IN THE HIGH COURT OF JUSTICE **AC-2023-LON-000174**
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N :

THE KING (on the application of
TRANSPORT ACTION NETWORK LIMITED)

Claimant

- and -

SECRETARY OF STATE FOR TRANSPORT

Defendant

CLAIMANT'S SKELETON ARGUMENT

For substantive hearing listed 30 April 2024

References: to page x in the core or evidence bundle are respectively **[CB/x]** or **[EB/x]**; to paragraph y of the Defendant's detailed grounds of defence **[DGD/y]** and to paragraph z of the witness statement of Jessica Matthews on behalf of the Defendant as [**JM/z**].

Presentation: Subject to approval of the Court and in pursuance of the guidance issued by the LCJ (and others) on 8 November 2023, it is anticipated that the presentation of the case for the Claimant will be split between the two advocates with Mr Bishop addressing Ground 3.

Introduction

1. Section 21 of the Infrastructure Act 2015 ("**IA 2015**") requires the Secretary of State for Transport ("**the SoS**") periodically to set a "Cycling and Walking Investment Strategy" ("**CWIS**") which must specify the objectives (including results) to be achieved and the financial resources to be made available by the SoS for the purpose of achieving those objectives. The Updated **CWIS2** covers the period 2021 – 2025 and included dedicated funding ("**DF**") for active travel ("**AT**").

2. Pursuant to permission granted by Jay J on all grounds **[CB/124]**, the Transport Action Network ("**TAN**") applies for judicial review of the decision of the SoS embodied in his written ministerial statement ("**WMS**") to Parliament of 9th March 2023 ("**the Decision**") to cut that DF in the final two years of CWIS2 to 2025 by £225m[1] (or 65%).

3. The Decision is unlawful because it:

    a. was made outside the framework provided for the setting and varying of the CWIS in s. 21 and was contrary to and inconsistent with CWIS2 (as updated) for the period to 2025 (Grounds 1 and 2);

[1] JM/45: comprised of £200m capital funding and £25m revenue funding. JM/63 explains how with various off-setting sums the total reduction from the dedicated funding in CWIS2 was £179m. The relevance of this offsetting is considered below.

b. was made without taking into account necessarily material considerations notably the impact on air quality (“**AQ**”); the public sector equality duty (“**the PSED**”) and carbon emissions and as to the latter was contrary to and inconsistent with the then current Transport Decarbonisation Plan (“**TDP**”) and the Net Zero Strategy (“**the NZS**”) (Ground 3).

4. Through the SoS’s Detailed Grounds of Defence (“**DGD**”) and supporting evidence of Jessica Matthew (“**JM”**), it is now clear that, following a detailed process, the SoS had decided *not* to make cuts to DF for AT. Such funding was central to achieving the objectives for AT, was important for equality ambitions, for air quality targets and for delivery confidence in meeting carbon targets, and had a very high cost-benefit ratio. However, immediately prior to the Decision, His Majesty’s Treasury (“**HMT**”) and 10 Downing Street required the SoS to impose *“additional savings”* including the £225 reduction in AT referred to above **[CB/8]**. This appears to explain (at least in part) the illegalities in the Decision.

Legal framework

Section 21 Infrastructure Act 2015[2]

5. S. 21 provides:

> **“(1) The Secretary of State may at any time**
>
> **(a) set a Cycling and Walking Investment Strategy for England; or**
>
> **(b) vary a strategy which has already been set.**
>
> **(2) A [CWIS]is to relate to such period as the [SoS] considers appropriate but a Strategy for a period of more than five years must be reviewed at least once every five years.**
>
> **(3) A [CWIS] must specify-**
>
> **(a) objectives to be achieved during the period to which it relates, and**
>
> **(b) the financial resources to be made available by the [SoS] for the purpose of achieving those objectives.**
>
> **(4) The objectives to be achieved may include –**
>
> **(a) activities to be performed;**
>
> **(b) results to be achieved;**
>
> **(c) standards to be met.**
>
> **(5) Before setting or varying a [CWIS] the [SoS] must consult such persons as he or she considers appropriate.**

[2] The statutory material relevant to ground 3 is referred to in the submissions on that ground below.

(6) In considering whether to vary a [CWIS] the [SoS] must have regard to the desirability of maintaining certainty and stability in respect of Cycling and Walking Investment Strategies.

(7) A [CWIS] must be published in such manner as the [SoS] considers appropriate.

(8) Where a [CWIS] has been published the [SoS] must from time to time lay before Parliament a report on progress towards meeting its objectives.

(9) If a [CWIS] is not currently in place, the [SoS] must –

(a) lay before Parliament a report explaining why a Strategy has not been set, and

(b) set a Strategy as soon as may be reasonably practicable."

Headline legal principles

Grounds 1 and 2

6. It is axiomatic and not in dispute that resource allocation decisions are in the classic territory where the courts afford the decision-maker a wide margin of appreciation: *R (Rotherham MBC) v. Secretary of State for Business Innovation and Skills* [2015] PTSR 322 @ [62-63].

7. However, where Parliament has conferred on the executive statutory powers or duties to do a particular act, that act can only thereafter be done under the statutory powers so conferred and the SoS cannot act inconsistently with the statutory scheme: *R v Home Secretary ex parte Fire Brigades Union* [1995] 2 AC 513 @ 552D and F. The SoS's investment strategy must be contained in, and can only be contained in, the statutory documents: *Great Portland Estates v. Westminster City Council* [1985] AC 661 @ 674E.

Ground 3 – material considerations[3]

8. A decision-maker must take into account a consideration which the legislation expressly or by implication requires to be taken into account or which is so "*obviously material*" that it was irrational not to take it into account: *R (Friends of the Earth) v SSBEIS* [2023] 1 WLR 225 at [199]-[200]. In determining whether or not a matter was taken into account, a minister only takes into account matters of which he has personal knowledge or which are drawn to his attention in briefing material. If the briefing material "*omits something which the minister was legally obliged to take into account, and about which he otherwise had no personal knowledge, and which was not insignificant*" then it would be unlawful: *R (WildFish Conservation) v SSEFRA* [2023] EWHC 2285 (Admin) at [152] ("***WildFish***")

9. Where a decision-maker decides to take a consideration into account it is generally for him to decide how far to go into the matter, or the manner and intensity of any inquiry into it, which

[3] The more detailed legal principles applicable to each part of Ground 3 are addressed below.

judgment may only be challenged on the grounds of irrationality. Likewise, it is for the decision-maker to decide how much, if any, weight to attach to a factor he takes into account, a judgment which cannot be challenged unless irrational: *R (Transport Action Network) v Secretary of State for Transport* [2022] PTSR 31 at [12] ("***TAN 1***").

