IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

PLANNING COURT

[2021] EWHC 1642 (Admin)

No. CO/4844/2020

Royal Courts of Justice
Thursday, 10 June 2021

Before:

MR JUSTICE HOLGATE

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
SAVE STONEHENGE WORLD HERITAGE SITE LIMITED — Claimant

- and -

SECRETARY OF STATE FOR TRANSPORT — Defendant

- and -

(1) HIGHWAYS ENGLAND
(2) HISTORIC BUILDINGS AND MONUMENTS COMMISSION FOR ENGLAND
("HISTORIC ENGLAND") — Interested Parties

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MR D. WOLFE QC (instructed by Leigh Day) appeared on behalf of the Claimant.

MISS R. GROGAN (instructed by the Government Legal Department) appeared on behalf of the Defendant.

MR R. TAYLOR QC (instructed by Pinsent Masons) appeared on behalf of the First Interested Party.

The Second Interested Party did not appear and was not represented

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J U D G M E N T

(Transcript prepared from Microsoft TEAMs recording)

MR JUSTICE HOLGATE:

1 In these proceedings, the claimant seeks to quash the development consent order relating to the proposed new road scheme for the A303 at Stonehenge which was granted by the defendant under the Planning Act 2008 to the applicant, Highways England, by a decision letter dated 12 November 2020. A claim for judicial review was issued on 22 December 2020.

2 On 16 February 2021, I ordered a rolled-up hearing of the application for permission in relation to the five grounds of challenge then pleaded. Part of my stated reasoning was that I considered that those grounds justified taking that course, which is not a normal course, albeit that it meant that those grounds would not be subject to the usual separate consideration under the permission filter.

3 On 23 February 2021, a directions hearing took place and I made a detailed order providing for the timetabling of the proceedings.

4 On 23 March 2021, the first witness statement of Mr David Buttery, a senior official in the Department of Transport, was filed on behalf of the defendant. The claimant says that this prompted them to make an application on 7 April 2021 for leave to amend the statement of facts and grounds to add an additional ground 6 and for an order for disclosure in relation to that ground. Ground 6 reads:

> "The decision to grant the DCO is vitiated by actual or apparent predetermination."

5 Much of the relevant case law on that subject was analysed by the Divisional Court in *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 at [508] - [535]. I have had regard to that analysis in considering this application.

6 Amongst the principles stated by the court is that a distinction must be drawn between predisposition on the part of a decision-maker, which is entirely lawful, and predetermination, which is not. Predetermination refers to a decision-maker having a closed mind. As Mr Wolfe, on behalf of the claimant, rightly submits, it is possible for predetermination to exist in two forms; either actual predetermination or the appearance of predetermination based upon the usual objective test of how the circumstances appear to a reasonable person.

7 The application was resisted. Mr Buttery provided second and third witness statements. The application was considered by Waksman J on the papers and on 18 May 2021, in a detailed and careful decision, he refused it. On 24 May 2021, the claimant renewed its application to an oral hearing, which has taken place before me today. I am grateful for the written and oral submissions of all counsel involved.

8 The claimant, at least in writing, takes a preliminary point, although not surprisingly it did not take centre stage in the oral submissions made by Mr Wolfe. The point advanced in writing is that although the claimant has applied for the court's permission to add ground 6 and, indeed, the application before me today is to the same effect, it is asserted that the claimant does not need the court's permission to amend.

9 CPR 54.15 provides:-

> "The court's permission is required if a claimant seeks to rely on grounds other than those for which he has been given permission to proceed."

10 The claimant says that this rule applies where a claimant has been given permission to proceed, whereas in the present case the application for permission has not yet been determined. Instead, it has been adjourned to a rolled-up hearing. For much the same reason, it is said that Waksman J was wrong to consider whether ground 6 is arguable and to refuse permission to amend, in part because he considered it to be wholly unarguable.

11 This is a bizarre submission. It would mean that in any case where a judge orders a rolled-up hearing of the grounds then contained in the statement of facts and grounds, a claimant could add other grounds to the claim for determination at the rolled-up hearing without any control by the court as to their number or content. Even grounds eventually found at a substantive hearing to be unarguable would have received what might be called a "bye" through to the final.

12 I start with the ordinary case where permission to apply for judicial review has been granted. It is clear that arguability is a relevant consideration which the court may take into account when deciding whether to grant permission to amend (see, for example, *R (AB) v Chief Constable of Hampshire* [2019] EWHC 3461 (Admin) at [114]). In my experience, that reflects the consistent practice of this court over many years. It also accords with the approach taken in other parts of the civil justice system (see, for example, para.17.3.6 of the White Book dealing with statements of claim).

