

HS2: IMPACT OF THE DECISION OF THE HIGH COURT

Introduction

1. On 15 March 2013, Ouseley J gave judgment in respect of five challenges to decisions taken by Justine Greening, the then Secretary of State for Transport (SST), on **10 January 2012**. As the judge stressed, it was not his role to reach a decision on the **merits** of her decisions; it was rather to determine the **legality** of the decision-making process. Had all the claims succeeded, this would merely have resulted in a “quashing order”, compelling the current SST, Patrick McLoughlin, to reconsider the decisions.

2. I annexe a summary of the judgment. The full judgment (259 pages) can be found at <http://www.judiciary.gov.uk/media/judgments/2013/r-oao-bucks-cc-v-sec-state-transport>.

3. The Judge rejected the nine challenges to the decision to proceed with HS2 which were brought by the 51M Group of Councils including Camden; HS2 Action Alliance (HS2AA); Heathrow Hub Ltd; and the Aylesbury Park Golf Club. The Councils have been granted permission to appeal. Any appeal could take months. It will not delay the development of the project. If any appeal were to eventually succeed, the implications would be complex.

4. The Judge allowed the challenge by HS2AA in respect of the compensation scheme. The substance of this challenge related to the government’s decision to proceed with a **hardship based** compensation scheme in preference a **property bond**. Because the government had abandoned this scheme, it did not form part of Stage 2 of the consultation which closed on 21 January 2013. In our response to this Consultation, the Euston Forum concluded:

“The compensation offered is not fit for purpose. There is a need for a new package of measures which address the real impact of constructing HS2 in our vibrant, diverse and densely populated community. A better solution would be to replace the current proposals with a **property bond** which can help reduce the blight itself.”

5. The SST has announced that he will not appeal this decision. The Government will re-run this consultation “in line with the judge’s finding that further consideration should have been given to other potential compensation models”. A re-run of the property compensation consultation will not affect the HS2 construction timetable. Frank Dobson MP has written to the SST asking him to design a new scheme that it tailor made for the needs of the Euston area.

6. Events have moved on since January 2012, when the then SST took her decision to proceed with HS2. There is growing evidence both that HS2s timeline for the scheme is slipping and that it HS2 has significantly underestimated the cost of the scheme both at Euston and further up the line. In particular, the government has underestimated the cost of building a new station in a densely populated, high value area such as Euston. This is the current agenda that we need to address.

Camden's Challenge

7. The 51M group of councils (including Camden) challenged the SST of 12 January 2012 on seven 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 re-consult 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 re-consult 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.

8. I highlight three aspects of the judgment. First, it was common ground that HS2 have failed to carry out an Environmental Impact Assessment. The issue was whether the SST was bound to do so before taking her decision to proceed; the Judge held that she was not. It is understood that HS2 launch their consultation on the "Environmental Statement" for Phase 1, including design refinements and the Code of Construction Practice on about 8 May.

9. Secondly, the Judge decided that it was for Parliament, rather than him, to decide on whether it is appropriate to approve a hybrid bill when important issues are unresolved:

(a) the capacity of Euston Station to cope with the additional number of passengers: By 2033, HS2 will increase the number of passenger arriving at Euston during the three hour morning peak period from 23,500 to 57,000. Euston could only cope with this throughput with Crossrail 2. The government has made no commitment to this scheme.

(b) The use of the North London line to provide the link between HS2 and HS1: The London Mayor and Transport for London consider that this will cause unacceptable disruption to existing services and constrain future growth of this vital network for London.

(c) The Heathrow Spur: On 28 January 2013, Patrick McLoughlin announced that all work on the spur to Heathrow is to be suspended until after 2015 pending the outcome of the Davies Commission on Airports in London.

10. Thirdly, the section of the judgment of HS2's public sector equality duties is particularly weak. The Judge rejected the challenge on the ground that the challenge was "untenable": the adverse impact was because individuals live or work in the Euston area, and had nothing to do with their ethnicity. In the most recent consultation exercise, HS2 had not had any "due regard" to those with "protected characteristics" as defined by the Equality Act 2010, whether the British Bangladeshi communities in the Drummond Street areas, or the elderly and disabled residents in the Euston area. This related both to the manner in which they consulted, and the impact on these communities of the compensation that was being offered. This will remain a live issue over the months ahead.

