



Hearing date: 8 July 2020

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**Judgment Approved by the court  
for handing down**

## Lord Justice Lindblom, Lord Justice Haddon-Cave and Lord Justice Green:

### *Introduction*

1. This is the judgment of the court.
2. These proceedings and the claim brought separately, on very different issues, by Hillingdon London Borough Council (*R. (on the application of Hillingdon London Borough Council) v Secretary of State for Transport* [2019] EWHC 3574 (Admin)) are the latest in a series of legal challenges to the HS2 project. They came before us on successive days – 8 and 9 July 2020. Judgment in the Hillingdon proceedings is also being handed down today.
3. If fully constructed, HS2 will be a high-speed railway connecting London, Birmingham, Manchester and Leeds, with intermediate stations and connections to the existing national rail network. Its construction is envisaged in phases, under an Act of Parliament giving the necessary powers for the construction and operation of each phase.
4. This claim is starkly in contrast with the Hillingdon case. In the Hillingdon proceedings, the challenge was to a specific decision within the approval process, though not to the principle of the project itself being permitted to proceed, and its success would not prevent the project progressing in accordance with the programme set for it. Here, however, the challenge is to the Government’s decision to proceed with the HS2 project itself, for part of which Parliamentary approval has long since been given. It does not touch any of the statutory processes by which that part of the project has been approved in principle, or any present or future decision-making under the statutory regime in place for subsequent approvals. It is directed to the Government’s commitment to the implementation of HS2. But neither case involves us, the court, in the political controversy and debate surrounding HS2. To echo what a different constitution of the Court of Appeal said in its judgment on the recent appeal in the Heathrow third runway case – *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 (at paragraphs 2 and 281 to 285) – our task in adjudicating on these claims for judicial review has nothing at all to do with the merits of HS2 as a project. That is the Government’s responsibility, not the court’s.
5. On 21 August 2019, the first respondent, the Secretary of State for Transport, announced a review of the project, to be undertaken by a panel chaired by Douglas Oakervee. On 11 February 2020, after the review had been completed and a report of it submitted to the Government, the Prime Minister announced in the House of Commons the Government’s decision that the project would go ahead.
6. The applicant, Christopher Packham, is an environmental campaigner and television personality. By a claim for judicial review issued on 27 March 2020, he challenged the Government’s decision to continue with the project. He also sought an interim injunction to prevent the clearance of trees in six ancient woodlands – five in Warwickshire and one in Staffordshire – to make way for its construction. The second respondent is the Prime Minister. The interested party, High Speed Two (HS2) Limited (“HS2 Ltd.”), is a company created by the Government. As “nominated undertaker” for Phase One, it is responsible for delivering that part of the project.

7. The claim came before the Divisional Court (Coulson L.J. and Holgate J.) on 3 April 2020. At the end of the hearing, the court announced its decision to refuse permission to apply for judicial review and the application for an interim injunction. In a substantial judgment handed down on 6 April 2020, it gave its reasons for those decisions. In doing so, it emphasised – as we must too – that it was “only concerned with whether the decision being challenged is unlawful in some way”, and that although “members of the public have strongly held views for and against the HS2 project, ... it is not part of the court’s role to deal with its pros and cons” (paragraph 5 of the judgment). It concluded that the claim had not been brought promptly, in accordance with CPR r.54.5(1), and fell to be dismissed for that reason in any event (paragraph 126). It described the Oakervee review, and the Government’s decision based upon it, as “limited in scope and macro-political in nature”. It held that the only realistic basis on which the decision could be challenged was on “conventional, ‘light touch’ *Wednesbury* grounds” (paragraph 127). And it rejected all four grounds of the claim as unarguable (paragraphs 128 to 131).
8. On 19 May 2020 Lewison L.J. adjourned the application for permission to appeal for an expedited “rolled-up” hearing – so that if permission to appeal or to apply for judicial review were granted, the appeal or the claim for judicial review would follow immediately. He acknowledged that such a hearing in this court is unusual. But three things made it appropriate here: first, the Divisional Court had given “comprehensive reasons” for refusing permission to apply for judicial review, and if permission were now granted, the claim would likely be retained in this court; second, the timetable was “tight”, because further clearance work had been arranged; and third, there was “considerable public interest in the case”.
9. We have considered the application in the light of all the evidence before the court, including the witness statements produced on either side since Lewison L.J. made his order.

*The issues before us*

10. Of the four grounds originally pleaded in Mr Packham’s claim, only grounds 2 and 3b are now maintained. It is contended that both of those grounds are good. It is also contended that the claim was brought promptly.
11. The essential issue in ground 2 is whether 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. The essential issue in ground 3b is whether 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. It is argued for Mr Packham that the Divisional Court did not tackle either of those issues properly.

*The progress of the project between 2011 and August 2019*

12. The history of the project is clearly set out in the Divisional Court’s judgment (in paragraphs 7 to 31). It is not necessary to repeat the whole narrative here, only the salient events.

13. Between February and July 2011, a national public consultation on the strategic case for HS2 and the proposed route for Phase One, from London to the West Midlands, was carried out by the Secretary of State. Among the issues raised in the consultation was the need – both on transport planning and on socio-economic grounds – for a major increase in rail capacity and a significant improvement in connections between cities to deal with the predicted growth in passenger numbers, and to enhance the performance of the West Coast Main Line and other parts of the existing rail network. In January 2012, the Government published its adopted high-speed rail strategy and the route for Phase One. In July 2013, this court held that the consultation had been lawfully carried out (*R. (on the application of HS2 Action Alliance Ltd.) v Secretary of State for Transport* [2013] P.T.S.R. 1194).
14. In November 2013, a Bill was introduced into Parliament seeking powers for the construction and operation of Phase One. In January 2014, the Supreme Court dismissed appeals against the decision of the Court of Appeal holding that the Government’s published high-speed rail strategy complied with EU environmental law for strategic environmental assessment and that the objectives of EU law on environmental impact assessment were capable of being fulfilled for Phase One of the project through the Parliamentary process (*R. (on the application of Buckinghamshire County Council) v Secretary of State for Transport* [2014] 1 W.L.R. 324).
15. Powers for the construction and operation of Phase One were granted by the enactment, in February 2017, of the High Speed Rail (London-West Midlands) Act 2017. The long title of the 2017 Act is “An Act to make provision for a railway between Euston in London and a junction with the West Coast Main Line at Handsacre in Staffordshire, with a spur from Water Orton in Warwickshire to Curzon Street in Birmingham; and for connected purposes”. Section 1 gives power to HS2 Ltd. as nominated undertaker to construct and maintain the works specified in Schedule 1 to the Act – the “scheduled works” – being works for the construction of Phase One and works consequent on, or incidental to, such works. Section 20 grants deemed planning permission under Part 3 of the Town and Country Planning Act 1990 for the carrying out of development authorised by the 2017 Act. Development consisting of the carrying out of a work that is not a scheduled work falls within the scope of the deemed planning permission if it is covered by an “environmental assessment” in connection with the Phase One Bill (section 20(2)(c)).
16. Section 68(5)(a) of the 2017 Act refers to a “statement deposited” in connection with the Phase One Bill in November 2013 under Standing Order 27A of the Standing Orders of the House of Commons “relating to private business (environmental assessment)”. Section 68(5)(b) refers to “statements containing additional environmental information” published in connection with the Phase One Bill – supplementary environmental statements – in 2014 and 2015. Both the environmental statement and the supplementary environmental statements were subject to public consultation in accordance with Standing Order 224A. A report prepared by an “independent assessor” under Standing Order 224A, summarising the issues raised by comments made on the environmental statement, was presented to MPs before the Second Reading of the Bill in the House of Commons, and, in the case of the supplementary environmental statements, before the Third Reading.
17. Both the environmental statement and the supplementary environmental statements contained detailed descriptions and assessment of the environmental effects of the Phase One works – for example, their effects on wildlife, including European Protected Species and their habitats, and on designated ancient woodlands and other areas of woodland

affected by the works authorised by the 2017 Act. Both set out detailed arrangements for the mitigation of those effects where they could not be avoided, and for compensation – for example, by extensive tree planting – where they could not be fully mitigated. Their content was the subject of petitions to both Houses. Among the petitioners were local authorities, and many organisations concerned with the environment – for example, national and local wildlife trusts and the Woodland Trust. The environmental statement also provided an assessment of the performance of Phase One, as proposed to be authorised under the Bill, against the then current legislative, regulatory and policy requirements and objectives relating to climate change.

18. As nominated undertaker for Phase One of the project, HS2 Ltd. is under a contractual duty in the HS2 Phase One Development Agreement to comply with the published Environmental Minimum Requirements (“EMRs”) for construction of Phase One of HS2. The EMRs are intended to ensure that Phase One is delivered in accordance with the deemed planning permission granted under section 20 of the 2017 Act, with the environmental statement and supplementary environmental statements, and with the requirements of Parts 3 and 4 of the Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”).
19. The HS2 Phase One Code of Construction Practice, issued in February 2017, is a component of the EMRs. Section 9 of the Code of Construction Practice imposes obligations on HS2 Ltd. for the protection of ecological interests, including protected species, statutorily protected habitats, and other habitats and features of ecological importance – such as ancient woodlands. HS2 Ltd. also published, in August 2017, an Ancient Woodland Strategy for Phase One, setting out detailed arrangements for managing the impact of the construction of Phase One on the areas of designated and other ancient woodland in which works are authorised under the 2017 Act.
20. By the time the Oakervee review was set up in August 2019, powers for the construction and operation of Phase 2a, running from the West Midlands to Crewe, had been provided in the High Speed Rail (West Midlands-Crewe) Bill introduced by the Secretary of State in the House of Commons in July 2017, which was awaiting a Second Reading in the House of Lords. And powers for the construction and operation of Phase 2b, which would complete the north-western leg to Manchester and provide the north-eastern leg to Leeds, were to be sought under a Bill to be introduced later in the current Parliament.

