

R (North Warwickshire Borough Council) v Secretary of State for Transport [2026] EWCA Civ 832

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Introduction

The diverse litigation relating to the HS2 scheme from its inception persists. This appeal related to an alteration to the design of the HS2 plans, where a proposed 2.9 km extension to the Bromford Tunnel was found to not form part of the original planning permission granted, on the basis that the extension required an environmental impact assessment, and stand-alone planning permission. LJ Holgate gave the lead judgment in this appeal. LJ Holgate allowed the appeal on one of the grounds of appeal. The decision in this appeal was unanimous.

The Legal Backdrop

After diverse public scrutiny and litigation, the Birmingham to London leg of the HS2 scheme was granted planning permission in 2017. The HS2 project was authorised through The High Speed Rail (London-West Midlands) Act 2017, (“**the 2017 Act**”). The 2017 Act broadly made provision for the construction of a “*railway between Euston in London and a junction with the West Coast Main Line at Handsacre in Staffordshire, with a spur from Water Orton in Warwickshire to Curzon Street in Birmingham; and for connected purposes.*”¹

The works approved in the 2017 Act are set out in Schedule 1 to the 2017 Act, (the “**Scheduled Works**”). In summary, Section 1(1) of Schedule 1 of the 2017 Act imposes a mandatory obligation on the developer to conform with the Scheduled Works and approved plans; whilst Section 1(2) of the 2017 Act provides certain parameters for how much the construction and maintenance of the Scheduled Works can deviate from the plans approved by the 2017 Act.

¹ Introductory Text of the 2017 Act

Section 2 of the 2017 Act enables the developer to carry out a range of “non-scheduled works” without stipulating specific locations.

Section 20 of the 2017 Act is entitled ‘Deemed planning permission’ and sets out what the criteria is for a development that is deemed as being granted planning permission. One of the developments which is specified in 20(2)(c) as not coming within the criteria for being granted planning permission, is a development which *“is not covered by an environmental assessment in connection with the High Speed Rail (London - West Midlands) Bill.”*²

The works which were at the centre of the appeal are labelled: 3/157, 3/200 and 3/203 in the Scheduled Works. 3/157 relates to a viaduct and embankment in Water Orton, Birmingham, whilst the other two relate to the areas where the railway line would pass in specific areas. The length of the railway in each of these works is stipulated in the Scheduled Works.

In 2020, HS2 Limited altered the design plans so that Bromford Tunnel would be extended so in effect, the original length of the Bromford Tunnel would be doubled by the new plans, (the Bromford Tunnel Extension or “**BTE**”). HS2’s position was that the BTE came within the scope of Section 2 of the 2017 Act and therefore had deemed Planning Permission pursuant to Section 20 of the 2017 Act. HS2 then carried out environmental screening, concluding that it would not give rise to new or different significant environmental effects.

The Grounds of Appeal

The two grounds of appeal were as follows.

“Ground 1

The judge misconstrued s.2 of the 2017 Act. It does not authorise the construction and maintenance of the BTE.

Ground 2

*The judge misconstrued s.20(2)(c) of the 2017 Act so as to treat the proposed works as being “covered by an environmental assessment in connection with” the Bill where those works would have no new or different likely significant effects to those reported in the ES for the Bill. He therefore erred in holding that s.20(2)(c) did not apply to those works and that they had the benefit of the deemed planning permission in s.20(1) of the Act.”*³

² Section 20(2)(c) of the 2017 Act

³ Paragraph 23 of the Judgment

The High Court in its decision interpreted the 2017 Act in its context and in the light of its purpose, and came to the decision that a project as complex and large as the HS2 Scheme means that an element of ‘constrained flexibility’ is required in the works carried out and that the 2017 Act provided for this, and ultimately found that the BTE fell within s.2(1) of the 2017 Act.

On ground 2, the High Court interpreted the term “Covered by an environmental assessment” in 20(2)(c) by reference to the legal principles governing the operation of the Environmental Impact Assessment (“EIA”) regime, and found that works under s.2(1) “*will be within the scope of the project which has been the subject of Environmental Impact Assessment if they would not give rise to any likely significant effects greater than those which had been assessed in the environmental statement*”.⁴

The Court of Appeal were therefore, concerned with two issues of statutory construction:

- (1) Were the revised works authorised by the 2017 Act?
- (2) If they were so authorised, did those works have the benefit of the deemed planning permission granted by s.20(1) of the 2017 Act?

The Decision

On Ground 1, the Court found that Section 2(1)(i) is drafted in deliberately broad terms as to allow for the flexibility that is needed on a large infrastructure project like the HS2 scheme. The Court found that ‘non-scheduled works’ do not have to be ancillary to the scheduled works, and can still constitute substantial works. As such, the Court upheld the High Court’s decision on Ground 1, finding that the BTE and portal were authorised by the 2017 Act.

On Ground 2, the Court considered how the 2017 Act was enacted on the assumption that the development had undergone an EIA. The Court assessed the screening decision from the Secretary of State for Transport from March 2021, and highlight how the BTE at the eastern end in this decision, had been found to cause significant adverse environmental effects. This 2021 screening decision was then compared to the subsequent approach by the Secretary of State for Transport in their joint decision letter of 14 May 2024, which found that the BTE and portal would not give rise to new or different significant environmental effects.

⁴ Paragraph 49 of the High Court judgment: <https://d2nsgnsf036lw8.cloudfront.net/PDFs-documents-and-other-resources/Judgments-and-decisions/North-Warwickshire-Borough-Council-v-Secretary-of-State-for-Transport-Anor.pdf>

In assessing what ‘covered by’ in Section 20(2)(c) of the 2017 Act means, the Court analysed Section 68(4) and (5) of the 2017 Act which provide clarification on the interpretation of the term. Applying this interpretation to the facts, the Court ultimately found that the BTE and its portal were not “contained in” or “covered by” the environmental statements during the Parliamentary process.

The Court’s reasoning was that the Scheduled Works which had been granted planning permission had been subject to an EIA and Section 20(2) therefore, existed in the statute to ensure that non-scheduled works, such as the BTE and portal which fall into Section 20(2)(a) and (c) obtain planning permission and undergo an EIA. The Court clarified that *‘The test in s.20(2)(c) is not whether, if EIA were now to be carried out, the likely significant adverse environmental effects of that development would be no greater than, or no more harmful than, those assessed in the ES ‘(Environmental Statement)’ for the Bill for a different development of the same part of the project.’*⁵

The BTE and portal had not been subject to an EIA and did not form part of the Environmental Statement which was put before Parliament at the point the development was approved. For these reasons, the Court ultimately allowed the appeal on Ground 2. The Appellants did not seek a quashing order, but rather a declaration that the deemed planning permission provided for in the 2017 Act does not apply to the BTE and tunnel. This was duly granted by the Court.

Reflections

This appeal is somewhat very specific to the interpretation of the 2017 Act, but it does highlight that when developments are seeking to deviate from planning permission, that all commentary and specific references to the alternative design in all the documentation pertaining to the planning application and planning decision are carefully assessed prior to deciding on how to proceed. If there is a significant change in position or conclusion as to the environmental effects of an alteration in the design which was granted planning permission, then careful reasoning and justification for deviation, as well as consideration of the interplay with the EIA regime must be given due weight.

LJ Holgate and LJ King both allude to how the decision should not be “*seen as a means by which those who still object to the Phase One project may improperly seek to impede or materially delay its execution*”, which likely points to the wider objections around the HS2 development.

⁵ Paragraph 145 of the Judgment

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