Neutral Citation Number: [2014] EWCA Civ 1578

Case No: C1/2014/3192

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE LINDBLOM
CO/11729/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/12/2014

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE SULLIVAN
and
LORD JUSTICE LEWISON

- -

Between:

THE QUEEN **on the application of**	**Appellants**
(1) HS2 ACTION ALLIANCE	
(2) LONDON BOROUGH OF HILLINGDON	
- and -	
THE SECRETARY OF STATE FOR TRANSPORT	**Respondent**
- and -	
HIGH SPEED TWO (HS2) LIMITED	**Interested Party**

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- -

David Elvin QC and Charles Banner (instructed by **Nabarro LLP Solicitors**) for the Appellants
Tim Mould QC (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date: 25th November 2014

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Approved Judgment

Lord Justice Sullivan:

Introduction

1. The issue in this appeal is whether the safeguarding directions ("the Directions") made by the Secretary of State for Transport ("the Secretary of State") under the Town and Country Planning (Development Management Procedure) (England) Order 2010 ("the Order") for Phase 1 of the proposed High Speed Two railway ("HS2") "set the framework for future development consent of projects", including projects for EIA development, within the safeguarded zone? If the answer to that question is "Yes", the Directions should have been, but were not, assessed under the regime for strategic environmental assessment in Directive 2001/42/EC ("the SEA Directive").

2. In his judgment dated 6th August 2014, [2014] EWHC 2759 (Admin), Lindblom J held that the Directions did not "set the framework for development consent" for either the HS2 project itself, or any other project (paragraphs 45 and 46), so there was no need to assess them under the SEA Directive (paragraph 57). The Appellants do not contend that the Directions set the framework for development consent for the HS2 project. Development consent for the HS2 project will be granted by Parliament if it enacts the hybrid High Speed Rail (London – West Midlands) Bill which is presently before a select committee. The Appellants submit that Lindblom J erred in concluding that the Directions did not set the framework for development consent for other projects, including EIA projects, within the safeguarded zone.

3. Lindblom J also held (1) that the Directions were "required by legislative, regulatory or administrative provisions" for the purposes of article 2(a) of the SEA Directive (paragraph 66 judgment); and (2) that if he had concluded that the Directions were subject to the SEA Directive, he would not have exercised his discretion against making an order to quash them (paragraph 74 judgment). There is no cross-appeal by the Secretary of State against these two further conclusions of Lindblom J.

The judgment below

4. Lindblom J set out the factual and legal background to this appeal in paragraphs 1-32 of his judgment. There is no dispute about the contents of those paragraphs in the judgment. I gratefully adopt, and will not repeat them. Lindblom J considered the question "Are the safeguarding directions a plan or programme which sets the framework for future development consent?" in paragraphs 33-57 of his judgment. Having set out the relevant passages from the judgments of Lord Carnwath, Lord Sumption and Baroness Hale in (Buckinghamshire County Council) v Secretary of State for Transport [2014] UK SC3, [2014] 1W LR 324 ("*Buckinghamshire*") in paragraphs 34-38 of the judgment, Lindblom said in paragraph 44 that the parties were agreed that the crucial issue was not whether the Directions were, in the ordinary sense of the words, a "plan" or "programme", it was

> "whether they can properly be said to set the framework for the future development consent of relevant projects."

5. Lindblom J's reasons for answering "No" to that question are set out in paragraphs 46-56 of the judgment. The core of his reasoning is contained in paragraphs 48, 50 and 53:

"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.

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.

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."

The Appellants' case

6. In his submissions on behalf of the Appellants, Mr. Elvin QC placed particular emphasis upon the purpose of the Directions, first stated in the October 2012 Consultation, and then repeated in the Guidance Notes accompanying the July 2013, October 2013 and June 2014 Directions:

> "Safeguarding aims to ensure that new developments along the route [of HS2] do not impact on the ability to build or operate HS2 or lead to additional costs."

7. Mr. Elvin accepted that these three objectives – ensuring that new developments along the route of HS2 will not: (i) prejudice the building of HS2, (ii) prejudice the operation of HS2, or (iii) increase the cost of the HS2 project – would all have been material considerations for the purpose of section 70(2) of the Town and Country Planning Act 1990 ("the 1990 Act") in any event, regardless of the existence of any Directions.

8. At the heart of the Appellants' case was the submission that the Directions had made these three objectives a mandatory consideration for any local planning authority considering a planning application (including an application for EIA development) within the safeguarded zone; and had thereby required them to be given a greater (and in some cases a decisive) weight when the local planning authority was deciding whether to grant planning permission under section 70 of the 1990 Act.