### *The Oakervee review*

21. In his announcement on 21 August 2019 that the Government had commissioned Mr Oakervee to undertake a review of the project, the Secretary of State indicated that the review would consider “whether and how to proceed with the [HS2] project”.
22. The terms of reference for the review, published by the Secretary of State on the same day, are annexed to the review report (as Annex B). So far as is relevant here, they are:

“Purpose

The Prime Minister has stated his wish to review “whether and how we proceed” with HS2 ahead of the ‘Notice to Proceed’ decision for Phase 1 (London-West

Midlands) due by the end of 2019. The review will assemble and test all the existing evidence in order to allow the Prime Minister, the Secretary of State for Transport and the government to make properly-informed decisions on the future of Phases 1 and 2 of the project, including the estimated cost and schedule position.

For the whole HS2 project, the review should rigorously examine and state its view on:

- ...
- the full range of benefits from the project, including but not limited to:
  - ...
  - economic transformation including whether the scheme will promote inclusive growth and regional rebalancing
  - environmental benefits, in particular for carbon reduction in line with net zero commitments
  - the risk of delivery of these and other benefits, and whether there are alternative strategic transport schemes which could achieve comparable benefits in similar timescales
- the full range of costs of the project ...
- ...
- whether the assumptions behind the business case ... are realistic ...
- ... how much realistic potential there is for cost reductions in the scheme as currently planned ...
- ...
- the direct cost of reprioritising, cancelling or de-scoping the project ...
- whether and how the project could be reprioritised ...
- whether any improvements would benefit the integration of HS2, [Northern Powerhouse Rail] and other rail projects in the north of England or Midlands
- any lessons from the project for other major projects”.

23. As the Divisional Court said (in paragraph 19 of its judgment), this was “[in] essence, ... a costs/benefit review”. The terms of reference made it clear that the support provided to the review panel by the Department of Transport would have to be sufficient “to allow a searching and rigorous review in a relatively short time”. The panellists’ appointments ran from 21 August to 31 October 2019, and set a “working deadline” of 18 October 2019 for the report.

24. On 3 September 2019, the Secretary of State released the “stocktake report”, submitted to him by the Chairman of HS2 Ltd., on the cost and deliverability of HS2. On the same day, in a written statement to the House of Commons, the Secretary of State said the Oakervee review was “an independent, cross-party review ... into whether and how HS2 should proceed”. The review would consider HS2’s “affordability, deliverability, benefits, scope and phasing, including its relationship with Northern Powerhouse Rail”. He went on to say:

“The Chair will be supported by a Deputy Chair, Lord Berkeley, and a panel of experts from business, academia and transport to ensure an independent, thorough and objective assessment of the programme. Panellists will provide input to, and be consulted on, the report’s conclusions.

The review will report to me this autumn. I will discuss its findings with the Prime Minister and Chancellor of the Exchequer. Its recommendations will inform our decisions on our next steps.

HS2 is the single largest project of this Government. One important aspect of the panel's work is to consider whether both the costs, and the benefits, of the scheme have been correctly identified. HS2's business case has been founded on increasing capacity on our constrained rail network, improving connectivity, and stimulating economic growth and regeneration. The current budget was established in 2013 and later adjusted to 2015 prices. Since that time, significant concerns have been raised.

I want the House to have the full picture. There is no future in obscuring the true costs of a large infrastructure project – as well as the potential benefits.

...

... It is ... right that we subject every project to the most rigorous scrutiny; and if we are to truly maximise every opportunity, this must always be done with an open mind and a clean sheet of paper.”

25. In the course of debate in the House of Commons on 5 September 2019, the Secretary of State said (HC Deb, 5 September 2019, c357):

“... I do not have confidence in the data I have been provided with to know yet whether the benefits have outstripped or under-stripped these various different costs. I just start with a blank sheet of paper. I just want the data: give me the facts and then we will be in a much better position to decide, including for people throughout the [West Midlands].”

26. On 7 November 2019, a draft of the review report was leaked to the press. On 5 January 2020, Lord Berkeley, who had earlier indicated that he intended to publish a dissenting report, did so. Entitled “A Review of High Speed 2”, it was, as the Divisional Court said (at paragraph 26), “largely concerned with the issue of costs”. It was widely reported in the press. There is no dispute that the Government was aware of its content when the challenged decision was made.

### *The review report*

27. The review report was published on 11 February 2020. In section 1, the “Chair’s Foreword”, which is dated “December 2019”, Mr Oakervee described the genesis of the review and the constraints it had faced:

“Shortly after [the] Prime Minister ... took up office ... , he invited me to lead a quick review of High Speed Two (HS2) to better allow the government to consider whether and how to proceed with HS2 ahead of the Notice to Proceed decision for HS2 Phase One. ...

...



The short duration of the review meant we did not conduct a formal call for evidence but instead canvassed the views of a wide variety of interested parties all with different perspectives, both for and against the HS2 project. ... [We] are grateful to the many organisations and individuals who have written to us expressing their views. All this information has strengthened this report and my recommendations.

Given the limited time available, the Review has faced a major challenge to undertake a deep examination of all the areas included in its Terms of Reference. I believe the Review has, though, provided views on the key issues.

... .”

28. In section 2, “Introduction”, it was pointed out that although “[much] of the debate surrounding HS2 [had] presented the project as a dichotomy”, and the review had “seen evidence for both extremes, ... in reality the position is much more nuanced” (paragraph 2.1). It was explained that the review had “looked at the project from multiple perspectives” (paragraph 2.2). These included:

“ ...

- the environmental case for and against HS2, particularly in the light of the government’s recent commitment to net zero carbon emissions by 2050 and the impact of the construction of HS2 itself on the environment

...

- the impact of the construction and operation of HS2 on communities and individuals

...

- the costs of the project and the certainty of current estimates

...”.

29. The report continued (in paragraphs 2.3 and 2.4):

“2.3 ... [It] is important to note that any examination of the project does not start from a blank sheet of paper. Phase One of the project has had 10 years of design, public consultation and lengthy debates in Parliament. Phase Two is at an earlier level of maturity and here the focus is on finalising route design, station locations and integration with other transport projects.

2.4 It should also be noted that, given the instruction to report in the autumn, there was a limited amount of time to carry out the review. Evidence was considered by the Review largely over the course of September 2019. Following this period, HS2 Ltd, the DfT and others may have further refined and built on the evidence originally provided to the Review.”

30. Several “key points” were identified (in paragraph 2.8) as matters the review had considered in coming to its conclusion on whether and how the project should proceed:

“ ...

- HS2 could help deliver the government’s commitment to bring all greenhouse gas emissions to net zero by 2050. This net zero commitment

was only made in June 2019 – well after HS2 was initially proposed and indeed after the Phase One Act achieved Royal Assent in 2017.”

31. The report recommended in section 3, its “Executive summary”, under the heading “Overall conclusions”, that, “on balance, Ministers should proceed with the HS2 project, subject to the following conclusions and a number of qualifications”.

32. In section 5 of the report, “Review of the objectives for HS2”, under the heading “Wider environmental considerations”, it said (in paragraphs 5.30 and 5.31):

“5.30 In June 2019 the UK government committed to bring all greenhouse gas emissions to net zero by 2050.

5.31 In the short to medium term, the construction of HS2 is forecast to add to carbon emissions. The most recent estimates from HS2 Ltd on emissions from construction of the full HS2 network are at between 8m and 14m tonnes of CO<sub>2</sub>e (carbon dioxide equivalent) over the construction period, around 0.1% of current UK emissions on an annual basis. This is driven by the construction of tunnels, earthworks, bridges, viaducts and underpasses. The decisions to adopt straight alignments and very gradual gradients to reduce noise and visual pollution has led to the need for large excavations with bigger local impacts and the use of higher volumes of concrete – the production of concrete is carbon-intensive.”

33. It went on to examine the potential for HS2 to produce carbon savings during the operational phase (in paragraphs 5.32 to 5.34):

“5.32 It is though important to consider the carbon impacts of HS2 against alternative ways of managing increased demand for travel. The Review notes that HS2 could in fact be less carbon intensive than other non-rail alternative transport schemes which deliver similar transport outcomes. This includes, for example, the construction and operation of new motorways, and of new runways or airports.

5.33 Over the longer term, HS2 could be promoted to encourage modal shift from both road and domestic aviation. Transport is a major contributor to the UK’s emissions: 33% of CO<sub>2</sub> emissions were from the transport sector in 2018. Research by Eurostar has shown for example that a Eurostar journey from London to Paris emits 90% less greenhouse gas emissions per passenger than the equivalent short haul flight. Nevertheless, the Review notes that the whole rail network needs to be decarbonised if the government is to deliver its net zero target. HS2 should be considered carefully in the role it could play in helping meet this target.

