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Welcome to Landmark Chambers'

Planning High Court Challenges, Part 3 webinar

Your speakers today

Lord Carnwath (Chair)

James Maurici KC

Challenging PINS mode of determination and other procedural decisions

Jacqueline Lean

Injunctions in planning high court challenges

Matthew Henderson

Latest NPPF case-law

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Challenging PINS mode of determination and other procedural decisions

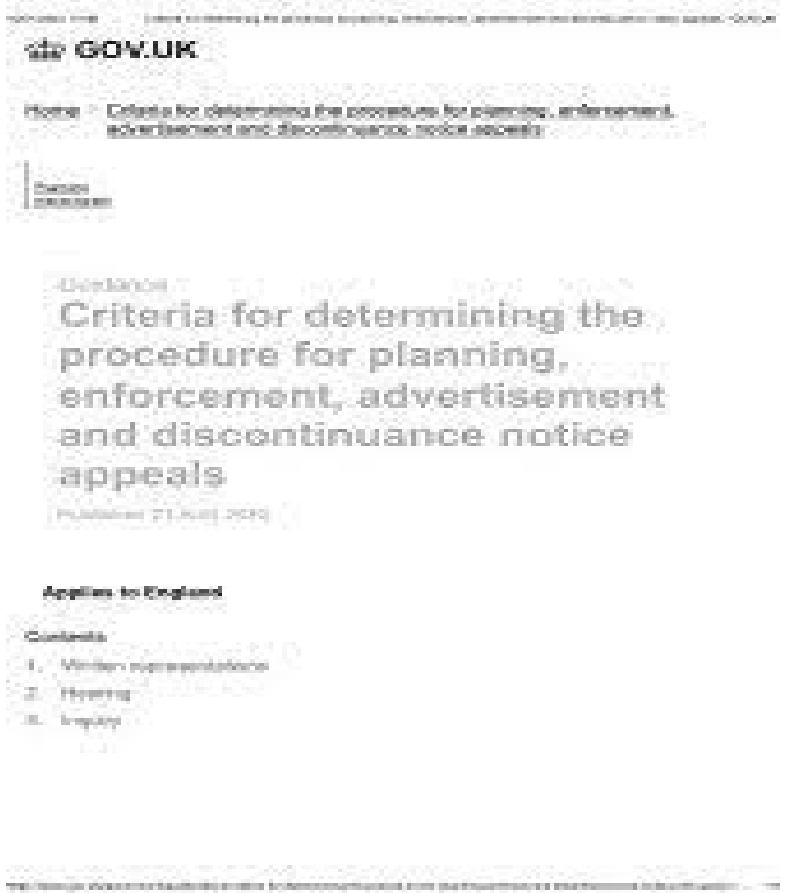
James Maurici KC

Introduction

The purpose of this talk is to explore:

(1) High Court challenges to mode of determination decisions by PINS – that is to say decisions made under s. 319A of the TCPA 1990; *and*

(2) High challenges to other procedural decisions by PINS and or Inspectors in the course of pursuing a planning appeal.



Mode of determination decisions – the issue (1)

The issue that most often arises where an appellant seeks an inquiry but PINS decide that the case should proceed by way of a hearing.

The Appellant, in its Statement of Case, must set out as full a case for an inquiry as possible having regard to the published criteria *https://www.gov.uk/government/publications/criteria-for-determining-the-procedure-for-planning-enforcement-advertisement-and-discontinuance-notice-appeals/criteria-for-determining-the-procedure-for-planning-enforcement-advertisement-and-discontinuance-notice-appeals* ("the Criteria")

The Criteria suggest an inquiry would be appropriate if:

There is a clearly explained need for the evidence to be tested through formal questioning by an advocate;

the issues are complex, e.g. *"large amounts of highly technical data are likely to be provided in evidence*";

the appeal has generated substantial local interest to warrant an inquiry as opposed to dealing with the case by a hearing.

The Criteria are clear, however, that "*the prospect of legal submissions being made is not, on its own, a reason why a case would need to be conducted by inquiry*".

Mode of determination decisions – the issue (2)

Given financial constraints the LPA will often argue for a hearing;

There seems to be a drive at PINS at present to push cases that really should be inquiries into hearings. There are, of course, obvious resource savings for PINS in doing this. Moreover, it doubtless assists with the monthly reporting of how long appeals take on average to determine. However, it is worth recalling why it is that appellants, and those advising them, often favour an inquiry over a hearing:

1. **there is a perception, denied by PINS as I understand it, that for an inquiry there is a greater likelihood of a more experienced inspector being appointed;**
2. **cross-examination is an invaluable tool in: (i) making one's own case; and (ii) exposing the flaws in the case of the opposition;**
3. **the belief (in my view justified) that the quality, and hence robustness from legal challenge, is generally higher for decisions that are made following an inquiry.**

Mode of determination decisions – the issue (3)

The PINS procedural guide says:

> *"6.2.3. In making our decision, we will consider the views of the appellant and the LPA and the criteria for procedure determination.*
>
> *6.2.4. Where our choice differs from that of the LPA and appellant, we will explain the reasons for our choice.*
>
> *6.2.5. The appellant and the LPA can ask for the choice to be reviewed by a senior officer.*
>
> *6.2.6. We keep our choice of procedure under review throughout the appeal. Subject to notification and procedural requirements, we may change the procedure. We may also, either at the start or at any point throughout the appeal, combine procedures."*

So, if you have asked for an inquiry and PINS determine it should be a hearing:

You should be given reasons for why this has been decided;

You may (and if you ae considering a legal challenge really must) ask for the decision to be reviewed by a senior officer.

