Neutral Citation Number: [2018] EWHC 3402 (Admin)

Case Nos: CO/374/2018 and CO/378/2018

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2019

Before :

MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL (SITTING AS A JUDGE OF THE HIGH COURT)

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Between :

SWALE BOROUGH COUNCIL	**Claimant**
- and -	
SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT	**1st Defendant**
-and –	
MR S MAUGHAN and Others	**2nd Defendant**

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Mr Stephen Whale (instructed by **Sharpe Pritchard LLP**) for the **Claimant**
Mr Richard Honey (instructed by **Government Legal Department**) for the **1st Defendant**
Mr Alan Masters (instructed by **Minton Morrill Solicitors**) for the **2nd Defendant**

Hearing date: 3 October 2018

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Approved Judgment

C. M. G. Ockelton :

1. These proceedings are, respectively, an application for statutory review under section 288 of the Town and Country Planning Act 1990 and an appeal under section 289 of the same Act. Permission in relation to both was granted, by myself as it happens, following a hearing on 8 March 2018. I take the factual background from the permission judgment.

2. On the west side of Spade Lane, Hartlip, Kent ME9 7TT is an area of former pasture land, surrounded by open country, largely in agricultural use. In 2013 there was an application for planning permission for change of use to accommodate two travellers' pitches. That application was refused, and the refusal was confirmed by a planning inspector on appeal. In April 2016 the land was sold to Mr Maughan, one of the present defendants. Soon afterwards, Swale Borough Council, the local planning authority, became aware that there was a proposal to build an access road to and within the site, and to use it for a number of travellers' pitches. Despite orders of the Court, Mr Maughan and a number of other persons moved onto the site with their families in the summer of 2016. There was a further injunction, the effect of which was suspended on condition that the occupiers of the land submitted an application for retrospective planning permission. On 15 November 2016 the application for planning permission was refused, and an enforcement notice was issued, served on 20 named individuals and, in addition, generally on the "owner(s), occupier(s) and any other person with an interest in the land". Mr Maughan and seven others appealed against the enforcement notice. Two of the appeals (by Mr Maughan and Mr F Mongen) were on the grounds set out in section 174(2)(a), (f) and (g) of the Town & Country Planning Act 1990 (as amended); the other appeals were on grounds (f) and (g) only. There was a further appeal by Mr Maughan only, against the refusal to grant planning permission. The inspector, Paul Dignan MSc PhD made a site visit and held a hearing on 31 October 2017. His decision is dated 15 December 2017.

3. The inspector allowed the first two appeals on ground (a), that is to say he found that planning permission should be granted for the development that had actually taken place by the constitution of the eight traveller pitches, including caravans, and the access road. The planning permission he granted was temporary, for a period of 3 years, and was subject to a number of conditions. He dismissed the appeal against the refusal of planning permission: the permission applied for was for a more intense development, including 8 further buildings, which the inspector was not persuaded was appropriate. He took no further action on the appeals raised on grounds (f) and (g) only, because the grant of planning permission entailed the quashing of the enforcement notice.

4. Swale Borough Council (the Council) filed these proceedings on 25 January 2018. Claim CO/374/2018 is an application for statutory review under section 288; claim CO/378/2018 is the Council's appeal under section 289 against the inspector's decision in relation to the enforcement notice. The permission stage of the former having been ordered into Court by Holgate J, in order to enable the two claims to be considered together, permission was granted, by myself as it happens, following a hearing on 8 March 2018.

The Issue

5. In his decision, the inspector concisely reviewed a considerable amount of material, reaching a number of conclusions that are not challenged, in particular, the harm to the local character of the site, the fact that the development would be contrary to the local development plan, the loss of grade 1 agricultural land, and the fact that the individuals living there had intentionally promoted an unauthorised development. He then turned to the supply of deliverable travellers' sites. The government's Planning Policy for Traveller Sites (PPTS), at paragraph 10(a), requires local planning authorities to:

> "Identify and update annually, a supply of specific deliverable sites sufficient to provide 5 years' worth of sites against their locally set targets."

6. The Council's position before the inspector was that it complied with that paragraph. A table of the sites identified as deliverable over the 5-year period was before him, and included calculations on the phasing of deliverability over a five-year period and over the 14 years to the end of the current local plan in 2031. The assessment of need, revised to take account of the change of the definition of "Gypsies and Travellers" in PPTS in August 2015, was for 61 pitches to 2031. The Council's position was that, by the date of the hearing before the inspector, planning permission for 63 pitches had already been granted, so that the whole of the requirement until 2031 had already been fulfilled.