5.34 The Review looked at effects in both the short to medium term and the longer term. The operational footprint of the full HS2 network is estimated by HS2 Ltd at saving circa 11-12m tonnes of CO<sub>2</sub>e over the first 60 years of operation, taking into account requirements for operation, tree planting, modal shift and freight uptake of released capacity.”

34. Detailed text followed on “modal shift” (in paragraphs 5.35 and 5.36). The outcome of this analysis brought together the effects of both the construction and operational phases of the project on carbon emissions (in paragraph 5.37, followed by Conclusion 5):

“5.37 On balance, taking into account both the construction and operation of HS2, it appears that HS2 is likely to be close to carbon neutral, though it is not clear whether overall HS2 is positive or negative for greenhouse gas emissions. Based on the current assessment, if the low end construction emissions are achieved, HS2 will reduce carbon emissions by 3-4m tonnes of CO<sub>2</sub>e; at the high end, the project will contribute 1-3m tonnes of CO<sub>2</sub>e over the assessment period of construction and 60 years of operation. It is therefore important for HS2 Ltd to continue to look for ways to be more carbon efficient, particularly in construction in the short-medium term.

Conclusion 5: The government’s 2050 target has placed a new emphasis on the design, build and operation of the HS2 network. The ability to reduce carbon emissions in the construction of Phase One may be limited so focus should be placed on improving plans for Phase Two in this regard in particular. HS2 Ltd should look to drive innovation in construction and delivery of the project to reduce its forecast greenhouse gas emissions. Over the longer term HS2 should form part of an integrated government strategy to encourage people to shift to greener transport modes.”

35. In section 6, “The HS2 design and route”, under the heading “Localised environmental impacts”, the report states (in paragraphs 6.14 to 6.21 and Conclusions 8 and 9):

“6.14 In addition to carbon emissions (described in section 5 above), it is also important to note other environmental considerations, including impacts on woodland, landscape, biodiversity and more broadly on built and natural environments. Though such impacts are, in many ways, unavoidable on a project like HS2, it is vital that appropriate mitigation and compensatory measures are implemented by HS2 Ltd.

6.15 Although the evidence submitted to the Review has been mixed, HS2 Environmental Policy aims for HS2 to be an exemplar project:

- no net biodiversity loss; minimising carbon footprint, reinstating agricultural land, etc.
- ideally it will avoid environmental impact by design; where impact is unavoidable, the project will work to reduce and abate the impact, and where this is not possible repair and compensation measures will be used.

6.16 The Review recognised the loss of habitats and potential impacts on certain species, for example barn owls, from HS2. It is understood that HS2 Ltd is seeking to implement mitigation and compensatory measures to address such impacts. Given the duration of the project, the Review considers that it is vital that environmental impacts, and mitigation and compensatory measures are kept under review to ensure such measures are effective.

6.17 One example of environmental impacts is the impact on woodlands, for which HS2 Ltd have put in place repair and compensation measures. On Phase One, this includes the planting of 112.5 hectares of woodland in response to the direct loss of 29.4 hectares of ancient woodland. For Phase 2a, compensation measures to address the direct loss of 10.2 hectares of ancient woodland include the planting of 77.1 hectares of woodland. Similar figures are not yet available for Phase 2b given its

current lack of maturity, although the Review has seen evidence to suggest that at least 10 ancient woodlands will be affected. The Review recognised however that planting new woodland is not a direct replacement for removing areas of ancient woodland.

6.18 The Review also noted that mitigating some negative impacts had caused a worsening of others: proposing deep cuttings or tunnels to avoid visual impacts and noise pollution from HS2 trains has, in the case of the deep cuttings, resulted in needing to transport large amounts of spoil during construction, with associated impacts on communities. It is not clear how well this issue (needing to move large amounts of spoil) and its impacts are understood by HS2 Ltd.

6.19 Ground investigations have also revealed that the quality of earth removed from cuttings and tunnels is unlikely to be of good enough quality to be re-used as originally planned for embankments elsewhere, further increasing the transport and storage impacts.

...

6.21 More generally, disruption from the construction of HS2 will severely impact on communities up and down the line route. As indicated in section 10 below, HS2 Ltd needs to significantly improve how it treats individuals and communities affected by HS2 especially as it moves into the main construction phase. Further, in the design of Phase 2b, there may be opportunities to avoid, reduce or mitigate negative impacts – this should be looked into as a priority.

Conclusion 8: The Review recognised the impact of HS2 on woodland, landscape, biodiversity and more broadly on built and natural environments. Given the duration of the HS2 project, such impacts, along with any accompanying mitigation and compensatory measures, need to be kept under review.

Conclusion 9: The Review recognised the impact on communities of construction of HS2, and HS2 Ltd should continue to mitigate these. There are opportunities in the design of Phase 2b to avoid, reduce, or mitigate negative impacts.”

36. Paragraph 6.22, under the heading “The full Y-shaped network”, says that Phase 2b is “currently planned to be deposited as one hybrid Bill in June 2020”, and that “[given] its large scope and that it is still in a design phase, before the Bill has been deposited, there may be opportunities for changes to be made to the Phase 2b scheme to increase benefits or deliver them sooner, and potentially reduce costs and negative impacts”.
37. In section 11, “Economic assessment of HS2”, under the heading “Impacts not quantified in the appraisal”, the report states (in paragraph 11.13) that “[the] full extent of HS2’s environmental and social impact is not captured in the benefit-cost ratio”; and that “[adverse] impacts during construction in the form of increased carbon, noise and air quality as well as the permanent removal of ancient woodland and land and property are not captured either”. Conclusion 51 acknowledges that “[there] are impacts that are currently not quantified that are important to consider alongside the monetised benefit-cost ratio ...”. The 2017 economic assessment of the full HS2 network is recorded in Table 11.2 as showing a “Level 1 benefit-cost ratio (no wider economic impacts)” of 1.9, and a “Level 2 benefit-cost ratio (with wider economic impacts)” of 2.3. As for the latest economic

assessment, Conclusion 52 states that “[the] net economic cost to the transport budget, as valued by DfT TAG, of HS2 has increased from £40bn to £62-69bn ...”. And Table 11.3 records a “BCR without wider economic impacts” in a range of 1.1 to 1.2, and a “BCR with wider economic impacts” in a range of 1.5 to 1.3.

### *The Government’s decision*

38. Announcing the Government’s decision in the House of Commons on 11 February 2020, the Prime Minister said:

“The review recently conducted by Douglas Oakervee ... leaves no doubt of the clinching case for high speed rail[.] A vast increase in capacity ... making it so much easier for travellers to move up and down our long narrow country. That means faster journey times[.] Not just more capacity – it means faster journey times ... . [But] this is not just about getting from London to Birmingham and back[.] This is about finally making ... a rapid connection from the west Midlands to the northern powerhouse, to Liverpool, Manchester, Leeds, and simultaneously permitting us to go forward with [Northern Powerhouse] Rail across the Pennines finally giving the home of the railways the fast connections they need[,] and none of it makes any sense without HS2 ... [.] And if we start now, services could be running by the end of the decade. So today ... the Cabinet has given high speed rail the green signal.”

### *Was the claim issued promptly?*

39. As we have said, these proceedings were begun on 27 March 2020, which was six weeks and three days after the challenged decision. A pre-action protocol letter had been sent to the Prime Minister on 28 February 2020. Before the Divisional Court, the Secretary of State did not contend that there had been a lack of promptness in issuing the claim, as CPR r.54.5(1) requires. However, the Divisional Court itself invited Mr David Wolfe Q.C., on behalf of Mr Packham, to deal with this question at the hearing.
40. In its judgment the Divisional Court referred to the decisions of this court in *Finn-Kelcey v Milton Keynes Borough Council* [2009] Env. L.R. 17 and *R. (on the application of Gerber) v Wiltshire Council* [2016] 1 W.L.R. 2593. In *Finn-Kelcey* the Court of Appeal held that the six-week time limit for a statutory review of an appeal decision of the Secretary of State was relevant when the court was considering whether a claimant had acted promptly in challenging a local planning authority’s grant of planning permission. As Keene L.J. said (at paragraph 24), it “emphasises the need for swiftness of action”. That approach was supported by Sales L.J. in *Gerber* (at paragraphs 11 and 49). The Divisional Court also referred to the six-week time limit for challenges to development consent orders for nationally significant infrastructure projects under section 118 of the Planning Act 2008, and claims for judicial review brought under the “planning acts” (see CPR r.54.5(5)). It thought the approach in *Finn-Kelcey* was “relevant to the analogous circumstances of the present case”. HS2 was a project of national importance, and Mr Packham’s claim sought to impede the implementation of the phase authorised by the 2017 Act (paragraph 38 of the judgment).

