

FAO: The Secretary of State for Transport

Department for Transport
Great Minster House
33 Horseferry Road
London
SW1P 4DR

Direct Dial: 020 3780 0474

Email:

Your Ref:

Our Ref: RWS/LJH/00239263/2

Date: 2 July 2017

First by email:

URGENT:
PRE-ACTION PROTOCOL LETTER FOR JUDICIAL REVIEW

Dear Secretary of State,

Re: National Policy Statement for National Network (the “NPS”)

Introduction

1. We write this letter on behalf of our client, Transport Action Network (“TAN”), in order to comply with the pre-action protocol for judicial review under the Civil Procedure Rules. If we do not receive a satisfactory response to this letter, we propose to advise our client to make an application for judicial review without further reference to you.
2. We are aware that judicial review is a remedy of last resort and write in the hope that this matter can be resolved without recourse to legal proceedings. We therefore outline at the end of this letter the steps which we ask you to take in order to avoid recourse to the court.
3. Please be clear in your response in identifying any areas of factual and/or legal dispute, and the basis for them, so that the issues in dispute can be identified and if possible narrowed.
4. On 5 March 2020, TAN wrote to the Secretary of State to request him to review the NPS. This was chased up by TAN’s legal representatives in letters dated 22 and 29 April 2020. By letter dated 1 May 2020, the Secretary of State

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promised to respond in due to course¹. TAN has still not received that response.

5. It therefore appears to TAN that the Secretary of State has simply failed to decide whether or not to carry out a review.

The Parties

6. The proposed Claimant is: Transport Action Network Ltd, 254 Upper Shoreham Road, Shoreham-By-Sea, West Sussex, BN43 6BF.
7. The proposed Defendant is: The Secretary of State for Transport (the “Secretary of State”), Department for Transport, Great Minster House, 33 Horseferry Road, London, SW1P 4DR.

Aarhus Convention

8. This proposed claim falls under the definition of an Aarhus Convention claim within the meaning of the CPR, and we proceed subject to the costs protection that brings, on the basis that the grounds of claim concern numerous pieces of environmental legislation, which are all elements of national law relating to the environment within the meaning of Article 9(3) of the Aarhus Convention.

Decision under challenge

9. The proposed claim challenges the failure by the Secretary of State lawfully to consider whether it is an appropriate time to carry out a review under s. 6(1)-(2) of the Planning Act 2008 (the “PA 2008”) of the relevant parts² of the NPS.

Factual Background

10. The NPS was presented to parliament pursuant to ss. 5(4) and 9(8) of the PA 2008. It was published on 17 December 2014 by the Secretary of State³.

¹ The correspondence referred to here is the pre-action letters and interim response concerning the separate claim for judicial review against the publication of the Second Roads Investment Strategy. Given we have already been in correspondence with the Government Legal Department concerning this matter, we have sent them a copy of this letter.

² Appended to TAN’s letter dated 5 March 2020.

³ <https://www.gov.uk/government/publications/national-policy-statement-for-national-networks>

Legal Framework

11. It is stated in mandatory terms under s. 6(1) of the PA 2008 that the Secretary of State must review the NPS whenever he thinks it appropriate to do so.
12. A review may relate to all or part of a national policy statement (s. 6(2)).
13. In deciding when to review any relevant part of the NPS, the Secretary of State must consider whether (s. 6(4)):
 - (a) since the time when the relevant part was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the relevant part was decided;
 - (b) the change was not anticipated at that time; and
 - (c) if the change had been anticipated at that time, any of the policy set out in the relevant part would have been materially different.
14. When deciding whether it is appropriate to carry out a review, the Secretary of State must do so with the objective of contributing to the achievement of sustainable development in mind (s. 10(2)). In discharging that duty, the Secretary of State must in particular have regard to the desirability of mitigating, and adapting to, climate change (s. 10(3)(a)) and achieving good design (s. 10(3)(b)).
15. It is trite law that a decision-maker may not simply abdicate the duty to make a decision that is required by statute. Unreasonable delay in making a decision required by statute will also be unlawful. Equally, a positive decision to defer a decision is reviewable on public law grounds.
16. The Secretary of State has power under s.11(4) of the PA 2008 to suspend the operation of part of an NPS, pending a review, where the condition in s. 11(3) is met. The condition in s. 11(3) is in identical terms to the consideration in s. 6(4), relating to when it is appropriate to carry out a review.