9. He submitted that this meant that the Directions fell squarely within the way in which the Supreme Court had approached the meaning of a plan or programme for the purposes of article 3(2) of the SEA Directive in *Buckinghamshire*; see in particular paragraph 123 of the judgment of Lord Sumption:

> "..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. Thus a development plan may set the framework for future development consent although the only obligation of the planning authority in dealing with development consent is to take account of it. In that sense the development plan may be described as influential rather than determinative."

10. The Directions operated as a constraint on the discretion of the local planning authority when it was deciding whether or not to grant planning permission for proposed developments (including EIA developments) within the safeguarded zone. While the Directions did not limit the range of discretionary factors which the local planning authority could take into account, they significantly affected the weight which the local planning authority was required to give to the three objectives identified in the stated aim of the Directions, (see paragraphs 6 and 7 above), even to the extent of requiring the local planning authority to give decisive weight to those objectives. Unlike a development plan, which was merely influential, the Directions were determinative for the local planning authority when dealing with development consents within the safeguarded zone.

11. Mr. Elvin submitted that this approach to setting the framework for development consent was consistent with the European Commission's Guidance in *Implementation of Directive 2001/42 on the assessment of certain plans and programmes on the environment*, paragraph 3.23 of which explained the meaning of "set the framework", as follows:

> "The words would normally mean that the plan or programme contains criteria or conditions which guide the way the consenting authority decides an application for development consent. Such criteria could place limits on the type of activity or development which is to be permitted in a given area; or they could contain conditions which must be met by the applicant if permission is to be granted…"

The Directions contained criteria which not merely guided, but mandated the way in which the local planning authority decided applications for development consent in the safeguarded zone. Within the safeguarded zone limits were placed on the type of development which could be permitted, or certain conditions were required to be met by applicants for permission for development.

12. In support of these submissions Mr Elvin drew our attention to a number of examples in which the Appellants said that the Directions had constrained decisions of local planning authorities within the safeguarded zone, both on applications for planning permission and in the making of development plans, as described in the Witness Statement of Mr. Thynne, a Principal Sustainability Officer at the Second Appellant. Mr. Thynne also produced the Parliamentary Under-Secretary (Department for Transport)'s answer to a Parliamentary Question about the number of referrals to High Speed Two (HS2) Limited ("HS2 Limited") pursuant to the Directions. There have been no referrals where a local planning authority was minded to approve an application for planning permission against the advice of HS2 Limited. In Mr. Thynne's view:

> "This demonstrates Local Authorities are either refusing application for development falling within the Safeguarding Directions based on the recommendations of HS2 Limited or developers are altering their schemes to accommodate the railway proposals."

The Respondent's case

13. In his submissions on behalf of the Respondent, Mr. Mould QC supported the reasoning of Lindblom J. The Directions did not "set the framework for development consent." They contained no substantive policy framework or criteria for the determination of applications within the safeguarded zone, and were simply a procedural mechanism which enabled the Respondent to restrict the grant of planning permission at the local level for development which would prejudice the HS2 project. In those cases where the Respondent judged it necessary to issue a direction restricting the grant of planning permission (because the local planning authority was not minded to agree with HS2 Limited's advice) the practical effect would be that any decision to grant planning permission would be taken at the national, not the local level.

14. If the local planning authority refused planning permission or imposed conditions upon a grant of permission pursuant to a direction from the Secretary of State, or if the local planning authority simply failed or declined to determine an application for planning permission because it disagreed with the Secretary of State's direction, the applicant was able to exercise his right of appeal under section 78 of the 1990 Act to the Secretary of State for Communities and Local Government, who would then determine any such appeal on its planning merits in accordance with section 70(2) (as applied by section 79(4)) of the 1990 Act, and section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). At that stage in the decision-making process, the Directions would have "fallen away" in terms of having any influence on the outcome of the appeal (because they would have achieved the purpose of ensuring that the decision would be taken by central, rather than local Government), and the question for the Secretary of State for Communities and Local Government would be whether the proposed development would prejudice the implementation of the HS2 project, and if it would whether that prejudice, together with any other planning objections, outweighed the planning advantages of the proposed development. In that weighing exercise, considerable weight would, no doubt, be given by the Secretary of State for Communities and Local Government to the need not to prejudice the implementation of the HS2 project, but that consideration would be accorded considerable weight, not because of the Directions, but because of the fact that HS2 was, in the Government's view "the most significant single transport infrastructure project in the UK since the building of the motorways": see paragraph 1 of Lindblom J's judgment.

Discussion

15. I accept Mr. Mould's submissions. Lindblom J's conclusion that the Directions do not set the framework for development consent for projects, including EIA projects, within the safeguarded zone was correct, for the reasons given in his judgment. The Appellants' submission is flawed because it looks at only part, rather than the entirety, of the decision making process for development consent within the safeguarded zone, and because it does not distinguish between procedure and substance in the decision-making process, viewed as a whole.