41. In the Divisional Court's view, there were several considerations indicating that the claim had not been made promptly. It was made outside the six-week period "for planning cases generally". The announcement made on 11 February 2020 could not have come as a surprise to anybody. Lord Berkeley had made clear his dissatisfaction with the process in a letter to the Secretary of State dated 11 November 2019, and had repeated his concerns in his dissenting report of 5 January 2020. There was nothing in grounds 2 and 3 that arose from information provided after 11 February 2020. And the delay in bringing the claim would also result in the clearance works being put back by another five or six months. The delay was not justified by unanswered requests by Mr Packham's solicitors for documents considered when the decision was made. The proceedings had been begun without that information. The court therefore concluded that the challenge had not been made promptly, and that the application for permission should be dismissed for this reason alone (paragraphs 39 to 45).
42. Mr Mould submitted that the Divisional Court's approach was consistent with this court's in *Finn-Kelcey* and *Gerber*. The court was entitled to proceed on the basis that Mr Packham was able to bring a claim based on grounds 2 and 3 at any time after 11 February 2020. It was also entitled to weigh the consequences of delay for the programme of clearance works. After the Divisional Court's decision, on 15 April 2020, HS2 Ltd. gave notice of its intention to proceed with the four main HS2 Phase One works contracts.
43. Mr Wolfe submitted that the Divisional Court's approach was wrong. It should not have applied, in effect, a six-week time limit for bringing the claim. As Keene L.J. acknowledged in *Finn-Kelcey* (at paragraph 24), "where the CPR has expressly provided for a three-month time limit, the courts cannot adopt a policy that in judicial review challenges to the grant of a planning permission a time limit of six weeks will in practice apply". As for the facts: Mr Packham had acted as quickly as he could in the circumstances. It had been difficult to establish what works HS2 Ltd. was actually carrying out, and Mr Packham's solicitors were awaiting a response to their request for further information. This case was not like *Finn-Kelcey*, *R. v Independent Television Commission, ex parte TV NI Ltd.* 1991 WL 839599, and *Re Friends of the Earth* [1998] J.P.L. 93, where the substance of the underlying complaint was known before the decision was published. Here the grounds of the claim depended on what the review report said, how it was understood by the Government, and what other information was considered in the making of the decision. None of this could have been known before 11 February 2020. And the Divisional Court was wrong to take into account the likely consequences of the delay for the programme of clearance work, because those consequences would have flowed from the grant of an injunction, and not from the timing of the judicial review claim itself.
44. The court has repeatedly stressed the need for promptness in bringing proceedings for judicial review. But as Keene L.J. pointed out in *Finn-Kelcey* (at paragraph 25), "[what] satisfies the requirement of promptness will vary from case to case" and "depends on all the relevant circumstances" (see also the recent decision of this court in *R. (on the application of Thornton Hall Hotel Ltd.) v Thornton Holdings Ltd. and Wirral Metropolitan Borough Council* [2019] EWCA Civ 737, at paragraph 21). In the circumstances of this case, we think that requirement was met.
45. It seems to us that this case is materially different from *Finn-Kelcey*, *Independent Television Commission* and *Re Friends of the Earth*. In our view, for three reasons, the claim was made promptly for the purposes of CPR r.54.5(1)(a). First, this was a claim for

judicial review outside the procedure specifically introduced for claims brought under the “planning acts”, in CPR r.54.5(5). The relevant time limit was therefore not six weeks but three months “after the grounds to make the claim first arose”. The claim was issued well within that period, more than five weeks before it expired. Secondly, it is, we think, inappropriate to treat this case as analogous with challenges falling within the scope of the six-week time limit under section 118 of the Planning Act and CPR r.54.5(5) on the basis that the subject matter of the challenge was a decision that followed a process in which a series of planning decisions had been made under the legislative scheme for the approvals required by the HS2 project. The decision with which we are concerned lies wholly outside that legislative scheme. Indeed, as the Divisional Court itself rightly emphasised (in paragraphs 46 to 57 of its judgment), neither the Oakervee review nor the Government’s decision of 11 February 2020 were made within any statutory framework, whether for the planning of major infrastructure or otherwise. This was a process undertaken entirely under common law powers. And thirdly, we would give no significant weight to the fact that some information relevant to the challenge, such as Lord Berkley’s dissenting report, was available before the decision was taken. Indeed, if anything, the occurrence of that dissent might be seen as a factor that made the Government’s decision harder to foresee. But in any event the claim – whether sound or not – rests on the content of the review report, which was not published in its final form until 11 February 2020, when the decision was announced. In the circumstances it was not unreasonable for Mr Packham to wait until then before contemplating a challenge.

46. We therefore accept Mr Wolfe’s argument here. Unlike the Divisional Court, we would not have refused permission to apply for judicial review solely for a lack of promptness in filing the claim.

#### *The court’s jurisdiction*

47. The Divisional Court heard submissions on the ambit of the court’s jurisdiction in these proceedings. It drew “little assistance” from *R. (on the application of Stephenson) v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 519 (Admin), which concerned the consultation on a document containing national planning policy, whereas this case concerns a process to inform the Government’s decision on whether and how to proceed with HS2 (paragraph 52). Neither the Oakervee review nor the decision it was to inform was part of any statutory process. This was “the exercise of a common law power”, of the kind referred to by Lord Sumption in *R. (on the application of Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 W.L.R. 2697 (at paragraph 83) (paragraph 53). In the Buckinghamshire County Council proceedings, the Supreme Court had recognised that a decision on whether it was in the public interest to proceed with a project such as HS2 is a matter of national political significance, appropriately dealt with by the legislature (see the judgment of Lord Reed, at paragraph 108). In the Divisional Court’s view the same applied to the decision taken by the Government on 11 February 2020. This was a “macro-political” decision (see *R. (on the application of Begbie) v Secretary of State for Education and Employment* [2000] 1 W.L.R. 1115, at p.1131). The Secretary of State was accountable to Parliament for it, and the functions he exercised were not constrained by legislation (paragraph 54).
48. Mr Packham’s challenge therefore required only a “low intensity of review” (see *IBA Healthcare Ltd. v Office of Fair Trading* [2004] I.C.R. 1364, at paragraph 91; *R. (on the*

*application of Plant*) v *Lambeth London Borough Council* [2017] P.T.S.R. 453, at paragraphs 62 to 69; and the Divisional Court’s judgment in the Heathrow third runway case (*R. (on the application of Spurrier and others) v Secretary of State for Transport* [2020] P.T.S.R. 240, at paragraphs 141 to 184, endorsed by the Court of Appeal in *Plan B Earth*, at paragraphs 79 and 80). Where the decision is one of political judgment on matters of national economic policy, the court would only intervene on grounds of “bad faith, improper motive and manifest absurdity” (paragraph 55). The Government’s decision could only be impugned on “Wednesbury” grounds – that it was irrational for the Secretary of State not to take into account something that was “obviously material”. The Divisional Court described this as a “light touch” review (paragraph 57).

49. Mr Timothy Mould Q.C., who appeared for the Secretary of State and HS2 Ltd., invited us to accept those conclusions. Mr Wolfe, for Mr Packham, did not seek to dissuade us from them. And they are, in our view, clearly correct.
50. It may be that the question is only hypothetical. The main burden of the arguments presented to us, on both grounds, is that the Government lapsed into misunderstanding in making the decision under challenge. If that contention were made good, the court would have to consider whether any such misunderstanding was material. But if the contention is not made good on either ground, the challenge must fail in any event, no matter whether the appropriate standard of review is “light touch” or more intense.
51. In our view, however, this is unquestionably the kind of case in which the court should refrain from anything beyond a “light touch” approach, applying the traditional test of “irrationality”. It is, of course, fundamental that both the intensity of review and the extent to which a court will accord a margin of judgment or discretion to a decision-maker will always depend on fact and context. The intensity of the review and the breadth of the margin of discretion accorded are conceptually different. The court may closely scrutinise the reasoning for a decision yet still conclude it is proper to accord the decision-maker a broad margin of discretion.
52. If one is to apply the test of irrationality in this case, we are in no doubt that the Cabinet, as the effective decision-maker, was entitled to a broad margin of discretion in handling the content of the review report. The reasons for this can be stated shortly. First, the decision to proceed with HS2 was taken at the very highest level of Government. It was largely a matter of political judgment. Secondly, at the date of the decision the Cabinet can be taken to have been aware, at least, of the existence of the 2017 Act and the fact that in the course of the passage of the Phase One Bill through Parliament a detailed assessment of environmental impacts had already been carried out. That assessment had not precluded the coming into force of the statute. It remained lawful and valid at the time of the Oakervee review, and at the time of the decision. So did the statutory approval process itself. And that will remain so regardless of the outcome of these proceedings. Thirdly, it is not said that, in the period between Royal Assent and the Cabinet’s decision, there had been any physical change in circumstances bearing on the assessment of environmental effects that was either capable of undermining the assessment or of affecting the operation of the 2017 Act. Fourthly, in arriving at the decision, the Cabinet had to balance a number of significant – and potentially conflicting – political, economic, social and environmental considerations. Fifthly, largely for that reason, there was not a single “right” decision. A decision either way might be perfectly reasonable. And sixthly, the review report had obvious limitations,



and did not gain full support even from the whole panel – as the dissent of Lord Berkeley shows.

53. All these factors, in one way or another, manifest the essentially political quality of the decision under challenge, and the need for the Government, as decision-maker, to be accorded a wide margin of discretion. That is how we shall proceed.

