

IN THE COURT OF APPEAL

ON APPEAL FROM

THE ADMINISTRATIVE COURT (KERR J [2024] EWHC 1405)

BETWEEN:

THE KING

(on the application of TRANSPORT ACTION NETWORK LIMITED)

Appellant

-v-

SECRETARY OF STATE FOR TRANSPORT

Respondent

RESPONDENT'S REPLACEMENT SKELETON ARGUMENT

7 JANUARY 2025

ASkA/# refers to paragraph numbers of the Appellant's skeleton argument dated 1 October 2024

J/# refers to paragraph numbers of the judgment of Kerr J

CB/##/## and **SB/##/##** refer to tab and pages numbers of the core and supplementary bundles for the appeal hearing

A. INTRODUCTION

1. The Respondent, the Secretary of State for Transport, resists the Appellant's appeal against the decision of Kerr J dated 11 June 2024 [CB/4/37]. The Judge dismissed the Appellant's claim for judicial review of the Respondent's decision, communicated in a written ministerial statement to Parliament of 9 March 2023, to reduce funding for active travel ("AT"), the principal elements of which are cycling and walking [CB/22/228].
2. Permission was originally refused on the papers by Lang J on 5 July 2023 [CB/9/67] but granted by Jay J on 26 October 2023 after an oral hearing [CB/7/62]. Lewison LJ

granted permission to appeal against Kerr J's decision on 16 September 2024 [CB/3/36].

3. A number of grounds were advanced before the Judge. Only one is pursued on appeal, alleging that the Judge erred in finding that the Respondent's decision was compatible with s.21 of the Infrastructure Act 2015 and the Second Cycling and Walking Investment Strategy ("CWIS2") [CB/11/82].
4. The ground of appeal is not made out. The Judge was right to find that s.21 requires a CWIS to specify the financial resources which the Secretary of State intends to make available for the purpose of achieving the strategy's objectives, rather than imposing a mandatory obligation on the Secretary of State to make those resources available. The resources to which s.21 refers, and which are specified in CWIS2, are necessarily projections and estimates. The Respondent's decision of 9 March 2023 was not inconsistent with either s.21 or CWIS2.

B. LAW

5. Section 21 of the 2015 Act provides (bold emphasis added):

"21 Cycling and Walking Investment Strategies

- (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, and**
 - (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) activities to be performed;**
 - (b) results to be achieved;**
 - (c) standards to be met.**
- (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 respect of Cycling and Walking Investment Strategies.

(7) A Cycling and Walking Investment Strategy must be published in such manner as the Secretary of State considers appropriate.

(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 its 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 not been set, and

(b) set a Strategy as soon as may be reasonably practicable.”

6. There is no prior case law on s.21. Section 3 of the 2015 Act contains a similar legislative framework for road investment strategies. Section 3 was considered in *Transport Action Network v SST* [2022] PTSR 31, in which Holgate J emphasised the status of the document as an investment strategy at [126] (emphasis added):

“126. In this connection Mr. Wolfe QC sought to lay emphasis on the requirement in s.3(6) of the IA 2015 for the SST and HE to comply with RIS 2. **But that is a requirement of a general nature addressed to a strategy as whole. It promotes the delivery of the projects identified in a strategy, but it does not create an absolute obligation that each such project must be carried out.** The strategy may be varied. RIS 2 itself is expressed in terms of the 5 year period during which construction is expected to start, but some schemes are not expected to start within that timescale. Furthermore, schemes which cease to be deliverable, for example by failing the process for obtaining planning approval or which cease to offer "sufficient value for money" will be reconsidered (p. 91). A scheme will only remain in the strategy if public investment is justified. **Fundamentally, RIS 2 remains an investment strategy.**”

7. The Respondent’s decision to reduce AT funding was a high-level resource allocation decision. Such decisions involve the exercise of a broad discretion involving numerous and competing policy and public interest considerations. The courts have held that they are inherently less susceptible to judicial review as a result. As Lord Neuberger observed in *R (Rotherham MBC) v Secretary of State for Business, Innovation and Skills* [2015] PTSR 322 (a case concerning distribution of European Union funding between different parts of the UK) at [62-63]:

“62. The importance of according proper respect to the primary decision-making function of the executive is particularly significant in relation to a high level financial decision such as that under consideration in the present case. That is because it is a decision which the executive is much better equipped to assess than the judiciary, as (i) it involves an allocation of money, a vital and relatively

scarce resource, (ii) it could engage a number of different and competing political, economic and social factors, and (iii) it could result in a large number of possible outcomes, none of which would be safe from some telling criticisms or complaints.

