Raissi: The Interpretation of planning policy

1. This paper explores the approach taken to the interpretation of planning policy and examines in particular whether a new approach is likely to emerge following the decision of the Court of Appeal in R (Raissi) v Secretary of State for the Home Department [2008] 3 WLR 375 (CA).

2. I will deal with matters in the following order:-

   a. The pre Raissi approach – judicial restraint
   b. Pre Raissi – limits of restraint
   c. Pre Raissi – signs of activism
   d. Raissi
   e. The implications of Raissi for planning cases
   f. Should Raissi be followed in planning cases?
   g. Lessons from other planning cases – retreats from activism
   h. Conclusions

Part 1: Judicial Restraint in the construction of planning policies pre-Raissi

3. Policies play a critical role in planning decisions. Section 38(6) of the Planning and Compensation Act 2004 provides that planning determinations should be in accordance with the terms of the development plan unless material considerations indicate otherwise. National planning policy documents are also material considerations to be taken into account in reaching planning decisions.

4. It is well established that the decision maker needs to properly understand the policy in order to have lawful regard to it - see Gransden EC v Secretary of State for the Environment (1987) P&CR 86 (Woolf J) "if the body making the decision failed properly to understand the policy, then the decision would be as defective as it would be if no regard had been paid to the policy".

5. However, the basic requirement to understand the policy begs the question of how the courts will decide whether or not the content of a policy has been misunderstood.

6. Historically there has been a debate between 2 types of approach to the interpretation of policies:-

   a. The first strand, expressed for example in HJM Caterers Ltd v Secretary of State for the Environment [1993] JPL 958, held that the effect of a development plan was a matter of construction of law.

   b. The second strand, expressed in Northavon District Council v Secretary of State for the Environment [1993] JPL 761 was that the meaning of policies was a matter of fact and degree. The issue in Northavon concerned the meaning of the expression *'institutions standing in extensive grounds',* and the reasoning of Auld J (at 763) was as follows:

      > "The words spoke for themselves and were not readily susceptible to precise legal definition. Whether a proposed development met the description was in most cases likely to be a matter of fact or degree and planning judgment"

7. This second strand has come to be preferred as the established approach in planning cases.

8. In R v Derbyshire CC ex parte Woods [1997] JPL 958 the Court of Appeal held:-

   a. It is for the court to determine as a matter of law what the words are capable of meaning

   b. If in all the circumstances the wording of the relevant policy document is properly capable of more than one meaning and the planning authority adopts and applies a meaning which it is capable as a matter of law of bearing, then they will not have

gone wrong in law. A court will intervene only if the judgment on the meaning was demonstrated to be perverse or otherwise bad in law.

c. If the decision maker attaches a meaning to the words they are not properly capable of bearing, he will have made an error of law and will have failed properly to understand the policy.

9. The rationale for this approach has been articulated in the following terms by George Bartlett QC sitting as a Deputy Judge in Virgin Cinema Properties Limited v Secretary of State [1998] PLR 24:

> **"Since a planning policy does not confer rights or impose duties that are legally enforceable I cannot seen that it could ever be a matter for the court to determine its meaning as a matter of law for the purpose of deciding an issue arising from the making of a planning application. …..A conclusion on the meaning of a planning policy [in contrast to the meaning of a statute or planning permission] is a matter for the decision maker in the case. On review the role of the court, in my judgment, is to say whether the decision maker has attributed to it or, in forming his conclusion, has taken into account irrelevant matters or disregarded matters that were relevant. The court thus determines the ambit of reasonableness which is a matter of law".**

10. George Bartlett QC in Virgin went on to contrast cases where the issue is simply the meaning of ordinary words in which case he indicated that the ambit of reasonableness may be narrow or nil and "policies which may require for their interpretation an understanding of the thinking and purposes that underlie them. In such cases the expertise of the decision maker will play an important part, and the ambit of reasonableness will be determined taking this into account. The court will also be concerned to see that the decision-maker, in interpreting the policy, has taken relevant matters into account and has disregarded irrelevant matters".

11. In practice, in planning cases the prevailing approach in applying ex parte Woods has been that the meaning of planning policies is a matter for the decision maker and the court will adopt a non-interventionalist approach implicitly categorising the type of case as being one where the expertise of the decision maker plays a role in the interpretation of the policy. See Wandsworth London Borough Council v Secretary of State for Transport, Local Government and Regions, 19th February 2003, [2003] EWCA Civ 142 in

which the Court of Appeal approved of and adopted the ex pare Woods approach, the observations of Ouseley J in R v Oxford City Council ex parte J A Pye (Oxford) Ltd [2002] 2 P&CR 568, [2001] EWHC Admin 870 at page 581; and of Keene J in R v Secretary of State for Environment, Transport and Regions ex parte Tesco Stores Limited (19th October 2000) at paragraphs 27 and 28 and R v Leominster DC, ex parte Pothercary [1997] 3 PLR 91 at 100F "In many cases the relevant policies will contain within themselves value judgments upon which reasonable persons may differ".

