

Fairness challenges

Dan Kolinsky QC

dkolinsky@landmarkchambers.co.uk

Natural justice and planning inquiries



Hopkins Developments Ltd v Secretary of State for Communities and Local Government [2014] EWCA Civ 470

- Leading case on approach to fairness in planning appeals
- Rules not decisive
- Requirements of fairness are “acutely fact sensitive” [93]
- [61] – duty of Inspector is to conduct the proceedings so that each party has a reasonable opportunity to adduce evidence and make submissions on the material issues, whether identified at the outset or emerging during the course of the inquiry

Natural justice and planning inquiries (2)



[Hopkins Developments Ltd](#) at [62] summarised principles of fairness at a planning inquiry:

6 key points identified :

- (1) Any party to a planning inquiry is entitled (i) to know the case which he has to meet and (ii) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case.
- (2) If there is procedural unfairness which materially prejudices a party to a planning inquiry that may be a good ground for quashing the inspector's decision.
- (3) The procedural rules are designed to assist in achieving objective (1)(i), avoiding pitfall (1)(ii) and promoting efficiency. Nevertheless the Rules are not a complete code for achieving procedural fairness.



- (4) An Inspector's statement as to the main issues identifies what the inspector regards as the main issues at the time of his statement. Such a statement is likely to assist the parties, but it does not bind the inspector to disregard evidence on other issues. Nor does it oblige him to give the parties regular updates about his thinking as the Inquiry proceeds.
- (5) The inspector will consider any significant issues raised by third parties, even if those issues are not in dispute between the main parties. The main parties should therefore deal with any such issues, unless and until the inspector expressly states that they need not do so.
- (6) If a main party resiles from a matter agreed in the statement of common ground prepared, the inspector must give the other party a reasonable opportunity to deal with the new issue which has emerged.



Fairness and Statements of Common Ground



Engbers v Secretary of State [2016] EWCA Civ 1183

- Recent case about interplay of points 5 and 6 in Hopkins para 62
- Inspector refused permission for development on highways grounds.
- SoGC had stated there were no highways issues
- High Court quashed decision on basis of procedural unfairness given statement of common ground



Engbers v Secretary of State (2)



- Court of Appeal disagreed: third parties had raised highways issues, and the inspector had identified those as a “main issue” at the outset.
 - If a third party raises an issue which is at variance with the agreed stance of the appellant and the local planning authority, the inspector is duty bound to consider it. Fairness to third parties demands no less.
 - Inspector had also requested that the applicant call its highways witness. This was enough to have placed the applicant on notice that the Inspector might depart from the SoCG [48]



Engbers v Secretary of State (3)

$\frac{L}{C}$

Inclusion of a matter in the main parties' SoCG cannot debar consideration of those issues if the public disagrees: applicant runs a risk if he ignores such matters, especially where the inspector identifies the points as main issues [51]



Fairness and the cases advanced by objectors

$\frac{L}{C}$

See also Ecotricity Ltd v Secretary of State for Communities and Local Government [2015] EWHC 801 (Admin)

- Wind turbine proposal
- Grounds of refusal include “intensification of risk to aviation”
- Not at issue between main parties at inquiry
- But raised in letter from flying club as objection
- Developer’s fairness challenge fails
- Sufficiently on notice; should have addressed it (see [71] and [76] – C “has only itself to blame for not dealing with the matter head on”



Fairness and focussed debate at inquiry



- Wokingham BC v SSCLG [2017] EWHC 1863 (Admin)
 - Housing supply case
 - Inspector applies own approach to “lapse rate” which had not been canvassed at inquiry [50]
 - Breach of natural justice as lpa had insufficient opportunity to address
 - John Howell QC (sitting as a Dep Judge):



Fairness and focussed debate at inquiry (2)



[71]

“not correct to label the process that leads to a decision on a planning appeal simply as inquisitorial or simply as adversarial. It combines elements of both. [Inspector] is discharging a function that requires him to take reasonable steps to obtain information necessary to make his decision in the public interest. But he does within a framework of rules designed to enable such information to be obtained and to enable those participating to advance their case and criticise that of others in a fair manner. Although the application of those rules will normally achieve both objectives, their application does not necessarily exhaust the requirements of fairness nor does it necessarily secure all the information which the Secretary of State or appointed person may need to obtain in order to determine the appeal in accordance with the law and the public interest”.



Fairness and focussed debate at inquiry (3)



- [78] “the fact that a party may have told an Inspector that he or she is entitled to make a particular adjustment to the assessments that are the subject of the appeal, but without suggesting that the Inspector should do so, does not alter that conclusion. Far from such conduct advancing the focussed nature of a planning inquiry, it undermines it. The other party will not know, if the Inspector says nothing, whether or not it is something that it needs to address in evidence and submission.....[reviews evidence at inquiry and concludes that] The Council was entitled to conclude that the application of such a lapse rate to such sites, much less to others, was not an issue it had to address”.



conduct of inquiries



- Turner v SSCLG [2015] EWCA Civ 582 at [18] – no apparent bias or breach of natural justice when robust case management is adopted.

