

BETWEEN:

**THE QUEEN (on the application of TRANSPORT
ACTION NETWORK LIMITED)**

Claimant

- and -

THE SECRETARY OF STATE FOR TRANSPORT

Defendant

SUMMARY GROUNDS OF RESISTANCE

References

The following referencing is used in these Summary Grounds of Resistance:-

[ASFG/...] = Claimant's Amended Statement of Facts and Grounds followed by the paragraph no.

[CB/...] = Claim Bundle followed by the page no.

[SB/...] = Supplementary Bundle followed by the page no.

Introduction

1. By this claim Transport Action Network Limited ("TAN") seeks permission to proceed with its claim for judicial review of the Secretary of State's decision ("the Suspension Decision") taken on 21st July 2021 not to suspend all or part of the National Networks National Policy Statement ("the NN NPS"). The Suspension Decision followed the Secretary of State's earlier decision announced on 14th July 2021 to review the NN NPS ("the Review Decision").
2. Permission is resisted by the Secretary of State for the following summary reasons:-
 - (1) Ground 1 makes an allegation of actual predetermination. This ground relies on a partial and tendentious reading of the relevant documents which, contrary to the

Claimant's ground, clearly explain that the Secretary of State held over the making of the Suspension Decision to the 21st July 2021. In short, the Claimant gets nowhere near to establishing that the Secretary of State had already determined not to suspend the NN NPS prior to making the Suspension Decision, and that his mind was so foreclosed that he gave no genuine consideration to the issue of suspension: see, e.g., *Franklin v Minister of Town and Country Planning* [1948] AC 87.

- (2) Ground 2 alleges that the Secretary of State has misdirected himself as to the correct approach to ss.11(2) and (3) of the Planning Act 2008 ("PA 2008"). This ground again relies on a partial reading of the submissions made to the Secretary of State, which must be read fairly and as a whole (that is, the submissions of 8th July 2021 ("the 8th July Briefing") [CB/234] and 15th July 2021 ("the 15th July Briefing") [CB/228]). When this is done, it is apparent that the Secretary of State was fully aware of his statutory powers under s. 11.
- (3) Ground 3 alleges that the Secretary of State misdirected himself as to the effect of not suspending the NN NPS in future decision-making. The alleged error of law is difficult to discern; at its highest the Claimant appears to be alleging that the Secretary of State has failed to properly take account of potential errors in future decisions which may never occur. There is no merit in this ground.
- (4) Ground 4 alleges that the Secretary of State misunderstood the terms of the Transport Decarbonisation Plan ("TDP") when making the Suspension Decision, despite having determined to publish the TDP only seven days previously. The Claimant fails to explain how the 8th July Briefing was capable of significantly or seriously misleading the Secretary of State when determining to make the Suspension Decision, i.e. that the Secretary of State was misled in some material way: see *R (Mansell) v Tonbridge and Malling BC* [2019] PTSR 1452, at [42].
- (5) Ground 5 alleges that the Secretary of State irrationally concluded that it was not appropriate to suspend those parts of the NN NPS relating to need and/or carbon emissions. No arguable irrationality arose as alleged or at all. The need case in the NN NPS cuts across the whole of the NPS, meaning that the complaint in reality is that the Secretary of State should have suspended the whole of the NN NPS. Further, current policy on climate change can plainly be considered by decision takers of infrastructure projects pending the outcome of the review.

- (6) The Secretary of State explained in his pre-action response dated 10th September 2021 what was meant by the reference to scheme sponsors and private sector developers in the 15th July Briefing. The Claimant plainly disagrees with the Secretary of State’s judgement about the effect on these parties, but fails to demonstrate any error at all in the Secretary of State reasonably having regard to the effect of suspending the NN NPS on future road delivery.

