TOWN AND COUNTRY PLANNING ACT 1990

APPEAL BY MR H SINGH AGAINST A REFUSAL OF PLANNING PERMISSION BY SOUTHAMPTON CITY COUNCIL FOR THE CONVERSION OF AN EXISTING BUILDING INTO 5 FLATS (2 X 3-BED, 2 X 2-BED AND 1 X 1-BED) WITH ASSOCIATED PARKING AND CYCLE/REFUSE STORAGE

SITE AT 13 GROSVENOR ROAD, SOUTHAMPTON, SO17 1RU

LPA REF: 14/00999/FUL
PINS REF: APP/D1780/W/15/3008850

REPRESENTATIONS ON BEHALF OF
THE HIGHFIELD RESIDENTS' ASSOCIATION

INTRODUCTION

1. These submissions are prepared on behalf of the Highfield Residents' Association ('**HRA**') by Michael Rudd of Counsel and presents the HRA opposition to the appeal made by Mr Neil March of Southern Planning Practice on behalf of Mr H Singh ('**the Appellant**') against the refusal by Southampton City Council ('**the Council**') to grant planning permission for

the conversion of an existing building into "…*5 flats (2 x 3-bed, 2 x 2-bed and 1 x 1-bed) with associated parking and cycle/refuse storage*…" ('**the Appeal Development**') at 13 Grosvenor Road, Southampton, SO17 1RU ('**the Appeal Site**').

2. HRA is an active group of local residents and their families who seek to protect and preserve their environment, that being the area of Highfield in Southampton. HRA have a formal membership and is run by a Committee. The appeal site lies within Highfield, Grosvenor Road being to the western extent of the area.

3. These submissions should be read together with the substantial volume of written objections to the Appeal Development made by both HRA and local residents at both application stage and now in response to the appeal. In particular, HRA is aware that letters have been provided to the Planning Inspectorate by the residents of 7 Grosvenor Road, 9 Grosvenor Road and 27 Grosvenor Road and these should be taken as specific evidence to substantiate the concerns of HRA set out in these written representations.

4. Permission was refused for the Appeal Development by way of a notice dated 30th October 2014. Permission was refused on two grounds;

   (i) Harm to amenity of neighbours and character of the area – intensification of the use of the Appeal Site would result in harm to the amenity of neighbours through noise and general disturbance and would be likely to exacerbate on street parking difficulties. This would in turn have an adverse impact on the character of the immediate street scene. It was also noted as part of this reason for refusal that the proposed amenity space was inconveniently accessed and remote and thus contrary to extant Development Plan policies;

   (ii) In the absence of a lack of a satisfactory legal agreement preventing occupants of the flats from applying for parking permits the scheme fails to mitigate against the consequential unacceptable risk of serious inconvenience and danger arising from increased parking demand in Grosvenor Road.

5. HRA oppose the Appeal Development on the following grounds;

(i) The impact on the character and appearance of the area;

(ii) The adverse impact on residential amenity

(iii) The provision of inadequate living conditions for future occupiers of the Appeal Development;

(iv) Unacceptable adverse highways impact.

6. There is significant history behind the appellant's attempt to use the Appeal Site for residential occupation. In November 2011 the council enforced against the use of the Appeal Site as a HMO, the building occupying the Appeal Site being used to house 15 people. The appeal against that enforcement notice was dismissed but the appellant continued to use the building on the Appeal Site for purposes other than as a single family home, contrary to the requirements of the 2011 enforcement notice. A previous application for planning permission for a change of use identical to the Appeal Development was refused and dismissed on appeal in August 2013. The relatively recent planning history of the Appeal Site shows the determination of the appellant to use the building on the Appeal Site for multiple residential occupancy; either by way of a HMO or a *de facto* HMO in the form of multiple flats.

PREVIOUS APPEAL DECISIONS

7. As referenced above, there have been two recent appeal decisions addressing residential development at the Appeal Site; Appeal Reference APP/D1780/C/11/2167641 dated 11th July 2012 (**Appendix A**) and Appeal Reference APP/D1780/A/13/2190531 dated 15th August 2013 (**Appendix B**).

8. The July 2012 appeal decision ('**the 2012 Appeal Decision**') relates to an enforcement appeal lodged by the same appellant against an enforcement notice alleging a material change of use from a single dwelling house to two separate dwelling houses each occupied as a house in multiple occupation by 7 persons and 8 persons respectively.