Factual background

CWIS1 and subsequent AT policy developments

10. Following the entering into force of s. 21 and subsequent s. 21(5) consultation, CWIS1 was set on 21 April 2017 aligning with the Spending Review 2015 period (2016/17 to 2020/21) **[EB/31]**. It set four objectives for 2020 consistent with s. 21 ("**the 2020 Objectives**") alongside an "ambition" for 2040, two "aims" for 2025 and a "target" for 2025. These ambitions/aims/target are not part of the IA 2015 "objectives" framework. The two aims and the target for 2025 ("**the 2025 Aims**") were:

    a. aim to double cycling from 0.8 billion stages in 2013 to 1.6 billion stages in 2025;

    b. aim to increase walking activity to 300 stages per person per year in 2025; and

    c. increase the percentage of children aged 5 to 10 that usually walk to school from 49% in 2014 to 55% in 2025.

11. After publishing CWIS1, the government commissioned a private consultancy to conduct a modelling project to understand how much additional investment would be needed to achieve the 2025 Aims. This led to the CWIS "*Insights from Investment Modelling*" paper (February 2020) based on data from 2019 **[EB/238]**.[4]

12. In July 2020, the government published its "Gear Change" plan - a non-statutory policy statement setting out a long-term vision for what it described as a "golden age" of cycling and walking. It included a new ambition for half of all journeys in towns and cities to be cycled or walked by 2030 ("**the 50% Target**"). Gear Change was consistent with the CWIS1 (and later CWIS2).

13. On 27 October 2021, the Spending Review 2021 ("**SR21**") confirmed, so far as relevant, that a total of £710m dedicated funding would be made available for active travel in the three years 2022/23 to 2024/2025[5].

[4] A version of this paper was disclosed to TAN on 12 January 2024 with an undated covering note to explain that the key principles and scenarios used in the model have been affected by subsequent events and as such the headline cost ranges produced are no longer valid.

[5] JM/22 and JM/35 and table 1

The Transport Decarbonisation Plan, the Net Zero Strategy and the Carbon Budget Delivery Plan

14. Ss. 13 and 14 of the Climate Change Act 2008 ("**CCA 2008**") impose duties to prepare (and report on) proposals and policies to meet carbon budgets.

15. On 14 July 2021, the Department for Transport ("**DfT**") published the TDP **[EB/69]**. It features a set of strategic priorities, the first of which ("**priority 1**") is to accelerate modal shift towards sustainable travel, which here includes AT. It incorporated the 2025 Aims of CWIS1 **[EB/104]** and repeats the 50% Target. The achievement of all this was predicated on the delivery of £2bn of investment over the following 5 years in cycling and walking.

16. On 19 October 2021, the NZS was presented to Parliament in purported[6] compliance with the ss. 13 and 14 duties **[EB/110]**. Within the NZS, the modal shift to active travel was seen as a critical plank in the effort to reduce emissions from surface transport, which itself was the largest contributor towards the UK's carbon emissions. The NZS relies heavily on and reinforces the TDP. It listed the 50% Target as a key policy **[EB/134]**.

17. The government published its Carbon Budget Delivery Plan (after the WMS) on 30 March 2023 **[EB/195]**.[7] Policy 140 of the CBDP, which concerns active travel and is the only policy supporting TDP Priority 1 (mode share), is shown to deliver quantifiable CO_2 savings over carbon budgets 4, 5 and 6, but those depend on the assumption that the 50% Target in CWIS2 will be met **[EB/218]**.

CWIS2

18. CWIS2 was set and published on 6 July 2022 **[CB/15]**. CWIS2 covers the period 2021/22 to]2024/25. It repeated the 2040 ambition included in CWIS1 as well as the 50% Target. These ambitions are not part of the IA 2015 "objectives" framework.

19. This claim is focused on the specified four statutory objectives (which broadly mirror the 2025 Aims in CWIS1) in accordance with s21(3)(a) as follows **[CB/20]**:

    a. increase the percentage of short journeys in towns and cities that are walked or cycled from 41% in 2018/19 to 46% in 2025;

    b. increase walking activity to 365 stages per person per year in 2025;[8]

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[6] In *Friends of the Earth*, Holgate J found that the NZS did not satisfy these duties. He did not quash the NZS but made a declaration as to its legal inadequacies without holding that the entirety of it was unlawful (see [20]). Consequently, the NZS remains a valid legal document in accordance with ss. 13 and 14. The Judgment led to the CBDP.

[7] A judicial review of the legal adequacy of the CBDP was heard by the High Court between 20-22 February 2024. Judgment had not been handed down at the time of filing.

[8] Thus imposing a tougher target than under the CWIS1 "aim" which was for 300 stages per person per year in 2025.

c. double cycling from 0.8bn stages in 2013 to 1.6bn stages in 2025;[9] and

d. increase the percentage of children aged 5 to 10 who usually walk to school from 49% in 2014 to 55% in 2025.[10]

20. CWIS2 also incorporated the 50% Target **[CB/21]**.

21. The objectives of CWIS2 were set in the context of the resources to be made available which were themselves based on the modelling referred to in paragraph 11 above.

22. As explained in CWIS2 **[CB/24]** there are three main sources of funding for AT:

a. dedicated DfT funding for AT - which was the subject of the Decision and is, thus, the focus of this claim. This money is allocated (principally) to local transport authorities ("**LTAs**[11]") to spend specifically on AT capital and revenue items;

b. wider DfT programmes including:

i. the City Region Sustainable Transport Settlements ("**CRSTS**" – hereafter referred to as "**City Funds**") - provided to mayoral combined authorities ("**MCAs**") to cover a wide range of transport initiatives including but wider than AT in respect of which the MCA have a discretion as to what to prioritise;

ii. National Highways funding – some of which may be used for AT schemes relating to the Strategic Road Network ("**SRN**") including as part of highway improvement schemes;

iii. the Highways Maintenance Block Funding and Integrated Transport Block ("**ITB**") funding - which will include elements for AT, such as resurfacing; and

c. other central government funds which may provide AT investment as part of their wider remit – including the Levelling Up Fund, Future High Streets Fund and Towns Fund.

23. The DF was fixed in the Updated CWIS2 in alignment with SR21 at £1,073m **[CB/26]** including the £710m for the last three years referred to above[12]. In recent years the DF has been allocated through broadly annual Active Travel Funds 1 – 4 (in the region of) £150m - £200m annual awards to LTAs (see e.g. **[EB/401]**). Revenue is allocated to develop local authority capabilities and plans and for maintenance, while capital is allocated for infrastructure such as improved pedestrian and cycle paths and routes and highway crossings. It is the only funding

[9] This repeats the first 2025 Aim of CWIS1.
[10] This repeats the "target" of CWIS1.
[11] Principally county councils and unitary authorities with AT responsibilities.
[12] See also the slightly different figures in JM/39.

dedicated to AT. It is fixed and is not just an estimate for the period of the CWIS. It is the only dedicated funding *"to be made available"* by the SoS for the purpose of achieving the objectives[13]. Such funding is central to the achievement of the objectives in urban, non-MCA areas.

24. As explained in JM/18, in respect of all the other streams, elements of them will be spent on AT measures as part of the wider ambit of that funding stream. As TAN understands it:

    a. an element of City Funds may be used on similar items as the DF;

    b. the focus of the other funding streams is not on AT but AT improvements may be delivered as part of the schemes approved under those funding streams[14].

