Landmark CHAMBERS

THE RETURN OF THE DUTY TO GIVE REASONS FOR THE GRANT OF PLANNING PERMISSION?

Tim Buley

(A) REASONS ON APPEAL

Statutory duty on inspector to give "full" reasons in any planning appeals. As to nature and extent of the duty, see: *South Bucks v Porter (No 2) [2004] 1 WLR 1953:*

> *36 The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.*

(A) REASONS ON APPEAL: SECRETARY OF STATE DECISIONS

- Duty to give full reasons applies equally to Secretary of State on call-ins and recovered appeals where he is the decision maker

- Of course in such cases Secretary of State will have a fully reasoned decision from the Inspector which will ordinarily have a fully reasoned "report" from the inspector with a recommendation

- In cases where Secretary of State agrees with Inspector's recommendation, his reasons can be quite short and simply set out the main steps by reference to the I's report

(A) REASONS ON APPEAL: SECRETARY OF STATE DISAGREES

- Some recent controversy about *adequacy* of reasons in cases where Secretary of State rejects I's recommendation: compare Lang J in *Wind Prospect Dev Ltd v SSCLG* [2014] EWHC 4041 (Admin), §§23-4, Lewison LJ in *Horada v SSCLG* [2016] PTSR 1271, §36. Latter case can be read as suggesting "heightened standard"
- Resolved by Lindblom LJ in *SSCLG v Allen* [2016] EWCA Civ 767:

  19. Where the Secretary of State disagrees with an inspector … He must explain why he rejects the inspector's view. He must do so fully, and clearly. But there is no heightened standard for "proper, adequate and intelligible" reasons in such a case. Whether the reasons given are "proper, adequate and intelligible" will always depend on the circumstances of the case … What he has to do is to make sure that his decision letter shows why the outcome of the appeal was as it was, bearing in mind that the parties to the appeal know well what the issues were. In this case he did that.
- In *Lichfield DC v SSCLG* [2017] EWHC 2242 (Admin), Singh J particularly emphasised the absence of any "heightened test" by reference to this paragraph (§33).

(B) LPA REASONS FOR PLANNING PERMISSIONS: Cttee Decisions

What about Local Planning Authorities?

- No general duty to give reasons for grant of planning permission at common law absent statutory duty: *R v Aylesbury Vale DC, ex p Chaplin* (1998) 76 P & CR 207.
- There is a duty to give reasons for refusal in the relevant procedure order but that will rarely be the subject of public law challenge given the availability of appeal to the Secretary of State
- From 5 December 2003 to 30 September 2010, Art 22 of the GPDO 1995 required a "summary of ... reasons" for granting planning permission, thus creating a statutory duty to give reasons albeit different in kind from that imposed on inspectors.
- This was repealed, in England, with effect from 1 October 2010. Government stated that it thought it was wrong in principle to require reasons

- So that is completely clear! Um ….

(B) LPA REASONS FOR PLANNING PERMISSIONS: Cttee Decisions

- Is the position different in cases involving EIA development within the meaning of the EIA Directive and Regulations? Under Article 24(1)(c) of the EIA Regulations 2011, LPAs are obliged, in relation to EIA development, to keep a statement containing, *inter alia,* "the main reasons and considerations on which the decision was based ...".

- But in *R (Richardson) v North Yorkshire CC* [2004] 1 WLR 1920, the Court of Appeal held that the identically worded predecessor in the 1999 EIA Regs did not create a statutory duty to give reasons for the grant of permission for EIA development. Rather, per Richards J at first instance, this obligation "looks to the position *after* the grant of planning permission" so that (per Simon Brown LJ in the CA) its purpose was to inform the public "retrospectively" of the reasons.

- As a result, the failure to comply with the art 24 obligation does not have any relevance to the legality of the permission itself, and cannot form a basis upon which to quash it. Rather, the only remedy which the court will give for a failure to comply is to order that the relevant reasons are added to the planning register.

(B) LPA REASONS FOR PLANNING PERMISSIONS: Cttee Decisions

SOME CURIOUS RECENT CASES!

- *R (Hawksworth Securities) v Peterborough CC* [2016] EWHC 1870 (Admin)
- *R (CPRE Kent) v Dover DC* [2016] EWCA Civ 936
- *R (Seventeen de Vere Gardens (Management) Ltd v RBKC* [2016] EWHC 2869 (Admin)
- *R (Oakley) v South Cambridgeshire DC* [2017] 1 WLR 3765

(B) LPA REASONS: *Hawksworth (1)*

Hawksworth

- In this case the claimant argued that, though there was no statutory duty to give reasons, nevertheless the LPA had "volunteered reasons" by recording a discussion in the minutes of the planning committee. The claimant relied on the principle that where reasons are given they must be adequate, regardless of any obligation to give reasons (*ex p Moore* [1999] 2 All ER 90.
- Lang J rejected this, holding that this did not amount to a volunteering of reasons:

  75. If the claimant's analysis were correct, the mere act of recording some reasons for a decision in the minutes ... would trigger an obligation to provide legally adequate reasons in every case ... even though the Secretary of State has made an order, laid before Parliament, which does not require local planning authorities to give reasons ...
- This reasoning appears correct and compelling.

