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Case No: CO/11729/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 August 2014

Before :

Mr Justice Lindblom

- -

Between :

The Queen (on the application of (1) HS2 Action Alliance Limited (2) London Borough of Hillingdon Council)	**Claimants**
- and -	
Secretary of State for Transport	**Defendant**
- and -	
High Speed Two (HS2) Limited	**Interested Party**

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- -

Mr David Elvin Q.C. and Mr Charles Banner (instructed by **Nabarro LLP**) for the **Claimants**
Mr Tim Mould Q.C. and Ms Jacqueline Lean (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing date: 10 June 2014

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Judgment Approved by the court for handing down

Judgment Approved by the court for handing down

Mr Justice Lindblom:

Introduction

1. The proposed High Speed Two railway ("HS2") is, in the Government's view, "the most significant single transport infrastructure project in the UK since the building of the motorways". That is how the project is described in the Command Paper "High Speed Rail: Investing in Britain's Future – Decisions and Next Steps", which was presented to Parliament in January 2012. In its scale and purpose it recalls the great schemes of railway expansion promoted in the 19th century.

2. In this claim for judicial review, as re-amended on 21 July 2014, the claimants, HS2 Action Alliance ("HS2AA") and the London Borough of Hillingdon Council ("Hillingdon"), contend that the defendant, the Secretary of State for Transport ("the Secretary of State"), acted unlawfully when, on 26 June 2014, he used statutory powers to make safeguarding directions for Phase 1 of HS2. Their essential complaint is that the safeguarding directions ought to have been assessed under the regime for strategic environmental assessment ("SEA") in Directive 2001/42/EC "on the assessment of the effects of certain plans and programmes on the environment" ("the SEA Directive") and the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA regulations"), and that the Secretary of State's failure to undertake such an assessment renders them unlawful and liable to be quashed. The claim is opposed by the Secretary of State. The interested party, High Speed Two (HS2) Limited ("HS2 Ltd."), has taken no active part in the proceedings.

Background

3. This is not the first claim for judicial review in which the Government's promotion of HS2 has been challenged. And it may not be the last. HS2, if it is built, will transform the environment along its route. On any view, its impacts on the environment will be significant. The Government acknowledges this, but believes that the new railway will also bring about great economic and social benefit. The project is vigorously opposed by many objectors, including a number of local authorities. HS2AA is running a national campaign against it. Hillingdon is one of the authorities whose areas are crossed by the proposed route of the railway.

4. In March 2010 the Government then in power published a Command Paper entitled "High Speed Rail" (Cm 7827), outlining its proposed strategy for a high speed railway in the form of a Y-shaped network linking London to Birmingham, Manchester, the West Midlands, Sheffield and Leeds. This strategy was adopted by the coalition Government after it came to power in May 2010. In December 2010 the Secretary of State published details of the proposed route for Phase 1 of the railway, between London and Birmingham, including provision for a spur link to Heathrow Airport, which would be built at the same time as the lines to Leeds and Manchester. The Command Paper published in January 2012 was produced after public consultation on the proposed Y-network, including the preferred route for Phase 1 from London to the West Midlands. It announced and explained the decision to promote this project using the procedure for hybrid bills.

5. One of the "Next Steps" for the project referred to in the 2012 Command Paper was this:

> "Develop the Directions to safeguard the proposed route from London to West Midlands. The intention is to consult on the draft directions in Spring 2012 and, subject to the outcome of this consultation, bring final safeguarding directions into effect later in the year. From that point households in the safeguarding area will be able to serve a blight notice on the Government, which requires it to consider buying their property, for its unblighted value, in advance of any compulsory purchase. …".

6. HS2AA's previous claim for judicial review was directed at the 2012 Command Paper. It was contended in those proceedings that SEA ought to have been undertaken for that Command Paper, and that the hybrid bill procedure would not meet the procedural requirements of European law for environmental impact assessment ("EIA"). That claim failed at first instance, then in the Court of Appeal, and ultimately, on 22 January 2014, in the Supreme Court (*R. (on the application of Buckinghamshire County Council and others) v Secretary of State for Transport* [2014] 1 W.L.R. 324).

7. The first of the proposed hybrid bills, the High Speed Rail (London – West Midlands) Bill, for Phase 1 of HS2, was introduced in the House of Commons on 25 November 2013 and, following its second reading on 29 April 2014, is now before a select committee.

The claim

8. This claim, when first issued in August 2013, was a challenge to safeguarding directions which came into force on 9 July 2013. On 4 October 2013 it was stayed by Ouseley J. until the conclusion of the first proceedings. On 24 October 2013 the July 2013 directions were revoked and replaced by new directions. Under an order made by consent on 4 December 2013 the claim was amended and thus became a challenge to the October 2013 directions. On 17 April 2014, the appeal from the Court of Appeal's decision in the previous proceedings having been dismissed by the Supreme Court, Ouseley J. ordered an expedited "rolled-up" hearing. That hearing took place on 10 June 2014. I reserved judgment.

9. The directions issued by the Secretary of State on 26 June 2014 replaced those issued in October 2013. On 21 July 2014 the claimants applied under Part 17.1(2) of the Civil Procedure Rules to amend the claim to challenge the new directions. The application to amend was not resisted by the Secretary of State, and I granted it. I gave the parties the opportunity to make any further submissions in writing by 25 July 2014. The claimants then adopted the same argument in support of their re-amended claim as they had put forward in challenging the previous directions, and the Secretary of State maintained his argument in defence.

10. The claimants require an extension of time for bringing the claim, which was lodged one day late. In the end this was not opposed, and there being no prejudice to the Secretary of State or to HS2 Ltd. and no other good reason not to do so, I grant it.

The SEA regime

11. The "objective" of the SEA Directive, as stated in article 1, is "to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to

promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

12. The concept of "plans and programmes" is defined in article 2(a) of the SEA Directive, which is transposed into domestic law by regulation 2(1) of the SEA regulations:

> "'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:
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> – which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
>
> – which are required by legislative, regulatory or administrative provisions".

