Neutral Citation Number: [2015] EWHC 29 (Admin)

Case No: CO/3367/2014

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

Date: 19/01/2015

Before :

HER HONOUR JUDGE BELCHER

- -

Between :

Ann Dear	**Claimant**
- and -	
Secretary of State for Communities and Local Government (1) **Doncaster Metropolitan Borough Council (2)**	**Defendants**

- -
- -

Mr Marc Willers QC (instructed by **Lester Morrill**) for the **Claimant**
Mr Stephen Whale (instructed by **The Treasury Solicitor**) for the **First Defendant**

Hearing date: 11 December 2014

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Approved Judgment

Her Honour Judge Belcher :

1. This is a statutory application pursuant to Section 288 Town and Country Planning Act 1990 ("TCPA 1990") to quash the decision of the First Defendant dated 10 June 2014 in which he dismissed a planning appeal brought by the Claimant. The Second Defendant did not appear before me and has taken no active part in these proceedings. References in this judgment to the trial bundle will be by the capital letter "B" followed by the relevant page number or numbers. References in this judgment to the authorities bundle will be by the capital letters "AB" followed by the relevant Tab number. The authorities bundle is not paginated and any reference to page numbers will therefore be to the internal pagination of the relevant law report.

The Facts

2. This case concerns a site of approximately 4 hectares at Ten Acre Farm, Norton Common Road, Norton, Doncaster ("the Site"). The site is a strip of agricultural land within the South Yorkshire Green Belt. The Claimant is a Romany Gypsy and it is agreed that she and her family fall within the planning definition of Gypsies and Travellers. They moved onto the Site in April 2009. The Claimant and her husband sought retrospective planning permission for their use of the Site which was refused by the local planning authority. On 14 December 2009 planning permission was granted on appeal for the change of use of the land to mixed use for keeping horses and as a residential caravan site. The residential use was subject to conditions limiting that use to a period of 3 years, and requiring that no more than 3 caravans should be stationed on the land at any one time, of which no more than 1 should be a static caravan or mobile home.

3. On 13 October 2012 the Claimant and her husband sought further planning permission for mixed use for keeping horses and as a residential caravan site, but without the previous restrictions on the residential use. On 7 October 2013, the Second Defendant, Doncaster Metropolitan Borough Council, refused that application. The Claimant appealed and a Hearing was held on 22 January 2014. On 23 January 2014 the Secretary of State for Communities and Local Government ("the Secretary of State") recovered the appeal for determination by himself, because it relates to a traveller site within the Green Belt. On 4 March 2014, the report of the Planning Inspector (Bern Hellier) to the Secretary of State was completed (B19-36). It recommended dismissal of the appeal. On 10 June 2014 the Secretary of State dismissed the appeal (B13-17).

4. In these proceedings the Claimant challenges only the Secretary of State's refusal of temporary planning permission. It is of relevance to the challenge that on 2 April 2014 a planning inspector, Mr Richard Clegg, granted temporary planning permission on appeal for a site on the south east side of Flashley Carr Lane, Moss, Doncaster following a 7 day inquiry ("the Flashley Carr Lane Decision"). The permission granted in that case was for change of use of land to a gypsy site for a limited period of 4 years from the date of the decision (B134-152). I shall consider that decision in more detail below.

The Law

5. By S288 TCPA 1990 an application may be made to the Administrative Court in respect of a decision by or on behalf of the Secretary of State on the grounds either (i) that it was not within the powers of the Act and/or (ii) that any relevant requirements have not been met, leading to substantial prejudice to the applicant's interests. If the grounds of challenge are made out, this Court's powers are limited to quashing the decision.

6. I adopt from Mr Willers' skeleton argument (slightly amended at iv below) the following agreed propositions of law which the court must bear in mind when considering applications under S288 TCPA 1990:

   i) The decision maker is not writing an exam paper and his decisions must be read in good faith (see AB Tab 1: *South Somerset DC v Secretary of State for the Environment* [1993] 1 PLR 80 at 83E-G and 87F-G);

   ii) Questions of planning judgment are for the decision maker and not for the Court which should not substitute its own judgment (see AB Tab 2: *City of Edinburgh v Secretary of State for Scotland* [1997] 1 WLR 1447 at 1458G-1459D);

   iii) The weight to be attached to material considerations and matters of planning judgment are within the exclusive jurisdiction of the decision maker (see *ELS Wholesale (Wolverhampton) v Secretary of State for the Environment* (1987) P&CR 69);

   iv) The requirement to take account of relevant matters is a requirement to take into account a matter which might cause the decision maker to reach a different conclusion to that which he would reach if he did not take it into account – by "might" is meant that it is clear that there is a real possibility that the consideration of the matter would have made a difference to the decision (see AB Tab 3: *Bolton MBC v Secretary of State for the Environment* (1990) 61 P&CR 343 at 352-353)

