

B E T W E E N

(1) HIGH SPEED TWO (HS2) LTD
(2) THE SECRETARY OF STATE FOR TRANSPORT

Claimants

-and-

PERSONS UNKNOWN and Others

Defendants

CLAIMANTS' SKELETON ARGUMENT IN REPLY ON A1P1

INTRODUCTION

1. The hearing of this Claim took place over 26th and 27th May. D6 indicated that he intended to make further written submissions on whether A1P1 was a right which the Claimants have, and if so, in what regard.
2. D6 has filed and served those submissions which argue:
 - a. HS2 Ltd is a core public authority, alternatively a hybrid public authority and a governmental organisation, being wholly owned by the Secretary of State and publically funded – see *Aston Cantlow*;
 - b. The burden lies on the Claimants to establish in law and in fact that they may rely on A1P1 rights;
 - c. So far as previous cases say otherwise, they are wrongly decided or distinguishable;
 - d. The exercise of CPO powers falls within '*functions of a public nature*';
 - e. Thus, neither Claimant may rely on A1P1 rights in support of the application.

3. We address each of these five points in turn. Before doing so, it is worthwhile to draw attention to the following points:
 - a. There is no claim by either Claimant to be ‘victim’ nor any claim under s7 Human Rights Act 1998;
 - b. The A1P1 point only arises in the context of proportionality and balancing such rights under Arts 10 and 11 as the defendants contend for;
 - c. D6’s case has focused on particular parts of the draft injunction order, particularly the prohibition in 3(b) [B/8/051] on standing etc. on the carriageway to impede free passage of vehicles and slow walking in front of vehicles;
 - d. The draft injunction order seeks prohibition of many other acts on HS2 Land, i.e. not at the gateways, but on land in HS2 Ltd’s possession;
 - e. The definitions of D(1), D(2), D(3), D(4) capture the different circumstances which pertain and which cause damage, delay and hinderance.
4. D6’s submissions do not differentiate as between these elements of the harms which the defendants cause and will continue to cause. However, it is necessary to be precise because it is HS2 Ltd’s case that Art 10 and 11 rights are not even arguably in play for D(1), D(2), and D(4). The A1P1 rights of the Claimants only become relevant in respect of protest on the public highway. So far as persons unknown are concerned, that falls within D(3).

SUBMISSIONS

[a] Public authority

5. The starting point is s6 of the Human Rights Act 1998, in particular:
 - (3) In this section “public authority” includes –
 - (a) a court or tribunal, and
 - (b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

6. The Claimant cites the very well-known domestic authorities on ‘public authority’. As will be submitted below, it does not advance the understanding of the issues on this point to examine those cases. This is because it is obvious that the Secretary of State is a public authority, and it is also obvious that HS2 Ltd has functions of a public nature. Indeed, that fact is an important part of the Claimants’ case for the injunction – the defendants are impeding and actively trying to stop a major piece of public infrastructure which the Claimants are charged with delivering at public expense.
7. What D6 does not grapple with, is how or why it is relevant that HS2 Ltd is a s6(3)(b) public authority (a hybrid public body in the language used in *Aston Cantlow*). D6 does not suggest that an act to protect its property rights is not an act of a private nature. Rather, D6’s arguments proceed on the basis that a s6(3)(b) public authority cannot rely on a convention right as a ‘victim’. That is not at issue in this case. The issue is whether a s6(3)(b) public body such as HS2 has A1P1 rights to be balanced against such rights as the defendants rely upon.
8. HS2 Ltd does not say that it is a ‘victim’ in convention terms. That is not HS2 Ltd’s case. HS2 Ltd’s case is in trespass and nuisance. It is the defendants who rely on their convention rights, particularly Arts 10 and 11¹. Evidently, the Court will: (1) decide whether and if so to what extent those rights are in play, and if so; (2) whether there would be an interference, and if so; (3) whether such interference is justified.

[b] Burden

9. There is no question of burden here. The Court’s task is as at paragraph 8 above, considering the basis of the draft injunction order which is sought and all of the evidence.

¹ There is a hint in D6’s skeleton that convention rights trump domestic rights in property (para 2(ii) as to the ‘elevated status of an ECHR right’). The point is not developed, so nothing further is said here save to deny that there is any such simple ranking.

[c] Case law

10. D6's submissions are silent on which cases are said to be wrongly decided or distinguishable. That hampers the Claimants in assisting the Court with a reply.