13. Article 3(2) of the SEA Directive, which is transposed into domestic law by regulation 5(2) and (3) of the SEA regulations, provides:

> "Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
>
> (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC ["the EIA Directive"], or
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> (b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC."

14. Article 4(1) of the SEA Directive provides that SEA must be undertaken "during the preparation of a plan or programme and before its adoption or submission to the legislative procedure". Article 5(1) provides that where an environmental assessment is required under article 3(1), an environmental report must be prepared which identifies, describes and evaluates the likely significant effects on the environment of implementing the plan or programme itself and "reasonable alternatives". Annex I specifies the information to be provided under article 5(1), including "(a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes", "(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme", "(c) the environmental characteristics of areas likely to be significantly affected", "(f) the likely significant effects on the environment …", and "(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken …". Article 8 requires that the environmental report and the opinions expressed in the consultation on the report "shall be taken into account" during the preparation of the plan or programme and before it is adopted.

The issues for the court

15. The claimants contend that, on a proper interpretation of the SEA Directive, the safeguarding directions which have been issued for the HS2 project – the July 2013 directions, the October 2013 directions, and now the June 2014 directions – fall within its scope, because they constitute a plan or programme setting the framework for the future development consent of Annex I and Annex II projects and were required both by legislative and administrative provisions. The Secretary of State was obliged to subject them to SEA before their adoption. He did not do so. The directions are therefore unlawful, and there is no good reason for the court not to quash them. That argument is opposed by the Secretary of State. He says that, in the light of the decision of the Supreme Court in the previous proceedings, the safeguarding directions cannot be regarded as a plan or programme setting the framework for future development consent, and that in any event they were not required by any legislative, regulatory or administrative provision. But if SEA was required, the court should, in its discretion, refrain from quashing the directions.

16. There are, therefore, three main issues for the court to decide: first, whether the safeguarding directions are a plan or programme which sets the framework for future development consent; secondly, whether they were required by legislative or administrative provisions; and thirdly, if both of those two issues are decided in favour of the claimants, whether the directions ought to be quashed.

The statutory power to make safeguarding directions

17. Section 74(1) of the Town and Country Planning Act 1990 ("the 1990 Act") states that "[provision] may be made by a development order for regulating the manner in which applications for planning permission to develop land are to be dealt with by local planning authorities", for any of several different purposes. These include enabling the Secretary of State "to give directions restricting the grant of planning permission by the local planning authority, either indefinitely or during such period as may be specified in the directions, in respect of any such development, or in respect of development of any such class, as may be so specified" (subsection (1)(a)); requiring that, "before planning permission for any development is granted or refused, local planning authorities prescribed by the order or by directions given by the Secretary of State under it shall consult with such authorities or persons as may be so prescribed" (subsection (1)(c)); and requiring the local planning authority "to give to the Secretary of State, and to such other persons as may be prescribed by or under the order, such information as may be so prescribed with respect to applications for planning permission made to the authority, including information as to the manner in which any such application has been dealt with" (subsection (1)(f)).

18. The Town and Country Planning (Development Management Procedure) (England) Order 2010 ("the Development Management Procedure Order") was made under section 74(1). Article 16(4) of the Development Management Procedure Order provides:

> "The Secretary of State may give directions to a local planning authority requiring that authority to consult any person or body named in the directions, in any case or class of case specified in the directions."

Article 25(1) provides:

> "The Secretary of State may give directions restricting the grant of 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."

Article 29(6) enables the Secretary of State to direct what information is to be provided about a planning application and to whom:

> "A local planning authority shall provide such information about applications made under article 5 or 6 (including information as to the manner in which any such application has been dealt with) as the Secretary of State may by direction require; and any such direction may include provision as to the persons to be informed and the manner in which the information is to be provided."

The October 2012 consultation

19. In October 2012 the Secretary of State published a consultation document for Phase 1 of the project, entitled "High Speed Two: Safeguarding for London – West Midlands", seeking views from local authorities and the public on the proposed safeguarding directions. The consultation period ran from 25 October 2012 to 31 January 2013.

20. The purpose of the proposed directions was described as being "to protect the planned railway corridor from conflicting development before construction starts". The Government was therefore "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". It was seeking "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".

21. In paragraphs 1.5 to 1.9 of the consultation document the Secretary of State explained how the proposed safeguarding directions would operate: the requirement for local planning authorities to consult HS2 Ltd. when determining planning applications for planning permission for the development of land within the safeguarded area, the opportunity HS2 Ltd. would have to recommend the imposition of appropriate conditions on a planning permission or that the application be refused, and the requirement for the authority to notify the Secretary of State if it did not accept that recommendation, giving him the chance to issue a direction restricting the grant of planning permission. The consultation document also explained, in paragraphs 1.12 to 1.19, that the draft safeguarding plans were based on the best estimate of the land which would be needed for HS2, that they would not set a boundary for land to be acquired by agreement or compulsory purchase, and that revised directions might be issued as work on the design of the project proceeded.

22. Annex C to the consultation document was a "Draft Impact Assessment". This stated:

> "Construction of HS2 is not expected to commence until 2017. Safeguarding is a long established part of the planning process, which aims here to ensure that new developments along the route do not impact on the ability to build or operate HS2. Unless safeguarding directions are put in place there is a higher risk that third parties may bring forward developments that will conflict with the operation and construction

> of HS2. This could lead to nugatory investment for developers and increased costs or risks for the HS2 project. Also, not issuing safeguarding directions would mean that statutory blight processes would not be triggered meaning that statutory compensation for home-owners would not be available until after Royal Assent of the HS2 Bill."

The impact assessment also said this:

> "… Safeguarding is a standard process and there is a legitimate expectation that it will be undertaken for HS2."

