

how consent will be sought for it; it is not the decision, which will be for Parliament, that that is the proposal which will be built. Again, I could not discern how Ms Lieven related s149(1)(a) to the facts of the case.

504. Her case under s19 of the Equality Act 2010, which is where the thrust of this ground ended up was made far too late for it to be given proper consideration, including by the Bucks CC Group, if there was anything in it. It would require an application for permission to amend. If properly sought, it might have called for further evidence. I refuse permission to amend for those reasons.

505. I see no clear merit in it either. The adverse effect is entirely related to the fact that individuals live there, and nothing remotely to do with their ethnicity. I also accept Mr Mould's short analysis of the application of s19: the proposal does not put the ethnic minority residents west of Euston Station at a "particular disadvantage" compared to other ethnic groups. The ethnic minority residents are disadvantaged compared to residents who are not affected, who could equally well be of the same or some other ethnicity, minority or majority by whatever calculation is appropriate in this case. They are disadvantaged simply because of where they happen to live. It is also difficult to see why this effect would have different legal consequences if the proportion of the ethnic minority were not larger but at or less than the borough average by ward, particularly in the context of a linear, national project.

506. I also accept Mr Mould's point that, should the issue get that far, s19(2)(d) provides a complete answer. The case for the HS2 London terminus being at Euston Station is clearly set out in the DNS at paragraphs 5.29-5.31, and its related documents.

507. This ground is dismissed.

7 Bucks CC Group's rationality challenges

direct link between these two nationally-significant pieces of infrastructure is an important objective, and intends to implement the link in phase 2 of the project. This will enable trains to run directly between HS2 and HS1, without the need for passengers to change trains. There are clear strategic advantages from ensuring that a new national high speed rail network in Britain is integrated with the only existing high speed line in this country, particularly given that HS1 would then directly connect HS2 with Europe's growing high speed rail network."

536. The strategic advantages were elaborated: business supported the growth potential from a direct link into HS1 from the North and Midlands; many European countries had plans to extend their high speed networks, and rail was becoming more important across Europe making a "strong strategic case" for the connection. It offered other "connectivity benefits": future HS2 services could stop at the stations served by HS1.

537. Paragraph 4.46 continued:

"Some consultation responses questioned whether the speed and capacity of the proposed link were sufficient, and whether it would impact on existing services using the North London Line, HS2 Ltd has reviewed these issues following the consultation (see *Review of HS2 London to West Midlands Route Selection and Speed*). On the basis of this analysis, the Government remains content that the link provides sufficient capacity to meet likely demand for the foreseeable future. And, whilst initial work by HS2 Ltd suggested that existing services on the North London Line would not be impeded, the Government has commissioned HS2 Ltd to continue discussions with Network Rail and Transport for London to further test this position.

As with other elements of the HS2 network, as the project progresses, the Government will also explore opportunities for third party funding contributions for this link."

538. Paragraph 4.48 described the HS2-HS1 link as “an important component of a high speed rail strategy for Britain.”
539. The Review Document referred to in paragraph 4.46 contains nothing of relevance which I could see or to which my attention was drawn. HS2L’s “Economic Case for HS2: Updated Appraisal” of January 2012 said that the economic case remained positive as it had been in February 2011, paragraph 6.1.5, before other wider benefits were allowed for.
540. The DfT’s “Review of the Government’s Strategy for a National High Speed Rail Network”, also published in January 2012, dealt with the link at section 7.4. While noting that consultation responses had cast doubt over the economic case for the direct link, because of the level of demand set against the cost of construction and operation, that was but one of five components in the overall business case for any project. There was a strong strategic case for the link which contributed to the robustness of the overall case; the omission of such a connection would risk sacrificing a wide range of opportunities. The CBI, and a large number of businesses, supported the link because it would help Britain to remain an attractive place for business. It would provide an attractive alternative to some short-haul air journeys.
541. Sufficient frequency of service would be required to make the service attractive; HS2L’s work indicated a maximum of three trains per hour in each direction over the link. No decision had yet been reached on service specification but it would be used to ensure maximum possible advantage for passengers. So far as existing NLL services were concerned:

“HS2 Ltd’s assessment is that the HS1 line has sufficient unused line capacity to accommodate the envisaged three trains per hour in each direction that would run on to HS2, without the need to remove any existing services. In summary, these developments would only have the effect of increasing choice and the levels of service for passengers.”

542. HS2L's January 2012 "Review of Possible Route Refinements to the Proposed HS2 London to West Midlands Route", paragraph 5.4, said that work between HS2L, TfL and Network Rail had identified a number of potential options which would ensure that the existing services on the NLL were not "impacted." This had been factored into the cost estimates. It would continue to develop these solutions and recommend one for incorporation into the Bill.
543. Ms Lieven submitted that the proposed link to HS1 would create major disadvantages for existing passengers on the London Overground network, and within the area of Camden Town. If needed to provide capacity, four tracks through Camden would cause huge disruption, yet once the decision was set there would be very little that residents and businesses could achieve in any future consultation. Ms Hayward's evidence for Camden LBC highlighted the problems which upgrading the NLL through Camden Town would create, with its densely populated streets close to each side of the line; the Engineering Report, part of the 2011 consultation, adverted to the number of bridge widenings and modifications, and track and platform changes which would be required.
544. The Government had wholly failed to address the business case for the HS1 link in its decision, or the implications of the very low levels of usage predicted, and so it was irrational for the SST to decide to proceed with the HS1 link, at a cost of £0.9bn. It was also irrational for the SST to decide to proceed with a Parliamentary Bill, with no opportunity for any independent scrutiny, without having determined how the problems for passengers and freight with using the existing NLL, highlighted by Camden Council and the Mayor, were to be addressed. Alternatively, the SST failed to take into account the uncontested evidence set out in the 51M response (and that of Camden and the Mayor of London) and in her own supporting documents. Mr Graham did not seek to contradict any of the points made by Mr Stokes. It was simply not enough to say that further work would be carried out to "test" the issue. The SST did not have the support of TfL for this approach.
545. Mr Mould responded that the SST had not published an individual business case for the link to HS1, nor did she have to. She was entitled to have regard to wider strategic objectives such as those discussed at paragraph 4.41 of the DNS and in the Review of Strategy. The criticisms made of the proposed link were expressly considered and rejected in the DNS, and the related documents. This conclusion was reached on the basis of the analysis referred to in the DNS and in Mr Graham's evidence. It was a conclusion that the SST was entitled to reach.

546. The decision to include a link to HS1 was a rational response to the range of transport planning, social and economic objectives considered by the SST in paragraphs 4.41 to 4.48 of the DNS. Paragraph 4.46 of the DNS reinforces the rationality of the SST's decision and reflects her consideration of consultation responses. The need to continue to appraise the likely performance of the proposed direct link in consultation with Network Rail and TfL, in the context of the detailed development of the project, was self-evident.
547. The SST was entitled to decide to promote the scheme at this stage and was correct to note that further work would be required as the scheme developed. The problem had been identified, and it needed to be resolved if the powers sought were to be obtained. If no solution was found through discussion with the other relevant bodies, the SST would have to think again. A good deal more work had to be done to make it an acceptable reality, said Mr Mould. Bucks CC Group's concern about "four tracking" and its impact was a matter for consideration, if necessary, as the project developed.
548. But it was not perverse to decide to seek powers at this stage, especially as it could not be left to Phase 2 without unacceptable disruption. Nor would there be any point in a remedy being granted by the Court which prevented the issue being examined by DfT and HS2L.

