

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

Appeal Number: UKSC 2013/0172

B E T W E E N: -

THE QUEEN
(on the application of HS2 ACTION ALLIANCE LIMITED)

Appellant

- and -

THE SECRETARY OF STATE FOR TRANSPORT

Respondent

- and -

HIGH SPEED TWO LIMITED

Interested Party

AND BETWEEN:

Appeal Number:

THE QUEEN
(on the application of LONDON BOROUGH OF HILLINGDON AND OTHERS)

Appellant

-and-

THE SECRETARY OF STATE FOR TRANSPORT

Respondent

-and-

HIGH SPEED TWO LIMITED

Interested Party

AND BETWEEN:

Appeal Number:

THE QUEEN
(on the application of HEATHROW HUB LIMITED
AND HEATHROW HUB PROPERTY LIMITED)

Appellant

-and-

THE SECRETARY OF STATE FOR TRANSPORT

Respondent

-and-

HIGH SPEED TWO LIMITED

Interested Party

STATEMENT OF FACTS AND ISSUES
(with amended references)

Facts

Introduction

1. The facts and chronology relevant to these appeals have been divided into a number of stages for convenience only. This SFI covers the facts relevant to all three appeals.
2. The HS2 Action Alliance is a not-for-profit organisation working with over 90 affiliated action groups and residents' associations in opposition to the HS2 scheme which the Government has decided to promote for the reasons given in *High Speed Rail: Investing In Britain's Future – Decisions and Next Steps* (Cm 8247, 10 January 2012) ("the DNS"). The details of the membership and interests represented by HS2AA are set out in the witness statement of Thomas Crane, HS2AA's Director [**Appendix Part 2/Tab 9**]¹.
3. The Appellants in the Hillingdon appeal are local authorities along the proposed route of Phase 1 of HS2. The Appellants are all members of "51m", a group of – originally eighteen local authorities, now more, that joined together in a national campaign to oppose the HS2 rail proposals.
4. Heathrow Hub Limited and its sister company Heathrow Hub Property Ltd (collectively referred to as "HHL") have for many years promoted the concept of a multi-modal transport hub at Heathrow Airport, integrating Heathrow with road, conventional mainline railway and high speed rail services. HHL consider that this would have various environmental and economic benefits

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(1) HS2 Ltd's 2009 Report and the 2010 Command Paper *High Speed Rail*

5. In January 2009, the previous Government established a company called High Speed Two Limited ("**HS2 Ltd**") with the principal aim of advising on "*the development of proposals for a new railway from London to the West Midlands and potentially beyond*", including the identification of a potential route or routes, costs and benefits and finance, and the design of the potential route or routes. See the letter from the Secretary of State to HS2 Ltd dated 14th January 2009 [**Appendix Part 2/Tab 16**].
6. In December 2009 HS2 Ltd reported to the Secretary of State: see *High Speed Rail – London to the West Midlands and Beyond* [**Appendix Part 2/Tab 17**]. HS2 Ltd summarised its advice to the Government in the report's Executive Summary (pages 2 to 9 of the report).
7. On 15 December 2009, the Secretary of State made a statement to Parliament setting out his proposed next steps [**Appendix Part 2/Tab 18**]:

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¹ The references have been completed and amended in the light of the agreed Appendix Part 2

“Having taken full account of the HS2 report, if the Government decides to pursue proposals for high-speed rail, we will publish a White Paper setting out plans by the end of March 2010. This would include route proposals, timescales and associated financial, economic and environmental assessments. The White Paper would be followed by a full public consultation in the autumn of 2010, giving all interested persons an opportunity to comment before proposals are finalised and a hybrid Bill is prepared.”

8. On 11 March 2010, the Department for Transport published a Command Paper entitled *High Speed Rail (Cm 7827)* (“the March 2010 Command Paper”) [Appendix Part 1/Tab 5], together with HS2 Ltd’s December 2009 Report and other technical reports. The March 2010 Command Paper was the Government’s response to HS2 Ltd’s December 2009 Report. Under the heading “A National Strategy for High Speed Rail” (pp. 7-10), the Government set out its assessment in the light of HS2 Ltd’s December 2009 Report –

