Neutral Citation Number: [2020] EWHC 2180 (Admin)

Case No: CO/2050/2020 & CO/2051/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/08/2020

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

SEFTON METROPOLITAN BOROUGH COUNCIL	**Claimant**
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
-and-	
JERRY DOHERTY	**Interested Party**

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- -

Piers Riley-Smith (instructed by **Sefton Council**) for the **Claimant**
Sarah Reid (instructed by **Government Legal Department**) for the **Defendant**
Michael Rudd (instructed by **Claas Solicitors)** for the **Interested Party**

Hearing date: **21 July 2020**

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Approved Judgment

The Honourable Mr Justice Julian Knowles:

Introduction

1. The Claimant (the Council) seeks permission to appeal against the Defendant's Inspector's decision of 27 April 2020 to allow the Interested Party's (Mr Doherty) conjoined appeals against the Claimant's refusal of planning permission and issuing of two enforcement notices (the Decision).

2. There were three appeals in total before the Inspector, all relating to land south of Spurriers Lane, Liverpool, L31 1BA (the Site):

    a. Appeal A (APP/M4320/C/19/3221283) and Appeal B (App/M4320/C/19/3221286 were against two enforcement notices issued by the Council on 25 January 2019. They were brought under s 174 of the Town and Country Planning Act 1990 (the 1990 Act) The breaches of planning control alleged in the two notices were without planning permission and within the last 10 years, unauthorised change of use of the land for residential purposes including the siting of caravans; and the performance of unauthorised engineering works. The Notice required Mr Doherty to return the land to its former condition.

    b. Appeal C (APP/M4320/W/19/3220481) was brought under s 78 of the 1990 Act against a refusal to grant planning permission, the refusal being dated 18 December 2018. The proposed change of use was from a disused pony paddock to provide six gypsy/traveller pitches and other work.

3. The application for permission to appeal against the planning permission decision (Appeal C) has to be brought under s 288 of the 1990 Act. That is CO/2050/2020. The application for permission in respect of the enforcement notices (Appeals A and B) has to be brought under s 289. That is CO/2051/2020. On 24 June 2020 Holgate J ordered that the application for written permission for the s 288 application claim be adjourned to be heard orally at the same time as the application for permission with the s 289 application. There is authority that challenges under s 288 and s 289 should be heard at the same time: *Oxford City Council v Secretary of State for Communities and Local Government* [2007] 2 P & CR 29, [15]. It is common ground between the parties that the issues arising on both applications are the same.

4. So it was that both applications came before me on 21 July 2020 for a remote oral permission hearing. Mr Riley-Smith appeared for the Council; Ms Reid for the Secretary of State; and Mr Rudd for Mr Doherty. I reserved my decision.

The facts in brief

5. The Site is an L-shaped parcel of land sitting within the Green Belt. Before 2019 it was undeveloped and enclosed by fences and hedgerows.

6. On 18 December 2019 the Council refused Mr Doherty's application for planning permission at the Site. The Council gave three reasons for refusal of which the first of which was that:

> "… the proposed development constitutes inappropriate development in the Green Belt which is, by definition, harmful to the Green Belt and further harm is caused by a loss of openness and encroachment in the countryside. There are no very special circumstances which would clearly outweigh the harm caused to the Green Belt therefore the development is contrary to the requirements of Section 13 of the National Planning Policy Framework 2018, Policy E of Planning Policy for Traveller Sites 2015 and policies MN7 and HC5 of the Sefton Local Plan 2017."

7. Notwithstanding this refusal, Mr Doherty carried out unauthorised engineering work by creating a hardstanding area at the Site, and changed the use of the Site to residential by the siting of a number of Caravans on it.

8. In response, the Council issued two Enforcement Notices on 25 January 2019 relating to the unauthorised engineering work and the unauthorised change of use. As I have said, these required Mr Doherty to return the land to its former state.

9. Mr Doherty appealed to the Defendant against the Council's decisions under s 78 and s 174 of the 1990 Act.

10. The three appeals were conjoined by the Defendant and heard by way of a hearing on 10 March 2020.

11. It was common ground that the application for planning permission would constitute inappropriate development in the Green Belt, and therefore [143] and [144] of the National Planning Policy Framework (NPPF) applied:

> "143. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 144. 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 resulting from the proposal, is clearly outweighed by other considerations."

12. It was accepted by the Inspector at [9] of his decision that these elements of the NPPF were reflected and applied in Policy MN7 of the Local Plan for Sefton 2017.

13. The Council's position was 'very special circumstances' did not exist for a number of reasons, but a central part of the Council's case related to the Green Belt harm.