Mode of determination decisions – the issue (4)

If an appellant is not content with the decision made by PINS on mode of determination and any consequential procedural decisions (e.g. as to allowing additional time for submission of further evidence where an inquiry was sought – see *Inquiry to hearing: some pitfalls surrounding PINS decisions on mode of determination* by James Maurici KC J.P.L. 2023, 8, 985-1003) then the remedies open are:

(1) to seek a review and so to persuade PINS via correspondence to change its decision; and/or

(2) failing that, to seek, to challenge that decision in the High Court.

In my experience, getting PINS to change its decision, once made, on mode of determination, is very, very difficult.

So, if an appellant is very dissatisfied then a legal challenge may be the only possible remedy.

Mode of determination decisions – the issue (5)

Reasons …

It is important to note that in the Guide there is a clear commitment to give reasons where PINS decision on the mode of determination differs from that requested by the appellant or the LPA.

That gives rise to a clear legitimate expectation that reasons should be given and which would provide a ground for judicial review if this were not to happen, see by analogy R. (Save Britain's Heritage) v SSCLG (2019) JPL 237.

Where such reasons are given, these are often "*crisp*" and along the lines of "*this appeal should follow the hearing procedure because the likely issues are suitable for a round table discussion format*".

This is rarely terribly informative but a legal challenge based on the reasons given being inadequate in this regard would be rather difficult.

Legal challenges to PINS on mode of determination What is the form of challenge? (1)

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The only safe advice on the form of legal challenge is that you should bring a judicial review proceedings within 6 weeks of PINS final decision on mode of determination, so normally the decision of a more senior officer following a review.

What it is not safe to do in this situation is to not challenge the s.319A by way of judicial review but to proceed on with the planning appeal and then only if the appeal goes against you, seek to challenge that final decision on the appeal under s.288 of the TCPA 1990 on the basis of unlawfulness (usually unfairness) in the decision on mode of determination.

This is not a safe course because there is authority to the effect that a challenge to a decision under s.319A of the TCPA 1990 is not usually challengeable under s.288 of the TCPA 1990, but instead only by way of a judicial review.

The case-law is messier than it should be on this … so we need a quick review of the case-law.

Legal challenges to PINS on mode of determination What is the form of challenge? (2)

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There are some cases where a challenge to a s. 319A decision has been entertained (albeit dismissed on the merits) in the context of a s.288 challenge or s. 289 appeal to the decision ultimately made on the s.78 or 174 appeal: see, e.g. Riza v SSCLG [2014] EWHC 909 (Admin) but the better view is that this is generally not allowed.

In Bluebell Cemetery Ltd v SSCLG [2015] EWHC 2339 (Admin) Holgate J. reviewed the authorities:

(1) The Judge began by looking at authorities that had suggested that such decisions had to be brought by judicial review: e.g. *Westerleigh v SSCLG* [2014] EWHC 4313 (Admin);

(2) He then referred to *Co-operative Retail v SSE* (1980) 1 WLR 271. That well-known case was concerned with an application to challenge a decision by the S/S refusing to adjourn the date fixed for a public inquiry. The Court of Appeal held that what is now s. 284(3)(b) of the TCPA 1990 only applies to a decision which disposes of an appeal, that is to say a decision on the final outcome of the appeal. It does not apply to a decision made in the course of the appeal process.

Legal challenges to PINS on mode of determination What is the form of challenge? (3)

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Holgate J. said that on the facts in that case the challenge to the s. 319A decision should have been made by judicial review and not via s. 288 after the appeal had been determined:

> *"67. There are sound practical reasons which, in my judgment, support this legal analysis. Planning appeals involve several parties. In some cases they may indeed involve many participants with many different interests, each party potentially incurring substantial costs. It can readily be understood why the legislature has created a process of statutory review under section 288 which applies to the final determination of an appeal, leaving public law challenges to earlier decisions (where properly arguable) to be dealt with soon after the matter has arisen so that any justifiable complaint can be addressed at that time before yet further substantial costs are incurred, potentially by several parties. However, I accept that some breaches of "relevant requirements," for example, breaches of a duty to act fairly, causing substantial prejudice, will have a continuing effect which taints the final decision or outcome. Drawing a dividing line between the two must await further argument in an appropriate case."*

Legal challenges to PINS on mode of determination What is the form of challenge? (4)

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So, generally such challenges are to be brought by judicial review within 6 weeks of the final decision on mode of determination.

But Holgate J. seems to have held open there may be exceptional cases where complaints related to the mode of determination can be brought via later s. 288 proceedings.

The Riza case, see above, was not cited in Bluebell.

It does not seem that this was an exceptional case as contemplated by Holgate J. but rather it would appear that the S/S failed to raise the issue of whether the s. 319A challenge was inappropriate for a s. 288 challenge.

Outcomes of mode of determination challenges (1)

The reality, however, is that challenging a s.319A decision whether by judicial review or exceptionally by way of s.288 (or s.289), is always going to be difficult.

On such matters, as on other procedural decisions, the court will tend to accord a wide margin of appreciation to the decision-maker.

Looking at the cases and the outcomes …

Outcomes of mode of determination challenges (2)

(1) Riza: the mode of determination challenge was entertained as part of a s. 288 challenge but failed on the merits.

Outcomes of mode of determination challenges (3)

(2) Westerleigh:

Judge opined the challenge on fairness of mode of determination should *not* have been pursued by s.288 after the appeal was determined. However, the judge did not in fact dismiss the claim on that basis. Instead, the judge went on to consider the issues raised.

C asserted that inspector should have decided that nature and complexity of the evidence required appeal to proceed by way of a hearing/public inquiry and not by written reps. There had in that case been substantial local opposition to the scheme which had been rejected by the LPA and, it was contended, that in following the written reps procedure inadequate consideration had been given to the choice of alternative sites.

