Neutral Citation Number: [2023] EWHC 2528 (Admin)

Case No: CO/2201/2023
CO/2203/2023

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

IN THE MATTER OF AN APPEAL UNDER SECTION 289 AND A CLAIM UNDER SECTION 288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

Manchester Civil Justice Centre
1 Bridge Street West, Manchester M60 9DJ

Date: 13 October 2023

Before:

Karen Ridge sitting as a Deputy High Court Judge

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Between:

MR BRYAN ROGERS — **Claimant**

- and -

SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES — **First Defendant**

-and-

SOUTH STAFFORDSHIRE DISTRICT COUNCIL — **Second Defendant**

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Mr Michael Rudd (instructed by Tedstone, George and Tedstone **Claimant**
Mr Michael Fry (instructed by Government Legal Department) **First Defendant**

Hearing date: 24 August 2023

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JUDGMENT

Deputy High Court Judge Karen Ridge:

1. This is an application brought by the Claimant for permission to seek a statutory review under s.288 of the Town and Country Planning Act 1990 ("the 1990 Act"). The Claimant's challenge is to a decision, dated 23 March 2023, made by the First Defendant's appointed Inspector to dismiss an appeal against the refusal of the Second Defendant to grant planning permission for development of '*Land off Micklewood Lane, Penkridge, South Staffordshire, ST19 5SD*' ("the Land").

2. There is a further application by the Claimant to extend the time for service of the sealed s.288 claim form. In relation to the same issue, the First Defendant seeks a declaration that the Court does not have jurisdiction to entertain the s.288 challenge due to the failure to serve a sealed claim form within the prescribed period.

3. The Claimant originally sought to bring a second challenge pursuant to s.289 of the 1990 Act. That was an appeal against the decision of the Inspector to dismiss the Claimant's appeal against the enforcement notice issued in respect of the Land. For reasons relating to a procedural error, the Claimant accepts that the Court no longer has jurisdiction to hear the s.289 appeal. The Claimant failed to serve a copy of the s.289 appeal documents on the Defendants within the prescribed 28-day period and the Court having no power to extend the time for service. That claim is therefore withdrawn.

The application to extend time for service

4. The s.288 application was commenced within the 6-week statutory period which ended on 4 May 2023. The relevant documents were filed with the Court on 18 April 2023. Paragraph 4.11 of PD54D provides that: "The claim form must be served within the time limited by the relevant enactment for making a claim for planning statutory review set out in paragraph 1.2." The 'relevant enactment' referred to in paragraph 1.2 is s.288 TCPA 1990. Thus, service of the claim form must also be effected within the same six-week period for making the claim.

5. The Claimant was unable to serve the sealed papers upon either of the Defendants within the statutory 6-week period due to the Court not issuing the sealed papers until after expiry of that time limit. The Court did not acknowledge receipt of the documents when they were initially sent on the 18 April 2023 and on 2 May 2023, the Claimant's legal representatives chased matters by email. Between 10 May 2023 and 14 June 2023, the Claimant's representatives contacted the court on no fewer than 10 occasions enquiring about the sealed documents. The Court finally issued the s.289 appeal on the 15 June 2023 but the sealed s. 288 claim form was not issued until 11 July 2023. The s.289 documents were served on the second Defendant on 11 July 2023 and on the first Defendant on 12 July 2023.

6. The Court has the power to extend the time for service of the claim form under CPR r.3.1(2)(a) if application is made. The test to be applied on an application

for an extension of time for service of a claim form in the context of a judicial review challenge has been recently clarified by in *R (Good Law Project) v Secretary of State for Health and Social Care [2022] EWCA Civ 355*. Carr LJ (as she then was) distinguished service of a claim form from other procedural steps, given that service of originating process is the act by which the Defendant is subjected to the jurisdiction of the Court. As such the principles established in Denton and Mitchell[1] are not applicable.