Projections/estimates

25. Because the allocation of the non-dedicated funds will be made at a local level in accordance with local priorities, will be part of wider DfT schemes or will be decided by other departments, the CWIS includes "projected investment" from those funding streams on AT **[CB/25]**. *"The projected investment has been calculated based on a range of evidence and data sources including funding allocations previously announced, successful funding proposals from local bodies, previous research, historical trends and an assessment of the proportion of investment into active travel projects and programmes from wider government funds"* following the established approach to estimating (or projecting) the financial resources to be made available under those heads.

26. Hence the "wider" non-DF funding **[CB/26]** is, in that limited sense, an "estimate" – it is the SoS's modelled projection based on a wide range of the best evidence available as to what will be spent (mainly) by others from those other funding streams. The term "estimate" is not used in the sense of giving the SoS leeway to adjust those other funding streams or to reduce the contribution made from them to AT – any such action would be inconsistent with the statutory obligation.

27. The "estimate" terminology only applies to the non-DF: see footnotes 8 and 9 **[CB/26-28]** and JM/19 – *"estimates of the proportion of wider funding programmes that is spent on active travel"*.

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[13] Of-course there will be years of overspend or underspend of DF (see e.g. JM/63) with an underspend in 2021/22 being then available in the 2022/23 financial year but that does not impact the overall picture over the 5 year life of the CWIS – indeed it confirms it.

[14] So on a new motorway junction, an element of the total cost may be in relation to the provision of pedestrian or cycle routes under, over or around the new junction; highway maintenance funds may cover maintenance of AT infrastructure or improvements to it; Levelling Up Funds and similar for town centre regeneration projects may include improvements to the pedestrian environment, improved road crossings or enhanced cycle paths.

Process leading up to the Decision and HM Treasury's "Efficiency and Savings Review"

28. The Autumn Statement of 22 November 2022 announced an "*Efficiency and Savings Review*" which would reprioritise "*spending away from lower-value and low-priority programmes*" and "*review the effectiveness of public bodies" in an effort to "manage pressures from higher inflation*" and "*keep spending focused on the government's priorities*" JM/27. This was to be settled by the Spring Statement in March 2023.

29. DfT thus undertook a comprehensive review of all its future spending plans. This included a number of ministerial meetings between December 2022 and March 2023 at which scenarios for reductions across all budget lines were considered. Two relevant "deep dives" were held with the SoS on 6 December 2022: "local transport" **[EB/331]** and "decarbonisation" **[EB/367]**.

30. The disclosed copy of the local transport deep dive slide pack presents three different options **[EB/349]**. Option 1 is redacted but is assumed not to include any cuts impinging on AT DF. Option 2 involved an 18% cut to City Funds, which would have implications for AT in the MCA areas. Option 3 included a 13% reduction to dedicated AT funding, equating to £40m over the period[15]

31. It was noted that option 3 would have the following implications inter alia **[EB/353]**:

    a. on connectivity between rural communities and accessibility of the National Cycle Network to people with disabilities;

    b. ability to achieve the 50% Target, necessitating higher levels of funding in 2025 onwards to make up shortfalls (although the viability of this was not considered);

    c. lost carbon savings (of 0.009 MtCO2e from active travel itself[16], in addition to losses from 0.056 MtCO2e from cuts to the City Funds and 0.088 MtCO2e from cuts to TCF and ITB); and

    d. a shortfall on the £2bn active travel commitment.

32. No air quality analysis was provided in this deep dive.

33. The "decarbonisation" deep dive was primarily targeted at presenting options for savings within the decarbonisation budget. It included Option 3 as above **[EB/390]**. While it featured a slide on "air quality" **[EB/379]**, this considered a budget head not related to dedicated AT funding but rather held across the Department for Environment, Food and Rural Affairs ("**Defra**") and the DfT. Further, the slide considered only NO_x and not other air pollutants like $PM_{2.5}$, which

[15] Comprising a £20m reduction in funding for upgrade work to shared-use pathways on the National Cycle Network and a £20m reduction in funding to 44 LTAs.

[16] These figures are based on a calculation to 2050 and do not align with any carbon budget or with any requirement of the CCA 2008.

are subject to separate targets and deadlines. The slide does not analyse the impact of any AT funding cuts on air quality.

34. There is no specific equality analysis of the 13% cut provided in either slide deck.

35. On 13 February 2023, a different option from the 13% cut was sent in a slide pack to be read by the SoS, namely one of 100% reduction in AT DF **[EB/405]**. The very short unredacted paragraph **[EB/413]** explains the implications: it would mean the government could not meet the 50% Target, would not be in line with previously stated government ambitions on sustainable transport and would compromise the achievement of TDP's priority 1 by reducing modal shift to sustainable modes of transport. The slide deck does not appear to contain any analysis relating to implications for the CWIS2 objectives, carbon impact, air quality impact or equality issues.

36. It is clear that following this process the SoS put forward proposals which did not include any cuts to the DF. Given the extent of the redactions, it is unclear what the extent of the cuts was to other funding streams of which AT might be a part (see para 22 above).

Intervention of HM Treasury, ministerial submission and the Decision

37. The deep dive material does not explain the gestation of the £225m cut embodied in the Decision.

38. In that respect, JM/45 states that:

> **"In preparing this WMS, following the deep dive discussions, it was initially thought that it would not include active travel and would solely outline reductions in other, larger Departmental spending programmes. However, as the WMS was reviewed across Government, in the days immediately before the announcement, it was felt that the funding reductions were insufficient. It was therefore suggested that the active travel reductions were included in the statement, reducing active travel by £200m, leaving £100m for active travel over the next two years. This amounted to a 65% reduction in each of the two years in question."**

39. This explanation is opaque but the (albeit limited) unredacted material shows that, immediately before the Decision and after the draft WMS had been prepared, HMT and No. 10 decided that there should be further DfT cuts over and above those promoted (and agreed) by the SoS. Those additional cuts included the £225m cut to AT DF the subject of this challenge:

   a. the SoS put forward proposals and drafted the Decision on the basis that there would be no cuts to AT DF: see JM/45 above;

   b. as a result, no further work on the implications of cuts in AT was undertaken – whether in respect of the CWIS2 objectives, AQ, carbon emissions/climate change or the PSED;

   c. after the draft WMS had been circulated, HMT and No. 10 sought further reductions - as explained in para 10 and Annex A of the Ministerial Submission of 9th March 2023

(the date of the Decision) **[CB/7-9]**. Annex A sets out those reductions agreed by No. 10, HMT and DfT and separately those "*Additional Options agreed by No10 and HMT*". The AT DF reductions are in the latter section. The text explained that: "*They [HMT and No. 10] have also confirmed additional savings to offset the remaining pressure*". Those additional savings included the reductions in AT DF2. Para 10 of the Ministerial Submission states:

> **"10. Active Travel: HMT asked for Active Travel England's CDEL to be reduced by 65% per annum. This is difficult due to the high VfM of the schemes and lack of support from the Commissioner, in particular given the Government's Net Zero moment at end March. We are working through the implications of this (as other active travel funding may also be reduced) and the final saving figures for SR21 years will be agreed through business planning. There will be a minimum savings amount of [£100m][17] per annum in SR21 years."**

40. There is no evidence or suggestion that in requiring the reductions to AT DF, HMT and No. 10 took into account s. 21 IA 2015. The Decision was driven solely by financial considerations.

