Précis of judgment

HS2

The Local Authority Case

The key to the judgment is that Mr Justice Ouseley has found that the "decision" to proceed with HS2 which has been challenged by the local authorities is too early in the decision-making process to justify upholding the complaints against it – e.g. of deciding to undertake an unlawful hybrid bill decision making process, of deciding unfairly without a proper consultation, or re-consultation, of being irrational because there is no capacity at Euston or on the underground for the prospective passengers.

He has made a clear error of law on the PSED ground.

The grounds are set out below in the order in which they have been dealt with in the judgment.

1. The application of the Strategic Environmental Assessment Directive [SEAD]

   Should there have been a SEA?

   No because:

   (i) SEA applies to plans and programmes and this is not a plan or programme, just a "high level strategic/ national policy decision to promote a high speed rail network, in the Y shape, and to promote it in two phases…..and the process decision that development consent will be sought through two hybrid Bills." (para 91)
   (ii) Policies could be subject to SEA, but not this one because the decision maker is to be Parliament "Parliament's views are not trammelled by the [policy decision]…..it can just disagree…(para 95) "It would be wrong for the Court to rule that Parliament, whipped or not, is not constitutionally free to reach whatever conclusion it wishes" (para 99)

However, he does reject the argument that, if an SEA were required, the Appraisal of Sustainability amounted to substantial compliance. It does not do so for two reasons – first because it did not examine the Y and second because it did not assess reasonable alternatives.

2. Was an appropriate assessment under the Habitats Directive required?

No, because it is too early in the process: a view will be taken by HS2/DfT about whether an appropriate assessment is required and when it is taken it will be challengeable then.

Précis of judgment

HS2

3. The Hybrid Bill breaches European law

No because parliament might get it right – para. 269 "The manner in which ES consultation responses are made available to and considered by parliament is unresolved. More obviously, the nature and substance of the debates in Committee and at Second and Third Readings are unknown. The Houses of Parliament may or may not be invited to provide reasons for their decisions. It is therefore impossible at this stage to say that the overall process will or will not satisfy EIAD requirements."

4. The failure to consider cumulative impacts for the purposes of Environmental impact Assessment

This arises from the intention to promote two separate bills.

"The important issue is whether producing two EIAs for two phases of the Y network rather than one EIA for the whole network will mean that cumulative impacts of the whole fall out of assessment altogether or are considered when it is too late for them to be given weight in the decision." (para. 295)

Too early to say that it would be unlawful "Whether what emerges amounts to an EIA which is so deficient as not to be an EIA is something which can only be considered when it is available, or has been through the public participation process." (para 301)

5. The Consultation challenge

a) Failure to consult the whole of the Y properly.

Not unlawful, because the S of S has wide discretion how to consult and "**There is no decision by the S/S fixing the principle that there should be a Y network." (para. 329)**

b) Failure to re-consult on reports commissioned to knock down 51M's OA

Not unfair because;

(i) Commuter capacity is not a new issue and
(ii) It would not have made any difference
(iii) This was not a decision. "The making of the decision, the parliamentary process, will afford a variety of opportunities for the public to pursue the OA, even if by lobbying MPs, and indirectly through what MPs say in debate. I assume that the OA will not be discussed at the Select Committee stage since it involves an objection to the principle of the Bill. "It would in my view be

> constitutionally improper for me to reach a decision on the basis that Parliament and its procedures cannot fairly and adequately deal with the issues which would arise on this Bill." (para 405)

c) Failure to provide passenger loading data

Not unfair because there was enough data available on the point, and the same point about the decision not really being a decision applies.

d) Failure to re-consult on amendments.

Not unfair.

And generally on consultation "I have grave reservations about the constitutional propriety of relief preventing an MP laying a bill before Parliament…" (para 482)

6. Ground 6 - Public sector Equality Duty (PSED)

The Judge says that our initial submission was under s.149(1)(c) (para 494); in reply we also relied on s.149(1)(a) (para 500); but, in reality, the breach that was asserted was of s.19 (para 501). He held that the S/S had given the issues due consideration for the stage reached (para 503); the case under s.19 was introduced too late and he would not have granted permission to amend in any event as the issue would have required evidence (para 504); the adverse effect suffered by the relevant population was unrelated to ethnicity, it was about where they lived (para 505).

7. Bucks CC rationality Challenges

The judge has applied a very high threshold of rationality to Euston capacity:

"There is clearly a problem of underground capacity at Euston…It is not just passengers from HS2 who would be affected, arriving at high speed and dispersing at slow speed on the busiest lines, but all those other passengers arriving at conventional speed and joining or leaving the Underground at Euston, and indeed passengers, passing through on very crowded lines." (para 524). "However, that does not make it irrational for the SST to promote legislation for HS2 when no definite solution has been identified, let alone committed for provision to a known timetable….. **Some might regard….to leave matters at they stand as foolish. But that would not make doing so irrational and so unlawful." (para. 525)**

It will be a political judgment for Parliament.

Précis of judgment

HS2

Ground 7(b) – link with HS1

There is nothing irrational in promoting a Bill on the basis of the overall case for the link (para 550); there is a dispute as to whether the alleged problems would arise in any event (para 551); it is a matter for Parliament (para 553).

Ground 7(c) – Heathrow spur

The S/S is entitled to take a broader view and to promote a project with a low BCR for other benefits (para 570); Parliament can make up its own mind (para 571).

Heathrow Hub's Case

The judge says their strongest point is that their responses were omitted but "I have come to the firm conclusion that there was no point of significance omitted from consideration which might have led to a different conclusion on the spur/hub issue." (para. 630)

No unfairness in consultation taking place before consultation on aviation strategy.

Generally "the points raised do not come near to establishing a legally deficient consultation process." (para. 652)

Golf course and others

HS2 reached a rational decision after conscientious consideration of the consultation responses. Therefore the case fails (para 680).

HS2AA Challenge on compensation decision

Wins! Because

a) SS did not make sufficient information available to consultees at first stage of the process
b) There was confusion surrounding two stage process
c) HS2AA's response was not conscientiously considered by the SS

So the consultation process in respect of blight and compensation was all in all so unfair as to be unlawful (para 843).