(B) LPA REASONS: *Hawksworth (2)*

Hawksworth (continuued): Lang J went on to recognise that there can be cases where, notwithstanding the absence of any *general* duty to give reasons, fairness may require that reasons should be given (referring back to earlier cases):

> *80 I agree with Jay J* [in Oakley] *that the court retains a residual power to imply a duty to give reasons for a grant of planning permission. In my judgment, since the 2015 Order has removed the general duty to give summary reasons, the duty will only arise exceptionally, in order to meet the requirements of fairness. Generally, the requirements of fairness will be met by public access to the material available to the decision-maker, setting out the issues, and the arguments for and against the grant of planning permission. ... These will generally suffice to demonstrate the basis upon which the application for planning permission was granted, despite objections. ... the planning committee's disagreement with the planning officer's recommendation, is not of itself evidence of some form of aberration giving rise to a duty to give reasons, though, on the particular facts of the case, it may give rise to such a duty, as Sullivan J. observed in ex parte Fabre .*
>
> *81 In my judgment, this was not a case where, exceptionally, fairness required that the Committee was required to give reasons for its decision.*

(B) LPA REASONS: *Hawksworth (3)*

As a further fallback (if she was wrong on the duty to give reasons), Lang J then said as follows in relation to the standard of reasons required:

> *87 I agree with the submission made by the Defendant and the IP that Lord Brown's formulation in South Bucks ... is not the standard to be applied to a local planning authority's decision .... Planning appeals are an adversarial procedure ... a local planning authority is an administrative body, determining an individual application for planning permission. ... it is not conducting a formal adjudication in a dispute between the applicant for planning permission and objectors, and so it is not required to give reasons for rejecting the representations made by those who object to the grant of planning permission.*
>
> *88.* Moreover ... " *[d]emocratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them… "*. They are politicians from all walks of life, not trained judges or civil servants. ...
>
> *89. For these reasons, I consider that where a local authority planning committee gives reasons ... it need only summarise the main reasons for the decision and can do so briefly. The committee is not required to set out each step in its reasoning, nor indicate which factual matters were accepted or rejected. Indeed, as the committee will comprise a number of councillors who may well have reached their shared conclusion by different routes, it would be impractical and undesirable for the committee to set out its step-by-step reasoning.*

(B) LPA REASONS: *CPRE (1)*

- *Major development in an Kent Downs AONB "unprecendented* [in scale] in an AONB". (a) 521 Residential units, 90 retirement apartments, (b) a further 30 residential units, a hotel and conference centre and (c) acess etc works, (d) conversion of some existings buildings and (e) creation of a visitor centre.
- EIA development
- Challenged failed in High Court: [20116] EWHC 3808 (Admin)
- Claimant CPRE succeeded in having permission quashed in the Court of Appeal

(B) LPA REASONS: *CPRE (2)*

- DUTY TO GIVE REASONS IN EIA CASE?
- Mitting J had followed *Richardson* on duty to give reasons in EIA case
- Court of Appeal does not refer to *Richardson*, appear to be unaware of it.
- Laws LJ says as follows:

  23 Thirdly, this was as I have explained a case in which the council owed a statutory duty to give reasons, imposed by the EIA Regulations : a duty that was not fulfilled by any document produced for the purpose. In those circumstances it seems to me that the decision should be quashed unless the reasons disclosed in the minutes were, so to speak, just as good.

  NB: clear from para 14 that this is a reference to art 24 of EIA regs, equivalent to art 21 at time of *Richardson.*
- At least arguable that this is *per incuriam* given absence of reference to *Richardson* and departure from it.

(B) LPA REASONS: *CPRE (3)*

- DUTY TO GIVE REASONS IN ALL CASES?
- Court of Appeal appears to proceed on *assumption* that LPA is always under a duty to give reasons in all cases. No reference to *Chaplin*.
- Not clear on this point, possible to read paras 18-23 as explaining why reasons were required in this case. But more natural reading is that they are explaining why a *higher standard* of reasons were required than Lang J suggested in *Hawksworth,* whilst *assuming* that *some* reasons were required.
- Even if it is treating reasons as only required exceptionally, as in *Oakley / Hawksworth*, appears to significantly water down that approach, by treating combination of officer recommendation for refusal, and fact that case is important in AONB, as sufficient to mean that reasons were required.

