Neutral Citation Number: [2021] EWCA Civ 1501

Case No: C1/2021/0791

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(PLANNING COURT)
SIR DUNCAN OUSELEY (SITTING AS A JUDGE OF THE HIGH COURT)
[2021] EWHC 871 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2021

Before:

SIR KEITH LINDBLOM
(SENIOR PRESIDENT OF TRIBUNALS)
LORD JUSTICE BAKER
and
LORD JUSTICE LEWIS

- -

Between:

The Queen (on the application of the London Borough of Hillingdon Council)	**Applicant**
- and -	
(1) The Secretary of State for Transport	**Respondents**
- and -	
(2) The Secretary of State for Housing, Communities and Local Government	
- and -	
High Speed Two (HS2) Ltd.	**Interested Party**

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- -

Mr Craig Howell Williams Q.C. and **Ms Melissa Murphy** (instructed by the **Solicitor to the London Borough of Hillingdon Council**) for the **Applicant**
Mr Timothy Mould Q.C. (instructed by the **Treasury Solicitor**) for the **Respondents**
Mr David Elvin Q.C. and **Mr Michael Fry** (instructed by **DLA Piper UK LLP**) for the **Interested Party**

Hearing date: 20 July 2021

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Approved Judgment

"Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down was deemed not before 3:30pm on 15 October 2021

The Senior President of Tribunals:

Introduction

1. Few projects of major infrastructure have come before the courts more often than HS2. The railway is now being constructed. This case concerns the effect of a provision in Schedule 17, "Conditions of Deemed Planning Permission", to the High Speed Rail (London-West Midlands) Act 2017 ("the HS2 Act"). The provision in question is paragraph 6, "Condition relating to road transport". The dispute is about the arrangements for the routeing of lorries to and from construction sites in the London Borough of Hillingdon. A previous claim concerning Schedule 17, in different circumstances, succeeded on appeal to this court in July 2020 (*R. (on the application of London Borough of Hillingdon Council) v Secretary of State for Transport* [2020] EWCA Civ 1005, [2021] P.T.S.R. 113), and the Supreme Court refused permission to appeal in February 2021. No new issue of law arises here.

2. The applicant, the London Borough of Hillingdon Council, seeks permission to appeal against the order of Sir Duncan Ouseley, dated 13 April 2021, dismissing its claim for judicial review of the decision of an inspector appointed by the first and second respondents, the Secretary of State for Transport and the Secretary of State for Housing, Communities and Local Government, on an appeal under paragraph 22 of Schedule 17. The paragraph 22 appeal was brought by the interested party, High Speed Two (HS2) Ltd. ("HS2 Ltd."), against the council's refusal to approve, under paragraph 6, its proposed lorry route arrangements for construction sites in the borough. The inspector's decision letter is dated 28 July 2020.

3. In the court below, and before us, the council has relied on the judgment of this court in the previous Hillingdon proceedings, which was handed down on 31 July 2020 – three days after the inspector's decision here. It has argued that the inspector's approach cannot be reconciled with the court's reasoning in that case. In a meticulous judgment, the judge rejected that argument. The council says he was wrong to do so.

4. On 11 June 2021, I ordered that the application for permission to appeal and the appeal itself, if permission were granted, be dealt with at a "rolled-up" hearing on 20 July 2021.

The issues in the appeal

5. The basic issue in the case is whether the inspector's approach was lawful. Each of the three main grounds in the claim asserts it was not. Ground 1 alleges that the inspector misconstrued and misapplied paragraph 6(5)(b)(ii) of Schedule 17 – wrongly believing that it imposed a legal "burden of proof" on the council (ground 1(a)), and that it empowers decision-makers to approve lorry route arrangements despite a lack of adequate information (ground 1(b)), placing unlawful reliance on the Environmental Minimum Requirements ("the EMR") (ground 1(c)), and misunderstanding Parliament's intention in Schedule 17 (ground 1(d)). Ground 2 alleges that he failed to take into account material considerations; and ground 3 that his decision was irrational, because he lacked the requisite information to make it. These points were all argued again before us.

The relevant statutory provisions

6. Section 20(1) of the HS2 Act deems planning permission to have been granted for the construction and operation of HS2. Section 20(3) states that "Schedule 17 imposes conditions on deemed planning permission under subsection (1)".

7. In Part 1 of Schedule 17, "Conditions", paragraph 1 states that the requirements in paragraphs 2 to 12 are "conditions of the deemed planning permission under section 20(1)". Paragraph 6 provides:

> "6(1) If the relevant planning authority is a qualifying authority, development must, with respect to the matters to which this paragraph applies, be carried out in accordance with arrangements approved by that authority.
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> (2) The matters to which this paragraph applies are the routes by which anything is to be transported on a highway by a large goods vehicle to –
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> a working or storage site,
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> …
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> (5) The relevant planning authority may only refuse to approve arrangements for the purposes of this paragraph on the ground that –
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> …
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> (b) the arrangements ought to be modified –
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> (i) to preserve the local environment or local amenity,
>
> (ii) to prevent or reduce prejudicial effects on road safety or on the free flow of traffic in the local area, or
>
> (iii) to preserve a site of archaeological or historic interest or nature conservation value,
>
> and are reasonably capable of being so modified.
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> (6) The relevant planning authority may only impose conditions on approval for the purposes of this paragraph –
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> (a) with the agreement of the nominated undertaker, and
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> (b) on the grounds referred to in sub-paragraph (5)(b)."

8. Under paragraph 6(2), HS2 Ltd. required the council's approval for the routes by which material used in the construction of HS2 would be transported by "large goods [vehicles]". The council is the "relevant planning authority", and also, because it has given the Secretary of State the necessary undertakings under paragraph 13(1) of Schedule 17, a "qualifying authority". HS2 Ltd. is the "nominated undertaker". The undertakings given by the council are set out in the Planning Memorandum, dated February 2017.

9. Paragraph 22 of Schedule 17 provides for "Appeals". Paragraph 22(1) provides that "[where] the nominated undertaker is aggrieved by a decision of a planning authority on a request for approval … (including a decision to require additional details) it may appeal to the appropriate Ministers … within 42 days of the notification of the decision". Under paragraph 22(2), the appropriate Ministers "may allow or dismiss the appeal or vary the decision of the authority", but may only make a determination involving the refusal of approval or the imposition of conditions on approval "on a ground open to that authority".

10. Paragraph 26(1), "Guidance by Secretary of State", provides that "[the] Secretary of State may give guidance to planning authorities in relation to the exercise of their function under [Schedule 17]". Sub-paragraph (2) requires that "[a] planning authority must have regard to the guidance".

The statutory guidance, the EMR and the Planning Memorandum

11. The statutory guidance issued by the Secretary of State states, in paragraph 4.4, that the approvals under Schedule 17 "have been carefully drafted to provide an appropriate level of local planning control over the works while not unduly delaying or adding costs to the project", and that "[planning] authorities should not through the exercise of [Schedule 17] seek to … revisit matters settled through the Parliamentary process" or "… modify or replicate controls already in place, … specific to HS2 Phase One such as [the EMR] …". Paragraph 10.3 says that "[when] determining any request for approval, conditions should not be imposed which conflict with controls or commitments contained in [the EMR,] … because these controls would have been considered necessary or sufficient by Parliament when it had approved deemed planning permission for the railway".

12. The EMR provide controls on HS2 Ltd., as nominated undertaker, to which it was bound under a development agreement entered into with the Secretary of State for Transport in 2014 and amended in 2017. The "Introduction" to the EMR confirms the Secretary of State's intention that the project will be carried out "so that its impact is as assessed in [the environmental statement]". The "General Principles" state that the controls in the EMR, the HS2 Act and the undertakings given by the Secretary of State "will ensure that impacts which have been assessed in [the environmental statement] will not be exceeded …". HS2 Ltd., it is said, "will be contractually bound to comply with the controls set out in the EMRs". As nominated undertaker, bound by the EMR, HS2 Ltd. was obliged to comply with the Planning and Environmental Memoranda and the Code of Construction Practice ["the CoCP"]. It was also required to comply with the Route-wide Traffic Management Plan ("RTMP") and any relevant Local Traffic Management Plan ("LTMP").

13. The CoCP provides, in chapter 14, for traffic management during the construction of HS2. It obliges HS2 Ltd. to require that "the impacts from construction traffic on the local community (including … users of the surrounding transport network) be minimised by its contractors where reasonably practicable" (paragraph 14.1.1), and requires "public access [to be] maintained, where reasonably practicable, and appropriate measures … implemented to ensure that … transport networks can continue to operate effectively" (paragraph 14.1.2).

