JUDICIARY OF
ENGLAND AND WALES

R (ON THE APPLICATION OF BUCKINGHAMSHIRE COUNTY COUNCIL AND OTHERS)
-V-
SECRETARY OF STATE FOR TRANSPORT

HIGH COURT (ADMINISTRATIVE COURT)

15 MARCH 2013

SUMMARY TO ASSIST THE MEDIA

The High Court (Mr Justice Ouseley) has today dismissed nine grounds of challenge to the Transport Secretary's decisions to proceed with High Speed Two (HS2) but has upheld a challenge to the Government's proposed compensation scheme on the grounds that its consultation process was so unfair as to be unlawful.

The Court will consider the form of remedy in an oral hearing this morning (15 March).

Introduction

Mr Justice Ouseley introduces the issues before the Court in paragraphs 1- 16 of the final judgment.

He said:

"These five claims, which were heard together, concern High Speed Two, HS2. This is the proposed new high speed rail network connecting London to Birmingham, and then on to Leeds and Manchester, in a second phase. This would create what for obvious reasons is known as the Y Network. It might later extend to Glasgow and Edinburgh. It would terminate in London at Euston Station. The first phase also includes, in addition to the Birmingham terminus, the junction north of Lichfield which is the fork of the Y network. HS1 is the existing Channel Tunnel Rail link from St Pancras. The first phase of HS2 would include a direct link through to HS1. The first phase of HS2 would also be designed to permit the addition in Phase 2 of spurs to Heathrow, but its proposed alignment would not provide a line through Heathrow for all trains, and it could not be realigned in the future.

"By way of brief introduction, the Government set up a National Network Strategy Group in November 2008, and in January 2009, the Secretary of State for Transport, SST, incorporated HS2 Ltd and commissioned it to develop proposals for a new high speed railway between London and the West Midlands and potentially beyond. HS2 Ltd (HS2L) is the vehicle used by SSTs to advise them on and eventually to promote HS2. It reported to Government in December 2009. The SST announced to Parliament in December 2009 that a White Paper would be published "setting out plans" which would include "route proposals, timescales and associated financial, economic and environmental assessments". This would be followed by "full public consultation".

"The Command Paper "High Speed Rail" was published in March 2010, along with other reports. It set out the Government's "proposed strategy" for "the development of a core high speed rail

network linking London to Manchester and Leeds via Birmingham" with northward high speed connections "from the outset". Wide consultation, a national debate, with a view to legislation was to follow.

"The Coalition Government affirmed its commitment to a high speed rail network in May 2010; but it was to be achieved in phases because of financial constraints. During 2010 various route options were considered; the Government's preference for the Y network was announced in October 2010. In December 2010, the SST published the final preferred route for the London to Birmingham sections, and announced that full public consultation on the high speed rail strategy, and on the London to Birmingham route would start in February 2011.

"The formal consultation was initiated in February 2011 by the paper "High Speed Rail Investing in Britain's Future", the Consultation Document. It was accompanied by an Appraisal of Sustainability, AOS, an Engineering Report and an Economic Case Report. There was also a Summary Consultation Document. The consultation period closed on 29 July 2011.

"The Government announced its decisions on 12 January 2012 in a Command Paper "High Speed Rail: Investing in Britain's Future – Decisions and Next Steps", the DNS. The Summary of Decisions announced that there was "a compelling case for delivering a step-change in the capacity and performance of Britain's inter-city rail network", the high speed Y network was the best means of achieving that, and a phased approach with a hybrid Bill for each phase was necessary. There should be a direct link to the HS1 line to connect with the Channel Tunnel in Phase 1, and a direct spur to Heathrow Airport in Phase 2. The route corridor for the London to Birmingham section proposed in the Consultation Document of February 2011 was the best option but certain alterations to the route itself should be made. A package of measures was set out in another document, the "Review of Property Impacts", to assist those affected by blight, but not covered by current statutory provisions; it did not include a bond-based property purchase scheme.

