Case No: CO/9812/012

Neutral Citation Number: [2012] EWHC 3743 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Bristol Civil Justice Centre
2, Redcliff Street
Bristol
BS1 6GR

Date: 21st December 2012

Before :

HIS HONOUR JUDGE DENYER Q.C.
(sitting as a Judge of the High Court)

Between :

MARIE HUGHES	**Claimant**
- and -	
THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
- and -	
SEDGEMOOR DISTRICT COUNCIL	**Interested Party**

Stephen Cottle (instructed by **South West Law**) for the **Claimant**
Gwion Lewis (instructed by **Treasury Solicitors**) for the **Defendant**
The Interested Party did not appear and was not represented

Hearing date: 12th November 2012

JUDGMENT

His Honour Judge Denyer Q.C.:

1. The Claimant occupies a plot of land at Yeo Moor Drove, Theale in Somerset. She lives there with her husband and small children. There is one other family living on the site. The Claimant's status as a traveller/gypsy is not in doubt. This status was accepted by the inspector. Although there is no formal plan of the site, there is a sketch at page 228 of the bundle. Putting it simply, the site is just off Yeo Moor Drove. When you come out of the site onto the Drove you turn right. After about 300 yards you arrive at the junction with the B3139 road.

2. The Claimant and her family went onto the land in April 2009. In May 2009 the second Defendant district council served an enforcement notice requiring that the site be vacated. A planning application and an appeal against the enforcement notice was launched by the Claimant. This was dismissed in January 2010. In May 2011 there was a further planning application. This was a slightly revised version of the scheme already rejected. On 7th September 2011 the second Defendant local authority refused the application. This led to an appeal to the Secretary of State pursuant to Section 78 of the Town and Country Planning Act 1990 (the Act). A hearing was then held which took place over a period of five days in 2012. On 7th August 2012 the planning inspector issued his decision. He refused the application. The matter comes before me as an application to review pursuant to Section 288 of the Act. The relevant parts of that Section are as follows -

> "(1) If any person –
>
> (b) is aggrieved by any action on the part of the Secretary of State to which this Section applies and wishes to question the validity of that action … he may make an application to the High Court under this Section
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> (5) On any application under this Section the High Court –
>
> (b) if satisfied that the order or action in question is not within the powers of the Act or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

The approach that a reviewing court must take to such an application in respect of planning matters is set out in the speech of Lord Hoffman in **Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759** at page 780 when he said –

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into

Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision making process. This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

3. The decision of the inspector is to be found between pages 21 and 33 of the bundle. His final assessment is set out between paragraphs 71 and 80 of his letter. In short form his findings are as follows –

> "71. Given the lifestyle of those occupying the site the provisions of the PPTS and local policies on gypsy and traveller sites are applicable in this case. These provisions do not rule out a countryside location and this is a sustainable site. However account should be taken of the serious detriment that would be caused to the character and appearance of the area.
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> 72. A further weighty factor against the proposal is the serious deficiency in the access from Yeo Moor Drove onto the B3139 given the lack of control over the sightline to the east.
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> 74. I consider that in relation to a permanent permission, the substantial harm identified outweighs those factors advanced to support the proposal.
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> 78. I do not come to such a view lightly. I recognise that dismissing the appeal ... would be likely to result in an interference with the home and family life of those on the site ... likewise, whilst I acknowledge the need to take into account the best interests of children and to prevent disruption to their education, such matters also need to be balanced against the harm that would arise from allowing this appeal."

4. The Grounds of Appeal are set out between pages 3 to 8 of the bundle. I hope I do the argument no disservice if I summarise it as follows. It is accepted that the finding that the site would have a detrimental effect on the visual amenity of the area is not a finding which is open to challenge and was certainly a finding that the inspector was entitled to make and to take into account. But, it was only one factor. The finding in respect of the visibility at the junction (the Section 79 argument) was at its best a very weak finding (and probably wrong) such that when set aside the requirement to have regard to the best interests of the children, it should either have been disregarded or at the very least regarded as comprehensively outweighed by the "best interests" argument.