63. Therefore, like Lord Carnwath JSC, I agree with the Court of Appeal that the Secretary of State's decision under consideration in this case is in the “classic territory” where the courts afford the decision-maker “a wide margin of discretion”. ...”

8. Similarly, in *Friends of the Earth v SSBEIS* [2023] 1 WLR 225 at [194] Holgate J observed that the Court’s response to a rationality challenge to policy decisions involves:

“a low intensity of review, or a “light touch”, a fortiori in relation to policies of a high level, strategic nature”.

C. FACTS

9. The facts are set out in detail by the Judge ([5]-[39] [CB/5/39-48]) and in the witness statement of Jessica Matthew, Co-Director for Local Transport at the DfT, dated 30 November 2023 [SB/3/32]. Parts of the factual background are no longer relevant given the narrowing of the grounds.
10. In summary, prior to 2015 funding for AT was more ad hoc and piecemeal. This changed with the coming into force of s.21 of the Infrastructure Act 2015 which required the Government to set out a CWIS.
11. Since 2015, there have been two statutory CWISs. CWIS1 covered the period 2016/17 to 2020/21 and was published in April 2017 following public consultation [SB/7/66]. CWIS2 was published in July 2022 and covered the period 2021/22 to 2024/25 [SB/1/3].
12. CWIS1 and CWIS2 have each been broadly aligned with a Spending Review period as a way of providing as much certainty in relation to funding as possible. The 2021 Spending Review (“SR21”) considered the amount of dedicated funding that should be made available for AT over the years 2022/23 to 2024/25. That informed the statement of financial resources in CWIS2.
13. Funding for AT is complex. It comes from a wide range of dedicated and non-dedicated funds from across Government, with the dedicated funding (the subject of the changes

in the WMS) making up only a relatively small percentage of the total. In practice the overall quantum of funding fluctuates over the period of a CWIS as new funding competitions are announced either by the DfT or other Government Departments or as it becomes clearer how much funding from existing wider funding streams is being spent on AT.

14. On 22 November 2022 the Chancellor announced in his Autumn Statement that Government Departments, including the DfT, would be required to identify savings to manage inflationary and other pressures. In response the DfT commenced a comprehensive review of all its future spending plans. The review process included a number of Ministerial meetings between December 2022 and March 2023 at which options for savings across different parts of the DfT's portfolio were discussed.
15. The final ministerial submission was dated 9 March 2023 [CB/23/231]. It noted that the DfT faced very significant pressures across a number of its capital programmes over the next two financial years. The submission advised that a way forward had been found following discussions with HM Treasury which reduced the total amount of pressure on DfT funding through additional funding in relation to HS2 Phase 1 but which required savings to be made across a number of other DfT programmes, principally in relation to strategic roads, rail and other phases of HS2, but which also included AT.
16. Annex A to the submission set out the full package of proposed savings [CB/23/233]. It included £100m capital savings against AT funding in the years 2023/4 and 2024/25. The total DfT wide savings identified in the submission over those two years was just over £3 billion.
17. The Respondent set out future funding plans in the WMS. The Respondent outlined reductions in spending on, and deferrals of, many schemes and programmes across a wide range of departmental capital spending programmes, in particular, in relation to strategic roads, rail and HS2.
18. The DfT's revenue funding budgets were under particular pressure in March 2023 as a result of the support package for the bus sector which was announced at that time. AT funding was one of several areas that saw its revenue budget reduced. It was reduced by £25 million in 2023/24. This decision was finalised on 27 March 2023 as part of the finance business plan for the 2023/2024 financial year.