7. Carr LJ went on to opine that the rules of the Court apply with equal force to public interest cases as much as to other types of claims; that there is palpable prejudice to the Defendant of the loss of an accrued limitation defence and that when considering an application for extension it is not appropriate to take any view on the merits of the claim. Carr LJ concluded that:

> "It is important to emphasise (again) that valid service of a claim form is what founds the jurisdiction of the court over the defendant. Parties who fail, without good reason, to take reasonable steps to effect valid service, in circumstances where a relevant limitation period is about to expire, expose themselves to the very real risk of losing the right to bring their claim."

8. I agree with Mr Fry that there is no logical basis for adopting a different approach to the determination of extension of time for service applications in planning statutory review claims than in judicial review claims.

9. The sealed claim form should have been served by 4 May 2023. It was in fact served on 12 July 2023, almost 10 weeks late. Mr Fry criticises the Claimant for use of an incorrect form and for not specifying that it was a claim under s.288 of the Act. The claim was however issued on a Part 8 claim from, and it was accepted by the Court. Whilst the Claimant did not, in terms, impress upon the Court the urgency of sealing the claim form, the Claimant's representatives were entitled to a reasonable expectation that the form would be sealed in a timely manner and that they would be able to serve the sealed form before 4 May 2023.

10. On the 2 May 2023 the Claimant's representative emailed the Court office to chase matters. The email was marked "high importance". The deadline of 4 May was passed two days later, and the Claimant's solicitor had still not received a sealed form. On the 11 May 2023, in a telephone call, the legal representative was assured that the Court would issue the claim "after lunch" and they were told "not to worry about the date". A further email was sent on 18 May 2023 referring to earlier communications, stating that the papers had been lodged on 18 April and "bearing in mind it is an application for review, there is some urgency".

11. On the 22 May 2023 the Claimant's representative made two telephone calls to the Court office and received an assurance that the matter would be sent to the court lawyer that same day to enable the lawyer to check the claim before issue. Further chasing telephone calls were made on 25 May, 30 May, 7 June and 9 June. On the 14 June 2023 the claimant's legal representative sent an email

[1] Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537 and Denton v TH White Ltd [2014] EWCA Civ 906

requesting an update and saying that they had attempted, without success, to telephone the Court office that week. The s.288 claim form was eventually issued and sealed on the 11 July 2023 and served on the 11 and 12 July 2023 on the first and second defendants respectively.

12. In these circumstances I am entirely satisfied that the failure to serve a sealed claim form in time was due to matters outside the control of the Claimant and his representatives. The behaviour of the legal representative in continuing to chase the Court for a sealed claim form was reasonable. The delay did not stem from the use of an incorrect form. The representative had marked the email with the Claim form of 'high importance' and they continued to chase matters which spoke of the sense of urgency in obtaining a sealed form. It is difficult not to have sympathy with the Claimant in such circumstances.

13. Unlike in the Good Law case, the Claimant did not choose to serve an unsealed claim form on the Defendants. However, that is unsurprising considering the assurances given by the Court that the matter was about to be dealt with. Likewise issue of the application for extension of time came after the expiry of the deadline but again, given the focus on obtaining a sealed form and the assurances given, this is unsurprising.

14. Whilst service took place significantly out of time, having regard to all the unusual facts of this case, I conclude that the Claimant took reasonable steps to effect valid service but due to matters outside his control and for good reason, his representatives were unable to do so. I therefore exercise the Court's discretion in extending the time for service of the sealed claim form up to and including the last date on which the sealed claim forms were served upon the Defendants.

The application for permission

15. By application dated 8 May 2022, the Claimant sought planning permission for "*the change of use of the Land to use as a residential caravan site for 4 gypsy families, including the stationing of 6 caravans, laying of hardstanding and erection of a communal amenity building*". The planning application was refused by the Second Defendant (as Local Planning Authority) in a decision dated 26th August 2022. Prior to that refusal the Second Defendant had issued an enforcement notice against the Land on 14th June 2022, in relation to the same development. The Claimant appealed against both decisions and the Inspector dealt with the appeals in a conjoined manner, dismissing both, following an Informal Hearing held on 24th November 2022.

