IN THE COURT OF APPEAL
(CIVIL DIVISION)

On appeal from the Administrative Court
[2024] EWHC 1405 (Admin) - AC-2023-LON-001745
Kerr J

BETWEEN:

THE KING (on the application of
TRANSPORT ACTION NETWORK LIMITED)

Appellant

- and -

SECRETARY OF STATE FOR TRANSPORT

Respondent

APPELLANT'S APPEAL SKELETON ARGUMENT

References: Jx is to paragraph x of the judgment of Kerr J below; JMx is to paragraph x of the witness statement of Jessica Matthew filed on behalf of the Secretary of State for Transport below.

A. Introduction and overview

1. In order to replace the former ad hoc and piecemeal approach to funding of cycling and walking under the former generalised discretion of the Secretary of State for Transport ("**SST**"), Parliament enacted section 21 of the Infrastructure Act 2015, which requires the SST periodically to "*set*" a Cycling and Walking Investment Strategy ("**CWIS**"). A CWIS "*must specify*" the objectives to be achieved and "the financial resources *to be made available* by the [SST] for the purpose of achieving those objectives" (s. 21(3)(b)). S. 21 makes provision for the variation of the CWIS "at any time" ("**the statutory variation process**").

2. On 9 July 2022, the SST set a second CWIS under s. 21 ("**CWIS2**") which, pursuant to s. 21(3)(b) specified, *inter alia*, dedicated funding to be made available for the years to March 2025 ("**the Dedicated Funding**").

3. By a written ministerial statement dated 9 March 2023 ("**the WMS**"), the capital element of the Dedicated Funding for the last two years of CWIS2 was cut from £300m

to £100m, i.e. by £200m or by 66%[1] ("**the Decision**"). There was no corresponding uplift in any other head of funding.

4. The effect of the Decision was that £200m of the resources specified to be made available in the statutory CWIS2 under s. 21(3)(b) would, now, not be made available. The statutory variation process was not followed.

5. The SST has never identified under what power the Decision was made and appears to rely on a general (prerogative) discretion regarding resource allocation to make funding decisions on investment in cycling and walking outside and inconsistent with the CWIS and other than under s. 21. It has never been suggested that the Decision was made pursuant to any specific statutory provision (such as a Finance Act or similar), which required the resources to be available to be different from those specified in CWIS2.

6. Pursuant to permission granted by Lewison LJ, this is the appeal by Transport Action Network ("**TAN**") against the dismissal by Kerr J ([2024] EWHC 1405 (Admin)) of its claim for judicial review of the Decision.

7. The appeal raises a short point of statutory construction – and then the implications of that statutory construction on the facts. Kerr J held that "*to be made available*" meant only "*intended to be made available*" [J59] at the time the CWIS was "*set*" and, on the facts, allowed the SST subsequently to change the sums to be made available as he saw fit outside the statutory variation process such that the Decision was lawful.

8. The Judge's interpretation is contrary to the words and statutory purpose of s. 21; emasculates it; and restores the general discretion and flexibility in relation to funding that s. 21 was enacted to remove. Once that error is corrected, the illegality of the Decision, on the facts, becomes plain.

9. The phrase "*to be made available*" is clear and unambiguous: once specified those resources must be made available. That is the whole point of the legislative framework.

[1] Various figures have been raised during the proceedings and there were also cuts to revenue dedicated funding, but for the purpose of the appeal and for identifying the legal flaw in the WMS and the Judgment, TAN is content to proceed on the basis of just this £200m cut in capital funding for the last 2 years. See e.g. the discussion as to £225m and £179m in [J34-35].

10. On that interpretation, TAN's short case is that the SST cannot, outside the statutory variation process, decide not to make available the resources specified "*to be made available*" in the CWIS and the Decision is thus unlawful. He cannot have a statutory document which sets the resources to be made available and then outside that framework decide not to make those resources available.

11. In reaching his conclusion, the Judge impermissibly relied on what had happened in practice previously (with historic outturns exceeding the figure in CWIS1); and what could, as he held, happen under other funding heads in CWIS2. He also considered TAN's approach to be "*impracticable and unworkable*".[2] He further wrongly regarded the Dedicated Funding as a just a projection or estimate.