23. HS2AA's solicitors responded to the consultation in a letter dated 20 December 2012, contending that the proposed safeguarding directions ought to have been subjected to SEA, warning that a claim for judicial review might be issued if SEA was not carried out, and promising that further representations would be made by the end of January 2013. Those representations came in a letter dated 23 January 2013. In that letter HS2AA's solicitors complained that it was premature to make safeguarding directions before the environmental impacts of the safeguarded route had been assessed, that the directions would prejudice the consideration of any changes to that route, and would sterilize large areas of land. In any event, they argued, the directions ought not to be unlimited in time, and should contain a "sunset clause". Hillingdon made representations in response to the consultation in a letter dated 31 January 2013, expressing concern about the lack of any consideration of "alternatives to safeguarding", prematurity, and the fact that "[the] areas included on the safeguarding map extend far beyond the line of the published route".

24. On 9 July 2013 – the day on which the first safeguarding directions came into force – the Secretary of State published a document summarizing the consultation responses. This referred to a number of representations in which it had been submitted that SEA ought to have been carried out for the directions. On the same day the Secretary of State published "The Government Response to the Consultation on Safeguarding HS2". In this document the Secretary of State referred to the power he would have under the safeguarding directions to "step in and direct refusal of, or restrictions on, the grant of planning permission" (paragraph 1.3.2). He said he was "best placed to understand and appreciate the planning implications and requirements of HS2 and thus determine what is appropriate" (paragraph 1.3.3). He rejected the suggestion that the directions ought to have been assessed under the SEA Directive (paragraph 4.3.2):

> "Under the law, there is no requirement to conduct an SEA in respect of safeguarding. Neither the safeguarding directions nor the decision to make them are a 'plan or programme' within the terms of the SEA Directive because they do not set a framework for future development consent. Instead they seek to ensure the proper planning of the area for the railway and allow the government to comment on relevant planning applications. The purpose of assessment under SEA is to identify the current state of the environment and the likely significant effects on the environment of implementing the plan or programme. The implementation of safeguarding as a planning tool is unlikely to have significant environmental effects."

The July 2013 and October 2013 safeguarding directions

25. The safeguarding directions issued on 9 July 2013 related to the project as it was at that time. The directions issued on 24 October 2013 reflected refinements to the design of Phase 1, the main difference being the inclusion of two tunnels, one at Northolt, the other near the Bromford Viaduct.

The safeguarding directions of 26 June 2014

26. The safeguarding directions issued on 26 June 2014, like those issued in July and October 2013, state that they were made "in exercise of the powers conferred by articles 16(4), 25(1) and 29(6) of [the Development Management Procedure Order]". Paragraph 8 of these directions confirms that they "revoke and replace" the safeguarding directions of 24 October 2013.

27. Paragraph 2 of the safeguarding directions states that they apply in respect of any application for planning permission which "(a) has not been finally determined by the commencement date", "(b) relates to development within the zone specified in paragraph 3", and "(c) is not an exempt application by virtue of paragraph 4". The zone specified in paragraph 3 is shown bounded by lines marked "Limits of Land subject to Safeguarding Direction" on the plans annexed to the directions. This is "the zone relating to the route of the railway proposed to be constructed between London and the West Midlands". Paragraph 4 specifies three categories of "exempt applications". These are applications for planning permission relating to development that "(a) lies within the zone shown on the plans referred to in paragraph 3 and is not shown shaded on those plans", "(b) consists only of an alteration to a building which is a hereditament that falls within the scope of section 149(3) of [the 1990 Act] …", and "(c) does not involve, or is not likely to involve, any construction, engineering or other operations below existing ground level".

28. The "Duties on local planning authorities" are set out in paragraphs 5, 6 and 7:

> "5. Before a local planning authority may determine any planning permission in respect of any application for planning permission to which these Directions apply it must consult [HS2 Ltd.].
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> 6. Where a local planning authority is required by paragraph 5 to consult [HS2 Ltd.], they must not grant planning permission otherwise than to give effect to the recommendation of [HS2 Ltd.]:
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> > (a) unless they have delivered to the Secretary of State for Transport the material specified in paragraph 7; and
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> > (b) until the expiry of a period of 21 days from the date on which that material was delivered to the Secretary of State.
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> 7. The material referred to in paragraph 6 is:
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> > (a) a copy of the application together with a copy of any plans or documents submitted with it;

> (b) a copy of the response of [HS2 Ltd.] to the consultation by the local planning authority in pursuance of paragraph 5;
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> (c) such information regarding the application as the Secretary of State may require by direction under article 29(6) of [the Development Management Procedure Order]; and
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> (d) a statement on the provisions of the development plan and other issues involved, including whether the grant of permission would be contrary to the views of another Government Department."

29. The safeguarding directions are accompanied by guidance notes for local planning authorities. Paragraph 3 of the guidance notes explains the purpose of the safeguarding directions as being "to protect the planned railway route from conflicting development before construction starts", and that such directions are "an established tool of the planning system designed for this purpose". The aim is "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". Paragraph 4 says that "due to the on-going detailed design of the project" the safeguarding boundaries in the October 2013 directions were "out of step with the latest designs for the project, as set out in the hybrid Bill which was deposited in Parliament in late November 2013". Paragraph 5 says that the safeguarding directions issued in 2013 were "based on plans which pre-dated the Environmental Statement designs". Though "the core of the route" was protected by those directions, "many accompanying sites … fell outside the safeguarded area". The proposed Leeds and Manchester spurs had also been omitted. Some areas of land were outside the boundaries in the hybrid bill, but had remained safeguarded. Paragraph 6 of the guidance notes states:

> "There is no formal requirement to update Safeguarding Directions; however, it is appropriate to continue to review them at periodic intervals to ensure that the right land is protected and that unrequired land is not unnecessarily blighted for extended periods and it is for this reason these new Safeguarding Directions have been issued."