16. The application for planning permission was refused for five reasons. The first reason was due to the proposal representing inappropriate development in the Green Belt, contrary to local and national planning policies. The second reason was related to the demonstrable harm which it was alleged would be caused to the Green Belt by virtue of harm to openness and permanence of Green Belt, as well as significant encroachment and landscape harm. The remaining three reasons for refusal relate to harm to the character and appearance of the area; lack of mitigation or protection measures for an ancient woodland and

intentional unauthorised development contrary to advice in the Written Ministerial Statement of December 2015.

17. The Inspector considered the appeal against the refusal of planning permission at paragraphs 40 to 122 of the decision letter. The main issues were identified as whether the development would constitute inappropriate development in the Green Belt; the effect of the proposal on the openness of the Green Belt; the effect of the proposal on the character and appearance of the site and the surrounding area; and whether any harm by reason of inappropriateness and other harm would be clearly outweighed by other considerations such as to amount to the very special circumstances necessary to justify a grant of planning permission.

18. The Inspector went on to make key findings in relation to each of those issues. It was concluded that the proposed use did constitute inappropriate development in Green Belt terms and that it would have a significantly harmful effect upon the openness of the Green Belt. She went on to conclude that the proposal would have a significantly harmful effect on the character and appearance of the land and the surrounding area.

19. After going on to consider various other factors, the Inspector set out other material considerations which weighed in favour of the grant of permission. These included the general need for gypsy and traveller accommodation and the lack of a 5-year housing land supply; the lack of alternative accommodation for the applicant and his family; the personal circumstances of the appellant and his family including the best interests of the children.

20. At paragraph 101 of the decision letter the Inspector undertakes the required balancing exercise in relation the Green Belt. After summarising her previous findings, she concludes:

> 106. The Framework establishes that substantial weight should be given to any harm to the Green Belt and that inappropriate development, such as the appeal scheme, is by definition harmful to the Green Belt and should not be approved except in very special circumstances. Policy E of the PPTS states that, subject to the best interests of the child, unmet need and personal circumstances, are unlikely to clearly outweigh harm to the Green Belt and any other harm.
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> 107. The Framework makes it clear that the potential harm to the Green Belt by reason of inappropriateness and any other harm resulting from the development must be clearly outweighed by other considerations for planning permission to be granted. In this case I find that although there are some matters which weigh in favour of the appellant, the cumulative weight of these other considerations does not clearly outweigh the substantial harm arising to the Green Belt in combination with the harm to the character and appearance of the surrounding area and the IUD.
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> 108. Consequently, my initial conclusion is that the very special circumstances that are necessary to justify inappropriate development in the Green Belt do not exist in this case. Accordingly, the development is

> contrary to Core Policy 2 and Policies GB1, H6, EQ4, EQ11 and EQ12 of the Local Plan and to the Framework.

21. The Inspector then goes on to consider whether a grant of temporary and/or personal permission is justified:

> 109 The appellant is clear that he is seeking planning permission on a permanent basis, however it is necessary for me to consider whether a grant of temporary and/or personal permission is justified.
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> 110. The substantial weight attached to any harm to the Green Belt is the same for a temporary as for a permanent permission. In this case the effect on openness and the harm to the character and appearance of the surrounding area would be moderated if the permission was of a limited duration. 111. The Council requested that if planning permission was granted it should be subject to a condition limiting the duration of consent until 31 March 2025. At the Hearing it confirmed that this timescale reflects the programme for its expected adoption of the DPD.
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> 112. There is no certainty that the DPD will be delivered in accordance with the Council's ambitions and even if it were in place by that time there is no information before me regarding the likelihood that there will be an available site for the appellants in that timescale. On that basis it cannot be said that there is a reasonable expectation of a change in planning circumstances within a two-year period and throughout that period and potentially beyond the harm which I have identified would endure.