19. Taken together, the reduction of up to £200 million in dedicated capital funding for AT over the two years 2023/24 and 2024/25 and the reduction of £25 million in dedicated revenue funding for AT in the year 2023/24 amounted a total reduction in dedicated funding for AT of up to £225 million compared to the SR21 baseline. However, some capital funding was able to be moved from 2021/22 into 2022/23 through the annual budget management process, with the outcome that the total reduction in funding across the three remaining years of the SR21 period compared to the baseline was £179 million.
20. CWIS2 was reissued on 10 March 2023 [SB/2/16]. This was to remove an error in the amount of funding available which had included a £225m double counting error. This was not a substantive change but a correction. The fact that this was done at around the same time as the publication of the WMS was coincidental and the two are not related.
21. Following the correction, Table 1 in CWIS2 provides a projected investment figure for the four years from April 2021 for AT revenue and capital funds (i.e. the dedicated DfT funding for AT) of £1,073 million and total funding of £3,559 million [SB/2/28].
22. In respect of CWIS3, an announcement will be made in 2025 as to the timeframe for its production.

D. RESPONSE TO GROUND OF APPEAL

23. The single ground of appeal [CB/11/82] comprises three elements, alleging that:
 - a. the Judge erred in his interpretation of s.21;
 - b. the Respondent's decision of 9 March 2023 was "unlawfully inconsistent with s.21";
 - c. the Respondent's decision of 9 March 2023 was "unlawfully inconsistent with ... CWIS2".
24. The first two elements concern the interpretation of s.21. The third element concerns the interpretation of CWIS2.

25. On all three matters, the Judge was correct for the reasons he gave. The Judge did not misinterpret s.21 or CWIS2, and the Respondent's decision of 9 March 2023 was not inconsistent with s.21 or CWIS2.

The correct interpretation of section 21

26. Section 21 for the first time required a statutory strategy to be set for investment in cycling and walking. It did so against the background of funding for cycling and walking having previously been more ad hoc and piecemeal, as explained in Jessica Matthew's witness statement (para. 8) [SB/3/33].
27. The purpose of s.21 was to produce a structured and coherent approach to AT funding (J/61 [CB/5/51]), but the precise content of the s.21 duty depends on its terms. It contains high-level requirements framed in a non-prescriptive way.
28. Section 21(3) prescribes what the strategy is to contain, namely objectives to be achieved and financial resources to be made available. It is no more prescriptive than that.
29. Section 21 is concerned with the setting of an investment strategy. That terminology does not imply a rigid set of constraints. Section 21 requires forward, longer-term planning to take place, but does not prescribe how any strategy is to be implemented over time: see Holgate J's remarks concerning the s.3 duty to set a road investment strategy in *Transport Action Network v SST* [2022] PTSR 31 ("TAN1") at [126], set out above.
30. The CWIS must specify resources to be made available (s.21(3)(b)), but the statutory language and context make clear that these are not legally binding, ring-fenced spending commitments (J/63). On a proper interpretation, the words "to be made available" in s.21(3) mean "intended to be made available", as the Judge held (J/59) [CB/5/51].
31. Section 21 does not include a statutory obligation to comply with the strategy. This is in contrast to s.3, which imposes an express duty to comply with the road investment strategy: "The Secretary of State and the [strategic highways] company must comply with the Road Investment Strategy" (s.3(5)). Public law controls will generally require the Respondent to act in accordance with her own policies and strategies, subject to having a good reason not to do so. However, it follows *a fortiori* from Holgate J's

remarks about s.3 that s.21 does not deprive the Respondent of the power or discretion to make decisions about funding in respect of walking and cycling other than through the s.21 mechanism (i.e. by varying an existing CWIS or adopting a new one). The fact that the statute contains a discretionary power to vary a CWIS (s.21(1)(b)) and specifies requirements to be observed when doing so (s.21(5)-(6)) does not mean that the Respondent is prevented from making any decisions in respect of AT funding other than by formally varying the CWIS. Section 21 gives no indication that it is intended to impose such a comprehensive and far-reaching legal constraint on ministerial decision-making.

