R. (on the application of Packham)
v. Secretary of State for Transport
31 July 2020

2020 WL 04427078

Analysis

Royal Courts ofJustice

Strand, London, WC2A2LL

Date: 31 July2020

Before:

Neutral CitationNumber: [2020] EWCA Civ 1004

Case No:C1/2020/0682

Lord JusticeLindblom

Lord JusticeHaddon-Caveand

IN THE COURT OF APPEAL (CIVILDIVISION)

Lord JusticeGreen

ON APPEAL FROM THE DIVISIONALCOURT

- - -- - - - - - - - - - - - - - - - -

LORD JUSTICE COULSON AND MRJUSTICE HOLGATE

Between:

[2020] EWHC 829(Admin)

R. (on the application ofChristopher Packham) **Applicant**

-and -

• 1. 1. **Secretary of State for Transport** • 2. 2. **The Prime Minister**	**Respondents**
-and -	
High Speed Two (HS2)Limited	**Interested Party**

- - -- - - - - - - - - - - - - - - -

- - -- - - - - - - - - - - - - - - -

MrDavid Wolfe Q.C. and Ms Merrow Golden (instructed by **LeighDay**) for the **Applicant**

MrTimothy Mould Q.C. and Ms Jacqueline Lean (instructed by **theGovernment Legal Department**) for the **FirstRespondentand the Interested Party**

The Second Respondent did not appear and was notrepresented.

Hearing date: 8 July 2020

- - -- - - - - - - - - - - - - - - -

Judgment Approved by the courtfor handing down

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

Introduction

• 1.
1. This is thejudgment of the court.

• 2.

2. Theseproceedings and the claim brought separately, on verydifferent issues, by HillingdonLondon Borough Council (R. (on the application of HillingdonLondon Borough Council) v Secretary of State forTransport [2019]EWHC 3574 (Admin)) are the latest in a series of legal challengesto the HS2 project. They came before us on successive days – 8 and9 July 2020. Judgment in the Hillingdon proceedings is also beinghanded down today.

• 3.

3. If fullyconstructed, HS2 will be a high-speed railway connecting London,Birmingham, Manchester and Leeds, with intermediate stations andconnections to the existing national rail network. Its constructionis envisaged in phases, under an Act of Parliament giving thenecessary powers for the construction and operation of eachphase.

• 4.

4. Thisclaim is starkly incontrast with the Hillingdon case. In the Hillingdon proceedings,the challenge was to a specific decision within the approvalprocess, though not to the principle of the project itself beingpermitted to proceed, and its success would not prevent the projectprogressing in accordance with the programme set for it.Here, however,the challenge is to theGovernment's decision to proceed with the HS2 project itself, forpart of whichParliamentary approval has long since been given. It does not touchany of the statutory processes by which that part of the projecthas been approved in principle, or any present or futuredecision-making under the statutory regime in place for subsequentapprovals. It is directed to the Government's commitment to theimplementation of HS2. But neither case involves us, the court, inthe political controversy and debate surrounding HS2. To echo whata different constitution of the Court of Appeal said in itsjudgment on the recent appeal in the Heathrow third runway case– R. (on theapplication of Plan B Earth) v Secretary of State forTransport [2020]EWCA Civ 214 (at paragraphs 2 and 281 to 285) – our task inadjudicating on these claims for judicial review has nothing at allto do with the merits of HS2 as a project. That is the Government's responsibility,not the court's.

• 5.

5. On 21 August2019, the first respondent, the Secretary of State for Transport,announced a review of the project, to be undertaken by a panelchaired by Douglas Oakervee. On 11 February 2020, after the reviewhad been completed and a report of it submitted to the Government,the Prime Minister announced in the House of Commons theGovernment's decision that the project would goahead.

• 6.

6. The applicant,Christopher Packham, is an environmental campaigner and televisionpersonality. By a claim for judicial review issued on 27 March2020, he challenged the Government's decision to continue with theproject. He also sought an interim injunction to prevent theclearance of trees in six ancient woodlands – five in Warwickshireand one in Staffordshire – to make way for its construction. Thesecond respondent is the Prime Minister. The interested party, High Speed Two (HS2) Limited ("HS2Ltd."), is a company created by the Government. As "nominatedundertaker" for Phase One, it is responsible for delivering thatpart of the project.

• 7.

7. The claim camebefore the Divisional Court (Coulson L.J. and Holgate J.) on 3April 2020. At the end of the hearing, the court announced itsdecision to refuse permission to apply for judicial review and theapplication for an interim injunction. In a substantial judgmenthanded down on 6 April 2020, it gave its reasons for thosedecisions. In doing so, it emphasised – as we must too – that itwas "only concerned with whether the decision being challenged isunlawful in some way", and that although "members of the publichave strongly held views for and against the HS2 project, … it isnot part of the court's

role to deal with its pros and cons"(paragraph 5 of the judgment). It concluded that the claim had notbeen brought promptly, in accordance with CPR r.54.5(1), and fellto be dismissed for that reason in any event (paragraph 126). Itdescribed the Oakervee review, and the Government's decision basedupon it, as "limited in scope and macro-political in nature". Itheld that the only realistic basis on which the decision could bechallenged was on "conventional, 'light touch' *Wednesbury* grounds" (paragraph 127). And it rejectedall four grounds of the claim as unarguable (paragraphs 128 to131).

• 8.
8. On 19 May 2020Lewison L.J. adjourned the application for permission to appeal foran expedited "rolled-up" hearing – so that if permission to appealor to apply for judicial review were granted, the appeal or theclaim for judicial review would follow immediately. He acknowledgedthat such a hearing in this court is unusual. But three things madeit appropriate here: first, the Divisional Court had given"comprehensive reasons" for refusing permission to apply forjudicial review, and if permission were now granted, the claimwould likely be retained in this court; second, the timetable was"tight", because further clearance work had been arranged; andthird, there was "considerable public interest in the case".

• 9.
9. We haveconsidered the application in the light of all the evidence beforethe court, including the witness statements produced on either sidesince Lewison L.J. made his order.

The issues before us

• 10.
10. Of the fourgrounds originally pleaded in Mr Packham's claim, only grounds 2and 3b are now maintained. It is contended that both of thosegrounds are good. It is also contended that the claim was broughtpromptly.

• 11.
11. The essentialissue in ground 2 is whether the Government erred in law bymisunderstanding or ignoring local environmental concerns andfailing to examine the environmental effects of HS2 as it ought tohave done. The essential issue in ground 3b is whether theGovernment erred in law by failing to take account of the effect ofthe project on greenhouse gas emissions between now and 2050, in the light of the Government'sobligations under the Paris Agreement and the Climate Change Act2008. It is argued for Mr Packham that the Divisional Court did nottackle either of those issues properly.

The progress of the project between 2011 and August 2019

• 12.
12. The history ofthe project is clearly set out in the Divisional Court's judgment(in paragraphs 7 to 31). It is not necessary to repeat the wholenarrative here, only the salient events.

• 13.
13. BetweenFebruary and July 2011, a national public consultation on thestrategic case for HS2 and the proposed route for Phase One, fromLondon to the West Midlands, was carried out by the Secretary ofState. Among the issues raised in the consultation was the need –both on transport planning and on socio-economic grounds – for amajor increase in rail capacity and a significant improvement inconnections between cities to deal with the predicted growth inpassenger numbers,

and to enhance the performance of the West CoastMain Line and other parts of the existing rail network. In January2012, the Government published its adopted high-speed rail strategyand the route for Phase One. In July 2013, this court held that theconsultation had been lawfully carried out (R. (on the application of HS2 ActionAlliance Ltd.) v Secretary of State for Transport [2013] P.T.S.R.1194).

• 14.

14. In November2013, a Bill was introduced into Parliament seeking powers for theconstruction and operation of Phase One. In January 2014, the Supreme Court dismissed appealsagainst the decision of the Court of Appeal holding that theGovernment's published high-speed rail strategy complied with EUenvironmental law for strategic environmental assessment and thatthe objectives of EU law on environmental impact assessment werecapable of being fulfilled for Phase One of the project through theParliamentary process (R. (on the application ofBuckinghamshire County Council) v Secretary of State forTransport [2014] 1W.L.R. 324).

• 15.

15. Powers for theconstruction and operation of Phase One were granted by theenactment, in February 2017, of the High Speed Rail(London-West Midlands) Act2017. The long title ofthe 2017 Act is "An Actto make provision for a railway between Euston in London and ajunction with the West Coast Main Line at Handsacre inStaffordshire, with a spur from Water Orton in Warwickshire toCurzon Street in Birmingham; and for connected purposes". Section 1gives power to HS2 Ltd. as nominated undertaker to construct andmaintain the works specified in Schedule 1 to the Act – the"scheduled works" – being works for the construction of Phase Oneand works consequent on, or incidental to, such works. Section20 grants deemedplanning permission under Part 3 of the Town and Country PlanningAct 1990 for the carrying out of development authorised by the 2017Act. Development consisting of the carrying out of a work that isnot a scheduled work falls within the scope of the deemed planningpermission if it is covered by an "environmental assessment" in connectionwith the Phase One Bill (section 20(2)(c)).

• 16.

16. Section68(5)(a) of the 2017 Act refers to a "statement deposited" inconnection with the Phase One Bill in November 2013 under StandingOrder 27A of the Standing Orders of the House of Commons "relatingto private business (environmental assessment)". Section 68(5)(b)refers to "statements containing additional environmentalinformation" published in connection with the Phase One Bill –supplementary environmental statements – in 2014 and 2015. Both theenvironmental statement and the supplementary environmentalstatements were subject to public consultation in accordance withStanding Order 224A. A report prepared by an "independent assessor"under Standing Order 224A, summarising the issues raised bycomments made on the environmental statement, was presented to MPsbefore the Second Reading of the Bill in the House of Commons, and,in the case of the supplementary environmental statements, beforethe Third Reading.