30. Paragraphs 7 to 16 of the guidance notes explain the arrangements under the safeguarding directions for the processing of applications for planning permission. Paragraph 9 says that any applications sent to HS2 Ltd. under paragraph 5 of the safeguarding directions "will be considered by [HS2 Ltd.] on a case-by-case basis on the grounds of whether the proposed development will impact on the ability to build or operate HS2 or lead to excessive additional costs". Paragraph 11 says that "to assist developers to design buildings that do not conflict or obstruct the route of HS2 and to avoid the possibility of a recommendation of refusal being made to the [local planning authority] by [HS2 Ltd.] under these Safeguarding Directions, [HS2 Ltd.] intends to produce information about HS2 design criteria for the use of developers bringing forward new developments in the safeguarded area of the route of HS2". Paragraph 13 says that where planning permission "is refused due to a conflict with the HS2 project, the decision notice should include that conflict in the reasons for refusal". It points out that HS2 Ltd. "may recommend that conditions are imposed in specified circumstances and where appropriate in order to protect the HS2 project". Paragraph 15 says that, within 21 days of receiving the application and the material required under paragraph 7 of the safeguarding directions, the Department for Transport will "either notify [local planning authorities] that there are no objections to permission being granted, or issue

Directions restricting the granting of permission specifically for those applications". Paragraph 16 confirms that where the Department for Transport has not responded to this consultation within 21 days the authority "may proceed to determine the application".

31. Paragraph 17 of the guidance notes refers to the provisions of the 1990 Act for blight and purchase notices, which, it says, "will apply to property affected by safeguarding".

32. Paragraphs 22 to 26 of the guidance notes give advice on the preparation of local plans. Paragraph 22 says that when local plans are being prepared "the area safeguarded by the Safeguarding Directions should be taken into account", and that where this is done the directions "should be represented on the policies map …". But paragraph 23 emphasizes that the requirements of the directions "apply … regardless of whether the safeguarded area is identified on the Proposals Map or not". Paragraph 24 says local plans "should state that the Safeguarding Directions have been made by the Secretary of State". They are not proposals of the local planning authority, and the routes in question will not be determined through the development plan process but considered in Parliament under hybrid bill procedures. Paragraph 26 says that when a local plan has been submitted for independent examination the local planning authority should bring any representations relating to the safeguarding directions to the attention of the inspector appointed to hold the examination. If the inspector is satisfied that an objection is solely to matters covered by the safeguarding directions, rather than to proposals of the local planning authority, he is "unlikely to consider the objection to be relevant to consideration of the Local Plan document".

Are the safeguarding directions a plan or programme which sets the framework for future development consent?

33. In the previous proceedings the Supreme Court rejected the argument that the 2012 Command Paper constituted a plan or programme which "set the framework for future development consent of projects …" and that it should therefore have been assessed under the regime for SEA.

34. Lord Carnwath – with whom Lords Neuberger, Mance, Kerr, Sumption and Reed all agreed – considered the provisions of article 3(2) of the SEA Directive and how the 2012 Command Paper related to them. The relevant passage in Lord Carnwath's judgment is in paragraphs 36 to 42. Both sides in these proceedings have sought to base their argument on the analysis set out in those paragraphs. Lord Carnwath began with general principle:

> "36. Against that background, and unaided by more specific authority, I would have regarded the concept embodied in article 3(2) as reasonably clear. One is looking for something which does not simply define the project, or describe its merits, but which sets the criteria by which it is to be determined by the authority responsible for approving it. The purpose is to ensure that the decision on development consent is not constrained by earlier plans which have not themselves been assessed for likely significant environmental effects. That approach is to my mind strongly supported by the approach of the Advocate General and the court to the facts of [*Terre Wallone ASBL v Region Wallone* (Joined Cases C-105/09 and C-110/09) [2010] ECR I-5611, ECJ] and by the formula enunciated in *Inter-Environnement Bruxelles ASBL v Region de Bruxelles-Capitale* [2012] 2 CMLR 909 and adopted by the Grand Chamber in

> [*Nomarchiaki Aftodioikisi Aitoloakarnanias v Ipourgos Perivallontos, Khorotaxias kai Dimosion Ergon* (Case C-43/10) [2013] Env LR 453, ECJ].
>
> 37. In relation to an ordinary planning proposal, the development plan is an obvious example of such a plan or programme. That is common ground. Even if as in the UK it is not prescriptive, it none the less defines the criteria by which the application is to be determined, and thus sets the framework for the grant of consent. No doubt the application itself will have been accompanied by plans and other supporting material designed to persuade the authority of its merits. In one sense that material might be said to "set the framework" for the authority's consideration, in that the nature of the application limits the scope of the debate. However, no one would for that reason regard the application as a plan or programme falling within the definition."

35. Lord Carnwath went on to apply those principles to the 2012 Command Paper:

> "38. In principle, in my view, the same reasoning should apply to the DNS, albeit on a much larger scale. It is a very elaborate description of the HS2 project, including the thinking behind it and the Government's reasons for rejecting alternatives. In one sense, it might be seen as helping to set the framework for the subsequent debate, and it is intended to influence its result. But it does not in any way constrain the decision-making process of the authority responsible, which in this case is Parliament. …"

He quoted Ouseley J.'s observation, in paragraph 96 of his judgment at first instance, that "[the] very concept of a framework, rules, criteria or policy, which guide the outcome of an application for development consent, as a plan which requires SEA even before development project EIA, presupposes that the plan will have an effect on the approach which has to be considered at the development consent stage, and that that effect will be more than merely persuasive by its quality and detail, but guiding and telling because of its stated role in the hierarchy of relevant considerations". Ouseley J. had concluded that the 2012 Command Paper did not have those attributes.

36. The crucial part of Lord Carnwath's analysis is in paragraphs 40 to 42 of his judgment:

> "40. I have noted that the majority and the minority in the Court of Appeal adopted the same test, turning on the likelihood that the plan or programme would "influence" the decision. The majority referred to the possibility of the plan having a "sufficiently potent factual influence": para 55. Although Mr Mould generally supported the reasoning of the majority, he submitted that "influence" in the ordinary sense was not enough. The influence, he submitted, must be such as to constrain subsequent consideration, and to prevent appropriate account from being taken of all the environmental effects which might otherwise be relevant.
>
> 41. In my view he was right to make that qualification. A test based on the potency of the influence could have the paradoxical result that the stronger the case made in favour of a proposal, the greater the need for strategic assessment. Setting a framework implies more than mere influence, a word which is not used by the court in any of the judgments to which we have been referred. It appears in Annex II of the Directive, but only in the different context of one plan "influencing" another. In *Terre Wallone* … Advocate General Kokott spoke of influence, but, as already noted, that

was by way of contrast with the submissions before her which suggested the need for the plan to be "determinative".