7. The inspector did not agree with the Council on that point. One of the factors upon which the Council relied was the grant of planning permission for 19 pitches at a site called Brotherhood Woodyard. The inspector heard evidence of the actual position at Brotherhood Woodyard following the grant of that permission and at paragraphs 22 and 23 of his decision he set out a number of issues that caused him to think that the 19 sites attributable to Brotherhood Woodyard should not be counted as contributing to the supply of specific deliverable sites. At paragraph 23 he indicated his conclusion on this point as follows:

> "23. … In the light of this I consider that it would be reasonable and appropriate to take a precautionary approach and disregard the contribution made by this site to meeting the identified need. This leaves a substantial shortfall over the full plan period and, on the balance of probability, in the five year supply, as discussed further below. These are matters which carry significant weight in favour of the appeal."

8. In paragraph 24 there is further discussion of the current supply. At paragraph 34, in striking the planning balance, having set out the adverse factors to which I have already referred, the inspector wrote this:

> "34. On the other side of the balance there are a number of factors that weigh in favour of planning permission. These include the unmet need for sites in the Borough, and indeed further afield, the Council's failure to demonstrate a 5-year supply of deliverable sites, the lack of any alternative site, and

> the personal circumstances of the site occupants, including the interests of the resident children which would be best served by enabling them to have a settled base. These carry substantial weight, particularly since a consequence of refusing planning permission is that those living at the appeal site would become homeless. However, I consider that these matters do not outweigh the harm identified and that a permanent planning permission should not be granted."

9. The inspector's final conclusion, as I have indicated, was that temporary permission should be granted for three years, which would provide an appropriate opportunity for seeing whether, in that period, the supply of sites met the identified need.

10. The Council's challenge to the inspector's decision was originally put on a number of grounds. I granted permission on two grounds, of which only part of one is now pursued. The only ground of challenge is now that the inspector erred in law in that in para 23 of his decision, when referring to "a substantial shortfall", he erred in law in failing to determine the amount of the shortfall in the five year supply.

11. That issue has now to be determined by reference to the decision of the Court of Appeal in Hallam Land Management Ltd v Secretary of State for Communities and Local Government and Eastleigh Borough Council [2018] EWCA Civ 1808 ("Hallam"), in which the judgments were handed down on 31 July 2018, that is to say after the grant of permission in the present case. I should say at once that I reject the argument of Mr Masters on behalf of the individual defendants that Mr Whale's reliance on the Court of Appeal's decision in Hallam amounts to a new ground of appeal not previously advanced. The judgments in Hallam clarify the law, they do not change it: the question whether the inspector made an error of law in his decision, by reference to the grounds upon which permission was given, falls to be determined in accordance with the most recent authoritative exposition of the relevant legal principles.

Hallam

12. The litigation in Hallam related to a substantial proposed development, including up to 225 new dwellings in countryside on the Hamble Peninsular. A section 78 appeal was recovered by the Secretary of State and eventually dismissed by him in a decision letter dated 9 November 2016. Decision-making was governed by the National Planning Policy Framework ("NPPF") published in March 2012, including the requirements in paragraphs 47 and 49 relating to the Local Planning Authority's obligation to maintain an up to date identification of a five-year housing supply and the "tilted balance" in favour of sustainable development in the absence of a five-year housing supply, subject only to negative factors set out in that paragraph. The Council had accepted that it was unable to demonstrate a five-year supply. It maintained, however, that the negative aspects of the scheme, including the landscape impact and loss of openness, would significantly outweigh the benefits, and that in accordance with paragraph 14, the balance should be struck against the development. The inspector, in a report dated 26 August 2015, recommended that the Secretary of State dismissed the appeal. The Secretary of State, in his decision, set out various factors relating to the under-supply of deliverable housing sites and concluded that the negative factors relied upon by the Council outweighed the presumption in paragraph

14. That decision was challenged by the developer. Its application under section 288 was dismissed by Supperstone J but the Court of Appeal allowed an appeal against his order.

13. The leading judgment is that given by Lindblom LJ. At [1] he identified the central question in the appeal as the following:

> "In deciding an appeal against the refusal of planning permission for housing development, how far does the decision-maker have to go in calculating the extent of any shortfall in the five-year supply of housing land?"