41. Apparently by reason of that chronology, the SoS never considered the implications of the Decision before it was made on CWIS2 and its objectives, on AQ, on carbon emissions/climate change and/or on the PSED. Para 10 is explicit that the DfT was "*working through the implications of this (as other active travel funding may also be reduced)*" – in other words those implications had not been worked through at the point of the Decision. The heavy redaction of the disclosed material means it is not possible to know the extent of cuts to other budget heads which could impact on non-dedicated AT funding.

42. Paragraph 14 of the submission refers to the PSED but states that there was inadequate time for a proper assessment of the PSED implications of the "*additional saving options from HMT*": the only assessment that had been carried out to date had been over the options which did not include the AT DF funding cuts - and no equality impact assessment ("**EqIA**") was appended.

43. The SoS approved the submission and made (and announced) the Decision on 9 March 2023 **[CB/3]**. He stated that there was a commitment to spend "*at least a further £100m capital on active travel over the remainder of the spending period*" when what he was in fact announcing was a 65%, £225m cut in AT DF. That fact was not made clear in the WMS and only became clear through the SoS's response to this claim and a report by the National Audit Office **[EB/418]**.

[17] Ms Matthew explains the reference to £50m in the document was a typo and should be £100m, as reflected in Annex A: JM/47.

This claim and disclosure

44. TAN sent a pre-action protocol letter on 5 May 2023 **[CB/128]**. No substantive response was received, but the SoS suggested ADR which TAN engaged in on 5 June 2023. No progress was made at that meeting and consequently the claim was filed on 6 June 2023.

45. Jay J granted permission on all grounds at a renewal hearing on 26 October 2023 **[CB/124]**. The Claimant's application to amend its statement of facts and grounds in light of disclosure and observations of Jay J remains outstanding **[CB/57]**. TAN has concerns about the SoS's compliance with the duty of candour (see annex to this skeleton) but has not made an application in that regard.

S. 21 IA 2015: submissions on the statutory framework and its purposes

Situation prior to s. 21 IA 2015

46. Prior to 2015, funding for AT was "*generally somewhat ad hoc and piecemeal with no clear long-term strategy*" [JM/9]. The SoS had an essentially unfettered discretion in respect of the approach to AT with no requirement to set an overall investment strategy, the objectives to be achieved in any given period or the resources to be made available.

Parliamentary intervention

47. As Lord Bingham put it in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 @ [8], in passing legislation, Parliament always intends "*to make some change, or address some problem, or remove some blemish, or effect some improvement in national life*".

48. Despite matters of funding for government policy priorities and initiatives not normally being the subject of legislative provision, in recognition of the importance of AT infrastructure delivery and of the shortcomings of the existing arrangements, Parliament enacted s. 21. It judged (as demonstrated by the words used in s. 21 not least the phrase "*investment strategy*") that the *ad hoc*, piecemeal, short-term (and thus unstable and uncertain) former approach to investment in AT was not appropriate and a statutory investment strategy was required to overcome those shortcomings creating a longer-term framework for investment and delivery. The subject matter was too important to be left to unfettered ministerial policy discretion or to be subject to the vagaries of short-term pressures and a statutory framework was thus imposed.

The essential features of s. 21 IA 2015

49. S. 21 provides a self-contained statutory framework and is thus *the* statutory vehicle for determining the national objectives in respect of AT and the resources to be made available for delivery of those objectives.

50. As such, it has replaced and superseded the former essentially unfettered discretion of the SoS – deliberately delimiting and defining instead the approach the SoS must adopt. There is thus now no surviving discretion as to the investment strategy for AT outside or inconsistent with the framework of s. 21.

51. The other key features of the s. 21 framework are as follows:

a. the SoS is required[18] to set a Cycling and Walking *Investment Strategy* which is then to be periodically reviewed and replaced or varied – thus requiring a continuous, long-term chain of investment strategies;

b. a key purpose (as demonstrated by s. 21(6)) is to maintain certainty and stability in respect of CWISs. This is a reflection of the underlying rationale as summarised above – thus avoiding problems associated with "stop-go", and enabling the building of capability in delivery organisations (principally LTAs) and larger, longer term more strategic projects to be pursued (see e.g. **[EB/6 para 10]** and **[EB/429 para 20**). *Ad hoc* policy announcements covering materially the same matters but outside its framework will thus be contrary to the basic purpose and premise of s. 21;

c. s. 21(3) contains the core obligations:

    i. it requires ("*must*") the statutory strategy to specify the objectives to be achieved during the period to which it relates ("**the Objectives**"). Those Objectives may include, and here do include, specific and measurable "*results to be achieved*" (s. 21(4)) rather than just activities to be performed or standards to be met. This is a strong formulation – and is explicitly not about setting objectives with just a *view* to achieving them – compare *R (AA) v NHS Commissioning Board* [2023] PTSR 2001; [2023] EWCA Civ 902 @ [87-90] ("***AA***");

    ii. it requires ("*must*") the statutory strategy to specify the "*financial resources to be made available by the [SoS] for the purpose of achieving those objectives*" ("**the Resources**"). This again is a strong formulation – the CWIS must define the resources "*to be made available*" not which might be made available or which will be made available unless the SoS decides otherwise. There is no ambiguity. There is a direct required relationship between the objectives and the resources to be made available for the purpose of achieving them. It is the SoS who is required to make available those resources so that the defined

[18] the combined practical effect of s.21(1) and s.21(9) is to so require.

objectives are achieved. Here, a key part of the resources to "*made available*" were the DF to which this challenge relates;

d. there is a statutory process for varying the CWIS (s. 21(5)) should the SoS wish to change the Objectives or adjust the Resources, and for reports to be made to Parliament (s. 21(8)) as to progress on meeting the Objectives;

e. the Objectives and the Resources are tied to the period of the CWIS – here to 2025. The CWIS thus contains a package of Objectives to be achieved and Resources to be made available in that period to achieve them. It is thus no answer to this complaint that there may be further resources made available later to meet objectives to 2030; and

f. unlike in *AA*, there is nothing else elsewhere in the statutory scheme relevant to the SoS that covers the same or similar subject matter or overlaps with these s. 21 duties.

