

**Case Name:** *Sefton Metropolitan Borough Council, R (On the Application Of) v Highways England* [2018] EWHC 3059 (Admin) (16 November 2018)

**Full case:** [Click Here](#)

**Commentary:** A judicial review of Highways England's decision not to include the option of a tunnel in pre-application consultation on a DCO for a new access route to the Port of Liverpool was dismissed.

This was the first judicial review of a decision by Highways England and it was accepted that its decision was amenable to judicial review. The case was brought before the formal DCO pre-application consultation stage but after Highways England had carried out a feasibility study which had ruled out the tunnel option on cost grounds and consulted locally on two options which did not include a tunnel.

In terms of the Highways England's obligations relating to consultation, the Court held that "Highways England exercises its functions according to a regime established under statutory authority and must follow directions and have regard to guidance from the Secretary of State. It is required to engage with bodies such as the council which have responsibility locally for planning and highways. On the other hand, Highways England is not a body whose functions have to be conducted according to a formula. Within the limits of the 2015 Act and the Licence, it has considerable freedom to act in the manner it considers best calculated to perform its duties efficiently and economically. It does not have to consult widely or in detail on every decision, though in practice will doubtless do so where major infrastructure projects are contemplated."

The Court acknowledged the Sedley criteria on the requirements for consultation. In judging whether the consultation was fair, the context was important.

Highways England was entitled to limit the parameters of the consultation and was not obliged to consult on a proposal that was beyond the budget constraints of the project on an equal footing with the other two options. There was no unfairness in the government and Highways England taking the position that the tunnel was not regarded as practical due to budget constraints. The size of the budget for the project was a political question and the balance to be struck between environmental protection and economic regeneration is par excellence a matter for the executive. In the factual context, the requirements that must be met before a DCO is granted were relevant to the fairness issue because the DCO process provides further opportunities for the objectors at the pre-application consultation stage and during the public examination of the ES.

*Case summary prepared by Susannah Herbert*