parliament would vote the funds that it thought appropriate to each department in the light of the responsibilities of each. I take it that one of his responses to this residual concern might have been that Parliament can be taken to have borne in mind the government’s and the defendant’s obligations under the Act in allocating funds to each of the relevant departments. I think that that would be taking the “constitutional convention” point too far. It is one thing to say that Parliament must have had in mind the constraints upon government’s resources in formulating the duties under the Act (just as Mr Justice Elias considered that it must have done so in relation to the Housing Act). It is another thing to say that government as a whole, and the Defendants in particular, have had regard to the express requirements of this Act in framing the later Appropriation Acts.

38. However, the evidence on this point is far from conclusive and is, in my judgment, an insufficient basis for a finding of breach of statutory duty. Even if I am wrong in that conclusion on the evidence, given the main thrust of the arguments in the case, I would not have exercised my discretion on judicial review to grant relief on the basis of this point alone.

(H) Allegation of specific failure to implement the Strategy

39. I turn to Mr Fordham's further point that the government has failed to implement a particular provision of the Strategy.
40. Mr. Fordham referred to paragraph 3.33 of the Strategy where the following appears:

“There are around 4 1/2 million households in Great Britain without a gas supply – some 20% of the total and around 1.3 million of these are thought to be in fuel poverty. This represents a very significant proportion of the fuel poor. Not having access to a gas supply reduces the choice of fuels for customers, and may lead to their having to use less convenient, less energy efficient, or more costly methods of keeping their homes warm. This suggests that a lack of access to gas may be an impediment to the eradication of fuel poverty.”

He then referred to the government's 2nd Annual Progress Report (2004) where it quotes the Fuel Poverty Advisory Group recommendation – “It is essential that funds are made available for appropriate extensions to the gas network”. The government response in the report was:

“The Government shares the view that connection to the gas network, allied with appropriate measures inside the home, has the potential to remove households from fuel poverty. The Government has worked to encourage connections to the network. The Design and Demonstration Unit, based in DTI, has developed pathfinder projects to provide connections to deprived communities. The first of these, in Llay, North Wales, was completed in February 2004. Additionally, in December 2003, Ofgem revised rules governing charging by independent gas transporters, to encourage more infill projects. Government funding for gas network extension is under consideration in the current Spending Round.”

In the 3rd Report (2005) the following appears:

“Both Defra and DTI are committed to ensuring that the full range of solutions is considered for those households and communities off the gas network. The recent changes to Warm Front will enable scheme managers to install oil based central heating systems once other lower carbon options have been considered. The DDU is actively working to evaluate the potential of renewable energy in deprived communities outside the gas network, utilising funding from DTI's renewables

budget. The first community - based models will be rolled out during 2005/06.”

Finally, Mr. Fordham referred to the Executive Summary to the 4th Report (2006) in the following terms:

“There are significant challenges ahead, especially in terms of assisting fuel poor homes off the gas network and addressing those households in fuel poverty on very low incomes.”

41. It was submitted that all this showed that the government had failed to implement paragraph 3.33 of the Strategy.
42. In answer, Mr. Coppel submitted that it was necessary to consider paragraph 3.33 in context. He referred me to paragraphs 3.34 and 3.35 of the Strategy. These paragraphs referred to the setting up of a working group which had considered the issues surrounding extension of the gas network. It was reported that the group had considered the question along with a range of other options and it had reported to Ministers that extension of the gas network across the whole country could not be justified on cost benefit grounds but the extension in some communities could be justified. The group recommended further work on the subject. This section of the Strategy concluded with the following:

“Against a background both of fuel poverty and of sustainable energy for the future, many respondents to the consultation process proposed that renewable energy would be a viable means of helping the fuel poor, particularly in rural areas, where gas might never be economically available but where primary inputs such as biomass might be. With this in mind, DTI and DEFRA will be jointly funding a number of pilot schemes to assess the contribution that renewable energy and other technologies can make in tackling fuel poverty.”

43. Mr. Coppel also referred to the evidence of Mr. Phillips of BERR in paragraphs 20 to 28 of his witness statement setting out the steps taken by government in relation to extension of the gas network. He mentions the setting up of the “Design and Demonstration Unit” (DDU) and its work in encouraging extensions to the gas network. After initial investigations, Mr. Phillips says that DDU used the results to identify likely areas where extension of the network could be justified. It has also, he says, worked on a model to cut the cost of providing gas connection to deprived communities. It is then stated that in 2004/5 five pilot projects were carried out which provided 1000 homes with a gas connection. (Pilot schemes were specific policies envisaged in paragraph 3.35 of the Strategy.) Finally, I was referred to paragraphs 37 and 38 of Mr. Phillips’ statement referring to further work initiated by government on this aspect of fuel poverty policy since the DDU’s report.
44. In the light of this information I find myself unable to hold that the government has failed in its duty to take the steps that it considers necessary to implement this particular aspect of the Strategy. It has taken steps as it saw necessary with the results that are reported. The claimants criticise the progress (or lack of it), but that does not

demonstrate that there has been a failure to implement, as considered necessary, the policies set out in the Strategy.

(I) Conclusion on statutory duty

45. I do not accept the claimants' argument that the Defendants are in breach of the duty imposed by s. 2 of the Act by reason of consideration of the resources of government as a whole as part of the exercise in deciding the steps to be taken under that section.

