

FAO: Secretary of State

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

Direct Dial: [REDACTED]

Email: [REDACTED]

Your Ref:

Our Ref: RWS/MAT/323388/3

Date: 5 May 2023

By email only to: transportsecretary@dft.gov.uk;
transportinfrastructure@dft.gov.uk

Copied to: thetreasurysolicitor@governmentlegal.gov.uk

LETTER BEFORE CLAIM
THIS LETTER REQUIRES YOUR URGENT ATTENTION

Dear Secretary of State,

Re: Variation to the Cycling and Walking Investment Strategy

Introduction

1. We are instructed by Transport Action Network Limited (“TAN”) (“our Client”) in relation to this matter. TAN supports people and local groups to press for more sustainable transport and motor traffic reduction in England and Wales. This includes helping local authorities to accelerate modal shift to sustainable travel so that people can use cars less.
2. This is a pre-action protocol letter in respect of a proposed claim for judicial review of the decision of the Secretary of State for Transport (“the SST”) communicated in his statement to Parliament of 9 March 2023 (“the Statement”) to reduce substantially funding for active travel (“AT”) contrary to and inconsistent with: (i) his own statutory Cycling and Walking Investment Strategy (“CWIS”) made under s.21 of the Infrastructure Act 2015, as originally published on 6 July 2022 and as updated on 10 March 2023 (“the CWIS2 Update”); and (ii) with the Transport Decarbonisation Plan (“TDP”). The SST failed to follow the statutory process for varying the CWIS2 and purported to act outside the statutory framework of s.21. Further, in so doing he failed to take into account a number of necessarily material considerations.
3. 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.
4. 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.
5. This letter sets out the factual (to the extent currently known to the Claimant) and legal basis on which any claim would be pursued. 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.

6. Given the contents of this letter, we have sent a copy directly to the Government Legal Department.

The Parties

7. The details of the claim are as follows:
 - a. **The Claimant:** Transport Action Network Limited.
 - b. **The Defendant:** Secretary of State for Transport.
 - c. **The Claimant's legal advisers:** Leigh Day, Panagram, 27 Goswell Road, London, EC1M 7AJ.
 - d. **The decision under challenge:** the decision of the Secretary of State for Transport communicated in his statement to Parliament of 9 March 2023 to reduce funding for active travel (the "Decision").

The Statutory Scheme

8. S.21 introduced a framework for setting a national Cycling and Walking Investment Strategy ("CWIS"). It provides a comprehensive and self-contained statutory framework for determining the objectives to be achieved during a specified period and the financial resources to be made available for the purpose of achieving those objectives. It is thus the statutory vehicle for determining the national objectives in respect of cycling and walking, also known as active travel, "AT", which also includes wheeling, such as by wheelchair users) and the resources to be made available. It has a built-in framework for varying the CWIS over time.
9. The essential features of the s.21 framework are as follows:
 - a. the practical effect of s.21(1) and (9) is that the SST is under an obligation to adopt a CWIS. He did so in publishing the second CWIS in 2022 ("CWIS2");
 - b. the CWIS will thereafter be in existence into the future (as varied over time in accordance with the process in s.21);
 - c. whilst the period covered by any particular version of the CWIS is not fixed, the Parliamentary intent is to have certainty and stability (s.21(6)) in the CWIS – ad hoc policy announcements covering materially the same matters but outside its framework are contrary to the basic premise of the CWIS;
 - d. 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". Those objectives may include (and in CWIS2 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 simply setting objectives with just *a view* to achieving them – compare R (AA) v NHS Commissioning Board [2023] EWHC 43(Admin) (“AA”) at [87-90];

- 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”. This is a strong formulation - the CWIS defines the resources “to be made available” to meet the objectives over the period covered by it. There is no ambiguity. There is a direct inter-relationship between the objectives and the resources to be made available for the purpose of achieving them.
- e. there is a statutorily defined process for review: s.21(5) and (6).
- f. Unlike in AA [94], there is nothing elsewhere in any statutory scheme for the SST that covers the same subject matter or overlaps with these duties (except the Climate Change Act 2008 (“CCA 2008”) and thus the Net Zero Strategy (“NZS”)¹ and TDP – which as we show below pick up and rely on the outputs of the CWIS).
- g. Under s.21(8), the SoS is required to report to Parliament on “progress towards meeting [the CWIS] objectives”.