Ground 7(b) Conclusion on the HS1 link

549. I do not accept that material considerations have been ignored by the SST. The consultation responses were given conscientious consideration. The DNS and related decision documents did not have to go through the responses as if a decision letter following a Public Inquiry. The real question is whether the response to the problems is rational.

550. As with the underground capacity problem at Euston, the real question is whether the decision to promote the Bill including the HS1 link in Phase 1 is irrational and unlawful. There is nothing irrational in promoting the Bill on the basis of the overall case for the link, passenger levels and the absence of a “business case”, notwithstanding. Those are all merits arguments about which reasonable people may differ.
551. The effect of operating the link on the existing passengers and freight services on the NLL is at issue: the SST concluded that there was sufficient capacity for HS2 trains on the link without impeding existing services; but further work would be undertaken. There is a difference of view between SST and TfL and the Claimants. This is not a case where the SST agrees that there is a problem to which a solution has to be found, but which has not been identified or resolved upon. Unlike the Euston underground capacity issue, there is a dispute about whether the problems raised by TfL and the Claimants would arise. It may be that further work will support what the Claimants say, that the works required for a sufficiently capacious link will be far greater and more damaging than at present accepted by the SST. It is not my task to resolve that. It is impossible for me to conclude that the Claimants have proved their case on capacity and impact on existing services.
552. I see nothing irrational in the present decision to proceed with the Bill, while doing further work. That work may make the position clearer by the time the Bill is presented to Parliament. The SST is content to make the case, for better or worse, to Parliament that all will be well enough to enact the Bill.
553. It will be for Parliament to decide whether there would be sufficient demand to make the link worthwhile, and whether constraints in the tunnel and on the NLL would make the link of so little value that it should be removed from the Bill. It would also be for Parliament to decide whether the promoters have made out the case that the disruption to existing services is acceptable or whether to refuse to enact the Bill because of the impacts or the need for far greater work than at present envisaged to the tunnel and NLL. I reject this aspect of the rationality ground of challenge.

Ground 7(c) The Heathrow spur

554. The DNS records the SST’s decision that “Route options for a direct spur link to Heathrow Airport should be developed to form part of Phase 2 of the Y network”. Like Phase 2, no route has been published for this spur. The Summary of Decisions explained:

“Diverting the main HS2 line via or close to Heathrow would be costly and would disadvantage the vast majority of HS2 passengers. The Government therefore favours a direct spur link to the airport, which could radically improve its accessibility from the major cities of the Midlands and the North. The options for such a spur link will be considered by the Government as part of Phase 2.

555. The Report prepared by HS2L “High Speed Rail: London to the West Midlands and Beyond”, in 2009 said at paragraph 3.3.10:

“...the total market for accessing Heathrow from the West Midlands, North West, North and Scotland is currently around 3.7 million trips [per annum]. Our modelling suggests relatively little of this would shift to HS2, with the rail share increasing by less than 1 percentage point (about 2,000 passengers per day or just over one train load each way).”

The estimated cost for the spur was £2.5-3.9 billion. A spur solution to access to Heathrow would cause the loss of one complete train path to London for every train terminating at Heathrow, making the spur an unattractive option, which was not considered further.

556. The Consultation Document proposed a direct link to Heathrow, with the aim of releasing short-haul capacity, to “transform” the accessibility of Heathrow from the Midlands and the North, and contributing to Heathrow as a multi-modal transport hub. The spur would be designed so that it could become a loop back on

to the main line in the future to enable through services via the airport to London. Whilst only Phase 1 operated, an interchange at Old Oak Common on to the Heathrow Express would be the best option. Demand for the direct link would have grown sufficiently by the implementation of Phase 2, but the spur junctions would sensibly be built as part of Phase 1. This was elaborated on and alternatives were canvassed in Chapter 3. There was no further analysis of demand, capacity and opportunity cost.

557. 51M analysed the case for a link to Heathrow in its consultation response. It noted at paragraph 130:

“The Consultation Document does not give any information on the proposed pattern of services to Heathrow or HS1. It appears likely that no serious work has been done in connection with this – an extraordinary position in relation to a proposed investment of £3.4-4.8 billion between them. The Economic Case for HS2 does include a “service specifications for the Y network” but this does not show any trains to Heathrow or HS1.”

558. 51M continued, paragraph 131:

“A frequent, regular service would be essential in order to achieve the scale of modal shift discussed above. The minimum pattern is an hourly service from Birmingham, joining at Birmingham Interchange with trains from Manchester and Leeds on alternate hours, giving a two hourly frequency for each branch of the ‘Y’. This pattern would give a total of 17,600 seats each way over a sixteen hour day, resulting in an unsustainably low average load factor of c.13% seats occupied. It is clear that an operation of this nature would not therefore contribute towards the cost of maintaining the infrastructure. There is no possibility of any return on capital for either the rolling stock used for Heathrow services or the investment in the spur itself.”

559. 51M then set out a more detailed critique of the case for a link to Heathrow and concluded that the Government had provided no quantitative evidence to support its case. In summary:
- (a) Analysis of the potential market for direct services to Heathrow showed that these would make heavy losses, even ignoring infrastructure costs.
 - (b) Operation of services to Heathrow would make the fragile reliability of HS2 significantly worse.
 - (c) The link would have no benefit in terms of carbon emissions, as it would free up slots for more long haul flights, with higher emissions.
 - (d) Operation of Heathrow services would have a major opportunity cost for the project as a result of reduced services to Euston.
560. In essence, the usage level for the link would be extremely low but it would add very significant complexity and risk to the operation of HS2 – especially as the case for HS2 was based on 18 trains per hour, a level not achieved on any high speed rail network anywhere in the world.
561. Ms Lieven also relied on a number of the SST’s own documents. The “Economic Case for HS2: Updated appraisal of transport user benefits and wider economic benefits”, January 2012, (which supported the DNS), at paragraph 3.2.5, calculated that 6,500 passengers a day, for two trains an hour each way, gave an average loading of 102 passengers a train, a load factor of 18%. She submitted that there did not appear to have been any consideration of the implications for the overall service in terms of reliability of a Heathrow link, nor any analysis of the business case for the link.
562. Recent disclosure from the Treasury Solicitor dated 23 March 2012 produced a document, said to be an HS2L internal briefing note to the Chief Executive of HS2L in November 2011, which included a section headed “The economic case for the Heathrow link”. The conclusion of this note on overall value for money states:

“The quantified benefits of a Heathrow link and station are relatively small compared to the costs. The level of demand is small compared to the core market of London and this creates a challenging trade-off in terms of the optimal use of capacity. It is unlikely that the quantified BCR within our modelling will exceed 1:1 and is likely to be substantially below this.

However, there are unquantified benefits and strategic arguments. We are likely to slightly underestimate demand to Heathrow airport itself (as there could be an increase in total passengers at Heathrow – something we have not assumed), and it is clear that stakeholders place a very high value in being able to access Heathrow: arguing this can lead to significant regional economic benefits.”