14. Counsel for the developer argued that if there were dispute as to the five-year supply, the decision-maker is obliged to establish the level of supply and the extent of any shortfall. As expressed in those general terms, Lindblom LJ rejected that argument. He set out the general principles as follows:

> "48. Relevant authority in this court, and at first instance, does not support the proposition that, for the purposes of the appropriate balancing exercise under the policy in paragraph 14 of the NPPF, the decision-maker's weighting of restrictive local plan policies, or of the proposal's conflict with such policies, will always require an exact quantification of the shortfall in the supply of housing land. This is not surprising. If the court had ever said there was such a requirement, it would have been reading into the NPPF more than the Government has chosen to put there, and more than is necessarily implied in the policies it contains.
>
> 49. …[T]hree main points emerge….
>
> 50. First, the relationship between housing need and housing supply in planning decision-making is ultimately a matter of planning judgment, exercised in the light of the material presented to the decision-maker, and in accordance with the policies in paragraphs 47 and 49 of the NPPF and the corresponding guidance in the Planning Practice Guidance ("the PPG"). The Government has chosen to express its policy in the way that it has – sometimes broadly, sometimes with more elaboration, sometimes with the aid of definitions or footnotes, sometimes not. …It is not the role of the court to add to or refine the policies of the NPPF, but only to interpret them when called upon to do so, to supervise their application within the constraints of lawfulness, and thus to ensure that unlawfully taken decisions do not survive challenge.
>
> 51. Secondly, the policies in paragraphs 14 and 49 of the NPPF do not specify the weight to be given to the benefit, in a particular proposal, of reducing or overcoming a shortfall against the requirement for a five-year supply of housing land. This is a matter for the decision-maker's planning judgment,

> and the court will not interfere with that planning judgment except on public law grounds. But the weight given to the benefits of new housing development in an area where a shortfall in housing land supply has arisen is likely to depend on factors such as the broad magnitude of the shortfall, how long it is likely to persist, what the local planning authority is doing to reduce it, and how much of it the development will meet.
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> 52. Thirdly, the NPPF does not stipulate the degree of precision required in calculating the supply of housing land when an application or appeal is being determined. This too is left to the decision-maker. It will not be the same in every case. The parties will sometimes be able to agree whether or not there is a five-year supply, and if there is a shortfall, what that shortfall actually is. Often there will be disagreement, which the decision-maker will have to resolve with as much certainty as the decision requires. In some cases the parties will not be able to agree whether there is a shortfall. And in others it will be agreed that a shortfall exists, but its extent will be in dispute. Typically, however, the question for the decision-maker will not be simply whether or not a five-year supply of housing land has been demonstrated. If there is a shortfall, he will generally have to gauge, at least in broad terms, how large it is. No hard and fast rule applies. But it seems implicit in the policies in paragraphs 47, 49 and 14 of the NPPF that the decision-maker, doing the best he can with the material before him, must be able to judge what weight should be given both to the benefits of housing development that will reduce a shortfall in the five-year supply and to any conflict with relevant "non-housing policies" in the development plan that impede the supply. Otherwise, he will not be able to perform the task referred to by Lord Carnwath in *Hopkins Homes Ltd.*. It is for this reason that he will normally have to identify at least the broad magnitude of any shortfall in the supply of housing land."

15. Lindblom LJ went on to apply those principles to the decision of the Secretary of State in the instant case. Although the Council in that case had accepted that it could not demonstrate a five-year supply, there was considerable difference between the figures suggested. The developer's position had been that the supply was as low as "2.92 years, or 1.78 years if the need for affordable housing is included". The inspector had noted the Council's position that "they are not able to demonstrate more than a four-and-a-half years' supply", and without making a specific calculation had concluded that "it can be said that there is a material shortfall against the five-year supply". In submissions made to the Secretary of State after the inspector's report had been delivered, the Council said on 23 June 2016 that it could demonstrate 4.86 years supply. In the decision under challenge, the Secretary of State referred to "the limited shortfall in housing land supply"; and it was apparently that characterisation of the deficiency which he put in the balance in making his overall decision.

16. Lindblom LJ's analysis of that was that first, the Secretary of State could not fairly be criticised for not having expressed a conclusion with "great arithmetical precision", because he was entitled to confine himself to an approximate figure or range. Reading his decision as a whole it was clear that he had rejected the figures put forward by the developer (because, if he had accepted them, he could not have described the shortfall as "limited"). He cited the figure of 4.86 years without specifically adopting it. He was aware also of the inspector's reference to "no more than four-and-a-half years supply". Following those comments Lindblom LJ remarked at [57] that "to describe the shortfall in housing land supply as "limited", as the Secretary of State did in paragraph 17, seems reasonable if he was assuming – though without positively finding – that the housing land supply now stood at or about 4.86 years". He then continued:

> "58. All of this is logical, as far as it goes. It may reflect an assumption on the part of the Secretary of State that he could rely on the figure of 4.86 years for the housing land supply, or at least on a range of between four and half and 4.86 years, and that this was sufficient to found his conclusions on the weight to be given to the benefits of the housing development proposed and to its conflict with restrictive policies in the local plan.
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> 59. This reading of the decision letter may be overly generous to the Secretary of State, because it resolves in his favour the doubt as to what figure, or range, he was actually prepared to accept for the present supply of housing land in the council's area. Assuming it to be correct, however, he can be acquitted of any misunderstanding or unlawful misapplication of NPPF policy. If he did adopt, or at least assume, a figure of 4.86 years' supply of housing land, or even a range of between four and half and 4.86 years, his approach could not, I think, be stigmatized as unlawful in either of those two respects. It could not be said, at least in the circumstances of this case, that he erred in law in failing to calculate exactly what the shortfall was. In principle, he was entitled to conclude that no greater precision was required than that the level of housing land supply fell within a clearly identified range below the requisite five years, and that, in the balancing exercise provided for in paragraph 14 of the NPPF, realistic conclusions could therefore be reached on the weight to be given to the benefits of the development and its conflict with relevant policies of the local plan. Such conclusions would not, I think, exceed a reasonable and lawful planning judgment."

17. That, however, was not the end of the story, because the post-report submissions had also drawn the Secretary of State's attention to two recent decisions on proposals for new housing within the same area. In one, ("the Bubb Lane appeal" decided on 24 May 2016) the inspector had concluded that the evidence before him did not support the Council's assertion that it was "a whisker" away from demonstrating a five-year supply. He thought that there was "something in the order of a four-year supply"; he

described the scale of the shortfall as "a significant material consideration" in determining the appeal. He nevertheless dismissed the appeal, because he thought the adverse factors outweighed the paragraph 14 presumption. In the other ("the Botley Road appeal" decided on 7 October 2016) the inspector's calculation was that there was a 4.25 years supply; he regarded the figure presented by the Council in that case (4.71 years) as "unlikely to be achievable". He described his conclusion as demonstrating "a significant shortfall in the amount of deliverable of housing land amounting to some 833 dwellings". In that case the inspector concluded, after taking all relevant factors into account, that the proposed development of up to 100 dwellings should be allowed to proceed.

18. In Lindblom LJ's judgment, by the time the Secretary of State came to make his decision in Hallam, the extent of the shortfall in housing land supply was a "principal controversial issue" in the South Bucks District Council v Porter (number 2) [2004] UKHL 33 sense. The relative weight to be attributed to the shortfall on the one hand and the restricted policies on the other was a matter which required to be properly dealt with, so that the parties knew their submissions had been considered. The Secretary of State's decision letter expressly stated that he had given "careful consideration" to the representations that had been made. The conclusions reached by the inspectors in the Bubb_Lane and Botley Road decisions on the extent of the shortfall could not be reconciled with the Secretary of State's characterisation of the shortfall as "limited" without explanation; and the truth of the matter was that there was no explanation of how he had reached his assessment of the shortfall in the light of the assessments by two inspectors in recent decisions on what was in essence precisely the same information. In these circumstances Lindblom LJ concluded that the Secretary of State's reasons in Hallam were in this respect deficient, because the developer was entitled to know how and why the Secretary of State had reached his assessment of the shortfall in the light of the inspectors' assessments to which he had been referred and which he expressly stated had been fully considered. The Secretary of State's decision accordingly fell to be quashed.

19. Hickinbottom LJ agreed with the judgment of Lindblom LJ. Davis LJ agreeing that the appeal should be allowed, added some observations of his own. He said at [82] that, given that there was a shortfall, he had "the greatest difficulty in seeing how an overall planning judgment thereafter could properly be made without having at least some appreciation of the extent of the shortfall". At [84] he said this:

> "An evaluation of some broad magnitude (in the phrase of Lindblom LJ in his judgment) may for this purpose be legitimate. But, as I see it, at least some assessment of the extent of the shortfall should ordinarily be made; for without it the overall waiting process will be undermined."

20. In the instant case, as he observed at [85], the Secretary of State had "noted" the Council's updated 4.86 figure and assessed the shortfall as "limited", without expressly referring to the different assessments of inspectors to which his attention had been drawn: the Secretary of State's assertion that he had taken account of the representations did not overcome the defect of "a demonstrable lack of engagement with the actual extent of the shortfall".

