PRESS SUMMARY

31 July 2020

R. (ON THE APPLICATION OF CHRISTOPHER PACKHAM)

Applicant

-and-

(1) SECRETARY OF STATE FOR TRANSPORT
(2) THE PRIME MINISTER

Respondents

and

HIGH SPEED TWO (HS2) LIMITED

Interested Party

R. (ON THE APPLICATION OF LONDON BOROUGH OF HILLINGDON COUNCIL)

Appellant

-and-
(1) SECRETARY OF STATE FOR TRANSPORT
(2) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

Respondents

and

HIGH SPEED TWO (HS2) LIMITED

Interested Party

COURT OF APPEAL: Lord Justice Lindblom, Lord Justice Haddon-Cave and Lord Justice Green.

INTRODUCTION

1. These two claims for judicial review, the Packham proceedings and the Hillingdon proceedings, are the latest in a series of legal challenges to the HS2 project. They came before the Court of Appeal on successive days, 8 and 9 July 2020. Judgments in both cases are being handed down today. We shall refer to them as the "Packham judgment" and the "Hillingdon judgment".

2. HS2 is a high-speed railway project designed to connect London, Birmingham, Manchester and Leeds, with intermediate stations linked to the existing national rail network. Its construction is envisaged in phases, under the High Speed Rail (London–West Midlands) Act 2017 ("the Act") giving the necessary powers for the construction and operation of each phase.

3. The two cases are quite different. The Packham proceedings concern a challenge by the applicant, Christopher Packham, to the Government's decision on 11 February 2020 to proceed with HS2. The grounds of challenge involve consideration of the Oakervee review report and climate change issues. Mr Packham seeks permission to appeal against the Divisional Court's refusal to grant permission to apply for judicial review.

4. The Hillingdon proceedings concern a challenge to the decision of the Secretary of State for Transport and the Secretary of State for Housing, Communities and Local Government dated 4 March 2019, overturning a decision of the appellant, the London Borough of Hillingdon Council, refusing to grant approval to a request made by HS2 Ltd for approval of plans and specifications for proposed works associated with the creation of the Colne Valley Viaduct South Embankment wetland habitat ecological mitigation. The case raises issues concerning the respective duties and obligations imposed by Parliament upon HS2 Ltd and local authorities in relation to the actual implementation of HS2 as it affects localised planning concerns. It involves questions of statutory construction. The council appeals against Mrs Justice Lang's dismissal of its claim for judicial review.

5. In neither case is the court concerned with the merits of the HS2 scheme itself. The court's task in both cases is simply to rule upon points of law raised.

THE APPLICATION IN THE PACKHAM PROCEEDINGS

6. In the Packham proceedings we have upheld the Divisional Court's decision and refused Mr Packham's application for permission to appeal and the application for permission to apply for judicial review.

7. Mr Packham maintained two grounds of appeal. The first was that the Government erred in law by misunderstanding or ignoring local environmental concerns and failing to examine the environmental effects of HS2 as it ought to have done (ground 2). The second was that the Government erred in law by failing to take account of the effect of the project on greenhouse gas emissions between now and 2050, in the light of the Government's obligations under the Paris Agreement and the Climate Change Act 2008 (ground 3b) (Packham judgment, **[11]**). Mr Packham also criticised the Divisional Court's finding that the claim had not been brought promptly.

8. The court accepted Mr Packham's argument that that the claim had been brought promptly for the purposes of CPR r.54.5(1)(a). This was a claim for judicial review not under the Planning Acts but at common law. Accordingly, the relevant time limit was three months not six weeks (Packham judgment, **[45]**).

9. However, the court rejected both of Mr Packham's substantive grounds of appeal as unarguable. As to the first ground (ground 2), we have concluded that it was not properly arguable that, in making the decision to proceed with HS2, the Government misled itself, or was misled, into thinking that the Oakervee review report contained a full assessment of the project's environmental effects. There is no basis, either in the evidence before the court or in reasonable inference, for concluding that the Prime Minister, the Secretary of State or any other minister, or the Cabinet collectively, made such an error (Packham judgment, **[79]**).