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- 1 That over the next 20 to 30 years the UK will require a step-change in transport capacity between its largest and most productive conurbations, both facilitating and responding to long-term economic growth;
2. That alongside such additional capacity, there are real benefits for the economy and for passengers from improving journey times and hence the connectivity of the UK;
3. That new capacity and improved connectivity must be delivered sustainably: without unacceptable environmental impacts, and in line with the Government’s strategy to promote a low carbon economy, including its statutory targets for reducing emissions of greenhouse gases;
- 4 That high speed rail is the most effective way to achieve these goals, offering a balance of capacity, connectivity and sustainability benefits unmatched by any other option;
- 5 That high speed rail should form an essential part of a wider strategy for sustainably enhancing national, regional and local transport networks in the UK that includes policies for managed motorways, rail electrification, and the increased uptake of low carbon vehicles,
6. That Britain’s initial core high speed network should link London to Birmingham, Manchester, the East Midlands, Sheffield and Leeds, and be capable of carrying trains at up to 250 miles per hour. This Y-shaped network of around 335 miles (see indicative map on page 14) would bring the West Midlands within about half an hour of London, and deliver journey times of around 75 minutes from Leeds, Sheffield and Manchester to the capital. HS2 Ltd’s work has shown that as a first step a high speed line from London to Birmingham would offer high value for money as the foundation for such a network, delivering more than £2 of benefits for every £1 spent;
7. That the initial core ‘Y’ high speed network should include connections onto existing tracks, including the West and East Coast Main Lines, so that direct high speed train services can be operated from the outset to other cities including Glasgow, Edinburgh, Newcastle and Liverpool. Consideration should be given to extending the network subsequently to these and other major destinations to further improve capacity and connectivity;
8. That the capacity released through transferring long-distance services to this network should be used to expand commuter, regional and freight service on existing lines, with particular benefit for areas expected to see significant housing growth including Milton Keynes, Luton, Northampton, Peterborough, Kettering, Corby and Wellingborough;
9. That HS2 Ltd’s recommended route for a London-Birmingham high speed line (‘High Speed Two’), which would run from a rebuilt Euston Station in London to a new Birmingham City Centre station at Curzon/Fazeley Street, is viable, subject to further work on reducing specific impacts on the local environment and communities;
- 10 That following completion of that further work, formal public consultation on the

Government's proposals for high speed rail in the light of HS2 Ltd's recommended route for such a line should begin in the autumn,

11. That HS2 Ltd should now begin similar detailed planning work on the routes from Birmingham to Manchester and to Leeds, to be completed in summer 2011, with a view to consulting the public early in 2012,

12. That effective integration with London's current and planned transport networks is crucial, and that this is best delivered through the combination of a Euston terminus and a Crossrail Interchange station sited between Paddington and Heathrow, which would also provide a link to the Great Western Main Line;

13. That a second interchange station located to the south east of Birmingham would be of value in enhancing access to the high speed line for the West Midlands, and offer direct links to Birmingham Airport, the National Exhibition Centre and the M6 and M42. Such a station should be included in the core project, subject to an acceptable funding package being identified;

14. That high speed rail access to Heathrow is important, and should be provided from the outset through a fast and direct link of about 10 minutes via the Heathrow Express from the Crossrail Interchange station;

15. That, as foreshadowed in paragraph 57 of the Government's 2009 Decision on Adding Capacity at Heathrow, further assessment is needed of the case for a potential station at Heathrow Airport itself. The Government has appointed Lord Mawhinney to assess the options, and their respective business cases, taking account of the work published today by HS2 Ltd, the study already underway by the airport operator, and the proposals that have been put forward for a station at Iver;

16. That the new British high speed rail network should be connected to the wider European high speed rail network via High Speed One and the Channel Tunnel, subject to cost and value for money. This could be achieved through either or both of a dedicated rapid transport system linking Euston and St Pancras and a direct rail link to High Speed One. HS2 Ltd will carry out further work to assess the viability and cost of each of these, including a full assessment of the business case, prior to any public consultation;

17. That powers to deliver this proposed high speed rail network should be secured by means of a single Hybrid Bill, to be introduced subject to public consultation, environmental impact assessment and further detailed work on funding and costs to feed into decisions to be taken in the next Spending Review. Depending on Parliamentary timescales and approval, this could allow construction to begin after the completion of London's Crossrail line, opening from 2017, with the high speed network opening in phases from 2026,

...

21. That a strategy of this kind can only be developed and made a reality through active and open engagement with those who will be affected by or those who are interested in it, and that, well before formal consultation starts in the autumn, HS2 Ltd should engage with local authorities and representative groups, including those representing key minorities, to ensure that the consultation can be as effective as possible.

This Command Paper sets out both the Government's response to HS2 Ltd's recommendations and its assessment of the case for an initial core British high speed rail network, on the basis of the evidence presented by HS2 Ltd and its own analysis. It will be the subject of formal public consultation and further review and assessment before any final decisions can be taken on either the strategic case for high speed rail or the specific routes that any line may follow.

The Government proposes to begin formal public consultation in the autumn, to cover three key issues:

- HS2 Ltd's detailed recommendations for a high speed line from London to the West Midlands

- The strategic case for high speed rail in the UK
- The Government's proposed strategy for an initial core high speed rail network

Part 3 of this document sets out in more detail the Government's plans for public engagement and consultation."

9. Part 3 of the March 2010 Command Paper [**Appendix Part 1/Tab 5**], entitled "*The Way Forward*", included chapters headed "*Engagement and Consultation*" and "*Planning Consents and Construction*". Paragraphs 9.2 to 9.4 stated-

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"9.2 Part Three sets out the Government's plan for taking forward the work that HS2 Ltd has undertaken to date and for developing a wider strategy for high speed rail. Of fundamental importance within this process will be formal public consultation on the detail of HS2 Ltd's recommended route option from London to Birmingham, and on the Government's strategic proposals for high speed rail. A consultation 'routemap' is provided later in this chapter. The subsequent chapters deal with what would be entailed in securing the powers to allow such a route to be constructed, and an outline of the likely key elements and timing of the construction process itself

9.3 The Government is mindful of the need for ongoing engagement with stakeholders even ahead of formal public consultation. This process of pre-consultation is important to ensure that the formal public consultation is communicated successfully to interested parties and particularly those most likely to be affected by HS2 Ltd's recommendations. It will also help to ensure that proposed activities to raise awareness of the consultation are taken forward on an informed basis and are configured such that all interested parties have access to the consultation materials and have an opportunity to comment.