It noted that the quantified BCR was likely to be less than 0.3:1.

563. The SST did not suggest that 51M’s analysis of the predicted passenger numbers was incorrect. Paragraph 428 of Mr Graham’s third Witness Statement acknowledged that the number of travellers forecast to use the link is “relatively small, and the costs of building it are high”, because of the tunnelling required. He outlined the “broader benefits” as already summarised in the Consultation Document, but Ms Lieven submitted that Mr Graham had not addressed the degree to which, if at all, these benefits would accrue from the interchange to Heathrow at Old Oak Common via Crossrail/Heathrow Express in any event.
564. Ms Lieven submitted that no rational Secretary of State could proceed with an infrastructure project costing upwards of £2 billion with inevitable widespread amenity damage including existing blight, without even grappling with what she described as the overwhelming evidence that the project was utterly misconceived. It was not rational to spend over £2 billion of public money on a rail service predicted on the Secretary of State’s own material to have only 18% usage, and a BCR of 0.3:1, poor value for money on the SST’s own guidelines.

565. Alternatively, the SST had failed to take into account the uncontested evidence set out in the 51M response and in her own supporting documents.
566. Mr Mould accepted that there was no incremental business case for the Heathrow spur – nor indeed was there an incremental business case for the link to HS1, or for each individual leg to Manchester and Leeds. The case advanced for the Heathrow link did not depend on quantified benefits or a favourable BCR when taken alone; it depended on wider benefits and strategic arguments. The Secretary of State was not irrational in promoting a scheme on that basis.
567. The claim that “the link would add very significant complexity and risk to the operation of the service” had been considered by the SST. The operation of an 18 trains per hour service had been the subject of detailed assessment by HS2L. The SST was entitled to conclude that the broad level of service set out in the DNS was capable of being delivered.
568. In light of the explanation given in the DNS, the SST’s decision was a rational response to the range of transport planning, social and economic objectives considered by the SST in the DNS.

Ground 7(c) Conclusion on the Heathrow spur

569. The approach of HS2AA and the Bucks CC Group to this topic is of course rather different from HHL’s. The former question the value of any link to Heathrow; the latter want what it regards as a much better one.

570. I do not accept that the SST has omitted material considerations in reaching the decision in the DNS. He simply does not agree on the need for a business case or normal BCR, nor on the degree of impact which the link would have on the operation of HS2 which earlier reports from his side of the fence have been concerned about. The SST is not bound into a decision-making framework by the sort of arguments which Ms Lieven deploys. He is entitled to take what he regards as a broader view and to promote a project which has a low BCR for other benefits as he sees them. There is clearly an issue over the degree of interference with the operation of HS2, which he has at present resolved by saying that the broad level of service is capable of being delivered on HS2. It is therefore to him a level of service which makes it worth promoting the Bill. There is nothing remotely irrational in the DNS or in the decision to promote the Bill on that basis.
571. Parliament may or may not be persuaded by the arguments of either side on the degree of interference with the rest of the operation of HS2, in the light of the concerns expressed on the promoter's side of the argument. It can also make its own mind up on the risk of interference that would be run for the low level benefits measured by BCR but set against its own view of the wider benefits. This ground is dismissed.

8 Heathrow Hub Limited's challenge

572. HHL's challenge had two limbs. The first concerned the impact of the decision in the DNS on the anticipated consultation process and decision making on the Government's aviation strategy. The second concerned the way in which its consultation response had been considered. I deal with the first one first.

Ground 8 (a) The DNS and aviation strategy

573. The DNS decision that the link between HS2 and Heathrow should be via spurs, built as part of Phase 2, off the high speed line on its alignment in the preferred corridor, also involved the rejection of a direct route for HS2 passing by Heathrow and linking to the Great Western Main Line, GWML. I have already set out the

summary of that Decision. What HHL have termed the Heathrow hub station is the location at which HS2, on the direct route alignment favoured by HHL, would link to Heathrow and the GWML. The first ground raised by HHL is that, in excluding such a route for HS2, in advance of the aviation strategy consultation, the SST unlawfully fettered her discretion, or pre-determined the outcome of that strategy or breached HHL's legitimate expectation of full consultation at the relevant stage on the aviation strategy.

574. The SST accepted that future high speed rail and the future of aviation in the UK were interlinked, and that “the strategic case for ensuring that Britain’s high speed rail and aviation hub strategies are effectively integrated will remain strong”; Composite Defence paragraph 240 and DNS paragraph 4.26
575. Mr Warren QC for HHL put the legitimate expectation he said HHL enjoyed in relation to aviation strategy in a number of ways. HHL had a legitimate expectation that the future long-term aviation strategy “would be fairly developed having regard to the possibility of high speed rail directly connected to Heathrow”. HHL had a legitimate expectation that “genuine consultation ... on [all the options for maintaining the UK’s aviation hub status except a third runway at Heathrow] would take place in due course”. I interpolate the words necessary to understand the formulation used at paragraph 41 of Mr Warren’s skeleton argument. Later he put it as a legitimate expectation of genuine consultation “on the breadth of future aviation strategy”.
576. The only document which he relied on as the source for any of these expectations was the DNS itself. Mr Warren referred me to many passages in it, in which the Government dealt with aviation strategy. I take as a good example paragraph 4.39, but 4.40 is also directly relevant to the legal argument:

“4.39 In addition, as the *National Infrastructure Plan* recognised, there is a clear case for maintaining the UK’s international aviation hub status. The Government will develop a long-term aviation strategy which will set out how we intend to address the UK’s airport capacity challenges, while ensuring aviation plays its part in delivering environmental goals and protecting the quality of life of local communities. The Government will publish a

consultation on this strategy in spring 2012. This will explore all the options for maintaining the UK's aviation hub status, with the exception of a third runway at Heathrow. There will remain a strong strategic case for ensuring that Britain's high speed rail and aviation hub strategies are effectively integrated. The Government will, therefore, continue to review how HS2 can best support its plans for maintaining the UK's hub status. An important element of this will be the scope for third party funding contributions to the costs of linking HS2 to the country's hub airports.

4.40 The Government has asked HS2 Ltd to develop detailed route options for a spur from the main HS2 line to serve Heathrow Airport. As outlined in Part III of this document, it is expected that plans for the spur will then be subject to public consultation. Depending on the conclusions of that consultation, the spur would be included in the hybrid Bill proposed for the second phase of the Y network.”

577. Mr Warren described paragraph 4.39 and a number of others as clear and unequivocal statements, which justified the claimed legitimate expectations. It is clear that the DNS excluded the development of a direct high speed rail link via a Heathrow hub station, which HHL regarded as one of the most important options for maintaining the UK's aviation hub status in general and that of Heathrow in particular. Thus, the legitimate expectations were breached, since that option could not be put forward during consultation on the aviation strategy.
578. The legitimate expectation argument is untenable. The DNS, upon which Mr Warren is wholly dependant, has to be read as a whole in order to see whether any claimed expectation arose. The DNS decided on a route for HS2 which prevented such a direct through route for HS2 at Heathrow, or Heathrow hub as promoted by HHL, and provided instead for spurs. It is impossible to read the DNS as containing a promise of consultation on future aviation strategy which kept open the option of a direct through HS2 line at Heathrow for the purposes. The aviation strategy consultation, when it comes, is clearly going to take place against the backdrop of the rejection of that option in the DNS. The legitimate expectation of consultation on aviation strategy is of consultation with no direct through route at Heathrow for HS2. The expectation asserted is no more than a complete misunderstanding of the DNS; the legitimate expectation claimed was breached in the very document which was said to create it.