   v) The duty on a decision maker is to have regard to every material consideration; he need not mention them all but it is necessary for the decision maker to state his reasons in sufficient detail to enable the reader to know what conclusion he has reached on the principal important controversial issues (see AB Tabs 4 and 5: *Bolton MDC v Secretary of State for the Environment* [1995] 3 PLR 37 and *South Bucks DC v Porter (No. 2)*[2004] 1 WLR 1953 per Lord Brown at paragraph 36)

   vi) Reasons must be proper, intelligible and adequate – they can be briefly stated but must not give rise to a substantial doubt as to whether the decision was based on relevant grounds and was otherwise free from any flaw in the decision making process, but such an adverse inference will not be readily drawn (see AB Tab 5: *South Bucks DC v Porter (No. 2)*[2004] 1 WLR 1953 per Lord Brown at paragraph 36);

vii) For a decision letter to be perverse it must be one which no reasonable person in the position of the decision maker, properly directing himself, could have reached (see AB Tab 6: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P&CR 26. See also *Associated Picture Houses v Wednesbury Corporation* [1948] 1KB 223 and *Fenton v SSETR* [2000] JPL 1179);

viii) If the court identifies an error of law it has a discretion whether or not to quash the decision – the error of law must materially affect the decision taken (see AB Tab 3: *Bolton MBC v Secretary of State for the Environment* [1990] 61 P&CR 343).

To the above list Mr Whale added the following propositions:

ix) It is only in limited circumstances in which it can be contended that a decision maker has erred in law by reference to a point not raised before him (see AB Tab 12: *Humphris v Secretary of State for Communities and Local Government* [2012] EWHC 1237 (Admin) at paragraph 23, per Ouseley J);

x) A decision maker's conclusions on permanent planning permission should be read across into the reasoning on temporary planning permission (see AB Tab 13: *Delaney v Secretary of State for Communities and Local Government* [2012] EWHC 1303 (Admin) at paragraphs 45 and 54: upheld by the Court of Appeal: AB Tab 14)

7. A planning authority must determine an application for planning permission in accordance with its development plan for its area unless material considerations indicate otherwise. In this case it is agreed that the following national guidance was relevant to the determination of the Claimant's application for planning permission: the guidance on protecting Green Belt land contained in the National Planning Policy Framework ("the Framework") and the Planning policy for traveller sites ("the PPTS"). I was not provided with a copy of the Green Belt guidance but it was accepted that it is accurately quoted and summarised in Lewis J's judgment in *Connors and Others v Secretary of State for the Environment* [2014] EWHC 2358 (Admin) (AB Tab 16) in the following terms:

> "16. Section 9 of the Framework deals with protecting Green Belt Land. Paragraphs 79 and 80 provide as follows:
>
> > "79. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.
> >
> > 80. Green Belt serves five purposes;
> >
> > - To check the unrestricted sprawl of large built up areas

- To prevent neighbouring towns merging into one another;
- To assist in safeguarding the countryside from encroachment;
- To preserve the setting and special character of historic towns; and
- To assist in urban regeneration, by encouraging the recycling of derelict and other urban land.

18. Paragraphs 87 and 88 of the Framework provide as follows:

> "87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in exceptional circumstances.
>
> 88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. "Very special circumstances" will not exist unless the potential harm to the Green Belt by reason of the inappropriateness, and any other harm, is clearly outweighed by other considerations."

8. There is no dispute that the land in question is Green Belt land and that the proposed development is inappropriate development, by definition harmful to the Green Belt.

9. The PPTS (AB Tab 8) sets out government planning policy for traveller sites and states that it should be read in conjunction with the Framework (Paragraph 1). Paragraph 3 provides as follows:

> "The Government's overarching aim is to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life of travellers while respecting the interests of the settled community."

10. Paragraph 4 sets out a number of aims in respect of traveller sites designed to achieve the overarching aim in paragraph 3. These include that local planning authorities should assess need for the purposes of planning, identify land for sites, plan for sites over a reasonable time scale, protect Green Belt, increase the number of traveller sites in appropriate locations, promote more private traveller sites, and to reduce the number of unauthorised developments. The PPTS then goes on to set out a series of policies. Policy B, "Planning for Traveller Sites" requires local planning authorities in producing their Local Plan to identify and update annually a supply of specific deliverable sites to provide 5 years worth of sites against locally set targets.

11. Policy E specifically relates to "Traveller Sites in Green Belt" and provides as follows:

> "14. Inappropriate development is harmful to the Green Belt and should not be approved, except in very special circumstances. Traveller sites (temporary or permanent) in the Green Belt are inappropriate development.
>
> 15. Green Belt boundaries should be altered only in exceptional circumstances. If a local planning authority wishes to make an exceptional limited alteration to the defined Green Belt boundary (which might be to accommodate a site inset within the Green Belt) to meet a specific, identified need fro a traveller site, it should do so only through the plan-making process and not in response to a planning application. If land is removed from the Green Belt in this way, it should be specifically allocated in the development plan as a traveller site only."