9.4 This chapter sets out the public engagement activities that the Government and HS2 Ltd will now take forward to inform the Government's preparation of the formal public consultation planned for the autumn. These activities will build on the stakeholder engagement which HS2 Ltd undertook in 2009 to inform its report to Government."

10. In §§9.19-9.26 of Chapter 9 of the March 2010 Command Paper, entitled "*Formal Consultation*", the Government set out why it had decided to undertake formal public consultation, the proposed subject matter of that consultation process and how it proposed to undertake it. §§9.19 and 9.20 explained that the decision to proceed with formal consultation was against the context of the potential implications of HS2:

"9.19 A project of the scope of High Speed Two has potential implications for many individuals, families, communities and businesses

9.20 The engagement process described in this chapter will enable HS2 Ltd and the Government to understand better the concerns and interests of those potentially affected by, or interested in, any new high speed line, and it will inform the further development of both the Government's proposed strategy for high speed rail and HS2 Ltd's detailed recommendations prior to consultation. However, it is not and nor is it meant to be a substitute for formal public consultation."

11. At §§9.21-9.22 the details of the consultation process to be undertaken were set out:

"9.21 The Government proposes to begin formal public consultation in the autumn, following completion of the additional work requested by the Government from HS2 Ltd on its recommended route from London to the West Midlands. This consultation will provide an

opportunity for all interested parties to express their view on HS2 Ltd's recommended route and on the mitigation measures that HS2 Ltd proposes to reduce any potential adverse impacts on individuals, communities and the environment.

9.22 The consultation questions posed will be set out in detail in a formal public consultation paper. They will also include questions on strategic issues relating to the key transport challenges to be addressed, the options to consider for addressing them, the weight to be attached to various factors in assessing those options, and the strategic conclusions reached as a result. The responses to these questions will inform the Government's consideration of its proposed strategy for high speed rail."

12. The Government stated that, to inform the consultation, it would publish alongside the consultation paper [9.23] -

"... a full Appraisal of Sustainability which will take into account the conclusions of the further work that has been commissioned from HS2 Ltd, as well as detailed maps and descriptions of the proposed route."

13. A further consultation would take place subsequently on Phase 2 [9.25]. 9.26 of the March 2010 Command Paper stated:

"9.26 The Government will not make a final decision on the detailed recommendations made by HS2 Ltd or on its proposed strategy for high speed rail until it has received responses to these consultation exercises. If it decides in the light of those responses that the routes recommended are viable and that any or all of them should be taken forward, the Government will commission HS2 Ltd to begin the work needed to prepare for seeking the necessary powers via a Hybrid Bill, including environmental assessment processes and further appropriate public and stakeholder consultations"

14. In the March 2010 Command Paper the Government envisaged a single Hybrid Bill for the core initial Y network:

"10.5 Whilst it would be possible to seek powers for each leg of any high speed rail network through Hybrid Bills, the Government's view is that this would not be viable in practice, and that subject to a decision to proceed, a single Hybrid Bill should encompass the core initial 'Y' network from London to Birmingham, Manchester and Leeds. The passage of a Hybrid Bill requires significant Parliamentary time and therefore any other approach would create significant uncertainty about whether and when powers for subsequent legs could be secured, which would impact upon the consideration of the legislation"

10.6 A second advantage to securing powers via a single Hybrid Bill is that it would enable construction of the network, should Parliamentary approval be granted, to be planned as a single coherent project. This could potentially reduce costs and bring forward completion."

15. The Government's Code of Practice on Consultation [Appendix Part 2/Tab 15] was expressed to apply when the Government "has decided to run a formal, written public consultation exercise" as opposed to informal consultation which does not engage the Code of Practice (p. 5 of the Code of Practice).

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16. Following Lord Mawhinney's appointment by the Government as announced in the March 2010 Command Paper, the terms of reference for his review assessing whether and if so when

- a high speed station at or near Heathrow Airport might be needed and where it might best be situated were set out in a letter from the then Secretary of State for Transport, Lord Adonis, dated 17 March 2010 [Appendix Part 2/Tab 17]. Appendix 2 Tab 17
17. By letter also dated 17 March 2010, the then Secretary of State commissioned further work from HS2 Ltd "in preparation for the formal public consultation in the Autumn" [Appendix Part 2/Tab 20]. Appendix 2 Tab 20
- (2) The Coalition Government
18. The Labour Government's proposals were carried forward by the new Coalition Government following the General Election. *The Coalition: Our Programme for Government* [Appendix Part 2/Tab 23], stated that the Government "will establish a high speed rail network... for the whole of Britain" but that "Given the financial constraints, we will have to achieve this in phases". The earlier initial Coalition Agreement also contained a policy commitment to taking forward high speed rail [Appendix Part 2/Tab 19]. Appendix 2 Tab 23 Appendix 2 Tab 19
19. On 21 May 2010 the new Secretary of State for Transport (Rt. Hon Philip Hammond MP) wrote to Lord Mawhinney [Appendix Part 2/Tab 24] confirming that he should continue to undertake his review of high speed rail access to Heathrow Airport in accordance with the terms of reference set out by Lord Adonis in his letter of 17 March 2010. The Secretary of State also confirmed that Lord Mawhinney would continue to conduct that review within the context of current Government policy, which now did not support the construction of a third runway at Heathrow. Appendix 2 Tab 24
20. On 11 June 2010 the Secretary of State asked HS2 Ltd to do further work on options for high speed links to Heathrow, including through-route, spur or loop, on a link between HS2 and HS1, and to carry out a comparative business case assessment of the Y and S networks [Appendix Part 2/Tab 25]. Appendix 2 Tab 25
21. Lord Mawhinney's report was published in June 2010. It concluded that there was no compelling case for a direct high speed rail link to Heathrow in the early stages of a high speed rail network, and recommended in the first place an interchange between HS2 and Crossrail at Old Oak Common, and later consideration being given to a direct link from HS2 to Heathrow when the network expanded beyond the West Midlands.
22. On 4 October 2010, the Secretary of State published HS2 Ltd's advice on network configurations. He announced that the Government's preferred option for high speed rail north of Birmingham would be for two separate corridors, one direct to Manchester and then connecting to the West Coast mainline, and the other via the East Midlands and South Yorkshire, with stations in both areas, before connecting to the East Coast mainline north of