12. None of those matters, properly understood, go to the correct interpretation of s. 21. They elide the question of statutory interpretation with the application of s. 21 properly construed.

13. They further confuse and elide three possible situations in which the outturn sums at the end of the CWIS period might not be as specified in the CWIS: (1) where the SST decides to reduce the resources to be made available – the subject of this appeal; (2) where the SST decides to increase the resources to be made available; and (3) where, as is inevitable for long-term investment strategies, the vagaries of the timing of award of grants, of getting "spades in the ground" and of variations in expenditure, mean that the outturn is not as anticipated at the outset. The subject of this claim is just (1). It is not concerned with situations under (2) or (3) – and on a correct understanding there is no read across from those situations to the issue here.

14. This Skeleton Argument first addresses the question of statutory construction, before addressing the implications on the facts for this Decision. It is submitted that it is necessary to keep the two exercises separate and to address the construction issue first without being unduly influenced by the facts of this particular Decision and this particular CWIS, and the precise way it defined the resources to be made available.

[2] See Order – Observations on PTA para (1).

B. The correct interpretation of section 21 of the Infrastructure Act 2015

Section 21 and its statutory purpose

15. As the witness evidence for the SST made clear [JM9] and as the Judge appears to have accepted [J61], the vice to which S.21 was directed was the former, "*somewhat ad-hoc and piecemeal*" approach to cycling and walking investment with "*no clear long-term strategy*" and with the consequential negative consequences of "*stop - start*" funding [JM12].

16. That situation arose under the SST's pre-s. 21 generalised and unconstrained funding discretion – there having been no obligation on the SST to set any strategy or objectives or resources in respect of cycling and walking.

17. Parliament found that situation unsatisfactory and, thus, enacted s. 21.

18. The statutory purpose of s. 21 as revealed by its words was to reverse (or "*change*" [JM9]) the existing situation – to remove the generalised funding discretion and to replace it with a self-contained statutory scheme for setting the objectives and resources in a long-term strategy giving stability and certainty.

19. S. 21 provides, so far as relevant, as follows:

> ***(1) The Secretary of State may at any time –***
>
> > ***(a) set a Cycling and Walking Investment Strategy for England; or***
> > ***(b) vary a Strategy which has already been set.***
>
> ***(2) A Cycling and Walking Investment Strategy is to relate to such period as the Secretary of State considers appropriate; but a Strategy for a period of more than five years must be reviewed at least once every five years.***
>
> ***(3) A Cycling and Walking Investment Strategy must specify:***
>
> > ***(a) objectives to be achieved during the period to which it relates;***
> >
> > ***(b) the financial resources to be made available by the Secretary of State for the purpose of achieving those objectives***
>
> ***(4) The objectives to be achieved may include –***
>
> > ***(a)….***

(b) results to be achieved;

(c)…..

(5) Before setting or varying a Cycling and Walking Investment Strategy the Secretary of State must consult such persons as he or she considers appropriate.

(6) In considering whether to vary a Cycling and Walking Investment Strategy the Secretary of State must have regard to the desirability of maintaining certainty and stability in the respect of Cycling and Walking Investment Strategies.

(7) …

(8) Where a Cycling and Walking Investment Strategy has been published the Secretary of State must from time to time lay before Parliament a report on progress towards meeting the objectives.

(9) If a Cycling and Walking Investment Strategy is not currently in place, the Secretary of State must-

(a) lay before Parliament a report explaining why a Strategy has been set, and

(b) set a strategy as soon as may be reasonably practicable."