The court determined that there had not been a failure to have regard to the Criteria on mode of determination. The judge held that conclusion had not been unreasonable, irrational or otherwise unfair.

Judge found it was appropriate for the inspector to exercise his professional judgment in deciding how the appeal should proceed and the Criteria did not make it mandatory for a public inquiry to be held even where there was significant local opposition.

Outcomes of mode of determination challenges (4)

(3) Chhokar v SSCLG [2015] J.P.L. 345.14

Enforcement case. C appealed under s.289 of the TCPA 1990 against dismissal by an inspector of his EN appeal under s.174. LPA had issued EN on the basis that he had breached planning control by using a detached structure, within a property he owned, as a separate residential unit which was not incidental to the enjoyment of the main dwelling.

When he appealed C said he wanted the matter dealt with by written reps.

PINS wrote to C about the merits and disadvantages of using written reps.

LPA submitted their written statement of case which stated that C had confirmed that use of the separate unit had ceased. That was not the case and C did not raise the error.

The inspector rejected the C's appeal.

C in his s.289 appeal alleged that the inspector had acted unlawfully in determining the appeal without holding an oral hearing.

Line in *Riza* S/S seems not to have raised issue that mode of determination not for s. 289 but should have been subject of a judicial review.

Outcomes of mode of determination challenges (5)

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Judge rejected the claim:

C had elected for written reprs. It had been open to him to request an oral hearing but he did not, even after he knew that there was a factual dispute. C had thus made an informed decision as he had been provided with a letter of advice from PINS.

Noted that the Planning Act 2008 removed the automatic right to an oral hearing in planning appeals.

The judge held that to the extent that the C had a general right to an oral hearing under Art. 6 of the EHCR, he had unequivocally waived it.

Fairness did not require a hearing, regardless of the parties' wishes. There was no requirement under the Criteria, the judge held, to hold an oral hearing.

Noted also "*PINS initiative to seek to determine more appeals by way of written representations*".

Inspector had to have regard to the Criteria, but he was an expert tribunal acting in a quasi-judicial manner with a broad discretion over the manner in which the appeal is conducted.

Outcomes of mode of determination challenges (6)

(4) North Norfolk DC v SSHCLG [2019] JPL 87. Following a six-day public inquiry into conjoined appeals, a planning inspector had allowed the appeals and granted permission.

The LPA challenged under s.288 of the TCPA 1990. The S/S conceded and the decision was quashed by consent in May 2017.

PINS decided initially that the appeals should be re-determined at a further public inquiry before a different inspector. The new inspector examined the file and concluded that the issues could be dealt with by written reps instead.

The LPA and the interested parties, who were local objectors, disagreed. PINS determined that, because there had been no significant change in circumstances since the original decision was made, and there were no complex issues involved and no need to test or clarify evidence, a public inquiry was unnecessary; it concluded that the issues raised could be dealt with adequately through the written reps procedure.

The LPA challenged that decision by way of judicial review contending that the Inspector had not properly interpreted or applied the Criteria for determining the procedure for re-determining planning decisions quashed by the High Court. The claim failed.

Outcomes of mode of determination challenges (7)

The judge noted that the question was whether PINS' decision, and its reasons, showed that the PINS procedural guide and the Criteria had been misinterpreted or not applied.

The new inspector, who was to decide the appeals, was able to assess all the evidence and written submissions placed before the previous inspector, with a view to suggesting the mode of re-determination. He had made his recommendation having considered the complexity of the issues and the need for formal questioning. The judgment about how complex the issues actually were, the need for testing through advocates, and how they could be resolved with further written reps and a site visit, was very much a matter for the inspector's expertise. It was thus an unchallengeable judgment and a necessary part of the decision as to the mode of redetermination.

Whilst extensive local interest was sufficient of itself to justify an inquiry, even where the issues were not complex and written reps would otherwise be adequate, the level of public interest would not render an inquiry mandatory.

The Inspector had given sufficient reasons for its decision that an inquiry was not required. It was an entirely reasonable judgment that no further oral submissions were required to deal with the legal issues (see [23], [29], [32], [37], [42])

Outcomes of mode of determination challenges (8)

I have not in fact been able to find any judgments that are examples of a successful legal challenge to a s. 319A decision.

However, there are a number of other cases that are worth noting in this context …

There are a number of cases where judges (mostly it should be noted Deputy Judges who were members of the Planning Bar) have made statements to the effect that the cases before them should really have been determined by an inquiry or at least a hearing.

However, despite this there are no reported examples of a successful challenge to a s.319A decision.

Outcomes of mode of determination challenges (9)

(1) Ricketts v SSE [1998] JPL 768 an appeal had been determined (by agreement) by written reprs. Graham Eyre QC, sitting as a Deputy HC Judge, raised concerns about the use of the written reps procedure in some cases. The case report is in the old JPL form:

"He (Graham Eyre, Q.C.) would be the last person to point to the shortcomings of that procedure. The procedure was appropriate in very many cases. It has very considerable administrative advantages in terms of time and costs. As a procedural mechanism it was wholly to be supported. On the other hand there was no doubt that an inquiry did give to the parties an opportunity to test the material rather more directly, effectively and efficiently. That seemed to be an inherent characteristic of an appeal by way of inquiry as against an appeal by way of written representations. The general problem was that there were many cases coming by way of appeal to this Court which on analysis demonstrated that material was not sufficiently tried or tested, or indeed that the material was not tried or tested at all. *Thus there had been an increase in the number of cases where recourse was had to this Court in order to make submissions on documents, their interpretation, their shortcomings and matters of that kind. It was suggested that the inherent limitations of the written representations appeal procedure could constitute a ground for coming to this Court because material was not put forward or properly tested. He (Graham Eyre, Q.C.) wished to make it clear beyond doubt that the Court simply would not entertain a case where the ground of challenge was that there was an insufficiency of material contained in the written documents before the Inspector or the Secretary of State and regard to other documents would cure the deficiency. It was the responsibility of the parties to an appeal to identify the material upon which reliance was placed at the stage of presenting the written representations. The Court was no place for 'second thoughts' …"*
(emphasis added)