The Grounds of Challenge

12. The Claim Form contains 5 Grounds of Challenge (B 4-5). Ground 3 was not pursued before me. The remaining Grounds, limited to a challenge to the refusal of temporary planning permission, are as follows:

i) Ground 1: The Secretary of State's conclusion that "the planning circumstances in the area are unlikely to change in the near future" was inconsistent with the conclusion reached by one of his Inspectors in the Flashley Carr Lane Decision issued on 2 April 2014;

ii) Ground 2: Alternatively, the Secretary of State failed to explain properly or at all why he had decided to take a different view to that of his Inspector in the Flashley Carr Lane Decision on the question whether there was an expectation that there would be a change in the planning circumstances at the end of the period for which temporary planning permission was sought;

iii) Ground 4: The First Defendant has erred in law in that he has treated the harm to the Green Belt by reason of inappropriateness as inherently more weighty than the best interests of the children living on the land, in breach of Article 3(1) if the United Nations Convention on the Rights of the Child ("UNCRC") and Article 8 of the European Convention on Human Rights ("ECHR");

iv) Ground 5: Further or alternatively, the First Defendant failed to explain why he concluded that the best interest of the children living on the land should only be attributed modest weight.

Grounds 1 and 2.

13. As they relate to the same issue, it is convenient to consider Grounds 1 and 2 together, as indeed the advocates did in their submissions. These grounds relate to the inconsistencies in the decisions of the Inspector in the Flashley Carr Lane decision

and the decision of the Secretary of State in this case. This relates to the findings as to whether the planning circumstances, in this case the likelihood or otherwise of further traveller sites being available, are expected to change. In the Flashley Carr Lane Decision issued on 2 April 2014 the Inspector, Richard Clegg, having refused permission for a permanent development for the proposed gypsy site on the basis that the harm suffered would not be outweighed by the considerations providing support, made the following findings;

> "PPG explains that a temporary permission may be acceptable where the planning circumstances are expected to change at the end of the period concerned. There is a realistic prospect of sites coming forward in accordance with the emerging DPD, since adoption is anticipated later this year. Allowing time for sites to be developed thereafter, and taking account of the time required for the submission of schemes and site preparation, I consider that four years would be an appropriate period for a temporary permission…….
>
> …taking into account all material considerations, including that it is in the best interests of the children to live on a settled base to avoid disruption to their education, I am satisfied that the legitimate aim of protecting the country side can only be adequately safeguarded by preventing permanent occupation of the site, and interference with the human rights of the families is, therefore, necessary. Restriction of planning permission to a temporary period is necessary and proportionate, and it would not result in a violation of the human rights of the prospective site occupants" (B 147-148, paragraphs 52 and 53).

14. Mr Willers made the point that the Inquiry in that case heard evidence from a number of people (listed at B151) and sat for a period of 7 days (listed at B134). He submitted it is clear from the decision, and in particular the documents submitted by the local planning authority (listed at B151) that the issue of the likelihood of future provision of traveller sites was considered in some detail.

15. The report of Planning Inspector Bern Hellier in relation to the Site is dated 4 March 2014 and follows a 1 day Hearing held on 22 January 2014. Having recommended that permanent permission is not appropriate, he goes on to consider temporary permission and concludes as follows:

> "The advice in Circular 11/95 is that a temporary permission is only justified when it is expected that the planning circumstances will change in a particular was at the end of the temporary period. In the Doncaster area I am not persuaded that circumstances will change greatly in the near future. The SPDPD refers to opportunities for new provision but does not allocate new sites ….
>
> If it is accepted that new sites and opportunities would open up with the adoption of the SPDPD then a two year temporary

> consent would give time, following adoption, for sites to be brought on stream…..
>
> ….I conclude that the harm from a temporary permission of two years would be substantial and would not be clearly outweighed by other considerations as set out above, including the significant weight that should be given to the absence of a five year supply of deliverable sites." (B32, paragraphs 59 and 61)

16. I was not told the distance between the Flashley Carr Lane site and the Site. However it is clear from the Flashley Carr Lane Decision that the site in that case is about 6.03km from Askern and about 5.53km from Stainforth (B137, paragraph 15). In relation to the Site, the Planning Inspector states in his report that it "….is in a reasonably accessible location on a bus route into Askern…." (B23, paragraph 17). It is described in the Claimant's Statement of Case for the Appeal to the Planning Inspector, as "....just a short distance North of Askern" (B57, paragraph 2.7). What is clear is that the Site and the Flashley Carr Lane site are reasonably proximate, certainly for the purposes of findings as to future provision of traveller sites in the area. Counsel did not seek to suggest otherwise.

