

39 FROM 39

TRANSPORT INFRASTRUCTURE CHALLENGES CONSIDERED (PART III)

R(Packham) v (1) SSfT (2) The PM & HS2 Ltd
[2020] EWHC 829 (Admin)
(“the HS2 Challenge”)

14 May 2020

Richard Wald QC

richard.wald@39essex.com

The Facts

- Mr P applied for (i) JR of HMG's decision to continue HS2 (ii) an interim injunction to protect 6 ancient woodlands
- 9 years after HS2 public consultation in 2011
- Following various JRs and ES publication the *High Speed Rail (London – West Midlands) Act 2017* was passed
- In Aug 2019 the SSfT set up Oakervee Review (OR) to conduct a cost/benefit analysis of HS2
- On 2 Feb 2020 the OR recommended that HS2 proceed and the SSfT so decided
- Mr P filed his claim on 28 Feb 2020, i.e. 6 ½ weeks later
- No parties raised any point on promptness

The Issues

- Was the claim brought promptly? (Div. Ct's own point)
- Was the decision to proceed unlawful because the OR
 - (i) departed from its own Terms of Reference (ToRs)?
 - (ii) failed to recognise local environmental concerns?
 - (iii) failed to consider climate change issues?
 - (iv) raised a legitimate expectation that the ToRs would be followed?

The Decision

- Claim dismissed as not prompt because filed after 6 ½ wks i.e. outside the statutory time limit for a Planning Act JRs, not reliant on new info and would prejudice seasonal protected species.
- The OR and decision were limited in scope, macro-political in nature and could only be impugned on *Wednesbury* grounds
- ToRs departure ground had no realistic prospect of success
- Environmental issues were unchanged since the 2017 Act was passed and this ground was an impermissible attempt to re-run them [73], [81]-[82], [88]
- Climate change issues (e.g. Paris Agreement) were considered [92]-[102]
- No unequivocal representation or legitimate expectation [103]-[105], [109].
- Interim injunction refused as no real prospect of success. In any event balance of convenience favoured continuation of the works. [117]-[119], [133]

Comment

- **Remote Hearings** – this early e.g. (3.4.20) worked well, journalists attended [6], Div. Ct appreciated clear submissions and the hard work of the judicial clerks [6] BUT criticised excessive bundle [34] and disclosure requests [30]. See also Holgate J’s “*Top Tips*” for *Planning Ct Remote Hearings* (14.4.20)
- **Promptness** – Counsel of caution is that nowadays even non-Planning Act JRs (and even cases where the parties raise no issue on timing) should be brought within 6 weeks unless there are good reasons for delay
- **The Limits of JR** – Claimant’s argument that the OR was effectively a blank piece of paper got nowhere. The Planning Ct is very alert to veiled attempts to re-run unsuccessful arguments under cover of a challenge to a more recent decision

Comment (2)

- **Climate Change** – OR had been asked to consider “the scope for carbon reductions in line with net zero commitments” and did so finding a fine balance (between construction impacts and operational savings) in favour of reductions provided Phase 2 savings were made. Whether this issue arises from a statutory duty (as in *Plan B*) or not, it will feature in many environmental JRs henceforth
- **Interim relief** – a comparative rarity in env. JR’s, The Div Ct applied *R(Medical Justice) v SSfHD* [2010] EWHC 1425 (Admin) at [6]-[7] & [12] and found no real prospect of success (cf JR permission test) mainly because Parliament had considered the scheme acceptable and in the national interest
- **Appeal** – Mr Packham is reportedly appealing on the basis of a failure to consider the Paris Agreement, but doubtless in anticipation of this (and the knowledge of other such possible challenges e.g. v the Energy NPS) the Div Ct was at pains to distinguish this case from *Plan B* [99]

Another HS2 challenge to watch out for...

- Another crowd-funded HS2 challenge
- Ms Hero Granger-Taylor (resident on the planned HS2 route) obtained permission from Lang J on 28 04 20 for a JR re tunnel design near Euston Station, including on Human Rights grounds
- The claim relies on an engineer's report on structural integrity of the 3 tunnel design beneath Park Village East
- The Planning Ct will therefore consider competing safety evidence in order to determine the proportionality of any risk inherent in the design
- Inevitably this will take the Court into evidential areas it is usually keen to avoid, and is likely to provide further general legal and evidential lessons for planning practitioners.

Thank you for listening

thomas.hill@39essex.com

philippa.jackson@39essex.com

richard.wald@39essex.com

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number OC360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.