The NN NPS

3. The NN NPS was designated in 2014 under s.5(1) of the PA 2008. It sets out the need for, and Government’s policies to deliver, nationally significant infrastructure projects on the road and rail networks. As it states at para. 1.11 [CB/94], “*The Government has chosen the policy set out in this NPS as it strikes the best balance between the Government’s economic, environment and social objectives.*” As it also states in para. 1.14 [CB/96], the NN NPS is setting “*high level policy rather than specifying locations for enhanced or new infrastructure*” and, at para. 1.16 [CB/97], that “*Appropriate levels of assessment under the Environmental Impact Assessment Directive and Habitats Directive will be carried out on individual proposals*”.
4. Section 4 of the NN NPS sets out the “*Assessment principles*” that apply to decision-making. Paragraph 4.2 states that, subject to the other policies and protections in the NN NPS and the PA 2008, “*there is a presumption in favour of granting development consent for national networks NSIPs that fall within the need for infrastructure established in this NPS*” [CB/119]. Paragraphs 4.3 and 4.4 then go on to state that the Secretary of State’s decision on a development should weigh overall the positive and adverse impacts. The statement of need is thus central to all decision-making relating to nationally significant infrastructure for road and rail projects.
5. Section 5 of the NN NPS sets out how generic impacts which are considered relevant to any national networks infrastructure should be considered. In respect of carbon emissions, paragraph 5.17 describes what must be included within an applicant’s assessment of carbon impacts. This provides that, in particular for road projects, “*applicants should provide evidence of the carbon impact of the project and an assessment against the Government’s carbon budgets*” [CB/139].

6. Paragraph 5.18 describes how decision-making will be approached. While making reference to the now superseded¹ Carbon Plan 2011, the material test remains that “*any increase in carbon emissions is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the proposed scheme are so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets*” [CB/139]. Notably, this is materially the same test as found in paragraph 5.82 of the Airports National Policy Statement,² which was held by the Supreme Court to require assessment against whatever carbon reduction targets were in force at the time of the decision: *R (Friends of the Earth) v Secretary of State for Transport* [2021] PTSR 190, at [98].

The approach of the Courts to national policy decision-making

7. Section 11(4) of the PA 2008 confers a broad discretion on the Secretary of State to suspend a national policy statement (in whole or in part) upon being satisfied that the conditions in ss. 11(2) or (3) are met. Just as with decisions on review under s.6, the decision as to whether it is appropriate to suspend all or part of a national policy statement is a matter of broad discretion for the Secretary of State which he exercises in a wide macro political context. Such judgments are not open to challenge on rationality grounds, short of the extremes of bad faith, improper motive or manifest absurdity: see, for example, *R v. Secretary of State for the Environment, ex parte Hammersmith and Fulham LBC* [1991] 1 AC 521, at 596F-597H; *R v. Secretary of State for the Environment, ex parte Nottinghamshire CC* [1986] AC 240, 250E-251A, 247H.

Ground 1

8. Ground 1 makes an allegation of actual predetermination. It is said that the Secretary of State had in fact already decided not to suspend the NN NPS when making the Review Decision.
9. Nothing in the passages on which the Claimants rely could realistically be said to amount to the positive evidence required to support this allegation. That is, the evidence simply does not begin to show that the Secretary of State had closed his mind in the sense that he had abandoned his obligations, or otherwise show that the Secretary of State gave no genuine

¹ Paragraph 1.8 anticipates that documents referred to within the NPS “*may be updated or amended over the time span of the NPS*” and requires that successor documents be referred to.

² Paragraph 5.82 provides “*Any increase in carbon emissions alone is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the project is so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets.*”

consideration to the issue of suspension: see, e.g., *Franklin v Minister of Town and Country Planning* [1948] AC 87, and p. 103. See, also, Collins J in R (*Island Farm Development Ltd*) v. *Bridgend County BC* [2006] EWHC 2189 (Admin), [2007] LGR 60, at [31] (approved per Rix LJ in R (*Lewis*) v. *Redcar & Cleveland BC* [2008] EWCA Civ 746, [2009] 1 WLR 83, at [96]):

“... unless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will suffice to persuade a court to quash the decision.”

10. Per Rix LJ in *Lewis*, at [97]:

“In context I interpret Collins J’s reference to “*positive evidence to show that there was indeed a closed mind*” as referring to such evidence as would suggest to the fair-minded and informed observer the real possibility that the councillor in question had abandoned his obligations, as so understood. Of course, the assessment has to be made by the court, assisted by evidence on both sides, but the test is put in terms of the observer to emphasise the view-point that the court is required to adopt. It need hardly be said that the view-point is not that of the complainant.”

11. It is plainly necessary to consider all of the material before the Secretary of State. The Claimant in this regard glosses over the fact that at the time of the Review Decision, the positive advice to the Secretary of State from his officials was that he should not decide on the issue of suspension at that stage. The 8th July Briefing informs the Secretary of State in terms that “*further advice will follow on whether to suspend or not suspend the NNNPS while a review is taking place, we are not seeking you (sic) views on that now*” (emphasis in original) [CB/234].