9. This appeal was dismissed, the Inspector finding adverse impact on residential amenity and unsatisfactory amenity space **[DL11]**, as well as an adverse impact on the character of the area **[DL21]**.

10. The August 2013 appeal decision ('**the 2013 Appeal Decision**') relates to a refusal of planning permission by the Council for ostensibly the same proposed development as the current appeal. The Inspector in the 2013 Appeal Decision identified four main issues and addressed them as follows;

    i. ***Noise and disturbance*** – concluding that the development is not a noise-generating development within the terms of the saved policy **[DL3-9]**;
    ii. ***Parking effects*** – concluding that in the absence of a parking survey **and** given the contrary evidence available the greatly increased parking permit provision which would arise from permission for the proposed conversion would give rise to an unacceptable risk of serious inconvenience and danger arising from increased parking demand in Grosvenor Road **[DL17]**;
    iii. ***Living conditions of future occupiers*** – concluding that the living conditions of future occupiers would not be seriously harmed by the appeal proposals **[DL21]**;
    iv. ***The character of Grosvenor Road*** – concluding that the character of the area would not be substantially affected as a whole **[DL25]**.

11. The Inspector found against the proposed development only on the issue of the potential impact of increased levels of parking causing inconvenience and danger to drivers and pedestrians in Grosvenor Road. Perhaps unsurprisingly, the appellant resubmitted the

planning application with a "parking survey", which was said to address the adverse findings of the Inspector.

THE APPELLANT'S CASE

12. The Appellant's case as set out at Section 9 of the Written Representations dated March 2015 is entirely lacking in substance. It focuses on two main issues; Impact of proposal on neighbours amenities and character of the area and secondly, parking.

13. The case presented on character impact relies upon the conclusions in the 2013 Appeal Decision, arguing that as there have been no changes to the proposal and no material changes to national or local plan policies "…*the same conclusions must be reached*…". No reference is made to the 2012 Appeal Decision. As set out below, the approach of the appellant ignores the material deficiencies in the 2013 Appeal Decision. That decision is not binding on any future decision maker, it is merely a material consideration. To suggest that any future decision maker must reach the same conclusions is to mislead decision maker and invite the decision maker to err. The Inspector in this appeal must consider all of the evidence presented, including material submissions on the law and come to his or her own conclusion. For the reasons set out below it is clear that the Inspector in the 2013 Appeal Decision was not available of submissions regarding the United Nations Convention on the Rights of the Child ('**UNCRC**') or the Children Act 2004. The fact that the 2013 Appeal Decision was not appealed does not automatically mean that blind adherence to the conclusions reached therein would be lawful.

14. As a consequence the appellant has failed to present any substantive evidence in respect of the impact of the Appeal Development on the character and appearance of the locale, on residential amenity and on the acceptability of the living conditions of future occupiers.

15. The case presented on the issue of parking asserts that the parking survey carried out on behalf of the appellant demonstrates that there is additional capacity in the surrounding roads to cater for the number of cars that could be associated with the development. The appellant's case focuses on the erroneous approach of the Council in requiring a s.106 Agreement preventing future residents of the Appeal Development from applying for parking permits. The appellant's case fails to address the finding of the 2013 Appeal Decision that the Appeal Development would give rise to an unacceptable risk of serious inconvenience and danger arising from increased parking demand in Grosvenor Road. To merely assert that the demand can be met, not an assertion that is accepted by HRA does not in itself address the concern that the increased demand, which is inherently accepted by the appellant will give rise to an unacceptable risk of serious inconvenience and danger. The Inspector in the 2013 Appeal Decision is clear as to the unacceptable risk and the parking survey is remarkable in the paucity of evidence addressing this clear concern.