14. The Planning Memorandum is one of the documents comprised in the EMR. It says that the EMR "include requirements on the nominated undertaker to comply with [it, and] … undertakings and assurances concerning the project specified in the register of undertakings and assurances, and to adopt and implement [the CoCP] and the Environmental Memorandum". It also "sets out undertakings by relevant planning authorities enabling them to become qualifying authorities under Schedule 17 …" (paragraph 1.1.1). It "seeks to ensure that the process of obtaining … approvals [under Schedule 17] does not unduly hinder construction of HS2" (paragraph 1.1.2). It says that it "shall be taken into account in determining matters submitted for approval to qualifying authorities

under Schedule 17 …" (paragraph 2.1.2). It records the qualifying authority's commitment to "join with … [HS2 Ltd.] … in establishing a Planning Forum … to help co-ordinate and secure the expeditious implementation of the planning provisions in the Bill" (paragraph 4.1.1); "not [to] seek to impose any unreasonably stringent requirements on the requests for approval …" (paragraph 7.2.1); and, when determining requests for approval, to "take into account the assessments in the Environmental Statement, the arrangements in the CoCP, … the Environmental Memorandum, and any relevant undertakings and assurances concerning the project …" (paragraph 9.1.1), and to "have regard to the statutory guidance issued by the Secretary of State …" (paragraph 9.3.1). It states that "[where] the authority's decision in relation to the determination of construction arrangements has been reached on the grounds that the arrangements ought to be modified and are reasonably capable of being modified, the authority shall include an explanation of why and how it considers modification should be made and where" (paragraph 7.7.3).

15. In accordance with the Planning Memorandum (paragraph 4.1.3), the Planning Forum has produced a set of Planning Forum Notes, which set out "standards and practices to be followed by those implementing" Schedule 17, and to which qualifying authorities are to "have regard" when considering requests for approval (paragraph 4.1.5). Planning Forum Note 6, "Lorry Route Approvals" ("PFN6") specified the information required to be submitted with requests for the approval of lorry routes, including a "written statement" providing "a summary of the lorry route information from the [LTMP] which will include predicted LGV numbers and timings".

The previous Hillingdon proceedings

16. In the previous Hillingdon proceedings HS2 Ltd. had requested approval for "Other construction works", under paragraph 3 of Schedule 17. These were works of ecological mitigation – earthworks and fences – in an archaeological protection zone. Under paragraph 3(6), approval could only be refused on limited grounds, corresponding to those in paragraph 6(5)(b)(i) to (iii). No archaeological assessment had been provided. The council refused the request for approval because HS2 Ltd. had failed to provide it with information necessary to enable it to perform its statutory duty. It was common ground that HS2 Ltd. had not provided that information, and that ground investigation was needed to discover whether the earthworks would harm features of archaeological importance.

17. On appeal, the inspector found that the site had archaeological interest since it potentially held evidence of past human activity worthy of expert investigation, and that whether there was such evidence could only be discovered through investigation and archaeological evaluation. He concluded that the archaeological information available to the council was not adequate; that the design of the works ought to be and could reasonably be modified to preserve a site of archaeological interest, if this were found necessary once adequate information became available; and that it was unreasonable to expect the council to approve an application, or to show how the works ought to be and could reasonably be modified, or carried out elsewhere, on the basis of inadequate information. The Secretaries of State disagreed. They concluded that "the Schedule 17 regime should not duplicate the controls in the EMRs", and were "satisfied in this case that the EMR processes, which were approved by Parliament alongside the HS2 Act, will ensure that the appropriate surveys will be conducted at the appropriate time and that appropriate action will be taken in accordance with their findings, including a further Schedule 17 application should that be required". They therefore allowed HS2 Ltd.'s appeal.

18. That decision was upheld by Lang J. ([2019] EWHC 3574 (Admin)). Reversing this outcome, the Court of Appeal (Lindblom, Haddon-Cave and Green L.JJ.) said (in paragraph 58):

> "58. … [None] of the facts found by the Inspector … were challenged in the Decision. The premise underlying the Decision was not that HS2 Ltd had supplied the necessary information and evidence, but that there was no obligation upon HS2 Ltd to submit such information and evidence. This was a conclusion of law concerning the interpretation of Schedule 17."

19. The court went on to say (in paragraph 68):

> "68. … Schedule 17 operates upon the clear premise that an authority is under a duty to perform an evaluation of the impact of submitted plans and specifications on the identified planning interests. … There is no basis in the Schedule for the duty that is imposed upon an authority to be delegated or sub-contracted to any third party, including of course HS2 Ltd, or for that duty to be abrogated by any other instrument (save for primary legislation) and in particular non-legislative guidance material. Nothing in the Statutory Guidance or the EMRs can, in law, oust the statutory duty or in any way modify or limit it; and indeed nothing in those instruments even purports so to do … . At their highest, they contain matters which, in the performance of its statutory duty an authority should take into account."

20. In a later passage the court observed that "… since HS2 Ltd cannot proceed to carry out works without an approval, it has a concomitant duty to furnish an authority with such evidence and information as is necessary and adequate to enable the authority to perform its allotted statutory task", and "[if] … HS2 Ltd does not do this … the correct approach is not to refuse the request for approval (as occurred in this case) but instead to decline to process the request until such time as adequate evidence and information has been furnished". It also suggested that "the eight-week period for consulting and then deciding upon the request will not start to run until adequate information has been provided" (paragraph 70).

21. Setting out the basis for its decision, the court said "the powers of the authority are constrained, but this is only because the grounds for the refusal of a request for approval are curtailed as explicitly set out in paragraph 3(6) …" (paragraph 72), and (in paragraphs 76, 77 and 78):

> "76. The reference in the Statutory Guidance to an authority not replicating or modifying "*controls*" set out in the EMRs, relied upon in the Decision, does not alter the analysis. There are many reasons for this. First, nothing in the Statutory Guidance or the EMRs is capable in law of altering the system of statutory "*control*" set out in Schedule 17. Secondly, as the Statutory Guidance and EMRs themselves make clear, they are, at best, matters for authorities to take into account but they do not bind authorities. Thirdly, nothing in the EMRs [indicates] that HS2 Ltd can decline to furnish the authority with the relevant and necessary information in order for the authority to perform its statutory duty; but, to the contrary, the thrust of the EMRs is to set in place a system whereby HS2 Ltd and authorities cooperate to avoid just [such] a problem as has arisen in the present case. Whilst ultimately it is for the authority to determine what information it needs (and it has a relevant margin of discretion in this regard), nonetheless the duty of mutual cooperation encompasses liaison over the nature and depth of information and evidence that the authority needs to make its assessment. Fourthly, the reference in the Statutory Guidance to the need to avoid replication and modification of control must be seen in this light and cannot amount to a reference that the entire system of statutory "*control*" set out in the Act is to be stripped from the authority simply because HS2 Ltd declines to submit evidence and promises to perform the evaluation itself. …

> 77. … We are in no doubt that the scheme contemplated by Schedule 17 – characterised as it is by duties of mutual cooperation on the parts of HS2 Ltd and the authority – must be construed to imply a duty of adequacy. We agree with the Judge on this point that the duty on HS2 Ltd to furnish information is commensurate with the task the authority must perform … . Since we consider that the authority must perform the evaluative assessment implicit in paragraph 3(6) it follows that HS2 Ltd must provide information necessary to enable that duty to be performed. We also take the view that the Statutory Guidance and the EMRs, properly read, operate upon this premise. It is important to note the common ground in this case that HS2 Ltd did not provide such information and evidence.
>
> 78. … The situation that arose in this case is the very antithesis of what should have occurred. Here HS2 Ltd submitted its request for approval prematurely and then used that prematurity to argue that it was under no obligation to furnish the necessary evidence. The scheme set up under Schedule 17 contemplates that a request will be submitted only when it contains adequate information. There may always be some leeway and room for debate as to what is adequate and under the cooperative procedure which has been instituted there will often be scope for discussion between HS2 Ltd and the authority as to what is required, but that does not alter the underlying point which is that the request ["]*as deposited*" should be "*adequate*" to meet the statutory task to be performed by the authority."

22. The court rejected the notion that Parliament had intended Schedule 17 to be "construed to lead to the situation whereby the state nominated undertaker could circumvent local planning control over impact by declining to furnish the authority with information on such matters …" (paragraph 82). Even if the EMR had fully replicated the enforcement system under the HS2 Act, it "would still have come to the conclusion that a non-legislative instrument such as the EMRs could not, constitutionally, supplant the legislative enforcement control system laid down by Parliament" (paragraph 84).

The council's decision in this case

23. I gratefully adopt the judge's extensive account of the facts (in paragraphs 43 to 136 of the judgment). There is no need to repeat it in full.

24. HS2 Ltd. submitted its request for the approval of lorry routes for five construction sites on 19 December 2019. The request was accompanied by a "Written Statement for Information" ("the Written Statement"), in accordance with the Planning Memorandum and PFN6, and a "Route Management, Improvement and Safety Plan" ("ROMIS"). The Written Statement ran to 33 pages. It described the lorry routes, and explained the role of each site.

