

Welcome to Landmark Chambers'

'Planning High Court Challenges – Session 2' webinar

The recording can be accessed [here](#).

Your speakers today are...



Matthew Reed KC (Chair)



Alex Goodman

Topic:
Public Sector
Equality
challenges:
case-law update



Heather Sargent

Topic:
Heritage case-
law update

Your speakers today are...



Nick Grant

Topic:
Recent development
plan challenges
round-up



Harley Ronan

Topic:
Latest NPPF
cases

Latest NPPF cases



Harley Ronan

5YHLS – previous oversupply?

Tewkesbury BC v Secretary of State for Housing, Communities and Local Government [2022] P.T.S.R. 340

- Can previous over-delivery of housing requirement be credited when calculating current 5YHLS?
- Plan period: 2011 – 2031. Tewkesbury had been delivery more housing than the annual average required by the plan.
- Tewkesbury argued that the previous oversupply (or advance delivery) should be taken into account when calculating current 5YHLS

5YHLS – accounting for previous oversupply?

- Tewkesbury's position:

The purpose of the requirement to demonstrate a 5YHLS was to ensure delivery of the housing requirement across the whole plan period, and therefore the NPPF should be interpreted to take past oversupply within the plan period into account.

5YHLS – accounting for previous oversupply?

- **Dove J: No obligation in NPPF to take into account past oversupply**
- “The text of the Framework is silent, or alternatively does not deal, with what account if any should be taken of oversupply achieved in earlier years when calculating the five-year supply.” [42]
- “In the absence of any specific provision within the Framework there is no text falling for interpretation, and it is not the task of the court to seek to fill in gaps in the policy of the Framework. It is far from uncommon for there to be gaps in the coverage of relevant planning policies: they will seldom be able to be designed to cover every conceivable situation which may arise for consideration...” [43]

5YHLS – accounting for previous oversupply?

- **But no barrier to it being taken into account in any particular case:**
- “When it arises that there is no policy covering the situation under consideration then it calls for the exercise of planning judgment by the decision-maker to make the necessary assessment of the issue to determine the weight to be placed within the planning balance in respect of it.” [43]
- As there was an absence on oversupply, **“the question of whether or not to do so will be a matter of planning judgment for the decision-maker bearing in mind the particular circumstances of the case being considered.”** [43]
- That question is not a binary choice of simply whether to take it into account or not: [46]. Rather, “several broad policy approaches” which could be taken.

5YHLS – accounting for previous oversupply?

- Oversupply post-*Tewkesbury*:
- Land east of Waters Lane, Middleton Cheney APP/Z2830/W/20/3261483.
(inspector accepted LPA including previous supply in calculating current 5YHLS)
- Land off Bedford Road, Willington, Bedfordshire APP/K0235/W/20/3259981
(inspector accepted that whole of oversupply should be discounted from current housing requirements. LPA therefore had a 5YHLS)

Parag 11(d) – determining the importance of policies

R. (on the application of Goesa Ltd) v Eastleigh BC [2022] EWHC 1221 (Admin)

- Conditional planning permission granted for extension of runway at Southampton Airport.
- Claimant argued that OR had misinterpreted para. 11(d) of the NPPF as officer had not made an explicit assessment of what development policies were the most important for determining the application or, specifically, that policy 115.E(v) of the local plan was the most important.

Parag 11(d) – determining the importance of policies

R. (on the application of Goesa Ltd) v Eastleigh BC [2022] EWHC 1221 (Admin)

- Officers’ report: ““Criterion (v) of saved policy 115.E lacks flexibility and is out of step with the NPPF aims set out in para 104(e)–(f), and therefore this criterion is deemed out of date. In the context of this application, officers consider that the out-of-datedness of policy 115.E means that the council should apply the presumption in favour of sustainable development under paragraph 11(d) of the NPPF and assess the proposed development on that basis” ([150], emphasis added)

Parag 11(d) – determining the importance of policies

- Hoglegate J: “Policy 115.E was critical to the outcome... It is therefore wholly understandable that the officer's report should have effectively treated that criterion as the most important policy. There was no need for that to be spelt out in order to satisfy the legal approach in *Palmer*. It is obvious that that was the officer's judgment. Judicial review is not concerned with awarding marks for the draftsmanship of an officer's report” [167]
- “I have reached the firm conclusion that there is no positive indication in the officer's report to suggest that he failed to consider which policies were important for the purposes of paragraph 11(d). To my mind it is obvious that he addressed the question in the specific context of the application”.
- The “important message” in *Mansell* is “still not being heeded” [160].

Parag 11(d) – determining the importance of policies

- How to determine “importance” of policies for the purposes of 11(d):
- “Paragraph 11(d) does not say how “importance” is to be assessed. It is a broad matter of judgment left to the decision-maker. Paragraph 11(d) is not akin to a legal rule or principle. It is a policy for practical use in decision-making (see Dove J in *Wavendon Properties Ltd v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 2077, para 58” [159].

The meaning of “design” in para. 120(e)

- ***Vanbrugh Court Residents' Association v Lambeth LBC* [2022] EWHC 1207 (Admin)**
- Para 120(e): planning policies and decisions should: “support opportunities to use the airspace above existing residential and commercial premises for new homes. In particular, they should allow upward extensions where the development would be consistent with the prevailing height and form of neighbouring properties and the overall street scene, is well-designed (including complying with any local design policies and standards), and can maintain safe access and egress for occupiers” (emphasis added).