579. The contention that the DNS fetters the discretion of the SST at the stage of the aviation consultation to adopt a Heathrow hub strategy with a through route for HS2 or pre-determines the issue is equally misconceived. True it is that such a rail line could not be the subject of discussion in the aviation strategy consultation, since the decision that it should not be provided would already have been taken. But that is not an unlawful fettering of discretion or pre-determination. It is simply taking a decision on rail strategy, even though it closes off a possible rail option which has some bearing on the arguments about future aviation strategy for Heathrow. The Government is entitled to make a decision on rail strategy at this stage, even though, as it is well aware, that decision will not be open for debate later, subject to any Parliamentary decision on the Bill.
580. I cannot see the basis upon which that gives rise to any unlawful fettering of discretion, and no legal analysis was provided to show how it could be. This is not a case in which decision A prevents the lawful consideration of the exercise of statutory powers in relation to decision B; *British Oxygen Ltd v Board of Trade* [1971] AC 610, read fully, cannot support Mr Warren; the passage at 625E was rather taken out of context. One may debate the merits of waiting or not, as Mr Warren's arguments tried to do, but that is not a legal issue. It cannot possibly be said that the only lawful way for the Government to proceed in its decisions on the HS2 route between London and Birmingham is to wait until the aviation strategy has been consulted on and resolved. I suspect that had the HHL proposal been adopted in the DNS, it would have resisted any suggestion that, since the through link was an unnecessarily expensive and damaging way of providing a link which could equally as well have been provided by spurs, HS2 should be delayed until the decisions on aviation strategy had been taken.
581. Mr Warren's argument was not improved either by reference to Decision 661/2010 adopted pursuant to Article 172 of the Treaty on the Functioning of the European Union. The Decision relates to guidelines for trans-European transport networks. Article 5 of the Decision requires the integration of rail and air transport, and rail access to airports to be a priority. Mr Warren submitted that the DNS jeopardised the attainment of this EU policy objective, and the fettering of the decision struck against "a core principle of EU law". There was no elaboration of that striking assertion. It is obvious that the integration of rail and air was an important consideration in the DNS; the concern was about the best way to do so when all factors were considered, including cost and level of usage of direct trains, the delay to the passengers who would not alight at Heathrow, and the journey from the station to the airport. The decision could not be regarded as irrational. I was referred, primarily in the context of the consultation ground to R

(Medway Council and Others) v SST [2002] EWHC 2516 (Admin) and *R (Hillingdon LBC) v SST* [2010] EWHC 626 (Admin). Those are very different cases from the one which Mr Warren sought to make in this ground. This ground is untenable.

Ground 8(b) The consideration given to HHL's consultation response

582. HHL's other main ground relates to the consultation process. In short, HHL argues that the consultation process carried out by the Secretary of State was unlawful in three respects: parts of HHL's consultation response were not taken into account by the SST, and the consultation was not undertaken at a time when there was still an opportunity to influence the decision. Third, the consultation was based on flawed information.

The failure to consider the full HHL consultation response

583. First, and what seems to me by far the most important aspect of this ground is that the SST had failed to take into account the full consultation response of HHL, among others, as was accepted in a letter dated 20 July 2012. The parts ignored were material, submitted Mr Warren, and potentially significant for the decision on the link to Heathrow.

584. He argued that for this reason alone, the DNS ought to be quashed and the decision reviewed with proper access to the relevant documents. Government policy on consultation, the Aarhus Convention and domestic authorities were prayed in aid. This was a formal consultation. There was no suggestion that HHL need not participate since its case was well known; instead, the question of connections between HS2 and Heathrow was a topic of consultation, which must have been approached with a mind prepared to consider the merits of the consultation responses. Indeed in its letter of 15 December 2011, of which more later, the DfT promised that any information on the HHL proposal provided in the consultation exercise would be given "due consideration".

585. HHL would not have locus before the Select Committee on the Bill, so this consultation process was its last chance to influence the process. The hub option would be closed off by the Phase 1 decision. Nor, save if its first ground succeeded, which I have decided it does not, would there be any further opportunity during the consultation on aviation strategy.
586. I accept that on the face of it, the omission to consider an important response on an important topic would provide a strong case that the consultation was unlawful in that respect, and the unlawfulness should be remedied. The purpose of the consultation would also be defeated if the DfT approached the responses with a closed mind; the process would be unlawful.
587. The SST responds that the proposal was well known to the Department, which raises a question of how far the Minister who took the decision was aware of it, or was dependant on incomplete briefings by officials. The full response from HHL was not a detailed or technical one but short and full of unproven assertions with which the DfT disagreed. Many other consultees had raised the through route which was essentially the HHL point. Dialogue by Design (DbD), which collated, analysed and reported on the consultation responses, had examined the omitted pages and had concluded that it would not have affected the content or balance of its Consultation Summary Report.

The facts

588. HHL's concept of a Heathrow hub was for an interchange between the HS2 line, GWML and Crossrail, as well as coach services, on a greenfield site at or near the existing Iver Station. It would be constructed in Phase 1, and would necessarily involve a different alignment for part of HS2 both near Heathrow and further north, curving south west of the consultation route. HHL envisaged that this interchange would also be able to carry out the passenger processing functions of a terminal, so that the onward journey (some 3 miles) to the on-airport terminals would be made "airside" and via fixed infrastructure in some form of people mover.

589. Not all of the various concepts of an HS2 line “through” Heathrow or for a hub, which others may have promoted, have been precisely the same as HHL’s. HHL and its former parent company Arup’s have long seen the potential for some form of hub at Iver to connect Heathrow with HS2, and have engaged with DfT officials, HS2L and others for some years in promoting it. HHL’s proposal, however, is for an altogether more ambitious interchange than Arup’s.
590. The potential for an interchange station between HS2, Crossrail and the GWML also providing access to Heathrow, a spur, and routeing a new line via Heathrow were among the options which DfT asked HS2L to consider in January 2009. HHL provided detailed information to HS2L. HS2L’s December 2009 Report, referred to above, assessed the merits of the various options, including the potential for an HS2 interchange at Iver on the GWML, giving access to Heathrow, as Arup had proposed. It thought that the high speed market to Heathrow was likely to be small, which meant that the greater number of passengers would not be Heathrow bound, and would suffer delay if they were on trains which were routed via and stopped at Heathrow. The December 2009 report concluded that the most promising options for serving Heathrow by high speed rail were an interchange at Old Oak Common via Crossrail and the Heathrow Express, or a station at or near Heathrow on a loop from HS2, connecting to the airport and GWML.
591. Arup met with the then SST on three occasions between December 2009 and March 2010. The March 2010 Command Paper, responding to the HS2L report, concluded that, although there could be a case in the future for a direct high speed link to Heathrow, the link should be provided initially via an interchange at Old Oak Common. Lord Mawhinney was commissioned to provide an analysis of the longer-term case for a direct link.
592. Before he reported, HS2L was commissioned in June 2010 to develop route options for Heathrow including a through route of the sort proposed by HHL, (but not of the same total character as an interchange terminal). The Mawhinney report supported the initial high speed connection being via an interchange at Old Oak Common. It did not recommend a through route for HS2 at or near to Heathrow, but an underground link to Heathrow’s Central Terminal Area, CTA, from the Old Oak Common interchange.