"Those are the decisions under challenge in these actions. Buckinghamshire County Council and fourteen other local authorities, including Warwickshire County Council and the London Boroughs of Camden and Hillingdon, were fifteen of the eighteen members of a group of local authorities, 51M, opposing HS2. I shall call them "the Bucks CC Group". They challenge the decision on the grounds:

(1) that the decision to promote HS2 by way of a hybrid Bill in Parliament breaches the Environmental Impact Assessment Directive 2011/92/EU;
(2) that the decision to proceed with Phase 1 without carrying out a cumulative impact assessment of Phase 2 also breaches that Directive; trans-boundary assessments were also required;
(3) that the decision to proceed required a Strategic Environmental Assessment under the S.E.A. Directive 2001/42/EC;
(4) that the decision to proceed breached the Habitats Directive 92/43/EEC;
(5) that the consultation process had been unlawful because of a) an insufficiency of details about the routes north of Lichfield, b) a failure to reconsult with them over reports obtained about an alternative solution they promoted, c) a failure to provide certain data supportive of their case, d) a failure to reconsult affected individuals significantly disadvantaged by post-consultation changes;
(6) that the decision ignored material considerations or was irrational in respect of a) underground line capacity through Euston, b) the link between HS2 and HS1 and c) the Heathrow spur;
(7) that the decision failed to comply with the public sector equality duty in s149 Equality Act 2012, with a late attempted variant allegation of indirect discrimination under

s19 of the Act, principally because of the effect of the redevelopment of Euston Station to the west on an ethnic minority community.

"High Speed 2 Action Alliance Ltd, HS2AA, is a not for profit organisation working with over 70 affiliated action groups and residents' associations opposed to HS2. It brought two claims with different Counsel and solicitors.

"Its general claim, CO/3467/2012, challenged the decision on the same basis as the Bucks CC Group's grounds 1, (use of hybrid Bill process), 2 (absence of cumulative impact assessment), 3 (breach of strategic Environmental Assessment Directive), 4 (breach of Habitats Directive), and 5 (the lawfulness of the consultation process). It also said that the SST had unlawfully failed to take into account the consultation response of Heathrow Hub Ltd, but as HHL was itself a Claimant, HS2AA adopted its arguments. It took the lead however on the alleged breach of the SEA and Habitats Directives – the Bucks CC Group took the lead on its other grounds.

"HS2AA's particular claim, CO/3605/2012, challenged the decision to proceed with HS2 and a general blight measure, on the ground that the consultation process provided insufficient detail for consultees to make informed responses, in principle on one general measure, before a later consultation process on the details of that one measure. The basis upon which the decision was reached was different from the basis upon which consultation took place. A legitimate expectation as to the substance of the decision was breached. The process was also unfair because the SST had not conscientiously considered the detailed consultation response of HS2AA on this point.

"Heathrow Hub Ltd, HHL, promoted an airport terminal at Iver on the Great Western Main Line, through which it would route HS2, providing interchange with Crossrail as well, connecting to Heathrow's on-airport terminals via a dedicated "airside" passenger transfer system. It owns various intellectual property rights in that project, and through Heathrow Hub Property Ltd owns real property necessary for its project.

"First, it contended that the SST had fettered his discretion in relation to aviation strategy by ruling out HHL's proposal before consultation on his aviation strategy or had breached HHL's legitimate expectation of full consultation on that strategy. Second, and more importantly, the SST had ignored HHL's consultation response, instead adopting demonstrably flawed responses to the issues raised. It added to the SEA and Habitats grounds that Article 8 of Decision 661/2010 on guidelines for the trans-European network (TEN-T) was also breached by non-compliance with those Directives. It adopted the hybrid Bill point made by other Claimants.

"Aylesbury Golf Club Ltd, with two local farmers, challenged the decision on the grounds of unfairness in the consultation process. First, the route published in February 2010 had been altered to their detriment when the preferred route was consulted on in February 2011, as a result of discussions with the National Trust of which they were unaware. Second, their own alternative route had not been conscientiously considered, nor had HS2 been willing to discuss it with their consultant. The only consultation responses genuinely considered on routeing had been minor changes largely of mitigation.

"These five claims were all heard together, so that fact and law relating to one could be considered in another.

"It will be apparent from the issues which I have outlined that it is not my task in this judgment to reach a view one way or the other on the merits of HS2." (paras 1 – 15)

Issues before the Court:

The Court considered the issues in the following order:

1. **Strategic Environmental Assessment Directive**: its application – paras 17-106; voluntary assumption of duty – para 107; substantial compliance – paras 108-185; relief – paras 186-189; HHL's submissions – paras 190-196;

2. **Habitats Directive**: paras 197-242;

3. **Lawfulness of the hybrid Bill procedure**: paras 243-276;

4. **Cumulative impact under the EIAD**: paras 277-301;

5. **Consultation challenge by the Bucks CC Group**: paras 302-308; routes north of Birmingham - paras 309-333; the reports on the OA – paras 334-406; the passenger loading data – paras 407-443; route amendments – paras 444-482;

6. **Public sector duty**: paras 483-507;

7. **Rationality challenge by the Bucks CC Group**: paras 508-509; Euston underground capacity - paras 510-527; link with HS1 – paras 528-553; Heathrow spur – paras 554-571;

8. **HHL's challenges**: para 572; aviation strategy – paras 573-581; consideration of consultation response - paras 582-643; others – paras 644-652;

9. **Aylesbury Golf Club and Others' consultation challenge**: paras 653-680;

10. **HS2AA's compensation challenge**: para 681; insufficiency of information - paras 745-778; changing basis of decision – paras 779-802; legitimate expectation – paras 803-817; consideration of consultation response - paras 804-844.