Leeds – the Y network. The chosen network option would be included in the consultation on the Government’s strategy for high speed rail planned for early 2011 [Appendix Part 2/Tab 26].

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23. On 20 December 2010, the Secretary of State announced that the proposed Y shaped high speed rail network would include a direct link to Heathrow and to the European high speed rail network. The Secretary of State also published details of the Government’s proposed route for Phase 1 of HS2, a new line between London and Birmingham, including detailed route maps. He announced that “full public consultation on the route – as well as on the Government’s broader strategy on high speed rail – will begin in February 2011” [Appendix Part 2/Tab 27]. This route, going through the Chilterns AONB at its widest point, included provision for a spur link to Heathrow Airport, to be built later at the same time as the lines to Leeds and Manchester in Phase 2, as well as a link via HS1 to the Channel Tunnel and the European high speed rail network.

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24. A number of detailed reports on various aspects of the high speed rail proposals, including the final preferred route for Phase 1, were published by the Government between September and December 2010. They are listed by Alison Munro at para. 14 of her witness statement [Appendix Part 2/Tab 14].

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(3) The February 2011 Public Consultation

25. In February 2011, the Government opened formal public consultation on its high speed rail proposals, including the case for high speed rail (including the proposed ‘Y’ network) and the preferred route for Phase 1 of HS2 from London to the West Midlands. The published consultation report was entitled *High Speed Rail: Investing in Britain’s Future* (“the Consultation Report”) [Appendix Part 1/Tab 6]. The Government also published an ‘Appraisal of Sustainability’ (“the AoS”) [Appendix Part 2/Tab 28]. The consultation was accompanied by supporting reports including the Economic Case [Appendix Part 2/Tab 30] and the Engineering Report [Appendix Part 2/Tab 31].

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26. The Consultation Report stated at §§1.15-1.16 [Appendix Part 1/Tab 6]:

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“1 15 The Government recognises that no final decision should be taken on a major infrastructure project of this scale until all those with an interest have had the opportunity to make their views known

1.16 The purpose of this consultation is to give people the chance to have their say Part 3 of this document sets out the questions on which the Government is seeking your views, and explains how you can reply. The last date for submitting a response to the consultation is Friday 29 July 2011.”

27. The Secretary of State's Foreword to the Consultation Report described the consultation as *"one of the largest and most wide-ranging ever undertaken by Government"* and stated that *"no final decisions will be taken"* until the formal consultation had concluded.
28. Paragraphs 2.29 to 2.33 of the Consultation Report were headed *"The Government's Preferred High Speed Rail Network"*. Paragraphs 2.78 to 2.95 of the Consultation Report were headed *"Alternatives to High Speed Rail"*. The text box on pages 79-80 of the Consultation Report referred to HS2 Ltd's consideration of alternatives to its recommended line of route for Phase 1 of HS2 between London and the West Midlands. Details were given in Annex B to the Consultation Report *"Alternative Options for HS2 (London to the West Midlands)"*. Appendix 6 to the AoS set out an appraisal of the sustainability of the recommended Phase 1 route in comparison with selected alternatives **[Appendix Part 2/Tab 28]**. Appendix
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29. Ouseley J considered these components of the Consultation Report and the AoS in concluding that, were Strategic Environment Assessment of the DNS required as a "plan or programme", there had not been substantial compliance with the SEAD. The Court of Appeal agreed. See Ouseley J at [108]-[185] and the Court of Appeal at [72], [183]-[185].
30. The section entitled *"Next Steps"* at para. 3.43 **[Appendix Part 1/Tab 6]** included a commitment that, following the conclusion of the formal consultation, the Secretary of State would *"announce the outcome of the consultation process and the Government's final decisions on its strategy for high speed rail before the end of 2011"*. On 6 December 2011 in a statement to Parliament the new Secretary of State (Rt. Hon. Justine Greening MP) said that she expected to *"announce my decisions in January"* following consideration of the consultation responses received **[Appendix Part 2/Tab 36]**. Core
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31. HS2AA was among those who submitted responses to the consultation and expressed concerns about the adequacy of the consultation material and the assessments undertaken by the Government.
32. 51m submitted an extensive consultation response raising a wide range of issues about the principle of HS2 and why it should not be supported **[Appendix Part 2/Tabs 32-33]**. 51m criticised the Government's business case for HS2; questioned the level of capacity increase upon which the DfT based its "capacity" case for HS2; expressed serious doubts over the level of reliability claimed for HS2, and therefore whether the benefits alleged would actually be delivered; drew attention to the disruption caused by HS2 works at Euston; disputed the alleged economic benefits of HS2 to the Northern regional centres; expressed concerns over the environmental impact of HS2; expressed concerns that the Government's Appraisal of Sustainability had not been properly carried out or consulted upon with regard to other Appendix
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alternatives, such as improving the capacity of existing rail services; and expressed concerns over the Government's route selection exercise for London to Birmingham and the alleged lack of business case for a link to Heathrow or a direct link to HS1.

