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Case No: CO/466/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 November 2022

Before : HHJ WALDEN-SMITH sitting as a Judge of the High Court

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Between :

WINIFRED HELEN WARD **Claimant**

– and –

(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) BASILDON DISTRICT COUNCIL **Defendants**

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STEPHEN COTTLE (instructed by **DEIGHTON PIERCE GLYNN**) for the **Claimant**
KILLIAN GARVEY (instructed by **GOVERNMENT LEGAL DEPARTMENT**) for the **First Defendant**

Hearing date: 9 November 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 18 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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1. This is the renewed oral application for permission to challenge by way of Planning Statutory Review the decision of the Secretary of State's planning inspector on 30 December 2021 to dismiss the appeal brought by Mark Cooper pursuant to the provisions of the Town and Country Planning Act 1990 (TCPA) against the decision of the Basildon District Council not to grant permission for change of use of land known as the Land East of White House, Carlton Road, Basildon SS13 2LT ("the site") for the purpose of stationing caravans for "residential occupation with associated development (hardstanding and day room) part retrospective.

2. Mr Cooper did not issue the claim for permission to appeal pursuant to section 78 of the TCPA. That application was made by his partner, Winifred Ward. By an order made by Lang J on 4 March 2022, Mr Cooper was ordered to file and serve written submissions as to why he was not joined in as an additional claimant, having been the sole applicant for planning permission in respect of the site. As I understand the situation this was because Mr Cooper has issues with legal aid. The Claimant, Winifred Ward, is an Irish Traveller and is the partner of Mr Cooper, who is a Romani Gypsy. They live on the site with their children in a mobile home and a touring caravan on the site.

3. At the oral hearing of the renewed application, Mr Cottle, who now acts as Counsel for the Claimant, expanded upon his written submissions and the Claimant's grounds. Mr Garvey, on behalf of the Secretary of State, responded to those oral submissions, in light of the expansion of the case put on behalf of the Claimant, I reserved the determination of whether to grant permission.

4. The application for permission to apply for Planning Statutory Review was refused on the papers by Johnson J. With respect to Ground 1, it had been alleged that the Inspector erred in concluding that substantial weight should be attributed to each element of the Green Belt harm. With respect to Ground 2 it was alleged that the Inspector's decision was irrational.

5. Ground 1 was refused on the papers on the basis that the Inspector had asked herself the correct question, namely whether there were very special circumstances to justify the grant of permission given the Green Belt harm. In addressing that question, the Inspector was not obliged separately to consider the weight to be ascribed to each Green Belt harm and would have been entitled to take an aggregate view of the overall harm; that fact that she considered each aspect of harm to the Green Belt was not wrong. She properly came to an overall view as to whether there were very special circumstances to justify the grant of permission notwithstanding the particular importance of the Green Belt.

6. The Claimant does not seek to renew the application for permission on Ground 1.

7. Ground 2 was refused on the basis that the Inspector took all relevant factors into account and the facts that weighed in favour of temporary of planning permission. The ultimate conclusion was well within the bounds of reasonableness and were not arguably irrational. It is this ground that is subject to the renewed challenge.

Irrationality – the Law

8. The Claimant, through her counsel Mr Cottle, sets out that the foundation of judicial review is that which is as set out by Lord Slynn in *R(Alconbury Ltd)v Environment Secretary* [2001] UKHL, namely that if the public decision maker *"misinterprets the legislation under which he purports to act, or if he takes into account matters irrelevant to his decision or refuses or fails to take account matters irrelevant to his decision or refuses of fails to take account of matters relevant to his decision, or reaches a perverse decision, the court may set his decision aside …"* and in order to establish irrationality the claimant:

> "does not have to demonstrate, as respondents sometimes suggest is the case, a decision so bizarre that its author must be regarded as temporarily unhinged. That the not very apposite term "irrationality" generally means in this branch of the law is a decision which does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic" per Sedley J (as he then was) in *R v Parliamentary Commissioner for Administration ex p Maurice and Audrey Balchin* [1996] EWHC Admin 152.

