HS2 Judicial Reviews – HS2AA's summary of Justice Ouseley's Judgement?

(1) Property Blight and Compensation

HS2AA case **The January 2012 decision on compensation was unlawful as it was based on a fundamentally flawed consultation process.**	**High Court Judgement (15 March 2013)** **Judge agrees that the consultation process "was all in all so unfair as to be unlawful".**
Ground One – Insufficient information was provided to consultees Inadequate information was provided on the three compensation scheme options (Hardship Scheme, Property Bond and Compensation Bond) for the public to properly evaluate them and respond to Question 7 (on whether they agreed the options) The 2-stage process was unlawful because insufficient detail was provided at the 1st stage to understand the consequences of the options (with just one being developed at the 2nd stage)	The Judge found overall that insufficient information was provided for the process to be fair: • Neither the Consultation Summary nor the relevant Fact Sheet had sufficient information to answer Question 7 • Despite problems with accessing Annex A this was not so unfair to be unlawful • The detail in Annex A was inadequate – the "unspoken qualifying criteria" for each option was omitted and refused when requested (yet it affected the costs which proved core to the decision) • The line drawn between the 2 stages was in the wrong place eg they should not be striking the right balance on detail, but giving sufficient detail; the admission of "understanding market impacts & local issues thoroughly" after Stage 1 was based on "muddled thinking". He said the 2-stage process was "doomed from start"
Ground Two – the basis of the decision (to select the hardship based option) was unlawful as it had changed from what was envisaged in the consultation document The decision was not based on the five aims/issues that DfT asked for comments on (eg enable the property market to function normally, compensate those with significant losses etc) and which were presented as the criteria on which the choice of scheme would be based The decision to reject the Property Bond option introduced new matters that were not mentioned in the five aims/issues: • costs and risk • exacerbating blight • lack of unambiguous support • (and precedent setting)	The Judge found overall that the basis on which the decision was taken had changed from its five stated aims on which it invited comment in the consultation document: • The decision was taken on costs/risks, which while relevant to the public purse were not covered by the 5 aims, and people had a legitimate reason for why cost should not affect fair compensation (Hammond's statement to Parliament). • Similar arguments applied to precedent setting (but by itself this might not make the consultation so unfair to be unlawful). • Exacerbating blight was not a new matter • The numbers in support/against could always legitimately be a relevant matter, but Question 7 wording was criticised as it did not require an option to be selected (so Gov could not rely on low numbers supporting one option in their decision). (However Government "bizarrely" selected an option with just 21 people

	supporting it!) • The reasons given for the decision were not based on comparing the options (but comments on "perceived drawbacks") and "are in part very odd".
Ground Three – "Hammond's promise" was not honoured by the decision Philip Hammond's promise in Parliament in December 2010 – that said people would be compensated "fairly" where they suffered "significant financial losses" – created a "legitimate expectation". But this was not then met by the decision on selecting a hardship based scheme	The Judge found that a 'legitimate expectation' had not been created: • But he could see how the SoS words were "encouraging and reassuring to the members of HS2AA" and that the "broad intent behind the crucial words is clear enough" • The words were insufficiently "clear unambiguous and devoid of qualification" to create a "legitimate expectation" – they were only an "aspiration of Government" The Judge however took the 'broad intent' into account in finding in favour on Ground 2
Ground Four – HS2AA's consultation response (along with others) was lost and not 'conscientiously' considered HS2AA's 34-page response was lost (along with many others) and in fact what was considered by the public process was a 6-page briefing document instead HS2AA's response was never 'conscientiously' considered by the Secretary of State herself (NB it is not sufficient for just DfT officials to have considered it). If she had, she might have reached a different decision. HS2AA's response included much material and argument eg on the Property Bond and its merits that was not taken into account in the decision (eg how it had the support of the property professionals and how perceived risks could be addressed); and how the three options measured up against the five aims. NB HS2AA's response was not even considered in the Addendum report of "lost" responses (in July 2012 after the Jan 2012 decision)	The Judge found that HS2AA's response was "careful and substantial", "detailed, well informed and fully reasoned" and "it was in reality just brushed aside" and not properly considered: • The "sorry saga" of how HS2AA's response was omitted is spelt out and the "failures of DbD" – not only does he agree it was excluded from their main process, and that a 6-page briefing document was in error included instead, but it did not even get included when an Addendum report (of all the lost responses) was done after the decision. • Agrees that DfT officials considered the HS2AA response as they were a "key stakeholder" but there was not enough evidence to say the SoS had. She took her decision based on "unheralded factors" which seemed more important eg cost and risk, that weren't even all listed in their decision document (ROPI). • HS2AA's response explained how risks could be addressed, but there was no evidence this had been considered in the decision. Similarly the decision did not reflect HS2AA's methodical approach to relating the options to the 5 aims.
DbD – Dialogue by Design – the organisation who conducted the analysis of the consultation responses. *ROPI – Review of Property Issues – the January 2012 decision document on compensation issues.*	