*Ground 2 – was the Government’s decision flawed by a failure to consider environmental effects?*

54. Before the Divisional Court it was common ground that the Phase One works were lawful. They had been authorised under the 2017 Act. An environmental impact assessment of that phase had been undertaken, in accordance with EU and domestic legislation, including public consultation, during the process of Parliamentary scrutiny. Petitions against the Bill had been brought by local authorities and by national and local wildlife and woodland trusts, and had been heard by Select Committees appointed by each House. The works were subject to regulation by Natural England as competent authority through the operation of the licensing procedures in Parts 3 to 5 of the Habitats Regulations. And they had to be carried out in accordance with the published HS2 Phase One Code of Construction Practice.
55. The Divisional Court regarded these propositions as “self-evidently correct” (paragraph 47 of the judgment). Both the Oakervee review itself and the decision taken in reliance on it on 11 February 2020 were of a “limited nature”. The purpose of the review was to inform the decision on whether HS2 should continue, not to consider the project “from scratch” (paragraph 48). There was no statutory basis for the decision to launch the review, and no statutory or policy basis for the terms of reference. How far the review should go on the topics it considered and the information it obtained was “a matter of judgment for the Chair”, susceptible of review only on the grounds of irrationality (see *R. (on the application of Khatun) v London Borough of Newham Council* [2004] EWCA Civ 55, at paragraph 35; and *R. (on the application of Jayes) v Flintshire County Council* [2018] EWCA Civ 1089, at paragraph 14 (paragraph 49)).
56. Relying on the decision of this court in *R. (on the application of National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154, Mr Wolfe had argued that a ministerial decision-maker was to be taken to have known only those matters he actually knew when making his decision, rather than what his departmental officials knew. The Divisional Court observed, however, that “the extent of a Minister’s actual knowledge is not in itself a public law ground for vitiating his decision”, and that “[the] real question is what as a matter of law *ought* the Minister to have known about when taking his decision” (see the judgment of Sedley L.J. in *National Association of Health Stores*, at paragraphs 39 to 65) (paragraph 50). The “public law test” was “whether the Secretary of State failed to take into account a consideration which was not only relevant but which he was *legally obliged* to take into account”, and this had “nothing to do with the different question of whether a decision was vitiated by an error as to fact” (see Sedley L.J.’s judgment in *National Association of Health Stores*, at paragraph 60). A “government department does not have to draw a minister’s attention to every relevant matter, but only to those matters which statute, or perhaps existing policy, require him to take into account, or which are so “obviously material” that he must, and not merely may, take them into account, applying

the distinction recognised in authorities such as *CREEDNZ Inc v Governor General* [[1981] 1 N.Z.L.R. 172]” (paragraph 51).

57. Where a minister had considered a review of a complex project, in which evidence had not been called, the Divisional Court thought it was “a nonsense to suggest that [he] could only be assumed to know about the review, and not the Parliamentary process by which environmental issues have been and will be addressed and Phase 1 has been approved”. The review could not be divorced from that process, as the review report had itself made clear (paragraph 56). At the time of the decision on 11 February 2020, the Secretary of State could be assumed to have known of the Parliamentary processes for the approval of the HS2 project, including the 2017 Act, the dissenting report of Lord Berkeley, and the review report (paragraph 57).
58. Specifically on ground 2 of the claim, the Divisional Court said it would be impossible to construct a project on the scale of HS2 Phase One without causing “interference with and loss of significant environmental matters, such as ancient woodland”, and this had been authorised in the 2017 Act (paragraph 81). The environmental impacts of Phase One had been assessed in detail in the Parliamentary process. This must have been obvious to the Government when it initiated the review, considered the report, and took the decision to proceed. No legal reason had been advanced to explain why that kind of assessment would need to be repeated (paragraph 82). Environmental impact assessments for Phase 2a and Phase 2b would also be carried out in the Parliamentary proceedings. There was no indication in the terms of reference that the review should carry out that type of assessment itself (paragraph 83). They did not mention environmental impacts, apart from climate change. It was “a matter of judgment for the review process ... what matters would be covered in the Report”, and that exercise of judgment could only be challenged by judicial review if it was “irrational or *Wednesbury* unreasonable”. The same test applied to the decision itself (paragraph 85). Mr. Wolfe had not suggested that the panel received any representations on the environmental impacts of Phase One that had not already been addressed in the proceedings on the Bill (paragraph 86). The review report referred to the impacts on ancient woodland, landscape, biodiversity and the built and natural environment, and recognised that such impacts were to some extent unavoidable for a project such as HS2. It stressed the importance of the appropriate mitigation and compensatory measures being carried out, and kept under review (paragraph 87).
59. The Divisional Court therefore concluded (in paragraph 88):
- “88. In all the circumstances, it is not arguable that there was any legal requirement for the Report to refer to, or for the Defendants to take into account, any of the particular matters referred to in the Claimant’s Ground 2. Nor was there any legal obligation for the decision made on 11 February 2020 to be based upon a full or detailed assessment of environmental impacts as the Claimant contends. This Ground is wholly unarguable.”
60. Seeking to persuade us to a different conclusion, Mr Wolfe submitted that the Divisional Court had failed to grapple properly with ground 2. Mr Packham’s case on this ground is not a complaint about what the Oakervee review was required to assess, or what the review should have done – but about what it said it had done. It is, essentially, that the Secretary of State was told, and would therefore have assumed when the decision to proceed with the project was made, that the review report had set out a “full and proper” account of HS2’s

harmful environmental impacts, whereas it had not done so at all. This misunderstanding of the scope of the report must have affected the weight the Government gave to the report's conclusions and recommendation, including the economic assessment, which showed a much weaker benefit-cost ratio than in 2017. That the Divisional Court had fallen into this error was apparent both from its summary of Mr Packham's case (in paragraphs 77 and 78 of the judgment) and from its conclusions (in paragraphs 80 to 88).

61. Forcefully as they were advanced by Mr Wolfe, we do not think those submissions are tenable. They are impossible to reconcile with the context in which the Oakervee review was set up, the circumstances in which it was conducted, its true purpose and scope, the content of the review report, and the Government's decision itself. They attribute to the review a function it did not have. We agree with the conclusions of the Divisional Court. We do not accept that it misunderstood Mr Wolfe's submissions, but in any event we see no merit in the argument as it was presented to us.
62. HS2 is an infrastructure project of national significance, with a long and well-publicised history. When the Government made its decision to proceed with the project in February 2020, the factual context in which the Oakervee review had come to be set up in August 2019 was a matter of record. Phase One of the project had passed through a lengthy process of consultation, assessment – including environmental impact assessment – and statutory approval. The process had been punctuated by challenges in the courts, and its lawfulness had been confirmed. Statutory authorisation for Phase One was embodied in the 2017 Act, which referred in several of its provisions to the environmental impact assessment that had been carried out. The Parliamentary process was well advanced for Phase 2a, and would soon begin for Phase 2b.
63. The deemed planning permission for Phase One of the project depended on the assessment of environmental impacts and mitigation and compensation measures set out in the environmental statement and the supplementary environmental statements. HS2 Ltd., as nominated undertaker, was under a contractual duty to comply with the EMRs and to ensure that both the construction and operation of Phase One were controlled in accordance with that assessment. It was an appropriately extensive and thorough assessment. Matters raised in representations in the course of the Oakervee review, and to which Mr Packham refers in these proceedings – such as the effects of tunnel boring on water quality and water supply and the possible dewatering of the River Misbourne and Shardeloes Lake, and ecological effects of various kinds – had already been raised in petitions against the Bill. Such effects were addressed in the environmental statement and controlled under the EMRs. These are merely a few examples. But they serve to illustrate the comprehensive coverage of environmental impacts within the approval process.
64. As Mr Mould submitted, the court can properly assume that the “existing evidence”, known both to the review panel and to the Government itself when making its decision to proceed with HS2, included the outcome of the Parliamentary procedures leading to the passage into law of the 2017 Act. The idea that the Cabinet, when forming the decision, lacked that basic knowledge of the project is, in our view, wholly unrealistic. There is no reason to suppose that it failed to follow the guidance in the Cabinet Manual, including that “[papers] and presentations for Cabinet ... should include any information that is needed for ministers to make an informed decision” (paragraph 4.30). But leaving that aside, it is simply not credible that, in the circumstances in which the review was commissioned and the decision made, the Secretary of State, or any other minister, was ignorant of the

legislative and procedural history of HS2, including the fact that the statutory approval process involved a lawful and comprehensive assessment of environmental impacts.