13 It would be an inappropriate use of the court's resources to allow a ground to be added which the court considered to be unarguable. That would not accord with the overriding objective. It is also inconsistent with the "procedural rigor" which is to be applied in public law cases (see, for example, *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841).

14 There is no logical reason for taking any different approach in a case where a rolled-up hearing has been ordered. That order applies only to the grounds which the judge has considered and ordered to be dealt with in that way. It does not authorise any other ground to be argued without the court's permission. Permission is plainly required in order for a claimant to be entitled to raise an additional ground.

15 When a claimant applies for permission to add a new ground, there is no reason why arguability should not then be a relevant consideration for the court to take into account. The fact that the court has decided that the original ground should go through to a rolled-up hearing without determining arguability in relation to *those grounds* provides no logical reason for treating arguability as irrelevant in relation to any additional ground in a subsequent application to amend. For example, a defendant is entitled to submit that the new point is unarguable and the court *may* decide to deal with that issue on the application to amend in the exercise of its case management powers. If the court is persuaded the point is unarguable, then plainly it should go no further.

16 I summarise briefly the factual background. On 3 January 2020, an email was sent by officials advising both the then junior minister concerned with the DCO process and the Secretary of State that the report of the examining panel of inspectors had been received by the Department on the previous day. Mr Buttery states in his evidence that ministers were not told at that stage what the panel had recommended; in particular, that it had recommended against grant of the DCO. In part, that was because, not surprisingly, time

was needed by officials to absorb a complex report and to provide their independent advice to ministers. The email also noted that under the 2008 Act the statutory deadline for the determination of the DCO application was 2 April 2020. That deadline was capable of being extended by the Secretary of State following the appropriate procedure in Parliament.

17 Mr Buttery also says that the Minister and the Secretary of State were not told the outcome of the panel's report, in particular, their recommendation, until officials submitted a written briefing note on 27 March 2020. That note put forward two alternative recommendations or options for ministers to consider. Naturally, one option, A, was to accept the panel's advice and to proceed to refuse the application for a DCO. The second option, B|, was formulated by officials in circumstances where ministers had not been told what the panel's recommendation was and officials had not discussed with ministers what their reaction to that recommendation might be. In other words, their independent advice to ministers was that the statutory deadline for determining the application could be extended to 17 July 2020 to allow officials time to explore whether there is evidence to support a case for disagreeing with the panel and approving the development. That would involve consulting on issues which the panel themselves had identified in their report. The officials provided a draft consultation letter for that purpose. The officials envisaged that this exercise might identify "whether there is evidence for why the impacts of the development would result in less than substantial harm" to the World Heritage Site.

18 In para.6 of the briefing note, the officials expressed the view that the benefits of the scheme would not appear to be significant enough to represent wholly exceptional circumstances which could be capable of outweighing a judgment that the proposal involved substantial harm to the WHS. In para.7, they advised the ministers that they could lawfully disagree with the panel and reach their own judgment on what weight to attach to a material consideration provided that there was sufficient justification for doing so. In para.8, they advised that any justification for disagreeing with the panel's recommendation would need to be fully and carefully set out in a decision letter to be issued in due course. They stated unequivocally that at that stage they had not been able to identify sufficient evidence to justify approval of the application for the DCO and would need to be able to identify and work up counterarguments as to why impacts on the development would result in less than substantial harm if a decision to that effect were to be reached.

19 Paragraph 11 of the briefing note pointed out that regardless of whichever of the two options ministers decided to choose, an extension to the deadline would be needed in any event. That was because the deadline was due to expire on 2 April 2020, only six days later. The officials made it plain that even if the decision were to be to accept the panel's recommendation and refuse the application, there would not be sufficient time to issue a decision letter to that effect before the statutory deadline expired.

20 The briefing note to ministers was accompanied by Annexe A, para.4 of which stated that it might be possible for the decision-maker to take an alternative view on the weight to be attached to the benefits and disbenefits of the proposed development in the planning balance if there were to be sufficient justification for doing so. They pointed out that, at that stage, no such justification had not been identified by officials. They also explained that the draft consultation letter which supported their suggested option B was based upon Appendix E to the panel's report and would be seeking information that the panel itself had recommended be obtained. Officials advised that this information might help to minimise the risk of substantial harm to the WHS.