10. As to the second ground (ground 3b), Mr Packham argued the Oakervee review panel and the Government failed to assess how the substantial carbon emissions caused by the construction of HS2 in the period before 2050 would affect the United Kingdom's "legal commitments under the Paris Agreement", and the Secretary of State's duty to ensure that the United Kingdom's carbon budgets under section 4(1)(b) of the Climate Change Act were not exceeded. It was submitted that the Paris Agreement was "obviously material" to this decision in the same way as it had been to the designation of the ANPS in *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 – the Heathrow third runway proceedings. Yet the Government had not considered the obligations established by the Paris Agreement and the Climate Change Act, and how the construction of HS2 would undermine them (Packham judgment, **[91]**).

11. The court has also rejected this argument. Like the submissions made on ground 2, it cannot be reconciled with the circumstances and remit of the Oakervee review, or with the relevant parts of the review report. It is impossible to infer from the report any failure by the panel to have regard to the Government's relevant statutory and policy commitments on climate change. And the Government did not demonstrably commit any such error in making its decision. On this point too, the court agree with the Divisional Court. There is nothing to show that the Government either ignored or misunderstood the legal implications of proceeding with HS2 for its obligations relating to climate change, including those arising from the Paris Agreement and under the provisions of the Climate Change Act (Packham judgment, **[92]**).

THE APPEAL IN HILLINGDON PROCEEDINGS

12. In the Hillingdon proceedings we have allowed the council's appeal and quashed the decision of the Secretaries of State, and have remitted the matter to them for reconsideration in the light of our judgment.

13. The dispute arose from a refusal by the council to approve HS2 Ltd's proposed Colne Valley mitigation works on the basis that HS2 Ltd had failed to furnish the council with adequate information. HS2 Ltd argued that it was under no obligation to furnish such information and would itself investigate the potential impact of the development upon any archaeological remains and take all necessary mitigation and modification steps. On this basis, HS2 Ltd maintained that the council was wrong to refuse to grant approval. The Secretaries of State allowed HS2 Ltd's appeal and granted approval. Mrs Justice Lang upheld the decision of the Secretaries of State (Hillingdon judgment, **[7]**).

14. The central legal issue in this case concerns the proper interpretation of Schedule 17 of the Act and the status of guidance documents and material prepared by the Secretary of State for Transport, which form part of the matrix of documents comprising the agreement between the Secretary of State and HS2 Ltd as nominated undertaker. The documents at the heart of the issue are the Environmental Minimum Requirements – the "EMRs" – and the Statutory Guidance, which were held by Mrs Justice Lang to have elevated the status of the EMRs so as to curtail, substantially, the powers of local planning authorities under the Act (Hillingdon judgment, **[8]**).

15. We have concluded that the duty to perform an assessment of impact, and possible mitigation and modification measures under Schedule 17, has been imposed by Parliament squarely and exclusively upon the local planning authority. It cannot be circumvented by the contractor taking it upon itself the role of conducting some non-statutory investigation into impact. We have also concluded that a local planning authority is under no duty to process a request for approval from HS2 Ltd unless it is accompanied by evidence and information adequate and sufficient to enable the authority to perform its statutory duty (Hillingdon judgment, **[10]**).

16. We emphasise that the context for our judgment in this case is important. A central tenet of Schedule 17, the Statutory Guidance and the other relevant guidance, planning materials and memoranda, is that Parliament intended local planning authorities and HS2 Ltd to work in an effective and collaborative way that balances important local interests with the broader national interest in the delivery of the HS2 project, to which the Government is committed and which Parliament has approved. The object of this co-operation is to prevent the planning process creating an undue hindrance to achieving that broader national interest whilst giving proper weight to local concerns. The court's judgment is consistent with that important aim (Hillingdon judgment, **[11]**).

NOTE
References in square brackets are to paragraphs respectively in the Court of Appeal "Packham" judgment and the "Hillingdon" judgment.
This summary is provided to assist in understanding the court's decision. It does not form part of the reasons for the decision. The full judgments of the court are the only authoritative documents. Judgments are public documents and are available on BAILII.