33. In particular, in its consultation response, 51m set out its case as to how any necessary increase in capacity could be met much more cost effectively by an alternative proposal, which it called the Optimised Alternative ("OA"). The OA developed from work undertaken for the DfT by Atkins (an international rail consultancy) on strategic alternatives to HS2, but the OA was a more effective (and thus "optimised") alternative. This was said to consist of a series of relatively straightforward and relatively cheap incremental interventions which could meet the increased demand predicted by DfT. In summary, it involved:
- (1) Rolling stock reconfiguration, particularly the conversion of some first class vehicles to standard class on Pendolinos (the type of fast train that runs on the WCML).
 - (2) Operation of longer trains, to the extent possible without major infrastructure expenditure, i.e. the lengthening of all existing Pendolinos to 12 cars (except for Liverpool which would still be limited to 11 cars because of restrictions on lengthening platforms at Liverpool Lime Street Station).
 - (3) Effective use of the increased capacity provided by Chiltern Railways as a result of the existing Evergreen 3 project (trains from London Marylebone to Birmingham), which has provided improved journey times between Birmingham and London since its introduction in late 2011.
 - (4) Carrying out a series of relatively minor infrastructure capacity improvements at "pinch points", including a grade separated junction south of Milton Keynes to allow improved separation between fast and slow lines.
 - (5) Introducing "smart" ticketing and demand management to smooth peak demand, e.g. by eliminating the artificial peak on Friday after 7pm at Euston.
34. 51m's consultation response also objected to the procedure being proposed by the Secretary of State and the use of the Hybrid Bill process.
35. Camden Council submitted a response to the DfT consultation on 28 July 2011. That Council raised concerns about the economic case put forward in support of HS2; the impact of the proposal on the community at Euston; insufficient underground capacity at Euston station; potentially serious impacts on the North London Line (London Overground); and argued that the consultation documents contained insufficient information to enable the Secretary of State to discharge her public sector equality duty under the Equality Act 2010.

36. HHL's consultation response contended that the mainline of HS2 should run via Heathrow Airport, as part of the hub concept which HHL advocated, as opposed to the route proposed in the Consultation Report in which Phase 1 of HS2 would provide for an interchange station at Old Oak Common at Phase 1, enabling passengers to change onto the Heathrow Express line serving Heathrow Airport, with a direct link to the Airport via a Heathrow spur to follow at Phase 2.

(4) January 2012 High Speed Rail: Investing in Britain's Future - Decisions and Next Steps (Cm 8247)

37. On 10 January 2012, the Department for Transport published the DNS, described above. Part 1 of the DNS set out the Government's high speed rail strategy and a summary of its decisions [Appendix Part 1/Tab 7]. Part 2 of the DNS set out the Government's review of evidence from consultation responses. Part 3 set out the Government's proposed next steps.

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38. §§1-3 of the DNS stated as follows:

"Purpose and background

1 On 28 February 2011 the Government launched a national consultation, High Speed Rail Investing in Britain's Future. The consultation set out the Government's proposed strategy for a national high speed rail network for Britain and the route for an initial line between London and the West Midlands

2 The consultation asked seven questions, covering the Government's overall strategy, the proposed route for the London to West Midlands line, the environmental appraisal of this line, and options for supporting property owners affected by the proposals. The consultation closed on 29 July 2011. 54,909 responses were received

3 The purpose of this document is to set out the decisions reached by the Government in the light of the consultation on these issues. It also outlines the programme for the immediate next stages of the project, including consultation on property and blight proposals and the development of the hybrid Bill for the London-West Midlands line "

39. The content of the DNS was then summarised and described at §§4-6:

"Content

4 Part I of this document sets out the Government's confirmed strategy for high speed rail. Over the long term, capacity pressure on the railways is forecast to escalate steadily. Demand for rail travel is growing in a number of markets, including long-distance travel but also for commuter and freight services. This section of the document demonstrates that a new national high speed rail network is the best option for dealing with these challenges. As well as providing vital capacity for passengers, High Speed 2 (HS2) will help to promote national economic growth, and support the Midlands and the North to fulfil their economic potential.