12. This is perhaps reflective of the fact that planning policies are typically expressed in broad terms. In Mid-Bedfordshire DC v Secretary of State for the Environment [1984] JPL 623, McCullough J had observed:

> "These circulars were intended to provide local authorities with general guidance. Their paragraphs are to be read with common sense. Words are to be given their ordinary meaning and the sense and purpose of the paragraph as a while, and indeed the circular as a whole, is of greater importance than any individual phrase or sentence contained in it".

Part 2: Pre-Raissi Limits on the Restrictive Approach

13. In R(Cranage District Council) v First Secretary of State (2005) 2 P&CR 23 [2004] EWHC 2949 (Admin) Davis J applied ex p Woods but in doing so, he was somewhat sceptical about what he perceived to be the over reliance on the ex p Woods approach which, it seems, went against his instincts. As such he considered the relevant case law in some detail and articulated a reasoned explanation for the relatively non-interventionalist approach but also articulated his views as to the limits of ex p Woods.

14. So far as the rational for the prevailing approach is concerned Davis J stated (at paragraph 49):

> 49. There are in fact pragmatic reasons for this being the approach to be adopted in this particular planning context: which approach by no means of course mirrors the approach ordinarily otherwise adopted by the courts in other civil contexts: for

example, interpretation of statutory instruments or of commercial contracts. For one thing, in the planning field policies and development plans of this kind are commonly drafted by planners for planners and often are very loosely drafted. They are not, putting it broadly, intended to be legally binding documents in the strict sense. For another, the relevant phrases used will often be hardly sensible of bearing a strict hard edged interpretative approach and resort will be needed to elements of value judgment: for example, "institutions standing in extensive grounds" (the Northavon case) or "existing town centre" (the Wandsworth case). Thus, the ex parte Woods approach can in fact be operated, as [Counsel for the Secretary of State] observed, so as to reduce the potentiality for legal disputes.

15. So far as the limits of the approach are concerned, he stated (at paragraph 50):

> 50. All the same, I would, speaking for myself, sound a note of caution. The courts must be wary of an approach whereby decision makers can live in the planning world of Humpty Dumpty, making a particular planning policy mean whatever the decision maker decides that it should mean. I make the following observations.
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> (1) First, it is plain that ex parte Woods does not sanction such an approach. As Brooke LJ makes clear, the court will need to assess, as a preliminary matter, whether the interpretation propounded by the decision maker is one that the words used are in law properly capable of bearing.
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> (2) Second, and following on from that, if, in any particular planning case, one meaning is, on any viewpoint, highly probable but a counter meaning is advanced on behalf of the decision maker which can at best justify no epithet better than "tenuous", that, I apprehend, is not likely in the ordinary case to avail the decision maker; and in such a context the parties should not be surprised if the courts choose to adopt a robust approach. As stated by Mr George Bartlett QC (sitting as a deputy judge of the High Court) in Virgin Cinema Properties Limited v Secretary of State for the Environment [1998] PLCR 1 at page 8, there may be instances, on a point of interpretation in a relevant planning context, where the ambit of reasonableness is narrow or even nil.
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> (3) Third, there may be instances where, even if the words of the policy taken on their own prima facie support the interpretation of the decision maker, consideration of the purpose and underlying objective of the policy in question may show that such linguistic interpretation simply will not accurately represent the true policy: see Petter and Harris v Secretary of State for Environment, Transport and the Regions [2000] 79 P&CR 214 as an example of that.
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> (4) Fourth, decision makers will of course need to bear in mind that the adoption of a particular interpretation of a policy in a development plan in a particular case will make it difficult, at all events in the absence of convincing explanation, for them to adopt a different interpretation in another case without attracting a challenge on the ground of arbitrariness or collateral purpose or the like.

16. Prior to Raissi the position was that the ex p Woods approach was firmly established as the prevailing approach albeit that in Cranage Davis J had stressed that there were limits to the leniency of the approach.

Part 3: Judicial Activism and the interpretation of policy

17. The analytical correctness of the prevailing approach of letting the decision maker determine the meaning of a policy subject to limited control from the courts has been doubted in a number of cases.

18. In the planning context Sedley LJ (giving the judgment of the Court observed) in First Secretary of State v Sainsbury's Supermarkets Ltd [2005] EWCA Civ 520 (at paragraph 16) as follows:

> "The interpretation of policy is not a matter for the Secretary of State. What a policy means it says. Except in the occasional case where a policy has been ambiguously or un-clearly expressed so that its maker has to amplify rather than interpret it, ministers are not entitled to thwart legitimate expectation by putting a strained or unconventional meaning on it. But what Ministers do have the power and obligation to do…is apply their policy from case to case , keeping in balance the countervailing principles a) that a policy is not a rule but a guide and b) that like cases ought to be treated alike".