THE CASE ON BEHALF OF HRA

16. It should be noted that the 2013 Appeal Decision is not binding on future decision makers in the same sense as a Court of Appeal judgement. In a planning context it is merely another material consideration which should be taken into account. If the Inspector does not agree with the previous Inspector he or she is perfectly entitled to arrive at a different conclusion, which obviously must be adequately and intelligibly reasoned. Equally, if the same conclusions as the 2013 Appeal Decision are reached they must be adequately and lawfully reasoned. (See ***South Buckinghamshire CC v Porter (No.2)*** [2004] 1 WLR 1953 at paragraph 36 – **Appendix 3**)

17. In respect of the submissions made by HRA of particular relevance in policy terms is Policy CS13 *Fundamentals of Design* of the Local Development Framework Core Strategy Development Plan Document (January 2010) which seeks to achieve a high quality built

environment. Of particular note is the following extract of the "*Policy Background/Justification*";

Policy Background / Justification:

5.1.1 Achieving a high quality built environment will, in part, be based upon a robust design process and on a clear understanding of the context of development and the contribution of better design. The implementation of the spatial strategy will therefore have regard to the following specific factors: -

……

· The challenge of delivering higher density development in appropriate locations that includes a mix of building styles, types and uses **and sufficient amenity space where appropriate**; [emphasis added]

· The need to deliver development and public spaces that are suitable, inclusive and accessible and reflect the needs of an ageing population in the city.

5.1.2 In putting forward development proposals applicants must explain, through the accompanying Design & Access statement, how they satisfy the above principles and also how they have taken a design-led approach in accordance with the principles set out in the Council's relevant design guidance, including the City Centre Urban Design Strategy, the City Centre Development Design Guide, the Old Town Development Strategy, the City Centre Streetscape Manual, the North South Spine Strategy (QE2 Mile) and the Residential Design Guide. Applications should address the local physical, social, economic, environmental and policy context for development. Development should seek to reduce crime through design, management and security measures as appropriate. All access routes and

paths should be safe and well designed, in accordance with the Secured by Design principles. As Southampton has an ageing population access to buildings and services and providing safe, attractive public areas are a key issue for planning now and in the future. Design measures to address flood risk may also be required. **Applicants should be able to demonstrate how they have taken account of the need for good layout and design, with particular regard to placing 'people first' and developing on a human scale**. [emphasis added]

18. Also of particular relevance is the Southampton City Council Residential Design Guide SPG (September 2006) which states at Chapter 4 –

4.4 Private Amenity Space

4.4.1 All developments should provide an appropriate amount of private amenity space for each dwelling to use (see Part 2 for further guidance).

4.4.2 This space can be created in a variety of ways from front gardens and back gardens to roof gardens, balconies and communal courtyards.

4.4.3 Private amenity space should be fit for the purpose intended.

4.4.4 The provision of amenity space will be assessed for its quality and usability. All dwellings should have access to a private space that is not overlooked. For example, family homes should have some private space in rear gardens and a block of apartments should have private balconies and access to some private communal space. Rear gardens should have useable space with some privacy and therefore should not be steeply sloping, awkwardly shaped or very narrow. A balcony for an apartment should

accommodate a table and chairs to allow residents to sit out comfortably. Proposals should include suitable locations for sitting outside in sun and in shade, planting beds, hanging out washing and barbecues.

19. The NPPF at paragraph 17, Core Principles sets out that planning should;

> ● always seek to secure high quality design and a good standard of amenity for all existing and future occupants of land and buildings;

20. In the context of the above policies and SPG and those other policies relied upon by the Council in refusing the application HRA make the following submissions in respect of the four principle areas of concern, as set out above at paragraph 5;

(i) <u>The impact on the character and appearance of the area;</u>

21. The previous use of the building on the Appeal Site was as a single residential dwelling. There have been persistent attempts by the appellant to secure either a HMO use or a use effectively akin to a HMO use. The Appeal Development in effect seeks a permitted use which would be a de facto HMO.

22. The potential number of occupiers, which could be up to a maximum of 22, a likely minimum of 11 but more realistically of the order of 15 or so (see below for further analysis) will without doubt result in an over intensification of the use of the Appeal Site resulting in an adverse impact upon the character and appearance of the locale.

23. The appellant does not address this point, relying entirely upon the 2013 Appeal Decision. The appellant fails to address the 2012 Appeal Decision and does not address the perhaps

unlawful and somewhat contrived speculation by the 2013 Inspector as to who is likely to occupy the Appeal Development. **[DL5]**

24. What is known is the number of rooms, the number of proposed bedrooms and the potential maximum occupancy rate of 22. Unless conditioned, the planning permission sought could result in such an occupancy and it is this scenario which must be adopted when assessing the potential impact. Lesser scenarios are no more likely, on the basis of the evidence provided than the potential maximum scenario. On the basis of the evidence provided a maximum occupancy rate of 22 would be provided for and it is this which must provide for the basis of the assessment of impact on character and appearance.