25. The council refused the request on 9 March 2020, for these reasons:

> "The Council and HS2 Ltd has evidence that HS2 LGV traffic numbers will result in congestion and therefore prejudice the free flow of traffic particularly in the AM and PM peak. The Council also has significant concerns about the arrangements into and from work sites that is likely to prejudice the free flow of traffic and the safety of other road users. HS2 Ltd has failed to submit information in support of [its] Schedule 17 application as to how [its] proposal would impact during traffic peak periods and also how the impact would be assessed via a comprehensive monitoring and reporting scheme. The Council is therefore entitled to refuse the application on the basis that the arrangements referred to in Schedule 17, paragraph 6 ought to be modified to prevent or reduce prejudicial effects on

> road safety or on the free flow of traffic in the local area and are reasonably capable of being so modified. The Council considered that the following 2 conditions could mitigate the above reason for refusal, however, HS2 Ltd refused to accept the imposition of the following 2 mitigating conditions, thereby resulting in the refusal of this permission."

26. The first proposed condition was:

> "Prior to commencement of the use of the routes set out in the application (except the route to the South Ruislip Vent shaft), a scheme to reduce and restrict the movement of LGV movements during peak hours (8am-9am and 4.30pm to 6pm) shall be submitted to and agreed in writing with the Local Planning Authority. The scheme shall set out the maximum number of peak hour movements at Swakeleys Roundabout, the Harvil Road junction, the Breakspear Road South Junction, Victoria Road and Long Drive signal controlled junction and the Ickenham Road junction. The scheme shall also set the methods for recording and reporting the movements to the highway authority on a weekly basis with information being available on written request at any other time. The use of the routes shall be carried out in accordance with the approved scheme.
>
> Reason
>
> To manage the LGV movements in the sensitive peak hour periods to avoid impacts on the free flow of traffic."

And the second was this:

> "Prior to commencement of development, a scheme for the arrangements (e.g. banksmen, stop/go signs, holding areas) to be used at the accesses to the work sites shall be submitted to and approved in writing by the highway authority. The scheme shall demonstrate that the movement into and from worksites shall be managed suitably to maintain a free flow of traffic (i.e. no queuing) and to maintain safety for other road and non-road users (i.e. safe movements of LGVs from sites). The use of the routes shall be carried out in accordance with the approved scheme.
>
> Reason
>
> To manage LGV movements to and from sites to ensure no safety impacts on the highways."

27. HS2 Ltd. considered these conditions unnecessary, and did not agree to them. It maintained that the measures in chapter 14 of the CoCP, the RTMP and the LTMP would achieve the required traffic monitoring and management.

The inspector's decision

28. In HS2 Ltd.'s appeal to the Secretaries of State under paragraph 22 of Schedule 17, substantial written representations and supporting evidence were submitted on either side (see paragraphs 68 to 102 of Sir Duncan Ouseley's judgment). HS2 Ltd.'s statement of case ran to 33 pages, the council's to 35. The documents presented to the inspector are listed in an appendix to his decision letter. They included the CoCP, PFN6, the ROMIS, the LTMP, the RTMP, relevant extracts of the report of the Parliamentary Select Committee, the environmental statement and a supplementary report, "Additional Provision 2", and Transport for London's report "Reassignment of traffic in Hillingdon

in response to HS2 construction traffic and the proposed signalisation of Swakeleys Roundabout" ("the TfL report").

29. The decision letter extended to 95 paragraphs. The inspector described the "central test in respect of the main issues in the appeal" as being "whether or not the Council has produced sufficient evidence to substantiate its concerns with regard to the alleged prejudicial effects on the free flow of traffic and highway safety" (paragraph 5). The "main issues" were, first, "… [whether] a refusal of the application is justified on the grounds under paragraph 6(5) and 6(6) of Schedule 17", and second, "… [whether] the Council has produced sufficient evidence to demonstrate a need for the proposed conditions and whether these are appropriate, having regard to the relevant guidance" (paragraph 8).

30. Under the heading "The Approach to the Determination of Applications and Appeals", the inspector referred to Lang J.'s judgment in the previous case, noting that "[she] ruled that, on a proper construction of the grounds set out in the Schedule, the onus is on the local planning authority to demonstrate that the submission made under Schedule 17 ought to be and is reasonably capable of being modified", and that "[this] is also stated at paragraph 7.7.2 [sic] of the Planning Memorandum" (paragraph 18). It was "not the role of the planning authority to seek to enforce controls within the EMRs by withholding approval" (paragraph 20).

31. On the question of whether refusal of the request was "justified", the inspector said that, "[having] regard to the decisions issued in relation to the first two HS2 appeals … and [Lang J.'s judgment], paragraph 6 requires that approval should only be refused if there is clear evidence that the proposed arrangements would result in prejudicial effects on road safety or the free flow of traffic that need to be prevented or reduced" (paragraph 34). He continued (ibid.):

> "34. … The burden of proof falls on the Council to demonstrate that the proposed arrangements would be so prejudicial as to require that the Schedule 17 submission should be modified."

He added (in paragraph 35) that the council "must demonstrate with appropriate evidence" three things: first, that "the use of the proposed routes would, rather than might, lead to the alleged prejudicial effect"; second, that "the submission ought to be modified to prevent or reduce that effect (the 'why') and explain what modifications it considers to be required (the 'how')"; and third, that "the submission is reasonably capable of being so modified".

32. In a passage headed "The ES Assessment", he noted that, according to HS2 Ltd., the number of LGV movements assumed both in the environmental statement and in the supplementary report was significantly higher than should now be expected, and the average traffic levels would be experienced only for a relatively short period in the five years of construction work. In the busiest period, on the section of the Swakeleys Road between Swakeleys Roundabout and Harvil Road, there could be 480 two-way trips per day, and the average flow of HS2 Ltd.'s LGVs would be about 420 (paragraph 38). He concluded (in paragraph 44):

> "44. Even the 480 daily total is substantially lower than either of the figures used in the original ES or Additional Provision 2 assessments. Both assessments concluded that the additional LGV movements would have a prejudicial effect on the free flow of traffic in this part of the network. However, given the very much higher daily flows that were assumed in those assessments, those findings do not demonstrate that the much lower level of movements now envisaged would also have that effect. The original ES and Additional Provision 2 conclusions cannot, in my view, be relied on as evidence that the use of the lorry routes as now proposed would, as opposed to might, result in the prejudicial effect on the free flow of traffic."

33. He referred (in paragraph 45) to comments made by members of the Select Committee about "traffic and air quality problems in Hillingdon", which, he said, "do not and cannot … carry any weight in terms of providing clear evidence that the much lower LGV movements now envisaged … would have a prejudicial effect on the free flow of traffic on the local network". He then said (in paragraph 46):

> "46. It is also important to note that the outcome of the Select Committee's examination of the Bill, including its consideration of the evidence submitted by the Council on the adverse impacts of construction traffic, was that the Act was passed and deemed planning permission was granted. Although Parliament no doubt had regard to the EMRs and the various undertakings and agreements given by HS2 Ltd in reaching its conclusions, the Act does not set specific limits on LGV flows on the road network within Hillingdon. It must, therefore, be assumed that Parliament concluded that the assessed impacts were acceptable, notwithstanding its expectation that additional work would be undertaken to try to reduce those impacts."

34. He turned next to "The TfL Report". He began by noting that Parliamentary approval of the HS2 Act had been "accompanied by a legal agreement (the Hillingdon Agreement) between the Council, HS2 Ltd and [the Secretary of State for Transport, dated 17 August 2017,] which required that further work be undertaken to reduce the impact of construction traffic on the road network in the Borough", and that this had included "a target of reducing two-way LGV movements to 550 per day or less (Clause 6.1)" (paragraph 47). He rejected as unfounded the council's assertion that the commissioning of this study provided "yet more evidence that the reduced traffic numbers arising from the legal agreement were still likely to cause problems on the network"; it had "logically flowed from [HS2 Ltd.'s] obligations under the Hillingdon Agreement". And in any event the presence of "likely problems", he said, fell "considerably short of the evidential burden required, under Schedule 17[,] paragraph 6, to demonstrate that the 480 daily peak flows now assumed would result in a prejudicial effect on the free flow of traffic or highway safety" (paragraph 48).

