Neutral Citation Number: [2015] EWHC 2357 (Admin)

Case No: CO/1401/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/08/2015

Before:

THE HON. MRS JUSTICE PATTERSON DBE

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Between:

FELIX CASH	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	
(2) WOKINGHAM BOROUGH COUNCIL	**Defendants**

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- -

Anthony Crean QC and Michael Rudd (instructed by **Hawksley's Solicitors**) for the **Claimant**
Stephen Whale (instructed by **Government Legal Department**) for the **First Defendant**
No appearance or representation for the **Second Defendant**

Hearing date: 28 July 2015

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Judgment

Mrs Justice Patterson:

Introduction

1. On 11 February 2015 the Secretary of State through his inspector, Diane Lewis BA Hons MCD MALL MRTPI, dismissed an appeal by the claimant against the decision of the second defendant in which it refused permission for the use of land at Pineridge Park Homes, Nine Mile Ride, Wokingham for the stationing of 22 mobile homes for residential purposes together with the formation of additional hard standing.

2. The appeal site is located in the countryside to the south of the town of Wokingham. The application was made under section 73A of the Town and Country Planning Act 1990 (TPCA) for development already carried out on an area of some 0.67 hectares. The 22 mobile home pitches are located around the perimeter of the site and are served by a central access road.

3. The appeal proceeded by way of public inquiry which sat for nine days.

4. The second defendant had previously issued two enforcement notices against unauthorised development at the appeal site. Notice one was issued on 26 June 2009 against the installation of services and utilities and the creation of 22 areas of hard standing and the other, notice two, was issued on 11 February 2010, against the change of use of the land to use for the stationing of mobile homes for the purposes of human habitation and the erection of a timber fence.

5. In a decision letter dated 1 April 2011 another inspector (Paul Morris Dip TP MRTPI) upheld the two enforcement notices, subject to correction and variation, and dismissed the application for planning permission under s 174(2)(a) TCPA. Challenges to the decisions were unsuccessful and the enforcement notices took effect. The period for compliance ended on 12 June 2015.

6. Notice one requires the removal of 22 areas of hard standing, the services and utilities associated with the development, all associated debris and the restoration of the land to its condition before the breach of planning control took place.

7. Notice two requires the cessation of the use of the land for the stationing of mobile homes and the removal of the mobile homes, the fence and all associated debris from the land.

8. A hearing took place on 23 October 2014 into an application by the claimant for declarations that the two enforcement notices were nullities. Elisabeth Laing J concluded that that claim failed because it was an abuse of process. She refused permission for the claim to continue as an application for judicial review on the grounds of:

    i) Inordinate and unexplained delay; and

    ii) Lack of merit.

9. On 28 October 2014 the public inquiry into the claimant's appeal under section 78 TCPA against the refusal of planning permission opened.

10. On 11 February 2015 the decision letter was issued dismissing the claimant's planning appeal. On 23 March 2015 the claimant issued the application the subject of these proceedings.

Grounds of Challenge

11. The claimant relies upon four grounds of challenge as follows:

    i) That the first defendant has made a fundamental and irretrievable error in the structure of decision making in that he (through his inspector) has failed to accord the impact of a negative decision on the lives of the children resident on the land in the planning balance required by law;

    ii) The decision letter is **Wednesbury** unreasonable;

    iii) The decision on proportionality is wrong and wrongly taken;

iv) The inspector has misunderstood or erred in law in making her decision on proportionality by misunderstanding the effect of the authorities relied upon by the claimant.

12. The claimant agreed that the central ground was whether the first defendant had erred in law in his approach to the interests of the children on the appeal site. The claimant agreed also that grounds three and four should be taken together as a proportionality claim.

Legal Framework

13. The law on challenges under section 288 is not controversial. It was set out as "seven familiar principles" in **Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government** [2014] EWHC 754 (Admin) at [19] by Lindblom J as follows:

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in Seddon Properties v Secretary of State for the Environment (1981) 42 P. & C.R. 26, at p.28).
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> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in South Bucks District Council and another v Porter (No. 2) [2004] 1 W.L.R. 1953, at p.1964B-G).
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> (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in Tesco Stores Limited v Secretary of State for the Environment [1995] 1 W.L.R. 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a

review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in Newsmith v Secretary of State for [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in Tesco Stores v Dundee City Council [2012] P.T.S.R. 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, South Somerset District Council v The Secretary of State for the Environment (1993) 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government [2012] EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in North Wiltshire District Council v Secretary of State for the Environment [1992] 65 P. & C.R. 137, at p.145)."