The meaning of “design” in para. 120(e)

- The OR considered that “The proposed roof addition is considered in keeping within the existing context of surrounding building heights and would not interrupt the skyline.”
- Claimant argued that OR misinterpreted para 120(e) on the basis that 120(e):
 - i. includes a reference to 'well designed' which refers not just to the external appearance of upward extensions but to their structural design; and
 - ii. there is nothing in the NPPF which suggests that design is distinct from structural design.

The meaning of “design” in para. 120(e)

- **Para 120(e) does not encompass structural design:**
 - Design occupies a chapter in the NPPF, in which there is no reference to structural integrity
 - “Design in NPPF terms is distinct from structural design which is left for the building control regime” [73]
 - “If the reference to design in paragraph 120 e) was considered to extend to structural integrity, then the effect would be to start to import the building control regime into the design policies when the general position is that structural issues are not normally within the scope of the planning application process.
 - Claimant’s interpretation “an unrealistic approach to the NPPF framework”

Latest green belt cases

***Warwick DC v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC 2145 (Admin)**

- Para 149: exceptions to inappropriate development in green belt include “the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building”.
- Does an “extension” have to be physically attached to the existing building?
- No. Key requirement was protection against “disproportionate additions”, not that the extension was attached to the existing building.

Latest green belt cases

R (on the application of Whitley Parish Council) v North Yorkshire CC [2022] EWHC 238 (Admin)

- In deciding whether development in the Green Belt is inappropriate development, the development must be considered as a whole and not by reference to any part or parts thereof: *Kemnal Manor* applied. OR had not fallen foul of that in the present case.

Sefton MBC v Secretary of State for Housing, Communities and Local Government [2021] EWHC 1082 (Admin)

- Assessment of harm under para 148 not a mathematical exercise. The exercise of planning judgement is a single exercise of planning judgement to assess whether there were very special circumstances which justified the grant of permission notwithstanding the particular importance of the green belt.

Loss of recreational facilities - para 99

- ***TV Harrison CIC v Leeds City Council* [2022] EWHC 1675 (Admin).**
Whether facility “surplus to requirements” a matter of planning judgement. In the absence of irrationality or misleading statements, it was open to the LPA to conclude that a particular playing field was of such poor quality that it added nothing to meeting local need and so was surplus to requirements.
- Must be applied with “good sense and realism”. Riding school not surplus to requirements as parts of it still in use: ***Millwood Designer Homes Ltd v Secretary of State for Communities, Housing and Local Government* [2021] EWHC 3464 (Admin).**

Heritage case-law update



Heather Sargent

Discussion post-*Bramshill*

Wiltshire Council v SSHCLG

- [2022] EWHC 36 (Admin)
- HHJ Jarman QC – 14 January 2022
- S. 288 challenge to Inspector’s decision to grant planning permission for 10 affordable dwellings on appeal
- Ground 2: alleged misinterpretation of Core Policy 58 (“CP58”) of the Wiltshire Core Strategy (“WCS”)

Wiltshire Council v SSHCLG

Ground 2:

- CP58 seeks to ensure conservation of the historic environment
- Inspector finds that Scheme would conflict with CP58 but reduces the weight to be given to the harm derived from that conflict from “great” to “moderate” because “the policy does not include provision for balancing potential benefits and is therefore plainly inconsistent with [...] the NPPF”

Wiltshire Council v SSHCLG

- Claimant accepts that CP58 does not expressly provide for a balance with potential benefits but contends that as a matter of law a balancing exercise is permissible when applying CP58
- Reliance on Court of Appeal in ***Bramshill*** [2021] EWCA Civ 320
- So the Inspector was wrong to downgrade the weight to be attached to the harm derived from the conflict with CP58

Wiltshire Council v SSHCLG

- ***Bramshill*** [87]-[89]
 - Inspector had given significant weight to local plan policies even though it had been agreed at the inquiry that they were inconsistent with NPPF policy on heritage assets because they did not provide for public benefits to be balanced against harm
 - Sir Keith Lindblom SPT: the absence of an explicit reference to striking a balance between “harm” and “public benefits” does not put the local plan policies into conflict with the NPPF, nor with s. 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990

Wiltshire Council v SSHCLG

- The local plan policies do not preclude a balancing exercise as part of the decision-making process (where appropriate), do not override NPPF policies and are directed to “the same basic objective of preservation”
- In performing the s. 66(1) statutory duty the Inspector was obliged to give “such weight to the local plan policies as she reasonably judged appropriate”
 - She acknowledged that the local plan policies lacked the “balancing requirement” of the NPPF but did not interpret them as shutting out that exercise

Wiltshire Council v SSHCLG

- **Wiltshire**: Claimant accepts that the Inspector carried out a balancing exercise but argues that it was done under the NPPF rather than by applying CP58, as required by s. 38(6) of the Planning and Compulsory Purchase Act 2004
- High Court: the Inspector carried out a similar exercise to that carried out in **Bramshill** and also referred to the s. 66(1) statutory duty (and gave considerable weight to that duty)
- Ground 2 rejected

London Historic Parks and Gardens Trust v Minister of State for Housing

- [2022] EWHC 829 (Admin) [2022] JPL 1196
- Thornton J - 8 April 2022
- S. 288 challenge to the grant of planning permission for the Holocaust Memorial
- Applicant for planning permission: SSHCLG
- Ground 1: the Inspector and the Minister applied the wrong legal test to the issue of whether “substantial harm” would be caused to heritage assets within Victoria Tower Gardens