35. Having described the relevant content of the TfL report in detail (in paragraphs 49 to 52), he referred to the fact that the assumed HS2 construction hourly flows in its Figure 16 "accord with the levels set out in Table 1 of HS2 Ltd's response to the HS2 Select Committee, dated 24 September 2015 …" (paragraph 52). And he continued (in paragraph 53):

> "53. That table shows assumed two-way LGV flows of 146 on Swakeleys Road and 96 on Harvil Road. Allowing for minor differences resulting from the way the figures were rounded in the different traffic models these figures are essentially the same as were assumed in the Additional Provision 2 Assessment presented to the Select Committee. TfL Report's conclusions about the likely effect of HS2 LGVs on the free flow of traffic were … based on the Additional Provision 2 flows of 1,460 extra LGV movements per day. This is a substantially greater number than the 480 peak figure underpinning the Schedule 17 application. Accordingly, I find that the TfL Report does not provide clear evidence that the use of the lorry routes as now envisaged would result in the prejudicial effects alleged by the Council."

and (in paragraph 54):

> "54. In the absence of other evidence, I conclude that the Council has not demonstrated that the proposed arrangements with regard to the routing of LGVs to the [four work sites, excluding the SRVSMC] would have a prejudicial effect on the free flow of traffic on the local road network. There is, accordingly, no justification for the refusal of the application on this ground."

and (in paragraph 57):

> "57. No separate evidence of congestion problems [on Victoria Road and at its junction with Long Drive] has been submitted. I can, accordingly, only assume that the Council relies upon the original ES and the Additional Submission 2 Assessment to substantiate [its] concerns. As they assumed much larger figures than the flows now proposed, I do not consider that these assessments serve to demonstrate that the additional LGV movements now envisaged would have a prejudicial effect on the free flow of traffic either on Victoria Road or through the Victoria Road/Long Drive junction."

36. On the two suggested conditions, he found that "the TfL Report's conclusions do not provide the evidence needed to demonstrate that the LGV movements now envisaged would result in prejudicial effects on the free flow of traffic at peak hours" (paragraph 60). Though HS2 Ltd. accepted "there would be a slightly higher flow than the hourly average in the evening peak hour", this did "not, on its own, serve as evidence of a prejudicial effect at the PM peak" (paragraph 62). It followed that "[on] this basis alone, proposed Condition 1 does not satisfy the paragraph 6 requirement that conditions be imposed only on the ground that the proposed arrangements "*ought to be modified*"". There was "no clear evidence that the number of movements now envisaged would have such a prejudicial effect as to require the proposed routing arrangements to be modified in the way that the Council suggests" (paragraph 63).

37. The first condition conflicted with paragraph 4.4 of the Statutory Guidance. It sought to replicate or modify controls already in place in the EMRs, which "would have been considered necessary or sufficient by Parliament when it approved deemed planning permission" (paragraph 64). In view of Lang J.'s judgment in the previous proceedings, the "correct approach" was for "the application to be determined on the basis that any requirements of the EMRs will be applied by HS2 Ltd and its contractors". It was "not the role of the Schedule 17 planning process to seek to enforce controls within the EMRs by withholding approval" (paragraph 65).

38. There was "no specific limit on peak hour movements in the EMRs". But under the Hillingdon Agreement HS2 Ltd. was "contractually bound" to comply with the EMR – including the requirement to reduce, as far as reasonably possible, the number of LGV movements at Swakeleys Roundabout during the morning and evening peaks. So the council was "already empowered to require [HS2 Ltd.] to demonstrate, with appropriate monitoring data, how that commitment is being achieved" (paragraph 68). The Hillingdon Agreement did "not specify a maximum number of LGV movements at any junction or any part of the network at peak times", nor "require that any specific number of movements should be agreed". Together with the other controls in the HS2 Act and the EMR, it represented "the settled position regarding the traffic concerns raised by the Council in its evidence to the Select Committee", and "[it] was on this basis that Parliament was content for the Act to be given Royal Assent and for deemed planning permission to be granted" (paragraph 69). Through the first condition the council was, said the inspector, "[seeking] to renegotiate that agreed position by introducing new and additional controls" (paragraph 70). And he went on to say (ibid.):

> "70. … Having regard to the basis on which Parliament gave its consent, the proposed condition is also inconsistent with the requirement in [paragraph 4.4 of the statutory guidance], that Schedule 17 applications should not be used to revisit matters settled through the parliamentary process. …".

39. The Hillingdon Agreement required HS2 Ltd. to collect data on traffic movements, including at Swakeleys Roundabout, to "ensure that the 550 limit is not breached". The council would be provided with "data on LGV flows at the peak times that it is concerned about" (paragraph 72). The vehicle management system ("VMS") enabled HS2 Ltd. and its contractors to make changes quickly

(paragraph 74). It could "reasonably … be considered to form part of the existing controls provided for within the EMRs". The inspector said he "should proceed on the basis that this suite of controls will be implemented and complied with by [HS2 Ltd.]" (paragraph 75). As these mechanisms were already in place, he saw "no justification for the more onerous requirement of weekly reporting as sought in the proposed condition". The council was "seeking to use the Schedule 17 process as a means of policing the traffic monitoring and management requirements set out in the EMRs" (paragraph 76). The first condition was "unnecessary and [failed] to meet the tests of acceptability for planning conditions set out in paragraph 55 of the National Planning Policy Framework ["the NPPF"]" (paragraph 77).

40. The inspector rejected the second condition because it would delegate to the highway authority the power to approve and enforce conditions, and also because it failed to explain how the Schedule 17 submission should be modified (paragraphs 78 and 79). The council's submissions were "general assertions about the nature and sensitivity of certain parts of the network", and did "not meet the evidential burden, under paragraph 6, that is required to demonstrate that the Appellant's Schedule 17 submission ought to be modified" (paragraph 81). It had "not provided sufficient evidence to demonstrate a strong highway safety reason for imposing any restrictions on specific movements", such as right turns. There was, therefore, "no clearly demonstrated need" for the condition. It would "also conflict with the SG requirement that planning authorities should not use the Schedule 17 process to modify or duplicate controls that are already in place" (paragraph 84). Under the CoCP, HS2 Ltd. was required to produce LTMPs "in consultation with the highway and traffic authorities, emergency services and other key stakeholders". The LTMPs would describe the access routes for construction traffic, the points of access to and egress from work sites, and the proposed strategy for traffic management. Detailed requirements for "vehicle access management" were set out in the RTMP. All construction traffic would be managed through the VMS. Through measures such as vehicle booking and the use of traffic marshals, one of its purposes would be to ensure safe operation of the points of access and avoid construction traffic queueing on the highway. This had been discussed between the council and HS2 Ltd.'s contractor (paragraphs 85 to 88). The second condition "would have the effect of duplicating and modifying controls already provided for within the EMRs and … conflict with paragraph 4.4. of [the statutory guidance]". It was "unnecessary", and did "not meet the tests … in paragraph 55 of [the NPPF]" (paragraph 91).

41. Thus the inspector concluded that the council had "not provided clear evidence to demonstrate that the lorry routes application ought to be modified and is reasonably capable of being modified in the way [it] seeks"; that the two conditions did "not meet the necessity test in paragraph 55 of [the NPPF]", and were in conflict with paragraph 4.4 of the statutory guidance (paragraph 94); and that HS2 Ltd.'s appeal should be allowed (paragraph 95).

Sir Duncan Ouseley's judgment

42. Sir Duncan Ouseley rejected the argument that the inspector had unlawfully imposed a legal "burden of proof" on the council, rather than simply considering what the evidence had shown or had not (paragraph 179). He did not accept that the inspector's reasons would have "differed in substance" had the Court of Appeal's judgment in the previous Hillingdon proceedings been before him (paragraph 195). As for the inspector's "approach to conditions", he said (in paragraph 196):

> "196. … [On] the correct interpretation of paragraph 6(5), the Council has to show why the proposals should be modified and why that is reasonable. That is consistent with the normal approach to planning conditions. The Inspector's language about conditions would be normal for any planning appeal. It is not for the planning authority to impose whatever

> it wishes, and to leave it for the developer to strike it down by evidence. It is also in line with the Planning Memorandum, [paragraph] 7.7.3, to which the Council had to sign up in order to become a qualifying authority, and to be in a position to decide these applications for approval in the first place. … Indeed, the decision of the Court of Appeal in *Hillingdon 1* is predicated on the obligation on the Council to make good its proposed modifications …".

43. The judge emphasised that "it was not [the council's] case at all that it could say nothing, as it had no material", and this was "very different from the facts to which the *Hillingdon 1* judgment was addressed, where nothing of significance about the archaeological potential or its extent or whereabouts on the site, was known to [the council] or indeed to [HS2 Ltd.]" (paragraph 197]. He continued (in paragraph 198):

> "198. … [The] absence of information was not the basis upon which the Inspector found against [the council]. The council had evidence, presented it and it was found wanting. It was for the Inspector … to decide whether he had enough information to decide the appeal. He concluded rationally that he did have. That implies that, with that information, he thought [the council] had had enough to come to a lawful decision, but that was not the essential question for him. He did not have to go through an indirect process of asking whether [the council] had had enough information for its duties. He had to judge that he had sufficient to reach the decision he did. He plainly reached that conclusion, and plainly was entitled to do so."

44. Here, the council "wanted to exercise controls over LGV numbers, particularly in the peaks". It considered it needed specific information to do this, which it said it did not have. But to demonstrate that the information was necessary, and that HS2 Ltd. had to supply it, either directly or through the schemes in the two conditions, "it had to show the Inspector both that there were problems sufficient to merit that form of control, which it failed to do, and that the scheme was the proper form of control, which [he] rejected" (paragraph 199).

