

HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

THE KING

(On the application of TRANSPORT ACTION NETWORK LIMITED)

Proposed Claimant

v.

SECRETARY OF STATE FOR TRANSPORT

Proposed Defendant

STATEMENT OF FACTS AND GROUNDS

Bundle refs are expressed as CB/x/y, where CB stands for Claim Bundle, x is the page number and y is the paragraph number (where relevant)

Introduction

1. This is an application by Transport Action Network Limited ("TAN") for permission to apply for judicial review of the decision of the Secretary of State for Transport ("the SST") communicated in his statement to Parliament of 9th March 2023 ("the Decision")¹ 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 ("the IA 2015") as originally published on 6th July 2022 ("CWIS2")² and updated on 10th March 2023 ("the CWIS2 Update")³; and (ii) the Transport Decarbonisation Plan ("TDP")⁴ and the Net Zero Strategy ("NZS")⁵. 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.
2. TAN complied with the pre-action protocol in its letter of 5th May 2023 ("the PAPL")⁶, but no substantive response has been received despite the SST being given ample time to do so and being asked twice to do so. Rather than respond properly to the PAPL, the SST suggested ADR which TAN engaged with on 5th June 2023 but substantive progress to reverse or correct the Decision was not made. TAN will continue to engage as appropriate. However, TAN is entitled to a response to its PAPL in accordance with the duty of candour. Absent a substantive answer to the PAPL, TAN considers that this claim is factually and legally well-founded, and – given that the ADR has not (yet) resulted in a positive outcome - wishes to pursue the claim. TAN will (consistent with its duty to the Court) update this Statement of Facts and Grounds if a

¹ CB/203-204

² CB/145-157

³ CB/205-220

⁴ CB/158-198

⁵ CB/92-144

⁶ CB/253-262

response to the PAPL or these Grounds demonstrates that any of it is factually (or legally) wrong and will, in parallel with this claim, continue to engage in ADR.

3. TAN's standing has not been disputed. The Court is respectfully referred to the PAPL para 1⁷ and the Witness Statement of Chris Todd⁸.

The Statutory Scheme

4. S.21 IA 2015 introduced a framework for setting a Cycling and Walking Investment Strategy ("CWIS") across England. 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 ("CW"⁹) and the resources to be made available. It has a built- in framework for varying the CWIS over time.
5. 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, then periodically set a new CWIS or vary an existing one. He did so, including in publishing the second CWIS in 2022 ("CWIS2") and the CWIS2 Update;
 - b. once adopted, a CWIS will thereafter be in existence into the future (as varied over time in accordance with the process in s.21), unless and until rescinded;
 - 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 and CWIS2 Update 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 6-8 ("*AA*") @ [87-90];
 - ii. it requires ("must") the statutory strategy to specify "the financial resources to be made available by the [SST] 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

⁷ CB/253

⁸ CB/32-43

⁹ Also known as "Active Travel" ("AT") which also includes wheeling such as by wheelchair users

the resources to be made available for the purpose of achieving them. It is the SST who is required to make available those resources;

- e. there is a statutorily defined process for review: s.21(5) and (6);
 - f. unlike in *AA* [94], there is nothing else elsewhere in any statutory scheme relevant to the SST that covers the same subject matter or overlaps with these duties (except the Climate Change Act 2008 (“CCA 2008”) and thus the NZS and TDP – which as shown below rely on the outputs of the CWIS); and
 - g. under s.21(8), the SST is required to report to Parliament on “progress towards meeting [the CWIS] objectives”.
6. It is thus clear that:
- a. Parliament has decided to impose specific duties on the SST in relation to AT objectives and funding – it has not left these matters to the SST 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 e.g. *R v SSHD ex p Fire Brigade Union* [1995] 2 AC 513 @ 552;
 - d. S.21 does not impose a duty to produce a strategy that is simply a general narrative with no concomitant obligations but 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 ambitions but is the investment strategy to achieve the objectives: see *R (Transport Action Network) v SST* [2022] PTSR 31 @ [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. In *Great Portland Estates v Westminster City Council* [1985] AC 661 (@ 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 [41/82]. The same principle applies here.
7. 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 the objectives for AT were to be determined through the annual budgeting cycle and subject to *ad hoc* variation then s.21 would serve no purpose.