42. Finally, Mr Elvin pointed to the fact that the DNS had specific legal consequences, notably in the safeguarding direction, and the consequent application of the related blight provisions, and also in providing the basis for the paving Bill, and for the allocation of resources under it. I accept that these points provide an arguably material distinction from the supporting material for a conventional planning application. However, they do not imply any further constraint on Parliament's consideration of the environmental impacts of the project as a whole, under the hybrid Bill procedure."

37. Lord Sumption – with whom Lords Neuberger, Mance, Kerr and Reed agreed – expressed effectively the same conclusion in paragraphs 122 and 123 of his judgment. The effect of the SEA Directive, he said, is that where the grant or refusal of development consent for a project is governed by "a policy framework" regulated by legislative, regulatory or administrative provisions, that policy framework must itself be subject to an environmental assessment. The object is to deal with cases where the assessment prepared under the EIA Directive at the stage when development consent is granted is wholly or partly pre-empted, "because some relevant factor is governed by a framework of planning policy adopted at an earlier stage" (paragraph 122). Thus "the policy framework must operate as a constraint on the discretion of the authority charged with making the subsequent decision about development consent". It "must at least limit the range of discretionary factors which can be taken into account in making that decision, or affect the weight to be attached to them" (paragraph 123).

38. Baroness Hale of Richmond, having acknowledged (in paragraph 136 of her judgment) that the 2012 Command Paper was "only one part of a long and complex process and it is entirely possible that no part of that process constitutes a plan or programme within the meaning of the [SEA] Directive", went on to say (at paragraph 155) that the aim of the SEA Directive "is not to ensure that all development proposals which will have major environmental effects are preceded by [SEA]; rather, it is to ensure that future development consent for projects is not constrained by decisions which have been taken "upstream" without such assessment, thus pre-empting the environmental assessment to be made at project level".

39. For the claimants in these proceedings Mr David Elvin Q.C. argued that the safeguarding directions are a plan or programme within article 2(a) of the SEA Directive. They were prepared for transport, town and country planning and land use, and thus come within the ambit of article 3(2)(a). And they set the framework for future development consent of projects within Annexes I and II of the EIA Directive. They impose a legal constraint on the decision-maker's discretion, the kind of constraint contemplated by the majority of the Court of Appeal in the previous proceedings (*R. (on the application of Buckinghamshire County Council and others) v Secretary of State for Transport* [2013] EWCA Civ 920, at paragraphs 49 to 55) and by Lords Carnwath and Sumption in their judgments in the Supreme Court. Their true purpose, as one can see in the Secretary of State's response to the representations made on consultation, is to "ensure the proper planning of the area for the railway". Like the setting of a framework for future development control decisions by a development plan, they introduce a further mandatory material consideration into planning decision-making. Their effect is no less than that of a development plan policy. Indeed, they can trump all other considerations in the decision. They will be used to restrain or preclude

various forms of development within the safeguarded land. In some cases they will be used by the Secretary of State to ensure that planning permission is refused. This is implicit in paragraph 15 of the guidance notes, which refers to the Secretary of State issuing directions "restricting the granting of permission …".

40. Mr Elvin submitted that the safeguarded land has now been blighted for an indefinite period. The directions cover not only the proposed route of HS2 but also large areas of land further afield, which is being safeguarded for associated works. As Hillingdon's Principal Sustainability Officer, Mr Ian Thynne, explains in his witness statement, this has already had the effect of blighting land covered by the safeguarding directions, constraining decisions both on applications for planning permission and in plan-making. The safeguarding directions will prevent local planning authorities from granting permission for EIA development on sites within the safeguarded land, no matter what its likely effects on the environment may be, and regardless of the effects of turning the proposal away – for example, foregoing the benefits of an energy-from-waste facility which would otherwise have been permitted or having to accept the development on another site less suitable for it. Land was included in the safeguarded area without any assessment of the comparative effects on the environment of other options. Reasonable alternatives were never assessed. Had SEA been undertaken, the potential impacts might have been minimized or avoided.

41. There are, said Mr Elvin, at least three material differences between the safeguarding directions and the 2012 Command Paper. In the first place, the 2012 Command Paper did not constrain Parliament's consideration of whether to grant development consent for HS2. The safeguarding directions, however, operate as a legal constraint on development consent being granted by local planning authorities for various projects, including EIA development. Secondly, the safeguarding directions set criteria by which this legal constraint may affect the determination of applications for planning permission – that the development is proposed within the safeguarded area and does not fall within the specified categories of exempted development. No such criteria were set by the 2012 Command Paper. And thirdly, the safeguarding directions also operate as a constraint on the Secretary of State's discretion in deciding whether and how to restrict the grant of planning permission in cases notified to him, because the requirement for the land that is to be used for HS2 will be a material consideration for him to take into account.

42. I do not think Mr Elvin's argument is right. As Mr Tim Mould Q.C. submitted for the Secretary of State, it cannot be reconciled with the decision of the Supreme Court in the previous proceedings. Applying the principles identified by the Supreme Court in that case, I find it impossible to conclude that the safeguarding directions fall within the scope of "plans and programmes … which set the framework for future development consent of projects …" in article 3(2) of the SEA Directive.

43. Article 3(2) clearly embraces a broad range of measures which may set such a framework. Paragraph 3.4 of the European Commission's guidance on SEA ("Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment") refers to the "wide scope" and "broad purpose" of the SEA Directive and says that the term "plans and programmes" should be taken to cover "any formal statement which goes beyond aspiration and sets out an intended course of future action". That is guidance, not jurisprudence. But it is clear from both European and domestic case law that the term must be given a broad meaning. Such an approach is to be seen, for example, in the

judgment of Lord Reed in *Walton v Scottish Ministers* [2013] PTSR 51 (at paragraphs 10 to 30).