London Historic Parks and Gardens Trust v Minister of State for Housing

- SSHCLG had contended that for SH, “very much if not all of the significance is drained away or that the asset’s significance is vitiated altogether or very much reduced”: reliance on ***Bedford*** [2012] EWHC 4344 (Admin)
- Westminster City Council (LPA): SH can arise where the adverse impact of a development “seriously affects a key element of [the asset’s] special architectural or historic interest” (reliance on PPG para. 018)

London Historic Parks and Gardens Trust v Minister of State for Housing

- Inspector: bearing in mind that para. 018 of the PPG “has been formulated in light of the **Bedford** judgment” there is in fact little to call between both interpretations
 - In both interpretations it is the serious degree of harm to the asset’s significance that is the key test
 - Para. 018 of the PPG explicitly acknowledges that SH is a “high test”, in accordance with the logic of the **Bedford** argument
- “It is a high test indeed”

London Historic Parks and Gardens Trust v Minister of State for Housing

- Thornton J:
 - Inspector came to own interpretation of relevant test for SH: “the serious degree of harm to the asset’s significance”
 - No objection from Claimant to that formulation, which reflects the PPG “and is an expression of Government policy”
 - Nor can Claimant take issue with Inspector equating “substantial” with “serious”
 - No issue with Inspector’s statement that test is a “high test”

London Historic Parks and Gardens Trust v Minister of State for Housing

- Inspector did not erroneously apply a test of “significance draining away”
- Inspector’s reasoning was not dependent on **Bedford** and thus in error
- Approach is entirely consistent with the approach to paras. 201 and 202 of the NPPF stipulated by the CA in **Bramshill**

London Historic Parks and Gardens Trust v Minister of State for Housing

– [74] of ***Bramshill***:

“...What amounts to "substantial harm" or "less than substantial harm" in a particular case will always depend on the circumstances. Whether there will be such "harm", and, if so, whether it will be "substantial", are matters of fact and planning judgment. The NPPF does not direct the decision-maker to adopt any specific approach to identifying "harm" or gauging its extent. [...] [T]he decision-maker is not told how to assess what the "harm" to the heritage asset will be, or what should be taken into account in that exercise or excluded. The policy is in general terms. There is no one approach, suitable for every proposal affecting a "designated heritage asset" or its setting"

London Historic Parks and Gardens Trust v Minister of State for Housing

– Thornton J:

- Strictly speaking [74] of ***Bramshill*** is *obiter* given the facts of that case but:
- The observations are consistent with a line of authority from the CA “emphasising the self-effacing role of the Court in respecting the expertise of Planning Inspectors and guarding against undue intervention in policy judgments within their areas of specialist competence which do not lend themselves to judicial analysis”

London Historic Parks and Gardens Trust v Minister of State for Housing

– On *Bedford*:

- Jay J’s judgment does not import a test of “draining away” to the test of SH; he was not seeking to impose a gloss on the term
- *Bedford* accords with [74] of *Bramshill*

Ground 1 dismissed

Newcastle upon Tyne CC v SSLUHC

- [2022] EWHC 2752 (Admin)
- Holgate J – 1 November 2022

- S. 288 challenge to the grant of planning permission on appeal for a residential development
- Ground 2: challenge to the Inspector's approach to the effect of the Scheme on the setting of a Grade I listed church

Newcastle upon Tyne CC v SSLUHC

- Common ground at inquiry that any harm to the setting of the church is “less than substantial”, not “substantial”
- Historic England and the LPA: a moderate degree of LTSH
- The developer (ultimately): no harm
- Inspector disagrees with HE and the LPA: harm caused would be “towards the lower end” of the LTSH category, in part because of “the key constraints of the plot”

Newcastle upon Tyne CC v SSLUHC

- Claimant (LPA) successfully argues that the Inspector's conclusion on LTSH is (impermissibly) based *inter alia* on her conclusion that the level of harm caused could not be further minimised by a different design
- HE's *Good Practice Advice 3* ("GPA3"):
 - Step 3: assess effects (beneficial/harmful) on significance
 - Step 4: explore ways to maximise enhancement and avoid/minimise harm

Newcastle upon Tyne CC v SSLUHC

- Holgate J: the considerations under Step 4 are relevant to the balance between scheme harm and benefit – not to the assessment of the level of harm that the scheme would cause
 - “Not surprisingly, GPA3 does not suggest that either the availability or non-availability of an alternative option reducing the harm that would be caused by the scheme for which consent is sought can be relevant to deciding how much harm that particular scheme would actually cause”

Newcastle upon Tyne CC v SSLUHC

- The Inspector took into account a legally irrelevant consideration when reaching her judgement on the level of harm that the Scheme itself would cause
 - The fact that the level of harm had been “minimised” in the sense that it could not be reduced further by adopting a different design solution was not relevant

Newcastle upon Tyne CC v SSLUHC

- Claimant also argues that Inspector failed to give “cogent and compelling reasons” from departing from HE’s view on the level of harm
 - Holgate J expresses “substantial reservations” about whether the case-law authorities actually establish the principle that “where a statutory consultee [...] has given its advice on a proposal, the decision-maker should give great weight to that opinion and, if departing from that opinion, should give cogent and compelling reasons for doing so”

