IN THE COURT OF APPEAL **C1/2021/**

IN THE MATTER OF A PROPOSED APPEAL FROM:

THE HIGH COURT OF JUSTICE (PLANNING COURT)

(Case No. CO/2003/2020)

BETWEEN:-

TRANSPORT ACTION NETWORK LIMITED

Appellant

- and -

THE SECRETARY OF STATE FOR TRANSPORT

- and -

HIGHWAYS ENGLAND COMPANY LIMITED

Respondents

PERMISSION TO APPEAL SKELETON

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1. The Parties are referred to as they were below. This is the Claimant's Permission to Appeal Skeleton, accompanying an appellant's notice that seeks permission to appeal against the Order made for the reasons given in the judgment of Holgate J, handed down on 26 July 2021 ("**the Judgment**").[1]

2. The claim concerns the decision by the Defendant Secretary of State for Transport to set the "Second Roads Investment Strategy" ("**RIS2**") on 11 March 2020 ("**the Decision**"). Justified by assumptions of strong traffic growth, RIS2 sets out the Government's desired outputs and outcomes for the operation, maintenance and enhancement of the Strategic Roads Network ("**SRN**") and financial resources to achieve these. RIS2 involved the Secretary of State in re-committing for that purpose

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[1] Case no. CO/2003/2020; **R (Transport Action Network Ltd) v Secretary of State for Transport** [2021] EWHC 2095 (Admin).

to the 45 schemes mentioned in (but not yet constructed during the currency of) the predecessor RIS ("**RIS1**") and thus freshly committing to some 50 major road schemes.

3. The Claimant's case is that the Defendant failed in the discharge of his duty under s.3(5)(a) IA 2015 to have regard to the effect on the environment of what he was approving in RIS2. More specifically, in making the Decision, the Defendant failed to take account (as part of the section 3(5) process) of the impact of RIS2 on climate change, and/or failed to take account of its impact on three specific climate change objectives that were obviously material to the necessary consideration of the impacts of RIS2 of the environment (together, "**the Climate Objectives**") consideration of which by him was therefore legally required:

    a. The objectives of the Paris Agreement on climate change; in particular, the fact that the Paris Agreement sets temperature-based goals (which require a focus on carbon emissions <u>over time</u> and which require action to reduce emissions urgently, not just by 2050 itself), and of its principles of equity between developed and developing countries;

    b. The carbon budgets set by the Government pursuant to section 4 Climate Change Act 2008 ("**CCA 2008**") and, in particular, the fifth carbon budget ("**5CB**") covering the period 2028-2032; and/or

    c. The target set by section 1 CCA 2008 for the net UK carbon account to be zero by 2050 ("**the Net Zero Target**").

4. The Court was presented with a stark contrast between, on the one hand, the minimal evidence of any consideration of even climate change or the Climate Objectives (let alone the effect of RIS2 on them) by the Defendant himself; and, on the other hand, more detailed analysis ("**the GHG Analysis**") undertaken by his officials and those of the Interested Party Highways England ("**HE**"). But, crucially here, that GHG Analysis was <u>not</u> part of the Defendant's deliberations and so – the Claimant submitted – could not have assisted in his discharge of <u>his</u> section 3(5) duty.

5. The Court expressed some surprise at the brevity of the applicable briefing material that was actually before (and thus considered by) the Defendant (as opposed to

officials but not by him). The single relevant sentence disclosed by the Defendant is set out at #105-106 of the Judgment and is aptly described as a 'laconic' briefing at #133. Nonetheless, the Court dismissed the claim, holding that the Climate Objectives were not obviously material to the Decision and/or that the Defendant took them adequately into account.

6. Permission to appeal should be granted because the Claimant has a real prospect of successfully showing that the Court erred in one or more of the following ways; and because, in any event, the appeal raises points of significant wider public importance - given the scale of the £27 billion roads programme contained in RIS2, the urgent imperative of reducing greenhouse gas emissions to mitigate the climate chance emergency, and the fact that it is the first case to consider the operation of s.3 IA 2015 - such that there is a compelling reason that permission should be granted.

Ground 1: the Court misdirected itself as to, and/or unlawfully failed to apply, the meaning and requirements of s.3(5) IA 2015 in assessing whether the Defendant had discharged his statutory duty

7. The Claimant's challenge is that the Defendant failed to discharge his duty under s.3(5)(a) IA 2015, which is in the following terms (underlining added):

> *In setting or varying a Road Investment Strategy, the Secretary of State must have regard, in particular, to the effect of the Strategy on—*
>
> *(a) the environment*

8. The underlined words are key. The Claimant has submitted throughout that the Defendant was required by them to have regard to the effect of RIS2 itself on climate change rather than the impact of other existing or aspirational transport policies.