44. As the parties agree, however, the crucial issue here is not whether the safeguarding directions are, in the ordinary sense of the words, a "plan" or "programme". It is whether they can properly be said to set the framework for the future development consent of relevant projects.

45. That issue divides into two questions. The first question is whether the safeguarding directions are a plan or programme setting the framework for the future development consent of the HS2 project itself. The second is whether they are a plan or programme setting the framework for the future development consent of any other project.

46. The answer I would give to both of those questions is "No". In my view, in the light of the Supreme Court's decision in the previous proceedings, it cannot be said that the safeguarding directions constitute or function as a framework for the subsequent consideration and determination of any proposal for development, including the HS2 project itself, or that they prevent the likely effects of any proposed development on the environment being taken into account when relevant decisions are made.

47. In the previous proceedings the claimants pointed to the preparation of the safeguarding directions as one of the effects of the decision in the 2012 Command Paper, one of the next steps in the Government's promotion of the project (see *R. (on the application of Buckinghamshire County Council) v Secretary of State for Transport* [2013] EWHC 481 (Admin), at paragraphs 79 and 100). The genesis of the safeguarding directions lay in the Government's decision to promote the HS2 project and to seek development consent for it through the hybrid bill procedure. That decision was embodied in the 2012 Command Paper. The 2012 Command Paper described the proposed route of the railway and explained the process by which the Government intended to gain approval for the project. The safeguarding directions are a consequence of the decision to promote the project. They were foreseen by the 2012 Command Paper. They are part of the process by which the decision was intended to be put into effect.

48. The HS2 project itself is not a plan or programme under article 3(2) of the SEA Directive. And neither, in my view, are the safeguarding directions which serve to protect it. The directions are a manifestation of the project as a zone of safeguarded land for Phase 1. The safeguarded area takes its shape from the project. Its boundaries have twice been altered to accommodate changes made to the proposals as they mature. No doubt the directions demonstrate the Government's belief that the safeguarded land provides a viable route for the railway and sufficient land to enable its construction. But they do not represent the evolution of the HS2 project into a plan or programme setting the framework for future development consent. They adjust the procedures for making planning decisions, providing formal arrangements for HS2 Ltd. to be consulted and ultimately for the Secretary of State to intervene in the process by restricting the grant of planning permission. They are not, however, a framework of policy or criteria constraining the discretion of the decision-maker in the making of the decision. It will be the HS2 project itself, as it is at the relevant time, which informs the response of HS2 Ltd. to consultation and the intervention of the Secretary of State in the process, if he does intervene.

49. The parties disagreed about the way in which the Secretary of State will be able to intervene. Mr Elvin said that the Secretary of State has the power to direct refusal of an application for planning permission for a development proposed within the safeguarded area, and that this was one obvious means of "restricting the granting of permission" foreseen in paragraph 15 of the guidance notes. Mr Mould did not accept that. He submitted that this guidance means no more than that the Secretary of State can prevent planning permission being granted or require it not to be granted unless particular conditions are imposed. The point may be moot. But even if Mr Elvin is right in contending that the Secretary of State will be able to direct refusal, I do not see how this can make any difference to the essential conclusion – that, in reality, the safeguarding directions are not a plan or programme which sets the framework for development consent. As Mr Mould submitted, however the Secretary of State intervenes, if he does, it will not be the directions that exert a substantive influence on the decision, but the HS2 project itself.

50. The safeguarding directions add to the existing provisions of statute and regulation which govern development control decision-making. When development is proposed within the safeguarded area they will ensure that the interests of the HS2 project are properly taken into account. They do this by requiring authorities to observe some straightforward procedural requirements, essentially to do with consultation and notification, which give the Secretary of State a measure of control over the process by which the authority's decision is made. They do not override the requirement of section 38(6) of the Planning and Compulsory Purchase Act 2004 that decisions on applications for planning permission are to be made in accordance with the development plan unless material considerations indicate otherwise, or the requirement of section 70(2) of the 1990 Act that such decisions must be made having regard to all material considerations, which include the relevant policy and guidance and, specifically, the development plan. They do not displace the existing statutory arrangements for consultation on applications for planning permission.

51. Whilst the safeguarding directions modify the procedure under which an application is handled by the local planning authority, they do not in themselves change the planning merits of the development proposed: its compliance or conflict with local and national policy, its benefits and shortcomings, or its relationship to, and potential effects upon, HS2.

52. Mr Elvin submitted that, irrespective of any intervention by the Secretary of State, the directions would themselves be a relevant factor in the determination of applications for planning permission. I can accept that. The fact that the directions have been put in place as a procedural mechanism to safeguard the HS2 project is capable of being a material consideration when a planning decision is made. And as a material consideration the directions will have to be given such weight as the decision-maker thinks they should have. To that extent they will influence the decision. But their status as a material consideration in that respect does not elevate them to the position and role of a plan or programme which sets the framework for future development consent.

53. That the safeguarding directions do not constitute a "framework of planning policy" – the concept referred to by Lord Sumption in paragraph 122 of his judgment in the previous proceedings – is simply a matter of fact. They do not articulate any policy. They do not alter the provisions of any development plan document, or any statement of government policy or guidance. They have none of the characteristics of a plan or programme as a coherent set of policies and principles for the development or use of land in any particular area. They do not disturb any allocation of land for development. They establish no criteria by which

proposals for development will be judged. They have no substantive content of that kind. Neither in form nor in substance do they amount to a framework of policy.

54. Nor do they prejudice any process of environmental assessment, either "upstream" under the SEA Directive and SEA regulations – as Baroness Hale put it in paragraph 155 of her judgment in the previous proceedings – or downstream under the regime for EIA. They do not invalidate any SEA of development plan documents prepared for the areas through which the protected route runs. They do not pre-empt the environmental assessment of individual projects of EIA development being carried out in the normal way, in accordance with the requirements of the EIA Directive, which will involve taking into account any relevant indirect, secondary or cumulative effects. There is nothing in them that could be said to inhibit or cut down the environmental assessment of any Annex I or Annex II project proposed within the safeguarded zone.