• 17.

17. Both theenvironmental statement and the supplementary environmentalstatements contained detailed descriptions and assessment of theenvironmental effects of the Phase One works – for example, theireffects on wildlife, including European Protected Species and theirhabitats, and on designated ancient woodlands and other areas ofwoodland affected by the works authorised by the 2017 Act. Both setout detailed arrangements for the mitigation of those effects wherethey could not be avoided, and for compensation – for example, byextensive tree planting – where they could not be fully mitigated.Their content was the subject of petitions to both Houses. Amongthe petitioners were local authorities, and many organisationsconcerned with the environment – for example, national and localwildlife trusts and the Woodland Trust. The environmental statementalso provided an assessment of the performance of Phase

One, asproposed to be authorised under the Bill, against the then currentlegislative, regulatory and policy requirements and objectivesrelating to climate change.

• 18.
18. As nominatedundertaker for Phase One of the project, HS2 Ltd. is under acontractual duty in the HS2 Phase One Development Agreement tocomply with the published Environmental Minimum Requirements("EMRs") for construction of Phase One of HS2. The EMRs areintended to ensure that Phase One is delivered in accordance withthe deemed planning permission granted under section 20 of the 2017Act, with the environmental statement and supplementaryenvironmental statements, and with the requirements of Parts 3 and4 of the Conservation of Habitats and Species Regulations 2017("the Habitats Regulations").

• 19.
19. The HS2 PhaseOne Code of Construction Practice, issued in February 2017, is acomponent of the EMRs. Section 9 of the Code of ConstructionPractice imposes obligations on HS2 Ltd. for the protection ofecological interests, including protected species, statutorilyprotected habitats, and other habitats and features of ecologicalimportance – such as ancient woodlands. HS2 Ltd. also published,in August2017, an AncientWoodland Strategy for Phase One, setting out detailed arrangementsfor managing the impact of the construction of Phase One on theareas of designated and other ancient woodland in which works areauthorised under the 2017 Act.

• 20.
20. By the timethe Oakervee review was set up in August 2019, powers for theconstruction and operation of Phase 2a, running from the WestMidlands to Crewe, had been provided in the High Speed Rail (WestMidlands-Crewe) Bill introduced by the Secretary of State in theHouse of Commons in July 2017, which was awaiting a Second Readingin the House of Lords. And powers for the construction andoperation of Phase 2b, which would complete the north-western legto Manchester and provide the north-eastern leg to Leeds, were tobe sought under a Bill to be introduced later in the currentParliament.

The Oakervee review

• 21.
21. In hisannouncement on 21 August 2019 that the Government had commissionedMr Oakervee to undertake a review of the project, the Secretary ofState indicated that the review would consider "whether and how toproceed with the [HS2] project".

• 22.
22. The terms ofreference for the review, published by the Secretary of State onthe same day, are annexed to the review report (as Annex B). So faras is relevant here, they are:

"Purpose

ThePrime Minister has stated his wish to review "whether and how weproceed" with HS2 ahead of the 'Notice to Proceed' decision forPhase 1 (London-West Midlands) due by the end of 2019. The reviewwill assemble and test all the existing evidence in order to allowthe Prime Minister, the Secretary of State for Transport and thegovernment to make properly-informed decisions on the future ofPhases 1 and 2 of the project, including the estimated cost andschedule position.

Forthe whole HS2 project, the review should rigorously examine andstate its view on:

…

- the full rangeof benefits from the project, including but not limitedto:

…

- - economictransformation including whether the scheme will promote inclusivegrowth and regional rebalancing
  - environmentalbenefits, in particular for carbon reduction in line with net zerocommitments
  - the risk ofdelivery of these and other benefits, and whether there arealternative strategic transport schemes which could achievecomparable benefits in similar timescales

- the full rangeof costs of the project …

…

- whether theassumptions behind the business case … are realistic…
- … how muchrealistic potential there is for cost reductions in the scheme ascurrently planned …

…

- the directcost of reprioritising, cancelling or de-scoping the project…
- whether andhow the project could be reprioritised …
- whether anyimprovements would benefit the integration of HS2, [NorthernPowerhouse Rail] and other rail projects in the north of England orMidlands
- any lessonsfrom the project for other major projects".

• 23.
23. As theDivisional Court said (in paragraph 19 of its judgment), this was"[in] essence, …a costs/benefit review". Theterms of reference made it clear that the support provided to thereview panel by the Department of Transport would have to be sufficient "to allow asearching and rigorous review in a relatively short time". Thepanellists' appointments ran from 21 August to 31 October 2019, andset a "working deadline" of 18 October 2019 for thereport.

• 24.
24. On 3 September2019, the Secretary of State released the "stocktake report",submitted to him by the Chairman of HS2 Ltd., on the cost anddeliverability of HS2. On the same day, in a written statement tothe House of Commons, the Secretary of State said the Oakerveereview was "an independent, cross-party review … into whether andhow HS2 should proceed". The review would consider HS2's"affordability, deliverability, benefits, scope and phasing,including its relationship with Northern Powerhouse Rail". He wenton to say:

"The Chair willbe supported by aDeputy Chair, Lord Berkeley,and a panel of experts from business, academia and

transport toensure an independent, thorough and objective assessment of theprogramme. Panellists will provide input to, and be consulted on,the report's conclusions.

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

HS2 is thesingle largest project of this Government. One important aspect ofthe panel's work is to consider whether both the costs, and thebenefits, of the scheme have been correctly identified. HS2'sbusiness case has been founded on increasing capacity on ourconstrained rail network, improving connectivity, and stimulatingeconomic growth and regeneration. The current budget wasestablished in 2013 and later adjusted to 2015 prices. Since thattime, significant concerns have been raised.

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

…

… It is … rightthat we subject every project to the most rigorous scrutiny; and ifwe are to truly maximise every opportunity, this must always bedone with an open mind and a clean sheet ofpaper."

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

"… I do not haveconfidence in the data I have been provided with to know yetwhether the benefits have outstripped or under-stripped thesevarious 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 amuch better position to decide, including for people throughout the[West Midlands]."

• 26.
26. On 7 November2019, a draft of the review report was leaked to the press.On 5 January 2020, LordBerkeley, who had earlier indicated that he intended to publish adissenting report, did so. Entitled "A Review of High Speed 2", itwas, as the Divisional Court said (at paragraph 26), "largelyconcerned with the issue of costs". It was widely reported in thepress. There is no dispute that the Government was aware of itscontent when the challenged decision was made.

The review report

• 27.
27. The reviewreport was published on 11 February 2020. In section 1, the"Chair's Foreword", which is dated "December 2019", Mr Oakerveedescribed the genesis of the review and the constraints it hadfaced:

"Shortly after[the] Prime Minister … took up office … , he invited me to lead aquick review of High Speed Two (HS2) to better allow the governmentto consider whether and how to proceed with HS2 ahead of the Noticeto Proceed decision for HS2 Phase One. …

…

The shortduration of the review meant we did not conduct a formal call forevidence but instead canvassed the views of a wide variety ofinterested parties all with different perspectives, both for andagainst the HS2 project. … [We] are grateful to the manyorganisations and individuals who have written to us expressingtheir views. All this information has strengthened this report andmy recommendations.

Given thelimited time available, the Review has faced a major challenge toundertake a deep examination of all the areas included in its Termsof Reference. I believe the Review has, though, provided views onthe key issues.

… .”

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

“…

• theenvironmental case for and against HS2, particularly in the lightof the government’s recent commitment to net zero carbon emissionsby 2050 and the impact of the construction of HS2 itself on theenvironment

…

• the impact ofthe construction and operation of HS2 on communities andindividuals

…

• the costs ofthe project and the certainty of currentestimates

…”.

• 29.
29. The reportcontinued (in paragraphs 2.3 and 2.4):

“2.3 … [It] is important to note that anyexamination of the project does not start from a blank sheet ofpaper. Phase One of the project has had 10 years of design, publicconsultation and lengthy debates in Parliament. Phase Two is at anearlier level of maturity and here the focus is on finalising routedesign, station locations and integration with other transportprojects.

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

• 30.
30. Several “keypoints” were identified (in paragraph 2.8) as matters the reviewhad considered in coming to its conclusion on whether and how theproject should proceed:

“…

• HS2 could helpdeliver the government’s commitment to bring all greenhouse gasemissions to net zero by 2050. This net zero commitment was onlymade in June 2019 – well after HS2 was initially proposed andindeed after the Phase One Act achieved Royal Assent in2017.”

• 31.
31. The reportrecommended in section 3, its “Executive summary”, under theheading “Overall conclusions”, that, “on balance, Ministers shouldproceed with the HS2 project, subject to the following conclusionsand a number of qualifications”.

• 32.
32. In section 5***ø***f the report, "Review of the objectives for HS2", under theheading "Wider environmental considerations", it said (inparagraphs 5.30 and 5.31):

"5.30 In June 2019 the UK governmentcommitted to bring all greenhouse gas emissions to net zero by2050.