5 Part II discusses the key issues raised in consultation responses. Considerable support for high speed rail was expressed during the consultation. However, a range of criticisms were also presented which merited careful further investigation. Detailed further work has been undertaken to test these issues, including in relation to options for upgrading the existing rail network instead of constructing HS2. The responses, and further work undertaken in the light of them, have prompted alterations to how the project will be taken forward. For example, a range

of amendments have been made to the London to West Midlands route, and the issues of timing and costs will be handled particularly carefully as the project is progressed

6 Part III presents the next steps that the Government will pursue on the project. In particular, further consultation on property and blight proposals will be undertaken over the coming months, and detailed preparation will commence of a hybrid bill for seeking Parliamentary powers for the construction of the London to West Midlands line”

40. Pp.11-15 of the DNS set out a summary of High Speed 2. The Government’s High Speed Rail Strategy is set out on pp. 16-36 therein. A summary of the decisions contained in the DNS is set out at pp. 37-38 therein.
41. As indicated in the passage quoted in paragraph 39 above, Part 3 of the DNS “*Next Steps*” sets out the process by which the Government intends to obtain development consent for HS2 (see further below), namely through two Hybrid Bills in Parliament, the first for Phase 1 and the second for Phase 2. The DNS also states at internal p. 111 that, following consultation on draft directions, safeguarding directions will be issued under Article 25 of the Town and Country Planning (Development Management Procedure) (England) Order 2010 and s. 74 of the Town and Country Planning Act 1990 to safeguard the Phase 1 route corridor adopted by the DNS from incompatible development. Consultation on safeguarding was started in October 2012 and completed in January 2013.
42. The DNS was accompanied by a series of supporting documents, including a Review of the AoS of Phase.
43. Under the heading “*Alternatives to high speed rail*” at page 68 of the DNS, the Government set out its reasons for rejecting the case for alternatives to the proposed high speed rail network, including the OA advanced by 51m. Paragraphs 4.30-4.32 and 5.26 of the DNS set out the Government’s reasons for rejecting the case for running the mainline of HS2 via Heathrow Airport (as proposed by HHL) and confirmed a route for Phase 1 which provides for an interchange station at Old Oak Common at Phase 1, enabling passengers to change onto the Heathrow Express line serving Heathrow Airport, with a direct link to the Airport via a Heathrow spur to follow at a later date. Paragraph 436 of the third witness statement of Philip Graham on behalf of the Defendant [**Appendix Part 2/Tab 10**], explains how the relative environmental impacts of a spur compared to a through route were considered relevant to this decision. Appendix
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44. Following publication on the DNS, continued on the details of Phase 1 and preparing the preferred options for Phase 2 to enable public consultation to be carried out. At a public meeting on 12 June 2012, HS2 Ltd’s response to questions included the following statement [**Appendix Part 2/Tab 39**] - Appendix
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“The Secretary of State’s January decision announced the route for the London to West-Midlands phase, including the stations. HS2 Ltd has been asked to develop that route. Therefore we would not expect to proceed with an option which is not consistent with the Secretary of State’s decision, or which was considered and rejected by the Secretary of State in reaching her decision.”

(5) Safeguarding the Phase 1 route

45. On 25 October 2012, as anticipated by the DNS, D announced a consultation to safeguard the Phase 1 route corridor set out in the DNS [**Appendix Part 2/Tab 40**]. The consultation paper stated:

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“In order to protect the planned railway corridor from conflicting development before construction starts, the Government is proposing to safeguard the London to West Midlands route using safeguarding directions, which are an established tool of the planning system designed for this purpose. Safeguarding aims to ensure that new developments along the route do not impact on the ability to build or operate HS2 or lead to excessive additional costs. “

46. The consultation ended on 31 January 2013. On 9 July 2013 D issued the Safeguarding Direction for the Phase 1 route. The land subject to the Safeguarding Direction reflects the Phase 1 route corridor adopted in the DNS.

47. Now that the Safeguarding Direction is in place [**Appendix Part 2/Tab 48**], the Secretary of State will be notified if a local planning authority is minded to grant planning permission for any development which HS2 Ltd considers would conflict with the Phase 1 route corridor adopted in the DNS. Under article 25(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2010, the Secretary of State has power to give directions restricting the grant of planning permission by a local planning authority, either indefinitely or during such a period as may be specified in the directions, in respect of any development or in respect of development of any class so specified.

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48. The making of the Safeguarding Direction also triggered the statutory blight procedures. Eligible property owners within the safeguarded area may serve a blight notice asking the Secretary of State to buy their property prior to it being needed for construction.

(6) Consultation on Phase 2

49. Public consultation on the detailed route for Phase 2 of the Y Network began on 17 July 2013 following a period of informal engagement on the preferred options. See

- (1) the publication of the D’s preferred route on 28 January 2013 including The Command Paper (Cm 8508) [**Appendix Part 2/Tab 40**] *High Speed Rail: Investing in Britain’s Future – Phase Two: The route to Leeds, Manchester and beyond*