14. The principles for a court to apply in dealing with the best interests of children are summarised in **Zoumbas v Secretary of State for the Home Department** [2013] UKSC 74 at [10]:

> "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
>
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
>
> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
>
> (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
>
> (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
>
> (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

15. Those principles apply in planning cases. There is a broad consensus that in all decisions concerning children their best interests must be of primary importance and that planning decisions by the Secretary of State ought to have regard to that principle.

16. The application of that principle was considered in **Collins v Secretary of State for Communities and Local Government** [2013] EWCA Civ 1193 at [9]. Richards LJ said:

> "In considering how the principle is to be applied, it is necessary to bear in mind the statutory framework for planning decisions of this kind. Section 70(2) of the Town and Country Planning Act 1990 provides that in dealing with an application for planning permission a local planning authority 'shall have regard to (a) the provisions of the development plan, so far as material to the application, (b) any local finance considerations, so far as material to the application, and (c) any other material considerations'. The Secretary of State is subject to the same obligation in relation to an application recovered for determination by him. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that 'if regard is to be

> had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise'. The development plan therefore has a special status within the decision-making process but may be outweighed by other material considerations. It is well established that relevant rights to family or private life under article 8 fall to be taken into account as other material considerations and can be properly accommodated in that way within the decision-making process. Where the article 8 rights of a child are engaged, the best interests of the child can and should be taken into consideration in the article 8 analysis in the manner explained in ZH (Tanzania) and H(H). The decision-maker may be subject to other duties relating to the welfare of children (I refer below to section 11 of the Children Act 2004), but they are unlikely to add anything of substance in relation to best interests where article 8 is engaged."

17. Richards LJ went on to consider and approve the propositions from the previous authorities set out by Hickinbottom J in **Stevens v Secretary of State for Communities and Local Government** [2013] EWHC 792 (Admin) at [69]. Those propositions were:

> "i) Given the scope of planning decisions and the nature of the right to respect for family and private life, planning decision-making will often engage article 8. In those circumstances, relevant article 8 rights will be a material consideration which the decision-maker must take into account.
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> ii) Where the article 8 rights are those of children, they must be seen in the context of article 3 of the UNCRC, which requires a child's best interests to be a primary consideration.
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> iii) This requires the decision-maker, first, to identify what the child's best interests are. In a planning context, they are likely to be consistent with those of his parent or other carer who is involved in the planning decision-making process; and, unless circumstances indicate to the contrary, the decision-maker can assume that that carer will properly represent the child's best interests, and properly represent and evidence the potential adverse impact of any decision upon that child's best interests.
>
> iv) Once identified, although a primary consideration, the best interests of the child are not determinative of the planning issue. Nor does respect for the best interests of a relevant child mean that the planning exercise necessarily involves merely assessing whether the public interest in ensuring planning controls is maintained outweighs the best interests of the child. Most planning cases will have too many competing rights and

> interests, and will be too factually complex, to allow such an exercise.
>
> v) However, no other consideration must be regarded as more important or given greater weight than the best interests of any child, merely by virtue of its inherent nature apart from the context of the individual case. Further, the best interests of any child must be kept at the forefront of the decision-maker's mind as he examines all material considerations and performs the exercise of planning judgment on the basis of them; and, when considering any decision he might make (and, of course, the eventual decision he does make), he needs to assess whether the adverse impact of such a decision on the interests of the child is proportionate.
>
> vi) Whether the decision-maker has properly performed this exercise is a question of substance, not form. However, if an inspector on an appeal sets out his reasoning with regard to any child's interests in play, even briefly, that will be helpful not only to those involved in the application but also to the court in any later challenge, in understanding how the decision-maker reached the decision that the adverse impact to the interests of the child to which the decision gives rise is proportionate. It will be particularly helpful if the reasoning shows that the inspector has brought his mind to bear upon the adverse impact of the decision he has reached on the best interests of the child, and has concluded that that impact is in all the circumstances proportionate. I deal with this further in considering article 8 in the context of court challenges to planning decisions, below."

