Case Summary – M4 Corridor Around Newport

Re: Various Scheme and Orders in relation to the M4 Corridor around Newport

Before: Mark Drakeford, First Minister of Wales

Date: 4 June 2019

The First Minister of Wales declined to make various Schemes and Orders pursuant to the Highways Act 1980 ("the 1980 Act") and the Acquisition of Land Act 1981 ("the 1981 Act") in relation to the proposed construction of a new M4 motorway to the south of Newport and proposed alterations to the existing M4 and M8 motorways between Magor and Castleton ("the Project") notwithstanding that the Project had been promoted by the Welsh Government and recommended for approval by the Inspector at inquiry.

The First Minister concluded that there was not a compelling case in the public interest to expropriate the land that was subject to the Compulsory Purchase Orders and that it would not be appropriate or expedient to make the other Schemes and Orders in accordance with the statutory tests.

On 29 April 2019 the Cabinet had decided that the Project was not affordable in the context of the Welsh Government's overall capital budget. The First Minister reasoned that he could not justify making the Schemes and Orders in circumstances where there was no prospect of the Project being implemented in the foreseeable future (DL 6.5).

The First Minister added that he would have decided not to make the Schemes and Orders even if the implementation of the Project had been likely (DL 6.11). He stated:

> *"I recognise the Inspector's conclusions as to the advantages and disadvantages of the Project. However, I attach greater weight than the Inspector did to the adverse impacts that the Project would have on the environment. In particular, I attach very significant weight to the fact that the Project would have a substantial adverse impact on the Gwent Levels SSSIs and their reen network and wildlife, and on other species, and a permanent adverse impact on the historic landscape of the Gwent Levels. As a result, in my judgment the Project's adverse impacts on the environment (taken together with its other disadvantages) outweigh its advantages."*(DL 6.12-6.13)

The Inspector's Report

Legal Submissions

The Habitats Directive

This legal issue arose in respect of bats and the Wye Valley and Forest of Dean Bat Sites SAC. The Gwent Wildlife Trust ("GWT") argued that likely significant effects on the management of the SAC could not be ruled out because there was reasonable scientific doubt as to the absence of such effects per Waddenzee v Staatssecretaris van Lanbouw (Case C-127/02) at [59]. Articles 12 and 16 of the Directive impose an absolute bar on the disturbance of a species if it would be detrimental to the maintenance of the population of the species concerned at a favourable conservation status. The 'no reasonable scientific doubt' test should be read across from Waddenzee to determine whether a protected species would be so disturbed. The proposed mitigation measures were insufficient for want of scientific evidence (IR 2.2-2.4).

The Inspector held that Waddenzee was not directly relevant because it applied to the possible effects of a development at the screening stage. At that stage it was necessary to be certain of no adverse effect on integrity. This stage had already been completed for the Project. Waddenzee should not be conflated with the requirements of the Directive in relation to European Protected Species. In any event, the evidence showed that there would be no adverse effect on the viability of the SAC bat population (IR 8.15-8.18).

The Environment (Wales) Act 2016

GWT and RSPB argued that the implementation of the Project would breach the requirement to maintain and enhance biodiversity and the resilience of ecosystems which was imposed on public authorities by the Environment (Wales) Act 2016 (IR 2.45-2.48).

The Welsh Government responded that the requirement of Section 6(1) of the Act on public authorities *"to seek to maintain and enhance biodiversity"* did not create an absolute duty (IR 2.49). The Section 7 duty on the Welsh Ministers was *"to take all reasonable steps".* These statutory qualifications meant that causing a negative effect to biodiversity, or to a Section 7 species or habitat, was not by itself a breach of the statute (IR 2.55). None of the provisions of the Act required either a total absence of harm on the one hand or enhancement on the other

(IR 2.50). The Welsh Government was seeking to maintain and enhance biodiversity and the unfavourable condition of the SSSIs of the Gwent Levels should be the baseline for assessment (IR 2.51).