45. What this demonstrated, said the judge, was that "the information sought was not necessary for the authority to reach a decision, because the Inspector reached a lawful decision, but was sought *in order to* impose the conditions it wished to do". There had been "no basis for such a test in *Hillingdon 1*". In that case the council "simply had no material at all, yet faced the burden of proving that the scheme had to be modified" (paragraph 200). The first sentence of the council's reason for refusal in this case stated that it and HS2 Ltd. "have evidence that HS2L LGV traffic "*will* … result in congestion and therefore prejudice the free flow of traffic particularly in the AM and PM peak"". The council's "problem" was that "the Inspector did not agree that it had proved what it had hoped" (paragraph 201). The judge did "not consider that the strictures of the Court of Appeal in *Hillingdon 1* have any bearing on this issue" (paragraph 202). It was "neither unfair, illogical or contrary to any general public law principles, let alone the obligations implied into [Schedule 17] in *Hillingdon 1*, on the basis of the non-statutory obligations which the Court of Appeal so firmly put in their place in other respects, to give significance to the failure of [the council] to show that the free flow and safety of the lorry routes *would* be prejudiced by the numbers proposed in the submission" (paragraph 203). The Court of Appeal was "not requiring HS2L to supply the sort of information which [the council] wanted here, or else face the impossibility of a decision both by [the council] and by an Inspector". The inspector in this case was "reaching his own decision on the material, … not reviewing the request for information". He "was not saying that [the council] did not achieve the control it wanted for want of information which HS2L had refused to supply …" (paragraph 207). The judge also pointed out that, under PFN6, a "considerable volume of material" was required with the application (paragraph 208).

46. As for the Court of Appeal's "obiter comments" in paragraph 70 of its judgment in the first Hillingdon case, to the effect that an authority might be entitled not to entertain a request purportedly made under Schedule 17 if it was not a meaningful request at all, and that the statutory period for determination might only begin to run when a proper request had been made, the judge expressed some caution on the point but acknowledged that the Court of Appeal was there "directing its remarks to a very different factual situation" (ibid.). He did "not think that in the circumstances of this case, as opposed to the circumstances of that rather extreme case, the suggested approach could be applied without collateral litigation and costly delays, which the Court of Appeal clearly did not intend" (paragraph 209).

47. He concluded (in paragraphs 211 to 214):

> "211. There is no doubt but that all the other documents referred to by the Inspector, ES, guidance, EMRs and undertakings, were material considerations to his decision. If so, I cannot see how [leading counsel for the council] can avoid the conclusion that the Inspector gave the material considerations the weight he thought fit, and reached a lawful decision. …
>
> 212. The vice in *Hillingdon 1* was the way in which the functions of the local authority *in total* were devolved on to HS2L, and this was because of the failure of HS2L to obtain the requisite information for a lawful decision. The fundamental point was that the approach of the Secretaries of State and HS2L, in relation to information, prevented the local authority fulfilling the task which statute had left to it, even with the limitations of paragraph 6 and the undertakings necessary to be a qualifying authority. It could not begin its task of evaluation and so, on their analysis simply had to pass it over. I am not surprised at the tone of constitutional affront which runs through the Court of Appeal judgment. To make matters worse, HS2L and the Secretaries of State had then required the local authority to fulfil that task and required it to do so on the basis that non-statutory guidance, and undertakings, and the like would fulfil the duties instead. The strictures of the Court of Appeal were well-merited in the circumstances of that case.
>
> 213. However, I do not consider that that problem, although it affected some of HS2L's submissions to LBH and to the Inspector, affected the essence of the approach of the Inspector. I do not accept the submission that he, applying Lang J, erred in relation to the application of the Court of Appeal in *Hillingdon 1* to the facts of this case. I agree that he would have phrased certain sentences differently, but he would not have altered the decision, based as it was on the evidence and material considerations. The Inspector plainly appreciated the need to consider and decide the issues on the factors in paragraph 6. In my judgment he set out to perform the evaluative analysis required by paragraph 6; he was not bound to stand in LBH's shoes as to what was required.
>
> 214. He did have, in clear contrast to *Hillingdon 1*, the PFN6 information and plenty more, including that from LBH which it said proved its case that the conditions, and further information for necessary controls, had been made out. That was rejected on the basis of his consideration of the paragraph 6 factors. He did not leave that to the evaluation of some other body. He considered the information he had adequate for that evaluation. He did not decide as he did because of an insufficiency of information on a point which it was for LBH to prove, although HS2L had refused to obtain or supply it. He decided as he did on the merits of the case put forward by LBH. He did not consider, in the light of that, that the case for the conditions had been made out. That was an evaluation for him, and he did not leave it to someone else. He considered that the other forms of control sufficed and

that the schemes proposed fell foul of the statutory guidance to which he, and LBH, were bound to have regard."

48. The inspector had to "consider how the various controls would operate … and whether the conditions proposed would modify or replicate them". That was "a matter for his evaluation". He "did not regard the modifications as justified or necessary" (paragraph 215). This was "not hiving off or delegating functions in the way found unlawful in *Hillingdon 1*" (paragraph 216). The council had sought "to disapply a whole suite of controls, into which it would have some input but which it could not define or enforce". But those controls were "adjudged to be effective and enforceable by the Inspector". There was no inconsistency here with the Court of Appeal's judgment in the previous case (paragraph 217).

49. After considering the council's evidence on construction traffic impacts, but taking into account the EMR and the various undertakings and agreements, Parliament had granted permission without imposing specific limits. It "had to be assumed that Parliament regarded the assessed impacts as acceptable "notwithstanding its expectation that additional work will be undertaken to try to further reduce those impacts"". This was "not an irrational conclusion on the material which the Inspector had", and he "treated it as material to how he should approach the justification for further controls" (paragraph 219).

Was the inspector's approach unlawful?

50. As I have said, the basic issue in this case is whether the inspector's approach was unlawful. For the council, Mr Craig Howell Williams Q.C. argued that it was, principally because the inspector misdirected himself on paragraph 6(5) of Schedule 17.

51. This argument failed in the court below, and in my view it should not succeed in this court. On a fair reading of the decision letter as a whole – and this case is an object lesson in the need for that – it displays a conventional approach to the issues the inspector had to decide, consistent with the statutory provisions. It is coherently reasoned. And the outcome itself is far from surprising. On its face, the decision seems reasonable. There is no obvious legal error in it. Whether it was also correct on the merits is not a question for the court. I would endorse the judge's reasoning to the same effect.

52. Three conclusions emerge. First, the judge's analysis stood on robust principles governing the review by the court of planning decisions (see *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2018] PTSR 746 (at paragraph 6), *Mansell v Tonbridge and Malling Borough Council* [2019] PTSR 1452 (at paragraphs 40 and 41), and *City & Country Bramshill Ltd. v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 320 (at paragraph 28)). It is not for the court to investigate the merits of either side's case before the inspector. It was his job to consider the evidence the parties had given, and to make the evaluative judgments required on the matters he had to decide. The court will not unpick his findings and conclusions on that evidence merely because they might be open to doubt as a matter of planning judgment. It will only interfere on public law grounds (see Lord Hoffmann's speech in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p. 780). It will resist excessive legalism, both in the parties' submissions and in its own consideration of the issues in the claim. All this, of course, is fundamental and familiar. It applies no less in this statutory context than in the broader sphere of challenges to planning decisions.

53. Secondly, this court's decision in the previous Hillingdon proceedings does not help the council in its argument here. As the judge concluded, the circumstances in that case were materially different, and the principles on which the court's conclusions were based, which were clearly offended by the

Secretaries of State's decision there, are not offended by the inspector's decision here. In the previous case, HS2 Ltd. did not even provide the council with information that was indisputably necessary if it was to make any attempt at an assessment, for itself, of the likely effects of the proposed earthworks on the site of archaeological interest. That was the context in which the legal issues in the case arose. This court held that under Schedule 17 an authority has a duty to conduct its own assessment of the matters it must decide within the ambit of the conditions imposed on the deemed planning permission under section 20. The duty cannot lawfully be "delegated" or "abrogated" (paragraph 68 of the judgment). And it is not discharged by the nominated undertaker performing its contractual duty to act within the scheme of control in the EMR. That scheme of control does not enable the authority – or, on appeal, the Secretaries of State or an inspector – to decide a request for approval without satisfying the statutory obligation to make their own assessment under Schedule 17. It is therefore incumbent on the nominated undertaker to provide the authority with enough information supporting its request for approval under Schedule 17 to enable it to comply with that obligation – "information … commensurate with the task the authority must perform" (paragraphs 76 to 78). To put it as did Mr Timothy Mould Q.C. for the Secretary of State, this goes to the decision-maker's ability to fulfil the "*Tameside* duty" (see *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] A.C. 1014).