19. Those observations sounded unusual in a planning context but echoed the prevailing approach to policy in other areas of law particularly where the protection of legitimate expectations are concerned. Example of steps in the development of this line of authority (outside of the planning context) are:-

a. In R v Secretary of State for the Home Department ex parte Kumar [1996] Imm AR 190 at 193: Sedley J mentioned without deciding the point: "a publicly stated policy of this kind creates a legitimate expectation in those affected, and it is arguable that the construction of the policy is for the court and not the decision maker".

b. R v MAFF ex parte Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714 in which Sedley J laid the ground work for the jurisdiction of a wider doctrine of legitimate expectation and rejected the proposition even though it had not been challenged in

argument) that a decision maker could give evidence as to the meaning of his own policy (see 732 h).

c. In R v Secretary of State for the Home Department ex parte Urmaza (unreported, transcript 11 July 1996 available on casetrack) Sedley J stated "There is a coherent line of authority, therefore, to the broad effect that a policy means what it says, and that its meaning can ordinarily be established by the court and the decision maker held to it". Sedley J particularly stressed the link between the interpretation of policies and the enforcement of legitimate expectations.

d. As is clear from the judgment of the Court of Appeal in the seminal case of R v East Devon HA, ex parte Coughlan [2001] QB 213 at paragraph 79 the development of the doctrine of legitimate expectation has its routes in the basic proposition that "government departments should be expected to honour their statements of policy or intention or else treat the citizen to the fullest personal consideration".

e. In Re McFarland [2004] 1 WLR 1289 at paragraph 24 Lord Steyn observed in his dissenting judgment that ministerial statements were :

"an important source of individual rights and corresponding duties. In a fair and effective public law system such policy statements must be interpreted objectively in accordance with the language used by the minister…That question, like all questions of interpretation is one of law. And on such a question of law it necessarily follows that the court does not defer to the minister: the court is bound to decide such a question for itself, paying, of course close attention to the reasons advanced for the competing interpretations. That is not to say that policy statements must be constructed like primary or subordinate legislation. It seems sensible that a broader and wholly untechnical approach should prevail".

f. As such in the context of the developing jurisdiction of legitimate expectations and in particular in the immigration context where rights often turn on the contents of policy or circulars, the Court has been much more interventionalist in determining the meaning and content of a policy -which is the first stage of analysis when dealing with legitimate expectation argument. An example is the approach of Stanley

Burnton J in R(Nadarajah) v Secretary of State for the Home Department [2002] EWHC 2595 (Admin) at paragraphs 21-26 in which he concluded that the meaning of "asylum seeker" upon which the Secretary of State had relied was neither the ordinary nor a reasonable meaning of the words. Although couched in terms of determining what the reasonable meaning of the policy is this decision is indicative of a more interventionalist approach to the meaning of policies in a context where rights flow from the proper understanding of the policy. This aspect of the case did not feature when the case went to the Court of Appeal. However, the Court of Appeal in Nadarajah [2005] EWCA Civ 1363 . emphasised in the judgment of Laws LJ that the doctrine of legitimate expectation was rooted in the requirement of good administration that "public bodies ought to deal straightforwardly and consistently with the public". It is easy to see the interpretation by the court of what the policy means as a key stating point of this analysis.

g. R v Director of Passenger Rail Franchising ex parte Save Our Railways [1996] CLC 589 in which the Court of Appeal held that the Director had not acted in accordance with the directions of the Secretary of State. Sir Thomas Bingham MR (for the Court of Appeal stated): "There is no reason to doubt that "instructions and guidance" bear their ordinary meaning" (579H) and at 601D "the objectives, instructions and guidance define and circumscribe the franchising director's statutory duty. The court accordingly cannot, in case of dispute, abdicate its responsibility to give the document its proper meaning. It means what it means, not what anyone – the franchising director, Secretary of State or member of the public – would like it to mean".

Part 4: Raissi

20. In February 2008 the Court of Appeal gave its judgment in R (Raissi) v Secretary of State for the Home Department [2008] EWCA Civ 72.

21. On first impressions, Raissi is a long way away from typical planning cases.

22. At issue was the interpretation of an ex gratia scheme for the payment of compensation to persons detained in custody following a wrongful conviction or charge.

23. The claimant was subject to extradition proceedings instigated by the US government based on a minor holding charge. This facilitated his detention pending against a background of unsubstantiated allegations of his involvement in the September 11th bombings in respect of which there was no evidence.

24. At issue in the judicial review proceedings was whether the Claimant was entitled to compensation under the ex gratia claim for his wrongful detention. The Home Secretary contended that the scheme did not apply to extradition proceedings.

25. The Court of Appeal held that the test to be applied in interpreting a ministerial policy statement (as to the ambit of the ex gratia scheme) was to ask what a reasonable and literate person's understanding of it would be, and not whether the meaning attributed by the minister to the meaning of the words of the policy was a reasonable one.