8. By creating a stable investment strategy, s.21 is designed to avoid the seriously adverse delivery implications arising from short term *ad hoc* changes in financial provision which makes it impossible or much more difficult for partners to develop projects, bid for and secure the necessary funds and deliver those projects in a coherent manner.

NZS and TDP

9. S.21 was introduced after CCA 2008, which at ss. 13 and 14 sets out duties to prepare and report on proposals and policies to meet carbon budgets. The NZS sets out the proposals and policies required to meet carbon budgets and the net zero target. The TDP provides additional detail for transport, including a set of strategic priorities, the first of which is to accelerate modal shift towards sustainable travel. Indeed the only modal shift targets contained in the NZS and TDP relate to AT. It is clear from the NZS and the TDP that the CWIS is a key element of the strategic priority to accelerate modal shift to sustainable travel. CWIS provides the framework of objectives and resources necessary to deliver this. It is telling that the NZS and the TDP have themes that will be readily recognisable from the CWIS1 and 2 (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 recognized the crucial role of walking and cycling in delivering a net zero transport system and meeting our climate ambitions”¹⁰.
10. Moreover, the Government’s Carbon Budget Delivery Plan (“CBDP”) was published on 30 March 2023¹¹ and builds on the NZS. Notably, the CBDP includes policy 140, which states that: “The second statutory Cycling and Walking Investment Strategy (CWIS2) and the government’s Gear Change Plan include delivery of a range of capital and revenue funded projects to enable more cycling and walking in line with the July 2021 Transport Decarbonisation Plan commitment to ‘deliver a world-class cycling and walking network in England by 2040’”¹². Policy 140 is shown to deliver quantifiable CO2 savings over carbon budgets 4, 5 and 6 and taking effect from 2020. As made clear by Table 7 in Appendix C, the deployment assumption underpinning those quantified savings is that 50% of short journeys (less than 5 miles) in towns and cities will be walked or cycled by 2030¹³ as in CWIS2 and the CWIS2 Update.

Environment Act 2021 and Environmental Improvement Plan

11. S.1 and 2 of the Environment Act 2021 (“EA21”) 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”¹⁴. In January 2023, 2040 targets were set via the Environmental Targets (Fine Particulate Matter) (England) Regulations 2023 and, separately,

¹⁰ CB/148

¹¹ We note that the CBDP was published post-decision. However, it is nevertheless informative, because it appears inevitable that the analysis that went into the CBDP would have been known to the Secretary of State by the time the Decision was made.

¹² CB/244

¹³ CB/247

¹⁴ CB/213

interim targets for 2028 via the EIP, which replaced the 25-year environment plan referred to in CWIS2.

12. The CWIS feeds into and impacts those targets. The effect on those targets is a necessarily material consideration in amending or here departing from the CWIS.

Equality Act 2010

13. CWIS2 states that “[e]quality and inclusion are golden threads that run through”¹⁵ it and the 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 the public sector equality duty under the Equality Act 2010 (“EqA 2010”) s.149.
14. The public sector equality duty is a necessarily material consideration in amending or here departing from the CWIS. No equality impact assessment was published alongside the Decision. That is despite there being well understood and established equality duty implications in respect of provision of (especially) cycling infrastructure¹⁶.

The Essential Facts

15. In the absence of a response to the PAPL, TAN proceeds on the basis of the matters set out in its PAPL except where stated below. A wide range of MPs and Peers have asked Parliamentary Questions to seek to understand precisely the impact of the Decision but the answers provided have not given the necessary clarity. TAN will, of course, amend this section, if the SST demonstrates to it that any of the facts in it are incorrect.
16. 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”¹⁷. Organisations were consulted, albeit at very short notice, on CWIS2 under s.21(5).
17. 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 considered 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 directly applies. The SST has not suggested that the focus on the Dedicated Funds is inappropriate.
18. Table 1 of CWIS2¹⁸ 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

¹⁵ CB/211

¹⁶ CB/781-91

¹⁷ CB/205

¹⁸ CB/217

not need to be projected – they were a specific funding allocation and an identifiable item in the DFT budget.