Was the Section 79 argument "weak"?

5. Section 79 of the Highways Act 1980 is in these terms –

> "(1) Where, in the case of a highway maintainable at the public expense, the highway authority for the highway deem it necessary for the prevention of danger arising from obstruction to the view of persons using the highway to impose restrictions with respect to any land at or near any corner or bend in the highway or any junction of the highway with a road to which the public has access, the authority may, … serve a notice, together with a plan showing the land to which the notice relates –
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> (a) on the owner or occupier of the land, directing him to alter any wall, fence, hoarding, tree, shrub or other vegetation on the land so as to cause it to conform with any requirement specified in the notice.
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> (7) A person on whom a notice has been served under subsection (1) may, within 14 days from the date of the receipt of the notice by him, give notice to the authority by whom the notice was given objecting to any requirement specified in it or to any restriction imposed by it and stating reasons for his objections.
>
> (8) Where notice is given under subsection (7) above the question whether the notice under subsection (1) above is to be withdrawn as respects any requirement or restriction objected to shall be determined, if the parties so agree, by a single arbitrator appointed by them and, in default of agreement, shall be determined by a County Court".

At the hearing in front of the inspector, so far as highway matters were concerned, the Claimant relied upon the evidence of a highway expert, Mr Jeremy Hurlstone. His evidence is set out between pages 83 to 150 of the bundle. It is said that currently the junction has a just satisfactory sightline to the left. On the basis of the evidence of Mr Hurlstone, even if the area of land to the left did become overgrown with shrubs and the like, in reality the junction would still be safe. This assertion derives from paragraphs 2.28, 2.29 and 2.30 of the Hurlstone report. These are to be found at page 89 of the bundle.

> "2.28 In terms of highway design MFS2 (Manual for Streets) is critical of the approach of some practitioners at paragraphs 3.2.1 which states
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> *'For some time there have been concerns expressed over designers slavishly adhering to guidance regardless of local context … designers are expected to use their professional judgment when designing schemes and should not be over-reliant on guidance … available guidance is just that, guidance, and cannot be expected to cover the precise conditions and circumstances applying at the site under examination … it would be neither reasonable nor rational to*

presume that anyone could produce an optimal design in abstract. The informed judgment of trained professionals on site should logically take precedence over guidance.'

2.29 As is clear MFS2 seeks to steer away from the slavish adherence to guidance and encourages practitioners to think about the circumstances of the case. A clear example of the MFS2 approach is provided at paragraph 10.4.2 which states

'It has often been assumed that a failure to provide this ability at priority junctions in accordance with the values recommended in MFS will result in an increased risk of injury collisions. Research carried out has found no evidence of this ... the Y distance should be based on the recommended SSD values. However, based on the research referred to above, unless there is local evidence to the contrary, a reduction in visibility will not necessarily lead to a significant problem.'

2.30 It is therefore clear that the guidance should be the starting point but a full assessment of the circumstances should be carried out including a review of the safety performance of a network."

At page 101, in paragraph 2.3 Mr Hurlstone sets out the visibility available to the left at the left at the junction. The conclusion of Mr Hurlstone is expressed in paragraph 2.25 (page 105) as follows –

"Having considered the foregoing it is apparent that the achievable visibility meets and exceeds the appropriate standards to the left and right for emerging drivers and also the forward visibility requirement towards emerging vehicles from Yeo Moor Drove along Wells Road from both directions. Therefore based on current national design guidance the visibility at the junction is clearly acceptable and should not be justification for refusing planning permission."

The inspector dealt with this evidence and these arguments between paragraphs 25 through to 42 of his letter. I do not intend reciting all of those paragraphs. The crucial findings are set out in paragraphs 33 and 34 –

"33. However, the available sightlines referred to by the Appellant are dependent upon views being obtained over a cottage garden to the left of the access. This garden is at the height of the 0.9 metre high retaining wall. Currently such views are obtainable. However, this is dependent upon views across a well-mown lawn. The Appellant has no control over this area. Although the wall may have been lowered at some time to facilitate this visibility, no evidence has been provided to show that there is an enforceable condition on a planning permission to maintain sightlines over the garden. Given the height of the garden if it became unkempt or even fairly low level shrub or flower planting took place, this visibility could be so severely restricted that only minimal sightlines would be available. I do not consider that such a possibility should be ruled out even

though the occupier of the site may be a user of the access. I appreciate that a driver would be able to edge out to get a better view. However, given the degree to which this could result in an incursion into the carriageway, this would carry its own dangers.