9. The Judgment records this submission (#9) and apparently accepts it. Indeed, it could hardly be disputed: that is what the words of the statute say. However, the Court fell into error by failing to apply the wording of the statute. It wrongly held that the much

broader consideration of climate change (but not the of the effect of RIS2 on climate change and the likelihood of the UK being able to comply with its obligations to mitigate it) undertaken by the Defendant amounted to lawful discharge of the s.3(5) duty. That was so even though that consideration was essentially by reference to other documents and strategies (see #82-92) that said nothing about the effect of RIS2 itself (which is what s3(5)(a) requires).

10. The Claimant's first Ground of Appeal is that the Court erred in its construction or approach to s.3(5) IA 2015. This error infected the Judgment throughout. Various ways in which this error of law manifested itself are presented as sub-grounds of Ground 1 below.

Ground 1(a): Court wrongly held that the Defendant was not required to consider the overall effect of RIS2 on climate change targets

11. The Court characterised RIS2 as being 'high level' (#37 'the high level nature of a RIS as a strategy for public investment'; #57 'RIS 2 is a policy statement without direct substantive effects'; #121 'essentially a high level strategy document providing for investment in the SRN'; #136 'a national policy at a high strategic level for the purpose of public investment'). In treating RIS2 in this way, the Court overlooked the fact that, whatever the minimum requirements for a RIS pursuant to IA 2015 (which might allow for a purely 'high level' document), this particular RIS chose to set up very specific statutory obligations on HE for delivering particular schemes.

12. The Court fell into error in dismissing the Claimant's submissions on this point at #126. The fact that the RIS could be varied did not obviate the need to assess its predicted effects at the point it was set. Indeed, s.3(5) IA 2015 imposes the same duty to consider effects on the environment when varying a RIS as when setting one. The emphasis on the possibility of varying the RIS also ignores the practical reality set out in RIS2 itself (p.93 'Given the degree of analysis and design work already completed for RIS2 schemes, however, we would expect these circumstances [the need for schemes to be substantially reconsidered] to be minimal').

13. The Court's emphasis at #125 on other mechanisms to address climate change concerns shows the degree to which it strayed from construing the specific statutory requirement in s.3(5) IA 2015 concerning climate change: none of those mechanisms will revisit the decision to proceed with the RIS or any scheme included within it, a decision which parliament says needs to consider its environmental effects of a RIS as a whole. There is no other time for the cumulative effects to be considered.

Ground 1(b): the Court placed reliance on the Defendant's wider knowledge of climate change that told him nothing about the impact of RIS2 itself

14. The Court erred in law in its approach to the evidence, including in attributing knowledge of climate change matters to the Defendant and holding that such knowledge was relevant to the s.3(5) duty:

    a. #82 – while there is no dispute that the Defendant had knowledge in principle of the Net Zero Target and the Fourth and Fifth Carbon Budgets via the CGS, that knowledge would not have told him of the impact of RIS2 on meeting those budgets (which is what s.3(5)(a) required). The Court was also wrong as a matter of fact to state that the Fourth and Fifth Carbon Budgets were set as a means to achieving Net Zero, when they were set prior to the adoption of the Net Zero Target, and so on the pathway to achieving only the previous statutory target of an 80% cut by 2050.

    b. #83 – while it is accepted that the Defendant was aware of RIS1 as published, there is no basis for the Court's assumption at #131 that the Secretary of State (who had not been in post at the time RIS1 was made) would have been familiar with the numerical (let alone any other) analysis carried out (when he was not Secretary of State) for RIS1. In any event the numerical analysis in RIS1 had become out of date as a result of the net zero target changing the emissions trajectory, including for 2040;

c. #83 – there is no evidential basis at all for the inference that development work on TDP involved the Defendant. Indeed, two weeks after the Defendant set RIS2, Setting the Challenge stated it was the "start of the conversation" to develop those policies. On the contrary, the only evidence before the Court pointed to the Defendant only being briefed late in the process of policy development and in 'laconic' fashion (#133). In any event, it certainly cannot be inferred that any briefings on TDP told the Defendant what he needed to know about the climate impact of RIS2, which is a separate and specific set of proposals for road schemes to enable continued traffic growth;

d. Generally, the other transport documents and strategies referred to at #82-92 pre-dated the adoption of the Net Zero Target, and for that further reason could not tell the Defendant anything about the impact of RIS2 on achieving Net Zero. The exception was Setting the Challenge, in which the Defendant acknowledged the need to "use our cars less" to meet the Net Zero Target – and which therefore proceeded on a different basis to RIS2, which assumed continued strong traffic growth.

