

**R (Buckinghamshire County Council and others) v  
Secretary of State for Transport [2014] UKSC 3  
“The Buckinghamshire Case”**

**Tim Mould QC**

## High Speed Rail – HS2

- Holds the key to the future prosperity of the United Kingdom?
- A vast and costly white elephant?
- Sustainable long term transport planning?
- An environmental disaster?

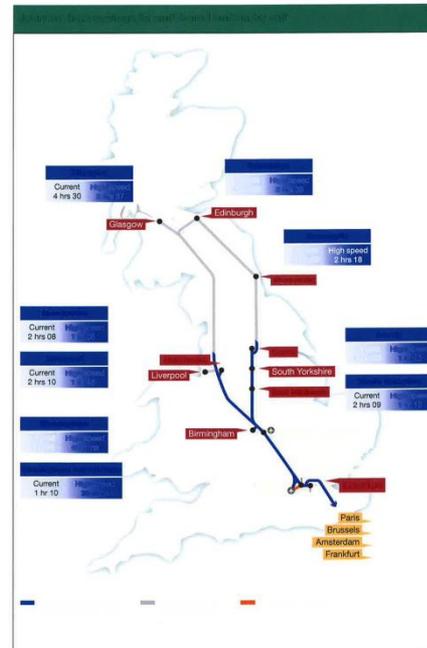
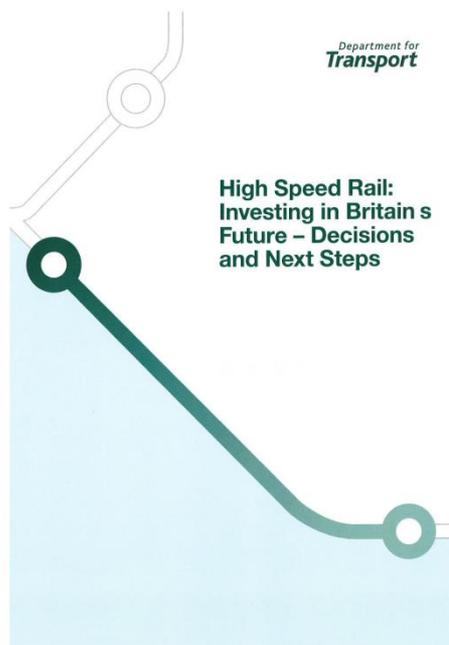
## Birth of a vision

- December 2006 – Eddington Transport Study
- January 2009 – Transport Secretary (Andrew Adonis) announces formation of HS2 Ltd to advise on proposals for new railway from London to West Midlands and beyond.
- March 2010 “High Speed Rail” – Government announces proposal for a core high speed rail network linking London, Birmingham, Manchester, East Midlands Sheffield and Leeds
- The “Y Network”

# High Speed Rail – Investing in Britain’s Future

- February/July 2011 – public consultation on Coalition Government’s proposal for high speed rail strategy – the Y network – and proposed route for Phase 1 route – London to Birmingham/West Midlands
- Phase 1 Appraisal of Sustainability published – comparative appraisal of Phase 1 route alternatives
- 51M consortium – publishes “Optimised Alternative” based on improving existing lines and services on the West Coast Main Line
- January 2012 – Government confirms high speed rail strategy, Y network and Phase 1 route

# Decisions and Next Steps – “DNS”



## HS2 – the policy objective

### DNS - Summary of High Speed 2 –

*The aim of the HS2 project is to deliver hugely enhanced rail capacity and connectivity between Britain's major conurbations. It is the largest transport infrastructure investment in the UK for a generation, and, with the exception of HS1, is the first major new railway line since the Victorian era.*

## Authorising HS2 – the hybrid Bill

- DNS – the Government announced its intention to seek powers for the construction and operation of HS2 Phase 1 through a hybrid Bill to be introduced into Parliament in late 2013.
- An established means of authorising a transport project of national importance
- Channel Tunnel Bill
- Channel Tunnel Rail Link Bill
- Crossrail Bill

## Hybrid Bill

- A public Bill which affects particular private interests in a manner different from the private interests of other persons of the same category or class
- Landowners whose property is subject to compulsory purchase for the construction of the railway
- Persons whose property or interests are “specially and directly affected” by the Bill may petition and be heard by a Select Committee of each House
- The principle of the Bill is established at Second Reading and may not be questioned before the Select Committee

# EC environmental impact assessment

Two EC Directives –

**Directive 2011/92/EU** – the Environmental Impact Assessment (EIA) Directive – requires certain projects to be environmentally assessed before the decision is taken to grant development consent to proceed

**Directive 2001/42/EC** – the strategic environmental assessment (SEA) Directive – requires certain plans and programmes to be environmentally assessed before the decision is taken to adopt them

## SEA Directive – the main issue

- Article 3(2)(a) –  
*An environmental assessment shall be carried out for all plans and programmes which are prepared for...transport...and which **set the framework for future development consent....***

Did the Government's announcement of its proposed high speed rail strategy – the Y network – and the proposed Phase 1 route in the DNS set the framework for future development consent by Parliament upon introduction of the proposed hybrid Bill?