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- (2) Appraisal of Sustainability of the options dated March 2012 - *Options for Phase 2 of the high speed network Appraisal of Sustainability*
 - (3) Various reports on options, design, engineering, costs, economics, scheme refinement and consultation.
50. Full public consultation on Phase 2 takes the form of a consultation paper ("*Consultation on the route from the West Midlands to Manchester, Leeds and beyond*"), maps and a suite of supporting documents.
51. The proposals for Phase 2 are broadly in accordance with the Government's High Speed Rail Strategy as set out on page 16 of the DNS. The consultation paper states:
- "Phase Two of the network will connect with a high speed line between London and the West Midlands (known as 'Phase One'), and will run on to Manchester and Leeds, along western and eastern legs.
- HS2 Ltd has been developing and refining a range of options for Phase Two of HS2 since 2010, with a brief to ensure the benefits are maximised while the impacts on local communities are kept to a minimum. Its advice to Government was submitted in March 2012 and set out all the options the company considered, presenting the greatest detail on those options that had emerged as the strongest. The Government consulted with the station city partners who would be served by HS2 to ensure that its initial preferred options, announced in January 2013, would be those that best supported development and growth in future."
52. The consultation is founded upon the "Y network": see the Map of High Speed Britain at p. 35 and Section 3 (which describes the route and stations) pp. 36-37.
53. The paper states at 5.4.1 the current intention to bring forward a hybrid Bill for Phase Two in the next Parliament, following the May 2015 General Election.

(7) The Hybrid Bills and the Preparation Bill

54. The Government proposes that there will be separate Hybrid Bills by which development consent will be sought and obtained for HS2. It is currently expected that there will be two bills: the first to seek (inter alia) the grant of development consent for Phase 1. In terms of timing, the current public consultation for Phase 2 will overlap with the proposed commencement of the Bill process for Phase 1. The project (as a long-distance railway) falls within the scope of the EIA Directive (Directive 2011/92/EU) ("EIAD") and requires environmental impact assessment.
55. A Hybrid Bill shares certain characteristics of a public bill and a private bill. In Hansard, 1962-9163, Vol.669, Col.45, Speaker Hylton-Foster described a hybrid bill as "a public bill which affects a particular private interest in a manner different from the private interests of other persons or bodies of the same category or class." This hybrid character influences the

Parliamentary procedure: a Hybrid Bill proceeds as a Public Bill (i.e. Second Reading, Committee Report and Third Reading), but there is an additional Select Committee stage after the Second Reading in each House at which objectors whose interests are directly and specifically affected by the Bill (including local authorities) may petition against the Bill and be heard. Parliamentary Standing Orders make provision for those persons who have standing to lodge a petition.

56. The principle of the Bill would be set at and upon the Bill receiving a Second Reading following the debate in the House of Commons. In the case of the Hybrid Bill for Phase One of HS2, it is expected that the principle of the Bill would extend at least to a high speed rail line running between London, Birmingham and the West Midlands, with its Central London terminus at Euston and a link to HS1. The principle could, at least in constitutional theory, be reopened at Third Reading.

57. The established convention is that a Select Committee for a Hybrid Bill cannot hear petitions which go to or seek to challenge the principle of the Bill, unless instructed to do so by the House at Second Reading. Under the Parliamentary procedures currently envisaged by the Government for the purpose of seeking development consent for Phase 1 of HS2, matters that go to the principle of the Bill will not be considered by the Select Committee. Such matters would be expected to include the business case for HS2, alternatives to the high speed rail project and alternative routes for Phase 1 of HS2 between London, Birmingham and the West Midlands.

58. In his Foreword to the January 2013 Command Paper for Phase 2 at p. 5, the Secretary of State said [**Appendix Part 2/Tab 41**]: Appendix
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Tab 41

“We are determined to get on and deliver HS2. We have already completed the consultation on the route for Phase One. In the year ahead we will begin seeking powers from Parliament to construct the London to West Midlands line. We plan to start construction in 2017 with the first high speed trains in service by 2026, just 13 years from now”

59. The High Speed Rail (Preparation) Bill was introduced into the House of Commons on 13 May 2013 and on 18 July 2013 completed the Public Bill Committee Stage [**Appendix Part 2/Tab 45**]. Appendix
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Tab 45

It is described as a “paving bill” to enable preparatory works in advance of the hybrid bills, to speed up the process as a House of Commons Library Note (SN316 *Railways: high speed rail (HS2)*, 15.3.13) [**Appendix Part 2/Tab 44**] records: Appendix
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Tab 44

“There is also likely to be a paving Bill in the 2013 Queen’s Speech; Earl Attlee recently told the House of Lords:

When parliamentary time allows, it is the Secretary of State for Transport’s intention to introduce an HS2 paving bill. The proposed paving bill would ensure that, subject to the hybrid bill achieving Royal Assent, we are able to deliver the HS2 project as fast as possible. It

would provide the Secretary of State with parliamentary approval to incur essential expenditure on preparatory works in advance of the proposed hybrid bill achieving Royal Assent. This would allow the construction programme to proceed as quickly as possible thereafter. It will also provide Parliament with an additional opportunity to debate elements of the HS2 project.”