Newcastle upon Tyne CC v SSLUHC

- “How is the court to assess whether the reasons given are “compelling and cogent” without trespassing into the “forbidden territory” of assessing the merits of the appeal proposal?”
- Issue not resolved
- The basis upon which the Inspector disagreed with HE’s advice is tainted by the legal error already identified by Holgate J

Kinsey: The Sequel

R (o.a.o. Kinsey) v Lewisham LBC

- [2022] EWHC 1774 (Admin)
- Fordham J – 11 July 2022

- Planning permission for 110 residential units originally quashed by Lang J in May 2021 and remitted to the LPA for redetermination
- Planning permission granted on redetermination, in August 2021
- Second grant of planning permission again judicially reviewed by Ms Kinsey

R (o.a.o. Kinsey) v Lewisham LBC

- Ground 1: “optimum viable use” (“OVU”)
 - NPPF para. 202: weigh LTSH against the public benefits of the proposal “including, where appropriate, securing its optimum viable use”
 - See also PPG
- Fordham J: NPPF and PPG as “two key sources” give four distinctive features of OVU: “applicability”, “method”, “idea” and “consequence”

R (o.a.o. Kinsey) v Lewisham LBC

- Applicability: OVU is only applicable where the Scheme entails a proposed use of a designated heritage asset (“DHA”)
- Method: against any LTSH to the significance of a DHA is weighed a “balance-sheet” list of any public benefits of the proposal; securing OVU of the DHA is included within that balance-sheet where “appropriate”. Inclusion is “appropriate” where the Scheme would involve “securing” the OVU of the DHA

R (o.a.o. Kinsey) v Lewisham LBC

- Idea: OVU means the economically viable use of the DHA that is likely to cause the least Heritage-Harm
- Consequence: OVU stands in the “balance-sheet” as one of the public benefits weighing against any LTSH to the significance of the DHA

R (o.a.o. Kinsey) v Lewisham LBC

- On the facts:
 - OVU had no applicability because the Scheme did not entail using a DHA
 - There was no documented / evidenced case put to the LPA that purported to demonstrate that the Scheme constituted “the least Heritage-Harm which an economically viable development proposal could entail”; nor did anything in the OR give a reasoned evaluative basis for such a conclusion
 - “Officers could not reasonably have reached the view that no less Heritage-Harmful scheme would be economically viable”

R (o.a.o. Kinsey) v Lewisham LBC

- Claimant unsuccessfully argues that the grant of planning permission is vitiated by legal error because the OR expressly advised Members that the Scheme “secures the OVU of the site”
- Fordham J :
 - The OR did not communicate to Members that planning officers had concluded that no less Heritage-Harmful scheme would be economically viable
 - No discussion anywhere in the OR of a smaller and less Heritage-Harmful scheme not being viable; no consideration of “comparative” viability

R (o.a.o. Kinsey) v Lewisham LBC

- A “policy-appreciating Committee Member, who understands how [the NPPF and the PPG] operate in practice, would also understand that [OVU] was inapplicable in the present case” (because the Scheme did not entail the use of a DHA)
- OVU had not been included in the officers’ “balance-sheet” lists of public benefits
- The reference to OVU was “a message about the “optimum use” of the site delivered by this “viable” development”: “[i]t is never said or developed [...] anywhere in the OR that the proposal is “optimum” in the sense of least Heritage-Harmful”

Recent development plan challenges round-up



Nick Grant

Context

Borough delays local plan consultation over 'uncertainties at national level'

1 September 2022 by Toby Porter

Another council has paused pro-
past year.



Council delays local plan submission over new PM and national policy uncertainty

12 September 2022 by Michael Donnelly

A council has delayed the submission of its emerging local plan for examination, citing a range of issues including statements made by the new Prime Minister in the run up to her appointment indicating a possible "removal" of the requirement to meet W... issued "housing targets".

Council to abandon draft local plan, delaying adoption by two years

17 August 2022 by Samantha Eckford

A council leader has said an authority will have to "start again" on its local plan, pushing the adoption date by up to two years, after councillors failed to agree

Council votes against restarting plan update despite

ing of 'significant
eculative de

Following at least 20 others in the

The 19 authorities that have withdrawn or delayed local plans in the past year

2 September 2022 by David Blackman

The councils reported by Planning to be delaying or withdrawing local plans over the

Local Plan Watch: Plan-making activity remains at rock bottom

25 August 2022 by Mark Wilding

Levels of plan-making activity look set to fall back to historically low levels, rebound last year, according to data published by the Planning Inspectorate

Local Plan Watch: Local plan slowdown set to reach historic low in 2022

3 November 2022 by Samantha Eckford

The number of local plans being published, submitted for examination and adopted this