12. In support of its allegation, the Claimant points to the advice to the Secretary of State in para. 8 of the 8th July Briefing which refers to mitigating a risk of disruption while a review takes place by providing certainty on timescales and by ensuring that the NN NPS remains extant and fully effective in decision making. However, the Claimant ignores that this immediately follows advice from officials, in para. 7, which confirms that they are “*finalising legal and policy advice on [suspension] and will submit that in due course*” [CB/235]. In other words, whatever certainty arose from keeping the NN NPS fully effective remained subject to the further promised advice.

13. The submission that the Secretary of State had, by the 8th July Briefing and the announcement of the Review Decision, taken a “*clear position*” on suspension both ignores that the 8th July Briefing represents the views of officials, and that those officials were urging the Secretary of State not to adopt any decision on suspension pending further advice. The position was that until the Secretary of State took a decision to suspend all or part of the

NN NPS, it remained in force. That is what the TDP says and it was an accurate statement of fact. The TDP does not imply, as the Claimant suggests, that the Secretary of State had already decided that he would not suspend the NN NPS at the time of publication.

14. The fact that following the Review Decision the Secretary of State sought further advice on “*minimising the chilling effect on road building and completion by 2023*” does not support the Claimant’s submission [SB/33]. The position is entirely to the contrary. If the Secretary of State had, as the Claimant contends, already made up his mind on suspension, there would have been no need for further advice. Even if, contrary to his case, the request by the Secretary of State amounts to an apparent favouring of suspension, that does not suffice to show pre-determination. There is nothing unlawful about a decision-maker having a pre-disposition towards a particular decision.
15. The further advice provided to the Secretary of State in the 15th July Briefing confirms the above. This advice, which the Secretary of State was advised in the 8th July Briefing would be forthcoming, was only necessary in order to inform the Secretary of State on matters relevant to whether or not to make the Suspension Decision. It was only having received this advice that the Suspension Decision was made [SB/34]. This first ground is entirely unarguable, and as set out above, relies on a partial and tendentious reading of the relevant documents.

Ground 2

16. The Claimant’s second ground again depends on a partial reading of the material before the Secretary of State. The Claimant’s core submission is that the Secretary of State cannot have made a lawful suspension decision because the 15th July Briefing does not state whether officials were advising the Secretary of State that the conditions in ss. 11(2) and/or 11(3) had been met.
17. The 15th July Briefing expressly directed the Secretary of State to the 8th July Briefing, which at para. 6 [CB/234] sets out that officials had “*identified two areas where we now believe that parts of the NNNPS now trigger the three considerations set out in the Planning Act, which you are required to consider when deciding whether to review a national policy statement*”. Those two areas of the NN NPS related to the Statement of Need (which officials said “*now meets all three tests*”), and carbon emissions (which officials said “*potentially requires a review*”). The 8th July Briefing went on to set out the view of officials that the Secretary of State could choose to suspend some or all

of the NN NPS. Plainly, officials would have that view only if satisfied that the conditions in ss. 11(2) and/or 11(3) had been met.

18. Just as with planning reports to committees, the 8th and 15th July Briefings are “*not to be read with undue rigour, but with reasonable benevolence... The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision ... Minor or inconsequential errors may be excused...*”: *R (Mansell) v Tonbridge and Malling BC* [2019] PTSR 1452, at [42]. Ultimately, it was for the Secretary of State to form a view as to whether the conditions in ss. 11(2) and/or 11(3) had been met. The advice to the Secretary of State proceeded on the basis that these considerations were met, hence the need to have regard to considerations bearing upon whether the Secretary of State should exercise his discretion to suspend the NN NPS (in whole or part).
19. This ground is again entirely unarguable.

Ground 3

20. The Claimant’s third ground is premised on the proposition that by taking account of changed traffic forecasts and changed climate change/emissions considerations, decision makers considering development consent order applications would not be acting in accordance with the NN NPS (see [ASFG/72]). This premise is flawed.
21. The NN NPS specifically contemplates that applications for road projects will usually be supported by analysis about local transport impacts that takes account of current traffic forecasts and information: see, e.g. paragraph 4.6 at [CB/120]. Indeed, it would be at odds with proper planning to ignore up-to-date information. The NN NPS further requires that carbon emissions be assessed against the ability of the Government to meet its current carbon budget and reduction targets (see above). The Claimant is wrong to say that in taking account of current traffic forecasts and current carbon budgets/reduction targets inspectors would necessarily be acting unlawfully.