32. As the Judge observed, the variation procedure may be apt where, for example, the minister wished to change the direction of government policy (J/63), but that is not what was taking place in the present case [CB/5/51].
33. The Appellant does not (and could not) dispute that, subject to its case on s.21, the Respondent has power to make decisions as to AT funding. Supply and Appropriation Acts, enacted annually, provide legal authority for public expenditure by each government department on activities identified in the Act. Further, the Secretary of State, as a minister of the Crown, has power to conduct the ordinary business of government: see *Shrewsbury and Atcham BC v Secretary of State for Communities and Local Government* [2008] 3 All ER 548 per Carnwath LJ at [44-49] and Richards LJ at [72-77].¹ It is equally well-established that the Secretary of State's powers may be excluded or limited by a statutory scheme covering the same subject matter: *Shrewsbury* at [50] per Carnwath LJ. This 'inconsistency principle', as Carnwath LJ termed it, has no application in the present case. For the reasons set out above, the Secretary of State's decision to reduce AT funding was not inconsistent with the s.21 duty to set an investment strategy, and s.21 cannot be read as curtailing the Secretary of State's power to make such decisions.
34. The case law relied on by the Appellant turns on the specific statutory schemes which those cases concern. It does not assist in understanding what s.21 involves. In particular:

¹ See also Wade & Forsyth's *Administrative Law* (12th ed.) at p.38-39 and *R (New London College Ltd) v SSHD* [2013] 1 WLR 2358 per Lord Sumption at [28].

- a. In *R v Home Secretary ex parte Fire Brigades Union* [1995] 2 AC 513,² statute prescribed an approach to calculating compensation for criminal injuries, but the Secretary of State brought into force a separate scheme under prerogative powers which provided for a different approach to calculating compensation. The House of Lords held that the Secretary of State had frustrated the will of Parliament (e.g. per Lord Browne-Wilkinson at 551-552). Section 21 of the 2015 Act is plainly not so prescriptive. It requires the Secretary of State to set an investment strategy which specifies financial resources, but does not prescribe what level of resources the strategy is to specify or whether or how those resources have to be spent.
 - b. In *Great Portland Estates v Westminster City Council* [1985] AC 661,³ statute required that a local development plan contain the Council's proposals for the development and use of land. The House of Lords held that, in excluding policies relating to the development and use of land from the local plan and instead including them in non-statutory guidance, the Council was in breach of its statutory duty (per Lord Scarman at 674). Again, that is not analogous to the present case. By producing CWIS2, the Respondent complied with the s.21(3) duty, and the Appellant does not suggest otherwise. Section 21 does not expressly or implicitly prevent the Respondent making the subsequent funding decision of 9 March 2023.
35. The Appellant further relies on the provision in s.21(3)-(4) that a CWIS must specify "objectives to be achieved" which "may include ... results to be achieved" (ASkA/20(d) [CB/1/8]). That language is consistent with both Kerr J's observations at J/61-63 [CB/5/51] and Holgate J's observations in TAN1 at [126]: the inclusion of objectives to be achieved in a strategy does not necessarily mean that they will or must be achieved.
36. The Appellant's case is entirely focused on dedicated funding for AT. That phrase or concept has no basis in s.21. Section 21 simply refers to "the financial resources to be made available by the Secretary of State". That deals with funding on an overall basis.

² Relied on at ASkA/45 [CB/1/13].

³ Relied on at ASkA/47 [CB/1/14].