19. In CWIS2, the Dedicated Funds were originally put at £1,298m, but this was said to have included an element of double counting (“the Mistake”) and the figure was corrected on 10th March 2023 to £1.073m.
20. Those Dedicated Funds are necessary to achieve the objectives. The SST has commissioned and received (but not published the funding requirements of) a report which assesses what financial resources were required to achieve the objectives. In the light of that report or otherwise, it has never been claimed that the resources identified by it in CWIS2 are more than are required to meet the objectives.
21. 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). AT4 was spent for DfT purposes in the 2022/3 financial year, but by local authorities in 2023/4. Bids were invited for projects which would further the CWIS2 objectives.
22. On 9th 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....”¹⁹.
23. On 10th 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).
24. CWIS2 continues to assert that the Dedicated Funding is £1.073m as part of the “financial resources to support these objectives”²⁰. It continues to assert that the Government has committed “an unprecedented £2billion”²¹ of funding for AT over 5 years; that the objectives remain the same as summarized above, refers to the £200m for active travel schemes and notes that “we need to step up a gear”²² and that there is a “renewed sense of urgency to act”²³.
25. In fact, the Decision amounts to a substantial cut in AT funding from that in CWIS2. 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 (and the CWIS2 Update).

¹⁹ CB/205

²⁰ CB/210

²¹ CB/207

²² CB/208

²³ CB/208

The Reduction in Funding

26. 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.
27. 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. Whilst the £100m may be increased and the figures are subject to review, the current position is that there has been, on the above basis, 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, given that it was spent in 2022/3.
28. In a meeting on 5th June 2023, the SoS through his officials indicated orally that the reduction in dedicated funding for the relevant period was £233m, but that has not yet been put in writing nor adequately demonstrated by reference to available public information. If and when the SoS sets out its position in writing, these Grounds will be amended if the correct reduction is explained.
 29. In any event, there does not appear to be any dispute that there has been a very substantial cut in dedicated funding.
 30. It appears that there has also been substantial reductions in non-dedicated funding but it has not been possible to assess the quantum of the reduction or its further implications for AT funding. There has been no suggestion by the SST (either orally or in writing) that *increases in* non-dedicated funding can make up for the reductions in dedicated funding. Further, the SST has not sought to demonstrate at any point that the non-dedicated funding will ensure that the objectives are met. In any event, TAN will show that the requirements of s.21(3) are focused on dedicated funding only, and it is not permissible to rely on un-hypothecated funding streams to meet the s.21(3) requirements.
 31. The statutory route to adjusting AT objectives or funding is via the CWIS variation mechanism – there has been no such variation.

32. 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 CDP/NZS.
33. The Decision is thus inconsistent with the statutory strategy and is outwith and frustrates the statutory purpose of s.21.

Grounds for Judicial Review

Ground 1: Decision unlawfully inconsistent with the CWIS

34. 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 from the SST "to be made available", be addressed through the CWIS. It is not permissible for the SST to bypass that statutory *duty* through ad hoc policy announcements outside the s.21 framework and pursuant to some unstated general power.
35. If the SST wishes to vary the 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 SST cannot have policy or a separate strategy 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.
36. In considering any variation, the SST 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.
37. 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.
38. It is no answer to claim that this is a polycentric, resource allocation decision of government. Parliament has provided a statutory process for the SST 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 but would not justify bypassing s.21.
39. 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). As to s.21(5), no relevant parties were consulted, contrary to the approach in the past and as required by s.21(5). The SST cannot rationally contend that there is no need to consult anyone. As to s.21(6) there is no evidence that the SST has considered the s.21(6) objective.

Ground 2: Available funding inconsistent with Strategy

40. S.21 requires the resources – from the SST alone – to be made available to be such as to secure the achievement of the AT objectives. The former sums in CWIS2 were presumably judged by the SST to be sufficient (and not excessive) to meet that requirement. The objectives have not been reviewed. Due to the funding cuts, 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).
41. The funding gap created by the Decision is compounded by the fact that recent developments (such as high rates of construction inflation and the pandemic meaning some funding intended for permanent measures was instead spent on temporary ones that have since been removed) have made it more difficult to fund the objectives within the previous funding envelope. To meet those objectives would require an increase in funding not a reduction.