26. Applying that test, the Court of Appeal held that having regard to the self-evident purpose of the scheme to compensate those who spent a period in custody resulting from a serious default on the part of the public authority that the scheme encompassed detention resulting from such default following a wrongful conviction or charge in extradition proceedings as well as domestic criminal proceedings.

27. The interest for present purposes lies in the reasoning of the Court of Appeal in the adoption of the above approach to the interpretation of the scope of the ex gratia compensation scheme.

28. The Court of Appeal considered how "policy statements such as this ex gratia scheme" should be interpreted. It set out the approach derived from R v Criminal Injuries Compensation Board, ex parte Webb [1987] QB 74 at 78 which was to decide what a

reasonable and literate person's understanding of the circumstances in which he could under the scheme is paid compensation.

29. In Raissi, the Home Secretary's submission was that ex parte Webb was no longer the right approach and instead the correct approach was that it was for the minister to decide to what his policy applies and what his policy means and provided that the interpretation is one to which a reasonable minister could reach then that interpretation will be upheld by the courts. That submission had been accepted by the Divisional Court in Raissi who had cited ex parte Woods as an authority in support of the contention (see paragraphs 110 and 111 of the Court of Appeal's judgment).

30. In paragraphs 118-120 the Court of Appeal referred to the "range of different approaches" which had been taken in cases as to the interpretation of ministerial policy statements. These specifically referred to planning cases in the following terms:

    a. At paragraph 119 – "....in planning cases... the courts have in the past tended to ask only whether the meaning attributed to the words of the policy was a reasonable one....."

    b. Paragraph 120 – "Even in planning cases the courts approach is not unanimous ... [it then set out paragraph 16 of the Court of Appeal's judgment in First Secretary of State v Sainsbury's Supermarket [2005] EWCA Civ 520 – see paragraph 18 above]"

31. In Raissi, the Court of Appeal concluded:
    At paragraph 122:

    "We have some difficulty with the reasonable meaning approach. One presumes that, if the minister has applied a meaning to some part of the policy, then the minister, without announcing any change in the policy, could not in a later case adopt another meaning, arguing that both meanings are reasonable and it is up to him or her to choose which meaning to use in any particular case. If that is right, then the reasonable meaning approach would only benefit the minister when interpreting the meaning of a particular part of the policy for the first time."

    At paragraph 123-4

"We have reached the conclusion that In re McFarland [2004] 1 WLR 1289 does not prevent this court from deciding what the policy means. To that extent we disagree with the Divisional Court. We shall use the Ex p Webb [1987] QB 74 text, whilst accepting that it could be worded in a more modern way.

What does the scheme mean? What was its purpose and scope? Who was the minister intending to compensate? We have already set out its terms at para 4 above. The purpose of the scheme, as set out in paragraph 1, was self-evidently to compensate those who had spent a period in custody resulting from a serious default on the part of a police officer or of some other public authority, in this case, so it is alleged, the CPS..... Having regard to what we believe is the purpose of the scheme, it is, in our view, quite wrong to approach it in the legalistic manner adopted by the Divisional Court. It should be interpreted purposively."

In interpreting the policy, the Court of Appeal held at paragraph 125-6:

"The most obvious circumstances in which such a period in custody could arise would follow a wrongful conviction or charge in a domestic criminal court. But it does not seem to us that the reasonable and literate person would require there to be wrongful charge or, alternatively, understand the word "charge" to be limited to a charge presented in a domestic criminal court..... We consider that it is quite artificial to draw a distinction between a person who faces a criminal charge in a domestic criminal court and one who faces a charge within extradition proceedings. No ordinary and reasonable reader of the scheme would think of drawing such a distinction.

In our view the scheme cannot be interpreted to exclude detention which results from the serious default of the police or a public authority in the context of extradition proceedings. .... It seems to us that the purpose of the scheme must encompass such a situation."

32. Thus in Raissi, the Court of Appeal:-

a. Rejected the approach of asking whether the meaning attributed to the words used in the policy by the decision maker was a reasonable one; and

b. Decided for itself what the meaning of the words in the policy meant and did so by reference to what it considered to be the self-evident purpose of the scheme as understood by the reasonable and literate person.

33. In so deciding the Court of Appeal had in mind the approach in planning cases as reflected in ex p Woods but commented that such an approach was not unanimous even in planning cases and declined to follow it.

34. It is also clear that the Court of Appeal regarded the 2 possible approaches about which it was making a choice as very different approaches. At paragraph 110 the Court of Appeal stated that the approach that the decision maker can decide to what his policy applies and what his policy means was "not based on what could be described as a quibble with the "person" test. It is a completely different test".

Part 5: The Implications of Raissi in planning cases

35. On the face of it, it is now open to argument post Raissi that even in planning cases the court must decide for itself what the policy means based on the reasonable and literate person's understanding and that this reflects a change of approach to the interpretation of planning policy.