60. Clause 1 of the Bill (as amended in Public Bill Committee) authorises expenditure (with Treasury approval) “in preparation for a high speed railway transport network” and that network is described as involving “the construction of railway lines connecting at least— London, Birmingham, the East Midlands, Sheffield, Leeds, and Manchester” and “connects with the existing railway transport network.” This allows expenditure on pre-construction activity, the acquisition of property and the payment of compensation for property “likely to be affected”.
61. In May/June 2013 the Secretary of State consulted the public on a draft Environmental Statement for Phase 1 of HS2 and certain changes to the detailed route proposal for Phase 1 adopted in the DNS. The draft Environmental Statement [**Appendix Part 2/Tab 47**] shows that the Hybrid Bill for Phase 1 will be substantially founded upon the line of route for Phase 1 adopted in the DNS. The Hybrid Bill will be introduced by and promoted by D. The terms of the DNS and D’s letter to 51m dated 20 February 2012 [**Appendix Part 1/Tab 8**] make clear that the contents of the proposed Hybrid Bill will be in accordance with the DNS. Appendix
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Tab 47
62. The Government has confirmed that the Hybrid Bills will be subject to a whipped vote [**Appendix Part 1/Tab 8**]. Core
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Tab 19
63. On 26 June 2013 the House of Commons amended its Standing Orders for Private Business supplementing SO 27A, which deals with the procedures for preparing and depositing an environmental statement for Government Bills where such is required. The amendments took account of amendments to the EIAD made by Directive 2003/35/EC on public participation.
64. SO 224A(6) requires that any comments upon the environmental statement which are received by the relevant Minister shall be submitted to an independent assessor who shall prepare a report “*summarising the issues raised by those comments*” . The report shall then be submitted to the House and Second Reading may not take place until at least 14 days have elapsed. At Third Reading the Minister must set out the main reasons and considerations upon which Parliament is invited to consent to the project and the main measures to avoid, reduce and it possible offset the project’s major adverse effects (see SO 224(9)). A written statement must be laid before the House not less than 7 days before Third Reading.
65. The House of Lords made corresponding changes to its Standing orders for Private Business on 30 July 2013. This has been numbered as SO83A.

(8) The judicial review proceedings

66. A brief chronology of the judicial review proceedings is set out below:

- 2 – 5 April 2012 – First, Second and Third Appellants' Claim Forms lodged at the High Court;
- 3 – 12 December 2012 – High Court hearing before Mr Justice Ouseley (conjoined cases: CO/3477/2012, CO/3467/2012, CO/3635/2012, CO/3605/2012 & CO/3732/2012);
- 15 March 2013 - High Court Decision handed down ([2013] EWHC 481 (Admin));
- 4 - 5 April 2013 - First, Second and Third Appellant's Notices of Appeal filed at the Court of Appeal;
- 10–13 June 2013: Court of Appeal hearing before The Master of the Rolls Lord Justice Richards and Lord Justice Sullivan (conjoined cases: C034672012, C034772012, C036352012);
- 24 July 2013 – Court of Appeal Decision handed down ([2013] EWCA Civ 920) and permission to appeal granted; and
- 29 – 30 July 2013 – First, Second and Third Appellant's Notices of Appeal filed at the Supreme Court.

Issues

Strategic environment assessment issues

67. The issues are:

- (1) Generally, whether the DNS in the circumstances of HS2 is a "*plan or programme*" which "*set the framework for development consent*" and was "*required by administrative provisions*" within the meaning of Articles 2-3 of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (and the corresponding provisions of the Environmental Assessment of Plans and Programmes Regulations 2004).
- (2) More specifically, and in the light of the judgments of the Court of Appeal –
 - (a) Whether the DNS was a "plan or programme";
 - (b) Whether the DNS was "required" by an "administrative provision";
 - (c) the proper interpretation of the term "set the framework for development consent" in Art 3(2)(a) of the Directive;

- (d) whether plans which may influence the Parliamentary consent process should be effectively excluded from the requirements of SEA by an interpretation or application of the Directive such as that applied by the majority in the Court of Appeal²;
 - (e) Whether on the facts the DNS would have a sufficient influence on Parliament to engage the Directive and the requirements for SEA and whether its potential to influence Parliament is a compelling factor;
 - (f) whether if the interpretation of the majority in the Court of Appeal is correct, Article 3(2)(a) Directive is inconsistent with Art 7 of the Aarhus Convention (as Sullivan L.J. found) to which the EU is signatory and is therefore invalid or is otherwise relevant to the issues with regard to SEA³.
- (3) Whether any or all of the above issues of interpretation are *acte clair* or should be referred to the CJEU for a preliminary ruling and whether the issue at (2)(f) should also be referred to the CJEU with regard to the validity of the Directive.

Environmental impact assessment issues

68. In a general sense whether the Hybrid Bill procedure proposed by D for gaining of development consent for HS2 meets the requirements of the EIAD. This raises the following issues;

- (1) Whether the procedure being proposed by D which involves -
 - (a) Consideration by Parliament of issues that go to the principle of the Bill being limited to Second Reading (and theoretically Third Reading) and excluded from the Select Committee stage, and
 - (b) The debate on the Bill at Second and Third Reading being subject to a Government whip;
 is capable of meeting the objectives of the EIAD.
- (2) Whether the Court should intervene at this stage, before the Hybrid Bill is introduced in Parliament and thereafter gains Royal Assent, to consider the issue of compliance with

² The Respondent does not agree that this arises as a separate issue for the Court and says that it begs the question posed by 67(2)(c)

³ The Respondent does not agree that this issue arises for decision and says that the relevant question is whether Article 7 of the Aarhus Convention has any bearing on the issues stated in paragraph 67.

the EIAD, or whether the Court should wait until the Parliamentary process is completed;

- (3) Whether any or all of the above issues are *acte clair* or should be referred to the CJEU for a preliminary ruling.

12 September 2013

Revised 16 September 2013

(references only)

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