

Appeal No.

**IN THE COURT OF APPEAL**  
**CIVIL DIVISION**

**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

**Claim Nos.CO/10734, 11055, 11091/2011**

**The Honourable Mr Justice Mitting**

**BETWEEN:**

**THE QUEEN**  
on the application of

- (1) SOLAR CENTURY HOLDINGS LIMITED  
(2) HOMESUN HOLDINGS LIMITED  
(3) FRIENDS OF THE EARTH LIMITED

**Respondents**

and

**SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE**

**Appellant**

and

- (1) ENCRAFT LIMITED  
(2) ARDENHAM ENERGY LIMITED  
(3) SECOND NATURE PARTNERSHIP  
(4) MORECAMBE BAY COMMUNITY RENEWABLES LIMITED  
(5) OUSE VALLEY ENERGY SERVICES COMPANY LIMITED

**Interested Parties**

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**GROUND OFS OF APPEAL**

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The Secretary of State for Energy and Climate Change seeks permission to appeal against the Order of Mitting J granting judicial review of a proposal made by the Secretary of State and contained in a consultation document dated 31<sup>st</sup> October 2011, and declaring that that proposal was unlawful.

The Secretary of State appeals on the following grounds.

1. The learned Judge erred in concluding that the proposal, if given effect to, would have been unlawful.
  - (1) The Judge was wrong to conclude that the Secretary of State's proposal was inconsistent with section 41(1) of the Energy Act 2008 (and therefore *ultra vires*) because it was not calculated to further the statutory purpose of encouraging small-scale low-carbon generation of electricity. In fact, and as is apparent from the consultation document read as a whole, that was the express purpose of the Secretary of State's proposal.
  - (2) The learned Judge erred by conflating the encouragement of a particular type of small-scale, low-carbon generation of electricity (namely that generated by solar photovoltaic installations), with the generation of small-scale low-carbon electricity in general. The statutory purpose identified at section 41 of the Energy Act 2008 is the encouragement of small-scale low-carbon electricity, not just that produced by means of solar photovoltaic installations. The Judge erred by failing to focus on the generation of low-carbon electricity by a range of means and having regard only to that generated by solar photovoltaic systems.
  - (3) The learned Judge failed to recognise that on the correct construction of section 41 of the Energy Act 2008 it is for the Secretary of State to decide the steps which ought to be taken in order to encourage the generation of small-scale, low-carbon electricity. The learned Judge illegitimately substituted his own view of what steps would further that purpose for the view of the Secretary of State.
2. The learned Judge erred in law in concluding that the procedure laid down in section 42 of the Energy Act 2008 was relevant to the content of proposals which the Secretary of State wished to advance for the purposes of consultation.
3. The learned Judge erred in law in holding that judicial review could lie in respect of a proposal about which the Secretary of State sought to consult. He should have held that the challenge to a proposal was either premature or was a matter that was not amenable to judicial review.

JONATHAN SWIFT QC  
PAUL NICHOLLS  
JAMES CORNWELL

4 January 2012.