20. It is submitted that:

(a) the combined effect of s. 21(1) ("*may*") and s. 21(9)(b) is that the SST must "*set*" a CWIS, which is then to be reviewed, varied, or replaced. That effectively requires a chain of investment strategies such that there will continually be a CWIS in place – formalising the strategy for cycling and walking investment and replacing the former generalised discretion;

(b) a key purpose of s. 21 is to maintain "*certainty and stability*" (s.21(6)) in respect of the CWIS(s). Thus, the CWIS is not to be a short-term strategy – see e.g. s21(2), which allows for the CWIS to cover a period of more than 5 years. An "Investment Strategy" is further, by definition, relatively long-term. The statutory purpose of requiring the CWIS is to enable long-term planning and

capacity building, to provide the certainty and stability previously lacking. That was the whole point – to replace the ad hoc and piecemeal approach with a long-term strategy providing certainty and consistency;

(c) there is a statutory scheme for variation of a CWIS, its objectives and/or the resources to be made available. It requires consultation (s. 21(5)); and in exercising the variation power the SST has to have regard to the desirability of certainty and stability. The route to varying the objectives or the resources is by varying the CWIS – not by ad hoc funding announcements outside it. The former unconstrained discretion to make ad hoc changes to funding is (very deliberately) removed, but the ability to vary the objectives/resources if thought necessary or desirable is maintained through and in s. 21. The SST has not contended (and could not contend) that following the statutory variation process would have made no difference;

(d) in setting or varying a CWIS, the SST has flexibility as to what objectives to be set, but having set those he "*must specify*" the resources to be made available for the purposes of achieving those objectives during the period to which it relates: s. 21(3)(b). Where, as here, the SST's objectives include "*results to be achieved*" (s. 21(4)(b)), the resources specified must reflect that. The Parliamentary intent is clear – the resources to be made available by the SST must be set in the light of, and for the purpose of, achieving the objectives – the objectives and the resources are two sides of the same coin;

(e) the reporting to Parliament is limited to reporting on progress towards meeting the objectives – it is not relevant to the setting of the objectives or the specifying of the resources and does not indicate that the "*policing*" of s. 21 is for Parliament alone.

21. S. 21 thus achieves the statutory objective by replacing the former unconstrained approach with the requirement for a process involving a long-term, stable investment strategy that "*sets*" the objectives to be achieved and the resources "*to be made available*" subject to the statutory variation processes.

<u>The essential features of section 21</u>

22. The essential features of s. 21 are, thus, as follows.

23. First, it creates a self-contained statutory scheme replacing the former discretion with a mandatory framework, which delimits and defines the approach and the procedure to cycling and walking investment that the SST must adopt, and which excludes reliance on the former generalised discretion.

24. Second, it creates the CWIS as *the* statutory vehicle for determining the national objectives in respect of cycling and walking (or active travel - "**AT**") and the resources to be made available in respect thereof. It is here (and only here) where the objectives and the resources for cycling and walking investment are to be contained. The SST cannot act inconsistently with the CWIS on matters required to be covered by it.

25. Third, it defines the resources to be made available by the SST – not which might be made available, or which are intended to be made available subject to *ad hoc* changes as the SST might decide.

The correct interpretation of section 21(3)

26. The core point can be shortly stated.

27. The words of s. 21(3) – "*must* specify"; "objectives *to be achieved*" and "resources *to be made available*" – are clear and unambiguous and require no elaboration. They demonstrate, give effect to and secure the statutory purpose.

28. Those objectives and those resources are "*set*" (s.21(1)) – in other words fixed, decided or determined – through the CWIS.

29. They can then be varied through the statutory variation process – with the CWIS being amended.

30. All of this is a clear, uncomplicated self-contained statutory framework for addressing cycling and walking investment for the period covered by the CWIS to meet the statutory purpose of s. 21.

31. Subject to statutory variation of the CWIS, the role of the SST regarding financing is then to make available those resources – it is not to decide not to make those resources available.

32. Thus, essential to achievement of, and to give effect to, the statutory purpose, the SST is required to set the CWIS and as part of that to specify the objectives to be achieved and the resources to be made available. Once specified and unless varied under the

statutory scheme, the SST has no residual discretion to vary those matters. That is the essence of the statutory scheme and is the basic purpose of it.

The contrary construction

33. The SST contended that:

(a) there was no statutory obligation to comply with the CWIS (compare s. 3): [J52-53];

(b) s. 21 was a target duty [J53];

(c) that therefore, and fundamentally to this challenge, s. 21 did not preclude funding decisions other than through the mechanism of s. 21 [J53]; and

(d) once the nature of the s. 21 regime and the nature of active travel funding are considered, there is no inconsistency between CWIS2 and the Decision.