37. The obligation in s.21(3)(b) is to specify financial resources to be made available “by the Secretary of State”. The office of the Secretary of State is one, notwithstanding the division of responsibilities between government departments.⁴ Accordingly, cross-government funding falls within s.21(3)(b).
38. The requirements of s.21(8)-(9) to report periodically to Parliament on progress towards meeting the CWIS’ objectives creates political accountability. That accords with the absence of a legally enforceable duty to meet objectives and comply with the CWIS (J/61 [CB/5/51]). There have been two such reports to date, in February 2020 and July 2022.⁵
39. Section 21 should not be construed so as to operate in an impractical way. That would be the effect of the Appellant’s interpretation, as recognised by the Judge (J/61-62 [CB/5/51]). In particular:
 - a. As explained by Ms Matthew, the nature of AT funding is such that:

“In practice the overall quantum of funding is bound to fluctuate over the period of a CWIS as new funding competitions are announced by other parts of the Department for Transport and other Government Departments, or as it becomes clearer how much funding from existing wider funding streams is being spent on active travel. (For example, if a funding stream relies on competitive bids from local authorities, it cannot be known at the outset what proportion will be spent on active travel, as that will only be clear once the bids are evaluated.)”⁶

The figures in a CWIS are therefore necessarily projections. The situation in respect of CWIS1 is illustrative (and not, contrary to ASkA/54, of no assistance [CB/1/17]). CWIS1 set out a figure of £1.182bn for estimated Government investment in walking and cycling (Table 4, para. 2.43 [SB/7/88]). That turned out to be a significant underestimate: the July 2022 report to Parliament estimated that around £3.245bn was invested in walking and cycling over the CWIS1 period (para. 3.4 [SB/9/149]).

⁴ See *Halsbury’s Laws of England, Constitutional and Administrative Law* (Volume 20 (2023)), para. 152 (Office of Secretary of State) and the definition of “Secretary of State” in Sch. 1 to the Interpretation Act 1978.

⁵ Jessica Matthew witness statement para. 21 [SB/3/36].

⁶ Witness statement para. 19 [SB/3/35].

- b. The Appellant's approach is incompatible with this reality. Funding would remain fixed, even though in reality the amount to be spent would depend on the outcome of competitions for funding and the ways in which wider funding streams ended up contributing to AT infrastructure.
- c. The Appellant's approach is to treat the statement of financial resources required by s.21(3) as if it related to a costed programme of works, which could be identified with certainty. That entirely misunderstands the nature of the CWIS as a high-level investment strategy stretching over a period of years, which is dependent on a large number of existing and emerging funding streams and project-specific investment decisions.
- d. The Appellant's approach of requiring rigid adherence to all the estimated figures in the CWIS2 would remove valuable flexibility and responsiveness. As the Judge explained:

“A minister should be able to change her or his mind about how much to spend in an area that may turn out to be benefitting disproportionately, or suffering disproportionately, compared with others. TAN's interpretation would make that difficult: the amount of dedicated funding down to the end of the CWIS period would have to remain constant, even if the rationale for the resourcing decisions at the start of the period had materially changed.” (J/62 [CB/5/51])

- 40. The Appellant fails to take account of the fact that if the statement of financial resources was construed as containing legally binding and fixed spending commitments, the adequacy of expenditure could not be judged until the end of the period for the CWIS, because only then would it be possible to know whether the resources had in fact been made available (J/59 [CB/5/51]).

The correct interpretation of CWIS2

- 41. In addition to challenging the Judge's interpretation of s.21, the appeal challenges the Judge's interpretation of CWIS2.⁷ The appeal goes beyond a pure issue of statutory interpretation.

⁷ See the allegation in the Ground of Appeal that the Respondent's decision was “unlawfully inconsistent with ... the Second Cycling and Walking Investment Strategy” [CB/11/82].

42. The Judge made no error in respect of the interpretation of CWIS2. The Judge was right to conclude that CWIS2, properly understood, sets out estimates or projections of available funding rather than fixed amounts (J/58 [CB/5/51]).
43. CWIS2 specifies the financial resources to be made available for the purpose of achieving objectives, in accordance with s.21. CWIS2 states the following in respect of total funding (with underlining added) [SB/1/12-14]:

“Total government funding for active travel

Table 1 provides an estimate of the total financial resources across government that may be invested in active travel over the 4-year CWIS2 period between April 2021 and March 2025. Many of the decisions on the allocation of these funds will be made by the relevant local body in line with local priorities, while ATE will ensure that relevant quality standards are met.

The projected investment has been 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.

This follows previous approaches to estimating the financial resources available in CWIS1 and the CWIS report to Parliament published in February 2020.