The judgement means the 2012 consultation on compensation was flawed - it was so unfair to be unlawful – and the decision should no longer stand

(2) Environmental and other issues

This covers HS2AA's and 51m's together, as some parts overlap. (The case is about whether HS2 has been properly environmentally assessed and properly consulted upon).

Ground 1 – SEA (taken by HS2AA) HS2 falls under the Strategic Environmental Assessment (SEA) Regulations that have not been complied with. The SoS has not done an SEA that would have required alternatives to be examined (including environmental assessments) and consulted on. The SEA Regs apply because (1) the Decisions and Next Steps contains a 'plan or programme' for the development of HS2, and (2) is 'required' as a result of the SoS committing to the 2010 White Paper. The Assessment of Sustainability (AoS) did not fulfil the substantive requirements of a Strategic Environmental Assessment.	Judge found that the SEA Regulations do not apply to HS2 because • The January 2012 Decision and Next Steps was not a plan or programme, as the decision maker, Parliament, is not constrained by the Government's policy, (ie Parliament can decide for itself) • The 2010 White Paper and its adoption does not 'require' anything, so the SEA Regulations do not apply But the judge also found that contrary to the Government's assertions, the AoS was not sufficient to achieve the requirements of an SEA. (NB If an SEA had been needed Government would not be able to claim that in practice they had done one)
Ground 2 – Habitats (taken by HS2AA) The argument is that the SoS must, under the Habitats Directive, be sure that no damage will be done to protected areas or individual species. They had not done the requisite assessment for the Y prior to the January 2012 Decisions and Next Steps.	Judge found • Habitats Directive does not apply as Decisions and Next Steps (DNS) is not a Plan (see SEA) • Habitats Directive requires assessment is done in advance of Parliament's decision, not the DNS • Even if a screening assessment of Phase 1 were required, this has now been done so would not grant relief.
Ground 3 – Hybrid Bill (taken by 51m, HS2AA QC also spoke on it) Proceeding with the Hybrid Bill is not compatible with the Environmental Impact Assessment (EIA) Directive, because: • the principle of the Bill is fixed at 2nd reading, before the select committee examines the environmental case. • The process (for public participation) is not known with the required certainty in advance NB We could challenge the Bill <u>after</u> it's passed, but this wastes time & money. If it's going wrong now it can't be right to wait.	Judge found the challenge is premature • Parliament is free to determine its own process, so cannot tell in advance that it will be unlawful • Whether the process is known with sufficient certainty and sufficiently in advance is to be judged after the event • We must wait and see what Parliament does and can challenge the Bill after it's passed if we need be. Also it is not the court's role to tell Parliament how it should conduct itself