Potential Grounds of Claim

17. TAN's letter to the Secretary of State of 5 March 2020 set out why, in TAN's view, it is necessary now to review relevant part of the NPS, by reference to the mandatory considerations in s. 6(4).

18. It appears to TAN that the Secretary of State has simply failed even to decide whether or not now is an appropriate time to carry out such a review. That failure is unlawful, because it amounts to an abdication of the Secretary of State's duty to review an NPS (or part of it) whenever he considers it appropriate. By necessary implication, that duty contains a requirement on the Secretary of State to make an assessment of when it is appropriate to carry out a review. This he must do by reference to the mandatory considerations in s. 6(4), and the sustainable development duty in s. 10(2)-(3). It is not open to the Secretary of State simply to refuse to come to any view on (or to defer deciding other than on the basis of a lawful decision) whether the time is appropriate or not.
19. If you confirm that such a decision is to be taken in future, we will consider whether that amounts to unreasonable (and so unlawful) delay, or an unlawful deferral of decision-making or an unlawful decision to defer even considering.

Steps required to be taken

20. The Secretary of State must now make a lawful decision whether or not to review the relevant parts of the NPS, which were identified in TAN's letter dated 5 March 2020.
21. If (unbeknownst to TAN) he has already done so (or made some related decision, as contemplated above), then please provide us with: (i) a copy of that decision; and (ii) an explanation as to the legal power(s) which the Secretary of State considered himself to be exercising in taking the decision, the reasons for taking that decision (including identifying all matters taken into account) and why that decision was not previously made public (or at least communicated to TAN, given the above correspondence).
22. If he is in the course of taking such a decision, please confirm when that decision will be published or communicated to TAN, and the nature of the decision in contemplation (including the legal power(s) being exercised in taking the decision).
23. If he has decided to defer a decision whether or not to review relevant parts of the NPS, please provide a copy of that deferral decision in your response to this letter, explaining:
 - (a) What legal power the Secretary of State was exercising when taking the deferral decision;
 - (b) To what point in time he has decided to defer taking the decision whether to review the NPS; and

- (c) His reasons for taking that decision (including identifying all factors taken into account).
24. If the Secretary of State has decided to defer a decision whether or not to review relevant parts of the NPS, please also confirm whether or not he will suspend the operation of the relevant parts of the NPS pending that deferred decision being taken. Please be clear in identifying all factors taken into account in deciding on such a suspension.
25. If the Secretary of State refuses to confirm any of the above, then we shall advise our client to issue a claim for judicial review without further notice to you. We may apply for interim relief if such a claim is issued.

Timing

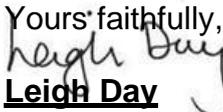
26. A judicial review questioning a decision of the Secretary of State not to carry out a review of all or part of a national policy statement must be brought within 6 weeks of the date of the decision not to carry out the review (s. 13(2) of the PA 2008). If your response to this letter confirms that the Secretary of State has decided not to review the NPS, that letter will be treated as triggering that deadline. If your response confirms that no decision has been taken, or a deferral decision has been taken, TAN considers that the 6-week deadline for issuing proceedings does not apply, as any challenge to such a decision would fall outside the statutory scheme in s. 13 for reviewing certain decisions taken pursuant to the PA 2008.

Information requested

27. When responding, please disclose under the Secretary of State's duty of candour any documents relevant to the Secretary of State's consideration of TAN's letter dated 5 March 2020 and/or decision to review the NPS (or the other possible related decisions, as explained above), if such a decision has already been taken.

Deadline for a response

28. We kindly request a substantive response within 14 days i.e. by 4pm on 16 July 2020. Please ensure that any response is sent to both Rowan Smith and Lewis Hadler (see above contact details) who are dealing with this matter.

Yours faithfully,

Leigh Day