25. In circumstances where it has been previously found that occupation by 15 people would result in an adverse impact on character and appearance the potential occupancy of the Appeal Development would have a similar if not greater impact on character and appearance and would thus be contrary to the Development Plan.

(ii) The adverse impact on residential amenity

26. It is clear that given the close proximity of the Appeal Development to other residential properties there is a significant potential for an adverse impact on residential amenity arising out of increased levels of noise and disturbance and potentially loss of privacy.

27. With respect, the approach of the Inspector in the 2013 Appeal Decision is somewhat questionable. The impact of the Appeal Development on residential amenity is likely to be a product of the number of people occupying the Appeal Development. There would be five residential units, 2 No. three bedroom flats, 2 No. two bedroom flats and 1 No. one bedroom flat. That might allow for 11 bedrooms all occupied individually resulting in 11 adults or perhaps families would occupy the multiroom flats resulting in 10 adults and perhaps 6 children living in the Appeal Development. Alternatively, were the property not to appeal to

families and perhaps appeal to students there could be a total of 22 adults living at the Appeal Development. This must all be viewed in the context that the lawful use of the building on the Appeal Site is as a single family dwelling with an injunction and enforcement notice preventing the previous unlawful use as a HMO.

28. The 2012 Appeal Decision dismissing the appeal against the enforcement notice found that occupation of the Appeal Site by 15 people would result in an adverse impact on residential amenity. However one speculates as to the likely occupancy of the Appeal Development it is easily capable of accommodating 15 adults, which is somewhat short of the potential speculated maximum of 22.

29. In the 2013 Appeal Decision HRA respectfully submit that the Inspector unlawfully speculates as to the likely occupancy of the Appeal Development. An Inspector can only determine an appeal on the basis of the facts and arguments before him or her in the context of the prevailing law. In the 2013 Appeal Decision the Inspector speculated as to the nature of the future use of the Appeal Development particularly with regards to the over-intensification of the use, as has been found to be an issue by Inspectors in previous appeals relating to the Land.

30. At [**DL5]** the Inspector concludes that the use of the building by 15 or more people is unlikely but the Inspector does not appear to have evidence to support such a finding. The simple fact is that the configuration of the proposed development will easily allow for 15 or more people to occupy the Appeal Development and given that the Inspector accepts the unacceptable noise and disturbance that was caused when the building was previously occupied in such a manner the Inspector must provide adequate reasons (***South Buckinghamshire CC v Porter (No.2)*****[2004] 1 WLR 1953**) as to why that would not be the case now. These reasons cannot be based on mere speculation in the face of the clear and undisputed ability of the Appeal Development to house 15 or more people.

31. Similarly, the findings at **[DL6-7]** are somewhat baffling. The Inspector in the 2013 Appeal Decision, and indeed in this appeal was and is not availed of any evidence as to who would or might occupy the Appeal Development. Further, it would appear that there is a valid argument that the 3 bed flats are unsuited to family occupation by virtue of either a lack of amenity space or an unsuitable layout, to which the Inspector gives no consideration. The conclusions with regards to five households as opposed to one household and the associated disturbance and also the conclusions on the "parental controls" issue would appear to be pure speculation. They are entirely unsustainable.

32. In this appeal, it is submitted that the Appeal Development is easily capable of occupation by 15 individuals or more, a level previously found to be unacceptable in the context of impact on residential amenity. No evidence is presented to rebut the assertion of the potential for occupation by at least 15 or more individuals and in that context the likely adverse impact on the residential amenity of adjacent homes weighs heavily against allowing the appeal.

(iii) The provision of inadequate living conditions for future occupiers of the Appeal Development;

33. The Appeal Development must include an appropriate amount of amenity space which is fit for purpose. The amenity space proposed is neither appropriate not fit for purpose. The amenity space is inadequate, poorly accessed and is not provided in sufficient proximity to the proposed flats to allow for supervised use of the amenity space by children. The Appeal Development does not represent good quality design but rather an ill thought out attempt to maximize the residential use of an existing building. The proposal does not accord with either Policy CS13 nor the SPG relating to amenity space.