36. Whilst, it is clear that the Court of Appeal in Raissi had an eye on what the situation was in planning cases, they were not deciding a planning case and did not have cited to them the range of caselaw relevant to policy questions in a planning context.

37. The decision of Raissi has so far been a complete non-event in planning cases. At the time of writing, there is no planning decision in which the Courts have considered the approach to policy as set out in Raissi. There are examples in planning cases of courts continuing to apply the ex parte Woods approach – see for example the decision of the Court of Appeal in South Cambridgeshire DC v Secretary of State for Communities and Local Government [2008] EWCA Civ 1010 (judgment dated 5 September 2008) at

paragraph 15 (citing and applying ex parte Woods as reflecting the correct approach to the interpretation of planning policies).

Part 6: Should Raissi be followed in planning cases?

38. The approach of searching for the self evident purpose of a policy scheme underpinned the approach of the Court of Appeal in Raissi. In planning cases, it will often be less clear whether such a singular purpose exists[1]. Planning policies are typically formulated so as to provide broad principles intended to function as guidance as to how to balance competing considerations.

39. Thus, the Court of Appeal's observation in Raissi that the 2 different approaches were completely different is unlikely to be the case in many planning cases where the wording of the policy does not lend itself to precise definition.

40. There are important differences between Raissi and the typical planning case both in terms of the language used in the policy and the context in which the policy falls to be determined. It is interesting to return to ex p Woods to note that the Court of Appeal had that contrast well in mind in formulating the approach to planning policies. The Court noted:

> "An example of the way in which in a particular context a court may as a matter of law restrict the range of possible meanings that a word is capable of bearing is to be found in the recent judgment of Lord Woolf M.R. in R. v. Radio Authority, Ex P. Bull and Wright (Unreported, December 17, 1996) with which I expressly agreed. Section 92(2)(a) of the

[1] That said, Petter and Harris v Secretary of State for the Environment (2000) 79 P&CR 214 is an example of a case where the Court of Appeal did identify a clear underlying purpose of the planning policy for agricultural dwellings. At p.223 Nourse LJ said: "What is the object of that part of the policy document? Or, as my Lord, Sedley L.J., put it in argument, one has to look at what is the policy. As I have already sought to demonstrate, it is clear, both from the predecessor of PPG 7, that was before the court in 1992, and also from the current document, that the reason why financial viability and the long-term prospects of the farming operation are taken into account is in order to seek to ensure that the residential development that is going to be permitted on the basis of the agricultural activity will indeed remain as a residential development linked to an agricultural activity; that is to say, as indeed paragraph I5(c) of PPG 7 puts it, the agricultural activity concerned has a clear prospect of remaining financially sound and profitable. The simple words of the policy and of the policy document must therefore be interpreted with that overall intention in mind.
As is agreed on all sides, the policy is to stop bogus or over-optimistic applications and to ensure that the relevant agricultural activity is likely to continue. Therefore, in looking at the wording of the policy, it is necessary for the inspector to consider what is the root reason why he is looking at financial viability at all."

Broadcasting Act 1990 refers to a "body whose objects are wholly or mainly of a political nature" , and Lord Woolf said that he accepted that "51 per cent or 99 per cent and anything between" were candidates for a possible meaning of the word "mainly". However, since the word was found in that context in a provision which constituted a restriction on freedom of communication (a freedom protected alike at common law and by the European Convention of Human Rights), the ambiguous word "mainly" was to be construed restrictively. By this he meant that it should be construed in a way which limited the application of the restriction to bodies whose objects were substantially or primarily (*i.e.* at least 75 per cent) political.

If in all the circumstances the wording of the relevant policy document is properly capable of more than one meaning, and the planning authority adopts and applies a meaning which it is capable as a matter of law of bearing, then it will not have gone wrong in law".

41. The search for the true meaning of a policy seems also to overlook the fact that the Courts have acknowledged even in a statutory context that words used in a particular provision may not lend themselves to precise definition. In R v Monopolies and Mergers Commission ex parte South Yorkshire Transport [1993] 1 WLR 23, the House of Lords considered the legality of a reference to the MMC where the jurisdictional precondition was that the reference area should be a "substantial part of the United Kingdom" under the provisions of s.64 of the Fair Trading Act 1973. The MMC considered that "substantial" connoted "something real or important as distinct from being merely nominal" and held that the South Yorkshire area was therefore a substantial part of the UK.

42. The House of Lords held that on their true construction the words "a substantial part of the United Kingdom" in s.64 of the Fair Trade Act 1973 connoted a part of such size, character and importance to make it worthy of consideration for the purposes of the Act.

43. The House of Lords approached the construction of the phrase "substantial part of the United Kingdom" in 2 stages (at p.28): first, a general appreciation of what "substantial means" in its present context and second, a consideration of the elements to be taken

into account when deciding whether the requirements of the word, so understood, are satisfied in the individual case.