Local plan core strategy adoptions 2022

# Local Council	# Last Updated	# Published	# Submitted	# Found Sound	# Adopted	# Review of Plan
Brentwood Borough Council	01/04/2022	05/02/2019	17/02/2020	23/02/2022	23/03/2022	NO
Darlington Borough Council	01/03/2022	06/08/2020	22/12/2020	28/01/2022	17/02/2022	YES
Eastleigh Borough Council	03/05/2022	25/06/2018	31/10/2018	14/03/2022	25/04/2022	NO
Folkestone & Hythe District Council - Core Strategy Review	01/04/2022	25/01/2019	10/03/2020	23/02/2022	30/03/2022	YES
Halton Borough Council - Delivery & Allocations Local Plan	01/04/2022	25/07/2019	05/03/2020	22/02/2022	02/03/2022	YES
Hambleton District Council	03/03/2022	30/07/2019	31/03/2020	19/01/2022	22/02/2022	NO
Ipswich Borough Council - Local Plan Review	01/04/2022	15/01/2020	10/06/2020	17/02/2022	23/03/2022	YES
Liverpool City Council	02/02/2022	26/01/2018	18/05/2018	20/10/2021	26/01/2022	NO
North Hertfordshire District Council	01/11/2022	19/10/2016	09/06/2017	08/09/2022	08/11/2022	NO
Northumberland Council	01/04/2022	30/01/2019	29/05/2019	26/01/2022	31/03/2022	NO
Old Oak and Park Royal Development Corporation	05/07/2022	14/06/2018	04/10/2018	01/04/2022	22/06/2022	NO
St Helens Metropolitan Borough Council	03/08/2022	17/01/2019	29/10/2020	18/05/2022	12/07/2022	YES
Watford Borough Council	01/11/2022	18/01/2021	06/08/2021	20/09/2022	17/10/2022	YES
Windsor & Maidenhead, Royal Borough of	01/03/2022	30/06/2017	31/01/2018	26/01/2022	08/02/2022	NO
Wyre Forest District Council - Local plan Review	03/05/2022	01/11/2018	30/04/2020	11/03/2022	26/04/2022	YES

Local plan other strategies 2022

Local Council	Plan Name	Published	Submitted	Found Sound	Adopted	
Braintree District Council	Local Plan Section 2 Site Allocations		Jun-17	Oct-17	Jun-22	
Central & Eastern Berkshire	Joint Minerals & Waste Plan		Sep-20	Feb-21	Oct-22	
Cheshire East	SADPD		Oct-20	Apr-21	Oct-22	
Colchester Borough Council	Local Plan Section 2 Site Allocations		Jun-17	Oct-17	May-22	May-22
East Devon District Council	Cranbrook Local Plan		Mar-19	Aug-19	Aug-22	Oct-22
Mid Sussex District Council	Site Allocations DPD		Aug-20	Dec-20	May-22	Jun-22
North York Moors National Park (+ N Yorks & York)	Minerals & Waste Joint Plan		Nov-16	Nov-17	Feb-22	Feb-22
Tewkesbury Borough Council	Tewkesbury Borough Plan		Oct-19	May-20	Apr-22	
West Berkshire District Council	Minerals and Waste		Jan-21	Jul-21	Oct-22	
Worcestershire County Council	Minerals Local Plan		Aug-19	Dec-19	May-22	Jul-22

Overview:

- Challenges under s. 113 PCPA 2004 in 2022
 - No substantive judgements.
 - Some challenges made, but knocked out at permission stage (e.g. Challenge to Windsor and Maidenhead Local Plan (***Hill v Royal Borough of Windsor and Maidenhead***, CO/1023/2022, Cranston J)).

- Challenges under s. 61N TCPA 1990 in 2022
 - ***R (Park Lane Homes (South East) Ltd v Rother DC*** [2022] EWHC 485 (Admin)
 - ***R (Fylde Coast Farms Ltd) v Fylde BC*** [2021] UKSC 18

Overview:

- Key points:
 - Timing (***Fylde***)
 - Strategic policies (***Park Lane***)
 - Procedural Fairness (***Park Lane***)

Neighbourhood Plans

- *Fylde* [2]:

Speaking generally, the making of neighbourhood development orders or plans requires the taking of ... seven consecutive steps, mainly by the relevant local planning authority. They are, in summary:

- (1) designating a neighbourhood area;*
- (2) pre-submission preparation and consultation;*
- (3) submission of a proposal;*
- (4) consideration by an independent examiner;*
- (5) consideration of the examiner's report;*
- (6) holding a local referendum;*
- (7) making the order or plan.*

Timing: *Fylde Coast Farms*

- S. 61N(1)-(3) - provides public law challenges to each of steps 5, 6 and 7:
 - (a) Claim brought by JR
 - (b) claim form filed within six weeks of day after decision published or referendum declared

Timing: *Fylde Coast Farms*

- Facts
 - July 2013: designation by BC of St Anne’s on Sea Neighbourhood Parish Area for preparation of neighbourhood plan (“NP”). (Step 1)
 - April-May 2014, June-July 2015: public consultation. (Step 2)
 - February –March 2016: submission draft NP consulted upon
 - March 2016: independent examiner appointed. (Step 4)
 - August 2016: (Examiner’s report) (Step 4)
 - Consultation with NE and ecological consultants about this
 - 02 March 2017: BC considered its decision statement at open meeting (Step 5)

Timing: *Fylde Coast Farms*

- Facts:
 - 04 May 2017: referendum. 90% voters in favour of plan (Step 6)
 - 26 May 2017: BC made plan (Step 7)
 - 5 July 2017: JR issued
 - Within time (by 1 day) for Step 7 (s. 61N(1))
 - 11 weeks late for step 5 (s. 61N(2)).