34. The Inspector in the 2013 Appeal Decision **[DL21]** finds that the proposed amenity space would be adequate to ensure that the living conditions of future occupiers would not be seriously harmed. The Inspector arrives at this conclusion by determining that children

playing in the shared rear garden would not be put at risk as there would be *sufficient natural surveillance* from adjacent properties and also from the other flats in the Appeal Development. **[DL20]**

35. With respect, this is simply baffling and wholly inadequate conclusion. It is highly unlikely that any responsible parent would entrust the supervision of their children in a communal garden to unknown, or even known neighbours. Natural surveillance from adjacent properties does not meet the requirements of Policy CS13 or the SPG, or indeed the requirements of commonsense. It is abundantly clear that the proposed amenity space is wholly inadequate, not fit for purpose and does not provide for acceptable living conditions for future occupiers of the Appeal Development.

36. Indeed, the suggestion that an inadequate amenity space can be made adequate for the purposes of children's recreation by virtue of natural surveillance from unknown sources is potentially unlawful.

37. The Children Act 2004 at s.11(2) (**Appendix 4**) states, in the context of the duty imposed upon a local authority;

> (2) Each person and body to whom this section applies must make arrangements for ensuring that–
>
> (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and
>
> (b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need.

38. This requirement, often described as the "*best interests of children*" is founded in Article 3 of the UNCRC (**Appendix 5**) which applies to and binds all decision makers, including the Secretary of State;

> **Article 3**
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

39. That such considerations are relevant in a planning context was established in the case of ***AZ v SSCLG and South Gloucestershire District Council*** [2012] EWHC 3660(Admin) (**Appendix 6**) and confirmed by the Court of Appeal in ***Collins v SSCLG & Fylde Borough Council*** [2013] EWCA Civ 1193 (**Appendix 7**).

40. The Supreme Court in ***ZH(Tanzania) v SSHD*** [2011]UKSC 4 (**Appendix 8**) emphasised that the best interests of children are a primary consideration in cases such as this and although they will not always determine the outcome of a case, no other factor should be given more weight. The bests interests of the children must be considered first (Lady Hale para 26).

41. The appellant prays in aid that the Appeal Development is primarily intended for families, at least in part (Written Representations para 4.5) and is not intended for the sort of extensive occupation that led to the refusal of the deemed application in the 2012 Appeal Decision. In such circumstances, given the inadequacy of the amenity space allowing the appeal would not be safeguarding and promoting the welfare and thus best interests of the children who are potentially likely to occupy the Appeal Development, indeed it would be putting those children at risk and requiring them to live in accommodation with inadequate amenity space.

42. Such considerations, which were not taken into account by the Inspector in the 2013 Appeal Decision, must be a primary consideration and to which no other matter can be given greater weight, must weigh heavily against allowing the appeal.

(iv) Unacceptable adverse highways impact.

43. The appellant relies upon a Parking Survey as the only real substantive evidence before the Inspector. This is simply to address the conclusions of the 2013 Appeal Decision that hinged in part on the lack of a parking survey. It should be noted that the conclusions of the Inspector with regards to the impact of parking were not based solely on the lack of a parking survey and it does not therefore follow that the provision of a parking survey, even assuming it is adequate will address the Inspector's concerns.

44. The Inspector's conclusions were as follows;

> *"...the absence of a parking survey and contrary evidence, the greatly increased parking permit provision which would arise from permission for the proposed conversion would give rise to an unacceptable risk of serious inconvenience and danger arising from increased parking demand in Grosvenor Road..."* **[DL17]**

45. The Inspector concludes that the **unacceptable** risk of serious inconvenience and **danger** arising from the increased parking demand was sufficient in its own right to refuse permission. The parking survey relied upon does not demonstrate to the required high degree of certainty that an unacceptable risk resulting in danger is not created. It merely states that the surrounding streets can absorb the expected minimum increase in parked vehicles arising from the Appeal Development. This is not adequate to demonstrate that such risk will not arise. The appellant seeks to persistently downplay the number of people who will or may occupy the Appeal Site and who will or may rely upon the motor car.

46. It is said that parking in the surrounding streets is controlled by permit and the Council's policy of not providing permits to new residential development will have a beneficial effect in terms of increased pressure on parking. However, that is to ignore the fact that the parking permit area only operates between 0800hrs and 1800hrs on weekdays only. The Appeal Development can only provide parking for three vehicles and it is not inconceivable, indeed it is highly likely that the Appeal Development will provide housing for at least 10 adults (see above).