17. At the time that the Planning Inspector's report in relation to the Site was finalised, the Flashley Carr Lane Decision had not been published. However, by the time of the Secretary of State's decision on the recovered appeal on 10 June 2014, the Flashley Carr Lane Decision had been issued and in the public domain for just over 2 months. The Secretary of State's decision letter adopts the Inspector's reasoning:

> "For the reasons given by the Inspector in IR59 the Secretary of State concludes that planning circumstances in the area are unlikely to change greatly in the near future… he gives significant weight to the lack of a five year supply of deliverable sites…..He agrees with the Inspector (IR61), for the reasons given in IR59 and 60, that the harm from a temporary permission would not be clearly outweighed by other considerations." (B16, paragraph 18)

18. Mr Willers submitted that it was not up to Mrs Dear and her representatives to point out to the Secretary of State the relevance of his own Inspectors' decisions in the same district or borough. He submitted that the Secretary of State should have informed himself of what his Inspector in another gypsy/traveller case had determined in terms of a key issue, the likely future provision of traveller sites, an issue equally key in the case the Secretary of State had recovered to determine himself. He pointed out that the 2 appeals were live at the same time. When Mr Bern Hellier was hearing the appeal in this case on 22 January 2014, the hearing in the Inquiry on Flashley Carr Lane had finished and was awaiting a decision. The fact of the outstanding Inquiry decision was known to Inspector Bern Hellier as is clear from the Doncaster Council's Hearing Statement for his Inquiry (B39, 41, 42 and 44). It is also mentioned in Mrs Dear's Statement of Case to Inspector Bern Hellier (B57, paragraph 2.12). Mr Willers submitted that all this documentation should have gone to the Secretary of State who, therefore, had knowledge of the Flashley Carr Lane Appeal. He further submitted that the Secretary of State should have established whether the

decision had been issued and that it must be unarguable that the Secretary of State should do his best to ensure consistency between his decisions and those of his Inspectors who are standing in his stead where decisions are not recovered. He reminded me that the two decisions are within a couple of months of each other, both in relation to gypsy sites in the same area and with the same key factor in relation to temporary planning permission, but with wholly inconsistent conclusions as to the likely future availability of traveller sites in the Borough.

19. Mr Willers recognised that he cannot submit that a temporary permission would be granted in this case. However he submitted that if the Secretary of State wanted to distance himself from the Flashley Carr Lane Decision conclusions on this key factor, he should have explained why he had taken that decision. There is no reference at all to the Flashley Carr Lane Decision in the Secretary of State's decision letter in relation to the Site. The question he submitted is whether it is clear that there is a real possibility that consideration of the conclusions of the Flashley Carr Lane Decision would have made a difference to the Secretary of State's decision. He submitted we cannot second guess the position and that the decision should be quashed.

20. Mr Willers referred me to the Court of Appeal decision in *North Wiltshire DC v Secretary of State for the Environment* (1993) 65 P&CR 137 (AB Tab 7) and in particular to the following passage from the judgment of Mann LJ at page 145:

> "In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appeal process. Consistency is self evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases *must* be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give reasons for departure from the previous decision.
>
> To state that like cases should be decided alike presupposes that the earlier case is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and

> assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it."

21. Mr Whale's first point can be disposed of very quickly. He submitted that this case and the Flashley Carr Lane Decision are not like cases because this case is a Green Belt case and the Flashley Carr Lane Decision was not. I reject that submission. The relevant issue for the purposes of considering the arguments on consistency is whether there is likely to be a future supply of traveller sites within a reasonable time such that a grant of temporary planning permission might be appropriate. An express finding was made in the Flashley Carr Lane Decision which is not consistent with the later conclusions of the Secretary of State in this case. I regard the issue of Green Belt/non Green Belt as wholly irrelevant when considering the arguments as to consistency in decisions/ the giving of reasons to support departing from an earlier decision.

22. Mr Whale submitted that the Secretary of State gave adequate and intelligible reasons for reaching his conclusion that planning circumstances in the area are unlikely to change greatly in the near future, in particular that the SPDPD does not allocate new sites, does not add materially to the policy framework already in place with Core Strategy Policy CS13, and that there is still uncertainty because the soundness of SPDPD is subject to unresolved objections and has still to be tested on examination. I accept that those reasons are intelligible and adequate on the face of the decision, but the submission fails to address the issue of inconsistency.

23. Mr Whale's next point was to pick up on Mr Willers' suggestion that the Secretary of State had a duty to make himself cognisant of the decisions of inspectors appointed by him. He sought to draw a distinction between the realities of the fact that the Flashley Carr Lane Decision was taken by an Inspector whereas the decision in this case was taken by the Secretary of State himself. I cannot accept that distinction. The Inspector is appointed by the Secretary of State and is exercising the delegated powers of the Secretary of State. In my judgement, as a matter of legal form, the Secretary of State must be deemed to have made both decisions.

24. Mr Whale's final submission on these points was that even if I accept the premise that the Secretary of State took both decisions, the Claimant still fails in this case as the burden of persuading the Secretary of State that very special circumstances exist in a Green Belt case is on the applicant for planning permission. Therefore, he submitted, it was for Mrs Dear to put forward the relevant considerations such as considerations affecting the children and their education, health considerations and any other relevant considerations, including, in this case, the Flashley Carr Lane Decision if she wished to rely on it. He submitted that Mrs Dear was professionally represented by Mrs Heine who was plainly well aware of the Flashley Carr Lane Inquiry. On 24 April 2014, after the Flashley Carr Lane Decision had been issued, Mrs Dear made further representations to the Secretary of State about changes in her personal circumstances. Those representations were not invited but were considered and are referred to in paragraph 6 of the Secretary of State's decision (B14). Mr Whale submitted that there was nothing to preclude Mrs Dear from making further representations at that time as to the Flashley Carr Lane Decision which, he said, her representatives plainly knew about. He also relies on these matters as relevant to the exercise of my discretion as to whether to quash the decision on temporary planning permission if I were to find any of the Grounds to be made out.