22. The Inspector concluded that granting permission on a temporary basis or on a personal basis did not change the Green Belt balance such that planning permission should be granted on either of these bases. The Claimant seeks permission to challenge the decision to dismiss the appeal on two grounds, namely that the Inspector erred in her approach to the issue of a temporary planning permission and secondly, that the Inspector erred in relation to consideration of the best interests of the children.

23. Lindblom J. (as he then was), *in Bloor Homes East Midlands Ltd. v. Secretary of State for Communities and Local Government and another [2014] EWHC 754 (Admin)* set out several legal principles relevant to s.288 challenges, which included recognition that:

> (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"… 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…

24. In *Barwood Strategic Land II LLP v East Staffordshire Borough Council [2017] EWCA Civ 893,* Lindblom LJ sets out the legal principles applicable on

considering an application for permission. There must be vigilance against excessive legalism when reading planning decisions of inspectors and such decisions should be read in a straightforward manner, with an appreciation that planning decision-making mostly involves the exercise of planning judgement with a correct understanding of policy and lawful application of that policy to the particular facts of a case.

Ground 1

25. The claimant contends that the Inspector has erred in her approach to the issue of temporary planning permission in two respects. Firstly, the claimant takes issue with the Inspector's statement at paragraph 110 that "The substantial weight attached to any harm to the Green Belt is the same for a temporary as for a permanent permission". Following that sentence the Inspector goes on to acknowledge that the effect on the openness and the harm to the character and appearance of the surrounding area would be moderated if the permission was of a limited duration.

26. It is for the Inspector, as part of their planning judgment, to attribute the weight to be given to any particular factor in the balancing exercise. Attribution of weight and assessment of these factors can only be challenged if the conclusions arrived at are irrational or perverse. It is well-established that the reasons for a decision must be intelligible and adequate as per Lord Brown in *South Bucks District Council v Porter (No.2) [2004] 1 WLR 1953.*

27. The issue of the nature of the planning balance and the weight to be attributed to various factors was considered in the case of *Moore v SSCLG and London Borough of Bromley [2013] EWCA Civ. 1194* when the Court of Appeal considered the lawfulness of the planning balance carried out by an Inspector when assessing temporary planning permission for development in the Green Belt. The Court of Appeal accepted the earlier observations of Cox J. when she stated:

> " 70 However, the substantial weight previously attaching to
>
> the harm arising from inappropriate development in the Green Belt fell to be reduced, because it would be limited in time..."

28. The decision as to the grant of a temporary planning permission is a matter of planning judgment. Mr Fry contends that the case of Moore is distinguishable because the Inspector in the Moore case had applied the same balancing exercise to both temporary and permanent planning permission. However, as the judgment of Cox J. makes clear, where substantial weight had been attributed to the harm arising from inappropriate development when considering a permanent permission; when one came to consider a temporary planning permission it was only right that the weight attributed should be reduced due to the harm existing over a shorter period.

29. Here, the Inspector has started her assessment with a statement that the substantial weight to be attributed to **any** harm in the Green Belt is the same for a temporary as for a permanent permission. She goes on to acknowledge that the **effect** on openness and harm to character and appearance of the surrounding

area would be moderated if the permission was of a limited duration. The Inspector is acknowledging the harm would be moderated but there is no reference to any corresponding reduction in weight.

30. Even if Mr Fry is correct, that the first sentence sets out the starting premise and the second sentence has the effect of adjusting the weight to harm, that reduction would appear to only apply to the harm by way of openness (and harm to landscape character and appearance). The decision is silent as to any reduction to the harm by way of inappropriate development.

31. Mr Fry points out that the National Planning Policy Framework makes no distinction between temporary and permanent permission. The Framework simply states that substantial weight should be given to any harm to the Green Belt. However, if the weight to various factors remained unchanged in relation to both a balancing exercise for a permanent planning permission and one for a temporary planning permission, what would be the point in conducting the second balancing exercise to consider a temporary planning permission?