55. The EIA for the HS2 project itself, as Mr Mould submitted, will comply with the requirements for an assessment prepared under the EIA Directive and the EIA regulations. In that assessment consideration will be given to the likely significant effects of the railway on the environment, including the use of the sites which are to be used for its construction, and to alternatives. The authorities within whose areas the railway will be constructed and operated, the owners of land affected by the project and also the public will have had the opportunity to participate in that process.

56. The possibility of there being a gap in environmental assessment was considered in the previous proceedings. Lord Carnwath dealt with this in paragraphs 43 to 49 of his judgment. He noted the difference between the procedures for SEA and EIA, including the different requirements for the treatment of alternatives (paragraph 44). The SEA Directive requires an environmental report to identify, describe and evaluate the likely significant effects on the environment of implementing the plan or programme itself and also of "reasonable alternatives" (article 5), and that it must give an outline of the reasons for selecting the alternatives dealt with and a description of how the assessment was undertaken (Annex I), whereas the EIA Directive requires an environmental statement to include "[an] outline of the main alternatives studied by the developer" and "an indication of the main reasons for this choice, taking into account the environmental effects" (article 5 and Annex IV). Lord Carnwath observed that even if the SEA Directive had applied it would not have required more detailed consideration of alternative strategies based on improvements to the existing network, such as the "optimised alternative" (paragraphs 47 and 48 of his judgment). But he went on to say (in paragraph 49) that there was nothing in the 2012 Command Paper to prevent arguments and evidence relating to the Government's intentions being presented to Parliament within the decision-making process on the HS2 project. This, he said, "illustrates the practical importance of the distinction, in the context of the SEA Directive, between merely influencing subsequent consideration, and setting limits on the scope of what can be considered". He added that "[until] Parliament has reached its decision, the merits of all aspects of the HS2 project, on economic, environmental and other grounds, remain open to debate". That conclusion, in my view, is also the answer to Mr Elvin's submission in these proceedings that the absence of SEA for the safeguarding directions perpetuates a gap in environmental protection, contrary to the intent of the SEA Directive.

57. I therefore conclude that the safeguarding directions are not a plan or programme which sets the framework for future development consent of projects in Annexes I and II to the EIA Directive, within the meaning of article 3(2) of the SEA Directive.

Were the safeguarding directions required by legislative, regulatory or administrative provisions?

58. My conclusion on the previous issue is enough to dispose of the claim. I can therefore deal with this issue relatively briefly.

59. Mr Elvin submitted that because the safeguarding directions were issued under, and regulated by, legislative provisions – in section 74 of the 1990 Act and the Development Management Procedure Order – they were "required" by legislative provisions in the broad sense described by the European Court of Justice in *Inter-Environnement Bruxelles*. They were also promised in the 2012 Command Paper. And, as the impact assessment in Annex C to the October 2012 consultation paper made plain, they were considered by the Secretary of State to be the subject of a "legitimate expectation". At the very least, said Mr Elvin, there is a question here suitable for a reference to the European Court of Justice, as Lords Neuberger, Mance and Carnwath had accepted in the previous proceedings, albeit in the context of the 2012 Command Paper.

60. As Mr Elvin recognized, the argument that the safeguarding directions were "required" by legislative or administrative provisions is hard to reconcile with the sense in which that word is understood in its normal usage in English – the sense of something being made necessary or compulsory. But the European jurisprudence does not support such an understanding of the concept of a plan or programme "required by legislative … provisions" in article 2(a) of the SEA Directive. In *Inter-Environnement Bruxelles* the Fourth Chamber of the European Court of Justice gave this concept a very broad and flexible meaning, extending it beyond plans or programmes whose preparation was based on a legal obligation. The meaning favoured by the court was wide enough to encompass plans and programmes whose preparation, though regulated by rules of law, is "not compulsory in all circumstances" (paragraph 28). It held that "plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as "required" within the meaning, and for the application, of [the SEA Directive] …" (paragraph 31). Mr Elvin submitted that the European Court of Justice, if given the opportunity to do so, might be expected to take a similarly broad approach to the meaning of the concept of a plan or programme "required by … administrative provisions".

61. At the end of the hearing Mr Mould conceded on behalf of the Secretary of State, though only at this stage in these proceedings, that the safeguarding directions were a measure required by legislative provisions.

62. In the previous proceedings Lord Carnwath said (in paragraph 23 of his judgment) that he was prepared to assume the 2010 Command Paper was an administrative provision which had, in the sense of the court's judgment in *Inter-Environnement Bruxelles*, "required" the preparation of a document in the form of the 2012 Command Paper, or at least that there was a referable issue here. Lord Neuberger and Lord Mance doubted the wide interpretation given to article 2(a) in *Inter-Environnment Bruxelles*, and concluded (in paragraph 189 of

their judgment) that this was a situation in which "a national court is faced with a clear legislative provision, to which the Fourth Chamber of the European Court of Justice has, in the interests of a more complete regulation of environmental developments, given a meaning which the European legislature clearly did not intend". If the result of those proceedings had depended on the meaning of the word "required" in article 2(a) they would have supported a reference to the European Court of Justice "for it to reconsider, hopefully in a fully reasoned judgment of the Grand Chamber, the correctness of its previous decision".

63. In the light of the judgment of the European Court of Justice in *Inter-Environnement Bruxelles*, in view of the conclusions expressed in the Supreme Court on the analogous question in the previous proceedings, and in the absence of any convincing argument to the contrary, I accept Mr Elvin's submission that the safeguarding directions were "required" in the relevant sense, both by legislative and by administrative provisions.

64. The directions were issued under, and thus "regulated by", legislative provisions – in section 74(1) of the 1990 Act and articles 16(4), 25(1) and 29(6) of the Development Management Procedure Order. They were also promised in the "Next Steps" in the 2012 Command Paper, which stated the Government's commitment to produce draft safeguarding directions, consult upon them, and then to bring final directions into effect, with the consequence that blight notices could then be served on the Government before any land was compulsorily acquired.