10. It is thus clear that:

- a. Parliament has decided to impose specific duties on the SoS in relation to AT objectives and funding – 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;
- b. S.21 is a comprehensive statutory code setting out the ambit of those duties – it sets out what must be done and the process to be followed and at least some of the factors to be taken into account;
- c. there is thus no room for the SoS under his general powers to act inconsistently with the statutory CWIS which meets the s.21 duties: see Fire Brigade Union [1995] 2 AC 513 at [552];
- d. S.21 is not simply about a duty to produce a strategy that is simply a general narrative without any true accountability, but rather requires there to be a strategy that embodies the objectives (and funding) to be achieved. This is made clear by the duty to report to Parliament on the progress towards meeting the objectives. It is, unlike provision made in other areas, a duty intended to produce legal consequences. S.21(3) is not about simply setting out general policy ambitions but is the investment strategy to achieve the objectives: see R (Transport Action Network) v SST [2021] EWHC 2095 (Admin)

¹ Republished on 30 March 2023 as the Net Zero Growth Plan and the Carbon Delivery Plan.

at [37,96,121,126]. Thus, the purpose of s.21 is to require the SoS to set out his objectives and how he is going to meet them;

- e. the CWIS thus sets a framework for objectives and funding with the clear intent that those objectives as set are then achieved including through the allocation of resources “for the purpose of achieving those objectives”;
- f. in any event, the CWIS necessarily embodies the SoS’s statutory strategy on those matters. It is *the* statutory document which is required to contain his investment strategy, including overarching objectives. In Great Portland Estates v WCC [1985] AC 661 at [674E], as a matter of statutory interpretation the Council could not have a policy outside its statutory development plan which was inconsistent with the development plan. See also: R (Alvi) v SSHD [2012] 1 WLR 2208 at [41,82]. The same principle applies here.

11. This statutory framework was enacted in the full knowledge of the need for flexibility in resource allocation through annual budgets and was enacted so as to ensure that the objectives for AT were not readily susceptible to ad hoc, annual variations dependent on wider budgetary issues but were to be only adjusted in accordance with s.21. Were the intention to be that objectives for AT were to be susceptible to ad hoc variation, then s.21 would serve no real purpose.

NZS and TDP

12. S.21 was introduced after s.1 CCA 2008. It is explicit from the NZS and the TDP that the CWIS is a key element of the strategic priority to accelerate modal shift to sustainable travel. It provides the framework of objectives and resources to deliver one key strand of the imperative to decarbonise transport– namely cycling and walking – which in turn provides an important strand of the NZS. It is telling that the NZS and the TDP have themes that will be readily recognisable from the CWIS (indeed in some cases appear to be directly cut and paste from it): see CWIS2 -“The Strategy”: “Commitments on walking and cycling also formed a significant part of the [TDP and NZS] which both recognised the crucial role of walking and cycling in delivering a net zero transport system and meeting our climate ambitions”.

Environment Act 2021 and Environmental Improvement Plan

13. S.1 and 2 of the Environment Act 2021 (“EA”) require the Secretary of State for Environment, Food and Rural Affairs to set environmental targets for air quality, while s.8 requires an Environmental Improvement Plan (“EIP”) to be prepared. CWIS2 states that AT “will play a significant part in meeting the government’s air quality targets, including our proposed targets on reducing population exposure to particulate matter 2.5 (PM2.5), the air pollutant with the greatest harm to human health”. In January 2023, 2040 targets were set via the Environmental Targets (Fine Particulate Matter) (England) Regulations 2023 and, separately, interim targets for 2028 via the EIP, which replaced the 25-year environment plan referred to in CWIS2.

