

*Breakout Session Two – Newman Room*

## **Asylum Accommodation – housing and planning issues in the courts**



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## The Home Secretary's responsibilities

- Statutory responsibility to provide accommodation and other support to asylum seekers and their dependants who would otherwise be destitute.
- S.95 Immigration and Asylum Act 1999 r.5 Asylum Seekers (Reception Conditions) Regulations 2005
- If asylum seeker/dependants appear destitute while application for support being considered, SSHD must provide temporary support/accommodation
- S.98 IAA r.5 2005 Regulations
- “Destitute” includes cases in which person does not have adequate accommodation or means to obtain it

## Impact of COVID pandemic

- **Prior to COVID pandemic** - Asylum seekers held at a clearance centre (48 hrs) moved into interim accommodation (2-3 weeks) before being placed in dispersed accommodation (usually conventional or local authority housing) until their claims were determined, then sent out into the community.
- **During COVID pandemic** - asylum seekers whose claims had been determined no longer compulsorily moved out of dispersed accommodation, creating blockage in throughput at interim centres; rate of processing application severely reduced; significant increase in arrivals in small boats.

Braintree District Council v SSHD [2023] EWHC 1076 (KB) at [13]-[14] [17]-[18]

## Increasing demand – other factors

- Small boat arrivals at unprecedented levels since early 2021
- 8466 arrivals in 2020
- 28526 arrivals in 2021
- 45000+ arrivals in 2022
- Trend remains upwards – almost all submit asylum claims
- Afghan Relocation & Assistance Policy/Citizens Resettlement Scheme
- August 2021 evacuation brought 15000 people to UK
- April 2023 - 8,000 Afghan nationals in bridging accommodation – hotels

Braintree District Council v SSHD [2023] EWHC 1076 (KB) at [19]-[22]

## Current position

- March 2023 – 109,000 asylum seekers in need of accommodation (Home Office estimate)
- Expected to increase to between 120,000-140,000 by end 2023 (HO estimate)
- Huge increase in need for interim accommodation

Braintree District Council v SSHD [2023] EWHC 1076 (KB) at [15]-[16]

## Home Office response

- Provision of “contingency” accommodation – block booking hotels for particular periods – prior discussion with LPAs
- January 2022 – Manston “processing facility” opened with capacity to house temporarily 1,600 people
- October 2022 – Manston accommodating 4,000 people – severe overcrowding
- HO began to “spot book” hotels on per room basis as urgent relief measure
- Controversial with local authorities – see injunction cases (below)
- Early 2023 – review/site selection of Ministry of Defence sites to provide contingency accommodation
- 3 sites selected – RAF Wethersfield, RAF Scampton, site at Bexhill

## Spot booking hotels – legal challenges

- Ipswich Borough Council v Fairview Hotels and Serco Ltd [2022] EWHC 2868 (KB)
- Great Yarmouth BC v Al-Abdin and Serco [2022] EWHC 3476 (KB)
- LPA claims for injunctions under section 187B Town and Country Planning Act 1990 on basis that proposed use of hotels to accommodate asylum seekers was unauthorised material change in their use from hotel to hostel use
- Holgate J heard *inter partes* applications for interim injunctions
- Applications failed in Ipswich
- Application succeeded in Great Yarmouth

## Hotel claims – analysis (1)

- Holgate J applied classic *American Cyanamid* principles – Ipswich at [98]-[141]; Gt Yarmouth at [48]-[79]
- In both cases there was a triable issue – whether the proposed use of the hotel would involve a material change of use and thus a breach of planning control (Ipswich at [98]-[104]; Gt Yarmouth at [48]-[56])

## Hotel claims – analysis (2)

- Holgate J resolved the “balance of convenience” by focusing on the flagrancy and degree of planning harm that would result from the alleged breach of planning control – would the planning harm would be “substantial” – see Ipswich at [93]
- Balance favoured interim injunction in Gt Yarmouth – flagrant breach as hostel use contrary to strong development control policy applied to specific area and existing enforcement notice protecting hotel use – see [40], [67], [79] and compare Ipswich at [117], [131], [138]
- Holgate J characterised the result in Gt Yarmouth as founding upon the “special” circumstances of that case – primarily the existence of policy GY6
- No section 187B “hotel to hostel” case has gone to a final hearing

## Military bases – legal challenges

- Braintree District Council v SSHD and SSD [2023] EWHC 1076 (KB); [2023] EWCA Civ 727
- R (West Lindsey District Council) v SSHD [2023] EWHC 1400 (Admin)
- Braintree involved a claim by the LPA for a final injunction under s.187B of the TCPA to restrain SSHD from using the site at RAF Wethersfield as contingency accommodation for asylum seekers. Waksman J held that the court lacks jurisdiction to consider granting an injunction under s.187B against Crown land. The Court of Appeal upheld the judge's decision.
- West Lindsey is a claim for judicial review of the SSHD's decision to deploy RAF Scampton as contingency accommodation for asylum seekers. Kerr J refused an interim injunction. The substantive claim is to be heard this month.

## Braintree – the jurisdiction question (1)

- RAF Wethersfield owned by MOD and therefore Crown land.
- The TCPA binds the Crown (s.292A) BUT subject to express provision made by Part 13 (ss.292A(2)).
- Ss.296A(2) –
  - “A local planning authority must not take any step for the purposes of enforcement in relation to Crown land unless it has the consent of the appropriate authority”.
- Ss.296A(4) –
  - “A step taken for the purposes of enforcement is anything done in connection with the enforcement of anything done or required to be done or prohibited by or under this Act”.