25. Mr Whale referred me to the decision of Ouseley J in *Humphris v Secretary of State for Communities and Local Government* [2012] EWHC 1237 (Admin) ("*Humphris*"). In that case Ouseley J was considering a S288 TCPA 1990 appeal against a decision of a Planning Inspector dismissing an appeal against refusal of planning permission for the erection of a house on the land in question. There was a mobile home on the land in question and an enforcement notice was issued for the discontinuance of the use of the mobile home for residential purposes. The two appeals, one against the Enforcement Notice and the second against the refusal of planning permission came before 2 different Planning Inspectors. The Enforcement Notice Appeal was heard on 14 December by an Inspector, Mr Woolnough. He issued his decision letter on 24 January 2011 accepting that a mobile home or caravan was present on the site for the whole of the relevant period but rejecting the alleged residential use of the mobile home for the whole of that period, concluding that initially at least it was used only as an occasional overnight shelter by riding centre staff.

26. On 11 January 2011 a different Inspector, Mr Hogger, held a hearing into the Claimant's appeal against the refusal of planning permission for the erection of a house. This was after the inquiry into the enforcement notice but before that decision was issued. Mr Hogger's decision was issued on 5 February 2011, some 10 days after Mr Woolnough's decision. Mr Hogger was well aware of the planning inquiry into the enforcement notice and advised the parties that he would not publish his decision until he had had time to consider the deliberations of the other inspector. Further Mr Hogger agreed with the parties that if the enforcement notice was upheld he would determine the appeal based on the evidence before him. However if the appeal was successful (involving a finding of the caravan being immune from enforcement control and therefore potentially relevant to the S78 appeal since the issue of potential detriment to the openness of the land would arise), then he would seek the written views of the parties. Both parties were satisfied with that approach. No party sought to make representations to Mr Hogger on Mr Woolnough's decision letter in the 10 days between the issuing of the two decision letters.

27. Before Ouseley J a new point was argued, a point not put to or raised in any way with Mr Hogger. This was that Mr Hogger ought not to have treated the site as a site that would be clear of a mobile home but rather as a site on which a caravan could be stationed (even if not used for residential purposes) and that this was, therefore, relevant to the decision about the openness of the land as there would be a caravan there. At paragraphs 22 and 23 of his judgment Ouseley J said this:

> "Mr Lopez, therefore, as he recognised, in is the unattractive, but, he says, nonetheless tenable, position of raising a point which was not raised before the inspector for his decision. He says he is entitled to do that because the meaning of the enforcement notice is a matter for the proper interpretation of the notice and its consequences are clear in the light of the enforcement notice decision letter and the inspector has simply got it wrong – a point which he is entitled to take.
>
> I reject that approach. Whatever may be the limited circumstances in which it can be contended that the inspector has reached a decision that is erroneous in law and beyond his powers by reference to a point not raised in front of him, this is

> not one of them. This is not a point that has not been available to be taken; it is not a point that can be described as an error of fact which has become an error of law not known to the parties at the time. It is not a point where it can be said it has arisen without the parties being given an opportunity to deal with it; it is clear that the inspector at the section 78 hearing was alive to the problems which the enforcement notice decision might create and sought to provide the means whereby it could be dealt with. This is not a pure point of law either. The existence of the fallback position may require the examination of fact, and conclusions as to fact and degree. The significance of the fallback position most certainly is capable of giving rise to a judgment of fact and degree. Those matters, available to be raised before the inspector, should have been raised before the inspector. If not raised, in my judgment, it cannot be said he has omitted to consider a material consideration; nor in my judgment, can it be said that his reasoning is inadequate by reference to an issue not raised before him…"

28. Mr Whale submitted that the above paragraphs from the judgment of Ouseley J apply here. He submitted that having had the opportunity to make further representations, and having done so in relation to different matters, it is not open to the Claimant now to criticise the Secretary of State for not referring to the Flashley Carr Lane Decision. He pointed out that Ouseley J is an experienced planning Judge having previously been an experienced planning silk. That is undoubtedly right. However, *Humphris* was not a case concerned with the issue of consistency with previous decisions. The issue raised in front of Ouseley J in that case arose out of the alleged interpretation of the decision on the Enforcement Notice appeal, a decision which was inevitably fully within the knowledge of the Claimant since he was a party to both appeals. Further the earlier decision was expressly awaited and considered by the second inspector and the parties, including the Claimant, had agreed his proposals as to how to deal with the earlier decision once it was published. In my judgement that is very different from the situation here.