Equality Act 2010

14. CWIS2 states that “[e]quality and inclusion are golden threads that run through” it and cycle infrastructure design guidance (LTN 1/20). It viewed delivery of a world class AT network by 2040, which meets that design guidance, as vital to fulfil duties under the Equality Act 2010 (“EqA”). Furthermore, it states the importance of a “long-term investment approach to deliver high-quality infrastructure”. This demonstrates a strong link between EqA 2010 duties, most notably the public sector equality duty under s.149, and the duty in s.21(6) to have regard to the “desirability of maintaining certainty and stability in respect of” CWISs.

The Essential Facts

15. CWIS2 was issued in July 2022 for 2021 – 2025 reflecting changes and increased ambition since the adoption of CWIS1 in 2017 (see foreword) including £2bn of new funding over the current Parliament. “The strategy includes new and updated objectives including doubling cycling, increasing levels of walking across the community and walking to school whilst also setting out the funding in order to achieve these”. Organisations were consulted, albeit at very short notice, on CWIS2 under s.21(5).
16. Having set out the Government’s ambition, CWIS2 then sets out four measurable and specific objectives of results to be achieved (s.21(4)(b)) in the period to 2025. It then sets out the approach to the required investment before setting out the financial resources to be made available under s.21(3)(a). Active travel funding comes from many “pots” but it is appropriate here to consider just the dedicated DFT Active Travel revenue and capital funds (“the Dedicated Funds”) as that is the relevant pot to which the Decision proposed to be challenged applies.
17. Table 1 of CWIS2 provided an estimate of the total financial resources across government that may be invested in active travel over the 4-year period. The projection was calculated based on a range of evidence and data sources. However, Dedicated Funds by definition did not need to be projected – they were a specific funding allocation and an identifiable item in the DFT budget.
18. In CWIS2, the Dedicated Funds were originally put at £1,298m but this included an element of double counting (“the Mistake”) and the figure was corrected on 10 March 2023 to £1,073m.
19. Those Dedicated Funds are necessary to achieve the objectives. The DFT has commissioned and received (but not published) a report which assesses what financial resources were required to achieve the objectives. It has never been claimed that the resources identified by it in CWIS2 are more than are required to meet the objectives.
20. The Dedicated Funds were spent in tranches through awards to local authorities. In February 2023, the DFT announced a new tranche of £200m which was the fourth such tranche (AT4) and was for the year 2023/4. Bids were invited for projects which would further the CWIS2 objectives.

21. On 9 March 2023, the Decision was communicated in a statement to Parliament – “We remain committed to supporting all forms of transport and have invested over £850m in active travel between 2020-21 and 2022/23. Despite the need to deliver efficiency in all areas of our budget, we will still commit to spend at least a further £100m capital into active travel over the remainder of the spending period [to 2025]... We will review these levels as soon as practically possible. These are the difficult but responsible decisions we are taking... They continue our record investment into our national infrastructure...”
22. On 10 March 2023, the CWIS2 was reissued simply updating the figure to rectify the Mistake. No other amendments were made either to the objectives or the resources to reflect the Decision. There has been no wider variation of CWIS2 in accordance with s.21(5) and (6).
23. CWIS2 continues to assert that the Dedicated Funding is £1.073m as part of the “financial resources to support these objectives”. It continues to assert that the Government has committed “an unprecedented £2billion” of funding for AT over 5 years; that the objectives remain the same, refers to the £200m for active travel schemes and notes that “we need to step up a gear” and a “renewed sense of urgency to act”.
24. In fact the Decision amounts to a substantial cut in AT funding from that in the CWIS. The objectives have not been reviewed or revised and remain the same but the necessary funding is not now to be available. The Decision is inconsistent with CWIS2.

