

Case Name: *London Borough of Hillingdon v The Secretary of State for Transport & Anor* [2021] EWHC 871 (Admin) (13 April 2021)

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Commentary:

This case concerned the statutory regime for the approval of particular details in respect of the high speed railway between London and Birmingham ("HS2") that is currently under construction.

High Speed Two (HS2) Limited ("HS2L") sought the approval of the London Borough of Hillingdon ("LBH") for the lorry routes within LBH's area to be used by construction lorries to and from the HS2 construction sites. Approval was refused by LBH under paragraph 6 of Schedule 17 of the High Speed Rail (London-West Midlands) Act 2017 (the "HS2 Act"). HS2L appealed LBH's refusal and the appeal was allowed by an Inspector appointed by the Secretary of State on 28 July 2020. This case was a judicial review challenge of the Inspector's decision.

Sitting as High Court, Sir Duncan Ouseley summarised LBH's case in his judgment [2]: "At the heart of LBH's case is its contention that HS2L ought to have provided a traffic impact assessment of the routes it had selected. This is not because LBH contended that other routes should have been selected by HS2L instead, but because LBH, as planning and highway authority for the routes selected, wished to impose controls on the level of usage of those routes by construction traffic, particularly in the normal peak traffic hours. To select and justify the controls it might wish to impose, it needed information which it said HS2L was duty bound to supply. HS2L had not supplied that information and so the Inspector was wrong in law to allow HS2L's appeal."

In bringing its challenge, LBH relied strongly on the Court of Appeal judgment in *R(London Borough of Hillingdon) v Secretary of State for Transport and another* [2020] EWCA Civ 1005 ("Hillingdon 1"). Hillingdon 1 also concerned the duty on HS2L to supply information for the purposes of approvals sought but under a different paragraph of Schedule 17 to the HS2 Act. The Court of Appeal judgment in Hillingdon 1, which allowed an appeal from Lang J whose judgment was applied by the Inspector in this case, was published on 31 July 2020 and the Supreme Court refused HS2L permission to appeal on 23 February 2021. LBH argued that Hillingdon 1 was applicable to the decision in this case and the Inspector had acted unlawfully by relying on the judgment of Lang J, which was overturned by the Court of Appeal.

Sir Duncan Ouseley rejected the contentions of LBH that this case was substantially similar to Hillingdon 1 and that reliance on Hillingdon 1 could have affected the outcome in this case. Unlike in Hillingdon 1, HS2L had provided information in various forms to LBH but LBH contended that it was insufficient and sought the imposition of conditions to require HS2 to provide further information and limit HGV usage. Sir Duncan Ouseley concluded that the decision in this case would have been the same had the Inspector followed Lang J's

judgment or the Court of Appeal's judgment in Hillingdon 1 [220]: "...because his substantive evaluation of the issues would have been the same, leading to the same outcome."

Sir Duncan Ouseley held that the Inspector was entitled to find that the evidence before him was sufficient to determine whether approval should be granted with or without conditions because [160]: "This was an appeal against a refusal of approval. The Inspector had to approach the appeal, as if the application had been made to him in the first place, save that he could impose conditions, without agreement from HS2L." The Inspector had to assess and give weight (as he thought appropriate) to the various pieces of evidence before him, and to do so in the light of various material considerations before him, including the Planning Memorandum and LBH's undertakings, statutory guidance, Environmental Minimum Requirements (which set out controls on HS2L), Route-wide Traffic Management Plans (which would be produced by HS2L in consultation with highway and traffic authorities), Local Traffic Management Plans (which form part of the Environmental Minimum Requirements), Vehicle Management System (which HS2L was building with contractor input) and the Secretary of State's undertaking to Parliament (to act reasonably and co-operate with local authorities and various other bodies).

In terms of the approach to conditions, Schedule 17 of the HS2 Act imposes conditions on deemed planning permission for the construction and operation of HS2 under section 20(1) of the HS2 Act. Paragraph 1 of Schedule 17 provides that the requirements in paragraphs 2 - 12 are conditions of the "planning permission". Paragraph 6 contains the "Condition relating to road transport" and the development must be carried out in accordance with various transport arrangements approved by the relevant planning authority. Hence, LBH's approval to the routes for large goods vehicles in the construction of HS2 was required under paragraph 6 of Schedule 17, albeit the range of grounds on which LBH could refuse to approve arrangements were limited by paragraph 6(5). Sir Duncan Ouseley rejected LBH's contention that a traffic impact assessment was required in order for it to know whether and how the arrangements could and should be modified to meet the provisions of paragraph 6 [196]: "...on the correct interpretation of paragraph 6(5), the Council has to show why the proposals should be modified and why that is reasonable. That is consistent with the normal approach to planning conditions. The Inspector's language about conditions would be normal for any planning appeal. It is not for the planning authority to impose whatever it wishes, and to leave it for the developer to strike it down by evidence."

Accordingly, LBH's application for judicial review was dismissed.