593. The HS2L report of September 2010, Chapter 1, supplementary to its December 2009 report, examined in some detail the range of options, including a through-route via a station at Iver on the GWML, much the same in terms of location as proposed by HHL, or at Terminal 5 or close to the Northern Perimeter Road. The CTA link proposed by Lord Mawhinney was rejected as too costly. The onward routes were examined. It concluded that spur options were, with the connection at Iver, the cheaper of what were all expensive options. The connection at Iver would also require further expenditure to provide a transport connection for the passengers from the station to the airport terminals. The spur was considered to be the best option economically, with the least interference to non-airport HS2 passengers.
594. On 20 December 2010, the SST announced in Parliament that the strategy to be put forward for consultation was the spur, to be constructed as part of Phase 2, with an interchange at Old Oak Common to the Heathrow Express and Crossrail till then. (The renewal of the former's track access rights would be required, I was told, for an interchange to include it). The SST mentioned but did not support what he referred to as "Arup's proposals for a transport hub near Iver."
595. The February 2011 Consultation Document accordingly included the spur proposal, but without its route details, since they had not been developed. The costs were included in the "Economic Case for HS2" published also in February 2011.
596. HHL submitted a 9 page response. It was not fully considered by DbD. What appears to have happened is that there was an unannounced word limit on the online consultation form in relation to each answer. Only the truncated response was considered by DbD. The more detailed answers to consultation Question 3, the relevant one for these purposes and which carried the weight of the argument in relation to the hub over some 4 pages, were not considered by DbD. Nor was the full response considered by DfT officials. The general objection to the proposed links to Heathrow were clear enough but all the points of detail by way of opposition to it and expressing the advantages of the proposals of HHL were omitted. Whatever the cause, there is no doubt but that this omission occurred, and it was not HHL's fault. I add at this stage that it is clear that the fault lay on the SST/HS2L's side of the fence, though there was no break in mid-sentence in HHL's response as considered to alert the reader.

597. Between November 2011 and January 2012, HHL had further communications with the SST and officials by letter and at a meeting with Mr Goding, Director General at the DfT, to explain with slides the advantages of HHL's proposals over those of HS2L.
598. The DfT letter of 15 December 2011 said that the SST, DfT and HS2L were "aware of the proposals advanced by HHL", as Mr Graham's fourth Witness Statement confirmed. HHL also made written and oral submissions to the Transport Select Committee (TSC) Inquiry into the Strategic Case for High Speed Rail. HS2L responded to HHL at the TSC's invitation. It contrasted its interchange with HHL's wider proposal and terminal facility. Its main reasons for not adopting HHL's proposals were: the significant time (7 minute) penalty for non-airport bound passengers, who would be in the great majority; for airline passengers, an on-airport location or one closer to the airport than Iver would be more attractive; the Old Oak Common interchange would be more attractive for passengers going to destinations in London, who would not transfer to Crossrail at Heathrow.
599. BAA and a number of airlines also supported the through route in the consultation process, as now did the Opposition. BAA supported a link to T5 or in the CTA.
600. The DNS decision was to provide an interchange at Old Oak Common initially, and then a spur link as part of Phase 2. It said in paragraph 69 of the Summary:

"One alternative which achieved particular prominence was an option for a direct route via Heathrow and the M40 corridor. The Government does not consider that this would offer a better solution than the route put forward for consultation. It would be impossible to locate a station close to one of Heathrow's main terminals, with the key potential station locations being either adjacent to the airport's Northern Perimeter Road, or some three miles further north, adjacent to the Great Western Main Line at Iver. Either of these possible locations would be some

distance from Heathrow terminals and would entail new transit facilities to the terminal areas, providing a journey experience little better than an interchange. In addition, a direct route via Heathrow would entail increased construction costs and substantial journey time penalties for the great majority of HS2 passengers travelling to and from central London. For these reasons the Government does not support a route of this kind.”

601. This was elaborated on in Chapters 4 and 5. It is clear that the DNS saw the link to HS2, whether by a through route or interchange and spurs, as helping to establish Heathrow as a multi-modal hub, and achieving a direct link between the two. At 4.31-3, the DNS referred to the consultation responses which raised the question of a through route, and said:

“The case for running the main HS2 line via Heathrow was raised in consultation responses. HS2 Ltd has carefully looked at the case for serving Heathrow in this way. This is discussed in more detail in Chapter 5. The outcome of this further consideration, coupled with the evidence presented in consultation responses, has not altered the Government’s conclusions. Whilst a through-route may bring benefits to the relatively small proportion of passengers who would use HS2 to access Heathrow, these would come at the loss of much larger benefits to the majority of passengers travelling into central London. HS2’s projected passenger mix shows that many more people would be using the service to access London than Heathrow.

HS2 Ltd’s analysis has also indicated that it is possible under the spur option to locate an HS2 station directly at one of Heathrow’s main terminals, which would not be the case if the main route was diverted to serve the airport more closely. In addition, the extra costs associated with routing the main HS2 line close to Heathrow could be higher than the costs of a spur to the airport from the main line. For these reasons, the Government favours a spur rather than a through route as the best option for providing direct high speed access to Heathrow.

A spur of this kind could, however, be designed to be capable of extension in the future into a loop back onto the main HS2 line.”

602. The terminal referred to as the Heathrow spur station location is Terminal 5, regarded by the SST as the only feasible terminal; the Mawhinney report CTA station proposal was rejected on the grounds of cost and technical difficulty.
603. The January 2012 “Review of the Government’s Strategy for a High Speed Rail Network” dealt further with HS2 connections to Heathrow in paragraphs 7.3.33-7.3.42, in the light of other consultation responses, such as those from BAA and British Airways, favouring a through-route to Heathrow. This elaborated the disadvantages to the operation of HS2 of stopping trains for a Heathrow through route interchange and the relatively small number of passengers who would be advantaged.
604. There is further analysis in section 3.4 of the “Review of HS2 London to West Midlands Route Selection and Speed”, also published in January 2012. In paragraph 3.4.7 it said:

“We believe, therefore, that a through route would only be practicable with a station remote from the main terminal areas. We had previously examined two options, one adjacent to the Northern Perimeter Road of the airport and one near Iver, some three miles further north adjacent to the Great Western Main Line (GWML). Neither could easily be integrated with passenger facilities and other public transport connectivity of Heathrow Airport. Passengers would need to be conveyed by a new system of people movers or bus-ways. Such an option would not match the passenger benefit of an on-airport station, integrated with airline passenger facilities.

We are confident therefore that in respect of serving the airport, the option for a spur to Heathrow from the consultation route to the airport itself performs better than a through route stopping close by the airport. Since it allows services to travel directly to a passenger terminal at Heathrow, it gives the opportunity of services in codeshare form with integrated luggage and ticketing. A spur route also allows dedicated airport services, which could be more suitable for such arrangements. A spur could take passengers to a station fully integrated into the passenger

facilities of the future Heathrow itself making a more attractive proposition for interlining passengers.”