Outcomes of mode of determination challenges (10)

(2) Richmond upon Thames LBC v SSCLG [2007] J.P.L. 1146.The court was considering a case where one of the main issues was the economics of affordable housing. The judge HH Judge Gilbart QC, sitting as a Deputy HC Judge, held that the Inspector had failed to interpret the policy properly and to calculate the contribution in accordance with the policy. The judge added:

"I should add that I have some sympathy with the Inspector. This was a classic case where cross examination would have exposed the flaws in the developer's argument, but that is not what happens at an informal hearing. This was one of those types of planning dispute where the Inspector should have insisted on an inquiry, where there would have been formal cross examination which would have tested the two rival methods of calculation."

Outcomes of mode of determination challenges (11)

(3) Pratt v SSCLG [2016] EWHC 637 (Admin). The development proposed was the change of use of an agricultural building. The judge, Charles George QC, siting as a Deputy HC Judge said:

" The appellant had initially requested a planning hearing but I understand that this request was turned down since the Planning Inspectorate, perhaps rather surprisingly, considered the matter appropriate for the written representations procedure. There was no challenge to this decision and there was no later application that the appeal should continue at a local inquiry or at a hearing as provided for by Section 319A (4) of the 1990 Act. In these circumstances the task of the Inspector was not easy, absent the assistance which might have been afforded to him by cross-examination at a public inquiry or by interplay with the parties at a hearing."

Outcomes of mode of determination challenges (12)

(4) Mahajan v SSTLGR [2002] J.P.L. 928.

Enforcement appeal determined using written reprs. The judge's view was, it self-evidently should have gone to inquiry.

EN directed against a further ground floor extension to the rear of the C's dwelling.

The inspector concluded that the development had not been substantially completed four years previously and that planning permission should be refused because of the impact on the amenity of neighbouring property.

In the s.289 appeal, it was alleged that the reasons given by the inspector were legally inadequate, in relation to the time at which the building had been completed, and that those deficiencies in reasoning arose from the fact that the appeal was dealt with by reps. It was said that it was unfair for the inspector to have proceeded in that way, even with the consent of the C.

C had asked for a hearing rather than an inquiry, and a date was fixed. He then wrote to the PINS asking to revert to written reps due to his ill health. The LPA had sought an inquiry in order that cross-examination could take place.

Outcomes of mode of determination challenges (13)

Following the non-attendance of the C, PINS confirmed that the appeal would proceed by means of written reps and C made no objection.

The inspector stated "*bearing in mind the limited weight that I can assign to untested evidence of fact, I am bound to say that there is insufficient firm evidence to lead me to the view that the canopy had been in place on the material date*".

The court decided that the inspector was in error to attach only limited weight to the written statements on behalf of the appellant because they were untested. In a written reps case, all the evidence is untested by cross-examination.

In downgrading the value of the evidence, the inspector had made the case almost impossible for the appellant to win, due to the procedure adopted.

The judge considered that the evidence should have been assessed explicitly.

The case was remitted to PINS for further consideration.

Outcomes of mode of determination challenges (14)

(4) R. (Waltham Forest LBC) v FSS [2006] JPL 1593

Issue was whether a decision arrived at after written reps should be reviewed on the basis that the decision letter did not deal adequately with ambiguities raised in evidence.

The LPA's challenge was rejected.

In an editorial comment on the case, the JPL noted that having agreed to the written reps procedure the parties had little cause for complaint if their evidence was less appreciated than if might be in a hearing or inquiry.

However, where a point occurred to an inspector, or was not raised by a party, he or she may need to consider whether to invite further written reps or propose a change of procedure to address it.

The JPL comment concluded that the case illustrated why parties should consider carefully the appropriate mode of appeal for the particular case and not necessarily pursue either the quickest or cheapest course.

Other procedural challenges (1)

The following procedural decisions may be the subject of judicial review within 6 weeks of those decisions:

(1) a refusal to adjourn an inquiry: see *Co-operative Retail* (see above);

(2) a decision to adjourn an inquiry: see *R v SSE, ex p Mistral* [1984] JPL 516;

(3) a letter from the S/S indicating that he would be disposed to grant conditional planning permission once a satisfactory agreement had been concluded between the appellant and the highway authority: *Solihull v SSE* [1987] J.P.L. 208;

(4) the position on refusal to entertain an appeal is more complex, see the Planning Encyclopaedia at P284.05.

Other procedural decisions (2)

Cala v the Scottish Ministers 2002 SC 42

At an inquiry post-exchange of proofs and on first day of the inquiry the appellant, Cala, sought to lodge a report on the suitability of the site for recreational use and lead a witness to speak to its terms. The reporter refused to allow this.

The appeal proceeded and was refused.

Cala challenged relying on refusal to admit document and witness.

The Ministers argued that a decision of a procedural character such as refusal of an adjournment or refusal to admit a witness or document should have been the subject of a judicial review.

The Court distinguished Co-operative Retail holding that a procedural decision may be founded on, in a challenge against the final decision, if it is a reason of a kind to justify holding that the inquiry was flawed in such a way as to vitiate the final decision. The challenge failed on its merits.