The Decision Letter

18. In her decision letter the inspector set out in [22] the main issues to determine whether the development was sustainable. That which is material to the current challenge is the last, namely, whether a refusal of permission in the circumstances of the case would be necessary and proportionate when assessed in the context of the provisions of the Human Rights Act 1998 and the requirement to safeguard and promote the welfare and wellbeing of children resident on the site. The inspector continued at [23]:

> "In my assessments and decision making I must have due regard to the public sector equality duty (PSED) contained in the Equality Act 2010. In summary, the three aims of the equality duty are to eliminate discrimination, advance equality of opportunity and foster good relations. The evidence indicates that most attention will need to be given to the protected characteristics of age and disability. Even though occupiers' individual circumstances and needs are explicitly addressed towards the end of my decision, I have had in mind the vulnerability and potential disadvantages of residents throughout my assessments, both in relation to the PSED and

> human rights. It is very relevant that the emphasis in the appellant's case was on the function of the site in providing for those in housing need and the very positive effects for family life and the best interests of children."

19. Before turning to the last issue the inspector reviewed the development plan and the situation with regard to housing land supply. She concluded at [45] that the Council at the current time was able to demonstrate a five year supply of deliverable housing sites. As a consequence the development plan policies for the supply of housing were up to date.

20. On the issue of housing need she concluded that the use of the site for the stationing of 22 mobile homes for residential purposes with no provision for a contribution towards affordable housing offsite was contrary to policy CP5 of the Core Strategy. The development that was proposed was appropriately described as low cost market housing. It did not provide intermediate housing and, in accordance with the National Planning Policy Framework (NPPF), could not be considered as affordable housing for planning purposes. She recorded that the development had catered for a resident population in housing need, including families with children.

21. Since the site had become operational residents had found and moved to alternative accommodation which in turn had enabled the site to continue to respond to those in housing need. There was no certainty that the current emphasis on occupation by young families would continue. She concluded on that matter in [78]:

> "The existing model of accommodation provision operated by the appellant does not lend itself easily to planning controls, a matter which has particular relevance where an exception to policy has to be justified. It is the proposal and how the site would be controlled in the future that is the critical consideration in the overall assessment. Importantly, the planning obligation would not secure all the existing benefits for the lifetime of the development. There is no significant support from Policy CP2. Accordingly I attach some weight to the proposed housing model and its contribution to meeting housing need in the Borough."

22. The inspector considered the location of the site and the impact of the development on the landscape character and visual impact. She concluded:

> "97. The landscape scheme would not be adequate mitigation for the harm to the landscape character area and visual amenity. The location and siting of the development conflicts with Policy CP3 criteria (c) and (f), and Policies CC03 and TB21. With reference to Policies CP1 and CP11 the development would not maintain the quality of the local environment."

23. The inspector then reviewed flood risk, the effect on infrastructure and community provision and planning conditions. She concluded:

"155. The policies in the development plan applicable to the development at Pineridge have a high degree of consistency with the Framework and the policies for the supply of housing are up-to-date. The policies have full weight. The aim of the development plan and national planning policy is to secure sustainable development.

156. A five year supply of deliverable housing sites has been demonstrated. The appeal site does not contribute to the identified supply. The site is in a countryside location outside a town or village settlement, where housing development is discouraged and there are deficiencies in accessibility. The site has not been identified or allocated as being suitable for development by the Core Strategy or MDD and it is not included in the identified five year supply. The change of use has resulted in very significant environmental harm primarily through the loss of woodland protected for its amenity value, the erosion of landscape character and ecological damage. Some harm has occurred to the appearance of the locality. The proposed landscape scheme would not provide adequate mitigation for the harm to landscape character and visual amenity or the necessary compensation to conserve biodiversity. There would be no unacceptable pressure placed on local infrastructure and I regard flood risk as a neutral factor in the circumstances. The economic benefits identified lend a small degree of weight in favour of the scheme. Overall the development fails to contribute in a positive way to the economic and environmental dimensions of sustainable development.

157. The low cost accommodation caters for a range of housing needs and has provided homes for those who have been unable to secure accommodation through social housing providers. A sense of community is present at Pineridge. The availability of the mobile home site safeguards the well-being of a number of children both living there and staying with family. No significant impact on community facilities would result, taking into account the planning obligations offered. However, the development does not provide affordable housing, a priority in the Borough. Residents of the site have wide ranging and changing circumstances, rather than being an identifiable group with protected characteristics. The common factor is a general one of housing need. The full benefits of the low cost housing model operated to date would not be secure in the longer term. The social dimension of sustainable development lends support to the development but not without some serious reservations.