44. The House of Lords held that as a matter of common language the term "substantial" accommodates a wide range of meanings. "At one extreme, there is "no trifling". At the other there is "nearly complete", as where someone says that he is in substantial agreement with what has just been said".

45. The decision of the House of Lords was that (at 32-3):

"Once the criterion for a judgment has been properly understood, the fact that it was formerly part of a range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ becomes a matter of history. The judgment now proceeds unequivocally on the basis of the criterion as ascertained. So far, no room for controversy. But this clear-cut approach cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: Edwards v. Bairstow [1956] A.C. 14 . The present is such a case. Even after eliminating inappropriate senses of "substantial" one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement. Approaching the matter in this light I am quite satisfied that there is no ground for interference by the court, since the conclusion at which the commission arrived was well within the permissible field of judgment. Indeed I would go further, and say that in my opinion it was right."

46. Thus, even in a statutory context[2], the words used may not be capable of precise definition and an approach which gives latitude to the decision maker to apply the policy

[2] See also R. (on the Application of Goodman) v London Borough of Lewisham [2003] EWCA Civ 140 [2003] Env. L.R. 28 at paragraph 8 for an application of the Monopolies and Mergers Commission case in the planning

as it sees fit prevails provided that the chosen approach falls within the reasonable range of meanings.

47. In Raissi the Court of Appeal did not consider the implications of the Monopolies and Mergers case for the approach to interpreting policies. There must be force in the submission that if there is a range of possible meanings to be attached to a word used in a statutory context, that must also be right where a planning policy is being interpreted.

48. The answer probably lies in an appreciation of context. Raissi is a case concerning individual liberty and entitlement to compensation where such liberty is taken away without justification. It is unsurprising in such a context that the court were anxious to construe the scheme in a way which provided for clear and fair rules and were not comfortable with the idea that the Secretary of State could pick and choose from an available menu of possible meanings.

49. Thus, the context in which the policy wording applies is critical as well as the language used. In planning, the contents of policies do not naturally lend themselves to precise definition and the green belt cases (discussed below) tend to suggest that attempts to constrain the meaning of words in such a context are unlikely to be successful.

50. That said, the ex parte Woods approach is not without constraints. The judgment of Davis J in Cranage (at paragraph 49) suggests some limitations on the open-ended nature of the approach. In particular, if a consistent approach to the meaning of words in a policy is adopted by a decision maker, it may well be unlawful for a different approach to be taken.

51. I would suggest therefore that the ex parte Woods approach subject to the limitations expressed by Davis J in Cranage may well provide a more realistic approach in planning cases than the decision of the Court of Appeal in Raissi. It is instructive to test that view

context- determining the meaning of the categories in schedule 2 of the Environmental Impact Assessment Regulations.

by reference to recent cases in 2 areas in which the caselaw has retreated from attempts to sharpen policy requirements in the planning context.

Part 7: Recent experience of a retreat from judicial activism in planning cases

52. There may be some clue as to whether Raissi is likely to be followed in planning cases from recent experience in 2 closely related area. First, in construing schemes of delegation in planning decisions, the Courts have retreated from an initial position of interventionalism. Similarly, in green belt cases the Court of Appeal has just retreated from a line of cases at first instance which appeared to impose close scrutiny on the way in which green belt policies were interpreted.

(1) Policy interpretation in schemes of delegation

53. The question of who interprets policy has arisen in the context of schemes of delegation. The question facing the court in these cases is whether a planning application had properly been determined under delegated powers by a planning officer as opposed to by the planning committee. The resolution of this issue turns on a construction of the relevant scheme of delegation – the terms of which frequently refer to whether or not a proposal is in compliance with policy. This begs the question whether the issue of compliance with the policy is an objective question for the court to decide for itself or a matter for the decision maker subject to review by the court on limited grounds.

54. In R(Carlton Conway) v London Borough of Harrow [2002] 3 PLR 77 there were a number of defects in the delegated officer's decision under challenge not least the absence of any evidence at all as to the basis for the decision. The Court of Appeal quashed the decision to grant planning permission. The potential importance of the case for present purposes is the suggested approach to construing schemes of delegation which referred to compliance with planning policies.

55. The scheme of delegation under consideration in Carlton Conway provided as follows: "where approval of development is recommended and a written objection or objections

have been received, except where the proposals do not conflict with agreed policies, standards and guidelines".

56. The Court of Appeal's judgment (given by Pill LJ) was as follows:

a. The scheme of delegation is "to be construed against a background that it is plainly the policy of the relevant statutory material and circulars that there should be public participation in planning decisions, including participation by those who are affected by them." (paragraph 21)

b. "Judgments as to whether a proposal conflicts with policies will often be difficult and making them should not be treated by a planning officer who has delegated powers as merely routine"(paragraph 22)

c. "The complexities present [in Carlton Conway] were such that the planning officer could not reasonably act upon the exception in [relevant part of the scheme of delegation]" (paragraph 24)

d. "Public policy requires, …… that the planning officer should be circumspect in exercising powers delegated in the terms they were in this case. When there are real issues as to the meaning of planning policies and as to their application to the facts of the case , reference to the appropriate committee is required" (paragraph 25).

