Neutral Citation Number: [2016] EWHC 200 (Admin)

Case No: CO/4106/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09 February 2016

Before :

HIS HONOUR JUDGE SYCAMORE
(Sitting as a Judge of the High Court)

- -

Between :

THURROCK BOROUGH COUNCIL	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT	**Defendants**
(2) ROBERT WARD	

- -
- -

Mr Stephen Whale (instructed by Sharpe Pritchard) for the **Claimant**
Mr David Blundell (instructed by Government Legal Department) for the **1st Defendant**
Mr Marc Willers QC and **Miss Justine Compton** (instructed by South West Law) for the **2nd Defendant**
Hearing date: 26 January 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE SYCAMORE

HIS HONOUR JUDGE SYCAMORE :

1. This is an application by the claimant council under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") to quash the decision of an Inspector contained in a decision letter of the 16 July 2015 ("DL") allowing an appeal and granting permission for development at Manor View, Southend Road, Corringham, Essex SS17 9EY ("the site").

2. The factual background is not in dispute. The second defendant and his family are Irish Travellers. On 7 January 2014 the second defendant applied to the claimant for planning permission for the change of use of the site, for a temporary period of five years, to a four pitch gypsy and traveller residential site, including the development of 3 day rooms, a stable/day room block and the siting of up to 8 caravans, of which no more than 4 would be mobile homes. The claimant refused the application on 20 March 2014. The second defendant appealed under section 78 of the 1990 Act and the inquiry procedure was adopted. The inquiry was held on 20 – 22 January 2015 and included a site visit on 22 January 2015. A number of matters were agreed at the inquiry. In particular:

   i) That contrary to paragraph 9 of the Planning Policy for Traveller Sites ("PPTS") the claimant could not demonstrate a five year supply of deliverable sites.

      DL12:

      "…. It is an agreed matter that the Council cannot demonstrate a five year supply of deliverable sites ….".

   ii) That there was significant unmet need for pitches both over the next five year period and into the future.

      DL9:

      "On this basis I am satisfied that there is a substantial proven need for gypsy and traveller pitches within the Borough. This overall point is a matter of agreement between the parties".

      DL43:

      "…. The Council acknowledge through the head-line figure of the September 2014 updated GTAA, that there is a significant unmet need for pitches both over the next 5 years and into the future ….".

   iii) That substantial weight should be attached to the unmet need within the Borough.

      DL43:

      "…. Consequently the Council acknowledge that substantial weight should be attached to the unmet need within the Borough ….".

3. As to the legal framework, so far as is relevant, section 288 of the 1990 Act provides that:

> "(1) If any person –
>
> ...
>
> (b) is aggrieved by any action of the part of the Secretary of State to which this section applies and wishes to question the validity of that action, on the grounds –
>
> (i) that the action is not within the powers of this Act, or
>
> (ii) that any of the any of the relevant requirements have not been complied with in relation to that action,".

4. As has been said on many occasions, see for example R (Newsmith Stainless Limited) v Secretary of State for the Environment Transport and the Regions [2001] EWHC (Admin) 74 per Sullivan J, as he then was, an application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision. The grounds upon which a court may interfere with an Inspector's decision are the conventional grounds for judicial review.

5. In Bloor Homes East Midlands Limited v Secretary of State [2014] EWHC 754 (Admin) Lindblom J, as he then was, set out the relevant legal principles applying to the consideration of decision letters at paragraph 19 as follows:

> "19. The relevant law is not controversial. It comprises seven familiar principles:
>
> (1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28).
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every

material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 W.L.R. 1953, at p.1964B-G).

(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for [the Environment, Transport and the Regions]* [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] P.T.S.R. 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment* (1993) 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).

> (7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P. & C.R. 137, at p.145)."

As to the relevant policy framework this can be found in the National Planning Policy Framework 2012 ("NPPF") which provides so far as is relevant that:

> "79 The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.
>
> 80 Green Belt serves five purposes:
>
> - to check the unrestricted sprawl of large built-up areas;
> - to prevent neighbouring towns merging into one another;
> - to assist in safeguarding the countryside from encroachment;
> - to preserve the setting and special character of historic towns; and
> - to assist in urban regeneration, by encouraging the recycling of derelict and other urban land.
>
> 87 As with previous Green Belt policy, inappropriate development, is by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 88 When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. "Very special circumstances" will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations".

6. The claimant's grounds of challenge as set out in the claim form are as follows:

Ground 1: Weight to Green Belt harm

(15) Paragraph 88 of the National Planning Policy Framework ("NPPF") directs that local planning authorities (and, by extension, Inspectors determining section 78 appeals) should "ensure that substantial weight is given to any harm to the Green Belt."

