Case name: *R (Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport & Ors* [2024] EWCA Civ 1227 (16 October 2024)

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Commentary:

This was an unsuccessful appeal against the order of Holgate J (as he then was), refusing the application of Save Stonehenge World Heritage Site Limited ("Save Stonehenge") for permission to apply for judicial review of the decision by the Secretary of State for Transport to grant a Development Consent Order (DCO) for a road improvement scheme for the A303 near Stonehenge.

Background

The original application for a DCO was made in 2018. An examination was held in 2019, and in January 2020 the examining authority recommended against the making of the order. The Secretary of State rejected that recommendation and granted a DCO in November 2020. In July 2021, that decision was quashed by Holgate J on a first challenge brought by Save Stonehenge (*R (on the application of Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2022] PTSR 74, ("*Stonehenge 1")*).

Upon redetermination, the scheme was approved again in July 2023 before being challenged once more by Save Stonehenge, who issued a claim for judicial review the next month. Following a rolled-up hearing, Holgate J refused permission on all grounds bar ground 7 (*R (Save Stonehenge World Heritage Site Ltd. and Rhind-Tutt) v Secretary of State for Transport* EWHC 339 (Admin) ("*Stonehenge 2*")). Ground 7 was stayed pending the decision of the Court of Appeal in *R. (on the application of Boswell) v Secretary of State for Transport* [2023] EWHC 1710 (Admin) but was refused once that judgment was handed down.

Permission was granted to appeal against Holgate J's refusal on all seven grounds, and the three-day hearing commenced on 15 July 2024, some two weeks after a new Government came to power. On 29 July 2024, the Chancellor of the Exchequer announced that the Government did not intend to undertake the DCO project. Despite this, the parties agreed that the appeal was not academic: Save Stonehenge maintained that the grant of the DCO was unlawful, whereas the Secretary of State maintained that it was lawful.

Grounds and judgment

The seven grounds of appeal gave rise to five main issues:

Issue 1: Whether the redetermination process was conducted properly and fairly.

- Ground 4 asserted that a further examination ought to have been held.

- Ground 3 alleged that Holgate J wrongly substituted his view for the Secretary of State's.

Issue 2: The legal adequacy of the ministerial briefing given to the Secretary of State.

- Ground 1 alleged that the weblinks in that ministerial briefing were inadequate.
- Ground 2 identified certain matters that, it is said, the Secretary of State should have considered personally.

Issue 3: Whether the Secretary of State's view on the scheme's compliance with the Convention Concerning the Protection of the World Cultural and Natural Heritage ("the World Heritage Convention") was legally sound (Ground 6).

Issue 4: Whether the risk and likely impact of the Stonehenge World Heritage Site being delisted by the World Heritage Committee were adequately considered by the Secretary of State.

Issue 5: Whether the Secretary of State's consideration of the then current review of the National Policy Statement for National Networks ("the NPSNN") in light of the UK's "net zero" commitment was legally adequate (Ground 7).

Issue One: the redetermination process

Counsel for the appellant submitted that in this case, procedural fairness required an inquisitorial process in which the issues would be examined by an independent person with appropriate expertise who would then provide a report to the Secretary of State. It was, the appellant claimed, significant that the examining authority had not considered the question of alternatives to the proposed development, or various other issues. The Secretary of State submitted that neither the common law principles governing procedural fairness nor the Infrastructure Planning (Examination Procedure) Rules 2010 required that an independent expert was given an opportunity to scrutinise any written representations. In this case, after the decision was first quashed, those who had previously taken part in proceedings were given the chance to make further written representations.

The Court of Appeal found that it was not the case that Secretary of State must necessarily ensure that there will be an inquisitorial process carried out by an independent expert who will consider the issues, any submissions, and any new evidence or facts, and then report to him. To impose such a requirement in all cases would be inconsistent with the statutory framework. None of the various other issues suggested by Save Stonehenge as requiring an independent expert to be resolved demonstrated such a need.

The Court also found no merit in the suggestion under Ground 3 that the judge strayed into considering the substantive merits of the case: Holgate J only considered the issues that arose for him in determining what procedural fairness required.

Issue Two: the Ministerial briefing

The Court of Appeal rejected the contention that the weblinks in the Ministerial briefing were inadequate. Holgate J did not assume that the Secretary of State considered all the documents available to him by provision of library weblinks. The Court of Appeal did not agree with the appellant's assertion that the minister himself, rather than officials, must consider everything of potential relevance. There was also no evidential basis to dispute the statements in the ministerial submission, the decision letter, or other materials considered by the Court that the Secretary of State had "reviewed all relevant information" and in doing so given sufficient consideration to the various other issues identified by the appellants.

Issue Three: Compliance with the World Heritage Convention

Counsel for Save Stonehenge submitted that the Secretary of State's contention that articles 4 and 5 of the World Heritage Convention allowed for the balancing exercised outlined in the NPSNN was wrong and was not, as Holgate J held in *Stonehenge 1*, a "tenable" construction of the Convention. In deciding this issue, the Court first had to consider whether the proper judicial function was to merely to establish whether the Secretary of State's own understanding of the relevant provisions of the World Heritage Convention was "tenable", or to establish for itself the proper interpretation of those provisions by orthodox statutory construction.

The Court of Appeal agreed with opposing submissions made by the Secretary of State: the "tenability" approach was correct in this case, and the broad wording of articles 4 and 5 of the Convention leaves much to the discretion of signatory states when creating policy to protect World Heritage Sites. Articles 4 and 5 did not prohibit any harm whatsoever to World Heritage Sites, nor did it prohibit an NPSNN-style balancing exercise of a plan or project's harms against its benefits.

The Court of Appeal also considered the alternative to the "tenability" approach: the interpretation of those articles of the unincorporated Convention in accordance with the normal principles of construction. The Court concluded that the Secretary of State's decision letter adhered to the UK's commitments and obligations under the Convention and displayed a lawful understanding of them. His decision was not at odds with the UK's international obligations.

Issue Four: World Heritage Committee delisting

The Court of Appeal found that the Secretary of State's conclusion that "no weight" be given to the risk of delisting to be rational and did not take into account immaterial

considerations, and that Holgate J was correct to refuse permission on this ground. The Secretary of State was satisfied that the World Heritage Site had been adequately protected in accordance with both domestic policy and international obligations. It is grounded in his judgment that the proposed development would cause "less than substantial harm" to the World Heritage Site. Compliance with policy in the NPSNN and with the commitments in the World Heritage Convention reinforced the likelihood that the World Heritage Site would not be delisted. Furthermore, the Secretary of State was entitled to give no weight to the risk of delisting and to not consider the effects of delisting.

Issue Five: The NPSNN

The appellants submitted that the NPSNN review meant there had been a significant change of circumstances for the purposes of the NPSNN policy test, and that the draft NPSNN had been a mandatory consideration for the Minister which he had not lawfully considered.

The Court of Appeal found no issue with the Secretary of State's approach to the NPSNN review, or Holgate J's conclusions on this issue in *Stonehenge II*. In his decision letter, the Secretary of State considered the relevant policy objective behind the draft NPSNN before satisfying himself that his application of the policies in the extant NPSNN did not breach domestic or international law. He was not required to explicitly link his consideration of the draft NSPNN with his consideration of the net zero target, nor was he required to address the exact wording of the draft NPSNN and identify the changes made.

Given the above, the claim was dismissed.

Case summary prepared by Gregor Donaldson.