65. Neither the judgment of this court in *R. (on the application of Hunt) v North Somerset Council* [2013] EWCA Civ 1320, nor the first instance judgment of Dove J. in *Stephenson*, nor any of the authorities to which he referred (in paragraphs 36 to 40 of his judgment), including the decisions of this court in *R. (on the application of Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, *R. (on the application of Kohler) v Mayor's Office for Policing and Crime* [2018] EWHC 1881 (Admin) and *National Association of Health Stores*, lends any support to Mr Wolfe's argument. Those cases are all significantly distinguishable from this. As Mr Mould said, they all relate to the performance of a particular statutory duty or statutory procedure, or the fulfilment of common law rules. Here, however, the situation is quite different. As the Divisional Court recognised, this case does not involve an alleged failure on the part of the decision-maker to perform some statutory duty or procedure, or to fulfil any common law rule. The starting point for the whole exercise entailed in the Oakervee review, and the Government's subsequent decision, was that the project had the requisite statutory approval to enable it to proceed, and that statutory approval had emerged from a process in which, among other things, environmental impact assessment and public consultation had been carried out. The decision now being taken was not a decision on the planning merits; it was a decision on whether or not to proceed with a project whose planning merits had already been considered in a statutory process, and its first phase approved in an Act of Parliament (see paragraphs 13 to 19 above). In the circumstances here, we are, to adopt Sedley L.J.'s words in *National Association of Health Stores* (at paragraph 60), "unable to accept that [the Government] had less information than the law required", and, like the Divisional Court, we can see no basis for concluding that "something relevant [was] left out of account by [it] in taking [its] decision" (see also the judgment of Keene L.J. at paragraphs 73 to 75).
66. There can be no suggestion that the Cabinet was under a misapprehension about the nature of the Oakervee review itself. As the Divisional Court recognised, the review was not part of the legislative process for the approval of the project. It did not engage either domestic or EU legislation on environmental impact assessment. The Government was under no obligation to set it up. To do so was not necessary to discharge any duty arising under any Act of Parliament or at common law, or to comply with any policy promulgated by this or any previous administration. There was no statutory or policy basis for the terms of reference. Though a number of organisations and individuals took the opportunity to make representations to the panel, there was no duty here to undertake public consultation.
67. It is also clear that the Government did not intend to base its decision on the future of HS2 solely on the conclusions and recommendations of the Oakervee review. In his written statement to the House of Commons on 3 September 2019 the Secretary of State said that the findings of the Oakervee review would be discussed with the Prime Minister and the Chancellor of the Exchequer, and that "its recommendations would *inform* our decisions on our next steps" (our emphasis) – not that it would dictate the Government's decision. As Mr Mould submitted, a reasonable person reading the Secretary of State's statement would have realised that the decision was to be made in the light of other considerations the Government thought relevant to the question of "whether and how" HS2 should proceed. There is no evidence to suggest that, against obvious good sense, the Government overlooked the factual and legal context within which those questions fell to be considered.

68. We should add that the Secretary of State’s reference in his written statement of 3 September 2019 to “an open mind and a clean sheet of paper” and his observation in debate on 5 September 2019 to his “[starting] with a blank sheet of paper” cannot sensibly be taken as suggesting that the history of the project to the point of Phase One being authorised in the 2017 Act, with Phase 2a already well advanced in its own approval process, and Phase 2b to follow, was to be ignored. Taken in context, the sense of those words was that the Government had an open mind on the future progress of the project, even though Phase One had already been approved and could now lawfully proceed.
69. One must have in mind the circumstances in which the review itself was conducted and its limitations – which are acknowledged in the Chair’s Foreword. As the Divisional Court said (at paragraph 49), it was a matter of judgment for Mr Oakervee as Chair how far the review should go on the matters it considered and the information it obtained. Speed was of the essence. The report was initially requested within two months of the review being commissioned – by the end of October 2019 – and it seems to have been completed and submitted to the Government sometime in December. As Mr Oakervee said, in the time allowed to the panel it had to provide “views on the key issues”. Those views were formed under considerable pressure of time. As it turned out, unanimity could not be reached. The majority of the panel came to its own view; Lord Berkeley disagreed and published his dissent.
70. The purpose of the review, and its scope, are evident from the terms of reference. Three things may be said about them. First, they are explicitly directed to the questions of “whether” and “how” HS2 is to be taken forward. Second, they explicitly seek a consideration of “existing evidence”, not evidence that is new or additional to that. And third, though broadly framed, they are precisely expressed in the questions they pose for the panel. The review was not, and was never suggested to be, a self-contained evaluation of HS2 as a project. It was much more circumscribed than that.
71. Plainly, the panel was not asked to undertake a comprehensive assessment, or indeed any assessment, of the myriad effects of the project on the environment. The terms of reference did not request, as Mr Wolfe put it in his skeleton argument, “an up to date assessment based on all the existing evidence of the environmental impacts of the project”. That is not surprising. To have asked the panel to venture upon so challenging and time-consuming an exercise would have been wholly unnecessary. It had already been done, comprehensively, and lawfully, for Phase One of the project. The results of it were recorded, and had been published, in the environmental statement and supplementary environmental statements produced in the course of the statutory procedures through which Phase One had been taken between 2013 and 2017, culminating in the works being authorised in the 2017 Act. The environmental impact assessment had informed the design and the requisite mitigation and compensation measures for that phase, which were now established. A similar exercise, which would also have to comply with the legislative requirements for it, was in prospect for Phase 2a and Phase 2b.
72. Three further points may be made here. First, no criticism is or could be made of the terms of reference themselves, as being inadequate, inconsistent, or unclear. The Government was free to formulate them just as it chose, and it did so.
73. Secondly, it is not argued that the panel misconstrued the terms of reference, or failed to comply with them. The report is faithful to them, even if the panel could not perform them

as fully as might have been possible had the constraints of time not been so severe. As for the effects of the project on the environment, the panel did what was asked of it when examining and stating its view on “the full range of benefits of the project”, including “environmental benefits, in particular carbon reduction in line with net zero commitments”. It focused on those benefits particularly under the heading “Wider environmental considerations”, in paragraphs 5.30 to 5.37 of the report, and Conclusion 5. There is nothing to indicate that, in doing so, it failed to consider with care any relevant content in the representations submitted to it (cf. *Kohler*, at paragraphs 60 to 68).

74. Thirdly, and tellingly in our view, if one leaves aside the explicit requirement in the terms of reference for the panel to state a view on the benefit of “carbon reduction in line with net zero commitments”, it has not been suggested that any new or different environmental impacts had now emerged that would affect the assessment set out in the environmental statement and supplementary environmental statements, or to justify the panel being asked to comment on any part of that assessment, let alone to second-guess it. As we have said, no significant change in circumstances has been identified as a basis for thinking that the assessment of any particular environmental effect that had already been undertaken, lawfully, in the course of the approval process for Phase One was no longer solid and complete.
75. Crucially, however, when it referred (in paragraph 2.2) to the review having “looked at” the project from a number of “perspectives”, including “the environmental case for and against HS2, particularly in light of the government’s recent commitment to net zero carbon emissions by 2050 and the impact of the construction of HS2 itself on the environment”, the report was not saying that the panel wanted to substitute an assessment of its own for that contained in the environmental statement and supplementary environmental statements. And in the short passage under the heading “Localised environmental impacts” (in paragraphs 6.14 to 6.21), where it acknowledges the local impacts on “woodland, landscape, biodiversity and more broadly on built and natural environments”, which were “important to note”, the report does not begin to provide an assessment of those impacts, let alone to provide a comprehensive re-assessment of all the environmental impacts either of Phase One or of the project as a whole. It was not required, or expected, to do anything of the kind. And it did not. What it did was to mention some of the mitigation measures proposed by HS2 Ltd., as a basis for Conclusion 8 – the need to keep impacts “under review” – and for Conclusion 9 – the need to “continue to mitigate” the impacts of construction on communities, and the “opportunities ... to avoid, reduce or mitigate” negative impacts in the design of Phase 2b.
76. Mr Wolfe maintained that those passages in the report were presented as if they were an up-to-date assessment of the environmental impacts of HS2 in the light of all the relevant evidence, and that this was how they would have been taken by the Cabinet when the decision was made.
77. We cannot accept that submission. There is no suggestion in those few paragraphs and conclusions, or anywhere else in the report, that the panel had taken upon itself so ambitious a task. To do that would have been to go far beyond its terms of reference, with their deliberate focus on the “environmental benefits” of HS2, as opposed to a comprehensive assessment of its environmental impacts. And it would also have been patently inconsistent with the essential purpose of the review, which was not to test the

project on its planning merits, but to inform the Government's decision on "whether and how" to go ahead with it.

78. As Mr Mould rightly submitted, the text in paragraphs 6.14 to 6.21 and Conclusions 8 and 9, properly understood, are concerned with the question of "how" to proceed with HS2, not the question of "whether" to do so. To recognise the fact that the project would have many effects on the environment, and to urge that the mitigation of those effects must be kept under review while the project is implemented, cannot be equated to the carrying out of a comprehensive environmental impact assessment. Conclusions 8 and 9 convey the true sense of the text to which they relate. They, like the paragraphs preceding them, are in qualified terms. They demonstrate the panel's awareness of the wide range of environmental impacts in the construction and operation of HS2, over a long period, and the inevitability of such impacts in an infrastructure project of this scale. They do not, however, cast any doubt on the adequacy and accuracy of the environmental impact assessment already undertaken, or the acceptability of any of the impacts identified and assessed, or the suitability of the mitigation and compensation measures proposed. In our view, the panel was conscious of those elements of the "existing evidence" when it referred in paragraph 2.2 of the report to its having "looked at the project" from the perspective of "the environmental case for and against HS2".
79. In short, we do not think it is properly arguable that, in making the decision to proceed with HS2, the Government misled itself, or was misled, into thinking that the 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 egregious error.
80. In particular, we reject as unfounded the argument that the Government mistook paragraph 2.2 of the review report, or other passages in it, as indicating that the review had included a comprehensive assessment of HS2's impact on the environment. The report does not say, or imply, any such thing. It does not replicate, amend or replace the assessment in the environmental statement and supplementary environmental statements already completed and in the public domain, of which ministers would have been well aware. It does not criticise or question any of that assessment. No one could sensibly take it as presenting a "full and proper" account of the harmful environmental impacts of the HS2 project as a whole. For the panel to have attempted an alternative environmental impact assessment of its own would have been to exceed its brief by a long way. And it did not. There was, in our view, no risk of any misunderstanding on this question, or of false weight being given by the Government to the report's conclusions and recommendation when the decision to proceed with the project was made. It would have been obvious to ministers that the environmental impacts of HS2, and the proposed mitigation, had been, and would be, formally assessed in accordance with the law. The review report did not have to spell that out.
81. Equally, there is no basis for the argument that the absence from the review report of a thoroughgoing, or any, assessment of environmental effects renders the Government's decision legally invalid. That is also a misconception. The straightforward point remains. It was not incumbent on the panel in discharging its brief, or on the Government in seeking independent advice and making its decision on "whether and how" HS2 should proceed, to revisit the environmental impact assessment of Phase One that had already been carried out

in accordance with the relevant legislation, or to become involved in the environmental impact assessment for the remaining phases of the project. No such obligation exists in law.