605. This Review also dealt with the impact on non-airport passengers (4 minute penalty for trains not stopping and 8 for trains stopping at the interchange) and the effect on capacity of operating a high frequency, selectively stopping, high speed railway, at 3 minute intervals; one complete train service would be lost for each stopping service, unless all trains stopped. The interchange with Crossrail at Iver would not provide as effective a means of passenger dispersal in London as it would at Old Oak Common.
606. In July 2012, after the omissions came to light, DbD produced a matrix analysis of the topics raised in the omitted responses. That conveys nothing of the substance of the points raised. A short paragraph deals with the spur. HHL’s point is expressed as being that connecting Heathrow should have been part of the initial route selection, leading to a more integrated solution. DbD also referred to the previously unconsidered response by the London (Heathrow) Airport Consultative Committee (LHACC) which is said to have expressed similar views, it appears, to those of HHL as summarised. The through route would maximise economic benefits and model shift from air; the link should be part of Phase 1, integrated rail/air ticketing was a possibility.
607. On 17 July 2012 the then SST made a written statement to the House of Commons (139-140 WS) about the omitted responses. She said “Inclusion in the original analysis [by DbD] would not have... affected the considerations which informed me in taking my decisions following the consultation.” This statement covered all the omitted responses without any elaboration.
608. HHL’s solicitors made inquiries on 25 July 2012 of the Treasury Solicitor, after the failures in relation to the consultation responses came to light, as to what material the SST had in front of her when the decisions were taken. The SST had not been at any of the meetings. The substance of the DfT response on the DNS had not been put to HHL at the meetings or in letters.

609. The reply on 26 September 2012 was that the principal sources of information she had were the draft decision documents and “a limited number of submissions from officials”. It went further: the DNS and supporting decision documents were a “detailed account of her decisions and her reasoning in the light of [the] advice [from DfT and HS2L officials]”.
610. However, that letter also disclosed the submission made to the SST by officials in July 2012 on the consultation responses omitted from the DbD analysis. The submission said that both HHL and LHACC made the case “for diverting the main HS2 route to run via or close to Heathrow Airport in preference to the spur to Heathrow proposed in consultation.” It then summarised her reasons for choosing the spur: only the spur would allow in practice for an interchange station to be sited at one of the terminals, (T5); the benefits of re-routeing the main line would be outweighed by the disadvantages to non-airport bound passengers; the additional costs would be less once the cost of transit from interchange to the terminals was taken into account, any environmental benefits would be small and insufficient to outweigh the advantages of the spur.
611. It then commented “Neither the Heathrow Hub nor the LHACC submission provide any robust challenge to these arguments”. HHL had provided no evidence that the 3 minute journey time penalty would be outweighed by wider benefits, and HS2L’s analysis suggested a greater time penalty. HHL disagreed with HS2L that the spur would be cheaper overall, but assumed private sector funding and ignored the cost of “connectivity” to the airport. HS2L disagreed with HHL’s suggestion that the Old Oak Common interchange would be omitted, because of the much greater role which that interchange would play in the dispersal of passengers in London without using Euston Station. The “Review of the Government’s Strategy” had dealt with the question of the adequacy of the information, especially environmental information about the spur.
612. Two LHACC points reflect in part concerns of HHL as well: broader range of users from the surrounding areas with a through route and damage to Heathrow in international competition without it; but its first point still showed that airport users would be the minority of HS2 users, and there was no evidence to support its claim that the absence of a direct link in Phase 1 would be damaging to Heathrow’s international competitive position.

613. The DfT remains unwilling to disclose what documents, other than the draft DNS and other decision documents, including DNS Part II “*Review of Evidence from Consultation Responses*”, the SST actually had in front of her. A lengthy request by letter dated 5 October 2012 under the Freedom of Information Act had led to a refusal on public interest grounds of disclosure of the array of official documents sought.

The effect of the omissions

614. The argument that the DfT was aware in fact of the points from other meetings and sources, and that other consultees had effectively made the important points anyway does require the missing parts to be considered. I have also set out at the same time the response by Mr Mould to the points, and Mr Warren’s reply.
615. The consultation response plainly assumed that the reader knew in July 2011 what HHL’s proposal was, since the response does not describe it in any detail; indeed it expressly states that the details have been provided to Government and DfT. Half of it comments on the disadvantages of the spur proposal, and half puts forward the case of HHL’s proposal. The final comment which the DfT /DbD would have seen was that HHL contended that the consultation proposals for connection to Heathrow were incoherent and would fail to stand up to scrutiny. What was missing was the reasoning behind that claim.
616. The points made against the spur were:
- (a) HS2L’s analysis did not consider interchange penalties faced by airline passengers with luggage and level changes, before the spur was provided; there would be level changes and a considerable walk at Old Oak Common (on which Mr Warren’s submissions focused this point); **SST**: January 2012 Strategy Review 7.3.40: the Old Oak Common interchange change would be a simple cross platform change with a journey time of 11 minutes to the CTA;

- (b) the absence of access from the west and the risk that Heathrow Express' access rights would not be renewed leaving the interchange dependant on Crossrail; **SST**: Strategy Review 7.3.22: other work between Network Rail and BAA was looking to provide a link from GWML to Heathrow, now supported by Government, for the benefit of air passengers from the West and for other passengers from the West using the Phase 2 interchange to use HS2 to the Midlands and North; Old Oak Common would also provide an interchange to the GWML; some of this point was in the part of the response considered by the DfT;
- (c) the uncertain assumption that the political will and funding for the spur would continue through to Phase 2; **SST**: this is not accepted and it will be in Phase 2, but it was possible that Phase 2 would not happen;
- (d) the spur would require a major interchange station at Heathrow *and* at Old Oak Common; **SST** did not appear to dispute this;
- (e) it was unclear whether the spur would provide access only to and from the north or to London/HS1 as well; the former would be very disadvantageous to airlines (in so far as the latter has now been announced by the SST with the junction locations, it showed that the DfT had provided insufficient information about it for an informed consultation response); **SST**: it was always "anticipated" that there would be two junctions, the locations of which have now been announced;
- (f) the spur would require two dedicated trains per hour to be attractive, which would provide much more seating capacity than required, making the business case unsound; **SST**: Strategy Review 7.3.4: the spur was not based on the economic case alone but on wider strategic objectives, such as enhancing the "connectivity" of Heathrow and providing an attractive alternative to short haul aviation, and promoting economic activity in the Midlands and North;
- (g) the impact on HS2 services of the reduced speed spur trains joining and leaving the main line could not be determined and had not been analysed by HS2L; **SST**: provided no direct answer to this save a general reference to the "detailed consideration of all Heathrow options" in the September 2010 supplementary report, which at 1.2.1-2 appears to confirm that the spur would have an effect on the operating capacity of HS2;
- (h) there was no detail or route for the spur and junctions, so neither its costs or environmental impact could have been properly considered, (the effect on the Colne Valley was raised in particular); **SST**: there was a dispute about the costs which SST said had been properly considered, and the environmental impact could not be assessed in detail at this stage because the detail of the spur route and junctions had not been decided;

- (i) the proposal was contrary to EC inter-modal transport policy since there was no consideration of a wider airport masterplan and connectivity with classic rail services; **SST**: the various decision documents demonstrate that the strategic connections to Heathrow for inter-modal purposes were an important part of the case for the link; modal shift to rail was considered throughout the DNS and in the Strategy Review;
- (j) delaying consultation on the spur connection between HS2 and Heathrow could mean that the decision was made before the details had been considered, which could have led to a different decision; **SST**: there was no direct response;
- (k) the possible further loop was an inefficient way of developing the spur, and European experience showed that a through line connection was better; **SST**: the loop was not proposed, but its potential provision was to be protected; there was no technical work to support the assertion about European experience and its relevance.