- Issue: can you challenge at step 7 based on an issue at step 5
 - High Court (Kerr J) – JR dismissed as out of time
 - EWCA (Lindblom, Lewison, Rose LJJ) – appeal dismissed

Timing: *Fylde Coast Farms*

- UKSC
 - Appeal dismissed (slightly different grounds)
 - S. 61N restrictive – not complete code for all public law challenges, deals with stages 5, 6, and 7 and imposes restriction (6 weeks, no extension)
 - Three step process:
 - Does challenge question decision with stage 5, 6 or 7
 - Is it brought by JR
 - Is it brought within 6 weeks
 - Cannot impugn decision at stage 7 by alleging deficiency at stage 5. Stage 5 issue needs challenging within stage 5 time limit.

Para 8(2) Sched 4B TCPA 1990

- Examiner must consider whether draft plan meets “basic conditions”:
 - (a) having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order,
...
 - (e) the making of the order is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area),
...

Park Lane Homes

- Policy
 - Rother District Local Plan (2006) allocates site for housing and recreational purposes (VL1)
 - Core Strategy (2014) supersedes RDLP 2006 but saves VL1.
 - Overall Spatial Development Strategy policies OSS1, OSS2, OSS3
 - Policy RA1 indicates 1670 dwellings needed in villages, indicates 50 for Burwash
 - Development and Site Allocations Local Plan (2019)
 - OVE1: Until NP for settlement with Core Strategy housing requirement comes forward, applications favourably considered if (a) contribute to meet housing target and (b) otherwise compliant with OSS2, OSS3.
 - DIM2: Development boundaries

Park Lane Homes

- Facts
 - C granted outline planning permission 7.3.18 for up to 30 dwellings. Application for full PP and discharge of RM conditions dismissed on *inter alia* impact on AONB grounds.
 - PC registered intention to proceed with NP on 7.6.16. SEA undertaken, pre-submission consultation in July 2019. C objected on basis it failed to allocate sites for housing or clarify whether development boundary extended.
 - Submitted to Council 27.08.20. At that point plan
 - Acknowledged target of 52 houses (Core Strategy and DSA 19) but
 - Made no allocations because existing sites unsuitable.

Park Lane Homes

- Facts
 - C objected- does not meet basic conditions as (1) fails to allocate any sites for housing in accordance with strategic policies of development plan (2) fails to expand development boundary for new housing. So contrary to NPPF and PPG.
 - Council rep to Examiner:
 - Acknowledged no allocations but OVE 1 provides appropriate sites come forward
 - Development boundaries do not conform with CS as no additional development provided to meet housing
 - Examiner's draft report – subject to long letter by C forwarded to Council, who forwarded to Examiner

Park Lane Homes

- Facts
 - Examiner's Report (6.7.21)
 - Accepted not allocating sites appropriate in light of C's failed applications
 - Suggested OVE1 be introduced into draft NP as default policy for addressing strategic requirements for housing
 - Development boundary should be modified, but majority of site already within it so no need to extend
 - Overall, did meet basic conditions.
 - 9.7.21 – Council's Chief Executive, exercising delegated authority, made Decision recommended modifications be accepted and BNDP proceed to referendum.

Park Lane Homes

- JR Grounds
 - Ground 1: Council erred in accepting Examiner's finding that NP met basic conditions set out in para 8(2) Sched 4B TCPA 1990 i.e
 - (a) Having regard to NPPF and PPG appropriate to make NP and
 - (e) Making of plan in general conformity with strategic policies for the area
 - Ground 2: Procedural unfairness as C not given opp to make reps on Examiner's reports before Chief Executive decided to adopt it.

Park Lane Homes

- Basic condition (a) [132]-[153]:
 - Confers discretion on examiner to decide whether appropriate to proceed “having regard to” national policy and guidance. It is not a “soundness” or “justification” test
 - NPPF 28 and 69, PPG 42,104 does not require neighbourhood plan to allocate housing sites. It is a choice
 - Not irrational to conclude NP had had regard to NPPF and PPG where it accepted need for homes, incl 52 in Burwash, and included OVE1

Strategic policies: *Park Lane Homes*

- Basic condition (e) [154]-[179]
 - Whether there is “general conformity” with “strategic policies” a matter of fact and planning judgment
 - Starting point is to identify “strategic policies”. NPPF 17-30:
 - SP should “*set out an overall strategy for the pattern, scale and quality of development, and make sufficient provision for...housing*”.
 - Plans should make explicit which policies are SP. These should be “*limited to those necessary to address the strategic priority of an area*”
 - Non-strategic policies should be used by LPAs to “*set out more detailed policies for specific areas, neighbourhoods or types of development. This can include allocating sites*”

Park Lane Homes: Ground 1

- Basic condition (e) [154]-[179]
 - C argued LV1 an SP: dismissed
 - Not listed in Core Strategy 2014 as a superseded strategic policy
 - A non-strategic policy as housing allocation on single site.
 - C argued DIM2 and OVE1 in DSA 2019: dismissed
 - DIM2 implements strategic policy on development boundaries in OSS2
 - OVE1 relates to specific areas (those without NP) and does not change strategy. A “default” mechanism aiming to ensure housing comes forward

Park Lane Homes: Ground 1

- Basic condition (e) [154]-[179]
 - C argued even if LV1, DIM2 and OVE1 are non-strategic policies, they effect interpretation of RA1 of the Core Strategy: dismissed
 - Condition (e) requires conformity with the SP, not development plan as a whole.
 - DSA 2019 post-dates Core Strategy, and is not an SP
 - Overall reasonable for Examiner, and Council, to conclude
 - NP did not challenge strategic need for development in Burwash
 - No policies prevent delivery of resi growth at appropriate site
 - “default mechanism” of OVE1 ensures housing favourable considered if criteria met

Procedural fairness: *Park Lane Homes*

- Ground 2 also dismissed:
 - Statute only requires consultation at stage 6 if Council proposes to make decision that differs from that recommended by the Examiner.
 - C had ample opp to make reps during whole process, which were taken into account by Examiner
 - As to suggestion Council should have notified C personally when decision made – Council busy. Not procedurally unfair. C found out from website
 - While LPA must give reasons for its decision, it can rely on the reasons given by the Examiner in his report.
 - As to suggestion Examiner should have held oral hearing: NP examination normally entirely written (Para. 9 Sched 4B TCPA 1990). Examiner's conclusion no need for oral hearing not impeachable.