47. The parking survey can only provide a snap-shot of the situation pertaining in Grosvenor Road. HRA believe the parking survey to be inadequate and believe it to downplay materially the potential impact of the Appeal Development.

48. Written representations from local residents, which are potentially more relevant than a mere snap-shot identify an already difficult situation on Grosvenor Road throughout the day, but particularly at school drop-off and pick-up time. Portswood School is located at the northern end of Grosvenor Road and there have been serious traffic incidents in the recent past. The Police are regularly called to deal with traffic problems caused by parking congestion.

49. It is simply not credible nor realistic to conclude that a further 5 properties with the potential for at least 10 adult occupiers, and more likely significantly more will not have an adverse impact on an already over stressed parking and highways environment. The parking survey relied upon by the appellant is clearly inadequate. It does not account for the potential occupancy of the Appeal Development, taking a minimal approach in all circumstances and does not adequately account for the wider demand arising from the nearby University. In any event, in accepting even a minimal increase in parking demand the parking survey fails to address the associated increase in risk in the context of the existing highly congested situation of Grosvenor Road.

50. It is submitted that the Inspector would be justified in dismissing the appeal for this reason alone.

Conclusion

51. The appellant has relied wholly upon a parking survey and the conclusions of the Inspector in the 2013 Appeal Decision. It is submitted that the parking survey is inadequate and in any event does not address the obvious increase in risk posed by an increased traffic and parking loading and further the conclusions of the Inspector in the 2013 Appeal Decision are unsustainable. The Inspector in that appeal has unlawfully speculated as to the likely extent of occupation of the Appeal Development and has failed to take into account the statutory obligation to safeguard and promote the welfare of children when finding that the remote, inaccessible and substandard amenity space was adequate. It is clear that the potential level of occupation of the Appeal Development will have an unacceptable adverse impact on the character and appearance of the locale and will adversely affect residential amenity. The proposed amenity space is out with that required by the Development Plan and will detrimentally impact upon the living conditions of future occupiers of the Appeal Site and the unacceptable risk of causing inconvenience and danger to drivers and pedestrians in Grosvenor Road due to the increased traffic that would be generated by the potential occupancy of the Appeal Site has not been addressed by the entirely inadequate parking survey.

52. For the reasons set out it is respectfully submitted that the appeal should be dismissed.

On behalf of Highfield Residents' Association

Michael Rudd
Kings Chambers
Manchester-Birmingham-Leeds

25th May 2015

APPENDIX 1
2012 APPEAL DECISION

The Planning Inspectorate

Appeal Decision

Site visit made on 28 May 2012

by R J Perrins MA MCMI ND Arbor

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 11 July 2012

Appeal Ref: APP/D1780/C/11/2167641
13 Grosvenor Road, Southampton SO17 1RU.

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr H Singh against an enforcement notice issued by Southampton City Council.
- The Council's reference is EP05/05/0331.
- The notice was issued on 28 November 2011.
- The breach of planning control as alleged in the notice is without planning permission, the change of use of the land from a single dwelling house to two separate dwelling houses each occupied as a house in multiple occupation by 7 persons and 8 persons respectively.
- The requirements of the notice are:
  (i) Cease to use the land as two separate dwelling houses in multiple occupation and
  (ii) Return the use of the land to its authorised planning use as a single dwelling house (C3 Use).
- The period for compliance with the requirements is two months.
- The appeal is proceeding on the grounds set out in section 174(2) (a) (f) and (g) of the Town and Country Planning Act 1990 as amended.

Decision

1. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Application for costs

2. An application for costs was made by the appellant against the Council and by the Council against the appellant. These applications will be the subject of separate Decisions.

Preliminary matters

3. On 27 March 2012, the Government issued the National Planning Policy Framework (the Framework), which sets out planning policies for England and how these are to be applied. At the heart of the Framework is a presumption in favour of sustainable development. As the Framework is a material consideration and was issued after the submission of evidence, both main parties were invited to submit further representations in the light of its publication, to which I have had regard.