Conclusion:

This summary does not form part of the Court's judgment but the judge has supplied the text below to help the media understand his findings and read this summary out in court as he handed down judgment.

Mr Justice Ouseley concluded:

"First, I rejected the claim that the Secretary of State ought to have carried out a Strategic Environmental Assessment of the Decisions and Next Steps document of January 2012. That document was not a "plan or programme" within the Directive because it set no framework to be

applied by or to guide the body which would reach the decision on whether or not development consent would be granted, that is Parliament. The March 2010 Command Paper was not an administrative provision which had "required" the Decisions document in the broad sense of that word in the Directive. If I were wrong and the Strategic Environmental Assessment Directive had applied to the Decisions document, setting a framework for Parliament's decision on development consent, I would have found that the Appraisal of Sustainability had not substantially complied with the Directive, because of its failure to assess the new network proposed north of Lichfield, and the spurs to Heathrow, and I would then have granted an appropriate form of relief.

"Second, I rejected the claim that the Decisions and Next Steps document was a "plan" within the scope of the Habitats Directive. A purposive application of the Directive did not bring the decisions within it; all that was required to meet its purpose could be provided within the Environmental Impact Assessment, which was yet to be done. The screening process already undertaken was sufficient for this stage. It identified a possible significant effect, which might have required an appropriate assessment under the Directive. Subsequent information showed there to be no likely significant effect in relation to the matters examined in the screening process. I would have refused relief anyway, since any error in the screening assessment could have had no effect in the light of the further information. and the EIA would enable the issue fully to be considered if necessary. The presence of Bechsteins bats became apparent during the consultation process, and the requirements of the Habitats Directive in relation to them can be fulfilled at the stage of Environmental Impact Assessment.

"Third, I rejected the contention that it would be unlawful for the Secretary of State to proceed by way of a hybrid Bill. It would have been constitutionally improper for the Court to have ruled that the laying of a Bill before Parliament was unlawful. The provisions of the Environmental Assessment Directive which exempt development consent enacted in a Bill from complying with the Directive only apply if the essential objectives of the Directive are nonetheless observed. If not observed, a Court can declare the development consent to be unlawful, even though it is contained within an Act of Parliament. I did not accept the Claimant's contentions that I could now be satisfied that the procedures which Parliament was likely to adopt would make the consent unlawful. Whether that was so, should be judged at the end of the whole process, in the light of what actually happened and what any alleged failings might be.

"Fourth, I was not persuaded that the promotion of the Y network in two phases by means of two Bills would cause any cumulative impacts which were required by the Environmental Assessment Directive to be considered at either stage to be omitted from consideration at the appropriate stage. Nor was I persuaded that the Secretary of State or HS2 Ltd were proposing to carry an EIA which fell short of what the Directive required. Any failings should be judged in the light of the actual EIA.

"Fifth, I dealt with the four aspects of Bucks CC Group's challenge to the consultation brought on the basis that it was so unfair as to be unlawful. It was not unlawful for the consultation on the detail of the Y route north of Lichfield to be undertaken separately from that on the part south of Lichfield. If Parliament decides that the two phases should be considered together, it can refuse to pass the proposed first phase Bill.

"It was not unlawful for the Secretary of State to reach her decision on the consultation process taking into account two reports, one from Atkins consulting engineers and one from Network Rail, commenting adversely on the Optimised Alternative promoted by the Group in the consultation process, without further consulting the Group on those reports. In any event, this litigation had revealed how the Group would have responded to those reports, and how the Secretary of State would have countered that response. The litigation revealed that they disagreed. The Group would not be advantaged by a further round of consultation, ending up where they now where. Nor was

there a change in the criteria by which the decision was to be reached; the advantage brought by a new network in releasing capacity on existing lines was not a new point in the consultation process such that those promoting the enhancement of existing rail networks were not alerted to the need to deal with it as a drawback to their proposals.

"The Secretary of State had not acted unfairly in not providing Claimants, for the purposes of the consultation process, with the passenger loading data. She had placed no significant reliance on it; and she rejected it as valuable in the context of the consultation, although it supported some of the capacity arguments of the Group. The Claimant's had sufficient information about the Government's proposals.