Public Sector Equality challenges: case-law update



Alex Goodman

Public Sector Equality Duty – s 149

- S 149(1) provides that, a public authority must, in the exercise of its functions, have due regard to the need to—
 - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under [the Equality Act 2010];
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Public Sector Equality Duty – s 149

- S 149(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
 - (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
 - (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
 - (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

Public sector equality duty

Discharging the duty:

- “the duty is a duty to have due regard to the specified matters, not a duty to achieve a specific result. The duty is one of substance, not form, and the real issue is whether the relevant public authority has, in substance, had regard to the relevant matters, taking into account the nature of the decision and the public authority's reasoning. The absence of a reference to the public sector equality duty will not, of itself, necessarily mean that the decision-maker failed to have regard to the relevant matters although it is good practice to make reference to the duty, and evidentially useful in demonstrating discharge of the duty”*: (**R. (on the application of Buckley) v Bath and North East Somerset Council** [2018] EWHC 1551 (Admin) per Lewis J at [113]).

Public sector equality duty

Discharging the duty:

The scope of the PSED was neatly encapsulated by the Court of Appeal in **R (Bridges) v Chief Constable of South Wales Police** [2020] 1 WLR 5037 at [181]:

“We acknowledge that what is required by the PSED is dependent on the context and does not require the impossible. It requires the taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics, in particular for present purposes race and sex.”

Public sector equality duty

Discharging the duty:

R (Sheakh) v London Borough of Lambeth [\[2022\] P.T.S.R. 1315](#)

(Failed challenge in Court of Appeal by disabled resident to a Low Traffic Neighbourhood)

“What is "due regard" in one case will not necessarily be "due regard" in another. It will vary, perhaps widely, according to circumstances: for example, the subject-matter of the decision being made, the timing of that decision, its place in a sequence of decision-making to which it belongs, the period for which it will be in effect, the nature and scale of its potential consequences, and so forth.”

PSED – failures to discharge duty

R. (on the application of Hough) v SSHD [2022] EWHC 1635 (Admin)

- Concerned a challenge to the granting of planning permission by special development order for an asylum accommodation centre at Napier Barracks near Folkestone.
- Originally planning permission was granted by permitted development rights for a maximum of one year. The Home Office conducted an Equality Act review in respect of the one-year use. When the use was extended to five years they failed to reconsider
- Held that there had been non-compliance with the duty: the issues of tensions with the local community; pressure on services; risks related to harassment and victimisation depended on the duration of the use.
-

PSED – failures to discharge duty

- **R. (on the application of Buckley) v Bath and North East Somerset Council [2018] EWHC 1551 (Admin)**: partial demolition and rebuild of estate: no regard was had to the impact on elderly residents of losing their homes and whether the impact was greater than those who did not share that protected characteristic. Outline planning permission quashed.
- **R. (on the application of Danning) v Sedgemoor DC [2021] EWHC 1649 (Admin)**: Error of law in failure to fulfil section 149 duty on basis of “a complete absence of evidence” in respect to Council’s consideration of the impact of proposed changed of use from pub to residential dwelling on persons with protected characteristics (at [56]).

PSED – failures to discharge duty

- **R. (on the application of Williams) v Caerphilly CBC [2019] EWHC 1618 (Admin)**: Claimant successfully challenged decision to close leisure centre. Court held that the Council failed to have regard to impact of closure of the leisure centre on elderly and disabled persons.
- **LDRA Ltd v Secretary of State for Communities and Local Government [2016] EWHC 950 (Admin)**: Court not satisfied that Inspector had any had to the impact on disable people of loss of car park used to access the River Mersey. Planning permission quashed.

PSED – Decisions upheld

- In [*Gathercole v Suffolk CC \[2020\] EWCA Civ 1179*](#), the Court of Appeal held that when considering a planning application to build a new primary school the local planning authority had failed to have regard to the effect of aircraft noise on children with protected characteristics in breach of the public sector equality duty. The appeal was dismissed because applying s.31(2A) of the Senior Courts Act 1981 it was highly likely that the same decision would have been made without the error.
- In [*R. \(Lakenheath Parish Council\) v Suffolk CC \[2019\] EWHC 978 \(Admin\)*](#) a decision to grant planning permission for a new primary school was upheld because the s.149 duty was discharged in substance even though the officer's report did not mention the PSED in terms.
- [*R. \(Coleman\) v Barnet LBC \[2013\] Eq. L.R. 223*](#): claim under s.149 dismissed on basis Council had done everything required of it under section 149 in weighing up the replacement of a garden centre used by elderly and disabled people with a school.