(J) Claimants' arguments if held to be wrong on statutory construction

46. Finally, Mr Fordham submitted that even if he was wrong about the significance of budget constraints in this case the government is still in breach of its obligations under s. 2(5)
47. This point was argued by reference to what Mr. Fordham called his three "best examples" relating, first, to the "method" employed by government in seeking to meet its duties and, secondly, to "actions" undertaken to that end in two particular areas.
48. In support of these submissions on the first point, Mr Fordham relied upon the evidence of his expert witness Dr. Brenda Boardman, a senior research fellow at the Environmental Change Institute of the University of Oxford, criticising the absence of publication by government of its thinking to explain why available measures have not been taken and why its targets cannot be met (paragraph 7.3 of her statement). Reliance is also placed on Dr. Boardman's opinion that the government has failed to produce a "clear and costed plan" setting out the task ahead, the options available and the potential costs involved: paragraphs 116-120 of the statement.
49. In support of the submissions on the second point, Mr Fordham pointed to the alleged deficiencies of the government's decision to cut the funds available for Warm Front, said to be a key element of government policy in relation to fuel poverty, and to the decision to provide the Winter Fuel payments to all pensioners, regardless of their means. Mr. Fordham referred to the Fuel Poverty Advisory Group's exhortation to government not to cut spending on Warm Front and its criticism of the payments to pensioners "across the board"
50. On the first point, the Defendants respond by saying that the government has regularly prepared papers considering the measures needed to eradicate fuel poverty and the costs of taking such measures. Miss Wynne addresses the point in paragraph 128 of her witness statement and produces supporting documents. Dr. Boardman takes issue with Miss Wynne's evidence in a second witness statement: see paragraphs 12, 25, 33, 38, 49(4)(a) and (b) and 74 of that statement.
51. In argument, Mr. Coppel submits that the government's annual reports also contain an assessment of the impact of steps taken and the progress made in achieving the interim and final objectives, which is all that is required by s. 2(6) of the Act. He objects that the only legitimate objection beyond the duties set out in the Act would be an objection to the rationality of particular actions, a course which the claimants have not chosen to take in this action. In the written argument in reply, the claimants say that their complaints (on all these three points) are best characterised as the absence of "reasonable justification" of the actions that they have taken.

52. In relation to the cut in funding for Warm Front, the Defendants say that the impact was off-set by the increase in funding effected through the energy suppliers' obligations in the new CERT scheme. It is asserted that overall spending on energy efficiency and other measures targeted on low income households will lead to an increase in spending overall of £680 million in the period from now to 2011: Miss Wynne's statement paragraph 117(2). It is also contended that the reduction to Warm Front funding was itself reversed in part by the measures announced last month: see Miss Sharp's witness statement paragraph 7.
53. In relation to the Winter Fuel payments the claimants contend that the spending of £15 billion on this aspect of policy out of £20 billion on fuel poverty initiatives generally cannot be justified and cite the Advisory Group's advice that such payments should not be made to higher rate tax-payers. It is submitted that it cannot be proper fulfilment of an obligation to tackle fuel poverty to the extent reasonably practicable to allocate three quarters of the funds to be spent to a measure that does not target specifically those in fuel poverty.
54. The Defendants respond by saying that the making of these payments was an express policy set out in the Strategy. However, it should be noted on the other hand that it is not contended that to meet the claimants' complaint would itself involve a breach of or departure from the Strategy.
55. The Defendants further submit that the making of these winter fuel payments is provided for by the Social Security and Benefits Act 1992 and in regulations made thereunder. They submit that the claimants cannot complain about the making of the payment without going behind this legislation. However, it would seem that this fact cannot define whether or not the government is or is not in breach of the separate duty under the present Act. It is not argued by the claimants that the making of the payments is unlawful of itself but that the allocation of funds in this manner demonstrates a failure to comply with the entirely separate duty under s. 2(5) of the Act.
56. On the substance of the matter Miss Wynne states in her evidence that the policy on these payments was adopted to give reassurance to older people who are more likely to be living in fuel poverty than any other group of the population. It is said that the "targeting" advocated by the claimants would exclude large numbers of people on fixed incomes who may find it difficult to budget for rapidly rising winter fuel bills. It is further argued that the policy advocated would involve substantial administrative cost and would be likely to reduce the "take-up" of benefit (because those potentially eligible would have to make special application for the payment and demonstrate their entitlement).
57. I find it understandable that the claimants take issue with the government on the manner in which they have reached the conclusions now criticised. However, I agree with Mr. Coppel that one must remember that there is no challenge made in these proceedings as to the lawfulness of the policy decisions taken, apart from the contention that the government has failed to comply with its duties under s. 2 of the Act. The claimants say that the Defendants have failed to provide "reasonable justification" of their actions (or lack of them) in the light of the statutory duty.

58. The problem, as it seems to me, is that the complaint made is as to the policies adopted by the government in meeting its own policy objectives set out in the Strategy. It is here that the statutory scheme of imposing a legal duty to implement a broad policy document is at its most unsound. There must be room for differences of opinion as to how one can best go about the implementation of such policy. When one looks at Section 2(5) of the Act again it is clear that the Defendants are only obliged to take such steps as “in [their] opinion” are necessary in order to implement the Strategy. Absent a challenge to rationality of particular decisions, taken in purported compliance with the Act, it is not open to this court to adjudicate upon the merits of the opinions so formed. The challenge sought to be made, in the guise of an allegation of breach of the duty under s. 2(5) is, in fact, a challenge to the making of policy, in particular in relation to the allocation of funds. This is starkly clear in the criticisms of the operation of the Warm Front scheme and of the Winter Fuel payments. Even if one sees force in the complaints made on their face, arguments are raised to meet them and these are arguments as to the desirability of the policy of government on the use of available money. Those arguments are not apt to found an argument of breach of statutory duty and judicial review.

(K) Conclusion

59. For these reasons this claim for judicial review is dismissed.