The nature of the duty under s. 21

52. It is clear that:

a. Parliament has decided to impose specific duties on the SoS in relation to AT Objectives and, crucially, Resources – it has not left these matters to the SoS under his general transport planning *powers* but has gone much further to impose specific measurable duties. That is the basic purpose of s. 21;

b. s. 21 provides a comprehensive statutory code setting out the ambit of those duties;

c. there is no room for the SoS under his general *powers* to act inconsistently with the statutory CWIS which meets the s.21 *duties:* see *Fire Brigades Union* @ 552F. Unless and until CWIS2 is varied in accordance with s. 21, the SoS cannot make Decisions inconsistent with it because that would be to frustrate Parliament's purpose in enacting s. 21 with its safeguards and processes;

d. s. 21 goes much further than simply requiring production of a strategy in the form of a general narrative setting out ambitions with no concomitant obligations[19]. It requires the strategy to define the Objectives "*to be achieved*" including here "*results to be achieved*" in the period of the strategy;

e. a key means to achieve those Objectives is through the allocation of Resources "*for the purpose of achieving those objectives*";

f. the CWIS has to, and does, contain the SoS's statutory strategy on those matters. By analogy with *Great Portland Estates* @ 674E as a matter of statutory interpretation the Council could not have a planning policy which was inconsistent with its development plan, here the SoS

[19] See the approach to an equivalent statutory investment strategy for roads in s.3 in *TAN 1* @ [37; 96, 121; 126]

could not adopt a position inconsistent with the CWIS. See also *R (Alvi) v SSHD* [2012] 1 WLR 2208 @ [41] and [82];

g. s. 21 was enacted in full knowledge of the normal need for flexibility in resource allocation and was enacted so as to constrain that flexibility, to fix the Objectives and Resources for the period of the strategy and thus to ensure that the CWIS was not subject to the vagaries of annual or periodic budgeting decisions other than through the variation process provided in it. If the Resources specified could be changed outside the s. 21 process, then s. 21 would be emasculated and the statutory purpose of it frustrated.

Ground 1: inconsistency with s. 21 and the requirements for the CWIS

Factual starting point

53. The essential factual context is as follows:

a. CWIS2 is for the period 2021 – 2025 - a period fixed in alignment with SR21 **[CB/20]**;

b. the Objectives including the "*results to be achieved*" in it are all to 2025. The SoS accepts that achievement of those Objectives is related to the Resources made available: JM/36. The Objectives and the Resources to be made available are two sides of the same coin;

c. pursuant to s. 21(3)(b), CWIS2 sets out the "*financial resources to be made available by the [SoS] for the purpose of achieving those objectives*" in that timeframe at Table 1. DF is a central element of that.

d. Line 1 of Table 1 is not an estimate or projection – it is a ring-fenced allocation (made in the light of and consistent with SR21: JM/35).

e. The Decision was to reduce dedicated capital AT funds by £200m (and £25m revenue) or 65% in the last two years of the CWIS2 period: JM/45[20].

f. There was no countervailing announcement that either the total AT funding in table 1 would be made up from changes to or increases in the other funding streams[21]. Nor was it suggested that the projections in the other lines of table 1 in CWIS2 were an

[20] The netting off exercise undertaken in JM/63 is inappropriate. The £40m transfer from 2021/2022 occurred independently of the Decision and would have occurred but for the decision. The same applies to the bus sector adjustment. The Decision was to cut £225m from the AT budget for the period 2023/4 – 2024/5.

[21] All the relevant lines for other funding streams at EB88-89 (and the preceding text) have been redacted but it is plain that other budget heads were also under significant downward pressure through the process described by JM including the City Funds.

underestimate[22] of what in fact had been, or would be, spent on AT under those streams in the period to 2025 such as to make up the shortfall.

g. The Decision was thus a net reduction of £225m of the total available for AT over the remaining 2 years to meet the same objectives (and in a period of significant inflationary pressure).

h. There is no suggestion (nor could there be) that the Objectives could be met with fewer Resources (including in the light of considerable cost inflation since adoption of CWIS2), or even that the Government was on track to meet those Objectives under the CWIS2 table 1 funding.

Submissions

54. The point can be shortly stated. S. 21(3)(b) required the financial resources to be made available by the SoS in the relevant period for the purposes of achieving the AT objectives to be specified in CWIS2. They were so specified in table 1 – and are thus "*to be made available*".

55. The Decision is that £225m of those funds "*to be made available*" under CWIS2 table 1 pursuant to s. 21(3)(b) are not now to be made available.

56. There is thus a clear inconsistency between: (i) the Decision; and (ii) s. 21(3)(b) and CWIS2 table 1 and in particular the first row thereof. The SoS has, outside the s. 21 framework, decided not to make available those sums which he has specified are to be made available under his statutory duties.

57. S. 21(3)(b) is not merely setting an ambition as to the funds which may be made available which sums the SoS retains a discretion to adjust as and when thought appropriate. The replacement of the general unfettered discretion of the SoS in that regard was a key part of the statutory purposes in enacting s. 21 in the first place. CWIS2 is the statutory investment strategy under s. 21 unless and until varied. By analogy with ***FBU***, where Parliament has set out statutory duties on the SoS covering a particular situation (here specifying the funding to be made available) the requisite act can only thereafter be done under the statutory duty so imposed. Any pre-existing discretion covering the same subject matter is excluded.

58. It is no answer to claim that this is a polycentric, resource allocation decision in respect of which the Courts will exercise a high degree of restraint. Parliament has provided a statutory process for the SoS to vary his resource allocation decisions if she or he so wishes. Under the statutory scheme and basic principle there is no scope to do so outside of that comprehensive

[22] "*may well turn out to be an underestimate*": JM/65 is the highest it can be put but that is forward looking and was not part of the decision making here. What JM does not say is that the projections may well turn out to be overestimates. Nor is there any suggestion - even now - that there has been any underspend elsewhere to allow reallocation into AT.

framework. It is not suggested that any subsequent Finance or Supply and Appropriations Act disapplied s. 21 as it could have done or that Government expenditure decisions somehow trump s. 21 and the existing CWIS.

59. If the SoS had formed the view that a reduction in AT funding might be required to meet the department's revised spending envelope that was reduced in the light of broader economic considerations, then it was necessary for him to:

    a. consult such persons as she or he considers appropriate (s. 21(5)) on the intended variations to the CWIS;

    b. have regard to the desirability of maintaining certainty and stability in respect of CWISs (s. 21 (6)) when formulating those variations;

    c. revisit the objectives to be achieved in the light of the changed financial resources to be made available to achieve them (s. 21(3)(a)) – the objectives and resources being two sides of the same coin and one cannot be varied without considering the implications for the other; and

    d. specify the new financial resources "*to be made available*" in a varied CWIS - thus ensuring the objectives and the resources align.

60. None of this was done - apparently for the short reason that the Decision was the result of a last-minute intervention/direction from HMT and No. 10. JM is clear that other constraints (such as contractual obligations) were respected in the overall process - the flaw here is that the constraint created by s. 21 and CWIS2 was not.

61. This Ground is not about imposing arid procedural technicalities on the SoS. Parliament has set out a comprehensive statutory framework to ensure that the underlying purpose of s. 21 is met via the CWIS. If the SoS considers that changes in funding may be appropriate, the structure imposes a necessary discipline to properly consider the implications of doing so including on stability and certainty (with all the consequential knock-on effects) and on the extent to which the objectives will have to be adjusted consistent with the available resources.