32. The second complaint against the Inspector's decision is in relation to consideration of the duration of the temporary permission. The Inspector went on to consider the duration of any temporary planning permission. At paragraph 111 she records the Council's request for a temporary period up to 31 March 2025, on the basis that this reflected the Council's timetable for expected adoption of its DPD. At 112 of the decision letter, the Inspector sets out her reasons for concluding that it could not be said that there was a reasonable expectation of a change in circumstances within the suggested period.

33. The Inspector was entitled to come to that conclusion in the exercise of her planning judgment but, having rejected the Council's suggestion of 2 years being a period in which circumstances might change, she did not go on to consider a longer period (allowing for slippage of the DPD adoption timetable) and coming to a view on the acceptability of a longer period.

34. For these reasons I consider that ground 1 is plainly arguable as to whether the Inspector has taken a lawful approach to the consideration of the grant of a temporary planning permission and having rejected the Council's suggestion of a 2-year period, failing to provide reasons as to why a longer period would not be appropriate.

Ground 2

35. The second ground rests upon the Claimant's contention that the Inspector erred in her approach to the best interests of the children. The Supreme Court in *ZH(Tanzania) v SSHD [2011]UKSC 4*, as confirmed in *Zoumbas v SSHD [2013] 1 WLR 3690* at [10], emphasised that the best interests of children are a primary consideration in cases such as this, that is where their interests are being adversely impacted upon, and no other factor should be given more weight.

36. In *Dear v SSCLG [2015] EWHC 29 (Admin)* it was accepted on behalf of the SSCLG [44] that the correct starting point in Green Belt cases is to attach substantial weight to the best interests of the child, according with the

substantial weight to be attached to the harm to the Green Belt. It is then a matter for the decision maker whether that weight may be reduced, (see *Dear* at [47] and *Stevens v SSCLG [2013] EWHC 792 (Admin)* at [63]) but if it is to be reduced, adequate and intelligible reasons must be given.

37. The Inspector deals with the question of personal circumstances of the appellant and his family at paragraphs 93-98. She acknowledged that the personal circumstances of the Claimant and his family..."*including the best interests of the children, weigh significantly in favour of the developmen*t".

38. The Inspector, in a separate paragraph, says the following:

> 104. The best interests of the children are a primary consideration, and no other consideration is inherently more important, however, they are not a determinative factor. In this case the best interests of the children who reside on the site weigh significantly in favour of allowing the appeal.

39. Finally, at paragraph 117 the Inspector, in a section entitled "Human Rights including the Best Interests of the Children" goes on to address the consequences of dismissal of the appeal and the significant interference with their Article 8 rights.

40. At paragraph 91 of the Decision Letter the Inspector accepts that there was no

other alternative accommodation option for the family should the appeal fail.

> "91. The appellant says that there are no suitable, affordable and acceptable sites available to him as an alternative to the appeal site. He has submitted letters from gypsy and travellers' sites in the area which state that there are no vacant pitches available. His only option if he and his family were not able to stay on the site, would be to occupy an unauthorised, roadside site. The Council does not dispute the information provided by the appellant and is not aware of any sites which may provide alternative accommodation."

41. The Inspector acknowledges at paragraph 118 that there is a lack of alternative accommodation for the family; that the children would benefit from a settled base in terms of accessing education and other support. She recognises that the prospect of a roadside existence would have significant implications for family life and could lead to separation of the wider family members. Whilst she used the term 'the potential of a roadside existence', I am satisfied that she was referring to a situation in which the appeal failed.

42. On reading the decision letter as a whole, the Inspector gave clear and detailed consideration to the best interests of the children, identifying them as a primary consideration and recording that no other considerations are inherently more important. The Inspector expressly grappled with the issue, identifying that it was in the best interests of the children to have a settled base. Her starting point was that the best interests of the children were a significant factor. She went to apply her planning judgment and concluded that the personal circumstances of the family, the best interests of the children and other factors in support did not

clearly outweigh the harm she had identified. For these reasons ground 2 is not arguable.

43. I therefore grant permission on ground 1 and refuse permission on ground 2.