(B) LPA REASONS: *CPRE (4)*

STANDARD OF REASONS Quotes Lang J in *Hawksworth* on standard of reasons, then says:

> *20 I would by no means suggest that this reasoning is wrong in principle: the differences between an inspector's decision after a planning inquiry and a planning authority's resolution to grant permission are real enough. Mr Cameron, supported by Mr Reed for the second respondent (the developers), was at pains to submit that the law should not impose on planning authorities an unduly onerous duty to give reasons, which would delay or complicate the processing of planning applications. The sceptic (cynic?) might say that this is just a plea to administrative inconvenience, but it was endorsed by Lang J ("the volume of applications which have to be processed") and there is a clear public interest in the expeditious resolution of planning issues. That said, I think that Lang J's approach needs to be treated with some care. Interested parties (and the public) are just as entitled to know why the decision is as it is when it is made by the authority as when it is made by the Secretary of State.*

Laws LJ goes on to say that a higher standard of reasons was required in this case, because of (a) development in the AONB, (b) the departure from the officer recommendation and (c) the alleged statutory "duty" to give reasons.

(B) LPA REASONS: *CPRE (5)*

BREACH OF DUTY?

- Orthodox approach is to say that duty to give reasons will only be breached, or that breach will only give rise to a remedy, where lack of reasons gives rise to "substantial doubt" about whether the reasons were adequate (see *South Bucks,* para 36).
- Here, the court held in terms that the AONB policy had been correctly understood and applied (at paras 16-17), and Laws LJ specifically repeats, when explaining why the decision must be quashed, that it was "not reasonable to attribute to the councillors an ignorance or misunderstanding of ... NPPF paragraph 116).
- Court nevertheless quashes the decision.

(B) LPA REASONS: *CPRE (6)*

WHAT DOES ONE MAKE OF THE CPRE JUDGMENT

- Appears to leave the law on LPA reasons for planning permissions in a state of considerable uncertainty.
  - It throws *Richardson* into doubt (no duty to give reasons in EIA cases)
  - It throws *Chaplin* into at least some doubt (no general duty to give reasons)
  - It appears to suggest that the *standard* of reasons may be quite high in some cases, higher than that suggested by Lang J in *Hawksworth*
  - It at least muddies the water in terms of the approach to breach of a duty to give reasons and remedy.
- Can be argued to be *per incuriam,* taken in ignorance of binding authority (see *Duke v Reliance Systems Ltd* [1987] 1 QB 108).
- Supreme Court judgment pending – WATCH THIS SPACE!!

(B) LPA REASONS: *17 de Vere Grdns*

- Hickinbottom J (now LJ) notes, follows and approves the approach of Lang J to standard of reasons in *Hawksworth*.
- No reference to *CPRE Ltd*
- Error found in reasoning in officer's report.
- Entirely orthodox approach, notable mainly for lack of reference to *CPRE Ltd.*

(B) LPA REASONS: *Oakley (1)*

- LPA grant of planning permission, (a) contrary to Dev Plan, (b) in Green Belt, and (c) contrary to "very strong" officer's recommendation
- Appeal from first instance decision of Jay J ([2016] EWHC 570 (Admin)), which set up entirely orthodox approach (referred to by Lang J in *Hawksworth)*
- CA Decision: [2017] 1 WLR 3765. Overturns Jay J. CA unanimous but difference of approach between Elias LJ (with whom Patten LJ agrees) and Sales LJ

(B) LPA REASONS: *Oakley (2)*

- All agree that reasons required in this case, *at least* as an exception to more general rule that reasons not required. For majority, critical factors are (a) breach of plan, (b) apparent breach of GB policy, (c) major impact on individuals affected and (d) departure from officer's recommendation.

- Sales LJ focusses on (a) and (b), specifically rejects (d) as a factor. Sales also appears to reject more general argument for duty in all or most cases

- Majority do not decide the wider argument but express attraction to it.

(C) LPA REASONS: *Delegated decisions and Shasha (1)*

- Little noticed reg 7 of Openness of Local Gov Bodies Regs 2014, duty to record, and give reasons for delegated local government decisions.
- In *R (Shasha) v Westminster CC* [2017] PTSR 306, John Howell QC considers Reg 7 and rightly rejects argument that does not apply to delegated planning decisions.
- Officers therefore under a duty to give reasons when decision to grant or refuse planning permission delegated to them
- NB Requirement breached in this case but decision not quashed for that reason: JHQC accepts that it can be inferred that reasons were those set out in junior officer's report to her line manager. Emphasises discretion to refuse relief for breach of reasons requirement.

(C) LPA REASONS: *Delegated decisions and Shasha (2)*

- NB curious codicial to *Shasha* in *Oakley*. CA rightly reject the argument that in a case where committee resolve to grant but then delegate final issue of permission to officer under delegated powers, reg 7 requires officer to obtain full reasons from committee.
- Nevertheless accept (albeit *obiter)* that officer must still give his own reasons, on premise that committee have taken in principle decision (so part of those reasons will be that committee has told him to do it!)
- Useful guidance on what in practice is required in para 36 of judgment:
  - Whether proposal accords with development plan
  - Possibly also reasons for rejecting objector's arguments
  - [May also need to consider national policy if in play and important]

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