## EIA Directive – the main issue

- Article 1(4) –

*This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.*

Would the hybrid Bill procedure enable the objectives of the EIA Directive to be achieved?

# The Supreme Court Judgment

- The SEA Directive issue – see the judgment of Lord Carnwath at [24]-[55]
- The DNS did not “set the framework” for future development consent for HS2 under the proposed hybrid Bill [36], [38], 40]-[41].
- There was no need for a reference to the CJEU since the guidance of the CJEU in the 3 cases to which Lord Carnwath referred in his judgment at [19] was sufficient to enable the Supreme Court to decide whether the DNS did set the framework [53]-[54].

## Setting the framework – Lord Carnwath

36. Against that background, and unaided by more specific authority, I would have regarded the concept embodied in article 3.2 as reasonably clear. One is looking for something which does not simply define the project, or describe its merits, but which sets the criteria by which it is to be determined by the authority responsible for approving it. The purpose is to ensure that the decision on development consent is not constrained by earlier plans which have not themselves been assessed for likely significant environmental effects. That approach is to my mind strongly supported by the approach of the Advocate General and the court to the facts of *Terre wallone* and by the formula enunciated in *I-E Bruxelles* and adopted by the Grand Chamber in *Nomarchiaki*.

## Setting the framework – Lord Carnwath

38. [The DNS] is a very elaborate description of the HS2 project, including the thinking behind it and the government's reasons for rejecting alternatives. In one sense, it might be seen as helping to set the framework for the subsequent debate, and it is intended to influence its result. But it does not in any way constrain the decision-making process of the authority responsible, which in this case is Parliament....

40. The majority [in the Court of Appeal] referred to the possibility of the plan having "a sufficiently potent factual influence". Although Mr Mould generally supported the reasoning of the majority, he submitted that "influence" in the ordinary sense was not enough. The influence, he submitted, must be such as to constrain subsequent consideration, and to prevent appropriate account from being taken of all the environmental effects which might otherwise be relevant.... 41. In my view he was right to make that qualification.

# The Supreme Court Judgment

- The EIA Directive issue – see the judgment of Lord Reed at [98]-[116]
- There is no reason to doubt that sufficient environmental information will be available to both Houses in time for its consideration prior to Second Reading [99], [113]-[115]
- Under EU Law, the influence of Parliamentary parties (whipping) and Government (ministerial responsibility) over voting in national legislatures is compatible with article 1(4) which reflects the constitutional traditions and principles of Member states [101]-[108]
- There is no need for a reference to the CJEU [117]

## The EIA Directive exemption – Lord Reed

[102] One of the ideas underlying the submissions on behalf of the appellants appears to be that members of the legislature must act independently and impartially when voting on whether to approve a project falling within the scope of article 1(4) of the EIA Directive, rather than being influenced by Parliamentary party politics. That idea appears to me however to be based on a misunderstanding of the constitutional role of the legislature.

[107] ...The fundamental objective of the Directive is, as the Court of Justice has explained, to ensure that the environmental effects of projects are assessed before consent is given. The achievement of that objective requires that appropriate environmental information should be available for consideration before consent is given. It does not require that the decision whether to give consent should be influenced solely or decisively by that information.

## The EIA Directive exemption – Lord Reed

[108] In particular, the question whether it is in the public interest to proceed with a project of national importance, such as HS2, may be a matter of national political significance. It is partly for that reason that such decisions may be considered appropriate for determination by the national legislature rather than by the ordinary processes of development control. The national legislatures of the member states are of course political institutions, whose decisions are likely to be influenced, possibly decisively, by the policy of the dominant Parliamentary party or parties. Article 1(4) ...is nevertheless based on the premise that the objectives of the Directive can be achieved where the decision is made by a body of that kind. That is not difficult to understand: the influence of party and governmental policy does not prevent the members of national legislatures from giving careful and responsible consideration to the information, including environmental information, which is relevant to the matters that they have to decide.

## The EIA Directive exemption – Lord Reed

[110] There is a further difficulty with the contention that EU law requires the internal proceedings of national legislatures to be subject to judicial oversight of this nature. The separation of powers is a fundamental aspect of most if not all of the constitutions of the member states. The precise form in which the separation of powers finds expression in their constitutions varies; but the appellants' contentions might pose a difficulty in any member state in which it would be considered inappropriate for the courts to supervise the internal proceedings of the national legislature, at least in the absence of the breach of a constitutional guarantee.

[116] Without therefore considering the fundamental constitutional objection to this line of argument – that the court would be presuming to evaluate the quality of Parliament's consideration of the relevant issues, during the legislative process leading up to the enactment of a statute – I conclude that the argument is based on an incorrect interpretation of the EIA Directive, and is in addition unsupported by the evidence as to the procedure which might be followed.