(16) The Inspector in this case found in paragraph 28 of the Appeal Decision that the proposed development would cause limited and not permanent harm in terms of both a loss of openness in the Green Belt *and* encroachment upon the countryside in conflict with the purposes of including land in the Green Belt.

(17) However, in terms of these harms the Inspector in paragraph 28 expressly attributed only "some weight" to them against the appeal. In so doing, the Inspector erred in law in that (*viz* paragraph 88 of the NPPF) she was obliged to ensure that these harms to the Green Belt were given substantial weight.

Ground 2: Failure to take into consideration conflict with Green Belt purpose

(18) As recorded above, the Inspector made a discrete finding of conflict with one of the purposes of including land in the Green Belt (being the third of the five purposes in NPPF paragraph 80).

(19) However, it is clear from paragraph 61 of the Appeal Decision that the Inspector failed to take into account this consideration in terms of overall conclusion and balance. The Inspector therefore erred in law.

Ground 3: Very special circumstances

(20) Very special circumstances are an outcome: they are not something to be weighed in the balance. Very special circumstances will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.

(21) The Inspector erred in law by applying the wrong test in paragraph 66 of the Appeal Decision. First, the Inspector wrongly treated very special circumstances as something to be weighed in the balance. Second, the Inspector wrongly applied a test of "outweigh" rather than "clearly outweigh". Third, the Inspector wrongly applied a test of "outweigh the harm to the

> Green Belt" rather than "clearly outweigh the harm to the Green Belt, and any other harm."

I deal with each of the grounds in turn.

Ground 1

7. The claimant complains that the Inspector erred in law. The focus of the criticism is that the claimant maintains that the Inspector failed to attribute substantial weight to the harm arising from the proposed development in terms of loss of openness in the Green Belt and encroaching upon the countryside in conflict with the stated purposes of including land within the Green Belt (see NPPF). In support of this the claimant relies on DL28 where the Inspector said:

> ".... The harm would be limited and not permanent, but nevertheless carry some weight against the appeal, adding appreciably to the substantial harm by reason of inappropriateness."

8. In my judgment it is inappropriate to read that, or indeed any part of the decision letter, in isolation. It is necessary to read the decision letter as a whole (see Bloor Homes) and Clarke Homes Limited v Secretary of State for the Environment (1993) 66 P and CR 263 per Sir Thomas Bingham MR at 271 – 272:

> "... this is an issue to be resolved as the parties agree on a straight forward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication ...."

9. Looking at the decision letter as a whole therefore it can be seen that the Inspector did not misapply the policy test set out at paragraph 88 of the NPPF.

10. At DL4, the Inspector having referred to the NPPF went on to say:

> "very special circumstances will not exist unless the harm by reason of inappropriateness and any other harm is clearly outweighed by other considerations."

At a later stage of the decision letter described as **"Inspector's overall conclusion and balance"** in which the Inspector set out her overall conclusions on the case the Inspector said:

> "There is definitional harm to the Green Belt arising from inappropriate development. Additional harm arises from erosion to openness which is an essential characteristic of Green Belts. Substantial weight should be given to any harm to the Green Belt ...." (DL61)

And

> "On one side of the balance is the substantial harm to the Green Belt caused by inappropriateness and to openness ...." (DL65)

And

> "These identified factors individually carry between them considerable and substantial weight. However, in combination, and with particular reference to the substantial weight ascribed to the specific personal circumstances of the appellant and his family ...." (DL66)

11. In my judgment the Inspector at DL4 set out the correct policy test and went on to correctly self direct herself on national policy at paragraphs 61 to 66 in her "**overall conclusion and balance**".

12. Having correctly directed herself as to the policy test and repeated that direction in the later stages of her decision letter I consider that there is no evidential basis for concluding that the Inspector failed to apply the correct test in her decision letter. It is inherently unlikely that she would have done so having correctly stated the legal test.

13. Thus reading the decision letter as a whole and in particular the correct self direction at paragraph 4 and avoiding an over sophisticated reading of the decision letter, I conclude that there is no merit in Ground 1.

Ground 2

14. The criticism by the claimant is essentially that the Inspector failed to have regard to encroachment on the countryside in her overall conclusion and balance (see NPPF 80). In particular the claimant points to the Inspector's finding of conflict with one of the purposes of including land in the Green Belt (that being the third of the five purposes at paragraph 80 of the NPPF). The thrust of the claimant's criticism arises from the fact that the Inspector did not mention "encroachment" at DL61, DL65 or DL footnote 42.