617. The points made in favour of HHL's proposals were:

- (a) BAA and Heathrow airlines favoured an interchange at or near Heathrow on the HS2 through line albeit BAA did not want that to be at Iver; **SST**: this was known already;
- (b) it would be available at Phase 1, co-located with a terminal, and would allow a "one-seat" ride from a large catchment, generating considerable demand and modal shift, improving the business case for HS2; **SST**: the DNS explained that the spur was not provided in Phase 1 because of the low level of use anticipated until the Y network was built; modal shift was a regular theme of the decision documents;
- (c) there would be a single interchange between HS2, GWML/Crossrail and the motorway network, and would be early benefits to the West and Wales;
- (d) the cost would be less on a greenfield site than at Old Oak Common, with fewer impacts on the local community;

- (e) the cost of the direct route was likely to be no greater than the cost of the spur and the HS2 consultation route and could be much less;
- (f) the environmental costs of the through route near Heathrow were likely to be lower than the spur and junction, and on the revised alignment it would require through the Chilterns;
- (g) the 3 minute time penalty was likely to be offset by greater wider benefits. SST: the benefits to Heathrow passengers and disadvantages to the others had been weighed, and a decision reached.

618. Mr Warren made the point that the thrust of HHL's contentions in the consultation response should not be obscured by picking off some of the detail, and picked up this theme in reply. I have set out the points made in the consultation response, as did Mr Warren. Some of his points in submission seemed to me to go beyond HHL's consultation response, which is not relevant for this case and were grouped to create a thrust to the case which did not come over so clearly in the omitted part of the response.

619. However, Mr Warren said, for example, to illustrate the themes of the consultation response that HHL's case was not answered by the DfT's acceptance that a connection between HS2 and Heathrow was of strategic benefit, and so there were benefits from a spur. HHL's case was that there should have been a proper comparison between the costs and benefits of each. Provision of the connection at Phase 1 was important. The decision on the spur or through route would be made at Phase 1. The whole analysis by the SST had been of the benefits and costs to HS2, rather than to the aviation role of Heathrow as the national airport hub as well.

620. Points (f) and (g) above against the spur were not answered by the SST, since the weaknesses in the economic case, the broader benefits relied on and the apparently admitted capacity impact of the spur should have been part of a comparative assessment of the through route and hub, not driven by BCR.

621. Point (h) above against the spur and point (f) in favour of the hub related to the impact of the spur which could not be assessed, but which would be the only direct connection option left with Phase 1 as proposed; there was insufficient information about the spur and the potential link from HS2 to Terminal 5 for an informed response or for a proper environmental and cost comparison to be drawn between the hub and spur. There was no answer to this, yet consideration of HHL's response might have led the SST to consider the issue further. The timing of the development of material relevant to the spur and Phase 2 shows that there was no reason not to delay the consultation so as to include the relevant material.
622. Mr Miller's response in his Witness Statement was troubling since it referred to work in 2009 and 2010 on a spur, loop and through route. This had considered a spur from Iver. But this work did not consider the HHL proposal.
623. Mr Mould emphasised the essence of the proposals as an interchange at Iver on the GWML on a through route for HS2. The problems with that, as set out in a number of documents published in January 2012, including the "Review of Strategy" and the "Review of Route Selection and Speed" had led to the rejection of the very basis of the proposal. Mr Warren made a number of very detailed criticisms of these documents which did not bear on the issues before me, at least so far as I could tell, and I have not referred to them.
624. I also note the extensive argument proffered, over many pages, by Mr Costello in his first Witness Statement and which I was asked to consider. I have. They do not advance the case since they go somewhat beyond the consultation response, debating the response by Mr Graham, whereas it is not for me to resolve the merits nor to assume that HHL would have had a second bite at the consultation cherry if its first response had been fully considered. It would be wrong to suppose that conscientious consideration of consultation responses on what the proposal should be, required a fully reasoned decision letter as if one following a Public Inquiry into the substantive decision.
625. Mr Warren submitted that there was no sound evidence that representations and knowledge gained from meetings with HHL and material provided over time were fully conveyed to the SST when she made the DNS decisions, or that the substance of the matters in its consultation response to Question 3 would therefore

have been before her, even at some earlier stage. The SST was not the same person throughout. The summary of HHL's omitted consultation response by DbD in July 2012 could afford no basis for supposing that the substance of the points had been properly appreciated. There was no evidence that the substance of HHL's particular points had been made by other consultees whose response had been considered.

626. Mr Mould accepted that the full response of HHL had not been analysed and considered in the same manner as most other consultation responses. However, he submitted that that this did not render the process so unfair as to be unlawful. The SST did consider HHL's primary contention – a through-route via Heathrow – as the DNS showed, for the reasons it gave. Other documents also deal with her consideration of the essential issue. The proposals had been carefully considered over a number of years; the issues raised had already been canvassed with the Secretary of State through the Transport Select Committee at a similar time in the decision-making process. The substantive points made in support of a through route serving Heathrow were taken into account by the Secretary of State. So HHL's proposal had been the subject of proper consideration by her before, during and after the consultation process; it had had the opportunity in that way to make its case.
627. The first part of each answer within the response was analysed. The points not considered were rather points of fine detail on a case in which there was a substantial policy or judgment element behind the conclusion that the spur should be provided and at Phase 2. There was no substantial prejudice to HHL, and the consultation process as a whole was not unfair.

Conclusion on the omitted responses

628. I have given this detailed consideration but the nature of the submissions has required it. I start from the premise, set out at the start of this issue, that the SST failed to consider the important parts of the consultation response of a major consultee on an important aspect of the consultation. On the face of it that is not merely unfair, but sufficient to render at least part of the consultation unlawful. But if the points which were made in the response have in fact been considered,

there is no unfairness or unlawfulness. It is upon that issue that the SST defends and is entitled to defend the decision.