82. In conclusion on ground 2, there is nothing to show that the Government failed to understand the limited scope it had given the Oakervee review to deal with environmental effects, or to grasp what the review report said about such effects. Nor did it err in failing to ask the review panel to investigate environmental effects more fully, or to do so itself at this stage. There is no arguable error of law here. The Divisional Court was right to refuse permission on this ground.

*Ground 3b – did the Government fail properly to consider the implications of the Paris Agreement and the Climate Change Act?*

83. We start with a short outline of the relevant provisions of the Climate Change Act. Section 4(1) imposes on the Secretary of State a duty to set carbon budgets to cap carbon emissions in a series of five-year periods (subsection (1)(a)), and to ensure that the net United Kingdom carbon account for a budgetary period does not exceed the carbon budget (subsection (1)(b)), thus ensuring progress towards the 2050 target in the period before that year. Carbon budgets must be set with a view to meeting the target for 2050 (section 8(2)). Before he sets a carbon budget, the Secretary of State for Business, Energy and Industrial Strategy must take into account the advice of the Committee on Climate Change (section 9(1)(a)). In setting a budget, he must take into account a number of things, including “scientific knowledge about climate change” (section 10(2)(a)), “technology relevant to climate change” (section 10(2)(b)), “economic circumstances ...” (section 10(2)(c)), and “social circumstances ...” (section 10(2)(e)). He is also required to prepare proposals and policies for meeting carbon budgets (section 13(1)). After a new carbon budget is set, he must lay before Parliament a report setting out proposals and policies for meeting carbon budgets for the current and future budgetary periods (section 14(1)). The Secretary of State is required to report to Parliament in an annual statement of emissions “[in] respect of each greenhouse gas”, setting out the steps taken to calculate the net carbon account for the United Kingdom (section 16(2)) – which will show whether or not carbon budgets are being met. The Committee on Climate Change, whose function, in part, is to provide advice to the Government on climate change mitigation and adaptation (section 38(1)), is required to report annually to Parliament on the progress made towards meeting the carbon budgets (section 36), and the Secretary of State is required to respond (section 37).
84. The first five carbon budgets have now been set in legislation, for the period from 2008 to 2032. The sixth, for 2033 to 2037, will be set in 2021. The most recent of the Secretary of State’s annual statements recorded emissions for 2018, the first year of the third budgetary period (2018 to 2022).
85. In October 2017, the Secretary of State published the Clean Growth Strategy, setting out the Government’s policies and proposals for decarbonising the national economy, fixing policy milestones as far as 2032, describing “illustrative pathways” for spreading decarbonisation throughout the economy, but allowing the Government to respond to changes in technology in those 15 years. The Clean Growth Strategy does not prescribe one particular “pathway” in the period to 2050. It envisages various means of managing emissions – such as taxation, regulation, investment in innovation, and establishing a UK Emissions Trading Scheme. And it leaves the Government to choose how to manage



increases in emissions from major infrastructure projects within its strategy for meeting the target of “net zero” emissions by 2050.

86. Energy and Emissions Projections are regularly published, which quantify the contribution of policies and proposals to the reduction of emissions and the achievement of the climate change targets in the legislation, and enable the Government to monitor progress in meeting the United Kingdom’s carbon budgets.
87. As Mr Mould submitted, the statutory and policy arrangements we have described, while providing a clear strategy for meeting carbon budgets and achieving the target of net zero emissions, leave the Government a good deal of latitude in the action it takes to attain those objectives – in Mr Mould’s words, “as part of an economy-wide transition”. Likely increases in emissions resulting from the construction and operation of major new infrastructure are considered under that strategy. But – again as Mr Mould put it – “it is the role of Government to determine how best to make that transition”.
88. The Divisional Court saw the substance of ground 3b of the claim as being that the review report, and in its turn the Government, “failed to address ... the effect of the project on greenhouse gas emissions during the period leading up to 2050, and not just in 2050 and beyond, in accordance with the Paris Agreement and the Climate Change Act 2008” (paragraph 89(b) of the judgment). The complaint – as the court understood it – was that neither the report nor the decision dealt with “the importance of reducing the cumulative burden of carbon emissions in the period *leading up to 2050*”, which is “not only referred to in the Paris Agreement but also reflected in the setting of 5 yearly carbon budgets for the period leading up to 2050 under Part 1 of the 2008 Act” (paragraph 100).
89. The thrust of Mr Wolfe’s argument, as the Divisional Court understood it, lay in its “considerable emphasis” on the decision of the Court of Appeal in the Heathrow third runway case “where it was held (inter alia) that ... the Government’s policy commitment to revised climate change targets in the Paris Agreement was an “obviously material” consideration which the Secretary of State had been obliged to take into account when he designated the Airports National Policy Statement [“the ANPS”]” (paragraph 98). But in the court’s view the circumstances in that case were significantly different. There, the Secretary of State accepted he had not had regard to the Paris Agreement at all, because it was not considered at that stage to be relevant. And the ANPS was designated in June 2018, a year before the Climate Change Act was amended to reflect the Paris Agreement, whereas the Oakervee report was launched and the decision taken after that amendment had been made. And it was accepted that both the report and the decision to proceed with HS2 took account of the Government’s commitment, following the Paris Agreement, to a net zero target for 2050 (paragraph 99).
90. The Divisional Court’s conclusions were firm (in paragraph 101):
  - “101. This point is wholly unarguable. The passages from the Report which we have previously set out make it plain that neither the OR nor the Defendants restricted themselves to looking at the effect of the HS2 project on climate change in 2050, or what Mr. Wolfe [Q.C.] referred to as a “spot measurement in the year 2050 itself” ... . Instead, the Report considered the effects of the project before and after 2050 resulting from construction and the first 60 years of operation. The conclusion that the project is “likely to be close to carbon neutral” relates to that overall period, both

before and after 2050. The OR considered that HS2 could be less carbon intensive than alternative forms of transport used to manage increased demand for travel (5.32) and also that it would produce carbon savings during the operational phase. It is obvious from the Report that the construction phase, which predates 2050, would increase carbon emissions during that period and that that effect is only off-set by carbon savings resulting from the operation of the scheme over a long period of time. The decision made on 11 February [2020] cannot arguably be challenged on the grounds of the “temporal” point advanced by Mr. Wolfe QC.”

91. Mr Wolfe’s argument to us on this ground was that the review panel and the Government failed to identify and assess how the substantial carbon emissions caused by the construction of HS2 in the period before 2050, and not merely at that date, 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. The United Kingdom was already struggling to meet those budgets. In the Committee on Climate Change’s report “Net Zero: The UK’s contribution to stopping global warming”, published in May 2019, it was noted that the fourth and fifth carbon budgets “were set on the path to the existing 80% target and therefore are likely to be too loose”. The critical point, submitted Mr Wolfe, was that the Government ought to have considered the “legal implications” of the emissions generated in constructing HS2, and not solely their “factual existence”. The Paris Agreement was “obviously material” to this decision in the same way as it had been to the designation of the ANPS in *Plan B Earth*. 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. To suggest that the implications of constructing HS2 for the Government’s commitment to the reduction of carbon emissions in the period before 2050 were obvious to the Oakervee review panel, or to the Government itself, was, Mr Wolfe submitted, incorrect. The review report noted that increases in emissions would occur in the construction period, but was silent on their legal consequences. In particular, it did not explain, nor did the Government take into account, how the impacts of HS2 on climate change would sit with the requirements of the Paris Agreement, and the domestic legal framework designed to carry it into effect. The Divisional Court had not dealt with this point.
92. We reject that 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 – especially the text under the heading “Wider environmental considerations”, in paragraphs 5.30 to 5.37, and Conclusion 5. It does not provide an arguable basis for upsetting the Government’s decision. In our view 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, we 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.
93. Two points may be made at the outset. First, the Oakervee review was not an exercise compelled, or even provided for, in any legislation relating to climate change, in any legislation relating to major infrastructure, or in any legislation at all. It finds no place in

the arrangements set in place by the Climate Change Act. Nor does it belong to any other statutory scheme, such as the Planning Act, in which the consequences of major infrastructure development for climate change are explicitly provided for as a necessary feature of decision-making. The same goes for the Government's own decision on the future of HS2.