34. The Appellant says that the highway authority has power under Section 79 of the Highways Act 1980 to prevent an obstruction to visibility. This Section of the Act enables a notice to be served on an owner to restrain them from causing or permitting any tree, shrub or vegetation being planted on the land. However, that imposes a substantial burden upon the council to enforce and I have been informed of no example of that Section of the Act being applied. Moreover, those served with the notice may object to it. The objection may be determined by an arbitrator or, in default of an agreement, by the County Court. The outcome of that cannot be guaranteed. I consider it unwise therefore, to rely upon powers under Section 79 of the Highways Act 1980 to ensure satisfactory visibility. In my experience visibility splays generally need to be over highway land or in some way governed by planning conditions to be regarded as effective."

In my view the inspector was entitled to take a conservative approach. He was not obliged to adopt the bold philosophy argued for by the expert for the Appellant. I do not believe that his interpretation of Section 79 is really open to challenge nor that he can be criticised for taking the view that it would be unwise to rely upon the Section 79 power. The Section does provide and require the serving of a notice. It also provides for an appeal to the County Court. It cannot simply be assumed that the County Court Judge would "rubber stamp" the view of the local authority. To conclude otherwise amounts to saying that the appeal process is meaningless. In my view he was entitled to conclude that the local authority did not have sufficient control over the land at the left of the junction to ensure that adequate sightlines would be maintained by which I mean sightlines which complied with relevant guidance and which are essential for ensuring safety at road junctions. In other words this was not a "weak" finding.

6. It is clear that at the hearing the provisions of Section 154 of the Highways Act 1980 were drawn to the attention of the inspector. The relevant parts of Section 154 are as follows –

"(1) Where a hedge, tree or shrub overhangs a highway or any other road or footpath to which the public has access so as to endanger or obstruct the passage of vehicles or pedestrians or obstructs or interferes with the view of drivers of vehicles ... a competent authority may, by notice either to the owner ... or to the occupier of the land on which it is growing, require him within 14 days from the date of service of the notice so to lop or cut it as to remove the cause of the danger, obstruction or interference.

(3) A person aggrieved by a requirement under subsection (1) may appeal to a Magistrates' Court."

It is a legitimate criticism that is made by the Claimant that the inspector does not deal with this provision in terms in his decision letter. The position of the Secretary of State in relation to this omission is that having regard to the approach which the inspector adopted to the Section 79 argument, he would inevitably have taken the same or a similar approach to this Section. In that respect reliance is placed upon Bolton Metropolitan Borough Council v Secretary of State for the Environment [1990] 61 P & CR 343 and the statement of principles by Glidewell LJ at page 352 and 353 of the judgment. The relevant passages read –

> "2 The decision maker ought to take into account a matter which might cause him to reach a different conclusion to that which he would reach if he did not take it into account. Such a matter is relevant to his decision making process. By the verb might, I mean where there is a real possibility that he would reach a different conclusion if he did take that consideration into account.
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> 3 If a matter is trivial or of small importance in relation to the particular decision then it follows that if it were taken into account there would be a real possibility that it would make no difference to the decision and thus is not a matter which the decision maker ought to take into account.
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> 4 There is clearly a distinction between matters which a decision maker is obliged by statute to take into account and those where the obligation to take into account is to be implied from the nature of the decision and of the matter in question.
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> 5 If the validity of the decision is challenged on the ground that the decision maker failed to take into account a matter in the second category, it is for the judge to decide whether it was a matter which the decision maker should have taken into account.
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> 6 ... but if the judge is uncertain whether the matter would have had this effect or was of such importance in the decision making process, then he does not have before him the material necessary for him to conclude that the decision was invalid"

I think it highly probable that the inspector would have approached this Section in precisely the same way that he approached Section 79. Again, there is no guarantee as to outcome and again the local authority have no control over that outcome. The person affected may appeal to the Magistrates' Court (by inference he could then appeal from there to the Crown Court). In other words reliance on Section 154 is open to precisely the same objections as reliance upon Section 79. Although therefore it would have been better if the inspector had specifically referred to the Section I do not believe that this omission can really be regarded as having any real significance so far as his decision is concerned. His decision would have been the same.