Remainders:

(1) Adams v ICO EA/2013/0060. Using the EIR to seek to obtain PINS in-house legal advice on mode of determination decision;

(2) R. (Padden) v SSHLG. This was a planning appeal brought in respect of an application for retrospective planning permission for an EIA development. PINS initially proposed that the case should proceed by way of written reps. Mr Padden, a local objector, resisted and eventually the process was changed to a hearing. Mr Padden remained unsatisfied with this and lodged judicial review proceedings seeking to challenge the s.319A decision. Lang J granted permission. The case was settled when the S/S offered to reconsider the mode of determination. Having done so, PINS reaffirmed the hearing process. The appeal then proceeded to a hearing. The appeal was dismissed and is now subject to s.288 proceedings.

(3) Link Park Heathrow LLP v SSLUHC [2023] EWHC 1356 (Admin). The Inspector following a 2 day hearing, the Inspector made a decision that was found to be flawed on many grounds. Leading counsel before the High Court had appeared at the hearing and so was able to assist the Court considerably in understanding the ways in which the Inspector had gone astray, see e.g. paras 15 and 17. Clearly should have been inquiry …

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Latest NPPF case-law

Matthew Henderson

Key Themes

1. Green Belt exceptions
2. Protection of AONBs & National Parks
3. Carbon & other pollution control regimes
4. Flood risk management
5. Presumption in favour of sustainable development

Green Belt Exceptions

Warwick DC v SSLUHC [2022] EWHC 2145 (Admin)

- NPPF paragraph 149(c) – 'extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building'
- Meaning a question of law for the court - see [21].
- Not confined to physically attached structures; can include structures which are physically detached from the building of which they are an extension – see [52].
- E.g. garages and domestic outbuildings ("normal domestic adjuncts" – *Sevenoaks* [1997] EWHC 1012 (Admin))

RB Kingston Upon Thames v SSLUHC [2023] EWHC 2055

- NPPF paragraph 150(e) – 'material changes in the use of land (such as changes of use for outdoor sport or recreation, or for cemeteries and burial grounds'
- Residential uses (in particular Gypsy & Traveller sites) not within this exception – see [36].
- What falls within? See examples 'such as' – not open-ended – "a list which took its flavour or extent from the examples given" – need for commonality – see [36] and [31].
- Note genesis of this exception, following *Timmins* – see [38].

Protection of AONB & National Parks

Persimmon Homes (Thames Valley) Ltd v Worthing BC [2023] EWCA Civ 762

- NPPF paragraph 176 – 'Great weight should be given to conserving and enhancing landscape and scenic beauty in National parks […] and [AONBs] which have the highest status of protection in relation to these issues'.
- See *Bayliss* [2014] EWCA Civ 347 and *Monkhill* [2021] EWCA Civ 74
- Inspector's assessment failed to demonstrate that he had approached the question of harm to the National Park with the great weight principle in mind – see [55].
- NB this was a setting case – views from National Park towards development - but common ground that great weight principle applied – see [53].

Protect Dunsfold Ltd v SSLUHC [2023] EWHC 1854 (Admin)

- Alleged failure to give great weight to harm.
- Rejected on reading of DL (note important context of a temporary development).
- Reiterated the approach in *Bayliss* and *St Modwen* – no incantation or mechanical recitation required.
- Compare *Persimmon* where there were positive contrary indicators. (And mere failure to refer is not a positive contrary indicator.)

Frack Free Balcombe RA v SSLUHC [2023] EWHC 2548

- Local Plan policy following NPPF paragraph 177 (earlier iteration) – 'the cost of, and scope for, developing outside the designated area, or meeting the need for it in some other way'
- Application for hydrocarbon exploration and assessment, not production.
- So, consideration of alternatives had to be confined to alternatives for the purpose or benefit of the exploration in issue, not alternatives to the production of hydrocarbons from the site – see [38].

Carbon and other pollution control regimes

Bristol Airport Action v SSLUHC [2023] EWHC 171 (Admin)

- NPPF paragraph 188 – 'The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. […]'
- Secretary of State's duties under the Climate Change Act 2008 in respect of aircraft – amounts to a separate pollution control regime within NPPF paragraph 188. Note context of UK ETS and CORSIA.
- Contrast *Gladman* [2020] PTSR 128 re. air quality given the absence of a local dimension.
- Key question: whether emissions would be so significant that they would materially affect ability of UK to meet carbon budgets and net zero. See also *Goesa* [2022] EWHC 1221 (Admin).
- Rebuttable presumption.

Flood Risk Management

Wathen-Fayed v SSLUHC [2023] EWHC 92 (Admin)

- NPPF paragraph 162 – sequential test – 'The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. […]'
- Risk of groundwater flooding.
- FRA erroneously excluded application of sequential test because site in Flood Zone 1.
- Inspector's conclusion lawful in any event – based on (1) SFRA; (2) FRA; (3) LLFA consultation; and (4) objections. See [122] – [123].
- NB also permissible to consider mitigation secured by condition – [124]

Presumption in favour of sustainable development

Widdington PC v Uttlesford DC [2023] EWHC 1709 (Admin)

- NPPF paragraph 11(d) – presumption in favour of sustainable development
- Officer's advice to committee: less than substantial harm to DHA (and other harms) do not significantly and demonstrably outweigh the benefits of the proposal, therefore grant permission.
- Confusion of 11(d)(i) – requiring application of NPPF paragraph 202 balance – and 11(d)(ii). See [102].
- See earlier cases – *Hopkins Homes*; *Monkhill;* and *Gladman*.