9. Significant reliance was placed upon *Moore v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1194. The Secretary of State submitted that the judge had been wrong to find that the decision not to grant temporary planning permission was irrational as the conclusion reached by the inspector was *"a matter of planning judgment and was reasonably open to him: it cannot be said that no reasonable inspector would have refused temporary planning permission."* David Richards LJ held that Cox J. had not strayed impermissibly into a judgment on the planning merits, that she had directed herself by reference to the relevant authorities and that *"she approached the Wednesbury challenge with due regard to the hurdle to be overcome by a claimant advancing such a challenge."*

10. The Secretary of State does not dispute the broad notion that a finding of irrationality is open to the court, but refers to *R (Newsmith Stainless Ltd) v Secretary of State for Environment, Transport & the Regions* [2001] EWHC Admin 74, where Sullivan J set out the difficulties in pursuing an irrationality challenge in respect to planning decisions:

> "In any case, where an expert tribunal is the fact finding body, the threshold of Wednesbury unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most planning cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscapes be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? Et centra. Since a significant element of judgment is involved there will usually be scope for a fairly broad range of views, none of which can be categorised as unreasonable…

> Moreover, the Inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection. Against this background an applicant alleging an Inspector has reached a Wednesbury unreasonable conclusion on matters of planning judgment, faces a particularly daunting task. It might be thought that the basic principles set out above are so well known that they do not need restating. But the Claimant's challenge in the present case, although couched in terms of *Wednesbury* unreasonableness is, in truth, a frontal assault upon the Inspector's conclusions on the planning merits of this Green Belt case."

11. The court's role is to assess whether the planning inspector determining the appeal made an error of law, having regard to the evidence before him and all material considerations. The court is not reviewing the planning merits of granting temporary permission.

The Claimant's Contentions

12. The Claimant argues that the refusal of a grant of temporary planning permission was disproportionate and perverse. In the course of the oral submissions, Mr Cottle significantly expanded the extent of his challenge that ground to contend that there was a failure to apply the public sector equality duty; that there was a failure to consider an absence of policy for the provision of sites; that some of the inspector's decisions were not supported by evidence; and there was a failure to have regard to the best interests of the children.

13. Mr Kieran Garvey, Counsel for the Secretary of State in this matter, said he was not prejudiced by this late extension of challenge which had not been set out in the skeleton argument save that where the Claimant contended that there was not sufficient evidence upon which the planning inspector could reach her conclusions with respect to the Green Belt, he had not had the opportunity to take instructions on whct evidence was before the planning inspector. His contention is that the Claimant is simply disagreeing with the planning inspector's conclusion, which does not come anywhere near a finding of irrationality. Rather, it is said by the Secretary of State, the Claimant is seeking to challenge the merits of the decision and the planning judgments that the planning inspector was properlymade.

14. The issue for the court is whether there is *"an error of reasoning which robs the decision of logic."* In light of the expansion of the argument in the course of the oral submissions, I reserved my judgment.

The additional medical evidence

15. A psychiatric report with respect to the Claimant was served upon the Secretary of State on 2 November 2022. This evidence was not available to the planning inspector when he made his decision on 30 December 2021 and can have no bearing upon the legitimacy of the planning inspector's determination. It indicates that the Claimant has a learning disability and is consequentially vulnerable but Claimant's counsel did

not seek to rely upon the report for the purpose of the challenge to the Inspector's decision. Clearly, the decision of the planning inspector cannot be impugned by reason of evidence that was not available at the time of the decision being made and the report is of no assistance.

The Decision Letter

16. In the Decision Letter, the planning inspector set out from paragraph 23 her determinations with respect to the decision of Basildon District Council to refuse permission for development on the Green Belt.

17. She referred to the fact that the proposed development would amount to inappropriate development in the Green Belt, which carried substantial weight, and that it further would result in harm to the openness of the area. Relevant parts of the National Policy National policy on the protection of the Green Belt (not set out in the Decision Letter) is as follows:

> 137. 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.
>
> 138. Green belt serves five purposes. The two relevant in this case are:
>
> (a) to check the unrestricted sprawl of large built-up areas
>
> (b) …
>
> (c) to assist in safeguarding the countryside from encroachment;
>
> (d) …
>
> (e) …
>
> 147. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances
>
> 148. 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.

18. The planning inspector referred in the Decision Letter to the need of the appellant (Mr Cooper) for a pitch, which carried substantial weight; that there are children whose best

interests would be served by having a settled base which provided them with access to education and other public services, something to which significant weight was attached.