## Braintree – the jurisdiction question (2)

*“In our view an application for an injunction under section 187B is undoubtedly a "step taken for the purposes of enforcement". Section 187B is one of a series of provisions comprised in Part VII of the 1990 Act, whose collective description, in the heading of that Part, is "Enforcement". It is manifestly an enforcement provision. Its explicit purpose is to enable the local planning authority to restrain, by means of an injunction granted by the court, any "actual or apprehended breach of planning control", regardless of whether it has exercised or proposes to exercise any of its other powers under Part VII. If an authority applies to the court for such an injunction, as the council has done here, it is in our view clearly taking a "step for the purposes of enforcement" within the definition in section 296A(4)”.*

Braintree (CA) at [51]

## Military bases – the Part 19 Class Q PD right

- A.3(2) GPDO 2015 grants planning permission for –  
“Q. *Development by or on behalf of the Crown on Crown land for the purposes of –*  
*(a) preventing an emergency;*  
*(b) reducing, controlling or mitigating the effects of an emergency; or*  
*(c) taking other action in connection with an emergency”.*

Q.1(b) Use of the land must cease before the expiry of 12 months beginning with date on which the development began.

## Class Q PD right – what is an emergency?

- Q.2 –

*“(1) For the purposes of Class Q, “emergency” means an event or situation which threatens serious damage to –*

*(a) human welfare in a place in the United Kingdom; or*

*(b) the environment of a place in the United Kingdom; or*

*(c) the security of the United Kingdom.*

*(2) For the purposes of sub-paragraph (1)(a), an event or situation threatens damage to human welfare only if it involves, causes or may cause –*

*...*

*(c) homelessness;...”.*

## An emergency within the scope of Class Q?

- SSHD in Braintree [81] –  
*“The Defendants contend that the unprecedented numbers of asylum seekers which the Secretary of State is legally obliged to support, combined with the absence of suitable accommodation, is an event or situation for the purposes of Class Q”.*
- Waksman J in Braintree [82] ff concluded Class Q applicable.
- A situation which develops over time can become a Class Q emergency. Real prospect of significant numbers of asylum seekers becoming homeless in the absence of available contingency accommodation threatens serious damage to human welfare. Not merely a policy choice but a statutory obligation in play. Development would reduce, control, mitigate effects.

## Scope of Class Q – where are we now?

- Waksman J's conclusions in Braintree are *obiter*.
- Court of Appeal in Braintree declined to rule on Class Q issue as dismissal of appeal on jurisdiction issue was determinative of appeal [64]
- Court of Appeal had in mind pending claims for judicial review by West Lindsey District Council and others seeking to challenge the lawfulness of SSHD's reliance on Class Q PD right in bringing forward MOD sites as contingency accommodation for asylum seekers.
- On 11 May 2023, Kerr J refused an interim injunction restraining SSHD from implementing the Class Q PD right at RAF Scampton, applying *American Cyanamid* principles – see [2023] EWHC 1400 (Admin) at [79]-[93].

## Scope of Class Q – where are we now?

- On 14<sup>th</sup> July 2023, following an oral hearing Thornton J gave permission for judicial review claims to proceed on the following grounds –
  - (1) SSHD is not entitled to rely on the Class Q PD right as there is no Class Q “emergency”. It is noteworthy that the claimant, a neighbouring resident, has been given permission to rely on expert evidence analysing the reasons why the “situation” relied on by SSHD has arisen.
  - (2) The negative EIA screening direction given by the Secretary of State for Levelling Up, Housing and Communities is defective in law with the result that the SSHD is not permitted to rely on the Class Q PD right (see A.3(10) of the GPDO 2015).
  - (3) SSHD has failed to discharge her PSED – s.149 of the Equality Act.

## Military sites – future use

- The *West Lindsey* litigation is concerned primarily with the lawfulness of the SSHD's reliance on the Class Q PD right to authorize the development of military sites for use as contingency accommodation for asylum seekers.
- Class Q PD right limited in duration – use to cease within 12 months.
- Extended use requires authorization under Part 3 of TCPA by grant of planning permission on application or under Special Development Order.
- Expectation that SSHD will seek SDO(s).
- Cf R(Hough) v SSHD [2022] EWHC 1635 (Admin) – Napier Barracks No 2.

Lieven J held SDO for extended use of Napier Barracks unlawful on ground that SSHD had failed to discharge PSED in relation to proposed extended use of facility for up to 5 years – [106]-[109].

## Other pending cases

### Ships and barges as contingency accommodation

On 10 October, Holgate J held oral permission hearing on judicial review claim contending that stationing of *Bibby Stockholm* at Portland is development amenable to development control under Part 3 of the TCPA – R(Parkes) v SSHD. Decision to be given on 11 October.

### Rwanda appeals – R(AAA and others) v SSHD [2023] EWCA 745

Supreme Court heard SSHD's appeals on 9<sup>th</sup> -11<sup>th</sup> October.

## Essential issue – political or legal?

- SSHD evidence (see above in Braintree case) is that impact of COVID pandemic, small boats crisis and Afghanistan have combined to create situation of emergency which demands urgent supply of contingency accommodation which cannot be met sustainably or effectively through spot booking hotels – cost and legal risk. Hence military sites and barges.
- Local authorities and neighbouring residents case that political choice by SSHD not to resource processing of asylum applications is real cause of problem. Evidence is said to show that majority of applications are ultimately successful and applicants move into community. Not on analysis an emergency but a problem of SSHD's own making which can be remedied by resourcing the asylum claims process and thereby freeing the logjam in temporary accommodation available for use in discharging statutory duties.

# Land Use Conference 2023

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# Thank you for listening

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