57. It is easy to see why the Court of Appeal reached the conclusion which they did on the facts of Carlton Conway where the decision making process at issue was a complete mess. However, the approach articulated by Pill LJ appeared to direct courts to decide how controversial a proposal was in terms of its compliance with policy. The difficulty which this appeared to create was to require the courts to carry out the role of assessing the extent of compliance with planning policy which is a task which in the series of cases

such as Northavon, ex parte Woods and Virgin Cinema they had indicated they did not have the ability to do.

58. This issue and the potential difficulties raised by Pill LJ's judgment in Carlton Conway came before the Court of Appeal in R (Springhall) v London Borough of Richmond upon Thames [2006] EWCA Civ 19 [2006] JPL 970.

59. Springhall concerned the legality of a decision made under delegated powers to grant planning permission for a somewhat controversial proposal for the demolition and replacement of a building of townscape merit with the conservation area.

60. The relevant part of the scheme of delegation reserved matters for the planning committee "where officers recommend a decision contrary to the submitted written views of interested third parties or consultees, except when ….(c) applications are in accordance with any Supplementary Planning Guidance…."

61. The relevant SPG contained a presumption against the demolition of buildings of townscape merit but indicated that should it prove necessary a high standard of design complementing the surrounding area would be required in any replacement building.

62. The Council granted planning permission by a decision of an officer under delegated powers. The delegated decision was supported by a delegated officer's report which addressed both the relevant criteria under the scheme of delegation and the question of whether the proposal was in accordance with the supplementary planning guidance.

63. The Claimant's case was that the decision should be quashed as being contrary to the approach in Carlton Conway because given the controversial nature of the proposal it should have been referred to the planning committee for decision.

64. The Court of Appeal rejected this contention and held that paragraph 25 of Pill LJ's judgment in Carlton Conway should not be read as setting out a general principle that if there is room for debate about whether there is compliance with the relevant planning policy then the matter should not be decided under delegated powers.

65. So far as general approach to the interpretation of planning policies is concerned, Auld LJ (giving the judgment of the Court of Appeal) confirmed the application of the principles set out in ex parte Woods and stated at paragraph 7: "In any particular case involving the inter-play of a policy indicated in a development plan and other material considerations, there may be more than one acceptable interpretation in planning terms of a policy indicated in a plan, and more than one "correct" application of it when set against other considerations. A planning decision maker's approach to policy will only be interfered with by the court if it goes beyond the reasonable meanings that can be given to the language used".

66. The Court of Appeal held that in the circumstances in Springhall the question of whether or not the demolition of a building of townscape merit was justified was "essentially a matter of planning judgment on the facts of the case" (paragraph 30). Auld LJ stated (at paragraph 29) that the Claimant's attempt to extend Carlton Conway ran into conflict with ex parte Woods and confirmed the general approach that "Unless the decision maker attaches a meaning to the words of a planning policy that they cannot reasonably bear, it is not for a court to substitute its own interpretation of the policy. And the application of such policy to the facts of any particular case is a matter of planning judgment for the decision maker, subject only to considerations of Wednesbury irrationality"

67. As such Auld LJ concluded that whilst Pill LJ's concerns (as expressed by him in paragraphs 24 and 25) were valid in the circumstances of Carlton Conway, they should not be taken as a general rule that a planning officer should, as a matter of course, decline to exercise delegated powers unless the relevant policies and facts are clear. Rather of the officer is of the view that he can make sense of the policies and identify the

relevant facts so as to enable him to apply the former to the latter, "there is no basis, short of illegality or Wednesbury irrationality why the courts should intrude further on the arrangements local planning authorities made for their decision making" (paragraph 35).

68. Thus, in Springhall the Court of Appeal retreated from the path of intervention that the decision in Carlton Conway appeared to open up. A reason for this was recognition that the Court is not well placed to make judgements about the extent of compliance of a proposal with a planning policy.

(2) Green Belt cases

69. One of the most litigated planning policies is the green belt policy contained in PPG 2. Recent cases in that context provide a useful indicator of the way in which the courts have approached the construction of planning policy.

70. Paragraph 3.2 of PPG 2 states:

> **"Very special circumstances to justify inappropriate development will not exist unless the harm by reason of the inappropriateness, and any other harm, is clearly outweighed by other considerations"** (bundle at C24).