5.31 In the short to medium term, theconstruction of HS2 is forecast to add to carbon emissions. Themost recent estimates from HS2 Ltd on emissions from constructionof the full HS2 network are at between 8m and 14m tonnes of CO2e(carbon dioxide equivalent) over the construction period, around0.1% of current UK emissions on an annual basis. This is driven bythe construction of tunnels, earthworks, bridges, viaducts andunderpasses. The decisions to adopt straight alignments and verygradual gradients to reduce noise and visual pollution has led tothe need for large excavations with bigger local impacts and theuse of higher volumes of concrete – the production of concrete iscarbon-intensive."

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

"5.32It is though important to consider the carbon impacts of HS2against alternative ways of managing increased demand for travel.The Review notes that HS2 could in fact be less carbon intensivethan other non-rail alternative transport schemes which deliversimilar transport outcomes. This includes, for example, theconstruction and operation of new motorways, and of new runways orairports.

5.33Over the longer term, HS2 could be promoted to encourage modalshift from both road and domestic aviation. Transport is a majorcontributor to the UK's emissions: 33% of CO2 emissions were fromthe transport sector in 2018. Research by Eurostar has shown forexample that a Eurostar journey from London to Paris emits 90% lessgreenhouse gas emissions per passenger than the equivalent shorthaul flight. Nevertheless, the Review notes that the whole railnetwork needs to be decarbonised if the government is to deliverits net zero target. HS2 should be considered carefully in the roleit could play in helping meet this target.

5.34The Review looked at effects in both the short to medium term andthe longer term. The operational footprint of the full HS2 networkis estimated by HS2 Ltd at saving circa 11-12m tonnes of CO2e overthe first 60 years of operation, taking into account requirementsfor operation, tree planting, modal shift and freight uptake ofreleased capacity."

• 34.
34. Detailed textfollowed on "modal shift" (in paragraphs 5.35 and 5.36). Theoutcome of this analysis brought together the effects of both theconstruction and operational phases of the project on carbonemissions (in paragraph 5.37, followed by Conclusion5):

"5.37 On balance, taking into account boththe construction and operation of HS2, it appears that HS2 islikely to be close to carbon neutral, though it is not clearwhether overall HS2 is positive or negative for greenhouse gasemissions. Based on the current assessment, if the low endconstruction emissions are achieved, HS2 will reduce carbonemissions by 3-4m tonnes of CO2e; at the high end, the project willcontribute 1-3m tonnes of CO2e over the assessment period ofconstruction and 60 years of operation. It is therefore importantfor HS2 Ltd to continue to look for ways to be more carbonefficient, particularly in construction in the short-mediumterm.

Conclusion 5:The government's 2050 target has placed a new emphasis on thedesign, build and operation of the HS2 network. The ability toreduce carbon emissions in the construction of Phase One may belimited so focus should be placed on improving plans for Phase Twoin this regard in particular. HS2 Ltd should look to driveinnovation

in construction and delivery of the project to reduceits forecast greenhouse gas emissions. Over the longer term HS2should form part of an integrated government strategy to encouragepeople to shift to greener transport modes."

• 35.
35. In section 6,"The HS2 design and route", under the heading "Localisedenvironmental impacts", the report states (in paragraphs 6.14 to6.21 and Conclusions 8 and 9):

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

6.15Although the evidence submitted to the Review has been mixed, HS2Environmental Policy aims for HS2 to be an exemplar project:

•
no net biodiversityloss; minimising carbon footprint, reinstating agricultural land,etc.

•
ideally it will avoidenvironmental impact by design; where impact is unavoidable, theproject will work to reduce and abate the impact, and where this isnot possible repair and compensation measures will be used.

6.16The Review recognised the loss of habitats and potential impacts oncertain species, for example barn owls, from HS2. It is understoodthat HS2 Ltd is seeking to implement mitigation and compensatorymeasures to address such impacts. Given the duration of theproject, the Review considers that it is vital that environmentalimpacts, and mitigation and compensatory measures are kept underreview to ensure such measures are effective.

6.17One example of environmental impacts is the impact on woodlands,for which HS2 Ltd have put in place repair and compensationmeasures. On Phase One, this includes the planting of 112.5hectares of woodland in response to the direct loss of 29.4hectares of ancient woodland. For Phase 2a, compensation measuresto address the direct loss of 10.2 hectares of ancient woodlandinclude the planting of 77.1 hectares of woodland. Similar figuresare not yet available for Phase 2b given its current lack ofmaturity, although the Review has seen evidence to suggest that atleast 10 ancient woodlands will be affected. The Review recognisedhowever that planting new woodland is not a direct replacement forremoving areas of ancient woodland.

6.18The Review also noted that mitigating some negative impacts hadcaused a worsening of others: proposing deep cuttings or tunnels toavoid visual impacts and noise pollution from HS2 trains has, inthe case of the deep cuttings, resulted in needing to transportlarge amounts of spoil during construction, with associated impactson communities. It is not clear how well this issue (needing tomove large amounts of spoil) and its impacts are understood by HS2Ltd.

6.19Ground investigations have also revealed that the quality of earthremoved from cuttings and tunnels is unlikely to be of good enoughquality to be re-used as originally planned for embankmentselsewhere, further increasing the transport and storageimpacts.

…

6.21More generally, disruption from the construction of HS2 willseverely impact on communities up and down the line route. Asindicated in section 10 below, HS2 Ltd needs to significantlyimprove how it treats individuals and communities affected by HS2especially 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 asa priority.

Conclusion 8: The Review recognised the impact of HS2 on woodland,landscape, biodiversity and more broadly on built and naturalenvironments. 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 ofconstruction 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.
36. Paragraph6.22, under the heading "The full Y-shaped network", says thatPhase 2b is "currently planned to be deposited as one hybrid Billin June 2020", and that "[given] its large scope and that it isstill in a design phase, before the Bill has been deposited, theremay be opportunities for changes to be made to the Phase 2b schemeto increase benefits or deliver them sooner, and potentially reducecosts and negative impacts".

• 37.
37. In section 11,"Economic assessment of HS2", under the heading "Impacts notquantified in the appraisal", the report states (in paragraph11.13) that "[the] full extent of HS2's environmental and socialimpact is not captured in the benefit-cost ratio"; and that"[adverse] impacts during construction in the form of increasedcarbon, noise and air quality as well as the permanent removal ofancient woodland and land and property are not captured either".Conclusion 51 acknowledges that "[there] are impacts that arecurrently not quantified that are important to consider alongsidethe monetised benefit-cost ratio …". The 2017 economic assessmentof 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)" of2.3. As for the latest economic assessment, Conclusion 52 statesthat "[the] net economic cost to the transport budget, as valued byDfT TAG, of HS2 has increased from £40bn to £62-69bn …". And Table11.3 records a "BCR without wider economic impacts" in a range of1.1 to 1.2, and a "BCR with wider economic impacts" in a range of1.5 to 1.3.

The Government's decision

• 38.
38. Announcing theGovernment's decision in the House of Commons on 11 February 2020,the Prime Minister said:

"The reviewrecently conducted by Douglas Oakervee … leaves no doubt of theclinching case for high speed rail[.] A vast increase in capacity … making it somuch easier for travellers to move up and down our long narrowcountry. That means faster journey times[.] Not just more capacity– it means fasterjourney times … . [But] this is not just about getting from Londonto Birmingham and back[.] This is about finally making … a rapidconnection from the west Midlands to the northern powerhouse, toLiverpool, Manchester, Leeds, and simultaneously permitting us togo forward with [Northern Powerhouse] Rail across the Penninesfinally giving the home of the railways the fast connections theyneed[,] and none of it makes any sense without HS2 … [. And] if westart now, services could be running by the end of the decade. Sotoday … the Cabinet has given high speed rail the greensignal."

Was the claim issued promptly?

• 39.

39. As we havesaid, these proceedings were begun on 27 March 2020, which was sixweeks and three days after the challenged decision. A pre-actionprotocol letter had been sent to the Prime Minister on 28 February2020. Before the Divisional Court, the Secretary of State did notcontend that there had been a lack of promptness in issuing theclaim, as CPR r.54.5(1) requires. However, the Divisional Courtitself invited Mr David Wolfe Q.C., on behalf of Mr Packham, todeal with this question at the hearing.

• 40.

40. In itsjudgment the Divisional Court referred to the decisions of thiscourt in Finn-Kelceyv Milton Keynes Borough Council [2009] Env. L.R. 17 and R. (on the application of Gerber) vWiltshire Council [2016] 1 W.L.R. 2593 . InFinn-Kelceythe Court of Appeal held thatthe six-week time limit for a statutory review of an appealdecision of the Secretary of State was relevant when the court wasconsidering whether a claimant had acted promptly in challenging alocal planning authority's grant of planning permission. As KeeneL.J. said (at paragraph 24), it "emphasises the need for swiftnessof action". That approach was supported by Sales L.J. in *Gerber* (at paragraphs 11 and 49). The DivisionalCourt also referred to the six-week time limit for challenges todevelopment consent orders for nationally significantinfrastructure 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 analogouscircumstances of the present case". HS2 was a project of nationalimportance, and Mr Packham's claim sought to impede theimplementation of the phase authorised by the 2017 Act (paragraph38 of the judgment).

• 41.

41. In theDivisional Court's view, there were several considerationsindicating that the claim had not been made promptly. It was madeoutside the six-week period "for planning cases generally". Theannouncement made on 11 February 2020 could not have come as asurprise to anybody. LordBerkeley had made clear his dissatisfaction with the process in aletter to the Secretary of State dated 11 November 2019, and hadrepeated his concerns in his dissenting report of 5 January 2020.There was nothing in grounds 2 and 3 that arose from informationprovided after 11 February 2020. And the delay in bringing theclaim would also result in the clearance works being put back byanother five or six months. The delay was not justified byunanswered requests by Mr Packham's solicitors for documentsconsidered when the decision was made. The proceedings had beenbegun without that information. The court therefore concluded thatthe challenge had not been made promptly, and that the applicationfor permission should be dismissed for this reason alone(paragraphs 39 to45).