34. The Judge considered that the SST's construction was "*much to be preferred*" [J58], because:

(a) a strategy for investment in walking and cycling is not the same as a series of projects or a programme of works [J58];

(b) as other lines of funding in CWIS2 were not fixed, there is no reason for the dedicated funding to be in a fixed amount [J58];

(c) the relevant words meant "*intended to be made available*" rather than must be made available as a minimum, because the latter interpretation would condemn an underspend and not an overspend [J59];

(d) whilst the s. 21 purpose was acknowledged [J61], "*[i]t does not follow that s.21 requires a rigid adherence to a costed programme of works and projects. That would be difficult to deliver...*";

(e) TAN's interpretation could have adverse consequences [J62];

(f) the resources to be made available are estimates or projections, not ring-fenced spending commitments [J63]; and

(g) the variation process does not need to be used where there are changes to funding without any changes in the objectives [J63].

35. It is striking that nowhere does the SST (or the Judge):

(a) engage with the essential features of s. 21 set out above;

(b) engage with how TAN's interpretation embodied, reflected and secured the statutory purpose, whilst the SST's did not;

(c) articulate how the SST's interpretation was consistent with the statutory purpose rather than emasculating s. 21 and restoring the general funding discretion which s. 21 was designed to remove, directly contrary to that purpose; or

(d) engage with the import of the key words of s. 21: "*set*" the CWIS; "*must specify*"; "objectives *to be* achieved"; "resources *to be* made available" and how the interpretation contended for gave effect to those clear phrases – instead importing words and flexibility.

36. The approach to interpretation by the SST was confused and elided questions of interpretation with previous practice, what had happened in the past (including the exceptional pandemic era), the possible difficulties with TAN's interpretation and what might happen under other heads of funding. This was the wrong way round.

37. S. 21(3)(b) cannot be construed as meaning "intended to be made available". Such an interpretation would mean that the SST was free after setting the CWIS to later decide that the resources specified to be made available in it would not be made available. It also sits uncomfortably with the same wording in s. 21(3)(a).

38. That interpretation:

(a) is contrary to the clear words of s. 21(3)(b);

(b) is contrary to the structure of s. 21 – which has a clear and comprehensive self-contained framework for "setting" and then "varying" the CWIS;

(c) is inconsistent with the statutory purpose of s. 21(3)(b) – restoring the generalised funding discretion, which s. 21 was enacted to remove; allowing a return to the ad hoc and piecemeal approach, which s. 21 was enacted to reverse; undermining the certainty and stability and long-term strategy, which s. 21 was enacted to achieve; and creating a situation where the CWIS has no practical effect regarding the resources being capable of being superseded by ad hoc funding decisions outside of s. 21;

(d) would make the statutory duty in s. 21(3)(b) devoid of practical consequence. Once "set", the CWIS could then be treated as just a statement of intent at a particular point in time with the actual resources to be made available thereunder determined other than under it; and

(e) would thus emasculate s. 21(3)(b) and render the statutory variation process otiose (at least as far as resources were concerned).

39. Nor can the SST's case on the point at the heart of this proposed appeal be sustained. It is said that there is nothing to preclude funding decisions other than through the mechanism in s. 21. On a correct understanding of s. 21 and its purpose, that is precisely what s. 21 does and is designed to do if those other funding decisions mean that the resources previously specified to be made available by the SoS will no longer be made available.

Section 3 and "target duty"

40. The SST submitted that one ought to distinguish s. 21 from s. 3 – the road investment strategy ("**RIS**") – on the basis that s. 3 imposed a duty on the SST and the strategic highway company ("**SHC**") to comply with the RIS, and s.21 did not impose a similar duty thus leading to the submission that s. 21 was just a "target duty".

41. S. 3(6) was necessary, because there were two bodies covered by s. 3, the SST and the SHC. The RIS set the objectives for the SHC and the resources to be made available by the SST (s. 3(3)). It is not surprising that in that context it was considered necessary to expressly define on whom the duty to comply with the RIS fell. S. 3(6) was necessary to make clear that both the SST and the SHC were bound to comply with the RIS. There was no such similar need under s. 21 where the SST was the only party.