29. In response to Mr Whale's submissions on this point, Mr Willers pointed out that although it is clear from her submissions to the Inspector that Mrs Heine was aware of the fact of the Flashley Carr Lane Inquiry, it does not follow that she was aware of the Flashley Carr Lane Decision or the detail thereof. She was not representing any party in the Flashley Carr Lane Inquiry and is not on the list of those parties, witnesses or interested persons in that Inquiry (B151). He submitted I cannot properly conclude that she knew of the decision.

30. Mr Willers pointed out that in this case the Secretary of State was alerted to the fact that the forthcoming decision in the Flashley Carr Lane Inquiry would be important, at least in relation to the issue of need. Mrs Heine had referred to it in her Statement of Case on behalf of Mrs Dear (B57, paragraph 2.12) in relation to unmet need. This was disputed by Doncaster Council in its reply at B42 (the reply refers to paragraph 2.10 of Mrs Heine's submission but it was agreed in front of me that this was an error and was plainly a response to paragraph 2.12). The Council stated as follows:

> "Finally it is not the case that the Flashley Carr Inquiry discussed figures of 164 pitches over 5 years. The appellants made various claims, however the decision on the case is awaited and many of these suggestions were based on various assumptions and no detailed planning histories and information on site." (B42)

31. Mr Willers recognised that the parties were addressing the issue of unmet need rather than the likelihood of further traveller site provision in the future. However, he submitted that both the Inspector, Mr Hellier, and the Secretary of State were alerted to the forthcoming decision in the Flashley Carr Lane Inquiry and that it would be important. He submitted that the Secretary of State should be cognisant of decisions in his name, whether or not flagged up in the materials before him. In any event, he submitted that the awaited decision was flagged up in this case and the Secretary of State should have considered the decision and issues of consistency.

32. I tend towards the view that Mr Willers' broader proposition that the Secretary of State should be cognisant of decisions in his name, whether or not flagged up in the materials before him, is correct. It seems to me that the Secretary of State cannot avoid the issue of consistency by suggesting that it was for Mrs Dear to inform him of decisions made on his behalf after the close of her appeal. However I do not need to go that far in this case since the awaited decision in this case was clearly flagged in the materials, albeit on a different point. In my judgment the Secretary of State should have had regard to the Flashley Carr Lane Decision. Had he done so he would then have had to address the issue of consistency head on, either by accepting and following the findings in the Flashley Carr Lane Decision as to future traveller sites coming forward, or to have expressly departed from that decision giving clear and proper reasons for doing so. He has done neither. I note in passing that had the Secretary of State's decision been the first in time, the same issue would have arisen for the Inspector in the Flashley Carr Lane Inquiry. It follows that I find for the Claimant on Grounds 1 and 2.

33. Mr Whale submitted that even if Grounds 1 and 2 are made out, it is clear that temporary planning permission would have been refused in any event. He submitted that the Claimant's complaint about the Flashley Carr Lane Decision is academic. He relied upon paragraph 60 of the Inspector's report where he concludes that the harm to the Green Belt from a temporary permission would still be substantial (B32). He also relied upon paragraph 18 of the Secretary of State's decision letter:

> "He further concludes, in agreement with the Inspector, that even were more sites to be made available over the period of the two year consent, the harm to the Green Belt would still be substantial. Against this he weighs the accommodation needs and personal circumstances of the appellants, and gives significant weight to the lack of a five year supply of deliverable sites. However he agrees with the Inspector (IR61) for the reasons given in IR59 and 60, that the harm from a temporary planning permission would not be clearly outweighed by other considerations" (B16)

34. Mr Whale submitted that in the light of those paragraphs I cannot properly conclude that it is clear that there is a real possibility that a consideration of the Flashley Carr Lane Decision, and in particular the issue as to the future availability of traveller sites, would have made a real difference to the decision in this case, given the findings as to the substantial harm to the Green Belt even on a temporary 2 year consent. He submitted that if I am uncertain as to that, I must come down in favour of the decision maker, in this case the Secretary of State. Here, he submitted, the Secretary of State has clearly considered the harm to the Green Belt on the one hand and on the other side of the scales has considered all the other considerations which might weigh in favour of a temporary planning permission and has still reached the conclusion that the considerations in favour of the grant of a temporary permission do not clearly outweigh the harm to the Green Belt. That he submitted would still be the case even if the factual issues in the Flashley Carr Lane Decision as to the future availability of traveller sites are factored into this decision. The Secretary of State expressly stated that even if more sites were available, the harm to the Green Belt would be substantial and that the harm from a temporary planning permission would not be clearly outweighed by other considerations.

35. I note that those remarks are made in the context of consideration of a possible 2 year temporary permission, that is until June 2016. The Flashley Carr Lane Decision considered that sites would not be available for 4 years, that is not until April 2018. Whilst not expressly considering the longer period, it seems to me that if the harm from a temporary 2 year planning permission would not be outweighed by the other relevant considerations, I cannot properly conclude that it is clear that there is a real possibility that a consideration of the Flashley Carr Lane Decision, and in particular the possibility of sites being available in April 2018, a period almost 2 years longer than that considered by the Inspector and the Secretary of State in this case, would have made a difference to the decision in this case.