• 42.

42. Mr Mouldsubmitted that the Divisional Court's approach was consistent withthis court's in Finn-Kelcey and *Gerber*. The court was entitled to proceed on thebasis that Mr Packham was able to bring a claim based on grounds 2and 3 at any time after 11 February 2020. It was alsoentitled to weigh theconsequences of delay for the programme of clearance works. Afterthe Divisional Court's decision, on 15 April 2020, HS2 Ltd. gavenotice of its intentionto proceed with the four mainHS2 Phase One works contracts.

• 43.

43. Mr Wolfesubmitted that the Divisional Court's approach was wrong. It shouldnot have applied, in effect, a six-week time limit for bringing theclaim. As Keene L.J. acknowledged in Finn-Kelcey (at paragraph 24), "where the CPR hasexpressly provided for a three-month time limit, the courts cannotadopt a policy that in judicial review challenges to the grant of aplanning permission a time limit of six weeks will in practiceapply". As for the facts: Mr Packham had acted as quickly as hecould in the circumstances. It had been difficult to establish whatworks HS2 Ltd. was actually

carrying out, and Mr Packham'ssolicitors were awaiting a response to their request for furtherinformation. 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 thesubstance of the underlying complaint was known before the decisionwas published. Here the grounds of the claim depended on what thereview report said, how it was understood by the Government, andwhat other information was considered in the making of thedecision. None of this could have been known before 11 February 2020. And the Divisional Courtwas wrong to take into account the likely consequences of the delayfor the programme of clearance work, because those consequenceswould have flowed from the grant of an injunction, and not from thetiming of the judicial review claim itself.

• 44.

44. The court hasrepeatedly stressed the need for promptness in bringing proceedingsfor judicial review. But as Keene L.J. pointed out inFinn-Kelcey(at paragraph 25), "[what]satisfies the requirement of promptness will vary from case tocase" and "depends on all the relevant circumstances" (see also therecent decision of this court in R. (on the application of Thornton HallHotel Ltd.) v Thornton Holdings Ltd. and Wirral Metropolitan BoroughCouncil [2019] EWCACiv 737 , at paragraph 21). In the circumstances of this case, wethink that requirement was met.

• 45.

45. It seems to usthat this case is materially different from Finn-Kelcey, *Independent TelevisionCommission* and *Re Friends of theEarth*. In our view,for three reasons, the claim was made promptly for the purposes ofCPR r.54.5(1)(a). First, this was a claim for judicial reviewoutside the procedure specifically introduced for claims broughtunder the "planning acts", in CPR r.54.5(5). The relevant timelimit was therefore not six weeks but three months "after thegrounds to make the claim first arose". The claim was issued wellwithin that period, more than five weeks before it expired.Secondly, it is, we think, inappropriate to treat this case asanalogous with challenges falling within the scope of the six-weektime limit under section 118 of the Planning Act and CPR r.54.5(5) on the basis that thesubject matter of the challenge was a decision that followed aprocess in which a series of planning decisions had been made underthe legislative scheme for the approvals required by the HS2project. The decision with which we are concerned lies whollyoutside that legislative scheme. Indeed, as the Divisional Courtitself rightly emphasised (in paragraphs 46 to 57 of its judgment),neither the Oakervee review nor the Government's decision of11 February 2020 weremade within any statutory framework, whether for the planning ofmajor infrastructure or otherwise. This was a process undertakenentirely under common law powers. And thirdly, we would give nosignificant weight to the fact that some information relevant tothe challenge, such as Lord Berkley's dissenting report, wasavailable before the decision was taken. Indeed, if anything, the occurrence ofthat dissent might be seen as a factor that made the Government'sdecision harder to foresee. But in any event the claim – whether sound or not – rests onthe content of the review report, which was not published in itsfinal form until11 February 2020,when the decisionwas announced. In thecircumstances it was notunreasonable for Mr Packham to wait until then before contemplating achallenge.

• 46.

46. We thereforeaccept Mr Wolfe's argument here. Unlike the Divisional Court, wewould not have refused permission to apply for judicial reviewsolely for a lack of promptness in filing theclaim.

The court's jurisdiction

• 47.

47. The DivisionalCourt heard submissions on the ambit of the court's jurisdiction in theseproceedings. It drew"little assistance" from R. (on the application of Stephenson) vSecretary of State for Housing, Communities and LocalGovernment [2019]EWHC 519 (Admin), which concerned the consultation on adocument containing national planning policy, whereas this case concerns a process to inform theGovernment's decision on whether and how to proceed with HS2(paragraph 52). Neither the Oakervee review nor the decision it wasto inform was part of any statutory process. This was "the exerciseof a common law power", of the kind referred to by Lord Sumptionin R. (on theapplication ofSandiford) v Secretary of State forForeign and Commonwealth Affairs [2014] 1 W.L.R. 2697 (at paragraph83) (paragraph 53). Inthe Buckinghamshire County Council proceedings, the Supreme Court had recognised that adecision on whether it was in the public interest to proceed with aproject such as HS2 is a matter of national political significance,appropriately dealt with by the legislature (see the judgment ofLord Reed, at paragraph 108). In the Divisional Court's view thesame applied to the decision taken by the Government on 11 February2020. This was a "macro-political" decision (see R. (on the application of Begbie) vSecretary of State for Education and Employment [2000] 1 W.L.R. 1115, atp.1131). The Secretary of State was accountable to Parliamentfor it, and the functions he exercised were notconstrained by legislation (paragraph 54).

• 48.

48. Mr Packham'schallenge therefore required only a "low intensity of review"(see IBA HealthcareLtd. v Office of Fair Trading [2004] I.C.R. 1364 , at paragraph91; R. (on theapplication ofPlant) v Lambeth London BoroughCouncil [2017]P.T.S.R. 453 , at paragraphs 62 to 69; and the Divisional Court'sjudgment in the Heathrow third runway case (R. (on the application of Spurrier andothers) v Secretary of State for Transport [2020] P.T.S.R. 240 , at paragraphs 141 to184, endorsed by the Court of Appeal in *Plan B Earth*, at paragraphs 79 and 80). Where thedecision is one of political judgment on matters of nationaleconomic policy, the court would only intervene on grounds of "badfaith, improper motive and manifest absurdity" (paragraph 55). TheGovernment's decision could only be impugned on "Wednesbury"grounds – that it wasirrational for the Secretary of State not to take into accountsomething that was "obviously material". The Divisional Courtdescribed this as a "light touch" review (paragraph57).

• 49.

49. Mr TimothyMould 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.

50. It may be thatthe question is only hypothetical. The main burden of the arguments presented tous, on both grounds, is that the Government lapsed intomisunderstanding in making the decision under challenge. If thatcontention were made good, the court would have to consider whetherany such misunderstanding was material. But if the contention isnot made good on either ground, the challenge must fail in anyevent, no matter whether the appropriate standard of review is"light touch" or more intense.

• 51.

51. In our view, however,this is unquestionably the kind of case in which the court shouldrefrain from anything beyond a "light touch" approach, applying thetraditional test of "irrationality". It is, of course, fundamentalthat both the intensity of review and the extent to which a courtwill accord a margin of judgment or discretion to a decision-makerwill always depend on fact and context. The intensity of the reviewand the breadth of the margin of discretion accorded areconceptually different. The court may closely scrutinise thereasoning for a decision

yet still conclude it is proper to accordthe decision-maker a broad margin of discretion.

• 52.

52. If one is to applythe test of irrationality in this case, we are in no doubt that theCabinet, as the effective decision-maker, was entitled to a broadmargin of discretion in handling the content of the review report.The reasons for this can be stated shortly. First, the decision toproceed with HS2 was taken at the very highest level of Government.It was largely a matter of political judgment. Secondly, at thedate 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 thecourse of the passage of the Phase One Bill through Parliament adetailed assessment of environmental impacts had already beencarried out. That assessment had not precluded the coming intoforce of the statute. It remained lawful and valid at the time ofthe Oakervee review, and at the time of the decision. So did thestatutory approval process itself. And that will remain soregardless of the outcome of these proceedings. Thirdly, it is notsaid that, in the period between Royal Assent and the Cabinet'sdecision, there had been any physical change in circumstancesbearing on the assessment of environmental effects that was eithercapable of undermining the assessment or of affecting the operationof the 2017 Act. Fourthly, in arriving at the decision, the Cabinethad to balance a number of significant – and potentiallyconflicting – political, economic, social and environmentalconsiderations. Fifthly, largely for that reason, there was not asingle "right" decision. A decision either way might be perfectlyreasonable. And sixthly, the review report had obvious limitations,and did not gain full support even from the whole panel – as thedissent of Lord Berkeley shows.

• 53.

53. All these factors, inone way or another, manifest the essentially political quality ofthe decision under challenge, and the need for the Government, asdecision-maker, to be accorded a wide margin of discretion. That ishow we shall proceed.

Ground 2 – was the Government'sdecision flawed by afailure to consider environmental effects?

• 54.

54. Before theDivisional Court it was common ground that the Phase One workswere lawful. They had been authorised under the 2017 Act. Anenvironmental impact assessment of that phase had been undertaken, in accordance with EUand domestic legislation, including public consultation, during theprocess of Parliamentary scrutiny. Petitions against the Bill hadbeen brought by local authorities and by national and localwildlife and woodland trusts, and had been heard by Select Committeesappointed by each House. The works were subject to regulation byNatural England as competent authority through the operation of thelicensing procedures in Parts 3 to 5 of the Habitats Regulations.And they had to be carried out in accordance with the published HS2Phase One Code of Construction Practice.

