

BETWEEN:

**THE KING**

**(On the application of TRANSPORT ACTION NETWORK LIMITED)**

Proposed Claimant

**v.**

**SECRETARY OF STATE FOR TRANSPORT**

Proposed Defendant

**REPLY TO SUMMARY GROUNDS OF DEFENCE**

*References to the bundle are in the form [CB/x] and [SCB/x] where "CB" stands for Claim Bundle and "SCB" stands for Supplementary Claim Bundle. References to the Statement of Facts and Grounds are given as "[SFG/para]" and to the Summary Grounds of Defence as "[SGD/para]".*

Ground 1: Dedicated Funding

The Scale of the Cuts

1. The Summary Grounds of Defence ("SGD") confirm what has previously been opaque – as TAN understood, there has been a substantial cut in dedicated funding for active travel ("AT") from that included in CWIS2. As confirmed by the National Audit Office ("NAO"), the cut for the two years in question is £233m [SCB/internal pagination 17 para 1.10]. This is equivalent to a cut in capital funding of three-quarters for 2023-25 compared to 2020-23, as illustrated in dark purple in Figure 4 of page 19 of the NAO report [SCB/internal pagination 13].

Dedicated Funding – an Estimate?

2. The first line of Table 1 in CWIS2 is a reference to the "Dedicated DfT Funding for active travel" described 2 pages earlier (emphasis added). The £710m from the SR21 [SGD/5] for the years 2022/3 to 2024/5 is included in this line and was fixed in advance of CWIS2.
3. The term "estimate" is used in CWIS2 because for all lines of Table 1 other than the first line, AT is just one element to addressed by the streams of funding represented by them. There cannot, in advance, be certainty as to the precise sums from those streams which will be dedicated to AT: see e.g. table 1 footnote 8 ("estimates") and footnote 9 ("estimates"). That issue does not arise for the first line – precisely because it is a fixed sum dedicated to AT only. The NAO has recognised this basic point - see SCB internal pagination p7 para 9.
4. It is because the second and third lines are estimates that, under the heading "Total government funding for active travel", table 1 only provides an "estimate of total financial resources across government". It is worded like that only because of the uncertainty in respect of lines 2 and 3 of table 1. There is no such uncertainty with line 1.

5. The text which follows is consistent with that being the reason for the use of the term “estimate”:

*“Many of the decisions on the allocation of these funds will be made by the relevant local body in line with local priorities....”*. That cannot apply to dedicated AT funds where there will be no such discretion. The dedicated AT funds are explicitly for achieving the CWIS national objectives (s.21(3)(b)) and are not subject to “local priorities”.

*The projected investment has been calculated using a range of evidence and data sources. This includes 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.”* The “funding allocations” include the dedicated £710m from SR21; “historical trends and assessment” by definition only concerned the other two lines.

6. The SGDs’ response to Ground 1 at [44-46] thus rests on a basic misunderstanding of CWIS2. There is no attempt to address SFG/18 [CB/25].
7. TAN has deliberately focused its challenge on the dedicated DfT AT funding for two main reasons. First, because it recognises that many of the other funding streams are not made available by the DfT so are dependent on the decisions of others. Second, those other funding streams are not explicitly tied via s.21 (3)(b) to the achievement of the CWIS objectives. Whilst there is no doubt that there have been major cuts under the other lines - it is difficult to identify with precision where cuts have occurred such as to conclusively demonstrate the inconsistency with CWIS2. There is no such difficulty with the first line.
8. The fact that other expenditure in CWIS1 exceeded the CWIS1 estimate is explicable because of: (1) the pandemic; (2) new discretionary allocations outside CWIS1 in e.g. Gear Change; and (3) the estimates of discretionary expenditure in the equivalent of lines 2 and 3 being underestimates.

#### Ground 2: No Evidence

9. SGD/48 claims that there is no evidence on which to conclude that the available funding is inconsistent with CWIS2 and its objectives. That assertion is wrong.
10. The DfT commissioned a report into the adequacy of CWIS2 funding to meet the objectives (“the Report”) and knows that it shows that even the CWIS2 original funding (before the cuts) was inadequate to meet the objectives. Whilst the DfT has not published the Report in full, it has never claimed that the original funds were more than required to meet the objectives: SFG/20 [CB26].
11. Furthermore, the National Audit Office’s (“NAO”) report of its inquiry on Active Travel shows that, using the DfT’s modelling updated by the DfT for the NAO, and even using higher assumed expenditure than in CWIS2, funding was inadequate to meet two of the CWIS2 objectives by a considerable margin: [SCB/17].
12. The SGD inexplicably do not refer to the Report at [48]. The duty of candour requires a proper answer to the obvious question – given that the funding was set to achieve objectives and given that there has never been any claim that the funding was excessive to meet those objectives and given the DfT has the Report (and the NAO work) which demonstrates the inadequacy of that

funding, how can substantial cuts be consistent with the objectives? That question is unanswered in the SGD.