629. The statement by the SST to Parliament on 17 July 2012 was general, in that it applied without differentiation to all the omitted responses; it was quite bald of reasoning; it referred to the effect of the omission of the responses from the DbD analysis, which begs the question of how that form of analysis would have captured the points made in HHL's response. Given the significance of the omission, and the need for the SST to show that the consultation was fair notwithstanding that omission, the SST's statement would not have persuaded me by itself that the consultation was in reality fair. Hence an examination of what was considered is required.
630. However, I have come to the firm conclusion that there was no point of significance omitted from consideration, which might have led to a different decision on the spur/hub issue. I accept that the submission to the SST contains the advice given by officials, and that the reasoning of the SST on the hub issue is set out in the DNS and the documents issued with it. The essence of the points HHL wished to make were in fact known to officials and adequately considered by the SST.
631. Before, turning to the detail, I make three observations. First, the consultation response was not a document which the SST was invited to consider on its own. It was set in the context of the knowledge which officials had acquired of HHL's proposals, its advantages and disadvantages, over some long time of discussion and consideration. This was not a free-standing response, but assumed knowledge of the proposal and what the respondent was talking about. As I have said, it did not describe the proposal in any detail.
632. One cannot exclude either the post-consultation meetings which HHL had with officials, seeking to put across its point, before the DNS and other decision documents were produced. The same applies to the debates which were carried on through the medium of or in responses to the Transport Select Committee. These were just as much endeavours to persuade officials as was the consultation response, which it cannot have supposed the SST would read personally, along with all the other consultation responses, and in its entirety. The very process of

consultation and presentation in the formal and outside the formal consultation process was predicated on the ability of officials to convey the essence of the points to Ministers and advise on them. Accordingly, in seeing what was considered and not considered as a point in the consultation response, what officials knew from other sources is very relevant.

633. Mr Warren sought to emphasise that not all proponents of a through route and hub had put forward the terminal which particularly marked out HHL's proposal. But some of the most important arguments for and against it were common to all such proposals. Among drawbacks were the delays to HS2 passengers who were not bound for the airport caused by the stops at Iver, or the loss of capacity from a selectively stopping service, the low proportion of HS2 passengers who would benefit, and the need to travel 3 miles from Iver Station, terminal or not, to the airport. Among asserted advantages were the potentially greater modal shift to rail, greater interchange potential for Heathrow and support for Heathrow's role, and improving rail access from the west and Wales.
634. Second, although it is not determinative to characterise a consultation response as having or lacking particular qualities, the points made are not of themselves supported by technical arguments, or detailed evidence; many are quite general. Mr Warren did not identify any points which had not previously been placed before officials by HHL, and by their nature it would have been surprising if any were essentially new.
635. Third, the DNS and other documents made it clear that the reasons why a hub was not taken forward are quite general judgments, which the consultation response was able to dispute, but of their nature not to refute. These were the transit cost and time from the interchange whether at Iver or the Northern Perimeter Road to the airport, the journey time penalties to non-airport bound passengers and the capacity problem of selective stopping, the small percentage of passengers who would benefit, a problem relied on by those against a link at all, and the advantages of a closer link at Terminal 5.
636. In examining the detail of the HHL consultation response, I emphasise that this case is not concerned with whether the answer given by the SST is satisfactory to HHL, could have been further answered by HHL, or meets the standard of

reasoning for a Decision Letter after an Inquiry. The issue is whether the points made in the consultation response were in fact sufficiently considered, even if considered despite the failure to consider the response itself.

637. I now deal with the specific points made against the spur in the consultation response, using the numbering from the earlier references:

(a) (b) and(f) (pre-spur interchange penalties, risk of dependency on Crossrail and the absence of a business case in view of the low usage): these points were specifically considered in the January 2012 Strategy Review;

(c) (uncertainty of provision): this is a political point, in effect met in so far as it can be in the fact of the decision in the DNS;

(d) (the existence of two stations, spur and Old Oak Common interchange): this is not a new point but an accepted part of the scheme as the SST knew; what may be new is the SST's response that the Old Oak Common interchange would be needed with the hub, but that cannot show that the actual point made by HHL was not considered;

(e) (uncertainty of travel direction of spur): it may have been true that consultees did not know the answer; but the answer has now been given, and the point met;

(g) (impact of spur trains on HS2 capacity): this appears to have been considered in the past, though it is not expressly dealt with in some way or other in the decision documents so far as the submissions went;

(h) (absence of detail of cost and impact of the spur route): these were not specifically dealt with in the DNS but the former has been provided, and the reason given for the latter. The answer and reason may be debateable on their merits, but the point has now been answered;

(i) (EC inter-modal policy); this issue permeates the decision documents;

(j) (decision on spur could be made without the details): this was an obvious and known risk at least so far as the DNS stage is concerned;

(k) (loop v through route): no loop was proposed; but overall the whole decision was about what option achieved the best balance between many competing considerations; the European comparison was a very general point quite unsupported by material which could have called for further consideration.

638. The advantages of the hub: BAA's stance was well known to the SST, and did not support the hub. The rest are asserted advantages expressed in very general terms; they summarise what, I infer from the meetings and papers which HHL had provided, was already known as the case for the hub. Not all the asserted advantages were accepted as advantages, even if of no great import. That is apparent from the DNS: for example cost of through route with Old Oak Common interchange required anyway, and the environmental impact of the spurs compared to the realignment through the Chilterns.
639. I find it impossible to conclude that, if the points against the spur, as made in the consultation response, had been considered as part of the consultation responses, they could have led to any different a conclusion in the DNS. The most important points are in fact answered in the decision documents directly or indirectly or were obvious factors the SST knew well. On two others (the travel direction and cost of the spurs), the failure to consider that consultees might not have been aware of that, could not show the consultation to have been carried out on the basis of insufficient information, and the points have now been clarified.
640. The only point on which there is no direct answer is (g), the effect of possible delay caused by spur trains joining the main line, although officials were aware of it. It was put forward at a very general level. I cannot conclude that this state of affairs leads to the consultation being so unfair as to be unlawful, or that there is the remotest prospect that the balance of advantage and disadvantage reached by the SST could be changed if this point, put in the general way it was by HHL, had been expressly and conscientiously considered by officials and the SST.
641. There is nothing in the benefits of the hub which added to what must already have been well known to officials for distillation in their advice to the SST.

642. The points as summed up by Mr Warren put something of a different form and thrust to HHL's consultation response. I think that, thus reformulated, they go somewhat beyond, or are presented rather differently in emphasis, from what HHL had actually put forward. However, it is clear that a comparison was done between the hub and spur, that the relation to Heathrow's role as a hub was considered, but the SST was entitled to approach this on the basis she did. I have already dealt with this point in relation to the aviation strategy ground. The insufficiency of information about the link at Terminal 5 was not really a consultation response point. The SST was entitled to approach the decision on the basis of the information she had. The complaint that HHL did not have enough to make an informed response has to fail if the SST had enough on which to reach a decision on the merits of spur versus hub, which she did. There was also very little material from HHL to enable an environmental comparison of routes. The main points of the comparison, as the SST was entitled to judge them, were dealt with in the submission to the SST.

643. Accordingly, this ground is dismissed.

Consultation unfair because not at a formative stage

644. I deal with this on the basis that there was no unfairness in the HS2 consultation taking place before the consultation on aviation strategy.

645. Mr Warren relied on the *Medway* (Gatwick) and *Hillingdon* (Heathrow expansion) cases I have already cited. He drew a parallel with the unfairness found in *Medway*. The DNS and the promotion of Phase 1, on the alignment proposed, would permit connection to Heathrow only via interchange at Old Oak Common or a spur: a through-route would have been ruled out. In *Hillingdon* Carnwath LJ had drawn a distinction, in the fairness or unfairness of a consultation process, between those cases where there was a further, real opportunity for views to be expressed, so that the flaw in the process could be put right later, and those where the flaw was fatal, because irremediable.