• 55.

55. The DivisionalCourt regarded these propositions as "self-evidently correct"(paragraph 47 of the judgment). Both the Oakervee review itself andthe decision taken in reliance on it on 11 February 2020 were of a"limited nature". The purpose of the review was to inform thedecision on whether HS2 should continue, not to consider the project "from scratch"(paragraph 48). There was no statutory basis for the decision tolaunch the review, and no statutory or policy basis for the termsof reference. How far the review should go on the topics itconsidered 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 theapplication of Khatun) v London Borough of NewhamCouncil [2004] EWCACiv 55 , at paragraph

35; and R. (on the application of Jayes) vFlintshire County Council [2018] EWCA Civ 1089 , at paragraph 14(paragraph 49).

• 56.

56. Relying on thedecision of this court in R. (on the application of NationalAssociation of Health Stores) v Department of Health [2005] EWCA Civ 154, Mr Wolfehad argued that a ministerial decision-maker was to be taken tohave known only those matters he actually knew when making hisdecision, rather than what his departmental officials knew. TheDivisional Court observed, however, that "the extent of a Minister's actualknowledge is not in itself a public law ground for vitiating hisdecision", and that "[the] real question is what as a matter oflaw *ought*the Minister to have knownabout when taking his decision" (see the judgment of Sedley L.J.in *NationalAssociation of Health Stores*, at paragraphs 39 to 65) (paragraph 50).The "public law test" was "whether the Secretary of State failed totake into account a consideration which was not only relevant butwhich he was *legallyobliged* to take intoaccount", and this had "nothing to do with the different questionof whether a decision was vitiated by an error as to fact" (seeSedley L.J.'s judgment in *National Association of HealthStores*, at paragraph60). A"government department does nothave to draw a minister's attention to every relevant matter,but only to thosematters which statute, or perhaps existing policy, require him totake into account, or which are so "obviously material" that hemust, and not merely may, take them into account, applying thedistinction recognised in authorities such as CREEDNZ Inc v GovernorGeneral [1981] 1N.Z.L.R. 172 []" (paragraph 51).

• 57.

57. Where aminister had considered a review of a complex project,in which evidence had not beencalled, the DivisionalCourt thought it was "a nonsense to suggest that [he] could only beassumed to know about the review, and not the Parliamentary processby which environmental issues have been and will be addressed andPhase 1 has been approved". The review could not be divorced fromthat process, as the review report had itself made clear (paragraph56). At the time of the decision on 11 February 2020, the Secretaryof State could be assumed to have known of the Parliamentaryprocesses for the approval of the HS2 project, including the 2017Act, the dissenting report of Lord Berkeley, and thereview report (paragraph 57).

• 58.

58. Specificallyon ground 2 of the claim, the Divisional Court said it would beimpossible to construct a project on the scale of HS2 Phase Onewithout causing "interference with and loss of significantenvironmental matters, such as ancient woodland",and this had been authorised in the 2017 Act(paragraph 81). Theenvironmental impacts of Phase One had been assessed in detail inthe Parliamentary process. This must have been obvious to theGovernment when it initiated the review, considered the report, andtook the decision to proceed. No legal reason had been advanced toexplain why that kind of assessment would need to be repeated(paragraph 82). Environmental impact assessments for Phase 2a andPhase 2b would also be carried out in the Parliamentaryproceedings. There was no indication in the terms of reference thatthe 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 thereview process … what matters would be covered in theReport", and that exercise of judgment couldonly be challenged by judicial review if it was "irrationalor *Wednesbury* unreasonable". The same test applied tothe decision itself (paragraph 85). Mr. Wolfe had notsuggested that the panelreceived any representations on the environmental impacts of PhaseOne that had not already been addressed in the proceedings on theBill (paragraph 86). The review report referred to the impacts onancient woodland, landscape, biodiversity and the built and naturalenvironment, and recognised that such impacts were to some extentunavoidable for a project such as HS2. It stressed the importanceof the appropriate mitigation and compensatory measures beingcarried out, and kept under review (paragraph 87).

• 59.

59. The DivisionalCourt therefore concluded (in paragraph88):

"88. In all the circumstances, it is notarguable that there was any legal requirement for the Report torefer to, or for the Defendants to take into account, any of theparticular matters referred to in the Claimant's Ground 2. Nor wasthere any legal obligation for the decision made on 11 February2020 to be based upon a full or detailed assessment ofenvironmental impacts as the Claimant contends. This Ground iswholly unarguable."

• 60.

60. Seeking topersuade us to a different conclusion, Mr Wolfe submitted that theDivisional Court had failed to grapple properly with ground 2. MrPackham's case on this ground is not a complaint about what theOakervee review was required to assess, or what the review shouldhave done – but about what it said it had done. It is, essentially,that the Secretary of State was told, and would therefore haveassumed when the decision to proceed with the project was made,that the reviewreport had set out a "full andproper" account of HS2's harmful environmental impacts, whereas ithad not done so at all. This misunderstanding of the scope of thereport must have affected the weight the Government gave to thereport's conclusions and recommendation, including the economic assessment, whichshowed a much weaker benefit-cost ratio than in 2017.That the Divisional Court hadfallen into this error was apparent both from its summary of MrPackham's case (in paragraphs 77 and 78 of the judgment) and fromits conclusions (in paragraphs 80 to 88).

• 61.

61. Forcefully asthey were advanced by Mr Wolfe, we do not think those submissionsare tenable. They are impossible to reconcile with the context in which theOakervee review was set up, the circumstances in which it wasconducted, its true purpose and scope, the content of the reviewreport, and theGovernment's decision itself. They attribute to the review a function itdid not have. We agreewith the conclusions ofthe DivisionalCourt. We do not acceptthat it misunderstood Mr Wolfe's submissions, but in any event wesee no merit in the argument as it was presented tous.

• 62.

62. HS2 is aninfrastructure project of national significance, with a long andwell-publicised history. When the Government made its decision toproceed with the project in February 2020, the factual context inwhich the Oakervee review had come to be set up in August 2019 wasa matter of record. Phase One of the project had passed through a lengthyprocess of consultation, assessment – including environmentalimpact assessment – and statutory approval. The process had beenpunctuated by challenges in the courts, and its lawfulness had beenconfirmed. Statutory authorisation for Phase One was embodied inthe 2017 Act, which referred in several of its provisions to theenvironmental impact assessment that had been carried out. TheParliamentary process was well advanced for Phase 2a, and would soon begin forPhase 2b.

• 63.

63. Thedeemed planningpermission for Phase One of the project depended on the assessmentof environmental impacts and mitigation and compensation measuresset out in the environmental statement and the supplementaryenvironmental statements. HS2 Ltd., as nominated undertaker, wasunder a contractual duty to comply with the EMRs and to ensure thatboth the construction and operation of Phase One were controlled inaccordance with that assessment. It was an appropriately extensiveand thorough assessment. Matters raised in representations in thecourse of the Oakervee review, and to which Mr Packham refers inthese proceedings – such as the effects of tunnel

boring on water quality andwater supply and the possible dewatering of the River Misbourne andShardeloes Lake, andecological effects ofvarious kinds – had already been raised in petitions against theBill. Sucheffects were addressed in theenvironmental statement and controlled under the EMRs. These aremerely a few examples. But they serve to illustrate thecomprehensive coverage of environmental impacts within the approvalprocess.

• 64.

64. As Mr Mouldsubmitted, the court can properly assume that the "existingevidence", known both to the review panel and to the Governmentitself when making its decision to proceed with HS2, included theoutcome of the Parliamentary procedures leading to the passage intolaw of the 2017 Act. Theidea that the Cabinet, when forming the decision, lacked that basicknowledge of the project is, in our view, wholly unrealistic. Thereis no reason to suppose that it failed to follow the guidance inthe Cabinet Manual, including that "[papers] and presentations forCabinet … should include any information that is needed forministers to make an informed decision" (paragraph 4.30). Butleaving that aside, it is simply not credible that, in the circumstances in which the review was commissioned andthe 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 alawful and comprehensive assessment of environmentalimpacts.

• 65.

65. Neither thejudgment of this court in R. (on the application of Hunt) v NorthSomerset Council [2013] EWCA Civ 1320 , nor the firstinstance judgment of Dove J. in *Stephenson*, nor any of the authorities to which hereferred (in paragraphs 36 to 40 of his judgment), including the decisions of this courtin R. (on theapplication of Bracking) v Secretary of State for Work andPensions [2013] EWCACiv 1345 , R. (on theapplication of Kohler) v Mayor's Office for Policing andCrime [2018] EWHC1881 (Admin) and *National Association of HealthStores*, lends anysupport to Mr Wolfe's argument. Those cases are all significantlydistinguishable from this. As Mr Mould said, they all relate to theperformance of a particular statutory duty or statutory procedure,or the fulfilment of common law rules. Here, however, the situationis quite different. As the Divisional Court recognised, this casedoes not involve an alleged failure on the part of thedecision-maker to perform some statutory duty or procedure, or tofulfil any common law rule. The starting point for the wholeexercise entailed in the Oakervee review, and the Government'ssubsequent decision, was that the project had the requisitestatutory approval to enable it to proceed, and that statutoryapproval had emerged from a process in which, among other things,environmental impact assessment and public consultation had beencarried out. The decision now being taken was not a decision on theplanning merits; it was a decision on whether or not to proceedwith a project whose planning merits had already been considered ina statutory process, and its first phase approved in an Act ofParliament (see paragraphs 13 to 19 above). In the circumstanceshere, we are, to adopt Sedley L.J.'s words in *National Association of HealthStores* (at paragraph60), "unable to accept that [the Government] had less informationthan the law required", and, like the Divisional Court, we can seeno basis for concluding that "something relevant [was] left out ofaccount by [it] in taking [its] decision" (see also the judgment ofKeene L.J. at paragraphs 73 to 75).