62. *The significance of the point:* The statutory purpose, the key features of s.21 and the nature of the s.21 duties are addressed above. Parliament has created a comprehensive and self-contained statutory framework replacing the former discretion requiring an investment strategy which specifies the objectives to be achieved and the resources to be made available for the purpose of achieving those objectives. It has done so to replace the former *ad hoc*, piecemeal approach where there was no clear long-term strategy so as to provide the stable framework for delivery of the step change in AT aimed for. The Decision runs directly contrary to the basic purpose

and premise of s. 21. It presupposes the continued existence of a generalised funding discretion which Parliament has deliberately and carefully removed.

63. *“Estimate”?:* The “estimate” point raised by the SoS is a red-herring. First, it is only rows 2 and 3 of table 1 that contain projections rather than dedicated/ring fenced allocations. Row 1 is dedicated funding in a fixed sum. Second, those projections in those rows are based on modelling using the best evidence available – they are *bona fide* estimates of what proportion of those other funding pots will be spent on AT and thus supporting achievement of the objectives; they are not “estimates” in the sense of being subject to later decisions of the SoS to reduce the size of those funding streams or reduce the proportion of them spent on AT. Third, consistently with s. 21(3)(b) would prevent the SoS cutting those other funding streams or taking positive action to adjust the proportion of them spent on AT, if the effect was to reduce the *bona fide* projections of the “*resources to be made available*” for AT below those in table 1[23] necessary to achieve the objectives.

64. *Making up for the Decision later*. It is suggested that there may be flexibility elsewhere later to make up for the £225m reduction. This is unevidenced assertion and implausible:

a. at the time of the Decision there was no evidence or suggestion that the shortfall would be made up in the relevant time frame to 2025 never mind in time to contribute to the achievement of the objectives to 2025;

b. the commitment to “*review these levels as soon as practically possible*” in the Decision **[CB/4]** has to be understood in the context of the pressure from HMT which led to the Decision in the first place. It is telling that JM/64 - 66 give no comfort in this regard and instead she confirms the lack of any such opportunity to date;

c. any increases after 2025 will not meet the statutory duty – CWIS2, its objectives including results to be achieved, and funding to be made available are all tied to the period 2021 – 2025. The accepted need for catch up funding later to meet later objectives (including the 50% by 2030 target) confirm rather than resolve the illegality;

d. movement of sums *between* years in the period to 2025 does not serve to offset the overall reduction from the sum in CWIS2 table 1;

e. irrespective as to all those points the reassurance the SoS gets from this claimed ability to make up for the reduction later is misplaced. The SoS has (heavily) redacted all the material covering the other funding streams. However, it is understood from the material available that there were substantial cuts to relevant wider funding streams.

[23] It has not been possible or necessary to establish whether that is the case here – the illegality in respect of the DF is sufficient – if there are further (hidden) potential illegalities that cannot save the Decision.

HMT then required further cuts beyond those the SoS was prepared to contemplate. In those circumstances, only looking at the potential for increases in AT funding, rather than the potential for further downward pressure on the AT funding including from other funding streams is illogical. If the other funding streams are being reduced, unless the proportion of them spent on AT is increased (for which there is no evidence and not even any assertion), the total available for AT will be further reduced.

Ground 2: Inconsistency between funding now available and the Objectives[24]

65. S. 21(3) requires an internally consistent package of objectives and resources – the resources to be made available are for the purpose of achieving the objectives.

66. By reason of the matters set out above, on the SoS's own logic properly understood, the Decision creates a clear inconsistency[25] between the Objectives in CWIS2 and the means to achieve them. The DF for AT in CWIS2 was fixed following detailed modelling work to understand what level of investment would achieve the objectives. There is no evidence that that was later reviewed or shown to be wrong or that lesser resources could achieve the Objectives. If anything costs pressures would have gone the other way **[CB/53 para 43]**.

Ground 3: failure to take account of necessarily material considerations

CWIS 2

67. Even if Ground 1 and 2 fail, the totality of the material shows that the SoS did not take into account the implications of the Decision for the achievement of the CWIS2 Objectives – a necessarily material consideration.

PSED

68. The principles underlying the PSED are well-known and uncontroversial: see *R (Bridges) v Chief Constable of South Wales* [2020] 1 WLR 5037 at [175], drawing on the well-known decision in *R (Bracking) v SSWP* [2014] Eq LR 60. Although the Defendant is at pains to highlight the high-level nature of the Decision, there is no dispute that the PSED applied to it. That is right and is consistent with the case law[26].

69. The issue, rather, is what the PSED actually required in this context. The Government Equalities Office's guidance for public authorities makes clear there are *"no exceptions from the general*

[24] It is accepted that this Ground is probably simply a different way of putting Ground 1.
[25] TAN does not have to show the scale of the inconsistency or whether it was "stark and inevitable" (SFG/47)
[26] See e.g. *R (Luton BC) v Secretary of State for Education* [2011] Eq LR 481 in which the court found the Education Secretary had failed to discharge the relevant statutory equality duties in his decision to cut funding for capital grants for the Building Schools for the Future programme which was announced via a statement in Parliament. In *R (Rotherham MBC) v SSBIS* [2014] BLGR 389, the PSED was applied in a challenge to decisions in relation to the regional allocation of EU Structural Funds. Further, *Bracking* itself concerned a challenge to the decision to close the Independent Living Fund.

duty in relation to high-level strategic decisions", and that even if it is practically challenging to carry out an assessment at this stage, *"you should take a pragmatic approach and acknowledge the known impacts, even if you are unable to provide more detailed consideration"*. Thus the PSED required the SoS to acknowledge and factor into his decision the "*known impacts*" of the Decision which would therefore require a high-level assessment of the Decision. This was the last opportunity to assess and consider those impacts – because the Decision sets the parameters for future investment at a local level. Reliance on the later local investment decisions having to do PSED is thus misplaced.

70. This is in a context in which active travel has clear equality implications as is acknowledged in CWIS2 itself and in the wider research **[EB/227]**. The equality analysis undertaken for CWIS2 identified a host of potential impacts from CWIS2 on a wide range of protected characteristics **[EB/287]**. For example, it says *"[m]uch of the funding outlined in CWIS2 is weighted towards areas with higher levels of deprivation and poor health, and therefore disproportionately benefits some ethnic minority groups*" **[EB/288]**.

71. The SoS says that he satisfied the duty by reference to the following:

    a. para 14 of the ministerial submission dated 9 March 2023 and its reference to saving options across "road" being considered **[CB/7]**;

    b. the references in the local transport deep dive to the impact on disabled road users **[EB/353]**; and

    c. the fact that an EqIA had been carried out in respect of CWIS2 which envisaged that further EqIA will take place at the local level of considering AT schemes **[EB/270]**.