4. The internal layout of the premises, as considered below, is reflected in the allegation and forms the basis of the ground (a) appeal which seeks permission

for the matters alleged. I say that given the appellant has referred to the deemed planning application as being that which could be considered alongside drawings which have been submitted with the appeal. Those drawings show a revised internal layout which, amongst other things, would subdivide the ground floor of the original part of the dwellinghouse, close a side access, and introduce a combined access for two reconfigured units to the front of the property. They also show a proposed refuse store. These changes would not be minor and I am unable to consider them as they have not been subject to the usual planning consultation process. The deemed planning application is for the matters alleged in the notice; it cannot be used to gain planning permission for something materially different.

The appeal on ground (a)

5. I consider the main issues in this case to be the impact of the use upon; the living conditions of occupiers of the premises and surrounding dwellings; and upon the character of the area.

Living Conditions

6. Policy H4 of the Southampton Local Plan Review (LP) states that permission will only be given for conversions to Houses in Multiple Occupation (HMOs) where there is no detriment to the residents of nearby properties and the character and amenity of the surrounding area. Policy SDP7 seeks developments which, amongst other things, integrate into the local community. Policy SDP16 states that noise generating development will not be permitted where it would cause an unacceptable level of noise impact.

7. The main entrance facing Grosvenor Road serves the front part of the premises; that which covers three floors and consists of a kitchen/dining room and lounge on the ground floor and eight bedrooms and two bathrooms over the first and second floors. An internal door between the front and rear of the property was locked at the time of my site visit and a key had to be sought to open it. Access to the rear of the property was via a side entrance. Given that lack of readily available access and the configuration of kitchens, lounges, bathrooms and bedrooms, it was evident that the two parts of the property were being used separately and as reflected by the enforcement notice. The rear part, which includes three bedrooms on the ground floor of the original house and a large single storey rear extension, consists of a kitchen, lounge/dining room, seven bedrooms a bathroom and separate toilet.

8. The appellant argues that the primary access point would be moved and the side access point would be blocked up and any 'unsocial hours' use would be to the front only. However, as explained in my preliminary matters I am unable to consider such alterations. The current side access, effectively serving a seven-bedroomed HMO, has introduced an unacceptable level of use to that side of the property. The comings and goings would exceed that which should be reasonably expected for a side, or secondary entrance. Moreover, given the lack of access to the rear garden for occupiers of the front of the property that use would be further exacerbated by those wishing to gain access to the rear garden. That would be unlike the use as a single family dwellinghouse where the main access would have been to the front. The noise and disturbance from increased comings and goings and late night activity would result in

unacceptable harm to the living conditions of occupiers of the adjacent property No 11.

9. Furthermore, the general noise levels associated with normal living activities, from fifteen occupiers, would be beyond that experienced from a single family unit or the previous use as a care home where it would be reasonable to expect life to be more sedentary. In addition, there would be additional noise generated by the comings and goings of visitors to those occupying the premises. That is borne out by third party representations which point to students returning to the premises late at night and causing disturbance. Whilst there is nothing to prevent such late night activity occurring in any residential setting, the opportunity for that to happen is increased where 15 individuals live together as opposed to a single family. It also goes beyond the disturbance that would reasonably be expected, for deliveries, visitors and staff attending a care home.

10. In coming to that view I have also considered the appellant's representations that more than one family lived at the property for a number of years. However, evidence in support of that has not been tested and I must temper the weight I give to it. In any event, the same argument applies; 15 individuals are more likely to create more disturbance than two or more family units living together.

11. For these reasons I find the current use of the property has resulted in an over intensive use of the site and has led to unacceptable harm to the living conditions of occupiers of nearby properties. That is at conflict with the aforementioned planning policies. In addition the current configuration of the property does not allow ready access to the rear garden by occupiers of the front of the property. Whilst that has not resulted in unacceptable harm to those individuals it is nevertheless contrary to Policy H4 which seeks amenity space with safe and convenient access for all. It is therefore a factor weighing against the development and adds weight to my conclusions on this issue.

Character of the area

12. The appeal property is a substantial detached property arranged over three floors and situated in a predominantly residential road made up of dwelling houses and flats. The property is served by a generous rear garden. To the front there is space to park three or four cars. Nearby are the Portswood District Shopping Centre and Southampton University Campus. The property has the appearance of a single dwelling when viewed from the street; it does not appear out of context and does not have a negative impact upon the street scene.

