

Case Name: *Boswell, R (On the Application Of) v Secretary of State for Transport* [2023] EWHC 1710 (Admin) (07 July 2023)

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Commentary: The Claimant, Dr Boswell, judicially reviewed three decisions of the SSfT to grant DCOs for 3 NSIP road schemes along the A47 in Broadland Norfolk. The Claimant's ground of challenge was, in essence, that the SSfT acted in breach of the relevant EIA Regulations by failing to conduct a lawful cumulative assessment of the carbon emissions. In particular, the Claimant alleged that the SSfT had failed to assess the significance of the combined carbon emissions from the 3 road schemes (and other local projects) by comparing and calculating them as a percentage of the UK's national carbon budgets whereas this calculation was only done for emissions for the particular scheme under scrutiny by the SSfT.

The High Court dismissed the Claimant's legal challenges for the following main reasons. First, the High Court reiterated previous case law that the questions as to what impacts should be addressed cumulatively; how the cumulative impacts might occur; whether the effects are likely to be significant and if so, how they should be assessed are all matters of evaluative judgment for the SSfT subject only to supervisory oversight by the Courts. Second, the High Court found that the carbon emissions from each road scheme were calculated and compared against the UK's national carbon budget. Third, the High Court concluded that adequate consideration was given by the SSfT to the cumulative impacts of carbon emissions from the 3 road schemes. In this regard, the High Court noted that a figure was produced for the combined emissions from the 3 schemes (and other local schemes) albeit the figure produced was not then assessed for significance against the UK's national carbon budgets which was a matter of evaluative judgment for the SSfT. Fourth, the SSfT reasons for not comparing the combined emissions against the national target were (a) that there is no single prescribed approach to assessing the cumulative impacts of carbon emission; (b) that the approach to assessing the cumulative impact of carbon emissions differs from that of other environmental impacts because carbon impacts are not geographically limited to a local area and (c) that the appropriate basis for assessing the significance of the emissions was to compare them against the UK's national carbon budgets. Fifth, the High Court concluded that there was a logical coherence to the SSfT's decision not to compare the combined carbon emissions from local road schemes against the UK's national carbon target, when those carbon emissions do not have a local geographic limit and the IEMA guidance counsels against the arbitrary cumulation of projects in these circumstances. Seventh, while the Claimant's concerns about the limited value of the exercise undertaken, of assessing the significance of an individual development project against a national carbon target, is acknowledged in independent guidance and in recent caselaw, on the state of present scientific knowledge, such an approach adopted by the SSfT in the 3 DCO decisions cannot be considered unlawful. Eighth, the High Court concluded that the Claimant's case was, on analysis, an impermissible legal challenge to the SSfT's decision on the

merits as to the acceptability of the carbon impacts from the three road schemes.

Comment- this case follows a now established line of case law (e.g. *Goesa v Eastleigh Borough Council* judgment) that it is acceptable for a decision maker to rely on percentage contributions to a carbon budget and conclude there is no material impact on the government's ability to meet its carbon reduction targets. This now settled line of case law suggests that it would be prudent for the Government to amend the relevant National Policy Statements to endorse the judicial guidance on this issue which may help to reduce the proliferation of litigation on this issue.

Case summary prepared by Paul Arnett