65. In his skeleton argument Mr Mould submitted that if the Government's promise to produce safeguarding directions gave rise to a legitimate expectation this would not mean that the directions were "required by … administrative [provision]". He pointed out that a similar argument was put forward in the previous proceedings and rejected by Ouseley J. (in paragraph 71 of his judgment). That is so. But Mr Elvin did not base his submissions merely or mainly on the concept of legitimate expectation. He argued that, irrespective of any legitimate expectation, the terms in which the "Next Steps" in the 2012 Command Paper were framed established an administrative requirement within article 2(a), just as the 2010 Command Paper was an administrative provision which "required" or "regulated" the preparation and adoption of the 2012 Command Paper itself. I accept that argument. It finds support in what Lord Carnwath said in paragraphs 21 to 23 of his judgment in the previous proceedings. The "Next Steps" in the 2012 Command Paper pass the tests for an administrative provision within article 2(a), in that they identify both the competent authority – the Secretary of State – and the statutory procedure for the preparation and adoption of the safeguarding directions.

66. For those reasons I would accept that the safeguarding directions were "required" in the sense of article 2(a) of the SEA Directive. I acknowledge that this question might remain contentious at a higher level, and might yet require a reference to the European Court of Justice. But having concluded that the claim must fail in any event because the safeguarding directions do not constitute a plan or programme which sets the framework for future development consent, I can see no justification for a reference at this stage.

Discretion

67. If I am right in my conclusion that the safeguarding directions were "required" by either legislative or administrative provisions or both, but wrong in finding that they are not a plan or programme which sets the framework for future development consent, it would follow that they ought to have been assessed under the regime for SEA. It would then be necessary to consider whether this is a case in which the court should exercise its discretion not to quash.

68. In *Walton* Lord Carnwath considered (in paragraphs 124 to 140 of his judgment) the circumstances in which the court may decline to quash the adoption of a scheme or order where there has been a failure to comply with the requirements of the SEA Directive. Having explored relevant domestic and European authority, he concluded that if effect has been given, in substance, to the obligations arising under European law, it is open to the court not to quash.

69. Mr Elvin submitted, and I accept, that where a plan or programme has been adopted in breach of the requirements of the SEA Directive, and a claim has been brought within time, the court should start from the position that the plan or programme ought to be quashed. Here, he submitted, the court should do that, because there has been a clear failure to give effect to the rights of the claimants and the public under the regime for SEA. In these circumstances the court should not hesitate to quash the safeguarding directions. Nothing less will do. This is clear from several decisions of the European Court of Justice, including, for example, its judgment in *L v M* ((Case C-463/11) [2013] Env LR 35, ECJ, at paragraphs 40 to 44). If the directions are quashed the Secretary of State will have to undertake SEA for any directions produced to replace them, including a proper assessment of alternatives.

70. Mr Mould resisted that argument. He did not suggest that there had yet been "substantial compliance" with the SEA Directive. However, he relied on the decision of the European Court of Justice in *Genovaite Valciukiene and others v Pakruojo rajono savivaldybe and others* (Case C-295/10) [2012] Env LR 283, in which the court held (at paragraphs 57 to 63) that where an EIA had been carried out under a co-ordinated or joint procedure meeting all the requirements of SEA there would be no need for a further assessment under the SEA Directive. The hybrid bill seeking the powers to construct and operate Phase 1 of HS2 has been laid before Parliament with an environmental statement, in which the likely significant environmental effects of the project, and alternatives to it, have been thoroughly assessed. So, submitted Mr Mould, there is no reason for the court to intervene now to secure a proper assessment of the environmental impact of the proposed development of HS2 on the safeguarded land. The court should also bear in mind that the protection the safeguarding directions give to owners of properties within the safeguarded area by triggering the blight notice provisions in Part VI of the 1990 Act would be lost if the directions were quashed.

71. At first instance in the previous proceedings Ouseley J. held (in paragraph 189 of his judgment) that if the 2012 Command Paper had required assessment under the regime for SEA he would have quashed it because the shortcomings in the assessment in the Appraisal of Sustainability made it impossible to conclude that the requirements of the SEA Directive had been substantially complied with. The Court of Appeal agreed (the Master of the Rolls and Richards L.J. in paragraph 72 of their judgment, Sullivan L.J. in paragraph 187 of his). No argument to the contrary was advanced in the Supreme Court.

72. If this claim were well founded, which I have held it is not, I would have seen no reason to take a different approach here. The requirements of the SEA Directive have not been substantially complied with. There has been no assessment of the kind specified in articles 4 to 9.

73. I do not accept that the Secretary of State would have been able to rely on the provisions of article 11 of the SEA Directive to avoid the requirement for SEA. Article 11(1) provides that an environmental assessment carried out under the SEA Directive "shall be without prejudice to any requirements under [the EIA Directive] and to any other Community law requirements". Article 11(2) states that "[for] plans and programmes for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and other Community legislation, Member States may provide for coordinated or joint procedures fulfilling the requirements of the relevant Community legislation in order, *inter alia*, to avoid duplication of assessment". In *Genovaite Valciukiene* the European Court of Justice was able to infer from article 11(2) that if an EIA has been carried out under a co-ordinated or joint procedure it may satisfy all of the requirements of the SEA Directive, and that, if this is so, there is no obligation to undertake a further assessment under the SEA Directive (paragraphs 62 and 63). But, as Lord Reed said in his judgment in *Walton* (at paragraph 28), if the two assessments differ in their scope or content a second assessment will be appropriate. Article 11(1) does not remove the obligation to carry out an assessment under the SEA Directive where such an assessment is required. Assessment under the EIA Directive is additional to that, not a substitute for it.

74. Therefore, if I had concluded that the safeguarding directions were subject to the requirements of the SEA Directive I would not have exercised my discretion against making an order to quash them.

Conclusion

75. For the reasons I have given, whilst I grant permission for the claim to proceed, the claim itself is dismissed.