The Inspector agreed with the Welsh Government that the duties imposed by the Act were qualified duties and that any deleterious effects would not lead to an automatic failure to comply with the Act. The current unfavourable condition of the SSSIs of the Gwent Levels should be the baseline for assessment on the principle that planning decisions should be based on real rather than imaginary scenarios (IR 8.38-8.39).

The Wellbeing of Future Generations (Wales) Act 2015

The GWT and RSPB contended that the Project breached the requirements of the Act because it would (1) fail to demonstrate a complete balance of achieving all the well-being goals of the Act equally; (2) add to carbon emissions; and (3) act against the principle of a resilient Wales by causing habitat loss, fragmentation and degradation (IR 2.58).

The Welsh Government responded that it was clear that the Act's definition of "sustainable development" required the weighing and balancing of different considerations. All actions cannot reasonably be expected to contribute equally to all 4 elements of well-being or all 7 well-being goals. The Act does not prescribe answers or outcomes nor does it say that the environment must always outweigh other considerations (IR 2.59-2.61).

The Inspector held that the definition of sustainable development should recognise that the achievement of the well-being objectives is bound to encapsulate a balancing exercise (IR 8.41). The Act recognises that every scheme programmed by the government may contribute to meeting some objectives but not others. The proposition that all of the well-being goals must be given equal weight in each decision is unrealistic in the real-world situation of a major infrastructure proposal. It is the actions of the Welsh Government as a whole that should meet the goals and objectives and not a single project alone (IR 8.44- 8.45). The Welsh Government's assessment of how the scheme would contribute to the well-being goals was convincing and the Project clearly complied with the Act (IR 8.49-8.50).

The Wildlife and Countryside Act 1981

Several objectors argued that the Project would cause the Welsh Government to breach its duty under Section 28G of the Act, which requires public bodies to *"take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna and geological or physiographic features by reason of which the site is of special scientific interest".* The objectors argued that the overall effect of the Project on the SSSIs would be devastating.

The Welsh Government argued that it had taken the reasonable steps required by Section 28G of the Act. Hickinbottom J had confirmed that detrimental impact on SSSIs did not entail a breach of the duty in R (oao) Friends of the Earth v Welsh Ministers [2015] EWHC 776 (Admin) (IR 2.68). The Inspector agreed that the Welsh Government had complied with the duty (IR 8.55).

Environmental Findings

Air Quality

The Inspector found that the Project would lower pollution and provide significant air quality improvements to the population in the majority of areas affected and that this was *"a significant environmental advantage of the scheme which should not be underestimated"* (IR 8.125)

Carbon

The Inspector found that the Project would alleviate congestion and eradicate excessive emissions from stop-start traffic. Claims that the motorway, in more than doubling of the capacity of the existing M4, would fill up and create excessive emissions within a year or so of opening were completely without merit. The scheme would, perhaps uniquely, be carbon-neutral over time (IR 8.128).

Protected Species

The Inspector found that the impact of the Project on dormice could be adequately mitigated. The habitat of the water vole would be significantly affected by the Project but only insofar as it would interfere with about 2% of the reen and ditch network. Otters would be adequately protected (IR 8.135-8.138). All the parties agreed that the Project would have adverse

significant effects on bats. The Welsh Government recognised that the mitigation of severance would be limited (IR 8.140).

Effect on the Gwent Levels SSSIs

The Welsh Government accepted that there would be a significant permanent impact on the Gwent Levels SSSIs in respect of the land-take. 1.96% of the SSSIs, 2% of reens and 2% of ditches would be permanently lost (IR 8.145). The Inspector found that the package of mitigation measures was comprehensive. It was obvious that the reen replacement could be successful but the time-lag that may result from the iterative process was a genuine concern (IR 8.151). Overall there would be a net increase of 41.87 ha of land performing SSSI functions which would not be an insignificant betterment of the SSSI area (IR 8.154). The effect on the reen network, while noticeable, would not represent a serious long-term impact on the Gwent Levels. The proposed motorway line would be sited as far to the north as possible which would leave smaller areas of SSSI isolated to the north of the motorway. This would constitute a permanent disadvantage of the Project (IR 8.159).

