19 February 2024

R (Save Stonehenge World Heritage Site Ltd and Andrew Rhind-Tutt) v Secretary of State for Transport [2024] EWHC 339 (Admin)

Summary

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are publicly available. A copy of the judgment as handed down can be obtained after 10.30 am on 19 February from:

- https://www.judiciary.uk/judgments/
- https://caselaw.nationalarchives.gov.uk/

Mr Justice Holgate, sitting in the High Court, today handed down judgment in the application for judicial review brought by Save Stonehenge World Heritage Site Limited and Andrew Rhind-Tutt against the Secretary of State for Transport (SST).

Introduction

This is the second claim for judicial review of a decision to grant a development consent order (DCO) under s.114 of the Planning Act 2008 (PA 2008) for a new dual carriageway section of the A303 13km long between Amesbury and Berwick Down, Wiltshire. The road crosses the Stonehenge, Avebury and Associated Sites World Heritage Site (WHS). In the first claim the court quashed the SST's decision to grant development consent, The application was redetermined. On 14 July 2023, the Minister of State, acting on behalf of the SST, granted the DCO. This claim relates to that second decision.

The first claimant is a company formed by the supporters of the Stonehenge Alliance, an umbrella campaign group which coordinated representations from many objectors to the scheme. The second claimant was also an objector. He owns a property, the value of which he says would be reduced because the scheme affects land over which he has a right of way. The interested parties are National Highways Limited, a strategic highways authority which made the application for the DCO, and Historic England, a statutory consultee on the application for the DCO and the Government's statutory adviser on the historic environment.

The central section of the scheme is a twin bore tunnel 3.3km long. Many of the objections relate to the western section. This includes twin tunnel portals, a cutting 1km long up to 60m wide and up to 11 m deep, running to the western boundary of the WHS and then a new grade-separated junction at Longbarrow connecting with the A 360.

The first claim succeeded on two grounds. First, the SST failed to take into account the scheme's impact on the significance of all heritage assets. Second, he failed to consider the merits of two alternatives, which would either cover the cutting or extend the tunnel to the west. The court is only concerned with whether there was an error of law in the redetermination. It has no involvement in considering the merits of the scheme or alternatives.

Grounds of Challenge

In summary, the claimants sought permission to raise the following grounds of challenge:

- **Ground 1:** the SST failed to re-open the Examination into the application for the DCO in breach of the common law duty to act fairly and Article 6 of the ECHR.
- **Ground 2:** When assessing alternative routes to the permitted scheme, the SST failed to have regard to certain "obvious material considerations."
- **Ground 3:** in ascribing no weight to the risk of Stonehenge being delisted as a WHS the SST acted irrationally.
- **Ground 5:** The SST failed to have regard the Carbon Budget Delivery Plan ("CBDP") and the Net Zero Growth Plan ("NZGP"), both published in March 2023.
- **Ground 6:** Given that the National Policy Statement for National Networks (NPSNN) is being reviewed because it does not reflect current targets under the Climate Change Act 2008 ("CCA 2008"), the SST failed to consider not applying the NPSPP (s.104 of the PA 2008) or acted irrationally in not departing from the NPSNN on climate change.
- **Ground 8:** Prior to the hearing the SST disclosed to the claimants the briefing provided to his Minister for deciding the DCO application. The claimants then applied to amend its claim to allege that this briefing was legally inadequate.

The Court decided that all grounds of challenge were unarguable and the application was dismissed. In his judgment, Mr Justice Holgate set out the statutory framework ([72]-[98]) before dealing with the grounds of challenge in the remainder of the judgment.

Ground 1

Counsel for the claimants contended that the Examination should have been reopened in relation to issues raised in the redetermination process. Instead, evidence was obtained and questioned by departmental officials in writing. This ground was deemed unarguable and permission to apply for judicial review was refused. The claimants raised a number of issues under this ground, including the contention that the redetermination involved drawing factual conclusions, as well as policy judgments. However, the court held that Art 6 of the ECHR did not require the Examination to be reopened. Any factual conclusions were in the context of regulatory decision-making and planning control: the decision to be taken was administrative [128]. The application of the SST's duty to act fairly at common law depended upon the nature of the issues and material advanced during the redetermination. Those matters did not necessitate the reopening of the Examination. The procedure adopted for questions and representations in writing satisfied the requirements of procedural fairness [138].