14. The Council set out its reasoning in its Hearing Statement and addressed the issue of 'Green Belt harm' between [4.2] to [4.15] of their Hearing Statement. The Council identified three distinct areas of Green Belt harm: definitional harm; harm to openness; and harm to purposes. The Council (in line with [144] of the NPPF) again asked that each harm be given substantial weight at [4.59] of its Hearing Statement:

> "The Council considers that the harm to the Green Belt is substantial in a variety of facets, there is substantial harm to the developments impact on openness, there is substantial harm in relation to the purposes of land being defined within the Green Belt, and there is substantial harm by definition to the Green Belt. The Council considers that these factors must each be afforded significant weight in reaching the conclusion that the development should be resisted."

15. The Council also argued that there were a number of non-Green Belt harms. Of relevance to this claim was the Claimant's argument (at [4.60] of Hearing Statement that substantial weight should be given by the Inspector to the intentional unauthorised development by Mr Doherty:

> "The Council consider that the harm arising out of the intentional unauthorised development is significant in relation to the [2015 Written Ministerial Statement: Green Belt HLWS 404], which inforces the concerns of Government in such cases of difficulty in limiting or mitigating the harms that result without considerable expense being incurred. This factor should therefore be afforded substantial weight in presumption against the development."

The Inspector's Decision

16. In his decision letter at [10] the Inspector recognised the Written Ministerial Statement as a material consideration in relation to unauthorised development. In respect of gypsy and traveller sites within Green Belt land it also confirmed national policy in the Planning Policy for Traveller Sites (DCLG 2015) that subject to the best interests of the child, personal circumstances and unmet need are unlikely clearly to outweigh harm to the Green Belt and any other harm so to establish very special circumstances.

17. At [11] to [14] the Inspector in the Decision assessed the impact of the development to the openness and purposes of the Green Belt with his conclusions as to the overall harm at [15]:

> "15. To conclude on this first issue, I consider that there would be a significant loss of openness and a limited adverse impact on one of the Green Belt purposes which seeks to safeguard the countryside from encroachment."

18. The Inspector concluded his decision on overall Planning Balance at [38]-[39]:

> "38. The Framework, reflected in LP Policy MN7, requires that substantial weight is given to any harm to the Green Belt, and that very special circumstances will not exist unless any harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.

> 39. The proposed development is inappropriate development and is therefore harmful by definition. I attach substantial weight to that harm. I have also previously identified some loss of openness and a limited adverse impact on one of the Green Belt purposes which seeks to safeguard the countryside from encroachment. The additional harm arising from these matters, together with the status of the development as intentional unauthorised development, attract collectively a further degree of weight."

19. The Inspector then went on to list factors in favour of allowing the development and concluded at [42]

> "The PPTS and WMS set out that personal circumstances are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances. However, in this case I find on balance that the totality of the harm to the Green Belt and any other harm is clearly outweighed by the combined weight I attribute to the best interests of the children on site, the wider family's personal circumstances; the site being sustainably located in compliance with LP Policy HC5; the lack of alternative suitable sites which would meet the particular needs of this family; and the very high likelihood that any other suitable sites would also be in the Green Belt. Together these considerations amount to the very special circumstances necessary justify the development."

20. The three appeals were accordingly allowed subject to conditions.

Grounds of Challenge

The Council's case

21. On behalf of the Council, Mr Riley-Smith argued the following grounds of challenge to the Inspector's Decision.

Ground 1: The Inspector acted unlawfully by failing to apply national policy in relation to Green Belt.

22. The Council's primary argument is that the Inspector failed to properly apply [144] of the NPPF by not giving the required minimum weight to the non-definitional Green Belt harm.

23. This is based on the Council's interpretation of [144]: that it should be interpreted as requiring substantial weight be given individually to each and any identified harm to the Green Belt caused by a proposed development. In other words, where a specific type of harm to the Green Belt is identified (eg definitional harm; openness; and harm to Green Belt purposes) then substantial weight must be attached to each type of harm identified and each then weighed in the planning balance.

24. Mr Riley-Smith said that in this case while the Inspector quoted [144] almost entirely at [38] of his Decision, that was then immediately followed by a misapplication of it in [39]:

> "39. The proposed development is inappropriate development and is therefore harmful by definition. I attach substantial weight to that harm. I have also previously identified some loss of openness and a limited adverse impact on one of the Green Belt purposes which seeks to safeguard the countryside from encroachment. The additional harm arising from these matters, together with the status of the development as intentional unauthorised development, attract collectively a further degree of weight."

25. The Council argues that the drafting of this passage is a positive indication that the Inspector did not apply the §144 test either 'individually' or 'cumulatively' because:

    a. The Inspector expressly tied his finding of substantial weight to only the definitional harm through the use of phrase '*that harm'*.

    b. The Inspector did not simply then go onto add further weight to that substantial weight.

    c. Instead the Inspector separated out 'the additional harm' and ascribed to that an unspecified separate 'further degree of weight'.

    d. The Inspector grouped together and given one degree of weight the non-definitional Green Belt harm and other non-Green Belt harm.