71. The approach to this policy guidance has been the subject of a number of judicial decisions.

72. In R (Chelmsford BC) V First Secretary of State [2004] 2 P&CR 34 Sullivan J quashed an Inspector's decision to grant planning permission for the stationing of a mobile homes in the green belt on the grounds that the harm to the green belt was outweighed by very special circumstances. The only very special circumstances identified by the Inspector granting planning permission was the educational needs of four gypsy families occupying the site which were characterised as entirely normal (see judgment at paragraph 65). Sullivan J held at paragraph 70 that the Inspector's approach was unlawful. He stated:

"An approach which in effect defines very special circumstances as *any* circumstances which in the decision taker's view clearly outweigh the harm to the Green Belt, would potentially drive a coach and horses through Green Belt policy which, as PPG2 explains, has been an essential element of planning policy for some four (now nearly five) decades: see para.1.1 of PPG2".

73. Sullivan J's decision in Chelmsford was followed at first instance by Mitting J in Wychavon District Council v Secretary of State for Communities and Local Government. At first instance, Mitting J quashed (with the consent of the Secretary of State) an Inspector's decision to grant temporary planning permission for gypsy sites on the basis of unmet regional and local need and the intention of the local planning authority to address it. Mitting J's reasoning was that such need was common place and thus was not capable of being a very special factor for the purpose of paragraph 3.2 of PPG2.

74. On appeal the Court of Appeal reversed Mitting J's decision and reigned back the tendency to define tightly the range of factors which were capable of amounting to very special circumstances for the purposes of paragraph 3.2 of PPG 2.

75. Carnwath LJ (giving the judgment of the Court) held:-

At paragraph 21 that the judge was wrong to treat the words very special as the converse of common place:

> "I say at once that in my view the judge was wrong, with respect, to treat the words "very special" in the paragraph 3.2 of the guidance as simply the converse of "commonplace". Rarity may of course contribute to the "special" quality of a particular factor, but it is not essential, as a matter of ordinary language or policy. The word "special" in the guidance connotes not a quantitative test, but a qualitative judgment as to the weight to be given to the particular factor for planning purposes."

At paragraph 23 Carnwath LJ noted that the policy guidance did not seek limit the range of circumstances in which the public interest in the green belt could be outweighed.

He observed:

"As it is, the guidance neither excludes nor restricts the consideration of any potentially relevant factors (including personal circumstances). The PPG limits

itself to indicating that the balance of such factors must be such as "clearly" to outweigh Green Belt considerations. It is thus left to each inspector to make his own judgement as to how to strike that balance in a particular case."

He then observed in paragraph 24:

"At the particular level there has to be a judgement how if at all the balance is affected by factors in the individual case: for example, on the one hand, public or private need, or personal circumstances, such as compelling health or education requirements; on the other, particular factors increasing or diminishing the environmental impact of the proposals in the locality, or (as in this case) limiting its effect in time. This judgement must necessarily be one to be made by the planning inspector, on the basis of the evidence before him and his view of the site."

At paragraph 26:

"I prefer the formulation used by Sullivan J himself in a judgment the previous year on somewhat similar facts, Doncaster MBC v SSETR [2002] JPL 1509 para 70, where (also in the context of 3.2 of PPG2) he said:

"Given that inappropriate development is by definition harmful, the proper approach was whether the harm by reason of inappropriateness and the further harm, albeit limited, caused to the openness and purpose of the Green Belt was clearly outweighed by the benefit to the appellant's family and particularly to the children so as to amount to very special circumstances justifying an exception to Green Belt policy" (original emphases).

This passage, rightly in my view, treats the two questions as linked, but starts from the premise that inappropriate development is "by definition harmful" to the purposes of the Green Belt."

76. Thus the Court of Appeal in Wychavon rejected the attempts made by first instance judges to limit the range of circumstances which were capable of being taken into account as very special circumstances in the green belt. Rather, the Court of Appeal viewed the policy as widely drawn and emphasised that the approach to applying that policy was a matter for the individual decision maker.

Part 9: Overall Conclusions

77. I would therefore suggest that:-

a. The Court of Appeal's approach in Raissi does not lend itself to be transplanted seamlessly to the planning context where policies tend to be broadly worded and where individual rights are not at stake.

b. The ex parte Woods approach lends itself better to the type of language typically used in the planning context (as indeed was the case in the Monopolies and Mergers case in the House of Lords when statutory language was being considered).

c. The history of planning cases suggests that attempts to sharpen policy based controls have been followed by retreats as the Courts have sensed the difficulties of being drawn into making planning judgments.

d. The ex parte Woods approach is not open ended but subject to limitations which were sensibly articulated by Davis J in Cranage at paragraph 50. An analytical framework which acknowledges that planning policies lend themselves to a range of meanings in many instances but controls against abuse by reference to the limitations highlighted by Davis J provides a much more realistic way forward than a Raissi inspired search for one true meaning in planning cases.

78. It is therefore doubted whether the decision in Raissi will mark a new chapter in the courts' approach to the interpretation of planning policies.

Daniel Kolinsky

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Landmark Chambers

180 Fleet Street

London EC4A 2HG