54. Thirdly, when those principles are applied here, no error of law is to be seen in the inspector's approach and conclusions. Applying his own judgment to the material before him, he accepted the case put forward by HS2 Ltd. The evidence and representations deployed by the council did not convince him that the proposed arrangements would harm highway safety or capacity, or that the conditions put forward were necessary. Once he had reached the first of those two conclusions (in paragraphs 29 to 59 of his decision letter), it was strictly unnecessary for him to embark on a close consideration of the suggested conditions, but he did (in paragraphs 60 to 91). In assessing the merits of HS2 Ltd.'s request, he properly took into account the traffic management measures that HS2 Ltd. would have to implement under the CoCP, the RTMP and the LTMP. Those traffic management measures were material considerations. Indeed, they went to the heart of the issues the inspector had to decide. The crucial question was whether the safety and capacity of the roads on which vehicles would travel to and from the construction sites would be adequately protected without the additional controls sought by the council but resisted by HS2 Ltd. In the words of paragraph 6(5)(b)(ii) of Schedule 17, it was whether such controls were necessary "to prevent or reduce prejudicial effects on road safety or on the free flow of traffic in the local area". Within the statutory parameters set for it, this was a classic matter of evaluative judgment for the inspector. Disagreement with his conclusions does not prove any error of law. As Mr Mould submitted, it is inherent in the relevant statutory provisions that the appellate decision-maker – here an inspector – may differ from the authority against whose decision the appeal is made. That is what happened in this case.

55. The inspector's approach was consistent with the relevant provisions of Schedule 17, including paragraphs 13 and 26. It was true to the statutory guidance. It took heed of the undertakings given by the council as qualifying authority, which did not envisage a need for extra controls to be imposed on lorry movements to and from HS2 construction sites in addition to the traffic management measures in the EMR, with which HS2 Ltd. and its contractors were already obliged to comply. The inspector directed himself appropriately in considering whether, in combination and when viewed in the light of the evidence before him, the relevant provisions of the CoCP, the RTMP and the LTMP would be enough to safeguard "road safety [and] the free flow of traffic". He gave significant weight to those traffic management measures, as he was entitled to do. But he did not avoid the assessment he had to make of their adequacy, and the need, if any, for additional controls to be placed on construction traffic under paragraph 6. The judge recognised all of this.

56. As he also concluded, the inspector's approach was in no way inconsistent with the reasoning of this court in the previous proceedings. In this case, in contradistinction to that, the decision-maker was

able to assess evidence and to reach a concluded view, upon that evidence, on the merits of HS2 Ltd.'s request. In my view it was reasonably open to the inspector to find, as he obviously did, that the information in the evidence before him was adequate for his own consideration of the impact of construction traffic on highway safety and capacity in making the determination required under paragraph 6 of Schedule 17. That evidence included the information provided by HS2 Ltd. with the request for approval, in accordance with PFN6. The judge aptly described this as "a considerable volume of material".

57. Lastly here, before turning to the individual grounds, I should come back to what the judge said about the suggestion made by this court in the previous case that there could be circumstances where an authority might properly decline to entertain a Schedule 17 request if it is wholly lacking in relevant content, and if the request is truly a nonentity the time for determination might not even run until it is given some substance. I can see some force in the judge's observations. But as the point was not decisive on the last occasion and nor is it here, I think the right thing to do is to leave it to be fully argued should it ever arise for the court to resolve.

Ground 1(a) – "burden of proof"

58. Mr Howell Williams argued that the inspector mistakenly imposed a "legal burden and standard of proof" on the council. Paragraph 6 of Schedule 17 places no such onus on authorities. This concept finds no support in this court's judgment in the first Hillingdon case, and it is also inconsistent with the normal position in planning – leaving aside enforcement. But it is clear, Mr Howell Williams submitted, that the inspector did regard the council as being under a burden of proof as a matter of law, with a standard of proof that was too high. Indications of this recur in his reasons, including these statements: that "the central test … is whether or not the Council has produced sufficient evidence to substantiate its concerns with regard to the alleged prejudicial effects on the free flow of traffic and highway safety" (paragraph 5 of the decision letter); that "the onus is on the local planning authority to demonstrate that the submission made under Schedule 17 ought to be … modified" (paragraph 18); and that "[the] burden of proof falls on the Council to demonstrate that the proposed arrangements would be so prejudicial as to require that the Schedule 17 submission should be modified" (paragraph 34). This, said Mr Howell Williams, was a misdirection in law, vitiating the inspector's decision.

59. I cannot accept this argument. I think it involves a misunderstanding of the inspector's decision letter, failing to take certain passages of it in their proper context and wrongly inferring from them an approach unwarranted under the statutory scheme. As I have said, I think the inspector's approach was consistent with the principles set out in this court's judgment in the previous case. He clearly understood the import of paragraph 6(5)(b) and (6)(b) of Schedule 17, and that it was imperative for a decision-maker to evaluate the evidence for and against granting a nominated undertaker's request. There was ample evidence before him on which to make the assessment required. And it is plain from his decision letter that he weighed all of that evidence in coming to a balanced judgment on the merits of HS2 Ltd.'s request. This was the judge's conclusion, and I see no reason to disagree.

60. I acknowledge that when the inspector made his decision the Court of Appeal had yet to give judgment in the previous proceedings, and that he referred several times to the first instance judgment in that case, which was not supported on appeal. This does not mean, however, that his own approach was wrong in law, and suffers from the same errors as the Secretaries of State's in the other case. As the judge concluded, the integrity of the decision-making in this case was unaffected by the shortcomings in the previous decision. And I agree with him that the inspector did, in substance, carry out the exercise he was required to undertake.

61. It is important to keep in mind that the statutory context in which the inspector was considering HS2 Ltd.'s request on appeal was not one in which he had to decide whether planning permission should or should not be granted, but one in which deemed planning permission was already in place. Parliament had decided to legislate for that permission on the basis of the information it had been given. This included the assessment of impacts in the environmental statement, which covered HS2 Ltd.'s proposed lorry routes as an intrinsic part of the entire project. The inspector was considering, within the scope set for him by paragraph 6 of Schedule 17, and conscious of the obligations relating to traffic management under the CoCP, the RTMP and the LTMP, whether approval should be refused for the proposed lorry route arrangements or granted subject to the conditions proposed. He could only refuse to approve arrangements under paragraph 6 on grounds that had been open to the council itself (paragraph 22(2) of Schedule 17). And one must also keep in mind how the relevant question in paragraph 6(5)(b) is framed. The question is whether the relevant arrangements "ought to be modified", instead of being left as they are – which is clearly a question of judgment in every case.

62. That was the context in which the parties' competing cases before the inspector came to be tested by him. The council relied on sub-paragraph (5)(b)(ii) – that the arrangements should be modified "to prevent or reduce prejudicial effects on road safety or on the free flow of traffic in the local area". It said there was compelling evidence demonstrating the need for refusal or for the conditions it was asking the inspector to impose. HS2 Ltd. said there was not. In discharging his duty under paragraph 22(2) of Schedule 17, the inspector had to judge whether the council's case was sound or not. Neither the council nor HS2 Ltd. was under any express obligation to produce evidence to make good its case. But if the council was to succeed in persuading the inspector that the arrangements "ought to be modified", as it maintained, it had to show why and how this ought to be done – which is what paragraph 7.7.3 of the Planning Memorandum points out, and what good sense would anyway suggest.

63. This case is materially distinguishable on its facts from the last. As the judge emphasised, there is a clear disparity between them. In the previous case information required for a meaningful assessment under paragraph 3 of Schedule 17 was missing. As Mr Mould put it, the very subject-matter of the requisite evaluative judgment was unknown. But that is not so here. The case we are dealing with is the usual kind, where parties disagree on the evidence about the substantive issues, and the decision-maker has to decide whether the evidence justifies refusal or a conditional grant of approval. That was a question for the inspector, not the court.

64. The inspector's approach accorded with the statutory scheme. It was consistent with the Court of Appeal's judgment in the previous case. It was also, as the judge said, in line with general principles governing the imposition of planning conditions. Government policy, now in paragraph 55 of the NPPF, recognises the orthodox and long-established principle that if a particular condition is to be imposed, the need for it must be shown. Since it was seeking to convince the inspector that its two proposed conditions ought to be applied to any grant of approval for HS2 Ltd.'s request, it fell to the council to persuade him to do that. A further and related principle, with which his approach also conformed, is that a condition should generally not be imposed if it would duplicate another relevant scheme of control.

65. At least in the circumstances of this case, it was only through evidence that the need for the conditions the council was seeking could be demonstrated. The council knew this. It tried but failed to persuade the inspector, both through its own evidence and by challenging the evidence on which HS2 Ltd. relied, that the conditions were necessary. Whether this is aptly described as the council taking upon itself a "burden" or "onus" of "proof" does not matter if, in substance, the inspector went about his own assessment correctly. In my view he did. He did not exaggerate the difficulty in demonstrating the need for the conditions. He merely recognised that the success or failure of the

council's case on appeal depended on its being able to demonstrate, by evidence, that the conditions were necessary. This was the test he applied.