"The amendments to the route as a result of the consultation process were not so significant or extensive as to require a further round of consultation. Decisions have to be reached. There will be a further opportunity for those adversely affected by these changes to object in the hybrid Bill process.

"Bucks CC Group's claim that the public sector equality duty had been breached was untenable.

"The three parts of the rationality challenge all failed. Whether it was wise to promote a Bill for a high speed rail link which would lead to passengers trying to use what would anyway have become a very overcrowded Underground system at Euston, if no effective steps to add to its capacity were identified and committed, was a matter for the Secretary of State in the first place. It was not irrational or unlawful to promote the Bill in such circumstances. It would be for Parliament to decide whether to pass the Bill if it did not know what capacity Underground infrastructure capacity improvements could be in place or when. It would not be unlawful for Parliament to pass the Bill without such knowledge or commitments, and it could not be unlawful for the Secretary of State to invite it to act lawfully.

"The Claimants may or may not be right that the HS1 link via the North London Line would create serious capacity problems for the existing passenger and freight trains. They disagree with the Secretary of State, although further work is being undertaken. It will be for Parliament to decide whether to pass the Bill in the light of the knowledge which it then has about the effect of the link on the North London Line. But it is not irrational or unlawful for the Secretary of State to promote the Bill with provision in it for that link.

"The Secretary of State was obviously entitled to promote the link to Heathrow via spurs, and to do so in the phased arrangement proposed. It was obviously not irrational.

"The challenge by Heathrow Hub Ltd to the Decisions and Next Steps on the basis that it fettered the Secretary of State's decision on future aviation strategy is untenable. The decisions documents are decisions on rail strategy which have some bearing on the arguments about future aviation strategy at Heathrow on aviation strategy, which the Secretary of State was well aware of. Government had created no legitimate expectation that decisions on high-speed rail would be delayed until after consultation on aviation strategy.

"The Secretary of State and officials failed to consider the full HHL consultation response. But that did not mean that they had failed to consider the points themselves. If they had in fact done so, the consultation process would not have been unfair. I was satisfied that the most important points had either been considered, or were obvious points of which the Secretary of State was well aware anyway. There were two points which were later clarified by the Secretary of State; and a failure to consider the fact that HHL were not aware of that during the consultation did not make the consultation unfair. There was one point, about the effect of spur trains joining or leaving the main track on capacity, which did not appear to have been dealt with, but officials were aware of it; it was

put at a very general level, and consideration of that part of the consultation response could not have affected the outcome of the consultation on the way Heathrow was to be served. There was nothing in HHL's other points on the consultation process.

"Aylesbury Golf Club's challenge to the fairness of the consultation process failed, the pre-consultation discussions between HS2Ltd and the National Trust, which led to a change to the line which was then consulted upon was not unfair, even though the three Claimants were not consulted and were adversely affected by the change. They were in a position to respond to the change during the consultation process. It was not the fault of the Secretary of State or of the process that they did not realise that the change had been made. Their alternative was, as the evidence showed in the end, considered conscientiously. There was no obligation on the Secretary of State or on HS2Ltd to meet the Claimants' expert to discuss their alternative. They disagreed about its advantages and drawbacks, but that did not mean that a lawful consultation process required them to meet.

"Finally, HS2AA's challenge to the lawfulness of the consultation on the compensation scheme succeeds, though I rejected the contention that what the Secretary of State had said in the House of Commons in December 2010 created any legitimate expectation about what the outcome of the process would be. The Secretary of State did not provide consultees with sufficient information about how the three options for a discretionary compensation scheme might be applied or made to work differently in practice for informed responses to be made as to which one should be taken forward for detailed consultation. The Secretary of State had in mind as relevant to the choice between the options, factors other than those referred to in the consultation material and which related to how she envisaged them working differently in practice. That overlaps with the next point: she made the decision on a different basis from that on which she consulted since new factors, cost to the public and effect on other options, were brought in to play as important factors determining which scheme was to go forward.

"The full response by HS2AA was considered by officials. But the Secretary of State did not consider it conscientiously, whether or not through any failings of officials, as to which I can make no findings. The reasons do not address the framework set by the consultation, they bring in new factors, and are distinctly odd. Although the overall decision is not irrational, the carefully reasoned and substantial HS2AA consultation response addressing the consultation issues as framed by the Secretary of State cannot have been conscientiously considered. All in all, the consultation on compensation was so unfair as to be unlawful."

-ends-

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.