15. Overall, the judge's approach to the evidence as to the Secretary of State's knowledge was fundamentally flawed. The point in issue goes to the heart of the way the court generally should approach evidence, particularly when it comes to ascertaining the knowledge of a statutory decision-maker. The whole framework of assessing whether a decision-maker takes into account the required relevant matters is undermined if the court makes assumptions without evidence, as happened here.

Ground 1(c): Flawed approach to the adequacy of the briefing

16. The Court was wrong in principle to conclude (at #133) that the briefing to the Defendant amounted to 'a legally adequate precis of the analysis for the purposes of taking the decision to set RIS 2', and/or failed to give legally sufficient reasons for why that was the case.

17. In so doing, the Court simply failed to address the Claimant's argument (Skeleton ¶56, developed orally) that the briefing says nothing meaningful about <u>the impact of RIS2 on achieving Net Zero</u>, because <u>any</u> impact could theoretically be offset and therefore "be consistent with" achieving Net Zero (in which case the scale, cost and feasibility of the extra offsetting effort constitute the impact on achieving Net Zero). To say that a particular GHG emission source is "consistent with" achieving Net Zero says absolutely nothing. The Court did not deal with that submission and gave no reasons for rejecting it.

18. That mattered because, once it is recognised (as it then must be) that the Secretary of State was given no briefing on (and therefore could not have taken into account) the impact of RIS2 on the meeting the Net Zero target (as he needed to be for s.3(5)(a) purposes) then it is clear that he failed to discharge the duty placed upon him.

<u>Ground 1(d): Flawed approach to the carbon budgets</u>

19. The Court's analysis of the part of the claim that relates to carbon budgets (#137-142) is wholly unclear. The Claimant submitted that the impact of RIS2 on achieving the Fourth and Fifth Carbon Budgets was an obviously material consideration for the Defendant as part of his s.3(5) duty given that they confer imminent, hard-edged legal obligations on the UK Government to reduce emissions by a specified amount. The Claimant further submitted that the Defendant had failed to take these matters into account, since it was not mentioned at all in the briefing that was before him.

20. Under this heading, the Court dealt with some of the Claimant's criticisms of the GHG Analysis (#138-139) which (as above) was produced by officials but not ever actually considered by the Defendant. It dismissed the Claimant's reference to the 'policy gap' to meeting the Fifth Carbon Budget (#138), which is based on the Defendant's own published analysis, by reference to the proposal to bring forward the ban on sales of new petrol/diesel vehicles to 2030 but without dealing with (let alone giving any reasons for rejecting) the Claimant's objection that this will have a minimal impact on emissions from the SRN in the period 2028-2032, particularly as the ban was never

proposed to extend to hybrid vehicles (which still produce significant emissions, especially on the longer-distance journeys typically undertaken on the SRN) until 2035. It then criticised the Claimant's case on cumulative emissions (#140-141), which was part of its Paris Agreement ground, separate from the specific obligation in relation to carbon budgets.

21. It then concluded (at #142) that 'for these reasons' the Defendant was not 'legally obliged to take into account a numerical assessment of how the predicted carbon emissions from RIS 2 related to CB4 and CB5'. But that conclusion is simply not logically connected to or supported by the reasons that the Court had given in the preceding paragraphs, or, therefore, by any reasoning. The Court simply failed to address the pressing nature of the carbon budgets in deciding whether they were material.

22. Finally, the Court stated that the 'the difficulties faced by the UK in meeting CB4 and CB5 generally' were known to the SST from policy material. That may have been so, but it says nothing about the impact of RIS2 on those budgets, which is what mattered for the s.3(5) duty. This is a further example of the Court proceeding on an erroneous reading of the s.3(5) duty, as explained under Ground 1.

23. Accordingly, the Court erred in law in its treatment of this aspect of the Claimant's claim.

Ground 2: Flawed approach to authorities dealing with the materiality of the Paris Agreement

24. The Court erred in its analysis of the Supreme Court's decision in **Heathrow**, and its effect on the Court of Appeal's finding about the obvious materiality of the Paris Agreement to the designation of the ANPS.