36. In those circumstances I accept Mr Whale's submissions that the issues as to consistency with the Flashley Carr Lane Decision and/or the failure to give reasons for departing from that decision are academic in the circumstances of this case. It follows that whilst I have found Grounds 1 and 2 are made out, an order quashing the decision on the temporary planning permission will not follow on those Grounds since it would be academic on the facts and circumstances in this case.

37. Before leaving Grounds 1 and 2, I should deal with Mr Willers' submission that the Secretary of State has got the test wrong when he uses the word "greatly" in the phrase that he "…concludes that planning circumstances in the area are unlikely to change greatly in the near future." (B16, paragraph 18). The formulation in the guidance is "…it is expected that the planning circumstances will change in a particular way…." (AB Tab 14, paragraph 8). I accept Mr Whale's submission that there is nothing in this point. He reminds me of the approach of Hoffmann LJ in *South Somerset District Council v Secretary of State for the Environment* [1993] 1 PLR 80 (AB Tab 1), at page 83 "The inspector is not writing an examination paper on current and draft development plans". The Secretary of State was plainly aware of the Guidance having drawn it to the attention of the parties and sought their representations. I agree with Mr Whale that the language used in the decision letter should be read in a straight forward manner and that at best, this is a forensic point with no prejudice to the Claimant.

38. Finally on Grounds 1 and 2, I should deal with Mr Whale's submission that even if I identified an error of law I should exercise my discretion not to quash the decision. Strictly speaking this argument no longer arises given my decision that it would be academic to quash the decision in any event. However I consider it appropriate to deal with it. Mr Whale submitted that I should exercise my discretion not to quash the decision based on Mrs Dear's failure to raise the issues arising from the Flashley Carr Lane Decision in further representations to the Secretary of State in the period between the publication of the Flashley Carr Lane Decision and the decision of the Secretary of State in this case. I do not in fact have any evidence that Mrs Dear or her representatives had knowledge of that decision either in general terms or in any detail. Mrs Heine is plainly a professional involved in planning matters concerning travellers and it seems likely that she would have been aware, at least in general terms, of the Flashley Carr Lane Decision. However I have no evidence of that and there is certainly nothing to support Mr Whale's submission that Mrs Heine knew of the Flashley Carr Lane Decision, and none that she knew the specific detail of it. In those circumstances I reject Mr Whale's submission that those matters are relevant to and would have militated against the making of an Order quashing the temporary planning permission.

Grounds 4 and 5

39. It is convenient to take these two Grounds together since they both relate to the issue of whether the Secretary of State has failed to give due weight to the interests of the children living on the land and/or whether he has given adequate reasons for giving those interest "modest weight".

40. If made out, these Grounds would be relevant not only to the grant or refusal of a temporary planning permission but also to a permanent planning permission, a point which Mr Whale submitted may be telling. The inference was that Mr Willers well knew these Grounds were weak. Mr Willers accepted that he has run the arguments on these Grounds in a couple of cases without success, albeit he suggests the facts in this case are different. He also told me that it is accepted that even if he were successful on these Grounds, the decision on a permanent permission was likely to be the same.

41. Mr Willers submitted that the Secretary of State had erred in law in that he had treated the harm to the Green Belt as inherently more weighty than the best interests of the children living on the land. The Claimant lives with her children in the caravans stationed on the land. Two of the children are of school age. One attends the local primary school. The other receives home tuition. It was accepted by the Inspector and by the Secretary of State that if no planning permission was granted the family was likely to end up moving around, effectively living on the roadside, with inevitable disruption to the family and to the education of the younger child.

42. Mr Willers referred me to the speeches of Baroness Hale and Lord Kerr in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166 ("*ZH (Tanzania*)"), (AB Tab 9), a case well known to all involved in administrative law. There is no dispute between Counsel that the principles set out in *ZH (Tanzania)* apply to the decision making process in planning appeals relating to gypsy and traveller sites. It follows, applying *ZH (Tanzania)*, that the best interests of the

children in this case must be **a** primary consideration. That is not the same as being **the** primary consideration or **the** paramount consideration.

43. Given that this case involves Green Belt land and that Paragraph 88 of the Framework (set out in paragraph 7 above) requires that substantial weight is given to any harm to the Green Belt, Mr Willers submitted that in order to give proper weight to the best interests of the children and to make those interests a paramount consideration, those interests must be assigned substantial weight at the outset. In other words if they are not given the same weight as the Framework guidance gives to the harm to the Green Belt at the outset, they are not being treated as a primary consideration.

44. Mr Whale accepted that inherently the best interests of the children must carry no less weight than other factors and that because this is a Green Belt case, the best interests of the children must start as "substantial". He submitted that if they started as significant that would also be sufficient based on the decision of Lewis J in C*onnor and Others v Secretary of State for Communities and Local Government* [2014] EWHC 2358 (Admin).