66. Taken in their context, the inspector's reference to the question of whether the council had "produced sufficient evidence to substantiate its concerns" (in paragraph 5 of the decision letter) and his use of the words "onus" and "burden of proof" (in paragraphs 18 and 34) do not set an inappropriately elevated test under paragraph 6. They must be read together with what he said about the council's submitted evidence (in paragraphs 37 to 53), his conclusion (in paragraph 54) that it "has not demonstrated that the proposed arrangements … would have a prejudicial effect on the free flow of traffic on the local road network" and that "[there] is accordingly, no justification for the refusal of the application on this ground", and his conclusion to the same effect (in paragraph 57) on the proposed route to serve the South Ruislip Vent Shaft Main Compound. When this is done, it is clear they reflect the reality that under the statutory scheme it was for the council to show with sufficient evidence, if it could, why HS2 Ltd.'s request should be refused unless its two conditions were imposed. Otherwise, the proposition that the arrangements "ought to be modified", as it sought to persuade the inspector, would not have been substantiated. Having considered for himself the evidence submitted, the inspector came to the unimpeachable judgment that the council had not been able to do this, and that HS2 Ltd.'s request ought not to be refused, and that neither of the two conditions should be imposed on the approval. In doing so, he committed no error of law.

Ground 1(b) – adequate information

67. Mr Howell Williams submitted that the inspector evidently believed – wrongly – that paragraph 6 of Schedule 17 permits a decision-maker to approve lorry route arrangements despite a lack of adequate information about their likely effects on highway safety and capacity. In the previous case it was held that paragraph 6 requires an evaluative exercise to be undertaken, and that the statutory scheme obliges HS2 Ltd. to provide adequate information for this to be done. Mr Howell Williams argued that the question of what is "adequate information" is for the court to decide; it is a question of law, not simply a question of judgment for the decision-maker. The judge should have considered whether the evidence before the inspector was adequate; and he failed to do so. The previous case concerned an area of known archaeological interest, but there was no assessment of the likely impact on that archaeological interest. Thus the information before the Secretaries of State was inadequate for the decision they had to make. In this case the proposed lorry routes were on parts of the road network that were agreed to be congested. The council's reasons for refusal expressed its concern that it did not have the information it needed for an evaluation under paragraph 6. No impact assessment was provided – based on accurate peak hour traffic figures, and reliable modelling. Nothing more came at the appeal stage. The inspector did not carry out any genuine evaluation. As in the previous case, there was inadequate information for the making of the decision.

68. I think this argument is also ill-founded. The council cannot attack the inspector's exercise of judgment on the issues in HS2 Ltd.'s appeal unless it can say that he lapsed into irrationality or made some other distinct public law error. That, however, is not the contention in ground 1(b). The premise here is that the inspector lacked adequate evidence on the question of whether the additional control envisaged in the council's two proposed conditions was necessary. But the grievance, in the end, is that he was not persuaded, on the evidence he did have, that the case for imposing the conditions was demonstrated, and found himself unable to sustain the council's refusal of HS2 Ltd.'s request for approval.

69. The situation here is not comparable to that in the previous proceedings. In that case there was no evidence on the focal issue of the site's archaeological value. There was no information available to

the council, or to the inspector and the Secretaries of State, on the presence and importance of any archaeological remains on the site, and thus nothing by way of evidence on which to base a decision under paragraph 3. So the decision-maker was deprived of the opportunity to do what the statute required. The question therefore arose, in those particular circumstances, whether the Secretaries of State could lawfully avoid responsibility for addressing HS2 Ltd.'s request on its merits.

70. That is not this case, or even remotely like it. Here, the decision-maker was able to do what the statute required. The inspector had substantial evidence about the asserted need for the conditions, including evidence on the volumes of traffic on the parts of the highway network that were going to be used by the lorries travelling to and from the construction sites, and the likely levels of construction traffic on those roads if the proposed lorry routes were to be used. It cannot be said that, in presenting its evidence, the council found itself constrained by the first instance judgment in the previous case. And there was, in fact, no dearth of information on the decisive issues. On the contrary, the information was ample. To illustrate this, Mr David Elvin Q.C., for HS2 Ltd., took us to some of the detail on LGV movements in the evidence – in HS2 Ltd.'s written statement, in the ROMIS, and in the LTMP – including, for example, what was said in the LTMP about specific limitations on HGV movements at Swakeleys Roundabout in the morning and evening peak hours.

71. Whether the information provided to him was "adequate" for the inspector's purposes in making the decision he had to make, and in particular whether, in its totality, it enabled him to judge whether there was a need to impose the council's two conditions, does not, in itself, constitute a matter of law for the court. It was, in the first place, for the inspector himself to gauge, as decision-maker. His view on that question, an archetypal matter of planning judgment for him, is amenable to the court's intervention only on public law grounds, not because the court might have taken another view had the judgment been for it to make.

72. From the inspector's decision letter, unlike the inspector's report in the previous case, one can see he was quite satisfied that he had enough information to decide the issues he had identified. Nowhere did he suggest otherwise. And on any reasonable view the information he had before him can properly be described as "adequate". Once again, I agree with the judge. There is, in short, no basis for the court to conclude that the inspector erred in law in regarding the information he had as sufficient for the purposes of making his decision on HS2 Ltd.'s appeal.

73. The freedom of an inspector determining a Schedule 17 appeal to judge for himself the adequacy of the evidence on the decisive issues in the case is a manifestation of the status and role of the planning inspectorate – akin to "expert tribunals", which are used to making such judgments (see *Wychavon District Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 692, [2009] PTSR 19, at paragraph 43). The court is not equipped to do that, and will not substitute its own view for an inspector's. Nothing in this court's judgment in the previous proceedings points to any other conclusion. The court recognised that "ultimately it is for the authority to determine what information it needs (and it has a relevant margin of discretion in this regard) …" (paragraph 76 of its judgment), and that "[there] may always be some leeway and room for debate as to what is adequate and under then cooperative procedure which has been instituted there will often be scope for discussion between HS2 Ltd and the authority as to what is required …" (paragraph 78). It did not hold that an authority's view of what amounts, or not, to "adequate information" submitted by a nominated undertaker must automatically be accepted by an inspector or the Secretaries of State in deciding an appeal, or by the court in a challenge to such a decision. That would be a serious misconception. The fact that the authority had wanted more or different information to be given to the inspector, or even that more or different information could have been provided, does not mean the inspector's decision was defective in law.

74. The inspector in this case, making a fresh decision on the merits, was not bound by the council's assertion to regard the evidence as inadequate. Nor is the court in the council's claim for judicial review. As Sir Duncan Ouseley concluded, it would not be appropriate for the court to assume a supervisory jurisdiction of its own in every case where the parties cannot agree whether the evidence before the decision-maker in an appeal under paragraph 22 of Schedule 17 was adequate as a basis for determining the appeal – judging, on the facts, the sufficiency of the evidence the parties had produced. The law does not require that.

Ground 1(c) – the EMR

75. Mr Howell Williams submitted that the inspector erred in placing "complete reliance" on the EMR as a scheme of protection for the safety and capacity of the highway network. The proper safeguarding mechanism is in the statute itself. The EMR are not to be equated with the control given to authorities there. As the Court of Appeal held in the previous case, the decision-maker is not entitled to leave to the EMR matters that must be considered under Schedule 17. Mr Howell Williams submitted that the same mischief occurred in this case too – as one sees, for instance, in the inspector's remark that "[it] is not the role of the planning authority to seek to enforce controls within the EMRs by withholding approval" (paragraph 20 of the decision letter), and elsewhere (such as in paragraphs 26, 65 and 70 to 76). As a system of control – if it is even right to refer to them in that way – the EMR are led by HS2 Ltd. And they allow great latitude for compliance. For example, the obligations in paragraphs 14.1.1 and 14.1.2 of the CoCP are qualified by the words "reasonably practicable". The stipulation of what the LTMPs are to include, in paragraph 14.2.4, is moderated by the words "as appropriate". A similar qualification appears in paragraph 14.2.5 for the lorry management provisions in the LTMPs. And the ROMIS, in paragraph 6.1, only requires HS2 Ltd. to "use reasonable endeavours" to attain a "maximum of 550 HGV movements per day … at Swakeleys Roundabout", and to reduce this in the morning and evening peak hours "so far as reasonably practicable".