• 66.

66. There can beno suggestion thatthe Cabinet was undera misapprehension aboutthe nature of the Oakervee review itself. As the Divisional Courtrecognised, the review was not part of the legislative process forthe approval of the project. It did not engage either domestic orEU legislation on environmental impact assessment. The Governmentwas under no obligation to set it up. To do so was not necessary todischarge any duty arising under any Act of Parliament or at commonlaw, or to comply with any policy promulgated by this or anyprevious administration. There was no statutory or policy basis forthe terms of reference. Though a number of

organisations andindividuals took the opportunity to make representations to thepanel, there was no dutyhere to undertake public consultation.

• 67.

67. It is alsoclear that the Government did not intend to base its decision onthe future of HS2 solely on the conclusions and recommendations ofthe Oakervee review. In his written statement to the House ofCommons on 3 September 2019 the Secretary of State said that thefindings of the Oakervee review would be discussed with the PrimeMinister and the Chancellor of the Exchequer, and that "itsrecommendations would *inform* our decisions on our next steps" (ouremphasis) – not that it would dictate the Government's decision. AsMr Mould submitted, a reasonable person reading the Secretary ofState's statement would have realised that the decision was to bemade in the light of other considerations the Government thoughtrelevant 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 withinwhich those questions fell to be considered.

• 68.

68. We should addthat the Secretary of State's reference in his written statement of3 September 2019 to "an open mind and a clean sheet of paper" andhis observation in debate on 5 September 2019 to his "[starting]with a blank sheet of paper" cannot sensibly be taken as suggestingthat the history of the project to the point of Phase One beingauthorised in the 2017 Act, with Phase 2a already well advanced inits own approval process, and Phase 2b to follow, was to beignored. Taken in context, the sense of those words was that theGovernment had an open mind on the future progress of the project,even though Phase One had already been approved and could nowlawfully proceed.

• 69.

69. One must havein mind the circumstances in which the review itself was conductedand its limitations – which are acknowledged in the Chair'sForeword. As the Divisional Court said (at paragraph 49), it was amatter of judgment for Mr Oakervee as Chair how far the reviewshould go on the matters it considered and the information itobtained. Speed was of the essence. The report was initiallyrequested within two months of the review being commissioned – bythe end of October 2019 – and it seems to have been completed andsubmitted to the Government sometime in December.As Mr Oakervee said, in thetime allowed to the panel it had to provide "views on the keyissues". Those views were formed under considerable pressure oftime. As it turned out, unanimity could not be reached. Themajority of the panel came to its own view; Lord Berkeley disagreedand published his dissent.

• 70.

70. The purpose ofthe review, and its scope, are evident from the terms of reference.Three things may be said about them. First, they are explicitlydirected to the questions of "whether" and "how" HS2 is to be takenforward. Second, theyexplicitly seek a consideration of "existing evidence", notevidence that is new or additional to that. And third, thoughbroadly framed, they are precisely expressed in the questions theypose for the panel. Thereview was not, and was never suggested to be, a self-containedevaluation of HS2 as a project. It was much more circumscribed thanthat.

• 71.

71. Plainly, thepanel was not asked to undertake a comprehensive assessment, orindeed any assessment, of the myriad effects of the project on theenvironment. The terms of reference did not request, as Mr Wolfeput it in his skeleton argument, "an up to date assessment based onall the existing evidence of the environmental impacts of theproject". That is not surprising. To have asked the panel toventure upon so challenging and time-consuming an exercise wouldhave been wholly unnecessary. It had already been done,comprehensively, and lawfully, for Phase

One of the project. Theresults of it were recorded, and had been published, in theenvironmental statement and supplementary environmental statementsproduced in the course of the statutory procedures through whichPhase One had been taken between 2013 and 2017, culminating in theworks being authorised in the 2017 Act. The environmental impactassessment had informed the design and the requisite mitigation andcompensation measures for that phase, which were now established. Asimilar exercise, which would also have to comply with thelegislative requirements for it, was in prospect for Phase 2a andPhase 2b.

• 72.

72. Three furtherpoints may be made here. First, no criticism is or could be made ofthe terms of reference themselves, as being inadequate,inconsistent, or unclear. The Government was free to formulate themjust as it chose, and it did so.

• 73.

73. Secondly, itis not argued that the panel misconstrued the terms of reference,or failed to comply with them. The report is faithful to them, evenif the panel could not perform them as fully as might have beenpossible had the constraints of time not been so severe. As for theeffects of the project on the environment, the panel did what wasasked of it when examining and stating its view on "the full rangeof benefits of the project", including "environmental benefits, inparticular carbon reduction in line with net zero commitments".It focused on thosebenefits particularly under the heading "Wider environmentalconsiderations", in paragraphs 5.30 to 5.37 of the report, andConclusion 5. There is nothing to indicate that, in doing so, itfailed to consider with care any relevant content in therepresentations submitted to it (cf. *Kohler*, at paragraphs 60 to 68).

• 74.

74. Thirdly, andtellingly in our view, if one leaves aside the explicit requirementin the terms of reference for the panel to state a view on thebenefit of "carbon reduction in line with net zero commitments", ithas not been suggested that any new or different environmentalimpacts had now emerged that would affect the assessment set out inthe environmental statement and supplementary environmentalstatements, or to justify the panel being asked to comment on anypart of that assessment, let alone to second-guess it. As we havesaid, no significant change in circumstances has been identified asa basis for thinking that the assessment of any particularenvironmental effect that had already been undertaken, lawfully, inthe course of the approval process for Phase One was no longer solid andcomplete.

• 75.

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 lightof the government's recent commitment to net zero carbon emissionsby 2050 and the impact of the construction of HS2 itself on theenvironment", the report was not saying that the panel wanted tosubstitute an assessment of its own for that contained in theenvironmental statement and supplementary environmental statements.And in the short passageunder 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 toprovide an assessment of those impacts, let alone to provide acomprehensive re-assessment of all the environmental impacts eitherof Phase One or of the project as a whole. It was not required, orexpected, to do anything of the kind. And it did not. What it didwas to mention some of the mitigation measures proposed by HS2Ltd., as a basis for Conclusion 8 – the need to keep impacts "underreview" – 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 ofPhase 2b.

• 76.

76. Mr Wolfemaintained that those passages in the report were presented as ifthey were an up-to-date assessment of the environmental impacts ofHS2 in the light of all the relevant evidence, and that this washow they would have been taken by the Cabinet when the decision wasmade.

• 77.

77. We cannotaccept that submission. There is no suggestion in those fewparagraphs and conclusions, or anywhere else in the report, thatthe panel had taken upon itself so ambitious a task. To do thatwould have been to go far beyond its terms of reference, with theirdeliberate focus on the"environmental benefits" of HS2, as opposed to acomprehensive assessmentof its environmental impacts. And it would also have been patentlyinconsistent with the essential purpose of the review, which wasnot to test the project on its planning merits, but to inform theGovernment's decision on "whether and how" to go ahead withit.

• 78.

78. As Mr Mouldrightly submitted, the text in paragraphs 6.14 to 6.21 andConclusions 8 and 9, properly understood, are concerned with thequestion of "how" to proceed with HS2, not the question of"whether" to do so. To recognise the fact that the project wouldhave many effects on the environment, and to urge that themitigation of those effects must be kept under review while theproject is implemented, cannot be equated to the carrying out of acomprehensive environmental impact assessment. Conclusions 8 and 9convey the true sense of the text to which they relate. They, likethe paragraphs preceding them, are in qualified terms. Theydemonstrate the panel's awareness of the wide range ofenvironmental impacts inthe construction and operation of HS2, over a long period, and theinevitability of such impacts in an infrastructure project of this scale.They do not, however, cast any doubt on the adequacy and accuracyof the environmental impact assessment already undertaken, or theacceptability of any of the impacts identified and assessed, or thesuitability of themitigation and compensation measures proposed. In our view, thepanel 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 environmentalcase for and against HS2".

• 79.

79. In short, wedo not think it is properly arguable that, in making the decisionto proceed with HS2, the Government misled itself, or was misled,into thinkingthat the review reportcontained a full assessment of the project's environmental effects.There is no basis, either in the evidence before the court or inreasonable inference, for concluding that the Prime Minister, the Secretary ofState or any other minister, or the Cabinet collectively, made suchan egregious error.

• 80.

80. In particular,we reject as unfounded the argument that the Government mistookparagraph 2.2 of the review report, or other passages in it, asindicating that the review had included a comprehensive assessmentof HS2's impact on the environment. The report does not say, orimply, any such thing. It does not replicate, amend or replace theassessment in the environmental statement and supplementaryenvironmental statements already completed and in the publicdomain, of which minsters would have been well aware. It does notcriticise or question any of that assessment. No one could sensiblytake it as presenting a "full and proper" account of the harmfulenvironmental impacts of the HS2 project as a whole. For the panelto have attempted an alternative environmental impact assessment ofits own would have been to exceed its brief by a long way. And itdid not. There was, in our view, no risk of any misunderstanding onthis question, or of false weight being given by the Government tothe report's conclusions and recommendation when the decision toproceed with the project was made. It would have been obvious to ministersthat the environmental impacts of

HS2, and the proposed mitigation,had been, and would be, formally assessed in accordance with thelaw. The review report did not have to spell thatout.