Historic Landscape

The parties agreed on the conclusions on the Environmental Statement that the Project would result in a long-term adverse effect on the Gwent Levels Landscape of Outstanding Historic Interest. This would result from the loss of land within the registered historic landscape and the consequent severance of several identified historic landscape character areas, along with visual and aural impacts on parts of the registered historic landscape that are not physically affected. This adverse effect would be significant and should be given weight (IR 8.181-8.182).

Concluding Comment

The decision is remarkable for several reasons. First, the First Minister refused a scheme which the Welsh Government had promoted. Second, it is rare that consent for road schemes is ultimately refused. Third, whereas in England the Project would have been promoted as a DCO, in Wales it had to be promoted using a number of different consenting procedures with the result that the process took over three years from application to decision. The weight which the First Minister gave to environmental matters may be indicative of the policy direction in Wales.

Case Summary – Heathrow Main Judgment

R (on the application of Spurrier and others) (Claimant) v Secretary of State for Transport (Defendant) [2019] EWHC 1070 (Admin)

Before: Lord Justice Hickinbottom and Mr Justice Holgate

Date: 1 May 2019

Four claims for judicial review of the decision by the Secretary of State of Transport ("the Secretary of State") to designate the Airports National Policy Statement ("the ANPS") as a National Policy Statement under section 5 of the Planning Act 2008 were dismissed. The ANPS selected a third runway at Heathrow as the preferred scheme for meeting new airport capacity in South East England.

HELD: All claims dismissed.

Main Grounds

Surface access

First, the claimants contended that the Secretary of State failed properly to engage with new information relevant to the adverse surface impacts of the scheme as a result of more people travelling to and from Heathrow by road (see para 202). Second, the claimants submitted that the Secretary of State had adopted mode share targets that could not realistically be delivered and, even if delivered, would fail to mitigate the impact of the scheme.

The court found that the Secretary of State had had adequate regard to the adverse surface impacts of the scheme (see para 208). The court concluded that the challenge to the deliverability of the mode share targets failed on the facts (see para 214) and that it was not irrational for the Secretary of State to adopt the mode share targets since it is always open to the Secretary of State to adopt higher targets at the DCO stage (see para 217).

Air quality

The claimants' main grounds were as follows:

(1) The Secretary of State failed to apply the precautionary principle in concluding that the scheme could be implemented without breaching the UK's obligations under the Air Quality Directive (see para 261);

(2) It was irrational for the Secretary of State to adopt a policy that was probably undeliverable; and

(3) The Secretary of State relied upon unjustified assumptions about the deliverability of public transport schemes and the effectiveness of Clean Air Zones.

The court found that:

(1) There was no scope for the exercise of the precautionary principle because the ANPS required the Secretary of State to be satisfied that a scheme would comply with legal obligations on air quality before granting development consent (see para 265);

(2) A policy that may not be deliverable is not, by virtue of that alone, irrational (see para 268);

(3) The Secretary of State's assessment of the efficacy of Clean Air Zones was a legitimate exercise of judgment (see para 272).

Habitats

The claimants argued that the Secretary of State had breached article 6(4) of the Habitats Directive in deciding that the Gatwick 2R scheme was not an "alternative solution". First, it was unlawful for the Secretary of State to adopt the policy objective of maintaining the UK's EU Aviation "hub status". Second, it was unlawful for the Secretary of State to conclude that the Gatwick 2R Scheme would not maintain the UK's "hub status". Third, there was no evidence to support his conclusion in respect of the harm to a Special Area of Conservation affected by the Gatwick 2R Scheme.

The court found that there was no legal basis for challenging the Secretary of State's decision to adopt the so-called "hub objective" and/or his assessment that the Gatwick 2R Scheme failed to meet it (see para 353). Article 6(4) of the Habitats Directive was therefore satisfied notwithstanding that there was insufficient evidence to show that the Gatwick 2R Scheme would cause harm to a Special Area of Conservation (see para 370).