Ground 8

The claimants relied upon caselaw that a Minister making a decision only has regard to those considerations of which he has personal knowledge or which are drawn to his attention. They argued that the briefing material provided to the Minister was inadequate because it did not refer to points that were so 'obviously material' that a failure to take them into account would be irrational [142]. However, in the court's judgment, counsel sought to apply this line of authority too liberally. Even if a particular subject qualifies as an obviously material consideration which a Minister must take into account, the law does not require all the information on that matter to be placed before him. He may rely upon his officials to carry out an analysis. Their summary may be brief. The Minister need not be given the underlying information so that he may carry out the analysis himself. So, for example, on alternatives to the proposed scheme, it was a matter of judgment for the SST and officials as to how much evidence was obtained, how far the comparative exercise should go into that evidence, and

how the impacts compare [177]. The Court rejected the various points which were said to be obviously material considerations that the SST had to address personally.

Ground 2

The claimants argued that the SST made an error of law in his handling of two alternatives to the proposal: route F010 and a "non-expressway" option based on rail routes. Counsel for Highways England and the Department showed evidence before the SST that F010 would have serious environmental effects, including biodiversity and landscape impacts, while acknowledging that F010 was preferable to the proposed scheme with its impacts upon the historic environment of Stonehenge [188-189]. The court said it was a matter for the SST to decide how much weight to give to the environmental impacts that would be caused by F010, including harm to villages and their conservation areas. How much detail to go into was a matter for him. The approach taken was not irrational [187-194]. The "non-expressway" option did not meet Government policy objectives to improve the A303 corridor for long distance vehicular traffic. A decision-maker is not obliged to a treat a suggestion which does not meet the objectives for a proposed scheme as an alternative [195].

Ground 3

This ground turned on criticisms made by the claimants of the reasons given in the decision for giving no weight to the power of the World Heritage Committee to delist Stonehenge as a WHS and the prospect of their doing so. Any question of delisting would be a separate process in which the key issue between the UK Government and the World Heritage Committee would be whether Stonehenge has lost the characteristics of outstanding universal value which resulted in it being designated a WHS. In addition, the decision letter set out that the SST was satisfied that the proposed road scheme accords with the NPSNN and that granting consent for the scheme would not lead to the UK being in breach of its Convention obligations. The decision also stated that the first interested party would be working with advisory bodies when working up the detailed design and building up the scheme [221]. Accordingly, the Court rejected the claimants' contention that the reasons given for giving no weight to the prospect of delisting were irrational [223].

Ground 5

The claimants submitted that the SST failed to have regard to the CBDP and the NZGP. The CBDP sets out predictions for emissions reductions from the policies of the Secretary of State for Energy Security and Net Zero ("SSESNZ") for meeting the carbon budgets and also delivery risks to those policies. The NZGP provides an update to the Net Zero Strategy [226]. The SST's overall conclusion was that the proposed scheme would not have a significant impact on climate change, it complied with the NPSNN, the Government policies and legislation relating to Net Zero, and would not result in the UK breaching any international obligations. The claimants contended that in his decision, the SST did not refer to the part of the CBDP which analysed the relative contribution to carbon reduction from transport policies with quantifiable effects, such as zero emission vehicles, and the risks to the delivery of those policies [240]. However, the Court held that there was nothing in this complaint. Reading the documents as a whole, along with the Net Zero Strategy, it is clear that the transition to zero emission vehicles is just one of a number of policies for reducing carbon emissions in the transport sector. Despite the identified delivery risks, the CBDP expresses confidence in the policy package enabling the carbon budgets to be met [241]. In these circumstances there was no reason why the SST was obliged in his decision to address individual comments in the CBDP on risks to delivery of particular transport-related policies. Furthermore, that subject related to the duties of the SSESNZ to achieve statutory targets under the CCA 2008.

Ground 6

The claimants submitted that in view of the SST's decision to review the NPSNN because it is out of date in relation to the CCA 2008, the SST failed to consider not applying the NPSNN under s.104(4), (5) or (7) of the PA 2008 and/or acted irrationally in not departing from the NPSNN. The SST had taken into account the matters which led him to decide that the NPSNN should be reviewed and had decided that s.104(4), (5) or (7) did not apply. The differences in status and language between the NPSNN and the draft revision were taken into account by the SST. The Court found that the changes do not show that the SST's judgment was irrational. The draft of the NPSNN maintained that it was sufficient to make an assessment of the scheme's carbon emissions against the carbon budgets [255]. The SST accepted the technical analysis provided by Highways England and decided that those emissions would be negligible and will not impair the ability to meet the carbon budgets. Those conclusions are not open to legal challenge.

Conclusion

After rejecting all the claimants' grounds of challenge as unarguable, the Court refused the application for permission to apply for judicial review.