158. The contribution the development would make to meeting housing needs is not of sufficient weight to overcome the objections – the failure to deliver a good quality standard of

> development in an appropriate location. My conclusion, subject to human rights considerations, is that the mobile home site is not a sustainable form of development and is contrary to the development plan and the Framework. This conclusion takes account of the Options identified by the appellant."

24. The inspector then proceeded to consider the human rights issues.

25. She outlined that article 8 was a qualified right with which, in appropriate circumstances, interference may be justified in the public interest. Central to striking a fair balance between the general interests of the wider community and the requirement to protect an individual's private right was the doctrine of proportionality.

26. She noted that if the appeal was dismissed the enforcement notices would continue to have effect so that the probability was that the residents would no longer be able to continue living in their homes. The consequences for all residents would be serious. The operation of the Convention Right was engaged.

27. In [162] the inspector noted the key elements of the proportionality assessment in the planning context. They were to:

> "…identify all relevant considerations relating to the individual household's exercise of their rights of enjoyment of a family life and a home; identify the best interests of any children; identify the particular public interests that have to be balanced against the individual or family's interest; carry out a structured weighing up and balancing of all of these interests."

28. In [164] the inspector considered her approach to individual or family interests. She said:

> "In this case there are a number of factors likely to affect an individual's or a family's interest and in turn the seriousness of the interference: the effect on children, the availability of alternative accommodation, the vulnerability of the family or individual, the importance of on-site support, community spirit and friendships, safety and security. In addition, the terms of the tenancy agreement and knowledge of the enforcement action and compliance period are relevant. The weight to be attached to each factor will vary according to an individual's circumstances, although there are a number of points of general applicability to be taken into account."

29. On the issue of alternative accommodation the inspector concluded:

> "169. In conclusion, there is an uncertainty around the availability of alternative accommodation, in part because of the constraints imposed by the procedures and because it was not explored in detail in the evidence of the main parties or residents. Residents in their evidence described a lack of

> assistance from the Council. The reasons why people are living at Pineridge and the shortage of affordable housing in the area indicate that there would be difficulties in securing a new home. However, over the period of time since the provision of the mobile homes, the development has offered homes to people in similar types of housing need. The history of occupancy at the site has shown that previous residents have been able to move to new homes. When account is also taken of the statutory duties of the Council, the probability is that residents would not become homeless. A move from Pineridge was generally regarded by residents as a retrograde step. Alternative accommodation may not provide amenities found at Pineridge, more especially in the short term. However, the accommodation may be of a better standard and offer its own advantages. There is no certainty the outcome would be negative."

30. On the best interests of the children she said:

> "170. The approach to be followed in a planning decision was set out in a series of propositions in the Stevens judgment, which was subsequently endorsed by the Court of Appeal in Collins. The Stevens judgment explains that whilst no other consideration must be regarded as inherently more important than the best interests of any child, that evaluation may alter during the course of the decision making process in the context of the individual case."

31. She considered the position with regard to unauthorised development as follows:

> "176. The reason for extending the compliance period to 18 months was to enable the occupiers who were resident on the site at the time to find alternative accommodation. The appellant explained subsequent re-lets by reference to the desperate circumstances of those seeking somewhere to live, as well as the income provided. It seems to me that a resident's knowledge of the enforcement notices and the length of the compliance period are relevant. Those residents who came to the site after the failure of the high court challenges in October 2012 should not have had a high expectancy of long term residence or residency beyond June 2015. However, when considering the well-being of the children, it would be wrong in principle to devalue their best interests by something for which they could in no way be held to be responsible."

32. The inspector then considered the substantial harm which she had found as a result of the development by reference to her reasoning on the planning issues. She concluded that the weight against the development was very strong and that it would not be in the public interest to accept an unsustainable form of development that did not have the support of the development plan or national policy.

33. She proceeded then to engage in structured proportionality assessments. In that part of her decision letter she considered the individual circumstances of each family group in occupation at the time of her decision. There were four households unable to speak or be represented at the inquiry. In evaluating those households she relied on their witness statements. In relation to the others she had the advantage of oral evidence as well as their written statements.