The Reduction in Funding

25. Whilst the Decision does not expressly so state, it embodied a reduction in funding for AT from that in CWIS2. Attempts have been made to establish the true extent of the reduction through questions in Parliament but the answers do not provide the level of clarity required. The Government contends that it is still committed to achieving the objectives.
26. Doing the best TAN can on the information publicly available and just by reference to the Dedicated Funds (and not to reductions in other funding streams):

Overall Figures

- a. £307m of Dedicated Funds were spent in 2020-21 – before the period of CWIS2 - and thus the total from 2020 – 2025 would be £1.38bn (£1.073m plus £307m);
- b. £850m has been spent to date and just another £100m is now allocated for the remainder of the period to 2025 making £950m since 2020
- c. Resulting in a reduction in Dedicated Funds of £430m in the period from 2021 – 2025;

AT4:

- d. An alternative way of demonstrating at least a substantial reduction is through the scope of AT4 – it was originally £200m for 2023/4 with a further tranche to follow in 2024/25 to make up the £1.073m but is now just £100m for 2023 – 2025 a cut of £300m.

27. If the fact of a substantial cut in the Dedicated Funds, or the accuracy of the above figures is disputed, the SST is invited in accordance with the duty of candour to explain in the response to this pre-action letter what the correct figures are.
28. The statutory route to adjusting AT objectives or funding is via the CWIS variation mechanism – there has been no such variation.
29. Given that the CWIS2 Dedicated Funds were the minimum necessary to achieve the objectives, it necessarily follows that the objectives can no longer be achieved, yet they have not been reviewed nor have the implications of being unable to meet the objectives been assessed either in terms of the CWIS or in terms of the TDP/NZS.
30. The Decision is thus inconsistent with the statutory strategy, and both is outwith and frustrates the statutory purpose of s.21.

Grounds for Judicial Review

Ground 1: Decision unlawfully inconsistent with the CWIS

31. S.21 is a comprehensive scheme for setting out the investment strategy for AT. CWIS2 is the SST's comprehensive statutorily required strategy on AT. In short, Parliament has enacted s.21 to require that the investment strategy for AT matters including the funding "to be made available" be addressed through the CWIS. It is not permissible for the SoS to bypass that statutory *duty* through ad hoc policy announcements outside the s.21 framework and pursuant to some unstated general power.
32. If the SST wishes to vary strategy, he must do so through the statutory route in s.21 and not by some extra-statutory policy outside and inconsistent with s.21. Unless and until CWIS2 is varied under s.21 the SoS cannot have policy or a separate strategy or inconsistent with it because that would be to frustrate Parliament's purpose in enacting s.21 with its safeguards and processes. In particular, he cannot set out financial resources for AT inconsistent with the CWIS for the same reason.
33. In considering any variation, the SoS would have to consider the objectives and the financial resources to be made available for the purpose of achieving those objectives. The objectives and the resources are two sides of the same coin. The SST cannot adjust one without considering the implications for the other.
34. The Decision to reduce the "financial resources to be made available" outside of the s.21 framework is thus unlawful; it frustrates the Parliamentary purpose behind s.21.
35. It is no answer to claim that this is a polycentric, resource allocation decision of government. Parliament has told the SST as to how to vary his resource allocation if he so wishes. There is no scope to do so outside of that comprehensive framework. If the general financial position

requires reductions that may justify a review and require the objectives to be reduced according to the means available, it would still not justify bypassing s.21.

36. If it be contended that the Decision constitutes a variation of CWIS: (1) that is factually impossible because CWIS2 was updated the next day without the changes embodied in the Decision; (2) there is no variation of the objectives to meet the new financial constraints; and (3) any such review will have been undertaken in breach of s.21(5) and (6) – no relevant parties were consulted as in the past and as required by s.21(5) the SoS cannot rationally contend that there is no need to consult anyone and there is no evidence that the SoS has considered the s.21(6) objective.