72. None of these is an answer to the claim.

    a. Civil servants expressly advised in the 9 March ministerial submission they had not had time to consider the equality implications of the actual cuts – as "*additional saving options*" – to AT funding that had been requested by HMT. In any event, it is notable that the submission in the DGD that "*road*" incorporated "*active travel*" is not repeated in Ms Matthew's witness statement. An expansive reading of the word "*road*" in its context is obviously wrong and inconsistent with the standard government approach of dealing with AT separate from "roads". In any event, even if there had been any relevant assessments available at civil service-level, these were not presented to the minister, and the duty is a non-delegable one: <u>*Bridges*</u> at [175(3)]. The duty is personal to the decision maker "*who must consciously direct his or her mind to the obligations; the exercise is a matter of substance which must be undertaken with rigour, so that there is a proper and conscious focus on the statutory criteria and proper appreciation*

of the potential impact of the decision on equality objectives and the desirability of promoting them": R (BMA) v SSHSC [2020] EWHC 64 (Admin).

b. The 6 December 2022 briefing materials concerned only a proposal to cut funding by 13%: they do not contain any analysis of the equality implications of a 65% cut. In *R (Hough) v SSHD* [2022] EWHC 1635 (Admin) at [107]-[109], Lieven J rejected a suggestion that an equality impact assessment which assessed the use of a site for 2 months would be adequate in respect of a decision to use that site instead for 5 years. The underlying principle is that the duty must be carried out in respect of the actual decision undertaken, not some inchoate or lesser version of it. A cut of 65% is obviously very different from that of 13%. The SoS did not consider what qualitative and/or quantitative implications would be of a difference between a 13% and 65% cut in funding (e.g. a cut of 65% might have entailed cuts to a different set of projects which would have benefited specific groups of people).

c. Further, it is misleading to suggest as **[DGD§63]** does that the briefing materials had regard to "*potential impacts on those with protected characteristics*" when there was only brief consideration of the impact on those with disabilities and when, as the DfT acknowledges in its own equality analysis underpinning CWIS2, a much broader range of protected characteristics may be affected.

d. As set out above, no EqIA at a local level could assess the whole-nation impacts of active travel, whose equality implications necessarily exist at a macro level as well as at an individual level. It is telling that **[DGD§69]** says only that local level assessments would be a "more detailed EqIA" (which is not correct in respect of the nationwide impacts) and ignores the fact that it will, at that stage, be impossible to consider the impacts in respect of the Decision. The existence of an EqIA underpinning CWIS2 indicates it is possible to undertake the exercise at this level, and the potential changes to that assessment needed to be assessed given the PSED is a continuing duty: *Bridges* at [176].

e. In light of the chronology and clear position that SoS was not going to make any active travel cuts, there was of course no need until HMT's intervention to assess the equality implications. However, once that decision was taken, no time had been left for any PSED assessment to be carried out.

Air quality

The legal framework

73. The Environment Act 2021 ("**EA 2021**") imposes various duties on the SoS:

a. to set a "long term target" (s. 1) which must include at least one matter within the "air quality" priority area (s. 1(2) – (3));

b. to set a target in respect of the annual mean level of $PM_{2.5}$ in ambient air to be achieved by a particular date (s. 2(1));

c. to prepare an "environmental improvement plan" (s. 8) for significantly improving the natural environment in the period to which the plan relates (and associated duties in ss.9-13) including setting interim, objectively measurable targets (s. 11(6)). The SoS must be satisfied that the plan would make an appropriate contribution towards meeting the s.1 – 3 targets (s. 11(8)).

d. to monitor and keep under review the progress towards meeting the targets under s. 1 – 3 and the interim targets under s. 11: s. 16.

74. These are not target duties. The SoS has a duty ensure that the ss. 1 and 2 targets "are met" (s. 5) – which means that the "*specified standard is achieved by the specified date*" (s. 4(7)). The targets are thus a duty of result not a duty of process. The legislation sets out a comprehensive scheme for the setting of, reporting on and review and monitoring of achievement of the targets (see e.g. s. 4(2); s. 4(3)(b), s. 6(1) – (4); s. 7).

The setting of the targets

75. Prior to the EA 2021, reg 17 of the Air Quality Standards Regulations 2010 (made in pursuance of the EU Air Quality Directive 2008/50/EC) and continued in force under the EU (Withdrawal) Act 2018 imposed an obligation to ensure that concentrations of $PM_{2.5}$ do not exceed an annual average of 20 µg/m from 1 January 2020.

76. The first s. 8 environmental improvement plan set the air quality targets by reference to existing legally binding targets.

77. On 30 January 2023, the SoS for Environment, Food and Rural Affairs ("**SSEFRA**") made the Environmental Targets (Fine Particulate Matter) (England) Regulations 2023 ("**the 2023 Regulations**") which set targets for 31st December 2040:

a. the annual mean concentration target for $PM_{2.5}$ in ambient air must be equal to or less than 10 $\mu g/m^3$: reg 4 (giving effect to s. 2); and

b. that by 2040 there is at least a 35% reduction in population exposure from average exposure in the period 2016 - 2018: reg 7 (giving effect to s. 1).

78. On 31 January 2023, the Environmental Improvement Plan 2023 ("**2023 EIP**") was published under s. 8 setting interim air quality targets for the end of January 2028:

a. an annual average of 12 µg/m3 for $PM_{2.5}$; and

b. population exposure to $PM_{2.5}$ is at least 22% less than in 2018.

79. The consequence of the 2023 Regulations and the EIP 2023 was thus to set significantly more testing and new air quality targets than had prevailed under the 2010 Regulations.

The targets are necessarily material considerations

80. The air quality targets in the 2023 Regulations and the 2023 EIP are necessarily material considerations in the exercise of any public function which would or could have more than a de minimis impact on the meeting of the targets. That obligation derives either by necessary implication from the statutory framework under the EA 2021 or from their obvious materiality.

81. This is consistent with the only reported decision to have covered Part 1 of the EA 2021, namely *WildFish* (in the second claim brought by the Marine Conservation Society and others) which concerned the Storm Overflows Discharge Reduction Plan ("**SORP**") and the species abundance target set under s. 3 EA 2021, which is in materially similar terms to s. 2 and which is also subject to s. 5. The SORP is similar to the Decision in this case, concerning a nation-wide approach to investment, in that case sewerage infrastructure. While Holgate J held that there was no obligation to adopt targets in the SORP which aligned with the species abundance target ([220]), that is a separate question from whether those targets needed to be considered in making the SORP. The SoS did not argue that the s.3 target was not a necessarily material consideration and it is implicit in Holgate J's judgment at [223] that he considered it to be so.

Application to the Decision

82. CWIS2 recognises that securing the modal shift towards walking, wheeling and cycling will play a "*significant part in meeting the government's air quality targets, including our proposed targets on reducing population exposure to [$PM_{2.5}$], the air pollutant with the greatest harm to human health*". The impact of CWIS2 on the specific $PM_{2.5}$ target was expressly relied on in support of it. Conversely, it is obvious that a reduction in funding would have a significant effect the other way. Yet it was not taken into account.

83. Contrary to **[DGD §58]**, TAN has never conceded that impacts on air quality were "taken into account": cf TAN's reply para 18.

