

Case Name: *London Borough of Hillingdon, R (on the application of) v Secretary of Transport & Ors* [2019] EWHC 3574 (Admin) (20 December 2019)

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Commentary: The High Court has dismissed a JR challenge by the London Borough of Hillingdon ('LBH') to the Secretary of State for Transport's ('SSfT') decision of 4 March 2019 to allow HS2's appeal against LBH's refusal to grant approval pursuant to Schedule 17 of the High Speed Rail (London-West Midlands) Act 2017 ('Act') for proposed works for the creation of an ecological mitigation area. Schedule 17 of the Act provides a scheme for HS2 to apply to LPAs for approval for its plans and specifications for the HS2 Phase 1 development.

The SSfT's appeal decision accepted the Inspector's reasoning and recommendation in relation to matters of ecological value but disagreed with the Inspector's recommendation, and some of his reasoning, in relation to matters of archaeological interest. The JR was limited to the SSfT's conclusions in relation to matters of archaeological interest and brought by LBH on 3 grounds, all of which were unsuccessful. Ground 1 was that the SSfT had unlawfully misconstrued Schedule 17 of the Act as (i) requiring the decision maker to grant consent for works with no substantive information as to the impact of these works; (ii) imposing an obligation on LPAs to carry out their own impact analysis; and (iii) offering LPAs no meaningful controls over works within the scope of Schedule 17. Ground 2 was that the SSfT had unlawfully failed to take account of a material consideration being the impact of the scheme on the archaeological interest of the site in circumstances when there was evidence of archaeological interest. Ground 3 was that the SSfT had failed in the appeal decision to provide any or any adequate reasons why he disagreed with the Inspector's conclusion that the parallel Environmental Minimum Requirements ('EMR') process did not give LBH the control intended by Schedule 17 of the Act.

As to Ground 1, the High Court considered, on a proper construction of Schedule 17 of the Act, that it expressly constrains the decision making functions of LPAs who have a limited role under the statutory scheme. Accordingly, the High Court considered that the SSfT was correct to conclude that under Schedule 17 the onus was on LBH to demonstrate that the design or external appearance of the earthworks ought to and could reasonably be modified to preserve the site of archaeological interest or that the earthworks could reasonably be carried out elsewhere within the permitted development limits. As to Ground 2, the High Court considered that there was ample evidence before the Inspector and the SSfT about the archaeological interest of the site and the potential adverse impacts of the construction works. As to Ground 3, the High Court considered that the SSfT's reasoning in the appeal decision were clear in respect of the main issues in the appeal.

The issues raised in this case are of importance to the determination of other applications for approval under Schedule 17 of the Act for HS2 Phase 1 within the LBH area and other areas.

Case summary prepared by Paul Arnett