34. In each of her assessments she carried out a thumbnail sketch of the family unit and then reached a conclusion as to the fair balance. I set out one example below:

> "185. **Ms Miles** moved to Pineridge in October 2013 having been homeless at the time and unable to get help from the Council. She now lives there with her daughter who is 1 year old and her newly born son. She has experienced difficult circumstances over care of her child and the security at the site is important to her. She values the support she has had from the staff at Pineridge and at the mobile centre and is not in contact with the rest of her family. She is involved with the on site crèche and her daughter enjoys playing with the other children there. Ms Miles is dependant on financial support and housing benefit and has been on the Council waiting list for a short time.
>
> 186. Fair Balance. Ms Miles and her children are a vulnerable family who have found a safe and supportive home at Pineridge. She believes that it would be in the best interests of her children to stay there and Ms Miles fears if she was unable to secure suitable alternative accommodation her children would be separated from her. Her experience to date indicates that finding a new home would be difficult and the potential serious consequences for her children have substantial weight. The interference with home, family and private life would be very serious. Balanced against these conclusions is the cumulative effect of the planning considerations and the substantial harm to the proper planning of the area. Having taken into account all the considerations and interests I conclude that the interference would be necessary and proportionate."

35. That process was repeated for each of the households on each of the pitches at the site.

36. At the end of that exercise the inspector concluded that the interference with private rights of residents would be necessary and proportionate when balanced against the wider public interest and that it was justified to withhold a grant of permanent planning permission. She then went on to consider whether temporary planning permission should be forthcoming.

37. In that section of her decision letter she noted that consideration had to be given as to whether there were lesser means to achieve the legitimate aims identified by way of a grant of temporary planning permission. On that she said:

"228. The positive contribution of Pineridge to meeting particular housing needs was taken into account in the overall assessment of the planning merits. This was outweighed by the strong objections associated with its location, environmental impact and broader housing policy objectives. The substantial harm associated with the development would be for a time limited period. Nevertheless, there is no presumption that a development granted a temporary permission should be granted a permanent permission at the end of the stated period. That being so a condition requiring the implementation of a landscape and ecological mitigation scheme would not be reasonable. Furthermore, the housing model that would be permitted at the site, restricted in part by the provisions within the unilateral undertaking, would not ensure controls on a range of matters related to the allocation of accommodation and provision of facilities at the site. The serious conflict with policies to promote sustainable forms of development in terms of their location and effect on the environment would be unacceptable even for the five year period proposed.

229. In the alternative, the assessments showed that the probable difficulty in securing alternative, acceptable and affordable housing would be critical to the seriousness of the outcome for the residents and their families. A purpose of a temporary permission of a year or eighteen months could be to allow additional time for those currently resident of the site to secure alternative accommodation, whether through the Council, other agencies or private provision. This would be a substantial benefit to home and family life and ease anxiety over securing a new home. At the end of the period the expected change would be that most if not all of the units would be unoccupied. A temporary permission in these terms would have the advantage of responding to any specific issues raised as regards equality of opportunity and accommodation needs of those with protected characteristics.

230. Based on recent experience at the site, a difficulty I foresee is that when a unit is vacated it would be let to new tenants. A temporary period would have the same function as the extended compliance period was meant to offer. The probability is that at the end of an eighteen month or two year period a similar set of circumstances would exist as now, with all units occupied. The existence of the prohibitions contained in the enforcement notices would not revive on the expiry of the permission. Moreover the development would be subject to the provisions in the unilateral undertaking, which in the circumstances would not satisfy the policy test of being necessary to make the development acceptable."

Ground One: Did the Inspector Err in Considering the Best Interests of the Children?

38. The claimant contends that the inspector did not consider the impact of a refusal of planning permission on the lives of the children in striking the planning balance, either at all, or in the manner required by law when considering both permanent and temporary planning permissions. She had, therefore, either:

    i) Failed to take into account a material consideration in striking the planning balance, namely, the elevated status of a negative impact on children; or

    ii) Erred in law by failing to understand and apply the special weight to be accorded to the impact on children in decision making.

39. The inspector had recorded that there were 23 children living on the land. She recorded that it was considered by the residents who were living on the site to be in the best interests of their children to remain living there. The opinion of the second defendant's housing providers, Transform Housing and Support, and the specialist health visitor from Berkshire Healthcare NHS were set out. Their opinions were that the site provided an invaluable facility providing accommodation to vulnerable families. They spoke of the extreme distress that the loss of the homes would cause to the adults resulting in social isolation and lack of continuity of care. Any impact on the adults would have an elevated impact on the children of those adults.