21. As Lindblom LJ said at [7], the issues raised in the Hallam appeal "raise no question of law that has not already been amply dealt with in a series of cases on the meaning of relevant policies in the NPPF, and on the importance of consistency in planning decision-making". I cannot accept Mr Whale's submission that the Court of Appeal's decision "has fundamentally changed the relevant legal landscape". It has not. Nor is it possible to derive from the judgments the proposition that where there is a shortfall a decision-maker will err in law if the amount of the shortfall is not the subject of a precise calculation or characterisation: Mr Whale accepted that this is not always required. As Lindblom LJ's analysis of the Secretary of State's decision in Hallam shows, if it had not been for the extra material provided by the inspectors' decisions in the Bubb Lane appeal and the Botley Road appeal, the Secretary of State's assessment of the shortfall as "limited" would probably have been sufficient in law, despite the fact that the Secretary of State did not specifically choose either 4.86 years or "no more than four-and-a-half years" or any other figure. What made the Secretary of State's decision unsupportable was his failure to show that he had taken into account other relevant evidence which in the absence of explanation or analysis was inconsistent with the assessment that the shortfall was properly to be characterised as "limited". It seems to me that the proposition properly to be derived from the majority judgment in Hallam is that the level of specificity or calculation required in assessing the degree of shortfall for the purposes of applying the tilted balance in paragraph 14 of the 2012 NPPF depends on the material put to the decision-maker and the degree of variation revealed by that material. I do not read the judgment of Davis LJ as contradicting that proposition or adding anything essential to it.

Discussion

22. In the determination of a claim before me in the light of Hallam, it appears to me that I ought first to consider the extent to which the judgments and observations in Hallam apply to a case falling for determination under the Planning Policy for Travellers' Sites (PPTS). On behalf of the defendants, both Mr Honey and Mr Masters argued that Hallam is simply not relevant. I accept that there are considerable differences. PPTS is not NPPF. PPTS does not contain a presumption in favour of granting planning permission for traveller sites. Instead, PPTS provides at paragraph 27 that, save in relation to certain designations of land:

> "If a Local Planning Authority cannot demonstrate an up-to-date five-year supply of deliverable sites, this should be a significant material consideration in any subsequent planning decision when considering applications for the grant of temporary planning permission."

23. Two features of that formulation are particularly noticeable. One is that the existence of a shortfall is itself classified a "significant material consideration": this might be taken to exclude a characterisation of the shortfall as of, for example, "limited" relevance. No doubt a balance has to be struck, but, in contrast to the process under the 2012 NPPF, where the lack of a deliverable five-year housing land supply operates, as Lord Carnwarth said in Hopkins Homes Ltd v SSCLG [2017] UKSC 37 at [44], as a trigger to the operation of the tilted balance under paragraph 14, the balance mechanism under PPTS remains the same throughout, and the purpose of paragraph 27 gives an indication of the weight of the factor in the balance, without applying a presumption. The second feature of paragraph 27 is that it is expressed

specifically to go to a decision on temporary planning permission. As a footnote somewhat deftly provides "there is no presumption that a temporary grant of planning permission should be granted permanently". The intention evidently is that the response to a shortfall in the required five-year supply of deliverable sites may, in an appropriate case, be the granting of planning permission for a temporary period during which, it may be surmised, the Local Planning Authority will make efforts to address the shortfall and meet its obligations under paragraph 10 to ensure a five-year supply of deliverable sites.

24. These differences are in my judgment of significance. The latter demonstrates that in the context of PPTS a shortfall is in principle to be seen as itself temporarily; the former shows that the provision in paragraph 27 of PPTS is not merely a trigger bringing into operation a specialised balancing process; it is itself part of the generally applicable balancing process. For those reasons I reject Mr Whale's submission that everything that one reads in Hallam is without more to be applied to a case of this sort. It does seem to me, however, that the generalised observations in Hallam are likely to have a role whenever a decision-maker is required to strike a balance. If the weight that he attributes to a particular factor is not readily reconcilable with material that is before him, he may need to give a more detailed justification of his assessment than would otherwise be the case.

25. Even if the strictures of Hallam, such as they are, were applicable in a PPTS case, there is, in my judgment, nothing in the inspector's decision that is thereby rendered unlawful. The shortfall he identified, 19 out of the 56 required, was one which the inspector was clearly entitled to characterise as "substantial" even apart from paragraph 27 of PPTS. He was not required to express in his decision the outcome of the applicability of the usual formula, which would have shown that, on the inspector's figures, the supply was 4.1 years. Thus, whether his characterisation of the shortfall as "substantial" derives from paragraph 27 or from his own assessment of the shortfall, it is simply unassailable.

26. As now argued, this is not a case where it is said that there was other material to which the inspector should have alluded, demonstrating that the shortfall should (presumably despite paragraph 27) not be regarded as substantial. There was no further explanation that the inspector had to give in order to justify his assessment. He did what he was required to do.

27. For these reasons I conclude that the inspector's decision is not unlawful in the manner asserted by the Council. I therefore dismiss this claim.