• 81.
81. Equally, thereis no basis for the argument that the absence from the reviewreport of a thoroughgoing, or any, assessment of environmentaleffects renders the Government's decision legally invalid. That isalso a misconception. The straightforward point remains. Itwas not incumbent on the panel in discharging its brief, or on theGovernment in seeking independent advice and making its decision on"whether and how" HS2 should proceed, to revisit the environmentalimpact assessment of Phase One that had already been carried out inaccordance with the relevant legislation, or to become involved inthe environmental impact assessment for the remaining phases of theproject. No such obligation exists in law.

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

Ground 3b – did the Government fail properly to consider theimplications of the Paris Agreement and the Climate ChangeAct?

• 83.
83. We start witha short outline of the relevant provisions of the Climate ChangeAct. Section 4(1)imposes on the Secretary of State a duty to set carbon budgets to cap carbon emissions ina series of five-year periods (subsection (1)(a)), and to ensurethat the net United Kingdom carbon account for a budgetary perioddoes not exceed the carbon budget (subsection (1)(b)), thusensuring progress towards the 2050 target in the period before thatyear. Carbon budgets must be set with a view to meeting the targetfor 2050 (section 8(2)). Before he sets a carbon budget, theSecretary of State for Business, Energy and Industrial Strategymust take into account the advice of the Committee onClimate Change(section 9(1)(a)). In setting a budget, he must take intoaccount a number of things, including "scientific knowledge aboutclimate change" (section 10(2)(a)), "technology relevant toclimate change" (section 10(2)(b)), "economiccircumstances …" (section 10(2)(c)), and "social circumstances …"(section 10(2)(e)). He is also required to prepare proposals andpolicies for meeting carbon budgets (section 13(1)). After a newcarbon budget is set, he must lay before Parliament a reportsetting out proposals and policies for meeting carbon budgets forthe current and future budgetary periods (section 14(1)). TheSecretary of State is required to report to Parliament in an annualstatement of emissions "[in] respect of each greenhouse gas",setting out the steps taken to calculate the net carbon account forthe United Kingdom (section 16(2)) – which will show whether or notcarbon budgets are being met. The Committee on Climate Change,whose function, in part, is to provide advice to the Government onclimate change mitigation and adaptation (section 38(1)), isrequired to report annually to Parliament on the progress madetowards meeting the carbon budgets (section 36), and the Secretaryof State is required to respond (section 37).

• 84.
84. The first fivecarbon budgets have now been set in legislation, for the periodfrom 2008 to 2032. The sixth, for 2033 to 2037, will be set in2021. The most recent of the Secretary of State's annual statementsrecorded emissions for 2018, the first year of the third budgetaryperiod (2018 to 2022).

• 85.
85. In October2017, the Secretary of State published the Clean Growth Strategy,setting out the Government's policies and proposals fordecarbonising the national economy, fixing policy milestones as faras 2032, describing "illustrative pathways" for spreadingdecarbonisation throughout the economy, but allowing the Governmentto respond to changes in technology in those 15 years.The Clean GrowthStrategy does not prescribe one particular "pathway" in the periodto 2050. It envisages various means of managing emissions – such astaxation, regulation, investment in innovation, and establishing aUK Emissions Trading Scheme. And it leaves the Government to choose howto manage increases in emissions from major infrastructure projectswithin its strategy for meeting the target of "net zero" emissionsby 2050.

• 86.
86. Energy andEmissions Projections are regularly published, which quantify thecontribution of policies and proposals to the reduction ofemissions and the achievement of the climate change targets in thelegislation, and enable the Government to monitor progress inmeeting the United Kingdom's carbon budgets.

• 87.
87. As Mr Mouldsubmitted, the statutory and policy arrangements we have described,while providing a clearstrategy for meeting carbon budgets and achieving the target of netzero emissions, leave the Government a good deal of latitude in theaction it takes to attain those objectives – in Mr Mould's words,"as part of an economy-wide transition". Likely increases inemissions resulting from the construction and operation of majornew infrastructure are considered under that strategy. But – againas Mr Mould put it – "it is the role of Government to determine howbest to make that transition".

• 88.
88. The DivisionalCourt saw the substance of ground 3b of the claim as being that thereview report, and in its turn the Government, "failed to address …the effect of the project on greenhouse gas emissions during theperiod leading up to 2050, and not just in 2050 and beyond, inaccordance with the Paris Agreement and the Climate Change Act2008" (paragraph 89(b) of the judgment). The complaint – as thecourt understood it – was that neither the report nor the decision dealt with"the importance of reducing the cumulative burden of carbonemissions in the period *leading up to* 2050", which is "not only referred to inthe Paris Agreement but also reflected in the setting of 5 yearlycarbon budgets for the period leading up to 2050 under Part 1 ofthe 2008 Act" (paragraph 100).

• 89.
89. The thrust ofMr Wolfe's argument, as the Divisional Court understood it, lay inits "considerable emphasis" on the decision of the Court of Appealin the Heathrow third runway case "where it was held (inter alia)that … the Government's policy commitment to revised climate changetargets in the Paris Agreement was an "obviously material"consideration which the Secretary of State had been obliged to takeinto account when he designated the Airports National PolicyStatement ["the ANPS"]" (paragraph 98). But in the court's view thecircumstances in that case were significantly different. There, the Secretary of Stateaccepted he had not had regard to the Paris Agreement at all,because it was not considered at that stage to be relevant. Andthe ANPSwas designated in June 2018, ayear before the Climate Change Act was amended to reflect the ParisAgreement, whereas the Oakervee report was launched and thedecision taken after that amendment had been made. And it wasaccepted that both the report and the decision to proceed with HS2took account of the Government's commitment, following the ParisAgreement, to a net zero target for 2050 (paragraph99).

• 90.

90. The DivisionalCourt's conclusions were firm (in paragraph 101):

"101. This point is wholly unarguable. Thepassages from the Report which we have previously set out make itplain that neither the OR nor the Defendants restricted themselvesto looking at the effect of the HS2 project on climate change in2050, or what Mr. Wolfe [Q.C.] referred to as a "spot measurementin the year 2050 itself" … . Instead, the Report considered theeffects of the project before and after 2050 resulting fromconstruction and the first 60 years of operation. The conclusionthat the project is "likely to be close to carbon neutral" relatesto that overall period, both before and after 2050. The ORconsidered that HS2 could be less carbon intensive than alternativeforms of transport used to manage increased demand for travel(5.32) and also that it would produce carbon savings during theoperational phase. It is obvious from the Report that theconstruction phase, which predates 2050, would increase carbonemissions during that period and that that effect is only off-setby carbon savings resulting from the operation of the scheme over along period of time. The decision made on 11 February[2020] cannot arguably be challenged on thegrounds of the "temporal" point advanced by Mr. WolfeQC."

• 91.

91. Mr Wolfe'sargument to us on this ground was that the review panel and the Governmentfailed to identify andassess how thesubstantial carbon emissions caused by the construction of HS2 inthe period before 2050, and not merely at that date, would affectthe United Kingdom's "legal commitments under the Paris Agreement",and the Secretary of State's duty to ensure that the United Kingdom's carbon budgetsunder section 4(1)(b) of the Climate Change Act were not exceeded.The United Kingdom was already struggling to meet those budgets. Inthe Committee on ClimateChange's report "Net Zero: The UK's contribution to stopping globalwarming", published in May 2019, it was noted that the fourth andfifth carbon budgets "were set on the path to the existing 80%target and therefore are likely to be too loose". The criticalpoint, submitted Mr Wolfe, was that the Government ought to haveconsidered the "legal implications" of the emissions generated inconstructing HS2, and not solely their "factual existence". The ParisAgreement was "obviously material" to this decision in the same wayas it had been to the designation of the ANPS in *Plan B Earth*. Yet the Government had not consideredthe obligations established by the Paris Agreement and the ClimateChange Act, and how the construction of HS2 would undermine them.To suggest that the implications of constructing HS2 for theGovernment's commitment to the reduction of carbon emissions in theperiod before 2050 were obvious to the Oakervee review panel,or to the Governmentitself, was, Mr Wolfe submitted, incorrect. The review report notedthat increases in emissions would occur in the construction period,but was silent on their legal consequences. In particular, it didnot explain, nor did the Government take into account, how theimpacts of HS2 on climate change would sit with the requirements ofthe Paris Agreement, and the domestic legal framework designed tocarry it into effect. The Divisional Court had not dealt withthis point.

• 92.

92. We reject thatargument. Like the submissions made on ground 2, it cannot bereconciled with the circumstances and remit of the Oakervee review,or with the relevant parts of the review report – especially thetext under the heading"Wider environmental considerations", in paragraphs 5.30 to 5.37,and Conclusion 5. It does not provide an arguable basis forupsetting the Government's decision. In our view it is impossible to infer fromthe report any failure by the panel to have regard to theGovernment's relevant statutory and policy commitments on climatechange. And the Government did not demonstrably commit any sucherror in making its decision. On this point too, we agree with theDivisional Court. Thereis nothing to show that the Government either ignored ormisunderstood the legal implications of proceeding with HS2 for itsobligations relating to climate change, including those arisingfrom the Paris Agreement and under the provisions of the ClimateChange Act.

• 93.