40. The inspector noted that the population of the site was not stable and concluded therefore that the planning balance should focus on land use issues. She said at [57]:

> "The personal circumstances of the residents currently living on the site illustrate on an individual and more specific basis the contribution of the development to meeting housing need. The immediate and ongoing needs for health care and education facilities could be satisfied by accommodation elsewhere. The probability is that most of the families currently on site would not be there in years to come. The appellant has accepted personal planning permission(s) would not be appropriate. These matters reduce the weight to be attached to residents' personal circumstances over and above the weight to the function and contribution of the site more generally. Within this context I attach some weight to personal circumstances."

41. The claimant submits that the needs of children living on the land must be treated as a primary consideration to which no other matter should be given greater weight. The inspector was addressed as to what was in the best interests of the children on site without challenge. Her approach to focus on land use and only afford some weight to those needs was in error. She was required to assess their needs as presented to the public inquiry.

42. The inspector's conclusion at [57] that the immediate and ongoing needs of healthcare and education facilities could be satisfied by accommodation elsewhere was flawed as there was no evidence presented to the inquiry of available alternative accommodation. Some of the residents had given evidence that they had been on the housing register for more than two years without being offered any accommodation.

43. In those circumstances the inspector's conclusions at [169] that the probability was that residents would not become homeless and that such alternative accommodation may be of a better standard and offer its own advantages was illogical given her earlier findings.

44. In her conclusions on the planning balance the inspector gave no reference to the need to treat the best interests of the children on the site as a primary consideration.

45. When the inspector addressed the issue of a temporary permission she dismissed that possibility without regard to the acknowledged severe impact of that decision on the lives of the children on site. She was required to determine the planning balance on the basis of all of the evidence before her taking into account personal circumstances and in particular the welfare and safe being of the children resident on the site.

46. In respect of both the permanent planning permission and temporary planning permission it is submitted that the first defendant made a fundamental error.

47. The defendant submits that the inspector was clearly mindful of the appropriate approach in relation to children on site. Her structured proportionality assessment, which ran from [180] to [224], had very many express references to the best interests of the children.

48. Her reference in [164] to the fact that the weight to be attached to each factor will vary according to an individual's circumstances was entirely lawful.

49. The claimant had wrongly elided the weight inherently to be afforded to the best interests of the children as the starting point in any assessment with the weight which may subsequently be afforded to that factor after considering the individual circumstances of each household.

50. Contrary to the claimant's submission the inspector did not fail to take into account a material consideration and did not err in law in terms of weight. She was clearly aware that the appeal development was subject to extant enforcement notices that would result in all of the residents losing their homes in June 2015.

51. Instead the inspector considered the matter carefully through her proportionality assessment which she undertook household by household and produced reasons for each that were adequate and intelligible.

52. There is no need for an inspector to repeat all her analysis and conclusions on her consideration in relation to a permanent planning permission in her consideration as to whether temporary planning permission ought to have been granted. They can and should be read across from the inspector's analysis and conclusions on the permanent planning permission.

Discussion and Conclusions

53. I can find no error in the inspector's approach to considering the interests of the 23 children on site.

54. As a footnote to [162] of her decision letter where she was considering the approach to proportionality the inspector records that her attention was drawn to **AZ v**

Secretary of State for Communities and Local Government [2012] EWHC 3660 (Admin), **Stevens** (supra) and **Collins** (supra).

55. She went on to say in [163]:

> "An Article 8 proportionality assessment is distinct from a consideration of personal circumstances because it takes account of a wide range of circumstances and is of a multi-stranded nature. Its purpose is to determine whether the protected rights of the individual and his family would be disproportionately interfered with if the rights of the community are upheld. As observed in both the Stevens and AZ judgments, in practice the number of cases likely to succeed under Article 8 will be few in number because of the importance of having coherent control over town and country planning to serve the public interest and also to protect the rights and freedoms of other individuals."

56. She was clearly aware of making any child's best interests a primary consideration. Mr Crean QC attacks the inspector's exposition of the key elements in a proportionality exercise (in [162] and set out above) on the basis that she does not prioritise the interests of the children above the other elements and that illustrates that her approach throughout the decision letter was misconceived. That is a hopeless submission. The decision letter is to be read as a whole and not selectively. When that is done it is clear that the inspector was making the best interests of the children a primary consideration (see [23],[165] and [170]). Further, it is to misread the paragraph relied upon. The inspector there was setting out what were material considerations to her exercise not attempting to apportion weight between them.