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Planning injunctions in high court challenges

Jacqueline Lean

Overview

- S.187B TCPA 1990
- Interim injunctions in judicial reviews
- Other cases of potential interest

S.187B TCPA 1990

- Braintree DC v SSHD [2023] EWCA Civ 727
- Ipswich BC v Fairview Hotels (Ipswich) Limited [2022] EWHC 2868 (KB)
- Fenland DC v CBPRP Limited [2022] EWHC 3132 (KB)
- Great Yarmouth BC v Al-Abdin & ors [2022] EWHC 3476 (KB)
- Waverley BC v Gray & Ors [2023] EWHC 2161 (KB)
- Epping Forest DC v Halama [2023] EWHC 2906 (KB)

Braintree DC v SSHD [2023] EWCA Civ 727

- C sought an injunction under s.187B to restrain the Gvt's proposed development of accommodation for asylum seekers on a former RAF Airfield
- Waksman J struck out the claim (under CPR r.3.4) as C had not received consent from the “appropriate authority" under s.296A(2) TCPA 1990
- S.296A(2): “A local planning authority must not take any step for the purposes of enforcement relating to Crown land unless it has the consent of the appropriate authority"
- S.296A(5): “A step taken for the purposes of enforcement include – (a) entering land; (b) bringing proceedings; (c) the making of an application"
- CA upheld Waksman J's decision: “an application for an injunction under s.187B is undoubtedly a “step taken for the purposes of enforcement"".

Ipswich BC v Fairview Hotels (Ipswich) Limited [2022] EWHC 2868 (KB)

- 2 claims to renew *ex parte* injunctions restraining use of two hotels (in Ipswich and in the East Riding of Yorkshire) for accommodation of asylum seekers
- Alleged breach of planning control: change of use from hotel to hostel
- Legal principles outlined by the Court (Holgate J) included:

(i) LPA must be satisfied not only that it is "necessary and expedient" to take enforcement action but to do so by seeking an injunction (para 88);

(ii) "Irreparable harm" is not a threshold test for an injunction under s.187B (para 97)

(iii) Use Classes Order does not operate so as to treat a change of use from within one Use Class to another use outside that Class as a material change of use (para 71).

Ipswich BC v Fairview Hotels (Ipswich) Limited [2022] EWHC 2868 (KB)

- Court considered that:
- (i) There was a triable issue as to whether there was a breach of planning control (noting as a starting point that "the distinction between hotel and hostel use in a case of the present kind is fine") (paras 98-104)
- (ii) Damages would not be an adequate (indeed even available) remedy (paras 105-7);
- (iii) Having regard to whether breaches could be said to be "flagrant" (Court considered they were not); the statutory duty on SSHD to provide accommodation for destitute asylum seekers and (iii) the Court's finding that the councils had not shown a case of "substantial planning harm", the factors in favour of discharging the injunctions outweighed those in favour of continuing it
- Note also the comments on steps taken (or not) to obtain a fuller picture of the proposed uses prior to commencing action, and justification for pursuing *ex parte* applications at paras 56, 62 and 66.

- Fenland DC v CBPRP Limited [2022] EWHC 3132 (KB)
- Application for an injunction restraining use of the Rose & Crown Hotel “and any other hotel in Wisbech" from being used to accommodate asylum seekers (Without notice application refused by Jay J)
- Application refused by Holgate J, for broadly similar reasons to *Ipswich* but also not accepting that the evidence demonstrated a serious level of risk to asylum seekers accommodated there
- Great Yarmouth BC v Al-Abdin & ors [2022] EWHC 3476 (KB)
- Application for an injunction restraining use of Villa Rose Hotel or any other hotel within an area protected by Policy GY6 of the Local Plan (return date hearing)
- In the “special circumstances" of that case, factors in favour of continuing the injunction “plainly outweigh" those in favour of discharging it.
- Factors in that case included an extant EN from 2006, and the absence of evidence as to why hotels outside the policy protected area would not be appropriate

Waverley BC v Gray & ors [2023] EWHC 2161 (KB)

- Injunction to restrain change of use of land to use for stationing of caravans for human occupation
- When C initially sought injunctive relief, application proceeded on the basis that land was unoccupied
- After interim injunctions were made/extended, Ds moved off the site. Some then moved back on, due to change in personal circumstances
- Court found there were "significant factors mitigating against grant of a final injunction" on the facts of the case, and that there was "scant evidence" to suggest C had "meaningfully reviewed the original decision at key points when identity of and needs of individual occupants became known"
- Court declined to grant final injunctive relief in light of C's failures to "properly engage and grapple with" the "significant welfare issues" of the Ds

Epping Forest DC v Halama [2023] EWHC 2906 (KB)

- Claim for an injunction to restrain an extension to domestic property larger than that for which PP had been granted
- HHJ Tindal (sitting as a DHCJ) sought to provide general guidance for County Court Judges dealing with such applications
- 5 stages:

(i) Is there an actual or apprehended breach of planning control?

(ii) Was the LPA's decision to apply for the injunction unlawful on public law grounds?

(iii) What other enforcement steps, if any, has the LPA taken?

(iv) Is an injunction "necessary and expedient"?

(v) Is it "necessary and expedient" and "commensurate" with actual or apprehended breach to grant the injunction following the guidance in *Porter* and, if so, on what terms?

Interim injunctions in judicial review claims

- R (West Lindsey DC) v SSHD [2023] EWHC 1400 (Admin)
- Some general observations:
- *R (Doncaster Metropolitan BC) v Doncaster Sheffield Airport Limited* [2022] EWHC 3600 (Admin)
- R (Richards) v Environment Agency [2022] Env LR 14
- *R (Packham) v SST* [2020] EWHC 829 (Admin)

R (West Lindsey DC) v SSHD [2023] EWHC 1400 (Admin)

- JR challenging the decision of the SS to deploy RAF Scrampton for the purpose of housing asylum seekers
- C sought an order quashing that decision, and an injunction to restrain the movement of materials, equipment and people onto the site until the claim was determined (+ acquisition of the site by SSHD from the MOD)
- Court not convinced by merits of the case, but "would not go so far as to say the grounds raise no serious issue to be tried" (para 79) but having considered balance of convenience (including SS's statutory duty to address the demand for accommodation for asylum seekers), the SS "has by far the better of the arguments at this stage"
- Interesting point raised as to whether s.296A TCPA 1990 if not a jurisdictional bar (as in a s.187B application) could still be a 'discretionary bar' for an interim injunction under CPR Part 25.