7. ZH (Tanzania) v Secretary of State for the Home Department [2011] 2 AC 166 deals with the question of the importance to be attached to the best interests of

the children of the applicant. At paragraph 26 of her judgment, Baroness Hale says –

> "That does not mean that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing therefore is to consider those best interests first."

In my view, it is important not to construe the word used in a judgment as if it were a statute. The question is whether in substance the inspector accorded primacy to the rights of the children but balancing those rights against the other factors which he found he concluded that permission should not be given. It seems clear to me that the inspector had very much in mind the family situation of the Claimant. In this connection it is worth simply setting out the various paragraph numbers in which the position of the family and the children is mentioned or considered. Those paragraphs are 8, 9, 11, 54, 68, 69 and 70. I note in particular paragraphs 68 and 69 –

> "68. I have referred above to the two families that live on the site. The daughter of the Attwell's is 6 years old and Mrs Attwell is shortly expecting another child. The Hughes children are aged between 6 years and 9 months. The two eldest children attend Wedmore First School. The middle child in the Hughes family goes to Wedmore Playgroup and will transfer to the First School in September this year.
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> 69. The Attwell's baby daughter has significant health problems. A consultant paediatrician says that they are such as to cause potential long-term health problems and that a suitable home and stable home life will be crucial for coordinating her care. One of the adults on the site has suffered from anxiety and depression due to concerns over the possibility of being evicted from the site."

I have already at the beginning of this judgment set out his conclusion in respect of the rights of the children as set out in paragraph 78 of his judgment. I note the decision in Collins v Secretary of State for Communities and Local Government [2012] EWHC 2760 (Admin) and the observation of the learned judge at paragraph 25 when he said "I do not accept that the failure explicitly to identify the interests of the children as being a primary consideration is material. The issue is whether as a matter of substance that was the approach of the decision maker." That is a view to which I adhere.

8. It is submitted that even if the inspector was correct in his reasoning in terms of rejecting the application for a permanent permission he should nevertheless have considered and indeed granted a temporary permission. The inspector was of the view that it was within his powers to grant a temporary permission – see paragraph 76 at page 32 of the bundle. He went on to say at paragraph 77 –

"Had the harm found been limited to the effect on the character and appearance of the area a temporary permission may well have been justified given the needs and personal circumstances of those on the site and the lack of alternative accommodation. However, even a temporary permission of between the three to five years proposed, would potentially expose site users and others on the public highway to hazards over that period and the risk is too great."

He goes on to say -

"80. The harm that I have found would be considerable even were a temporary permission granted. It is right to prevent such harm in the wider public interest and the legitimate aims of protecting that wider public interest can only be adequately safeguarded by dismissing the appeal."

I remind myself that the test is not whether if I had been the inspector I would or would not have granted a temporary permission. The test is whether the reasons relied upon by the inspector are legitimate reasons upon which it was proper for him to rely. He of course relies upon the same matter as he relied upon in refusing the application for a permanent planning permission. His conclusions as set out in paragraphs 77 and 78 above seem to me to be conclusions that were properly open to him.

9. I conclude therefore that there has been no failure on the part of the inspector to comply with any of his obligations pursuant to the Act. He was entitled to conclude that the objections both in terms of amenity (effects on the landscape) and traffic were of sufficient importance to outweigh the best interests of the children and justify his refusal of planning permission.

HIS HONOUR JUDGE DENYER QC

DESIGNATED CIVIL JUDGE FOR BRISTOL