11. There are, however, examples of exactly the balancing of rights which the Claimants' contend for in other applications of this type, and over many years. So, in *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1012 (Ch), Arnold J, as he then was, accepted the submissions of Mr Fancourt QC, as he then was, that A1P1 rights went into the balance against Art 10/11 rights, at [22]:

"In those circumstances, it seems to me that the approach laid down by Lord Steyn where both Article 8 and Article 10 ECHR rights are involved in Re S [2004] UKHL 47, [2005] IAC 593 at [17] is applicable in the present case. Here we are concerned with a conflict between the ODA's rights under Article 1 of the First Protocol, and the protesters' rights under Articles 10 and 11. The correct approach, therefore, is as follows. First, neither the ODA's rights under Article 1 of the First Protocol, nor the protesters' rights under Articles 10 and 11 have precedence over each other. Secondly, where the values under the respective Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test, or ultimate balancing test, must be applied to each."

12. It is a simple point. If the Court is looking at human rights, it must look at all of the relevant rights, not some of them. That would be the opposite of a balancing test. In the ODA case, there was a s6(3)(b) public body which evidently had rights under A1P1, and they were considered in the context of the rights asserted by the defendants.

13. That is what should happen in this case, to the extent which is relevant to any particular part of the order which is sought.

14. There was nothing wrong with the judge's approach in that case. It is not distinguishable. There were protests against a large development project. Protestors wanted to stop it. They did so by obstructing access. There were significant costs and delays.

15. D6 submits (paragraph 16 of its skeleton argument) that a s6(3)(b) public body cannot rely on its own convention rights in the balance when assessing proportionality. This

submission is based on the tailpiece of paragraph 75 of *YL*. That bears some further examination:

- a. The Court of Appeal was there expressly at odds with Lord Nicholls in the *Aston Cantlow* case;
- b. The whole context of the discussion in paragraph 75 is reliance on convention rights as a ‘victim’, which is not at all the case here;
- c. Nothing in *YL* addresses the balancing exercise as between the relevant rights which arise in a particular case.

16. In addressing conflicting human rights, the academic writing makes clear that rights which pull in different directions are to be taken into account²:

“A similar task is the balancing exercise required in the reconciliation of conflicts between fundamental rights. Intrinsically this is no different from cases where an article allows for exceptions and the question is whether the exception outweighs the rule, for example where the right to a public hearing is negated by the interest of morals, public order etc, as there provided. But balancing becomes particularly difficult where the main thrust of different articles is in different directions”

17. Further, D6’s submissions fail to address *DPP v Cuciurean* [A/13/078 at [84]], despite the Court having been taken to it in detail in opening. To emphasise:

“Articles 10 and 11 were not the only Convention rights involved. A1P1 pulled in the opposite direction to articles 10 and 11. At the heart of A1P1 and section 68 is protection of the owner and occupier of the Land against interference with the right to possession and to make use of that land for lawful activities without disruption or obstruction.”

18. In short, there is nothing in the leading cases to indicate that a proper balancing exercise in this case requires the Court to leave rights out of account. On the contrary, there is recent highly persuasive authority which sets out in one sentence the obvious point that rights which pull in different directions must be assessed together.

19. All of that having been said, even if the Court does consider Art 10/11 to be engaged on some aspect of the proposed injunction order, the evidence is such that the outcome will be the same whether A1P1 rights are put into the balance or not. The Court is asked to

² *Wade & Forsyth Administrative Law* (Oxford; 11th Edition) at [151]

make that alternative finding and conclusion, not least because other judges have reached that conclusion without A1P1 being taken into account³.

[d] CPO powers

20. It is irrelevant that the Claimants exercise statutory powers to acquire some of the HS2 Land. In any event, much of the Pink Land has been acquired by private treaty. Further, there are many statutory provisions which enable non-public bodies to acquire land compulsorily (e.g. the regime under the Planning Act 2008 for development consent orders, i.e. to consent nationally significant infrastructure projects such as highways and power stations).

CONCLUSION

[e] The correct approach to A1P1 rights in this case

21. In this case, Arts 10 and 11 are not even arguably engaged in respect of the activity defined D(1), D(2), D(4). This because there is no freedom of forum: *DPP v Cuciurean* [A/13/078 at [76-77]].

22. That leaves the delay and disruption which is caused at the gates, on which the Court will: (1) decide whether and if so to what extent those rights are in play, and if so; (2) whether there would be an interference, and if so; (3) whether such interference is justified.

23. Further, and in the alternative, the A1P1 point does not matter. The result will be the same. The Court is asked to make that alternative finding.

**RICHARD KIMBLIN QC
SIONED DAVIES
No5 Chambers**

**MICHAEL FRY
JONATHAN WELCH
Francis Taylor Building**

31st May 2022

³ [2018] EWHC 1404 (Ch) – Barling J granting an interim injunction in respect of Harvil Road