25. At #112, the Court was wrong to find that the Supreme Court had overturned that finding. Rather, #129 of the Supreme Court judgment is dealing with the class of case discussed in #121 of its decision, namely where a decision-maker takes account of a

matter and rationally decides to give it little or no weight (which the Supreme Court found was the case with the ANPS, at #125, such that the proper question was whether he 'acted irrationally in omitting to take the Paris Agreement <u>further into account</u>, or give it <u>greater weight</u>, than in fact he did' (underlining added)). #129 of the Supreme Court's judgment cannot be read as rejecting the position (*per* the Court of Appeal) that where the decision-maker does not consider Paris <u>at all</u>, that is a flaw because Paris is obviously material. Such a reading is simply incompatible with #134 of the Supreme Court's judgment, which refers back to the other situation, described in #120 (something with which the court here did not deal).

26. Accordingly, at #115 the Court was wrong to state that 'the Supreme Court concluded that the temperature target in the Paris Agreement was not an obviously material consideration', and it perpetuated that error by inferring the same finding in relation to Article 4.1 of the Paris Agreement.

27. At #141, the Court was wrong to hold that the Claimant's case was 'contrary to the reasoning of the Court of Appeal in *Packham* at [98-9].' The Court of Appeal's reasoning in the relevant section of Packham was explicitly specific to the (i) the findings of the Oakervee review and (ii) its context, specifically the lack of any statutory duty to carry to the review.

28. The Court's errors in interpreting relevant authorities materially affected its conclusion (at #117) about the materiality of the Paris Agreement.

<u>**Ground 3: Flawed approach to the DFT Analysis and the *de minimis* conclusion**</u>

29. At #143, the Court noted the Parties' agreement that obvious materiality of carbon emissions from RIS2 was 'a matter for the Court to determine'. That had two consequences: on the one hand, material not before the decision-maker could be taken into account; on the other, the Court was not confined to reviewing that material solely for irrationality – it had to make up its own mind whether the emissions were, in fact, *de minimis*. The Court erred in law by giving effect to the first but not the second of

these consequences. That is, it took into account the GHG Analysis, (including that post-dating the decision to set RIS2), but reviewed it only for irrationality / incontrovertible error (underlining added):

a. #132 (regarding impact of rolled-forward RIS1 schemes): ‘I can see no legal basis upon which the approach adopted in the HE/DfT analysis could be criticised as irrational’ (see also #148)

b. #138 (regarding a comparison with total Fifth Carbon Budget emissions): ‘I do not see how the department could be criticised as acting irrationally in making this comparison, because CB5 was the latest carbon budget in existence when RIS 2 was adopted’;

c. #147 (summarising the overall challenge to the correctness of the GHG Analysis): ‘I accept the defendant’s submission that the claimant’s experts have not identified an “incontrovertible error” in the evidence of Mr. Andrews’;

d. #150 (regarding construction emissions): ‘There is no public law argument which would allow the court to prefer any of the opinions of the claimant’s experts’;

e. #152 (Regarding induced traffic): ‘This is simply another difference of opinion between experts which, in proceedings for judicial review, the court is not in a position to resolve’ – that cannot the case where the question of obvious materiality is a matter for the Court to resolve.

30. Accordingly, the Court erred in its approach to assessing obvious materiality. Moreover, since it was the Defendant that advanced the submission that RIS2 emissions were *de minimis*, if the Court felt that it was hard to resolve technical issues, then it should have been driven to the conclusion that the Defendant had failed to make out that submission, which was for the Defendant to prove. It was wrong in principle to assume the Defendant’s witnesses applied the correct public law approach.

Ground 4: Flawed approach to "alternative"

31. The Court at #160 advanced an alternative argument that the Defendant had not put forward (in this form), namely that the emissions were so insignificant that, even if they were obviously material to setting RIS2, it would have made no difference to the decision – for the purposes of the 'adequate summary' argument. However, this argument suffers from the same internal inconsistency as the Defendant's s.31 SCA argument (which the court rightly rejected from the outset): the emissions cannot have been both so insignificant as to be legally irrelevant and simultaneously 'obviously material'. The Court was right to criticise that argument (at #15), but wrong to advance its own reformulation of it (at #160).

Overall

32. The grounds of appeal as explained above are plainly arguable with a reasonable prospect of success and, in any event, raise points of wider public importance, such that permission to appeal should be granted.

David Wolfe QC

Peter Lockley

16 August 2021