The Compensation Challenge

11. The SST decided to consult on the compensation proposals in two stages:

(i) In February 2011, the SST consulted on the principles for non-statutory compensation, seeking views on three options: (a) a property bond; (b) a hardship scheme; (c) a compensation bond. On 29 July 2011, HS2AA submitted their response supporting a modified form of a property bond. Only 21, out of 36,036 respondents, supported the hardship scheme. Despite this, on 12 January 2012, the SST announced that she intended to proceed with the hardship scheme. The Judge described how she had acted "**bizarrely**"; he quashed her decision.

(ii) On 25 October 2012, the SST consulted on the detailed consultation proposals modelled around their hardship scheme. The voluntary purchase scheme was to be restricted to the Chilterns. The SST also consulted on the Safeguarding zone. Both consultations closed on 31 January. This second consultation now falls away with the quashing decision relating to Stage 1. This is a cautionary tale of the consequences of ploughing on with a proposal in the face of a legal challenge. The cost of this abortive consultation is not known.

12. The Judge concluded that "the consultation process in respect of blight and compensation was all in all so unfair as to be unlawful". He did so on three grounds:

(i) The SST 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.

(ii) The SST 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.

(iii) The SST's failure to conscientiously take in account consultation responses, including that of HS2AA. The Judge found this to be "detailed, well informed and fully reasoned". The Judge described the "**sorry saga**" as a result of which DfT lost HS2AA's response. Thereafter, this had been "just brushed aside". The SST's reasons for reaching her decision were "**in part very odd**", the consequence of "**muddled thinking**".

13. A challenge based on legitimate expectation failed. This was based on the promise made by the then SST, Philip Hammond, of fair compensation for "individuals who suffer serious financial loss in the national interest". The Judge concluded that this statement was "not so clear, unambiguous and devoid of relevant qualification that it could found a legitimate expectation" enforceable in law. This was rather a matter for the political rather than the legal arena.

Next Steps

(i) I have requested a briefing on HS2's revised plans for Euston; this is still awaited. The CNJ report that HS2 are to abandon their plans for a new station, constructed below ground level. Having underestimated the cost of this option by 30/40%, they will opt for a cheaper option of a more modest station for HS2 to the west of the existing station. In January 2012, the cost of the station was estimated at £1.17bn. On 14 March, the DfT minister, Simon Burns, refused to specify the revised estimate in response to a question from Maria Eagle. HS2 are likely to argue that no further consultation is required on this as the station that is now proposed can be constructed within the current Safeguarding zone. The legality of this is questionable.

(ii) The DfT will need to recommence their consultation on compensation. We cannot assume that this will be more generous. There is a danger that Patrick McLoughlin will distance himself yet further from the promise made by Philip Hammond as HS2 attempt to rein in their overspend. We await information as to how much money has been set aside for compensation and mitigation in the Euston area.

(iii) DfT/HS2 will embark upon their consultation on the Environmental Statement on about 8 May. It is reported that this extends to 50,000 pages, albeit that only part of this will relate to Camden. It is probable that the SST will (a) press ahead with this before the safeguarding zone is confirmed; (b) require responses within a wholly unrealistic timescale of two month.

The legality of this is questionable. The 2011 consultation which has been held to be lawful was more straightforward; five months was afforded for responses.

(iv) The SST's main objective is to deposit a hybrid bill in parliament before the end of the year. This is necessary if the hybrid bill is to be enacted prior to May 2015. Detailed advice is required on the procedural steps that must be completed prior to the depositing of the hybrid bill. The SST may argue that unfinished work need not be completed until the bill is subject to parliamentary scrutiny. The legality of this is questionable

(v) There is increasing evidence that that the cost of Phase 1 of HS2 will exceed the current budget of £16.3bn. It is apparent that the cost of the new station at Euston has been underestimated by some 30 to 40%. The Forum have estimated the cost of fair compensation for Camden at some £1bn. To date, the SST has refused to specify how much has been set aside for compensation and mitigation measures in Camden.

(vi) In arguing for fair compensation, we are not arguing for a subsidy from the tax payer. We are rather highlighting that the promoters of the scheme should pay the real cost of HS2. They have chosen to build the London terminus in a densely populated high value area. Their scheme should not be subsidised by those live and work in Camden.

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