Case Name: *Transport Action Network Ltd, R (On the Application Of) v Secretary of State for Transport* [2022] EWHC 503 (Admin) (09 March 2022)

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Commentary:
This was an oral renewal hearing for permission to bring a claim for judicial review in respect of the Secretary of State for Transport's ("Defendant") decision not to suspend the National Networks National Policy Statement ("NNNPS") during a review of such policy statement. The Planning Act 2008 sets out the procedure for formulating and reviewing policy relating to nationally significant infrastructure projects and Section 104(3) provides that an application for development consent must be determined in accordance with any relevant national policy statement. Section 6 sets out three tests which the Secretary of State must consider when deciding when to review a national policy statement, whether in whole or in part. Section 11 provides that, subject to similarly-worded conditions, the Secretary of State may choose to suspend the designation of the national policy statement (which would then be treated as withdrawn) pending the outcome of the review. Of critical importance is the distinction between the option to the review and the option to suspend: the suspension may only occur if all of the three conditions specified in Section 11 are met, whereas the option to review must be informed by the three tests in Section 6 but need not pass all of them. In this case, the Secretary of State had, on the advice of his officials, elected to carry out a review and this was announced in July 2021. The Claimant welcomed the review but considered that the Secretary of State should also have suspended the NNNPS in the interim.

Permission was sought on five grounds. The first was that the decision not to suspend the policy statement during the review was unlawful because the chain of events indicated that it had been pre-determined. There was no authority identified on the test in relation to decisions of this type, but Chamberlain J accepted the submissions of both parties that the test should be the same as is applied in individual planning decisions: "whether there is positive evidence to show that there was indeed a closed mind". The judge found that there was no such evidence and he therefore concluded that the ground was not arguable.

The second ground concerned the language used to advise the Secretary of State on whether the tests outlined in Section 11 of the 2008 Act were met. In an annex to the advice, it was said that the first two conditions were met, and that the third was "potentially" met. The Claimant argued that the Secretary of State had therefore failed to consider whether all three conditions were met. The Defendant responded that it was obvious that the advice to the Secretary of State was that the conditions were met. Officials had previously recommended that a review be undertaken in October 2020 and February 2021, but these recommendations had not been accepted, partly on the basis that they conceded that all three conditions were not met and so there would be no

statutory power to suspend the NNNPS. Having reviewed all three sets of advice, Chamberlain J concluded that notwithstanding the language used, it was clear that officials believed that the conditions were now met as they had advised that there was now a power to suspend. This ground was also argued slightly differently: that there was some doubt as to the satisfaction of the third condition (evidenced again by the use of the word “potentially”) and that, had it been understood that there was no such doubt, the Secretary of State might have decided to suspend the NNNPS after all. Again, Chamberlain J dismissed this line of argument.

Ground 3 concerned an alleged error of law in the advice given to the Secretary of State, in which it was said that PINS would be able to consider up-to-date traffic forecasts within the context of the existing NNNPS. The Claimant drew attention to Section 104 of the Act which, it was suggested, requires Inspectors to adhere strictly to the NNNPS as published. The judge found that the NNNPS sets a framework for assessment which can take account of up-to-date evidence and, though some of the wording might change as a result of the review, the existing wording does not require Inspectors to ignore the possibility of carbon emissions arising from development proposals having an impact on the Government’s ability to meet its carbon reduction targets. The Secretary of State had therefore been correctly advised that the NNNPS could continue to provide an appropriate framework for decision-making during the review period.

The complaint under ground 4 was that the officials’ advice to the Secretary of State was incorrect in respect of the summary it included of the Transport Decarbonising Plan, the evolution of which was a factor in prompting the Secretary of State to commence the review. The advice included an unfortunate error, describing the commitment of the Plan to “keeping road emissions stable in the medium term”: in fact, the Plan is clear that emissions must decline by over 50% by 2035. The Defendant acknowledged the error but argued that the Secretary of State could not have been misled by it, given his knowledge of the Plan. The judge concluded that the error did not vitiate the Secretary of State’s decision as it was not material, “material” being context-dependent and not arguable in this case.

The final ground concerned the option of part-suspending the NNNPS, which the Claimant argued was not satisfactorily considered. It was concluded by Chamberlain J, however, that the option to suspend the statement in part was clearly drawn to the Secretary of State’s attention. The Secretary of State was entitled to conclude, in line with the advice given to him, that partial suspension would lead to uncertainty and would therefore be undesirable.

All five of the grounds having failed, permission to bring the claim was again refused.

Case summary prepared by Aline Hyde