Interim relief more generally

- Expedition where interim relief sought
- *R(Doncaster MBC) v Doncaster Sheffield Airport Limited [2022] EWHC 3060 (Admin) at R (Richards) v Environment Agency [2022] Env L.R. 14*
- Considering permission & interim relief together?
- ***R (Packham) v SST*** [2020] EWHC 829 (Admin)
- Q: where consideration is substantial, might a higher test apply? (*Mass Energy Limited v Birmingham City Council* [1994] Env LR 298)
- Importance of promptness
- ***R (Doncaster MBC)*** – permission not refused on grounds of delay, but would have affected scope/extent of interim relief sought

Other cases of potential interest

- Wildin v Forest of Dean DC [2023] EWCA Civ 366 (reactivation of a suspended committal order)
- Dyer v Webb [2023] EWHC 1917 (KB) (injunction sought to restrain harassment – including objections to planning applications)
- Maidstone BC v Brazil [2023] EWHC 965 (KB) (successful claim for final injunction to restrain use for residential occupation)
- South Downs National Park v Nash [2022] EWHC 3400 (KB) (unsuccessful application for an interim injunction)

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Practice and Procedure Update

Ben Fullbrook

Summary

1. Administrative Court Guide
2. Claims under s.288 TCPA
3. Claims under s.289 TCPA
4. Aarhus

Administrative Court Judicial Review Guide 2023

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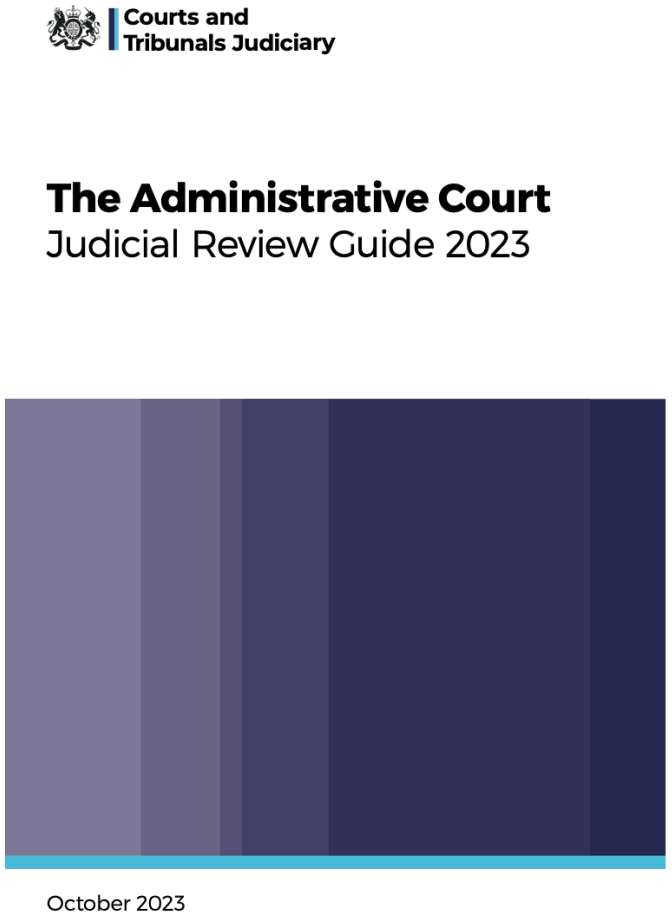

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Assertion of principle of open justice

- §7.12.1 "The guiding principle is the principle of open justice. The administration of justice takes place in public. The public have the right to attend all court hearings; the media is able to report those proceedings fully and contemporaneously. Consistent with this principle, the general rule is that the names of the parties to an action are made public when matters come before the court and included in orders and judgments of the court."
- Linked to increased judicial frustration at public authorities applying excessive redactions: see §15.5.3 and ***R (FMA) v SSHD*** [2023] EWHC 1579 (Admin).

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Duty of Candour

- §15.3.2. *The duty of candour has been recognised as applying at all stages of judicial review proceedings, **including when responding to the pre-action letter**, in Summary Grounds, Detailed Grounds, witness statements and in counsel's written and oral arguments.298 However, what is required to discharge the duty at the substantive stage will be more extensive than what is required before permission has been granted*.
- Based on *R (HM) v Secretary of State for the Home Department* [2022] EWHC 2729 (Admin) where Divisional Court prepared to proceed on basis that Tsol guidance (which states this principle) correctly states law.
- However, contrast ***R (British Gas Trading Limited) v Secretary of State for Energy Security and Net Zero*** [2023] EWHC 737 (Admin) where the Divisional Court held that *"it is usually the grant of permission which is the trigger for the duty of candour and cooperation with the Court to arise".*

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Factual disputes

- §11.2.3 repeats judgment of Chamberlain J in *R (F) v Surrey County Council* [2023] EWHC 980 (Admin):

If invited to resolve a dispute of primary fact, the court should consider carefully whether any pleaded ground of challenge really requires resolution of the dispute. In most cases, the answer will be that the resolution of the dispute was for the decision-maker, not the court: the court's supervisory function does not require it to step into the shoes of the decision-maker and therefore does not require it to resolve the issue for itself.

Where the resolution of a dispute of primary fact is necessary, the court usually proceeds on written evidence. The court will generally do so if no application to cross-examine has been made before the start of the substantive hearing.