42. In any event, TAN's case is not dependent on the target/absolute duty distinction. TAN's case is that, as a matter of statutory construction, the CWIS must specify the resources to be made available and the SST cannot outside that framework decide that those resources will not be made available. That submission does not turn on a target/absolute duty distinction.

43. However, if and to the extent necessary to sustain the appeal, TAN does contend that s. 21 did not just impose a target duty. The words are clear and precise and amount to language imposing an imperative to ensure the achievement of the objectives and the

making available of the resources: cf *R (AA) v NHS Commissioning Board* [2023] PTSR 2001, [2023] EWCA Civ 902 @ [87-90].

The legal consequences of the correct interpretation

44. The Judge's analysis turned on his interpretation of s. 21. If that interpretation is wrong, the consequences are as follows.

45. First, where Parliament has imposed on the SST a duty to do a particular act in a particular way or through a particular framework, that act can then only be done under that statutory scheme and the SST cannot act inconsistently with, or outside, it: see by analogy, *R v Home Secretary ex p Fire Brigades Union* [1995] 2 AC 513 (HL) @ 551C - 552F and 576F. In that case Parliament enacted a new (more generous) criminal injury compensation scheme to be brought into force on a date to be fixed by regulations made by the Secretary of State. The Secretary of State decided not to bring the statutory provisions into force and, instead, to adopt a non-statutory scheme less generous than, and inconsistent with, the statutory scheme. He then relied on the non-statutory scheme as the reason for not bringing the statutory provisions into force. That was unlawful. The Secretary of State had a continuing duty to consider exercising the power to bring the statutory scheme into force and he could not adopt a non-statutory approach inconsistent with that duty:

(a) Per Lord Brown Wilkinson at 151C: *"it cannot have been the intention of Parliament to leave it to the discretion of the Secretary of State as to whether to effect such important changes*"; @ 152D - "*most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament expressed in a statute…*"; @ 152F "*…if Parliament has conferred on the executive statutory powers to do a particular act, that act can only thereafter be done under the statutory powers so conferred; any pre-existing prerogative power to do the same act is pro-tanto excluded*"

(b) Per Lord Nichols @ 575H – 576A – "*This statutory duty is not devoid of practical consequence. By definition, the continuing existence of this duty has an impact on the Secretary of State's freedom of action. Since the legislature has imposed this duty on him, it necessarily follows that the executive cannot*

exercise the prerogative in a manner, or for a purpose, inconsistent with the Secretary of State continuing to perform this duty."

46. Those principles are of general application, apply here and the current situation is even stronger than there. The resources to be made available are "*specified*" and "*set*" under statutory scheme; the Decision was made outside the statutory scheme not to make available those resources; the Decision rather than the statutory CWIS now sets/specifies the resources be made available; and there are two inconsistent positions – the statutory CWIS and the non-statutory Decision in conflict and directly inconsistent with it. That is unlawful.

47. Second, where a statutory document is required to "*set*" the "*resources to be made available*", there is no scope for the SST to have a contrary position outside the statutory document. Where statute requires X to be addressed in a statutory document, it must be addressed there and not elsewhere. *Great Portland Estates v. Westminster City Council* [1985] AC 661 concerned Westminster's development plan. The inspector reporting on it had recommended that the plan include policy on when offices might be permissible outside the Central Activities Zone. The Council decided, however, to address that issue under guidance outside the statutory development plan. It could not do so. Sch 4 para 11(2) TCPA 1971 provided that the "*plan shall formulate in such detail as the council think appropriate their proposals for the development… of land in the area*" – a similar duty to that in s. 21. Lord Scarman @ 674E held that "*If a local planning authority has proposals of policy for the development and use of land in its area which it chooses to exclude from the plan, it is, in my judgement, failing in its statutory duty in the area*".

48. Here where the SST wishes to vary the CWIS by varying the resources to be made available, the scheme requires that to be done through the statutory variation processes. If that process is not followed, the result would be, as here, that the CWIS would set the resources to be made available, but the resources actually being made available would bear no resemblance to that and would be divorced from and determined independently of the CWIS.