S.71 of the Race Relations Act 1976

- Section 71 now superseded by EA 2010.
- But Cases raising the duty under r [s.71\(1\)\(b\) of the Race Relations Act 1976](#) to “have due regard to the need ... to promote equality of opportunity and good relations between persons of different racial groups” remain relevant
- See e.g. [*Baker v Secretary of State for Communities and Local Government \(Equality and Human Rights Commission intervening\)* \[2009\] P.T.S.R. 809](#) and [*R. \(Harris\) v Haringey London Borough Council \(Equality and Human Rights Commission intervening\)* \[2011\] P.T.S.R. 931](#) and [*Collins v Secretary of State for Communities and Local Government* \[2013\] P.T.S.R. 1594](#)), in which the Court of Appeal held that for the purposes of race relations, gypsies were capable of being a separate racial group as defined by [s.3\(1\) of the 1976 Act](#).

Equality Act 2010 – burden of proof

- Section 136: Claimant needs to establish prima facie case that defendant has breached the EA 2010. Burden of proof then shifts to defendant to show that the Act was not breached:
- 136(2): If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened [the 2010 Act], the court must hold that the contravention occurred.
- 136:(3) subsection (2) does not apply if A shows that A did not contravene the provision.

Generally on burden of proof under Equality Act, see *Smith v Secretary of State for Levelling Up, Housing and Communities* [2022]EWCA Civ 1391.

PSED in justification for discrimination

Smith v Secretary of State for Levelling Up, Housing and Communities [2022]
EWCA Civ 1391

Decision refusing planning permission for Gypsy site quashed. Policy excluded Gypsies who settled as a result of old age or disability from the definition of “nomadic” people who benefitted from particular planning policies for caravan sites. The PSED analysis did not support a defence to a discrimination claim:

“... it was apparent on the face of the PSED analysis that the relevant statutory considerations in [s.149\(1\) of the Equality Act 2010](#) were not met. It seems an unpromising starting point for the suggestion that the relevant exclusion would achieve fairness, to note that, at the outset, the advice to the Secretary of State was that the relevant exclusion did not eliminate discrimination; did not advance equality of opportunity between persons who shared a relevant protected characteristic and persons who did not share it; and did not foster good relations between persons who shared the relevant protected characteristic and persons who did not share it”

Direct discrimination – s 13 of the Equality Act 2010

S 13(1): A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

“Protected characteristics” defined in s 4 as:

age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.

Direct discrimination: *R. (on the application of Fraser) v Shropshire Council* [2021] EWHC 31 (Admin)

- Claimant argued that the Council had granted permission for residential development for older people with less open space than would be required for a conventional development and that older people were therefore treated less favourably.
- Officers' report concluded that, despite failing to provide the amount of open space required, the quality of the open space made it a better development proposal "irrespective of the intended residents of the development" (at [183]).
- Court found that no discrimination had occurred: permission would have been granted whether the intended residents were older people or not.

Direct discrimination: *Secretary of State for Communities and Local Government v Proudfoot Properties Limited* [2013] EWCA Civ 498

- Applicant sought permission to develop six houses with triple garages in an AONB. Applicant alleged:
 - 1. Refusal prevented the peaceful enjoyment of his possessions, contrary to Art. 1 of Protocol 1 ECHR (“A1P1”).
 - 2. planning permission had been granted to similar proposals in the area and that in refusing his application the Council had discriminated against him contrary to Art. 14.
- Court held: 1. refusal was a proportionate way of achieving legitimate aim of protecting AONB; and
- 2. No discrimination as comparator cases claimant relied upon presented different considerations, combined with pronounced harm to the area presented by his proposals – refusal therefore justified (see also *Holland* [2009] EWHC 2161 (Admin)).

Indirect discrimination: s 19 of the Equality Act 2010

- A applies to B a provision, criterion or practice (“PCP”) which is discriminatory in relation to a relevant protected characteristic of B’s (S19(1)).
- S 19(2): a PCP is discriminatory if
 - (a) A applies, or would apply, the PCP to persons who do not share the characteristic;
 - (b) it puts, or would put, persons who share B’s characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Moore v Secretary of State for Communities and Local Government [2015] EWHC 44 (Admin)

- *Planning policy for traveller sites* (2012): traveller sites in the green belt constituted inappropriate development.
- SoS stated in July 2013 that he would *consider* recovering appeals concerning the development of traveller sites on the green belt.
- However, SoS recovered *all* such appeals from September 2013 until September 2014
- Court found that although the policy for recovery was "not itself discriminatory", the application of the policy was discriminatory within the meaning of s 19: the appeals would take longer to determine than appeals made people other than travellers, and this approach was not a proportionate way of achieving the Secretary of State's aims (at [126]).

Article 14 ECHR

- “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground...”
- No claim under Art. 14 unless the facts "fall within the ambit" of another Convention right: *Petrovic v. Austria* (1998) 33 E.H.R.R, at [22].
- If the state creates a measure that affects the exercise of rights protected by the Convention, “*the state will be in breach of article 14 if the measure has more than a tenuous connection with the core values protected by article 8 and is discriminatory and not justified” (*Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916 per Etherton MR at [55]).*

***Connors v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1850**

Distinction between unlawfulness of the decision to recover the appeal and the substantive planning decision:

- A decision to recover an appeal which may contravene equality law does not impugn the substantive decision itself “*unless that unlawfulness infected the decision-making process itself*” (at [34]).

Thank you for listening

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