Per Sales LJ

(i) an inspector's role (in call in) has a **strong inquisitorial dimension**, investigating matters in a way which will enable him to report helpfully to the relevant decision-maker, the Secretary of State; with that end in view, it is **fair and appropriate for an inspector to seek to focus debate at an inquiry by making interventions to ensure that he is provided with material to assist him in his task**;



Conduct of inquiries (2)

$\frac{L}{C}$

- (ii) an inspector has to **manage efficiently the conduct of an inquiry within a limited time-frame**
- (iii) an inspector is **entitled to expect, and may legitimately seek to encourage, focused questioning and short and focused answers in the course of cross-examination of witnesses;**
- (iv) inspector is entitled to seek to focus debate on particular issues in the form which is most likely to provide clarity about what is at stake and assistance for him in writing a report; and
- (v) an inspector is entitled to give indications in the course of an inquiry of points which appear to him to be unrealistic or bad and to require concentration on what appear to him to be the real substantive points

Fairness at inquiries (3)

$\frac{L}{C}$

Overall:

Inspector must not go too far
but

Courts will judge assess any complaint having regard to the expectation that an inspector **should be actively managing the inquiry process to ensure that it is efficient, effective and fair to all interested parties**

Fairness and Hearings

L
C

- Dyason v Secretary of State for the Environment [1998] JPL 778 – conflicting evidence not adequately tested at hearing
 - Pill LJ
 - “Whatever procedure is followed, the strength of a case can be determined only upon an understanding of that case, and by testing it with reference to propositions in the opposing case”
 - “statutory right to be heard is nullified unless, in some way, the strength of what one party says is not only listened to by the tribunal but is assessed for its own worth and in relation to opposing contentions”
 - “A relaxed hearing is not necessarily a fair hearing. The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden upon an Inspector”
- 

Fairness and Hearings (2)

L
C

- Keene J in Croydon LBC v SSE (commenting on Dyason)
 - At informal hearing – “Inspector has to play an enhanced role in order to resolve conflicts of evidence. In addition, such an Inspector must not arrive at a finding adverse to a party without having put the point to the party in question or his witness”
- 

Fairness at hearings (site visit)

$\frac{L}{C}$

- LDRA Limited v SSCLG [2016] EWHC 950 (Admin) – grant of planning permission for (on shore) development to serve as marine operations and maintenance facility for off-shore projects
 - Inspector rejects 3P alternative sites argument as lacking details as to specific location; finds on available evidence that there is no indication of better location [44]
 - At site visit (by boat) – alternative site pointed out
 - Lang J determines that Inspector either did not understand or forgot [51-2]
 - Breach of natural justice to dismiss alternative sites case on basis that site had not been properly identified to Inspector
- 

Fairness at hearings (site visit) (2)

$\frac{L}{C}$

- At [52] – “rather than dismiss it out of hand, [Inspector] ought to have asked for further assistance by way of maps or photographs or conducted a site visit on land, so that he could give it due consideration”
- 

Fairness and written representations appeals



- R (Ashley) v Secretary of State for Communities and Local Government [2012] EWCA Civ 559
 - Decision quashed for breach of natural justice (even though no breach of regulations)
 - Appellant relied on expert noise evidence in written representations which were made after third parties had been allowed to comment (not foreshadowed in grounds of appeal)
 - Unfairness to third party arose in specific circumstances of the case (per Pill LJ “combination of circumstances which may occur only rarely” (para 33).

Fairness and Local Planning Authority Decisions



- Statement of Community Involvement
 - Potential source of legitimate expectations of procedural rights
 - See Majed v Camden [2010] EWCA Civ 1029 at [14]-[15]
“Legitimate expectation comes into play when there is a promise or a practice to do more than that which is required by statute. It seems to me that the Statement is a paradigm example of such a promise and a practice.... It would be difficult to imagine a more unequivocal statement as to who would, and who would not, be notified..... clear breach of the appellant's legitimate expectation that he would be notified”

Fairness and Local Planning Authority Decisions

L
C

- Majed applied in R (Kelly) v Hounslow [2010] EWHC 1256 – late notification by second hand post arrives with no realistic chance to attend committee meeting – “no better than no notice at all”; did not afford the opportunity promised by SCI
- No right general right to be heard/ make oral representations (see R (Adlard) v SSETR [2002] EWCA Civ 735)
- Claims of procedural fairness due to lack of access to confidential viability documents failed in R (Bedford) v Islington [2002] EWHC 2044 at 99-102 and R (Perry) v Hackney LBC [2014] EWHC 1721 (Admin) at 90-1 (where gist of conclusions reported in officer’s report)

Grafton Group (UK) plc v Secretary of State for Transport [2017] 1 WLR 373

L
C

- Planning appeal and CPO for redevelopment of wharf
- Inspector rejects development proposal but confirms CPO on basis that it is probable that pp granted for an alternative scheme
- It had been common ground at appeal that if appeal rejected CPO should not be granted
- Inspector had raised questions with witnesses but judge and CA decide that landowner had not been given a fair chance to address the basis on which the CPO was eventually confirmed (para 39)

Grafton v SST (2)

$\frac{L}{C}$

- CA reasoning:-
 - Central to Inspector's recommendation that the CPO be confirmed was his view that "a better design would be likely to come forward"
 - As a distinct proposition, that was never put to the parties at the inquiry
 - Landowner did not have fair opportunity to address it "unspecific as it was" "indeed he may have made much of its want of specificity"