26. Overall, the Council submits that it is at least arguable that the Inspector Defendant failed to properly apply national policy and hence that he rendered a decision which is unlawful *per Bloor Homes East Midlands Ltd v Secretary of State for Communities & Local Government* [2014] EWHC 754 (Admin), [19(4)].

Ground 2: failure to give adequate reasons

27. The Council submitted that the Inspector had not given proper reasons for his decision. Even if the Inspector intended to correctly apply [144] the drafting of gives rise to a substantial doubt that he went wrong in law.

28. Secondly, the Council submitted that the Decision does not allow for the Claimant to understand the overall findings the Inspector came to on Green Belt harm – one of the principle controversial issues. It argued that at one point the Inspector found a 'significant' loss of openness (at [15]) but this was later reduced just to 'some' in the overall planning balance (at [39]).

29. However, Mr Riley-Smith said that a more fundamental issue is that the Council cannot understand what weight the Green Belt harm collectively or individually was given. Even if the Defendant is right and the Inspector was entitled to give 'the' Green Belt harm one cumulative weight it is unclear what weight that was. This is due to the non-definitional Green Belt harm being ascribed part of an unspecified 'degree of weight*'*.

The Secretary of State's response

Ground 1

30. The Secretary of State response that the Council's argument effectively requires the Inspector to specify in the DL that substantial weight is given individually to each and every impact on Green Belt purposes identified, and that this amounts to a mechanical or quasi mathematical approach of the type routinely deprecated by the Courts, and *expressly rejected* in the Green Belt context in *Doncaster NBC v Secretary of State* [2002] EWHC 808 (Admin), [71].

31. He argues that the Inspector's Decision is clear and that when it is read in full and the relevant paragraphs considered in their proper context, it is clear that the Claimant's claim is unarguable. In particular he argues that:

    a. The Inspector expressly addressed his mind to the fundamental aims and purposes of Green Belt policy, as articulated in [133] – [134] of the NPPF at [12]-[13]**.**

    b. The Inspector expressly assessed the impact of the appeal proposals on those purposes, concluding that there would be a significant loss of openness' and a 'limited adverse impact' by reason of encroachment ([13]-[15]).

Ground 2

32. In relation to Ground 2, Ms Reid submitted that on a straightforward and down to earth reading of the Decision letter, there is no room for genuine as opposed to forensic doubt about what the Inspector concluded and why and that the Claimant's claim is unarguable.

33. As to the Claimant's arguments in respect of the Inspector's overall approach:

    a. At [13]-[15] the Inspector carefully assessed the impact of the scheme on the openness of the Green Belt, and found, overall, that this was 'significant'.

    b. At [14]-[15] the Inspector considered the purposes of including land within the Green Belt, and found that there would be 'limited' encroachment.

The Interested Party's submissions

34. On behalf of Mr Doherty, Mr Rudd supported the Secretary of State's submissions.

Ground 1

35. He argued that Ground 1 is based on a misunderstand of the relevant policy. There is no requirement for the Inspector to add substantial weight to definitional harm, and also individually add substantial weight to harm to openness or the purposes of including

land in the Green Belt and substantial weight to all and any other harms, resulting in some multi-faceted substantial weight 'of some indefinable quantum'.

Ground 2

36. In relation to Ground 2, Mr Rudd that this ground is unarguable. It is asserted that the Claimant is unable to understand the Inspector's conclusions on 'the majority' of the Claimant's case. Ostensibly, the Claimant expects the Inspector to set out in respect of each and every element of harm alleged the weight that the Inspector has given to that harm. There is no allegation that the Inspector has failed to consider any particular element of alleged harm, just that there is not a shopping list of harms with weight attached to those harms. There is no requirement for the Inspector to adopt such an approach. The Inspector has adequately considered and addressed the Claimant's case.

Discussion

37. I have carefully considered the arguments advanced by the parties. I remind myself that this is an application for permission and that the threshold is arguability.

38. In relation to Ground 1, despite their efforts, it does not seem to me that either the Defendant or Mr Doherty had a 'knockout blow' in response to the Council's arguments. There is, it seems to me, an arguable point about the proper approach to [144] of the NPPF and I therefore grant permission in relation to that ground of challenge.

39. I am less impressed by Ground 2. It seems to me that, read as a whole, the Decision is clear and the Inspector's reasons for allowing the appeals are readily understandable. The real heart of this case is whether the Inspector applied the relevant policy correctly in light of the harm to the Green Belt which he undoubtedly found the development would cause. I therefore refuse permission on Ground 2.