21 The claimant accepts that the defendant was free to disagree with the panel provided that he had evidence on which to do so. He was advised that he did not. At first sight, it appeared

by implication that the claimant was arguing that in circumstances such as these, where officials advise a minister that there is no evidence sufficient to justify disagreement with the recommendation of a panel or an inspector, the minster cannot decide to consult any further to see whether there is any additional evidence which would support the grant of a DCO because that, in itself, would involve actual predetermination or an appearance of predetermination. When the point was put to him Mr Wolfe, not surprisingly, made it plain that he does not argue for that proposition. There is no arguable legal justification for the law to straitjacket a minister in that way by reference to the doctrine of predetermination. There would be no appearance or arguable appearance of predetermination merely because a minister asked for further information to be sought to see whether it might support a decision to reject the Panel's recommendation. That, in itself, does not give an appearance of a closed mind. The argument is even more unmeritorious where, in fact, a minister reacts to independent advice given by officials of the kind which we see in the documents in this case. Indeed, the point is *a fortiori* where the request for further assistance proposed by officials aligns directly with a recommendation made by the panel or the inspector that the further information be obtained. It has not been suggested that the material was irrelevant to the possibility of reaching a different conclusion to that of the panel.

22 It is necessary for the court always to bear in mind in arguments of this kind that there is a critical legal distinction between predisposition on the part of a decision-maker which is lawful, as opposed to predetermination, which means exactly what it says, that the decision-maker has, or appears to have, a closed mind.

23 Just before this briefing note was submitted to ministers, a document known as RIS2 had been issued by the Secretary of State on 11 March 2020, which expressed the Government's commitment to a number of road schemes including this particular scheme. It reflected the fact that any necessary funding had been approved and it set out a commitment in unequivocal terms that the various schemes listed should be delivered over a period running from 2020 to 2025. But in addition, the document stated:-

> "We are committing funding to deliver the schemes named in RIS2 on the assumption that they continue to demonstrate a strong business case and secure the necessary planning consents. Nothing in the RIS interferes with the normal public planning consent process…".

24 On 23 April 2020, the ministers' private office responded that they were not content with the recommendation made by the panel and they had decided to accept the recommendation of the officials for option B to explore "whether" there would be evidence to support the case for rejecting the panel's recommendation. As a consequence, the statutory deadline was extended to 17 July 2020. On 4 May 2020, the consultation letter was sent out to the consultees and published on the website of the Planning Inspectorate so that it could be addressed by any interested party.

25 On 6 July 2020, a further consultation exercise was carried out in relation to new finds in the vicinity of the World Heritage Site. That was the subject of further briefing to both ministers and necessitated a further extension of the statutory time limit of four months, taking the matter to November 2020. On 13 July, the ministers agreed to that procedure being followed.

26 On 28 October 2020, following the completion of those consultation exercises and the receipt of representations, not only from the consultees identified to in the letter, but also from interested members of the public, officials provided their briefing to the Secretary of State and the Minister on the taking of a final decision. Officials advised ministers that in their judgment there was now sufficient evidence which could justify their reaching a

decision that the DCO should be approved if they considered that to be appropriate. The briefing referred to the material which had been received.

27 On 5 November 2020, the ministers reacted by announcing to their officials that they had decided to approve the DCO and, as I have said, the decision letter was issued a week later and the DCO granted.

28 I am grateful to Mr Wolfe for the written submissions which he and his junior have put forward to identify the criticisms they make of the decision made by Waksman J to refuse permission to amend.

29 What has emerged as a result of oral submissions and discussion this morning is that the claimant accepts that none of the points which have been advanced as an indicator of arguable predetermination would not by itself support any such conclusion. Therefore, the claimant accepts that the proposed ground 6 is entirely dependent for its arguability on treating all these considerations in combination. This is said to be justified in part because of the timing involved. I am bound to say that I had not previously understood that the case was being put in that narrow way. I apologise if I have missed something in the draft pleading, but it is a highly specific and narrow way of putting the allegation.

30 In summary, in para.13 of the renewed application, it is said that it is no part of the claimant's case to allege that the Secretary of State was not entitled to disagree with the recommendation of the examining authority: the claimant had made its position clear on that already. Instead, it is said that the "central feature" was that the Secretary of State extended the statutory timeframe to see whether evidence could be found to support the approval of the DCO, having been told that the existing evidence would not support such a decision. The second point, in para.14, is a slight extension of the first. It is said that the recommendation put forward by officials was made in the face of their advice that, despite having all the evidence within the panel's report and the evidence submitted in relation to the DCO application, nothing had been identified sufficient to justify approval.