# The Supreme Court Judgment

- Lord Sumption – a pithy judgment supporting Lord Carnwath’s reasoning on the issue of setting the framework
- Lady Hale – a judgment explaining her reasons for concluding that a reference was unnecessary on the issue of setting the framework, notwithstanding her concerns that there may be a ‘gap’ in the assessment of alternatives to national projects authorised by a specific act of national legislation

# The Supreme Court Judgment

- Lord Neuberger and Lord Mance [157]-[211]
- An important judgment on the EU principle of legal certainty [165] -

*"The general principle of legal certainty, which is a fundamental principle of Community law, requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly".*

EU citizens and others need to know and are entitled to expect that the legislation enacted by their European legislator will be given its intended effect.

# Legal certainty and interpreting EU legislation

[170] It is a common place in legislation that objectives may not be fully achievable or achieved. Compromises or concessions have to be made if legislators are to achieve the enactment of particular provisions. This is perhaps especially so at the international European level, in the case of measures agreed by the Council of Ministers where different Member States may only have been prepared to go part of the way with a Commission proposal (or Parliamentary proposal for amendment) and qualifications may have to be introduced to arrive at any agreement. The structure of the European Union involves a balance of interests which must be respected if the structure is to be stable.

[171] When reading or interpreting legislation, it can never therefore be assumed that particular objectives have been achieved to the fullest possible degree. Limitations on the scope or application of a legislative measure may have been necessary to achieve agreement. There may also have been good reasons for limitations, of which courts are unaware or are not the best judge. clearly did not intend.

## The proper role of the CJEU

[171] Where the legislature has agreed a clearly expressed measure, reflecting the legislators' choices and compromises in order to achieve agreement, it is not for courts to rewrite the legislation, to extend or "improve" it in respects which the legislator clearly did not intend.

[172] There are important practical consequences, if citizens and other users of the law cannot be confident that European legislation will be given its intended and obvious effect. First, there is a risk of loss of confidence at national level in European Union law, and a risk of impairment of the all-important dialogue between national courts and the Court of Justice, with its vital role of interpreting and consolidating the role of European law.....

# Legal certainty and the EIA Directive exemption

- Article 1(4) - The CJEU has interpreted “since” to mean “provided that”

[197] As it stands, the European Court of Justice's case-law in respect of article 1(5) (now 1(4)), raises the question what is meant by the condition that "the legislative process must have enabled the objectives pursued by the Directive to be achieved".

Must the courts then scrutinise the national legislative process in order to supervise that process?

## The proper role of the national court

- No

[201] The European Court of Justice was itself careful to use a general formulation, invoking the "objectives" of the Directive, when it re-interpreted "since" to mean "provided that" in article 1(5). It did not say that the Directive or its provisions applied to a specific legislative act. It said that it was a condition of their disapplication that their "objectives" were met by the legislative process. The Court was careful not to endorse the very wide formulae, used by the two Advocates General in *Boxus* and *Nomarchiaki*, which suggested close scrutiny by national judges of the legislative process to see whether "the people's elected representatives" had been able "properly" to examine and debate the proposal or had "perform[ed] their democratic function correctly and effectively".

## Constitutional principle

[202] There was good general reason for this. Whatever other adjustments in meaning it might make by way of interpretation, the Court was here concerned with the fundamental institutions of national democracy in Europe. It was concerned with a provision which deliberately distinguished projects approved by legislative process from projects approved by the ordinary planning process. It is not conceivable, and it would not be consistent with the principle of mutual trust which underpins the Union, that the Council of Ministers should, when legislating, have envisaged the close scrutiny of the operations of Parliamentary democracy suggested by the words used by Advocates General Sharpston and Kokott. The Court will also have been well aware of the principles of separation of powers and mutual internal respect which govern the relations between different branches of modern democracies

## Respecting the founding principles of the TEU

[210] The appellants' case, that the Parliamentary process will be tainted by considerations such as whipping or collective ministerial responsibility or simply by party policy, amounts to challenging the whole legitimacy of Parliamentary democracy as it presently operates. There would doubtless be a similar problem in most, probably all, the democracies of the Union. Finally, we note that article 10 TEU itself recognises that, in a Union "founded on representative democracy", whose citizens are directly represented in the European Parliament, "[p]olitical parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union." This, though it may at present be largely aspirational in so far as it refers to pan-European political parties, undermines any suggestion that the ordinary workings of political democracy can or should be seen as suspect under article 1(4) of the EIA Directive.

## In conclusion ...

- The role of the court is to interpret and to apply legislation, not to extend or manipulate it to meet a perceived better outcome.
- A principle of EU law – the principle of legal certainty.
- Separation of powers is a fundamental constitutional principle underlying EU as well as English law.
- EU law recognises and defers to Parliament's control of its own legislative procedures.