13. Further, the SGD themselves recognise the effect the cuts will have on achievement of the objectives – see e.g. [53] - reductions outside the AT dedicated funding would “also impact on our ability to meet the 2030 target”. Further there is no response to SFG/41 – and the implications of construction cost inflation.
14. Far from Ground 2 being based on unevidenced assertion, it is clear from the DfT’s own work (including for the NAO) that the cuts are inconsistent with the achievement of the statutory objectives of CWIS2.

### Ground 3: Necessarily Material Considerations not taken into account

15. Decarbonisation: An objective of CWIS2 is that 50% of short trips in towns and cities be by AT by 2030 (and 46% by 2025). As its own documents show the government is nowhere near on track to achieve that. That target fed through into the NZS and the TDP and now the Carbon Budget Delivery Plan (March 2023) as part of the statutory obligation to get to net zero.
16. SGD/24 shows that the SoS considered only the implications for carbon savings of just a 13% cut in funding, and not the higher overall cut that in fact occurred and the much larger cut in the two years under question. Further, there is no suggestion in the SGD that the SoS considered the implications of the scale of the cuts for the CWIS2 assumed contribution to TDP and NZS.
17. The SoS would have been aware at the time of the Decision as to the (at that time very soon to be published) Carbon Budget Delivery Plan and the assumption in it of the 50% target being achieved. Yet he failed to take into account the basic fact that the cuts were, on his own evidence, inconsistent with the achievement of the target about to be adopted.
18. Air Quality: It is not disputed that the SoS considered AQ at a generic and high level. However, after that consideration in December 2022, a new and more testing target for 2028 was fixed in January 2023. There is no evidence that the implications for achievement of that target was taken into account in making the decision under challenge even though a key element of CWIS2 was the contribution AT could make to AQ targets.
19. PSED: it is clear from the SGD that there was no consideration of the PSED in respect of the AT cuts. The only paragraph in which PSED is referred to is SGD/32 but that is not directed at AT but at decisions on strategic roads and rail related to separate budgets and investment strategies. Consistent with the duty of candour if there had been consideration of the PSED the SoS would be able to point to such an assessment in a document. The failure to do so is telling.

### Lack of disclosure

20. There are several key documents that the Defendant took into account in making the decision under challenge, that are referred to in the SGD, but which the Defendant has not disclosed. By way of example only, it has failed to disclose: the Ministerial Information Note (SGD para 15); the briefing slides shown to the SoS (SGD/20 and 24); and the 13 February 2023 submission provided to the SoS (SGD/26).

21. As a matter of law, a claimant in a judicial review cannot be prejudiced at the permission stage due to an absence of documents, and the existence of such further material, which may be critical to the arguability of the claim, is capable of being a good reason in and of itself to grant permission: R (Blue Sky Sports & Leisure Ltd v Coventry City Council [2013] EWHC 3366 (Admin) at [25]. The Court must be supplied with all the information necessary, including through pre-action disclosure, in order to determine any permission stage on an accurate footing: R (HM & others) v Secretary of State for the Home Department [2022] EWHC 2729 (Admin) at [15-16,39].
22. This case law was set out in the Claimant's pre-action protocol letter [CB/261, para 43]. It was not disputed by the Defendant in its response [CB/265-266]. Yet the SGD provide no satisfactory reason why these documents have not been disclosed. Notwithstanding the above, this absence of disclosure is a further sufficient reason for the Court to grant permission and require the Defendant to provide all of the decision-making documents when it comes to its detailed grounds of defence.

### **Conclusion**

23. Permission is sought to rely on this Reply. Permission to apply for judicial review should be granted. This is the first claim under s.21 and raises substantial issues as to its effect and implications.

**David Forsdick KC**

**Charles Bishop**

**Landmark**

**12 July 2023**