15. Once again in my judgment, it is necessary, for the reasons that I have already explained, to read the decision letter as a whole and in a reasonably flexible manner. What is clear is that notwithstanding the omission referred to above at DL28 the Inspector found as follows:

> "... In such circumstances the gypsy and travellers site would cause a loss of openness in the Green Belt, temporarily encroaching upon the countryside in conflict with the purposes of including land in the Green Belt ...."

In so finding the Inspector identified the loss of openness with encroachment.

At DL61 whilst the Inspector did not make any express reference to "encroachment" she did say this:

> "There is definitional harm to the Green Belt arising from inappropriate development. Additional harm arises from erosion to openness ...." (DL61)

16. The Inspector was clearly aware of the relevance of encroachment, which as I have already observed, by definition leads to a loss of openness. It is necessary to avoid

over analysis of the decision letter. I regard it as unrealistic to consider that the Inspector would have failed to take it into account having correctly identified it and directed herself at paragraph 28. In my judgment there is no merit in this ground.

Ground 3

17. Essentially the claimant suggests that the Inspector applied the wrong test in respect of the "very special circumstances" at DL66 which, in turn, needs to be read with DL65.

DL65:

> "On one side of the balance is the substantial harm to the Green Belt caused by inappropriateness and to openness. Whilst on the other, weighing in favour of the proposal in combination are the following factors:
>
> - The temporary nature of the appeal proposal;
> - Significant unmet need for pitches;
> - The lack of a 5 year land supply for gypsy and traveller accommodation;
> - Material failure of policy;
> - Lack of surety of when these above factors may be resolved;
> - Lack of available, affordable, acceptable and suitable alternative pitches;
> - Acknowledgement that future pitches may be provided in the Green Belt;
> - The enhancement of the environment by means of landscaping;
> - The lack of material harm[42] resulting from the posed temporary change of use upon matters of acknowledged importance;
> - Specific personal circumstances of the appellant and his family;
> - The family's human rights after being balanced against the wider public interest; and
> - The best interests of the children[43]."

[42] Notwithstanding the harm by reason of inappropriateness and on the openness of the Green Belt

DL66:

> "These identified factors individually carry between them considerable and substantial weight. However, in combination, and with particular reference to the substantial weight ascribed to the specific personal circumstances of the appellant and his family, taking into account their human rights and the best interest[44] of the children, these amount to very special circumstances which outweigh the harm to the Green Belt in the context of this temporary proposal. Consequently the appeal is allowed."

18. The claimant relied on three reasons which were set out in the skeleton argument:

i) The Inspector treated very special circumstances as something to be weighed in the balance.

ii) The Inspector applied a test of "outweigh" rather than "clearly outweigh".

iii) The Inspector applied a test of "outweigh the harm to the Green Belt" rather than "clearly outweigh the harm to the Green Belt and any other harm".

19. Once again it is necessary to look at the decision letter as a whole and consider whether the Inspector did correctly self direct herself on the applicable policy. It is necessary to look again at DL4:

> "... very special circumstances will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations ...."

And DL61:

> "..... The very special circumstances needed to justify development that is harmful to the Green Belt, and any other harm, will not exist unless that harm is clearly outweighed by other considerations".

Against that background I would find it inherently unlikely that the Inspector would go on to misapply the law having correctly directed herself.

20. It also needs to be recognised that at paragraph 65, before considering the identified factors, the Inspector correctly applied the test stating:

> "On the one side of the balance is the substantial harm to the Green Belt caused by inappropriateness and to openness. Whilst on the other, weighing in favour of the proposal in combination are the following factors ...."

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[43] Rights of the child
[44] As a primary consideration

The Inspector was thus carrying out the balancing exercise to establish whether very special circumstances did exist.

21. It thus follows that very special circumstances were not in the balancing exercise which the Inspector carried out. It is the case that the word "clearly" did not precede "outweigh" in paragraph 66 but, as I have indicated, looking at the decision letter as a whole and avoiding a consideration of paragraph 66 in isolation I form the view that there is no merit in this ground. There is no evidence to support the view that the Inspector made an error when she had clearly directed herself as to the correct test of "clearly outweigh" at DL61 and DL4. In reaching this conclusion I have reminded myself of what was said by Sir John Dyson JSC, as he then was, in MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49 at paragraph 46:

> "…. If, as occurred in this case, a tribunal articulates a self direction and does so correctly, the reviewing court should be slow to find that it has failed to apply the direction in accordance with its terms. All the more so where the effect of the failure to apply the direction is that the tribunal will be found to have done precisely the opposite of what it said it was going to do".

22. In all of those circumstances it follows that there are no grounds upon which to quash the decision and the application is dismissed.