These figures will be updated in future statutory reports to Parliament to reflect further investment from a range of emerging funding streams from policy areas including public transport, housing and sport.

Table 1: total government funding

Funding source	<u>Projected investment</u> from April 2021 to March 2025
Active travel revenue and capital funds	£1,298 million
Wider DfT programmes ^[footnote 8]	£1,328 million
Other central government funding ^[footnote 9]	£1,158 million
Total	£3,784 million

[Footnotes]

8. Includes National Highways Designated Funds and estimates of the proportion of spend on active travel from the CRSTS fund, Integrated Transport Block (11%) and Highways Maintenance Fund (9%).

9. Includes estimates of the proportion of spend on walking and cycling from other central government funding sources including the Levelling Up Fund,

Future High Streets Fund and Towns Fund. Estimates are based on a review of successful funding proposals.”

44. It is clear from the above that what is provided is:
- a. **a total figure** – three funding categories are identified, but in the context of providing an overall statement of “the financial resources to be made available”, in accordance with s.21(3); and
 - b. **an estimate** – in particular, the figure is based on projections which will be updated in reports under s.21(8) to Parliament.
45. CWIS1 similarly set out “Estimated Government investment in walking and cycling” (Table 4 and para. 2.43), based on a range of cross-government funds and programmes (paras. 2.11 – 2.47) [SB/7/78-88].
46. This approach in CWIS1 and CWIS2 reflects the complex reality of AT funding [SB/3/33]. It is cross-governmental in nature, more so than is the case in respect of, for example, rail or road funding.⁸ Accordingly, section 2 of CWIS2 identifies various AT funding streams: “dedicated DfT Funding for active travel”; “wider DfT programmes”; and “other central government funding, which delivers active travel infrastructure or behaviour change”. Section 2 also lists various funds and programmes from across government which contribute to AT funding and delivery.⁹
47. The Cycling and Walking Investment Strategy Report to Parliament 2022 likewise refers to a “range of funds from across Government” supporting AT (para. 3.3), itemises them for the period April 2016 to March 2021 (Tables 1 and 2) and explains that (para. 3.1):
- “The Department has worked closely with other government departments to ensure that relevant place-based funds can be used to support walking and cycling, as well as assisting with assessing bids for funding to ensure proper consideration is given to these elements of the bids.” [SB/9/149-151]

⁸ By way of comparison, the budget for the Road Investment Strategy comes largely from one dedicated funding stream, Designated funds - National Highways.

⁹ Including: City Region Sustainable Transport Settlements (“CRSTS”); National Highways designated fund; Integrated Transport Block funding; Highways Maintenance Block funding; Levelling Up Fund; Future High Streets Fund; Towns Fund [SB/1/11-12].

48. CWIS2 includes provision for performance monitoring. That assumes that CWIS2 is sufficiently flexible to respond to performance monitoring as required (J/62 [CB/5/51]).
49. Accordingly, CWIS2 is very clear that the financial resources that it sets out are an estimate of the total figure which may be invested in AT up to March 2025. It is self-evident that funding over a medium-term period such as the CWIS2 period might change.

Response to the Appellant's case

50. The Judge's interpretation of s.21 was correct and the Judge correctly found that the Respondent's decision of 9 March 2023 was not inconsistent with s.21 or CWIS2. The Appellant is wrong to suggest otherwise.
51. The Appellant's argument rests on interpreting the words "to be made available" in s.21 as meaning "must be made available" (ASkA/9 [CB/1/4]). That is to re-write the statute. It turns a duty to have a strategy setting out financial resources to be made available into a strict duty to make all those resources available.
52. The Appellant is incorrect to suggest that the Judge's interpretation undermines section 21 (ASkA/35 [CB/1/11]). As the Judge recognised, the purpose of s.21 is "to produce a structured and coherent approach to active travel funding" (J/61 [CB/5/51]). The Judge's interpretation is entirely consistent with that purpose. A duty to have a strategy setting out resources to be made available provides structure and coherence. It is not the case that structure and coherence can only be achieved by means of an absolute duty to make the identified funding available. The Judge's interpretation plainly does not make the statutory duty "devoid of practical consequences", or the CWIS of "no practical effect", contrary to ASkA/38(b)-(c) [CB/1/11].
53. The Appellant's suggestion that s.21 "creates a self-contained statutory scheme", the effect of which is "to preclude funding decisions other than through the mechanism in s.21" (ASkA/23 and 39 [CB/1/9;12]), significantly overstates the effect of the duty. Removing ministerial discretion to make funding decisions would require clear wording, which s.21 does not contain.