57. That the interests of the children have substantial weight as a social policy factor in the sense that no other consideration exceeds that factor as a starting point is correct but that is not the position fixed for all time. There is then required to be an evaluation of the individual circumstances of those interests and other factors need to be considered and assessed. The eventual judgment will be the result of the relative weighting that an inspector gives to all of the circumstances of the case.

58. As Hickinbottom J said in **Stevens**, **ZH (Tanzania) v Secretary of State for the Home Department** [2011] UKSC 4 and the UNCRC are concerned with the importance, as a matter of policy, that should be attached to the best interests of a child when those interests are in play in a decision making process. But upon investigation of the individual circumstances of the case and an assessment other factors may "equal or exceed" the best interests of the child in terms of weight.

59. As Lord Mance said in **HH v Deputy Prosecutor of the Italian Republic** [2012] UKSC 25 at [98]:

> "…This means, in my view, that such interests must always be at the forefront of any decision-maker's mind, rather than that they need to be mentioned first in any formal chain of reasoning or that they rank higher than any other considerations. A child's best interests must themselves be

> evaluated. They may in some cases point only marginally in one, rather than another, direction. They may be outweighed by other considerations pointing more strongly in another direction."

60. As Hickinbottom J observed in **Stevens** at [68]:

> "…But it is not to be assumed in an area of social policy such as planning that article 8 rights (even of children, whose interests must be treated as primary) will often outweigh the importance of having coherent control over town and country planning, important not only in the public interest but also to protect the rights and freedoms of other individuals… In practice, in my view, such cases are likely to be few."

61. It is clear from the decision letter that the inspector, having set out the position with the effective enforcement notices, considered the material issues that she identified as different strands of the planning judgment which she eventually had to make. In dealing with the issue of housing need she recorded statements from the residents explaining the valuable role of the site in resolving their immediate need. She noted that all those residents with children said how happy they were living there and that it was in the best interests of their children for them to continue doing so. She noted also that stability in home life enabled the young children to attend school without disruption and the proximity of the site to St. Sebastian's School was an advantage in that respect. Parents and the very young children relied on the benefit from the mobile children centre which would not be available if they had to move (see [56]). All of that was prior to the section of her decision letter which dealt expressly with human rights.

62. Within that later section the inspector went through, first, some general matters including the approach that she was going to take and then conducted a proportionality assessment in relation to each household. I have set out one example above. It was a very thorough approach which set out her reasoning prior to reaching a judgment in respect of each household. That is, in my judgment, a paradigm example of an approach which a decision maker should follow. The inspector had started with an acknowledgment of the importance of the interests of the children and then made an individual assessment of each household. That is entirely consistent with the jurisprudence set out above. Her reasons are clear and adequate.

63. Although the claimant submitted that there was no evidence before the inspector on alternative accommodation so that her findings on its availability were flawed that ignores the history of occupation of the site. It was a fact that previous households had moved on from the site and there was no evidence that that transient pattern of occupation was going to cease. She had ample evidence, therefore, as to the likelihood of alternative accommodation.

64. In dealing with the issue of temporary planning permission the inspector was under no obligation to repeat all of her analysis and conclusions from her decision on the permanent planning permission. Between paragraphs 225 to 231 she considered the argument for a temporary planning permission and concluded that it was not an acceptable solution when balanced against the wider public interest. Within that

section of her decision letter she concluded that a temporary period would have the same function that the extended compliance period under the enforcement notices was meant to offer. The probability was that, at the end of a limited period, a similar set of circumstances would exist as they were at the time of her consideration. Overall a temporary permission was unacceptable.

65. There is no error in the approach of the inspector to her consideration of the temporary planning permission. She did not go through the same individual assessment as she had done for the permanent planning permission household by household to consider the position if the permission was to be temporary. However, it is clear that she knew that the issue of the best interests of the children was still very much a live issue.