Grounds 3: Failure to take into account necessarily material considerations

42. On the material available to TAN and absent any information to the contrary from the SST in any response to the PAPL, it appears that 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;
 - 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;
 - c. failed to take into account the implications of the reductions in funding on the achievement of the air quality targets under the EIP and/or EA 2021; and
 - d. failed to take into account the implications for the public sector equality duty under the EqA 2010, despite the substantial issues which inevitably arise (as identified above).
43. On the SST's own reasoning in CWIS2, all these matters were necessarily material considerations, because they go to the heart of the Parliamentary purpose behind s.21 and/or to the SST's strategy. As to the second item listed above, 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 the TDP and NZS.

Remedies

44. TAN therefore considers that the Decision should be quashed; that it is entitled to a declaration that the Decision is inconsistent with CWIS2; that changes in the resources to be made available can only be made through the s.21 variation process and that in so far as the Decision has the effect of reducing the funds including dedicated funds for AT from those in CWIS2 it is of no effect unless and until CWIS is varied in accordance with s.21. TAN also seeks its costs.

Costs

45. This claim falls within Article 9(3) of the Aarhus Convention, which provides that members of the public should have access to “administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.” On TAN's case, the relevant act is the decision taken by the SST to reduce substantially funding for AT contrary to and inconsistent with his own statutory CWIS, TDP and NZS.

46. TAN's case is that that the Decision will have adverse environmental effects, not least on climate change, and was made contrary to established public law principles. As set out in the High Court judgment in Venn v Secretary of State for Communities and Local Government [2013] EWHC 3546 (Admin), acting contrary to principles of public law resulting in a failure to have proper regard to the relevant policies protecting the environment would fall within the scope of Article 9(3) of the Aarhus Convention. In the Court of Appeal, the ground challenging the High Court's findings that the case fell within Article 9 (3) failed, because the Court held that distinguishing between policy and law "would not be consistent with the underlying purpose of Aarhus to adopt an interpretation of Article 9(3) which would, at least in the UK, deprive it of much of its effect" Venn v Secretary of State for Communities and Local Government [2014] EWCA Civ 1539 [§17].
47. TAN also applies (pursuant to CPR 45.44) for the default sum under CPR 45.43(2)(b) to be varied to £5,000 inclusive of VAT. If such a variation is not allowed, the costs of the proceedings would be prohibitively expensive for it. As explained in the Witness Statement of Chris Todd²⁴, TAN's unrestricted reserved are virtually zero and so it cannot afford to bring these proceedings from its existing resources. It is relying solely on crowdfunding and third-part funding specifically to cover the costs of this litigation. The costs of proceedings are therefore in excess of TAN's resources, and so the subjective limb of the prohibitive expense test is satisfied (CPR 45.44(3)(a)).
48. In the alternative, TAN applies for a costs capping order ("CCO") under sections 88-90 of the Criminal Justice and Courts Act 2015 ("the 2015 Act"), limiting its total costs liability to the SST (and any other party to the claim) to the same amount.
49. The statutory test for a CCO is clearly satisfied:
- a. First, it is in the public interest for the Court to scrutinise the lawfulness of the Decision.
 - b. Second, in the absence of a CCO, the costs of the proceedings would be prohibitively expensive for TAN, and it would be reasonable for TAN to withdraw the claim on that basis if forced to do so (see: Witness Statement of Chris Todd, para 19); and
 - c. Third, in terms of the other factors that the Court must have regard to, TAN has explained why its financial resources and funding agreement with its legal representatives make a CCO appropriate (see: Witness Statement of Chris Todd, para 15). Neither TAN nor its funders have any private interest in the outcome of these proceedings. Lastly, TAN is clearly an appropriate organisation to represent the interests of other persons and the public interest generally (see: Witness Statement of Chris Todd, paras 5-10).

²⁴ CB/36, para 14

David Forsdick KC

Charles Bishop

Landmark Chambers

6 June 2023