Ground 4 – EIA (taken by 51m, supported by HS2AA) To carry out a lawful environmental assessment under the EIA, the full environmental effects of HS2 must be assessed, including Phase 2. By only doing Phase 1 the SoS fails to comply with EIA (as includes all the benefits but ignores some of the disbenefits)	Judge found • Assessing the environmental impacts of Phase 2 in a separate EA is not inherently unlawful • The lawfulness of the EA produced for Phase 1 can only be judged when it has been produced • The EA for Phase 1 should include the cumulative impacts of Phase 2 on Phase 1, but whether this will be adequately done cannot be judged at this stage
Ground 5- Unfair consultation (taken by 51m, HS2AA also spoke on consultation issue (last issue)) Failure to consult properly because • No consultation on the phase 2 route • Unfair to commission analysis of the Optimised Alternative (OA) without telling 51m or consulting them or asking 51m to comment on NR's conclusions eg that OA failed to meet commuter capacity • Failed to provide the loading data • Failed to re-consult on detailed changes to the HS2 route.	Judge found • Consultation on the principle of the Y network, but not the detail, is not so unfair as to be unlawful. • Commuting capacity was sufficiently identified to be an issue in the consultation materials • SoS didn't need to re-consult on the analysis that was commissioned on the OA, in part as no decision on consent has been given. • Failure to provide the loading data did not render the consultation so unfair as to be unlawful, as was not central to Government's case • Did not have to re-consult on changes to the route, and there is a further opportunity to raise objections to the changed route (eg at the Select Committee) In court the WCML loading figures were admitted not to be 'commercially confidential'
Ground 6 – Equality duty (taken by 51m) There has been a breach of public sector equality duty as SoS failed to carry out an assessment of the adverse impacts on equality groups at Washwood and London Euston. Governments own Appraisal of Sustainability said that this should be done.	The Judge found: • At this stage in the process (with the decision yet to be taken by Parliament), an Equalities Impact Assessment was not required (to fulfil the s149 duty) • There was no direct or indirect discrimination from the location of HS2
Ground 7 – Irrationality (taken by 51m) It was an irrational decision because: a) Failed to take account of fact they had no solution to the inability of Euston U/G station to cope with capacity. b) Spur to Heathrow not supported by passenger numbers/evidence	Judge found • Not irrational to not have a solution at this stage • Not irrational to propose a spur, whatever the passenger numbers, as there are other considerations. Further argument in H. Hub case. • The issue of the effect of the HS1 link on

c) Link to HS1 has no business case and a failed to consider impacts on North London line and Camden	other rail traffic was conscientiously considered, there are differing views, not irrational to proceed The Judge said there was no remedy, as could not prevent a bill being put to Parliament even if the SoS's decisions were irrational and uncorrected before the bill is put to Parliament

Heathrow Hub

(a) Aviation strategy The decision to proceed with connecting Heathrow by a spur unlawfully fetters choice in the anticipated consultation on aviation strategy as: • There is a legitimate expectation that a through rail route would be an option • It predetermines the aviation strategy option not to have a through route	Judge found: • There is no basis for a legitimate expectation that a through route would be an option (under aviation strategy) • SoS is entitled to rule out an option at this stage on basis of rail strategy
(b) conscientious consideration Heathrow Hub Ltd's consultation response was not given conscientious consideration, because HHL's full consultation response was not considered	Judge found: • Full consultation response may not have been considered, but HHL's position was well known by officials, who met with HHL to discuss after end of consultation period but before the decision was made • HHL issues adequately covered in briefing to the SoS
A Strategic Environmental Assessment (SEA) should have been undertaken and should have included Heathrow Hub as an alternative	Judge found that the SEA Regs do not apply (see above) and the AoS explains why the HH scheme is not a reasonable alternative

Aylesbury Park Golf Club and others

Aylesbury Golf Club's consultation submission was: • Unfair that National Trust should be allowed to influence the route prior to the public consultation • Only opportunity to influence the route preceded the consultation • AGC's submission not conscientiously considered	Judge found: • It was reasonable to discuss with National Trust prior to the public consultation • No evidence that all aspects of route were not open in consultation • Although there was no written record, the proposed route change was given adequate consideration; and it was not for decision maker to develop the proposal to the necessary degree, but for the consultee

This summary of the five JRs is based on Justice Ouseley's 300 plus page judgement of 15 March 2013. It covers HS2AA's JR's in more detail. It is produced in good faith but should not be relied upon legally.