49. Third, the objectives (including results) to be achieved and the resources to be made available for the purpose of achieving those objectives are two sides of the same coin. It is not possible to vary one element without considering the implications for the other. That is why the statute has review (varying) provisions – so that if circumstances

change (either as to objectives and/or resources) the implications for the long-term strategy are considered and addressed as a coherent whole and not as if they were independent variables. Variation could also be used in circumstances where it becomes clear that the existing resources are inadequate for the existing objectives.

C. Application of the correct interpretation to the facts

Essential facts

50. The facts are adequately summarised in [J5-39]. For the purposes of the ground now pursued the essential facts can be summarised as follows:

(a) In October 2021, a spending review identified that £710m would be provided by way of dedicated funding for AT in the three-year period ending March 2025 [J11].

(b) CWIS2 was published on 6 July 2022. The Court is respectfully invited to read section 2 – "*Financial resources, performance monitoring and governance*" up to table 1. There were multifarious sources of funding as explained in [J16]. The "*resources to be made available by the Secretary of State*" specifically for active travel with which this appeal is concerned is the Dedicated Funding - line 1 in table 1. Whilst other lines were necessarily projections/estimates given the subject matter, and the fact that they were not dedicated funds, but projected elements of more general pot (see [J19] and the footnotes there referred to), the dedicated funds were not estimates. The (corrected) figure of £1,073m included the £710m for the last three years referred to above: see [JM35] and table 1 and the £300m for capital in the last two years was a fixed part of that.

(c) Those sums were not identified for specific projects or a specific programme of works – they were dedicated for the purpose of meeting the AT objectives and, as made clear in CWIS2, would be provided to local authorities via grants through Active Travel England ("**ATE**") to be spent by them on a wide variety of AT initiatives including capital infrastructure;

(d) In November 2022, the Autumn Statement made clear the need for significant reductions in public expenditure [J22].

(e) The SST carried out a review of all expenditure heads including the AT Dedicated Funding.

(f) Initially, it was concluded that there should be no reduction in the dedicated funding, but at the last moment the Decision was made [J32].

(g) The CWIS was not varied and the statutory variation process was not followed.

(h) The CWIS was republished the next day to correct a double counting error in line 1 of table 1, but the updated CWIS2 of that date specified the resources to be made available in the sum of £1,073m (including the £710m, and £300m already referred to).

Key features of the factual matrix

51. *Costed Programme of Works?* S. 21 does not require and CWIS2 did not set out a costed programme of works. It required the objectives to be specified and the resources to be made available for the purpose of achieving those objectives to be specified. It was a strategy for investment [J58]. That basic fact gives the SST flexibility to change priorities over time – to allocate AT grants differently from previously – to address the sort of issues raised in [J62]. That is a matter of the allocation of the dedicated funds and not about changing the quantum of those funds.

52. *Dedicated Funding an Estimate?* The Dedicated Funding is expressly and by definition not an estimate. The later lines of table 1 are but that is an inevitable consequence of the subject matter of those lines. They cover non-dedicated funds where AT will be just an element of the projects – so for example an improved pedestrian crossing as part of a town regeneration scheme. Given that those lines are not ring fenced, CWIS2 made projections as to what element of the total "pots" would be spent on AT "*calculated using a range of evidence and data sources. This includes funding allocations previously announced, successful funding proposals from local bodies, previous research, historical trends and an assessment of the proportion of investment into active travel projects and programmes from wider government funds*" (see CWIS2 - "*Total government funding for active travel*"). Whether this approach is consistent with s. 21(3)(b) is not the subject of this challenge. The "dedicated" funds as the name suggests were not an estimate or projection and were ringfenced.

53. *Projections and outturns*:

(a) For lines 2 and 3 of table 1 – given they are projections, the outturn may (indeed almost inevitably will) be different from the projection;

(b) As to the outturn on dedicated funding, given the inevitability of the timing of grant allocations, getting "spades in the ground" and expenditure being incurred it is inevitable that the outturn in any particular period will not precisely correspond with the dedicated funds allocated for that period. That is a delivery issue and not a resource allocation issue.