93. Two points maybe made at the outset. First, the Oakervee review was not anexercise compelled, or even provided for, in any legislationrelating to climate change, in any legislation relating to majorinfrastructure, or in any legislation at all. It finds no place inthe arrangements set in place by the Climate Change Act. Nor doesit belong to any other statutory scheme, such as thePlanning Act,in which the consequences ofmajor infrastructure development for climate change are explicitlyprovided for as a necessary feature of decision-making. The samegoes for the Government's own decision on the future ofHS2.

• 94.

94. Secondly, aswith the previous issue, we must pay attention to the review'sterms of reference, which, as we have said, were not the product ofany statutory duty or other legal requirement, but were drafted autonomously by theGovernment to indicate the matters on which it required advice inmaking its decision. We need not repeat what we have already saidabout that. But it is worth recalling here that in the terms ofreference the only mention of any consideration relating toclimate change is in connectionwith "environmental benefits" – namely, "in particular for carbonreduction in line with net zero commitments". This is not ashortcoming in the terms of reference, but merely a fact. TheGovernment was under no obligation, statutory or otherwise, toextend them by requiring a wider or deeper consideration of theconsequences for climate change of constructing and operating HS2,or by embracing, for example, the "legal implications" of increasesin carbon emissions caused by the construction of theproject.

• 95.

95. Turning to thecontent of the review report, we see no basis for the criticismlevelled at it by Mr Wolfe. It is clear – and Mr Wolfe does notdispute this – that the panel was well aware of the Government'sdetermination to adhere, and give effect, to provisions of theParis Agreement, which had by then been translated into domesticlegislation in the corresponding provisions of the Climate ChangeAct. The panel was also familiar with what this meant in practice,in the form of commitments with statutory backing behind them. Itreferred in paragraph 5.30 of the report to the Government having"committed to bring all greenhouse gas emissions to net zero by2050". That is clearly a reference to the Government's commitmentto the main aspirationof the Paris Agreement.

• 96.

96. In thefollowing paragraphs the panel did not neglect the period before2050. On the contrary, it took care to consider what would be happening inthe course ofthat period. It concentrated onemissions likely to be generated in the construction of HS2,which would be going on duringthose years. Itacknowledged that construction would inevitably produce high levels ofcarbon emissions, estimated at "around 0.1% of current UK emissionson an annual basis" (paragraph 5.31). It set that conclusionagainst the "carbon impacts" likely to result from the constructionand operation of "alternative transport schemes" with "similartransport outcomes" (paragraph 5.32). It referred to the "longerterm" potential of HS2 to promote "modal shift", but pointedout that "the whole railnetwork needs to be decarbonised if the government is to deliverits net zero target". It suggested that "HS2 should be consideredcarefully in the role it could play in helping meet this target"(paragraph 5.33). The conclusion was one of balance, "taking intoaccount both the construction and operation of HS2" – that "HS2 islikely to be carbon neutral …", and it was therefore "important forHS2 Ltd to continueto look for ways to bemore carbon efficient, particularly in construction in theshort-medium term" (paragraph 5.37). That analysis informed theadvice in Conclusion5. Here too the panelwas clearly thinking about the achievement of the Government's"2050 target", and how the "construction and delivery" ofHS2, both in Phase One and in Phase Two,could be managed "to reduce … forecast greenhouse gasemissions".

• 97.

97. Paragraphs5.31 and 5.37 in particular, and Conclusion 5, frankly acceptedthat the construction of the project would push up carbon emissionsfor much of the period before 2050. Unmistakably, they were writtenin the light of the Government's then current commitments in bothstatute and policy, embodying the essential principles of the ParisAgreement. As Mr Mould submitted, the discussion here issquarely in the context of the statutory and policyframework for the "progressive decarbonisation of the [national]economy" in the years leading to 2050. And we agree with Mr Mould'ssubmission that the review report did not, in law, have to doanything more than it did to enable the Government to understandthe likely consequences of constructing HS2 for the obligations andobjectives in that body of statute and policy.

• 98.

98. What then isthe basis for contending that the Oakervee review was under a legalduty to venture further than the panel did in considering theimplications of the Paris Agreement – having recognised thestatutory commitment to the target of "net zero" for all greenhousegas emissions by 2050 – and to explore the need to restrict theglobal increase in temperature by that year, and the pattern andextent of emissions during the period before? And what is the basisfor contending that the panel's approach was enough to invalidatethe Government's decision on the question of "whether and how" HS2should proceed?

• 99.

99. No support foreither of those propositions is to be found in the legal and policyframework within which the Government must act to achieve its owncommitments on climate change in the period before 2050. It is notto be found in any provision of the Climate Change Act; Mr Wolfedid not contend that it is. Nor does it come from any otherlegislation referred to in argument before us. No statement ofnational policy or guidance is said to provideit.

• 100.

100. Nor is thereany support in authority. We do not accept Mr Wolfe's submissionthat the circumstances here are comparable to those in the Heathrowthird runway proceedings (*Plan B Earth*), in which the Court of Appeal made a declaration that the designation ofthe ANPS was unlawful and would not have legal effect untilreviewed in accordance with the relevant provisions ofPlanning Act. Thecircumstances in which thiscourt found it necessary to grant relief in that case weresignificantly different.

• 101.

101. It should beremembered that in *Plan B Earth* relief was granted not merely on a singleground, but to remedy four distinct, though related, errors of law– each the subject of separate argument and separate considerationin the judgment of the court (see paragraphs 184 to 285 of thejudgment): first, that for the purposes of section 5(8) of thePlanning Act, the Government's commitment to the Paris Agreementconstituted "Government policy relating to the mitigation of, andadaptation to, climate change", which the Secretary of State wasrequired, under that specific provision of the Planning Act, totake into account (see paragraphs 222 to 233); secondly, that thedesignation of the ANPS was in any event unlawful because theSecretary of State acted in breach of section 10(3) of the PlanningAct, which required him, "in particular", to "have regard to thedesirability of … mitigating, and adapting to, climate change", inthat he failed to have regard – indeed, deliberately did not haveregard – to the Paris Agreement as an "obviously material"consideration (seeparagraphs 234 to 238);thirdly, that hebreached Annex 1 toDirective 2001/42/EC "on theassessment of the effects of certain plans and programmes on theenvironment" by failingto take into consideration the "objectives" of the Paris Agreementas an "international agreement" (see paragraphs 242 to 247); andfourthly, that he erred in his consideration ofnon-CO2 impacts and the effect of emissions beyond2050 (see paragraphs 248 to 261).

Each of the first three of thosefour grounds, at least, would have been enough on its own tojustify the relief granted by the court.

• 102.

102. Thus thecourt's conclusion on the section 10(3)(a) issue – holding that, inthe circumstances, the Paris Agreement as an unincorporatedinternational obligation was "so obviously material" that it had tobe taken into account in discharging the explicit requirement inthat provision of the statute – did not depend on the Government'scommitment to the Paris Agreement necessarily having the status of"Government policy" on climate change within the reach of section5(8). It simply dependedon that unincorporated international obligation, with its clearsignificance for the United Kingdom's responsibilities inmitigating and adapting to climate change, qualifying in thecontext of the provision in section 10(3)(a) as an "obviouslymaterial" consideration. It was not submitted, nor was it concludedby the court, that as an unincorporated international obligationthe Paris Agreement was automatically an "obviously material"consideration in any decision where the implications ofinfrastructure development for climate change were in issue, butonly that in principle it could be, and, given the specificstatutory 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 ofHurst)*v HMCoroner 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 thespeech of Lord Scarman in In re Findlay [1985] 1 A.C. 318 , at p.334, as "a correct statement ofprinciple"; and also the recent discussion of the relevant case lawin the judgment of Lord Carnwath in R. (on the application of Samuel SmithOld Brewery (Tadcaster)) v North Yorkshire CountyCouncil [2020] UKSC3 , at paragraphs 29 to 32).

• 103.

103. There arethree 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 wehave said of the grounds on which this court granted reliefin *Plan BEarth*, that case wasmarkedly different from this. In this case the decision under challenge was not taken under a statutory scheme inwhich the decision-making process is shaped as it is under theprovisions of the Planning Act governing the designation of anational policy statement, with specific duties such as those insections 5(8) and 10(3) – or under any statutory scheme. To makethe decision at all was itself a matter of free choice for theGovernment, as were the decision-making parameters themselves. TheGovernment was at liberty to select the issues on which it wishedto be advised by the Oakervee review, against the background ofHS2's evolution as a project, including the statutory approvalprocess. In doing so it was not constrained by the provisions ofthe Climate Change Act or by any policy of its own.Secondly, the advice the Government received inthe review report dealt amply with the implications of, and for,the United Kingdom's commitments on greenhouse gas emissions andclimate change following the Paris Agreement. In the context in which that advice wasgiven, it was legally impeccable. And thirdly, as Mr Mouldsubmitted, when in February 2020 the Government made its decisionto proceed with HS2 it can be taken to have been fully aware of theUnited Kingdom's commitments under the Paris Agreement, and its ownresponsibilities under the Climate Change Act, and to have takenthose commitments and responsibilities into account. There is noevidence to the contrary, and no basis for concluding thatany "obviously material"consideration was disregarded.

• 104.

104. We are notpersuaded that the Divisional Court failed to address the substanceof ground 3b. We agreewith the conclusions it reached. But we also reject the submissions made tous on this ground. Like those on ground 2, they do not amount to aviable argument that the Government's decision was irrational, orotherwise unlawful. We therefore conclude that the Divisional Courtwas also right to refuse permission on ground 3b.

properly arguable, and we therefore refusepermission to appeal and permission to apply for judicialreview.

Conclusion

2020 WL 04427078

• 105.

105. For thereasons we have given, we are not persuaded that either of thegrounds still pursued is