54. The Appellant's position is internally inconsistent. The Appellant accepts that the second and third lines of the financial resources table in CWIS2 are not fixed, and indeed cannot be fixed because of the nature of funding in those lines (ASkA/52 [CB/1/16]). That is an acceptance that s.21 allows for adoption of a CWIS that includes estimated figures, which are subject to change. It is inconsistent of the Appellant to argue that in respect of AT dedicated funding s.21 requires something different, especially when s.21 draws no distinction between dedicated and non-dedicated AT funding. As the Judge said, there is no reason why the first line should be fixed given that the second and third lines are not (J/58 [CB/5/51]). The actual position, which is entirely consistent with s.21, is that CWIS2 as a whole provides an estimate of funding based on projections, to be updated in reports to Parliament.
55. The amount and timing of AT spending depends on decisions by various central and local government bodies and other organisations around the country. The Appellant's interpretation would impose a duty to adhere rigidly to the amount of spending in the CWIS when much of the spending is subject to decisions over which the Secretary of State has limited if any control (J/61 [CB/5/51]). For this reason, and for the further reasons set out above at [39], the Appellant's approach is entirely unworkable and unrealistic. That is not to elide questions of interpretation with issues of practice and application as the Appellant suggests (ASkA/11-12, 36 [CB/1/5;11]), but to recognise that s.21 must have been intended to be operate in a workable and practical way, and should be construed in a way which gives effect to that intention.
56. To the extent that the Appellant contends that s.21 does not impose a so-called 'target duty' but rather an absolute duty, that is misconceived (ASkA/43 [CB/1/12]). The language of s.21, supported by its context and purpose, is indicative of a target duty.¹⁰
57. The Appellant emphasises that the resources are for the purpose of achieving the objectives (ASkA/20(d) [CB/1/8]). There is, however, no evidential basis on which to conclude that the funding after the 9 March 2023 decision is necessarily inconsistent with CWIS2 and its objectives, given:

¹⁰ See e.g. *R(AA) v NHS Commissioning Board* [2023] PTSR 2001 at [43-74].

- a. The relatively modest extent of the reduction, i.e. a reduction of £179m of total CWIS2 projected investment of £3,559m, which amounts to a reduction in AT funding of c.5%;
 - b. The fact that the funding is an estimate;
 - c. The historic example of CWIS1 funding far exceeding the CWIS1 projection;
 - d. One of the main reasons for establishing Active Travel England was to deliver better value for money in programme delivery.
58. The Appellant focuses on dedicated AT funding in isolation. As stated above, that is inappropriate. But even taking that approach, the reduction of £179m is only c.17% of the total dedicated AT funding in CWIS2 of £1,073m [SB/2/28].
59. Less funding does not necessarily make objectives unobtainable. Given the high-level nature of the investment strategy, it was not the case that CWIS2 objectives and resources were precisely aligned. Further, the CWIS2 objectives were expressly “ambitious” (see Foreword and Section 1 [SB/1/5-6]). To the extent that reduced dedicated funding might make achieving the investment strategy objectives more difficult, that was plainly something factored into the decision. The Respondent had regard to CWIS2 objectives in reviewing AT spending and reaching the 9 March 2023 decision, as held by the Judge at J/67-70 [CB/5/52-53], against which finding there is no appeal.
60. The Appellant’s case is not made out.

E. CONCLUSION

61. For the reasons given above, the Court is invited to dismiss the appeal.

HUGH FLANAGAN

10 December 2024

Updated on 7 January 2025 with references to the core and supplementary bundles for the appeal hearing

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