22. At its highest the Claimant appears to be alleging that the Secretary of State has failed to properly take account of potential errors in future decisions which may never occur. This is an impossible task; and the remedy in any event for such potential future errors is challenge to those particular decisions.³ There is no merit in this ground.

Ground 4

23. Ground 4 alleges that the Secretary of State misunderstood the terms of the TDP when making the Suspension Decision, despite having determined to publish the TDP only seven days previously, by reason of the 8th July Briefing (it is said erroneously) making reference to the TDP having a commitment of “*keeping road emissions stable in the medium term*”. The reason this ground is said to be material to the Defendant’s decision is set out at **[ASFG/86]**, namely that this alleged misdirection meant that the Secretary of State failed to appreciate “*the urgency of reducing road transport emissions*” when determining not to suspend the NN NPS.
24. The Claimant’s submissions fail again to read the briefings to the Secretary of State fairly and as a whole, and to give proper regard to the relevant context to the Suspension Decision. That context was, of course, that a key reason for determining to review the NN NPS was because of policy changes relating to carbon emissions, including the ambitions set out in the TDP in respect of achieving the decarbonisation of transport. The Secretary of State’s own foreword to the TDP explained how the Government’s decarbonisation plan was the most ambitious of any major country, partly because “*in any imaginable circumstances the clear majority of longer journeys, passenger, and freight, will be made by road; and that rural, remote areas will always depend more heavily on roads*” **[CB/218]**.
25. Given that new policy on carbon emissions was a key driver in support of the decision to review the NN NPS, and the Secretary of State’s clear and recent publication of the TDP, it cannot arguably be said that the Secretary of State was misled in any material way by the 8th July Briefing. This is all the more so when it is understood that keeping emissions stable in the medium term despite historic increases in traffic requires substantial policy changes. When read fairly and as a whole, the briefings to the Secretary of State contained no material misdirection: see, again, *R (Mansell)* at [42].

³ The Claimant refers to a challenge to the A38 Derby Junctions Scheme. The Defendant conceded the challenge made to his decision in this matter on the basis that inadequate reasons had been provided for his decision. The outcome of that challenge provides no support for this application.

Ground 5

26. Ground 5 alleges that the Secretary of State irrationally concluded that it was not appropriate to suspend the parts of the NN NPS relating to need and/or carbon emissions. No arguable irrationality arose either as alleged by this ground, or at all.
27. So far as the need case in the NN NPS is concerned, as set out above, this is central to all decision-making relating to nationally significant infrastructure for road and rail projects, providing as it does for a “*presumption in favour of granting development consent for national networks NSIPs that fall within the need for infrastructure established in this NPS*” [CB/119]. The Claimant’s submission is tantamount to requiring the Secretary of State to reconsider his decision not to suspend the whole of the NN NPS. It was entirely rational for the Secretary of State to conclude that it would not be appropriate to suspend the need case in the NN NPS, both in order to provide certainty, and because he had already determined not to suspend the whole of the NPS.
28. The Claimant asserts, in reliance upon the matters set out in support of his third ground, that the sections on carbon emissions will cause particular difficulty for decision makers if they remain in force. For the reasons already set out above, this is obviously unarguable. Decision makers will be perfectly capable of considering current carbon reduction targets when determining the appropriateness of new nationally significant road schemes. In these circumstances, it was plainly rational not to suspend the sections of the NN NPS on carbon emissions (which would have left applicants and decision makers without a specific policy framework to apply while a review was ongoing, so creating more, not less, uncertainty).

Ground 6

29. The Secretary of State is best placed to determine whether suspending all or part of the NN NPS would affect the long-term certainty valued by scheme sponsors and private sector developers. As set out above, the Secretary of State explained in his pre-action response dated 10th September 2021 what was meant by the reference to scheme sponsors and private sector developers in the 15th July Briefing. The Claimant plainly disagrees with the Secretary of State’s judgement about the effect on these parties, but fails to demonstrate any error at all in the Secretary of State reasonably having regard to the effect of suspending the NN NPS on future road delivery.

Conclusion

30. The grounds are unarguable and permission should be refused. The Secretary of State seeks an order requiring the payment of his costs of preparing and filing the Acknowledgement of Service and these Summary Grounds of Resistance, in the sum of £10,000 (the upper cost limit pursuant to CPR 45.43(2)(b)). A schedule of costs is attached.

Dated 22 October 2021

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