19. The inspector further acknowledged that there was a general national and regional need for pitches, to which she attributed significant weight, and that Basildon District Council did not demonstrate an up to date 5- year supply of deliverable pitches so that the housing needs of the appellant were not addressed.

20. Having taken into account the housing circumstances of the appellant and the needs of his family, the benefits of settled accommodation with access to education and health care and the lack of available sites within Basildon DC, she found that those did not outweigh the substantial harm to the Green Belt so as to justify inappropriate development in the Green Belt.

21. In my judgment, that was a planning judgment that was properly reasoned and reasonably open to her and it is not arguable that her decision was irrational.

22. The planning inspector then turned to the issue of temporary consent and in paragraph 29 onwards of the Decision Letter, the planning inspector considered the grant of a temporary planning permission personal to Mr Cooper and his family in line with the advice provided by the Planning Policy for Traveller Sites (PPTS).

23. Basildon DC was not able to demonstrate an up to date 5-year supply of deliverable sites to address the current and historic need for pitches within the Borough and that was a significant material consideration in any planning decision when considering applications for the grant of temporary planning permission. The inspector recognised that, from the high number of unauthorised sites in the Borough, there is a clear and immediate need for sites in Basildon and the lack of sites holds significant weight in favour of the proposal, however there is an exception where the proposal is on land designated to the Green Belt. The harm to Green Belt would still be there – even though on a temporary basis. She also considered the imposition of a personal permission that would allow Mr Cooper and his family to reside at the site, but while that would result in a more limited interference it would *"not obviate the harm to the Green Belt".*

24. The inspector referred to section 8 of the Human Rights Act 1998 in respect of the private and family life of Mr Cooper and his children, and the fact that dismissal of the appeal would be an interference of the appellant's rights *"Nonetheless, I find that the issue of inappropriateness in relation to Green Belt along with the resulting harm to the openness is so substantial and that, in the wider public interest, it cannot be clearly outweighed by the personal circumstances of the appellant and/or the other considerations".* She considered whether a lesser requirement or alternative would overcome the harm but determined that imposing a temporary or personal permission would not overcome the harm to the Green Belt and determined that dismissing the appeal is proportionate and necessary.

25. Having come to that conclusion she then considered the Public Sector Equality Duty (PSED) under the Equality Act 2010 which sets out the need to eliminate unlawful discrimination, harassment and victimisation and to advance equality of opportunity between people who share a protected characteristic and people who do not share it,

acknowledging that Mr Cooper and the Claimant have a protective characteristic. She set out that she had due regard to their traditional way of life and their personal circumstances (notably the Claimant's ill heath) the what was in the best interests of the children including living on a settled and secure site with access to schools and healthcare facilities. She said that she had PSED as a primary consideration on her reasoning on personal permission but it did not follow that the appeal should succeed.

26. One of the complaints made by Counsel for the Claimant in his oral submissions is that the way in which the PSED was dealt with in the Decision Letter is an indication that the Planning Inspector failed to consider the PSED before concluding that the decision to dismiss the appeal was proportionate and necessary.

27. The Claimant complains that there was no apparent valuation of race implications, and the public benefits of fostering good relations between this Gypsy/traveller family and the rest of the community. In other words, there was a failure to consider the implications upon race relations A further complaint is that there was no consideration of the consequences to the Claimant and his family have to live roadside, whereas the site had already been fenced by neighbours – thereby interfering with the Green Belt with respect to encroachment and the open space – and was vacant with no other use. The area in which the site is located, in particular Carlton Road, is said to be an area of infill and this site is "one plot amongst a thousand plots".

28. The Claimant further contends that while the Planning Inspector took into account the fact that Basildon District Council fails to have a five-year plan for the provision of sites, she failed to give any weight to the fact that Basildon District Council does not have any plan for the supply of land for sites. The situation in Basildon is particularly acute as 63% of the land comprises Green Belt and the remainder is urban and, it is said by the Claimant, that the Planning Inspector failed in giving these particular matters any or any sufficient weight in her determination, thereby rendering the decision an irrational one. It is said by the Claimant that her conclusion in paragraph 31 of the Decision Letter that *"the issue of inappropriateness in relation to the Green Belt along with the resulting harm to the openness is so substantial and that, in the wider public interest, it cannot be clearly outweighed by the personal circumstances of the appellant and/or the other considerations"* is one that has not been supported by any clear analysis or objective evaluation and reliance is placed upon the determination of the Court of Appeal in *Moore* that *"I am not persuaded that the inspector's refusal of temporary planning permission was a reasonable reflection of the factors he was required to take into account in that context."*