Strategic Environmental Assessment

The claimants contended that the Secretary of State's environmental assessment did not satisfy the requirements of the SEA Directive.

The court found that none of the breaches of the SEA Directive were made out (see para 501). R (Blewett) v Derbyshire County Council [2003] EWHC 2775 (Admin) followed.

Consultation

The claimants argued that the Secretary of State did not carry out the required statutory consultation with an open mind or that there was a real risk that his mind had been closed.

The court emphasised the importance of distinguishing between actual or apparent pre-determination on the one hand and pre-disposition on the other. The latter is not unlawful (see para 510). It was clear that the Secretary of State had had a strong predisposition to advance the merits of the NWR Scheme; but the evidence fell far short of showing that there was a closed mind or a real risk of a closed mind (see para 544).

Climate Change

The claimants argued that the Paris Agreement was "Government policy" for the purposes of section 5(8) of the PA 2008; and a relevant consideration for the purposes of section 10. The Secretary of State erred in not taking it into account.

The court found that the Secretary of State did not err in failing to take into account the Paris Agreement. Government policy in respect of climate change targets was that set out in the Climate Change Act 2008. The Secretary of State was not obliged to have foreshadowed a future decision as to the domestic implementation of the Paris Agreement by way of a change

to the criteria set out in the CCA 2008 which can only be made through the statutory process (see para 619).

Preliminary Findings

Relationship between NPS and the DCO Processes

The ANPS in this case has established three matters of national policy which cannot be challenged in the DCO process by virtue of sections 87(3)(b), 94(8) and 106(1)(b) of the PA 2008[1], namely that (1) there is a pressing national need for new airport capacity in the South East of England; (2) this need should be met by the NWR Scheme as the scheme preferred by the Government and not by any of the alternatives considered; and (3) the assessments which an applicant for a DCO will have to carry out and the planning tests that it will have to meet in order for an order to be granted are as set out in the ANPS (see para 110).

Adequacy of reasons

The claimants submitted that Section 5(7) of the PA 2008, which requires an NPS to "give reasons for the policy set out in the statement", imposes an obligation on the Secretary of State to give reasons responding to points raised in the consultation required by section 7. The court found that though section 5(7) requires an NPS to contain the rationale for the policy, it is unnecessary for the Secretary of State to give reasons for rejecting every point made in response to consultation. It is for the Secretary of State to make judgments about what matters to include in the NPS itself, and to what level of detail (see paras 113-123).

Consultation requirements

Some claimants submitted that the Secretary of State failed to carry out the consultation with a sufficiently open mind and that his failure to give adequate respond to points raised in the consultation exercise reflected a failure conscientiously to take them into account. The court endorsed the approach advocated in R (West Berkshire District Council) v Secretary of State for Communities and Local Government [2016] EWCA Civ 441. It was unnecessary for the

[1] These sections confer a power on the Examining Authority and the Secretary of State to disregard representations relating to "the merits of policy set out in a national policy statement" at the DCO stage. The court accepted that these statutory provisions carried implications for the standard of review in this challenge (see para 93).

Secretary of State to conduct detailed analysis of alternative options before him or to consider and respond to every item of detail in the consultation responses (see para 134).

Standard of review

The court considered that the degree of scrutiny required by any challenge will be dependent upon, amongst other things, the strand of policy under review and the circumstances of the particular challenge. Some strands of the ANPS involved a greater degree of political judgment than others. The court accorded an enhanced margin of appreciation to decisions involving or based upon "scientific, technical and predictive assessments" by those with appropriate expertise (see para 179). Parliamentary approval of the content of the ANPS was not a particularly weighty matter in relation to the appropriate level of scrutiny given that, among other reasons, Section 13 expressly allows challenges to the designation of the ANPS by way of judicial review (see para 167).