45. The thrust of Mr Willers' submission is that the balance at the outset must be that harm to the Green Belt on the one hand and the children's best interest on the other must both be given substantial weight. Thereafter, in assessing other relevant factors and how these two interests will ultimately be weighed against each other, he submitted one or other of the harm to the Green Belt or the best interests of the children could be adjusted upwards in weight as part of the judgment of balancing of the competing interests, but that neither could be reduced downwards. In other words "substantial" is the bottom line and anything less than that is wrong. In this case, in his decision letter the Secretary of State concluded "…that the best interests of the children are a primary consideration…" (B15, paragraph 13). He plainly addressed the correct test. In reaching his final conclusions, the Secretary of State adopted the reasoning of his Inspector and gave "modest weight" to the family's personal circumstances (B16, paragraph 17).

46. Mr Whale submitted that Mr Willers' argument is contrary to authority and is a matter of form rather than substance. He referred me to the judgment of Hickinbottom J in *Stevens v Secretary of State for Communities and Local Government* [2013] EWHC 792 (Admin) ("*Stevens*"), (AB Tab 10), a case dealing, amongst others, with exactly this issue. He referred me in particular to paragraph 63 of Hickinbottom J's judgment where he said this:

> "The "weight" of a consideration is merely a reference to the importance attached to it…… In other words, before any consideration of the individual circumstances of the child or any other material considerations, the best interest of any child can be said to have "a substantial weight" in the sense of an importance that no other consideration exceeds; but that evaluation may alter once the individual circumstances of those interests and other factors are considered and assessed. Therefore, whilst it might be said at a policy level that a particular factor should be given a particular "weight" (e.g. "moderate" or "substantial"), where it is the very function of a decision-maker to attach weight to considerations which are

> material to the decision he is required to make, as he proceeds with his examination of the circumstances of the individual case, he must adjust the *relative* weighting to that which, in his judgment, the circumstances of the case require. On examination of all the material factors, the importance of one consideration may reduce (or, of course, increase), compared with others. There is no reason why any change cannot properly be reflected in the designation given to the weight of those factors: it is not sensible to require a decision-maker to stick formulaically with the designation he is required to start with The matter is one of substance not form. That applies equally to weight or importance that policy documents such as PPG2 require to be afforded to particular planning public policy factors, and to the weight or importance that article 3 of the UNCRC requires as a matter of policy to be given to the best interest of a child."

47. In his skeleton argument Mr Willers challenges the approach of Hickinbottom J. He accepts that after the consideration of the individual circumstances, other factors may earn and even exceed the substantial weight to be accorded to the best interests of the child, but he submits that the decision maker cannot achieve that balancing act by reducing the weight to be given to the bests interests of the child. I cannot accept that submission. Whilst not binding on me the decision of Hickinbottom J is plainly persuasive. In any event I share Hickinbottom J's view that this is a matter of form rather than substance. Mr Willers accepts, as he must, that ordinarily, the weight to be attached to a particular consideration in a planning appeal will be for the decision maker. In my judgement, provided the decision-maker ascribes the correct weight at the outset, in carrying out any adjustment to the weighting when considering the individual circumstances of the case, it matters not whether he reduces the weight on one side of the balance, or increases the weight on the other. The effect will be the same.

48. Further, in any event the Court of Appeal in *Collins v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1193 (AB Tab 15) approved Hickinbottom J's list of principles in Paragraph 69 of his Judgment as an accurate and helpful summary. That list includes the proposition that "Whether the decision-maker has properly performed this exercise is a question of substance, not form". It follows that I reject Ground 4.

49. I turn then to Ground 5 and whether the Secretary of State failed to explain why he concluded that the best interests of the Claimant's children should only be attributed modest weight. The thrust of Mr Willers' submissions was that the attribution of "modest weight" was plainly the starting point and does not reflect the position after an adjustment from the substantial weight to be afforded to the best interests of the child. Alternatively, he submitted there are no adequate reasons to explain why the downward adjustment has taken place. He submitted that the decision does not expressly state that the best interests of the child were given substantial weight at the outset, and gives no explanation as to how the adjustment was made to "modest".

50. I am satisfied that "modest weight" was not the starting point, but rather the conclusion as to the weight to be given after carrying out the balancing exercise. That

is clear from the context of the Inspector's report (B31) and the context of the Secretary of State's decision (B15-16, paragraphs 15 -17). Whilst I accept the Secretary of State does not expressly state that the starting point was to give the best interests of the children "substantial weight", he plainly treated them as a primary consideration. That is the correct test. The decision-maker does not have to go into fine detail as to exactly how the various factors have been balanced. It is matter of judgment and properly one for the decision-maker to make. Plainly he cannot simply ascribe weights to various aspects without any explanation as this would or might be wholly arbitrary. But that is not the position here. The decision maker has set out the relevant matters, making it clear he has taken them into account, and has then ascribed, as he is entitled to, the appropriate weight as a matter of judgment. In my judgement Ground 5 is not made out.

51. It follows that the Claimant's case fails on all Grounds and is dismissed.