54. *CWIS Overspend:* It is of course the case that in the CWIS1 period, the outturn was dramatically higher than the figures specified in CWIS1 [J15]. The resources specified in CWIS1 were thus made available in accordance with s. 21 and the Government went further and made additional resources available. There is nothing in s. 21 expressly to prevent a government acting consistently with it – by making available the resources specified in it – and going further than it under its general resource allocation powers. That discretion does not appear to be excluded by s. 21. There is no inconsistency with the CWIS by going further than it. However, the legality (or not) of the historic *overspend* is of no assistance in addressing the facts here – where the Decision is directly inconsistent with CWIS2 and where the resources specified as to be made available, will not (under the Decision) be made available.

55. *The Inconsistency*: The inconsistency here between CWIS2 and the Decision is made plain by the Updated CWIS2 published the next day. The dedicated funding continues to be identified in the sum of £300m, but the Decision means that the funding to be made available will now be (at least) £200m less than the £1,073m set out. It is said that there may be potential scope to catch up later. That may be so, but the purpose and effect of the Decision (until any catch-up funding is awarded) is inconsistent with CWIS2; there is no evidence and no suggestion that the £200m will be made up for under other lines; and any catch up will be dependent on a future decision. The legality of the Decision falls to be considered on the facts as they stand and not as they may in the future turn out to be.

The SST's case and the Judge's reasoning beyond the interpretation issue

56. The SST contended that:

(a) the Decision was a high-level resource allocation decision in respect of which a low intensity of review or light touch approach is required [J51];

(b) that the reduction was a small proportion of the whole [J51];

(c) s. 21 did not require a mandatory programme of works [J53] in contrast with s. 3 [J52];

(d) funding of AT is complex, cross-departmental and unpredictable and multifarious [J55];

(e) CWIS2 only set out estimates or projections [J54] which could change and it is impossible and unrealistic to suppose that available funding levels may not be subject to change during the period of a CWIS [J56-57].

57. In response:

(a) the resource allocation decision is required to be made in the CWIS and in any variation to it. The statute has removed the wide discretion regarding resource allocation outside the s. 21 framework. That was the basic purpose of s. 21 – to ensure that AT funding was not subject to ad hoc, piecemeal funding decisions, to create a long-term strategy to avoid stop-start problems and to create certainty and stability;

(b) the fact that the reduction is a small proportion of the whole is of no relevance. First, that claim is not comparing like with like. The reduction is admitted to be 65% of the capital dedicated funding for the last two years, affecting the certainty and stability, such as by meaning active travel staff of local authorities may no longer be funded. Second, no "no difference" case under s. 31(2A) of the Senior Courts Act 1981 is raised. Third, there is no evidence that the reduction is compensated for by corresponding uplifts elsewhere;

(c) it is correct that s. 21 does not require a programme of works. It is concerned with funding to achieve the objectives. The point goes nowhere;

(d) funding of AT for non-dedicated funds is complex, cross-departmental, unpredictable and multifarious. That is why lines 2 and 3 are projections. That point simply serves to elevate the s. 21 significance of the dedicated funding, which is a dedicated pot to be provided to local authorities specifically for

cycling and walking projects, and which is the only certain funding source. There is no complexity as to the sum or the purpose. Of course allocations require judgements to be made but the complaint here is about the prior stage;

(e) the line is not an estimate or projection and there is nothing unrealistic in expecting the government to make available those resources its CWIS says will be made available.

58. The Judge identified practical difficulties with precision in the sums, and in allocation of funds. It is not suggested that the outturn will be precisely the same as the resources specified to be made available in the CWIS or that any disparity in outcome from the CWIS figure would be unlawful. The illegality here is at an earlier stage – it is consciously deciding not to make available the resources specified to be made available in the CWIS.

Conclusion

59. The appeal should be allowed with costs. The Court should declare that the SST is not entitled to set resources to be made available for cycling and walking investment inconsistent with the resources identified in the CWIS and should quash the WMS to the extent that it has that effect.

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1 October 2024