84. The facts are clear:

a. The SoS received information on air quality at a generic and high level on 6 December 2022 (and only dealing with NOx and not $PM_{2.5}$).

b. The actual analysis of those slides does not present any data on the implications for air quality targets of making the cuts. A reference to air quality is not the same thing as considering the impact on air quality targets of the proposed decision.

c. Those slides concerned proposed cuts to funding in active travel as then being considered. It was not in respect of the actual Decision. The potential air quality impact of a 13% cut is obviously different from a 65% cut: nowhere does it appear that the impacts of cuts of that magnitude on the air quality targets has been considered. Indeed, JM/52 says only that there was "*express consideration of the potential air quality impacts of some options, and Ministers were advised that some air quality funding such as the measures funded through the Joint Air Quality Unit (JAQU) funding to implement local air quality schemes supports active travel*" (emphasis added). JM notably does not say that the air quality impacts of even option 3 were considered.

d. The slides did not in any event consider the more stringent air quality targets established under the 2023 Regulations and the 2023 EIP (albeit it is acknowledged the targets were at that point proposed in draft form).

85. The SoS appears to imply that the air quality targets did not need to be taken into account because "*CWIS2 does not quantify the contribution of AT to existing or new air quality targets*" **[DGD§58]** For the reasons set out above, that does not mean that they did not need to be considered if the decision would have a more than de minimis impact on meeting the target. The SoS has not presented any evidence to suggest they would only have a de minimis impact on air quality: indeed, he could not, because the impact on achievement of the standards has not been assessed.

<u>Failure to take into account the risk that a policy on which the NZS and CBDP relies could not be delivered</u>

86. The legal framework under the CCA 2008 was explained by Holgate J in *<u>Friends of the Earth</u>* at [28]-[59]. In short, in order to meet the s. 1 duty to reduce net emissions by at least 100% compared to 1990 by 2050, carbon budgets are required to be set and, by virtue of s. 13 and s. 14, the Secretary of State for Energy Security and Net Zero[27] ("**SSESNZ**") has a duty to set out proposals and policies to ensure that the s.1 duty and the carbon budgets are met.

87. Pursuant to those duties, the SSESNZ adopted the NZS (and then the CBDP) both of which relied on the 50% Target.

[27] It was held in *<u>R (Global Feedback Limited) v SSEFRA</u>* [2023] EWCA Civ 1549 @ [71-79] that the s. 13 duty was imposed on SSESNZ only and not other SoSs. *Global Feedback* has sought permission to appeal to the Supreme Court. In the event of permission being granted and its appeal being successful, TAN will argue that the s. 13 duty was binding on the SoS and needed to be satisfied in making the Decision.

88. The Decision will, by definition, have potential implications on the deliverability of that Target, the fulfilment of the SSESNZ's policies and thus the ability to meet the carbon budgets[28].

89. Given that the 50% Target had been relied on in setting carbon budgets and s. 13 policies, in making the Decision, the risk to achievement of the Target and the SSESNZ's policies was necessarily material. Part 1 of the CCA 2008 would be emasculated if other SoSs could act in a way which risked impacting the ability of the SSESNZ to meet his statutory duties.

90. Put another way, the risk to delivery was necessarily material and the risk was required to be investigated pursuant to the SoS's *Tameside* duty. There was no such investigation of the implications of the Decision on the achievement of net zero.

91. The SoS does not suggest that the potential implications of the Decision on the NZS/CBDP were not material.

92. The risk of the Decision to delivery of the SSESNZ's policies and duties was not considered. The SoS seeks to rely on the decarbonisation deep dive which does not address the 65% cut at all and the March 2023 ministerial submission's reference to the implications for the "net zero moment at end March". That says nothing about the potential deliver risks to the carbon budgets and the s.13 policies.

93. There is a clear contrast with the decision to set the Second Road Investment Strategy ("**RIS2**") challenged in ***TAN 1***. There, a numerical assessment of the proposed schemes had been undertaken (see [97]-[100]) and the ministerial briefing had referred to it when advising that the RIS was "*consistent with a major carbon saving required to deliver net zero*" ([106]). That was held to be a legally adequate précis in the circumstances ([133]). Here there is no numerical analysis and no reference to the implications for delivery of the NZS/CBDP policies.

Conclusion and relief

94. TAN therefore seeks a declaration that the decision on 9 March 2023 to cut the DF for AT was unlawful for the reasons set out above. It is proposed that the terms of the relief should be the subject of further consideration and submission, including the terms of the declaration and/or mandatory order. For the avoidance of doubt, TAN does not seek a quashing order: the SoS would of course be expected to comply with a declaration.

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8 April 2024

[28] The SoS has not undertaken the exercise and it is not for TAN to do it for him but: (1) the figures referred to in the slides were to 2050 and not for any carbon budget period; and (2) related only to 13% cuts. A mathematical extrapolation from 13% to 65% cuts would equate to 0.045mtCO2e or the equivalent of the annual anticipated saving from AT.

Annex – duty of candour

1. The SoS filed his DGD and evidence on 30 November 2023. TAN immediately raised concerns about the scope of that disclosure and the redactions that had been made which were inconsistent with the decision of Swift J in *R (IAB) v SSHD* [2023] EWHC 2930 (Admin) **[CB/145]**.[29] More crucially to this claim, it was clear to TAN on reading JM's witness statement and her exhibits that the Decision was ultimately one taken at the behest of HMT and No 10 but no correspondence with any other government department about the Decision was disclosed.

2. This exchange ultimately resulted in the SoS disclosing some of the documents filed with his detailed grounds with fewer redactions, although correspondence with HMT was not provided **[CB/150]**. TAN continued to raise significant concerns about the absence of further disclosure and about the remaining redactions in the documents disclosed which are not consistent with the recent and consistent case law on this topic **[CB/155, 157, 162]**.[30] It was noted that no witness statement, accompanied by a statement of truth, has been produced to explain the redactions.

3. TAN continues to have these concerns and remains unclear how correspondence – or, at the very least, explanations of the conversations with – HMT does not fall to be disclosed pursuant to the duty of candour in light of the chronology set out above. The explanation provided by Ms Matthew does not appear to satisfy the duty of candour. In particular, JM/45 is notably vague as to the crucial factors which actually fed into the Decision. Language such as "*it was initially thought that*", "*it was felt that*", "*it was therefore suggested*" appears to obscure central facts which would allow the Decision to be understood in its proper context.

4. However, notwithstanding these concerns, TAN has not pursued an application for specific disclosure in order to maintain a proportionate approach to these proceedings and will do the best it can with the evidence available. The Court may, of course, consider of its own accord that further disclosure is required.

[29] And which was later upheld on appeal: [2024] EWCA Civ 66.

[30] See, in addition to *IAB*, *R (FMA) v SSHD* [2024] 1 WLR 723 *per* Swift J; *R (Sneddon) v SSJ* [2023] EWHC 3303 (Admin) at [48]-[50] *per* Fordham J; *XY v SSHD* [2024] EWHC 81 (Admin) at [131]-[141] *per* Lane J; *R (L1T FM Holdings UK Limited) v Secretary of State in the Cabinet Office* [2024] EWHC 386 (Admin) *per* Swift J; *R (MTA) v SSHD* [2024] EWHC 553 (Admin) *per* Swift J.