31 It is plain why neither of these points in isolation could conceivably be arguable. In relation to the second matter, Mr Wolfe has very fairly accepted that faced with a situation of this kind there is nothing unlawful in a decision-maker deciding that an opportunity should be provided to see whether further information might be obtained which could justify taking a different view to that of the panel, even in circumstances where absent that further information the only proper conclusion that could be reached would be to accept the recommendation of the panel. I have dealt with this aspect already. It has been discussed at some length in the course of the hearing this morning and the point is plainly unarguable. But equally, there is no arguable merit in the complaint that part of the context here was the extension of the statutory time limit for decision-making. As I have pointed out, it had to be extended anyway. But more to the point, the extent of the extension which Parliament approved simply reflected the decision to carry out the further consultation exercise. It was simply a procedural consequence of having taken a decision which, in itself, is not open to challenge.

32 In para.15, it is said that the judge failed to recognise that the Secretary of State had explicitly stated that his intention behind the extension of time was to see if there was evidence for approving the scheme, despite having been advised that there was not sufficient evidence to that effect. It is submitted that this clearly points towards to predetermination. The complaint is that what happened here was that the Secretary of State actively sought out evidence. This is simply a restatement of the points which have been made in para.13 and

14 and does not add anything of substance to the legal analysis. It does not give rise to any arguable ground of complaint.

33 In para.16, it is said that Waksman J failed to consider the entire factual matrix in the round. The additional factor which is added in at this point in the claimant's analysis is that the decision I have described to seek further evidence or information was made in the context that the defendant had recently published the document RIS2.

34 At one stage the claimant seemed to be suggesting that because the Secretary of State had been involved in promulgating the investment strategy document, that, in itself, disentitled him from taking part in a decision on the DCO in this case. As a proposition, if it were to have any merit, it would apply not only to this particular road scheme, but to any other road scheme requiring the approval of the Secretary of State referred to in that document. Not surprisingly, Mr Wolfe made it plain that he was not advancing that argument; it would be untenable. It would run counter to the constitutional arrangements which are in place for the progressing of statutory schemes of this kind. So, even adding that factor into the mix, I fail to see how it changes the nature of the other points so as to create an arguable ground of challenge.

35 The further argument which is advanced is that the Department did not follow the propriety code which had been set out in a 2012 document which, in summary, provided for decisions to be taken by a minister allocated to deal with a particular matter, save that at the point of allocation the Secretary of State could be asked whether he wished to be involved.

36 What happened in February 2020 is that the Secretary of State decided that, in relation to all applications for DCO and Transport and Works Act orders, he would be involved in the decision. In other words, he changed the procedural approach not specifically for the Stonehenge project, but in relation to all projects falling within those parameters.

37 I fail to see how this materially alters the merits of the proposed ground 6 in a case where it is accepted that the Secretary of State was not otherwise debarred from taking part in this particular decision and his function in relation to RIS2, would not arguably amount to predetermination or even an appearance of predetermination.

38 The change in procedure was of a general nature. There is no suggestion of bad faith. In particular, this was not a change of procedure introduced in relation to one scheme alone.

39 It is also suggested that even under the new scheme, the Department did not follow the procedure as described by Mr Buttery. But this is a very narrow point about whether there should, in fact, have been a formal response from the junior minister before he discussed the matter with the Secretary of State. I am afraid I see no merit in this point at all.

40 So, after having carefully considered the written arguments and, indeed, the oral submissions made by Mr Wolfe, I am unable to see how even combining the factors to which he has referred, all of them, this ground becomes arguable. Therefore I respectfully agree with the decision of Waksman J that, the ground being wholly unarguable, permission to amend should be refused.

41 Mr Wolfe accepted that the application for disclosure, insofar as it seeks to support ground 6, stands or falls with that decision and so, therefore, I dismiss the application for disclosure in relation to that proposed ground.

42 I am left with the application for disclosure as set out in para.24 of the application before the court, subparas. (b) to (e). It is suggested for the first time in the renewal application that those categories of documents should be ordered to be disclosed by the court because they pass the test in *Tweed* in relation to ground 2.

43 Ground 2 is a complaint that there was no evidence to support the decision taken by the Secretary of State to approve the grant of the DCO against the conclusions and recommendation of the panel. This is a not uncommon ground of challenge. It is a no evidence ground of challenge. Ordinarily, it stands or falls on the evidence which was before the panel and the Secretary of State and therefore in the public domain.

44 Insofar as part of the concern here relates to the views of Historic England on which the Secretary of State said that he relied, the second interested party has plainly stated that there is no further material beyond that which is already in the public domain which is relevant to this ground.

45 The defendant has also confirmed this morning through Miss Grogan that that is also his position and that he has been aware and remains aware of his continuing duty of candour in relation to this matter. I am assured that there is no material which should be provided on this aspect, but I have asked for the matter to be checked again.

46 For all these reasons, the application must be dismissed, but I am grateful for the careful submissions that I have received this morning.

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This transcript has been approved by the Judge.