76. This argument diverges from the reasoning in this court's judgment in the previous proceedings where it considered the place and purpose of the EMR in the process for handling requests under Schedule 17. It was no part of the court's analysis there that an authority – or, on appeal, the Secretaries of State or an inspector – should disregard the relevant obligations of the nominated undertaker under the EMR. Taking into account the EMR where they are relevant to the assessment, and giving them appropriate weight, is not unlawful in the decision-making process under paragraphs 6 and 22. It is necessary in that process. It is also consistent with the legislative intent behind the provisions in paragraphs 13 and 26. When making a decision under paragraph 6 of Schedule 17, authorities that have put their name to the Planning Memorandum, thus gaining the status and enhanced powers conferred on qualifying authorities under paragraph 13, are effectively bound to have regard to the EMR. And the statutory guidance issued under paragraph 26 explicitly calls upon authorities to have regard to the EMR where they bear on requests for approval under Schedule 17. To leave the EMR out of account in such a decision would be inimical to the proper functioning of the statutory scheme.

77. There is a real and significant difference between a decision-maker, whether through necessity or choice, relying on the EMR as if they warranted the delegation or abrogation of responsibility for dealing with the issues raised in a Schedule 17 request – which is what happened in the previous Hillingdon case – and a decision-maker using the EMR, as they are intended to be used, to assist in the resolution of such issues – which is what was done here. This is an essential distinction between the two cases. The judge saw that. And he was, in my view, right to conclude that the inspector acted

lawfully in taking the EMR into account in the way he did. The inspector would have been at fault if he had done anything else.

78. He did not fall into the same error as did the Secretaries of State in the previous case. He did not look upon the EMR as a substitute for the statutory process itself, allowing a decision-maker on a Schedule 17 request to avoid responsibility for considering a request on its merits. He did not refrain from the decision-maker's proper role under the statutory scheme. He engaged fully with the issues in the appeal before him. He considered whether the proposed arrangements for lorry routes could be accepted without adding to, or adjusting, the commitments and controls in the EMR. He examined all the evidence said by the council to support its case for refusal or the imposition of the two conditions, and all the evidence said by HS2 Ltd. to compel the opposite result. He was mindful of the traffic monitoring and traffic management measures provided for in chapter 14 of the CoCP, the RTMP and the LTMP. He was entitled to assume that these measures would be implemented by HS2 Ltd. and would achieve their intended effects. There is nothing to suggest that he misinterpreted any of the relevant constituents of the EMR, ignored the qualified language in which they were expressed, or misdirected himself on the nature and degree of control they contained. And the passages complained of in paragraphs 20, 65 and 70 to 76 of his decision letter are faithful to the advice in paragraph 4.4 of the statutory guidance not "to modify or replicate controls already in place".

79. It is therefore not right to say that the inspector placed "complete reliance" on the EMR, or that he failed to appreciate their flexibility. He did neither. He took the EMR into account as an indispensable component, but only one component, in the process of deciding whether the proposed arrangements "ought to be modified", and gave them the weight he thought right in forming his own judgment on the acceptability of those arrangements. None of this involved any legal flaw.

Ground 1(d) – Parliament's intention in Schedule 17

80. On this ground Mr Howell Williams pointed to two passages in the decision letter (paragraphs 46 and 70), which, he submitted, betrayed a misunderstanding of Parliament's intention in establishing the Schedule 17 process. He submitted that the inspector proceeded, wrongly, on the basis that any effects less significant than those assessed in the environmental statement at the Bill stage must therefore be regarded as acceptable. This was to misconstrue Schedule 17 as providing no effective mechanism of control. It cannot be reconciled with this court's judgment in the previous Hillingdon case, where the court stressed that Parliament had given local authorities, because of their democratic accountability, necessary powers of control under paragraph 6.

81. This argument is also, I think, impossible to accept. I agree with the relevant conclusions of the judge. There is nothing in the decision letter to cast into doubt the inspector's comprehension of the purpose and effect of Schedule 17, and of Parliament's intention in enacting it. He had a sure grasp of the statutory provisions. He understood what they mean and what they require, and he applied them lawfully.

82. It was open to him under the statutory scheme, and appropriate, to assess the evidence in the light of the parliamentary process preceding the passage into law of the HS2 Act, and draw logical inferences. Naturally, he took into account the assessment of traffic impacts in the environmental statement submitted in support of the HS2 Bill, on which Parliament had relied when legislating for the deemed planning permission and the imposition of conditions upon it. That assessment was clearly relevant, and useful to him, in evaluating the likely impact of lorry movements to and from the construction sites, and thus in reaching the conclusions called for under paragraph 6(5)(b) and (6))b) of Schedule 17. Again, it was one part, but only one, of a multipartite assessment. How much

weight to give it was for the inspector to judge, within the bounds of reasonableness. It was, as he saw, an important part of the evidence. But he did not regard it as automatically determining the issues he had to tackle in deciding HS2 Ltd.'s appeal. He did not draw the simplistic inference that the proposed lorry route arrangements must be acceptable because their effects were likely to be less than those assessed in the environmental statement. His decision letter would have been a good deal shorter if he had thought that. Much of what he said would have been redundant.

83. The relevant assumption, stated in paragraph 46 of the decision letter, and in my view perfectly reasonable, was that since it had imposed no specific limits on "LGV flows", Parliament must have concluded that the assessed impacts were acceptable, though it also expected that further work would be done to reduce them. The same assumption comes through in paragraph 70, in the inspector's reference to "matters settled through the parliamentary process". He acknowledged (in paragraph 46) Parliament's acceptance of the assessed impacts, having "no doubt had regard to the EMRs and the various undertakings and agreements of the EMRs, legal agreements and statutory mechanisms in reaching its conclusions …". This also seems sensible to assume, nowhere near "Wednesbury" unreasonable. As the judge said, the inspector plainly treated it as relevant when considering whether further controls were justified. He went on to consider the TfL report in depth, before discussing, again in depth, the claimed justification for each of the council's two conditions, and ultimately whether, on all the evidence before him, including but not limited to the environmental statement, the proposed arrangements "ought to be modified". His assessment was, in my view, legally impeccable.

Ground 2 – material considerations

84. Mr Howell Williams submitted that the inspector did not take into account considerations material to his statutory role – considerations arising in the HS2 Act itself. He focused solely on the question of whether the legal burden he had placed on the council had been met. He failed to reach conclusions on the likely impact upon the two interests referred to in paragraph 6(5)(b)(ii) of Schedule 17: road safety and the free flow of traffic in the local area – especially in the peak hours. This was an error of law (see *R. (on the application of Friends of the Earth Ltd.) v Heathrow Airport Ltd.* [2020] UKSC 52, at paragraphs 116 to 118).

85. This argument too is, in my opinion, incorrect. As I have said, I do not accept that the inspector misdirected himself on the statutory provisions. He did not seek to avoid his responsibility to deal with HS2 Ltd.'s request himself. Nor did he set for the council's case a false and overly-demanding threshold to cross. He demonstrably did have regard to the effects on road safety and the free flow of traffic. He did so in determining the main issues in the appeal. He thoroughly considered the case for refusal of HS2 Ltd.'s request and specifically for the two conditions urged by the council. In doing all this he had to confront the evidence and submissions presented to him on either side. There can be no suggestion that he failed to grapple with the substance of the council's case. His assessment left no material consideration, statutory or otherwise, out of account.

Ground 3 – irrationality

86. Mr Howell Williams submitted that the inspector had information before him – both in the environmental statement and in the TfL report – indicating that the impact of the proposed lorry route arrangements would be to harm road safety and the free flow of traffic. He had no other substantive evidence. Granting approval without adequate evidence to support his conclusions was irrational. The judge's approach here was "less exacting" than it should have been. There are two aspects to irrationality. The judge considered only the first – whether the inspector's exercise of

planning judgment was within the range of reasonableness – and not the second, which was whether there was evidence before him on which he could lawfully reach conclusions on the issues raised by paragraph 6 of Schedule 17 (see *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778, at paragraphs 48, 114 and 115).

87. I see no force in this argument. It amounts only to a criticism of the inspector's planning judgment on the questions he had to consider when discharging his statutory function under paragraph 6 of Schedule 17. This was a matter of assessing all the material the parties had put before him, imperfect as it may have been, giving due weight to the evidence on either side about the likely effects of HS2 construction traffic on road safety and the free flow of traffic.

88. Neither aspect of irrationality is present. The inspector had a wide discretion in appraising the evidence and submissions on the issues he had defined. Having considered the evidence, he found it adequate for the decision that fell to him. This was, in the circumstances, a realistic and reasonable view for him to take. On all the material before him, he was able to reach firm and sufficient conclusions of his own on the merits of the request. By exercising his own judgment on that material, he concluded that the request should not be refused, and that there was no need to impose either of the two conditions for which the council contended. As the judge rightly held, there is nothing irrational about his decision.

Conclusion

89. With the benefit of counsel's submissions at the hearing and applying the same principles as this court did in the previous Hillingdon case, I have concluded that the council's appeal has no real prospect of success on any of the grounds. Nor is there any other compelling reason for it to be heard. I would accordingly refuse permission to appeal.

Lord Justice Baker:

90. I agree.

Lord Justice Lewis

91. I also agree.