Ground 2: Decision inconsistent with Strategy

37. S.21 requires the resources to be made available to be such as to secure the achievement of the objectives. The SST presumably judged that the former sums in CWIS2 were sufficient (and not excessive) to meet that requirement. The objectives have not been reviewed. There is now a stark and inevitable inconsistency between the objectives and the resources to be made available to for the purpose of achieving them. That is directly contrary to the Parliamentary intent in enacting s.21(3) and (8).

Ground 3: Failure to take into account necessarily material considerations

38. In making the Decision the SST:

- a. failed to take into account CWIS2 and the incompatibility of the reductions in funding with it and with its objectives; and
- b. failed to take into account the consequences for the ability to meet the CWIS objectives and thus the impacts on the TDP and on the NZS, or indeed the EIP.

39. On the SST's own reasoning in CWIS2, these were necessarily material considerations, because they go to the heart of the Parliamentary purpose behind s.21 and to the SST's strategy. The situation here is the converse of that in the first *TAN* case (see above) – here it is the SST who is saying CWIS2 is central to achieving the aims of and/or targets in the TDP, NZS and EIP, and to meet its obligations under the EqA 2010; yet the effect of the reduction in funding is that the CWIS2 objectives cannot be delivered in full, which in turn means that the TDP, NZS and EIP are now (as a result of the Decision) all proceeding on a false premise. This has clearly not been grappled with by the SST.

Remedies

40. TAN therefore considers that it is entitled to a declaration that: (i) the Decision is inconsistent with CWIS2; (ii) changes in the resources to be made available can only be made through the s.21 variation process; and (iii) in so far as the Decision has the effect of reducing the dedicated funds for AT from those in CWIS2, it is of no effect unless and until CWIS is varied.

ADR proposals

41. TAN seeks to engage constructively with the Secretary of State and welcomes any opportunity to resolve these concerns without recourse to the courts. Our client would welcome any proposals to engage on the substantive issues raised in this letter, so as to resolve or narrow the dispute. In particular, representatives of TAN would be willing to meet with DFT representatives to discuss the position. However, we consider that any ADR would only be worthwhile if: (i) the Secretary of State is genuinely willing to put the Decision on a lawful footing; and (ii) it does not put any limitation date at risk.

Information and documents sought

42. When you respond, please provide:
- a. any decision documents relevant to this proposed challenge. In particular, we seek a copy of any ministerial submissions and any Equality Impact Assessment that the Secretary of State took into account when making the Decision;
 - b. any evidence that the Secretary of State took into account any modelling of the impact of the Decision on NZS, TDP and/or EIP; and
 - c. a copy of the underlying research and report commissioned by the DFT from the Transport for Quality of Life in 2018, as referred to in footnote 38 of the DFT's 'Cycling and Walking Investment Strategy: safety review' (November 2018)².
43. If the Secretary of State fails to disclose a document now, which it later relies on in defence of this claim, then we reserve the right to bring this to the Court's attention when it comes to the matter of costs. Moreover, 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].

Aarhus Costs

44. The proposed claim is an environmental claim that plainly falls within the scope of the Aarhus Convention. The case law is clear that "environment" should be given as broad a definition as possible. Please confirm in your response that you will not contest that: (i) the Aarhus Convention applies; (ii) any claim will benefit from the costs capping in CPR r. 45.43; and (iii) the Claimant's costs liability will be varied at a cap of £5,000 inclusive of VAT owing to both the subjective and objective limbs of the prohibitive expense test.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758519/cycling-walking-investment-strategy-safety-review.pdf

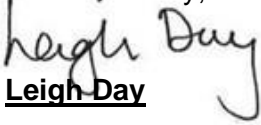
Address for service

45. Please can you confirm that: (i) you will accept electronic service; and, if so (ii) provide a single email address to enable us to effect valid service.

Proposed date for reply

46. We require a reply within 14 days of the date of this letter i.e. **by 4pm on 19 May 2023**. Please send your response to [REDACTED] ([REDACTED]). If you refuse to take the above steps, or 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.

Yours faithfully,


Leigh Day