29. The Defendant refutes all the points made by the Claimant as failing to give a fair reading of the Decision Letter and that the planning inspector did in fact take into account all the matters that were appropriate for her to take into account so that the irrationality challenge must fail. The Defendant's contention is that the Claimant is simply seeking to re-run the merits of the proposal and is, by putting this argument forward as an irrationality challenge, seeking to disguise a challenge on the merits.

30. In my judgment, while this is a case where another planning inspector may well have come to a different conclusion, this is not arguably an irrational decision.

31. In *Moore*, relied upon heavily in this case, Lord Justice Richards was keen to make it clear that the issues were fact-specific rather than of any wider importance: what I am considering is whether the decision is "robbed of logic" by reason of its alleged failings.

32. The planning inspector did in fact properly have regard to the public sector equality duty through the body of the Decision Letter. While there is criticism that she expressed mentioned it after she had already recorded that dismissing the appeal would be proportionate and necessary, she had before that point not only considered the ethnic background of both Mr Cooper and Ms Ward and the fact that they were of mixed heritage would make site sharing an unlikely option (see paragraph 18). The planning inspector weighed that in the balance as a significant matter. She also took into account the fact that without the site, Mr Cooper considered that he and his family might have to live a roadside existence without any fixed address. The lack of an alternative site and the personal circumstances of the appellant and his family carried significant weight in favour of the proposal (see paragraph 20). In *Moore* the inspector's failure to consider the possibility of a roadside existence was central to the court's determination. That failure is not in this Decision Letter.

33. The criticism of the way in which the planning inspector ordered her Decision Letter is not one which can hold any weight – not only is it undermined by the fact that she clearly had those matters in mind when reaching her decision and the PSED was not an afterthought, but the criticism that it is referred to in detail at the end of the Decision Letter is a criticism of form and not substance. She fairly considers the need to eliminate unlawful criticism, harassment and victimisation, the need to advance equality of opportunity and foster good relations between people who share a protected characteristic and people who do not share it; she sets out that she had due regard to the traditional way of life and the personal circumstances and the well being of Mr Cooper and his family and the health of Ms Ward; she has also had regard to the best interests of the children including for a settled and secure site with access to schools and healthcare facilities. Those matters are given primary consideration in her reasoning on a personal permission but, having considered those matters, she does not consider that the appeal should succeed. That was a planning decision she was entitled to reach.

34. There was agreement between the parties that the proposal would represent inappropriate development in the Green Belt. The conclusions that the planning inspector reached (see paragraph 11) were balanced and worked through. The criticism that she was not entitled to reach the conclusions she did is without foundation – the draft statement of common ground sets out it was agreed that the proposed development is inappropriate development would result in some loss of openness to which substantial weight is attached. The inspector was entitled to reach the planning judgment she reached and it is not for the court to interfere.

35. The planning inspector did consider the lack of available sites in Basildon and gave little weight to the suggestion that the emerging Local Plan may seek to facilitate development in the Green Belt. The criticism is that the planning inspector failed to give sufficient weight to the fact that Basildon has no plan but that does not, in my judgment, arguably show that her decision was irrational – this particular consideration being dealt with in paragraphs 14 to 18 of her decision letter.

36. With respect to the best interests of the children, again the planning inspector does refer to the needs of the children in the Decision Letter in a number of paragraphs but

particularly paragraph 25 where she states that she attaches significant weight to the best interests of the children, access to education and other services being a primary consideration.

37. In my judgment, this irrationality challenge is truly a challenge with respect to the planning judgment exercised by this planning inspector. She considered two appeal decisions referred to her by the appellant, and properly determined that these were decisions dependent upon the individual judgment of the decision maker.

38. The same is true in this case. This is a decision dependant upon the individual judgment of this decision maker. While another planning inspector may have come to a different decision, her decision is not an irrational one and is not open to challenge. In all the circumstances I refuse permission to judicially review her decision.