16. The practical effect of the Directions can be summarised as follows: if the local planning authority is not minded to refuse planning permission or to impose conditions in accordance with HS2 Limited's advice in respect of an application for planning permission within the safeguarded zone it must notify the Secretary of State who may issue a direction restricting the grant of permission for that application. The

applicant for planning permission may then appeal to the Secretary of State for Communities and Local Government against an adverse decision, or a failure to decide the application, by the local planning authority.

17. Much the same outcome in procedural terms could be achieved if the Secretary of State for Communities and Local Government issued directions under section 74 and 77 of the 1990 Act requiring local planning authorities to consult HS2 Limited in respect of planning applications within a defined area (a safeguarded zone) and calling in for his own determination of all those applications for which the local planning authorities were minded to grant planning permission contrary to HS2 Limited's advice. Mr. Elvin accepted that such directions would be purely procedural, and would not "set the framework" for development consent for projects within the area so safeguarded. He submitted that the distinction between this, wholly procedural, solution to the need (in the Government's view) not to prejudice the implementation of the HS2 project, and the present Directions, was that the latter did place a constraint on the outcome of the process: the local planning authority could be directed to refuse, or to impose particular conditions upon a grant of planning permission. In my judgment, if one looks at substance rather than form, that is a distinction without a difference. The Secretary of State cannot compel a local planning authority to make a decision on a planning application. Whether the local planning authority restricts the grant of permission as directed by the Secretary of State, or fails to make a decision (because it disagrees with the restriction directed by the Secretary of State) the outcome will be the same: the applicant will have a right of appeal to the Secretary of State for Communities and Local Government, who would have been the decision-taker if the application had been called in under section 77.

18. There is a clear distinction between the development plan and the Directions. On an appeal under section 78 the Secretary of State for Communities and Local Government is under the same obligation as the local planning authority in respect of the development plan: he must determine the appeal in accordance with the development plan unless material considerations indicate otherwise: see section 38(6) of the 2004 Act. While the Directions constrain the manner in which the local planning authority may determine an application, they do not place any constraint upon the Secretary of State for Communities and Local Government when he determines an appeal under section 78. While it is highly likely that on appeal the Secretary of State for Communities and Local Government would place considerable weight on the three objectives that are set out in the Guidance Notes and the Directions themselves (see paragraphs 6 and 7 above), he would not be doing so because they are the stated aims of the Directions. The three objectives would be weighty planning considerations because of the national importance which the Government attaches to the implementation of the HS2 project, as evidenced by the fact that it is promoting the hybrid Bill.

19. Far from supporting the Appellants' case, Mr. Thynne's evidence supports the conclusion that it is the national importance of the HS2 project itself, and not the Safeguarding Directions, which gives such weight to the three objectives (paragraph 7 above) as material planning considerations. In his first two examples there were no Directions in force when the planning applications were considered. In the first example, the application site was not even contained within the area of the draft safeguarding directions which had been published for consultation. In all three of the

cases which were said to be examples of the impact of the Directions upon the determination of planning applications, it is clear that the crucial planning consideration was not whether the site was within the safeguarded zone, but what would be the impact of the proposed development upon the implementation of the HS2 project, the design details of which are continuing to evolve.

20. The conclusion that the Directions do not "set the framework for development consent" of any project accords with common sense. The safeguarded zone does not determine the extent of the HS2 project. As Lindblom J said in paragraph 48 of the judgment (paragraph 5 above), the safeguarded zone takes its shape from the HS2 project. As the design of the HS2 project has evolved, so the July 2013 Directions have been replaced by the October 2013 Directions, which have in turn been replaced by the June 2014 directions. The Supreme Court decided in *Buckinghamshire* that the DNS was not a plan or programme which "set the framework for development consent" of the HS2 project, because Parliament was the decision-taker for the purpose of giving development consent to the project, and was not bound by statements of Government policy: see paragraphs 36-42 of the judgment of Lord Carnwath, cited in paragraphs 34-36 of the judgment below. The Government's proposal for HS2 is being pursued by specific legislation, and not pursuant to any "plan or programme" for the purposes of the SEA Directive. That being the case, it is not realistic to describe the Directions which take their shape from a project which is being pursued (in the absence of any plan or programme) in a hybrid Bill, and whose sole purpose is to ensure that the implementation of that project is not prejudiced by other developments, as some form of "plan or programme" in their own right.

Conclusion

21. For these reasons, which largely echo those given by Lindblom J in his judgment, I would dismiss this appeal.

Lord Justice Lewison:

22. I agree.

Lord Justice Longmore:

23. I also agree.