94. Secondly, as with the previous issue, we must pay attention to the review's terms of reference, which, as we have said, were not the product of any statutory duty or other legal requirement, but were drafted autonomously by the Government to indicate the matters on which it required advice in making its decision. We need not repeat what we have already said about that. But it is worth recalling here that in the terms of reference the only mention of any consideration relating to climate change is in connection with "environmental benefits" – namely, "in particular for carbon reduction in line with net zero commitments". This is not a shortcoming in the terms of reference, but merely a fact. The Government was under no obligation, statutory or otherwise, to extend them by requiring a wider or deeper consideration of the consequences for climate change of constructing and operating HS2, or by embracing, for example, the "legal implications" of increases in carbon emissions caused by the construction of the project.
95. Turning to the content of the review report, we see no basis for the criticism levelled at it by Mr Wolfe. It is clear – and Mr Wolfe does not dispute this – that the panel was well aware of the Government's determination to adhere, and give effect, to provisions of the Paris Agreement, which had by then been translated into domestic legislation in the corresponding provisions of the Climate Change Act. The panel was also familiar with what this meant in practice, in the form of commitments with statutory backing behind them. It referred in paragraph 5.30 of the report to the Government having "committed to bring all greenhouse gas emissions to net zero by 2050". That is clearly a reference to the Government's commitment to the main aspiration of the Paris Agreement.
96. In the following paragraphs the panel did not neglect the period before 2050. On the contrary, it took care to consider what would be happening in the course of that period. It concentrated on emissions likely to be generated in the construction of HS2, which would be going on during those years. It acknowledged that construction would inevitably produce high levels of carbon emissions, estimated at "around 0.1% of current UK emissions on an annual basis" (paragraph 5.31). It set that conclusion against the "carbon impacts" likely to result from the construction and operation of "alternative transport schemes" with "similar transport outcomes" (paragraph 5.32). It referred to the "longer term" potential of HS2 to promote "modal shift", but pointed out that "the whole rail network needs to be decarbonised if the government is to deliver its net zero target". It suggested that "HS2 should be considered carefully in the role it could play in helping meet this target" (paragraph 5.33). The conclusion was one of balance, "taking into account both the construction and operation of HS2" – that "HS2 is likely to be carbon neutral ...", and it was therefore "important for HS2 Ltd to continue to look for ways to be more carbon efficient, particularly in construction in the short-medium term" (paragraph 5.37). That analysis informed the advice in Conclusion 5. Here too the panel was clearly thinking about the achievement of the Government's "2050 target", and how the "construction and delivery" of HS2, both in Phase One and in Phase Two, could be managed "to reduce ... forecast greenhouse gas emissions".

97. Paragraphs 5.31 and 5.37 in particular, and Conclusion 5, frankly accepted that the construction of the project would push up carbon emissions for much of the period before 2050. Unmistakably, they were written in the light of the Government's then current commitments in both statute and policy, embodying the essential principles of the Paris Agreement. As Mr Mould submitted, the discussion here is squarely in the context of the statutory and policy framework for the "progressive decarbonisation of the [national] economy" in the years leading to 2050. And we agree with Mr Mould's submission that the review report did not, in law, have to do anything more than it did to enable the Government to understand the likely consequences of constructing HS2 for the obligations and objectives in that body of statute and policy.
98. What then is the basis for contending that the Oakervee review was under a legal duty to venture further than the panel did in considering the implications of the Paris Agreement – having recognised the statutory commitment to the target of "net zero" for all greenhouse gas emissions by 2050 – and to explore the need to restrict the global increase in temperature by that year, and the pattern and extent of emissions during the period before? And what is the basis for contending that the panel's approach was enough to invalidate the Government's decision on the question of "whether and how" HS2 should proceed?
99. No support for either of those propositions is to be found in the legal and policy framework within which the Government must act to achieve its own commitments on climate change in the period before 2050. It is not to be found in any provision of the Climate Change Act; Mr Wolfe did not contend that it is. Nor does it come from any other legislation referred to in argument before us. No statement of national policy or guidance is said to provide it.
100. Nor is there any support in authority. We do not accept Mr Wolfe's submission that the circumstances here are comparable to those in the Heathrow third runway proceedings (*Plan B Earth*), in which the Court of Appeal made a declaration that the designation of the ANPS was unlawful and would not have legal effect until reviewed in accordance with the relevant provisions of Planning Act. The circumstances in which this court found it necessary to grant relief in that case were significantly different.
101. It should be remembered that in *Plan B Earth* relief was granted not merely on a single ground, but to remedy four distinct, though related, errors of law – each the subject of separate argument and separate consideration in the judgment of the court (see paragraphs 184 to 285 of the judgment): first, that for the purposes of section 5(8) of the Planning Act, the Government's commitment to the Paris Agreement constituted "Government policy relating to the mitigation of, and adaptation to, climate change", which the Secretary of State was required, under that specific provision of the Planning Act, to take into account (see paragraphs 222 to 233); secondly, that the designation of the ANPS was in any event unlawful because the Secretary of State acted in breach of section 10(3) of the Planning Act, which required him, "in particular", to "have regard to the desirability of ... mitigating, and adapting to, climate change", in that he failed to have regard – indeed, deliberately did not have regard – to the Paris Agreement as an "obviously material" consideration (see paragraphs 234 to 238); thirdly, that he breached Annex 1 to Directive 2001/42/EC "on the assessment of the effects of certain plans and programmes on the environment" by failing to take into consideration the "objectives" of the Paris Agreement as an "international agreement" (see paragraphs 242 to 247); and fourthly, that he erred in his consideration of non-CO<sub>2</sub> impacts and the effect of emissions beyond 2050 (see

paragraphs 248 to 261). Each of the first three of those four grounds, at least, would have been enough on its own to justify the relief granted by the court.

102. Thus the court’s conclusion on the section 10(3)(a) issue – holding that, in the circumstances, the Paris Agreement as an unincorporated international obligation was “so obviously material” that it had to be taken into account in discharging the explicit requirement in that provision of the statute – did not depend on the Government’s commitment to the Paris Agreement necessarily having the status of “Government policy” on climate change within the reach of section 5(8). It simply depended on that unincorporated international obligation, with its clear significance for the United Kingdom’s responsibilities in mitigating and adapting to climate change, qualifying in the context of the provision in section 10(3)(a) as an “obviously material” consideration. It was not submitted, nor was it concluded by the court, that as an unincorporated international obligation the Paris Agreement was automatically an “obviously material” consideration in any decision where the implications of infrastructure development for climate change were in issue, but only that in principle it could be, and, given the specific statutory context provided by section 10(3), in that case it was (see the speech of Lord Brown of Eaton-under-Heywood in *R. (on the application of Hurst) v HM Coroner for Northern District London* [2007] UKHL 13, at paragraphs 57 to 59, citing the two relevant passages in the judgment of Cooke J. in *CREEDNZ*, at p.183, which were approved in the speech of Lord Scarman in *In re Findlay* [1985] 1 A.C. 318, at p.334, as “a correct statement of principle”; and also the recent discussion of the relevant case law in the judgment of Lord Carnwath in *R. (on the application of Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3, at paragraphs 29 to 32).
103. There are three difficulties for Mr Wolfe’s reliance on *Plan B Earth* in this case, and they are, we believe, fatal. First, as will be clear from what we have said of the grounds on which this court granted relief in *Plan B Earth*, that case was markedly different from this. In this case the decision under challenge was not taken under a statutory scheme in which the decision-making process is shaped as it is under the provisions of the Planning Act governing the designation of a national policy statement, with specific duties such as those in sections 5(8) and 10(3) – or under any statutory scheme. To make the decision at all was itself a matter of free choice for the Government, as were the decision-making parameters themselves. The Government was at liberty to select the issues on which it wished to be advised by the Oakervee review, against the background of HS2’s evolution as a project, including the statutory approval process. In doing so it was not constrained by the provisions of the Climate Change Act or by any policy of its own. Secondly, the advice the Government received in the review report dealt amply with the implications of, and for, the United Kingdom’s commitments on greenhouse gas emissions and climate change following the Paris Agreement. In the context in which that advice was given, it was legally impeccable. And thirdly, as Mr Mould submitted, when in February 2020 the Government made its decision to proceed with HS2 it can be taken to have been fully aware of the United Kingdom’s commitments under the Paris Agreement, and its own responsibilities under the Climate Change Act, and to have taken those commitments and responsibilities into account. There is no evidence to the contrary, and no basis for concluding that any “obviously material” consideration was disregarded.
104. We are not persuaded that the Divisional Court failed to address the substance of ground 3b. We agree with the conclusions it reached. But we also reject the submissions made to us on this ground. Like those on ground 2, they do not amount to a viable argument that the

Government's decision was irrational, or otherwise unlawful. We therefore conclude that the Divisional Court was also right to refuse permission on ground 3b.

*Conclusion*

105. For the reasons we have given, we are not persuaded that either of the grounds still pursued is properly arguable, and we therefore refuse permission to appeal and permission to apply for judicial review.