There is no absolute rule that the court must accept in full every part of the statement of a witness who has not been cross-examined, whether the statement is adduced for the claimant or the defendant. The court can reject evidence in a witness statement if it "cannot be correct".200 That might be so if it is contradicted by "undisputed objective evidence... that cannot sensibly be explained away".201 Courts have also rejected evidence given in witness statements as, on balance, inconsistent with other written evidence.202

In some cases, the court may be unable to resolve a conflict of written evidence on a question of primary fact. In that situation, "the court will proceed on the basis that the fact has not been proved".203 This will be to the disadvantage of whichever party must prove the fact.

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Other matters

- §11.3 documents in Welsh can be put before the court and at any hearing in Wales parties have right to address court in Welsh
- §14.5 requests for remote attendance at hearings must be made by application
- Prepare indexed and paginated bundles, both with applications and AoS (best practice) - §§13.7.3, 8.3.3.

Claims under s.288 TCPA

Telford and Wreckin v SSLUHC [2023] EWHC 2439 (Admin)

- PD54D, §4.11 – s.288 claims to be filed *and served* within 6 weeks
- C files claim within 6 weeks, but not issued by court or served until afterwards.
- C argued that PD54D should be read with CPR 54.7 (service in JR claims)
- Eyre J disagreed. PD54D a complete code. Application for extension of time refused.

Claims under s.288 TCPA

Home Farm Land Ltd v SSLUHC [2023] EWHC 2566 (Admin)

- Deadline for filing and serving s.288 3 November
- 2 November C attempts unsuccessfully to file on CE file (CE file not introduced in Admin Court at that time)
- 2 November C emails ACO for advice and told could file by email or posting in ACO drop box
- 3 November 11.58 C pays fee and instructs courier to attend the RCJ and deposit the claim form and bundle in the ACO drop box. Deposited at 15.45, but drop box only emptied twice a day and final collection 14.30
- 3 November 19.04 C emails unsealed claim form to GLD
- 4 November ACO raises issues with the claim form relating to the fee and names of parties and C sent amended claim form and tried to re-send to GLD (wrong email address). Finally resent on 25 November.

Claims under s.288 TCPA

Home Farm Land Ltd v SSLUHC [2023] EWHC 2566 (Admin)

- SoS argued that claim form not filed in time because did not reach ACO. C argued that since closure of Admin Court counters claim forms are now deposited with ACO when they placed in drop box.
- Lang J found for the SoS. A claim is not filed when left in the drop box. It is filed when it is taken from the drop box to the ACO and approved for filing by a member of ACO staff. Lang J said that C could have notified ACO that claim had been left in drop box after 14.30 and needed to be filed and issued on that day but he did not. The claim was not filed in time
- Further the claim was not served on time because the version served on 3 November was *unsealed.*
- In terms of extending time, Lang J held (consistent with *Good Law Project*) that CPR 7.6 to be applied directly or indirectly to claims for statutory review under s.288. Relief from sanctions/Denton princples do not apply. Must show *"all reasonable steps".*

Claims under s.289 TCPA

R (Ibrar) v Dacorum BC & SSLUHC [2022] EWHC 3425 (Admin)

- C issues JR or SoS's decision to dismiss his enforcement appeal. JR issued outside of 4 week time limit for s.289 challenges but within the 6 weeks for JR
- C argued that, based on nature of his claim, s.289 was not an adequate alternative remedy. Eyre J disagreed holding that this would be so *"only in the most exceptional case"*. There will almost never be a distinction between grounds which can be brought in a JR and grounds which can be brought in s.289 claim on "point of law"
- C applied in the alternative for an extension of time if the court found that the claim should have been a s.289. Eyre J rejected the application: A had persisted in deliberate decision to proceed with JR even after the point had been taken and the claim would have failed on its merits in any event.

Claims under s.289 TCPA

Willoughby (610) v SSLUHC [2023] EWHC 2553 (Admin)

- A brings appeals under s.174 and 78 TCPA in respect of development
- A succeeds in the appeals but Inspector imposes two conditions to which A objects.
- A brings claims under s.289 and 288 asking for “unusual request for relief striking down two conditions but retaining the permissions granted".
- SoS argued that A's claim was not justiciable because he succeeded at the planning appeals and so was not a person aggrieved.
- In a permission decision, Karen Ridge (DHCJ) accepted that A's claim was justiciable: if inspector had made an error of law in imposing the conditions then A was a person aggrieved. Relief was a matter for the substantive hearing.

Claims under s.289 TCPA

Muorah v SSLUHC [2023] EWHC 285 (Admin)

- A challenged decision to dismiss an enforcement appeal under s.289.
- A obtained permission to bring the appeal. However *after* that point A declared bankrupt.
- A's trustee in bankruptcy disclaimed A's interest in the property which the subject of the appeal.
- A attempted to continue the appeal in her own name and the SoS asked for it to be struck out as an abuse of process.
- The Court (Neil Cameron KC (DHCJ)) agreed. Upon her bankruptcy A's cause of action in the appeal vested in the trustee in Bankruptcy. The trustee *could* assign it back to A to pursue and allow the investigation of her bankruptcy issues. But as of the hearing this had not happened.
- It was an abuse of process for A to maintain her appeal when she knew that she did not own the right to bring it.

Aarhus

- With effect from 1 October 2023, the first instance Aarhus costs protections have moved from CPR Part 45 VII to a new home amongst the “Costs – Special Cases" in CPR Part 46 IX.
- The changes, which were effected by r.16 of The Civil Procedure (Amendment No.2) Rules 2023 are essentially a copy and paste of the provisions previously contained in CPR Part 45 VIII, with consequential amendments to referencing in CPR r.52.19A (Aarhus costs on appeal) and CPR Part 54.

Thank you

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