66. She recorded in paragraph 226 the appellant's submission that if permanent permission was not forthcoming the only proportionate solution was for a temporary planning permission to be granted particularly in the context of a significant number of children on the site and the requirement to treat their needs as a primary consideration. She dealt with that submission and the concerns that that raised and concluded that the serious conflict with policies to promote sustainable forms of development in terms of their location and affect on the environment would be unacceptable even for a five year period. Alternatively, she referred back to her assessments which show the probable difficulty in securing alternative accommodation which would be critical to the seriousness of the outcome for residents and their families. A temporary permission would be a substantial benefit to home and family life and ease anxiety over securing a new home. Despite recognising that, her conclusion was that a time limited permission was not an acceptable solution when balanced against the wider public interest. In coming to that conclusion she clearly had regard to the best interests of the children on site as part of the home and family life to which she expressly referred.

67. It follows that there is no fundamental error in the decision making process on behalf of the inspector.

Ground Two: Irrationality

68. It cannot be said either that the inspector's decision was irrational. As set out she found harm in terms of landscape character, visual impact, biodiversity, public transport, the inability to address the objections to the development by planning conditions, the conflict with the development plan and the NPPF and the failure of the development to contribute in a positive way to economic and environmental dimensions of sustainable development.

69. In terms of the social dimension of sustainable development her scrutiny of the individual circumstances was perfectly sound.

70. Accordingly there is no basis for any finding that the inspector's conclusions were irrational.

Grounds Three and Four: Proportionality

71. The claimant submits that the inspector did not properly engage with article 8 and did not carry out a proportionality assessment. Because of that the court had to carry out that exercise.

72. That then raised the question as to when that exercise had to be done. The claimant submits that the exercise is to be done at the time of the determination by the court albeit on what is, metaphorically, yesterday's evidence so far as the individual families are concerned. On a fair balance of all considerations the court has to take into account a recent decision letter of 9 June 2015 on an appeal on land at west of Beech Hill Road, Spencers Wood, Berkshire which allowed an appeal for up to 120 residential units associated infrastructure and defined access and found that the second defendant was not able to demonstrate a five year supply of deliverable housing sites.

73. The defendant submitted that proportionality was a question of substance and not form. The inspector was entitled to come to the conclusion that she did. In any event the shortfall in housing supply was not great and the position may well be different now so that no reliance could be placed on the decision letter relied upon by the claimant.

Discussion and Conclusions

74. How a court should approach a section 288 application when article 8 was engaged was considered by Hickinbottom J in **Stevens** (supra). He said at [87]:

> "In terms of the proper approach of the court when dealing with a section 288 application in which article 8 is engaged, so far as relevant to this claim, the following propositions can therefore be derived from the cases.
>
> i) The application does not require a full merits review. It requires review on traditional judicial review grounds, together with consideration of whether the resulting decision engages article 8 and, insofar as it does, whether the adverse impact of the decision on the article 8 rights engaged is proportionate to the legitimate aims sought to be protected (including both the public interest, and the rights and interests of other individuals).
>
> ii) In considering whether the decision breached relevant article 8 rights, the court is required to consider the merits, with appropriate scrutiny, but it should do so bearing in mind that the inspector's function, assigned to him by the statutory scheme and ultimately Parliament, is to consider the merits of all material considerations, including any article 8 rights that are engaged. The inspector is an expert and experienced, and acts in a quasi-judicial capacity, which each warrant a wide margin of discretion. He is acting in an area of social policy, which in itself attracts a wide margin of

> discretion. As a result, considerable deference ought to be attached to his conclusion.
>
> iii) Proportionality is a question of substance and not form. If the inspector has clearly engaged with the article 8 rights in play, and considered them with care, given his wide margin of discretion, it is unlikely that the court will interfere with his conclusion on grounds of proportionality. If he has not –even if he has not referred to article 8 rights at all – on usual principles, the court will not quash his decision if his error is immaterial. If his error is material, then it is open to the court to find that the interference with the relevant human rights is in any event proportionate; or quash the decision."

75. I agree with the propositions that Hickinbottom J set out. Although they were articulated in the context of the claim before him they are equally applicable here. Applying those principles it is evident that the inspector was aware that article 8 was engaged and applied the appropriate consideration to it. Given the wide margin of appreciation to be accorded to her conclusion I can see no basis whatsoever for the court to interfere.

76. For the sake of completeness I should record that I was unimpressed by reference to a single decision letter decided after the one under challenge where the shortfall in housing land was so slight in terms of five year supply. As the defendant submitted the position may well have changed. But, in any event, for the exercise to be redone properly, if that were called for, which it is not, would, in my judgment, require an assessment of all considerations at the same moment in time.

77. There is nothing in this ground.

78. Accordingly, this application is dismissed.