13. Policy CS16 of the Southampton Core Strategy (CS) sets out that the Council will seek to provide a mix of housing types along with more sustainable and balanced communities. That will be achieved through control of HMOs amongst other things and particularly those properties which provide accommodation for students. Addressing the latter point first; I accept the property would be advertised on the open market but, given its proximity to the university campus, it is reasonable to expect students to be attracted to the premises and the appellant's appeal indicates the property is currently let to students.

14. The appellant avers that there is no demand for this non-typical dwelling of 15-16 bedrooms in Southampton and that it was not a single-family house in any

event. I accept that demand for such a property may be low in comparison to other forms of households, nevertheless there is, as evidenced by the Council, a demand for dwellings of four or more bedrooms. Moreover, the appellant has made no appeal on legal grounds regarding any previous use and I must consider the impact of the current use upon the character of the area and in particular the street in which it is situated. That character is predominantly residential with a high proportion of dwellings remaining in family occupation.

15. Furthermore, since the appeal, the Council has adopted *Houses in Multiple Occupation* Supplementary Planning Document (SPD), which defines a tipping point where the concentration of HMOs starts to adversely impact upon the balance and character of a community. I accept the SPD sets out that each application site will be considered upon its own merits and the appellant points to that part of the SPD which addresses when exceptional circumstances will be a material consideration. However that part of the SPD is specific in that it applies to sites "where the vast majority of existing properties surrounding the application site within the defined area of impact are HMO dwellings"; that is clearly not the case here so is not applicable in this instance regardless of the views of local agents or the fact that the property was on sale for over a year.

16. Moreover, the SPD sets out that planning permission will not be granted in the appeal location where the proportion of HMO dwellings will exceed 10% of the residential properties. The Council aver that in excess of 22% of dwellings would be in HMO use in this case were this appeal to succeed. That figure is borne out by third party representations and my observations during my site visit. I must find therefore that the development would be contrary to the SPD to which I give significant weight.

17. In addition to that the current use would inevitably have an impact upon on-street parking in the locality. At the time of my visit, mid-morning, there were a number of cars parked in the street and spaces for on-street parking were readily available. However, that is likely to be subject to fluctuating periods of demand and I am unable to consider the plans submitted by the appellant showing parking provision. Furthermore whilst the close proximity to the University would reduce the need for car ownership by students living in the premises, as at present, that situation, on the appellant's own submissions, could change were it not to be rented to students. Such a change in the nature of occupancy would lead to pressure for on-street parking beyond what would be expected for a single family household.

18. In the same way I am unable to consider the appellant's plans for refuse storage. From what I could see on site there is currently a lack of adequate refuse storage facilities at the site. It is likely, given the number of people living at the premises that without such a facility the storage of refuse would be haphazard and detrimental to the street scene and character of the area.

19. I have also considered and accept that a HMO Licence has been issued by the Council however, as stated on the notice, it does not imply the property has the necessary planning consent and a licence is not granted on the planning merits of the case. Also, the recent high court judgement (ref:HQ11X02365) found the practical impact that an injunction would have had, upon the students living at the premises, fell decisively against the continuation of the injunction. I have dealt with this matter under the ground (g) appeal and the judgement does not alter my findings upon the planning merits of the case in any event; I have considered this appeal in light of the information that is

before me. Finally, whilst there is some merit in the argument that there is market led demand for the current use in this locality when compared to a 15-bedroom house, I have no detail of how the premises were marketed or what question was asked of the agents that have submitted their views and it does not outweigh the harm I have found.

20. In coming to my conclusions I have taken into account the Framework which sets out that local planning authorities should deliver a wide choice of high quality homes and create sustainable, inclusive and mixed communities; amongst other things they should identify the size, type, tenure and range of housing that is required in particular locations. The appellant suggests the SPD is at conflict with the Framework in that it does not address local market demand. However, the SPD is clear and sets out one of its aims is to redress the 'imbalance' of the city's 'communities' and its evidence base includes the Council's Housing Strategy 2011-2015. It seems to me, and without evidence to the contrary, that approach is not at conflict with the Framework. Moreover, and in any event, the Framework also sets out that that sustainable development would bring positive improvements to the built environment and the quality of peoples' lives; that is not so in this case where harm has been shown.

21. Therefore, when assessed against the aforementioned planning policies and the Framework as a whole, I find the use has resulted in unacceptable harm to the character of the area contrary to Policy H4 of the CS and Policy 16 of the CS. That significantly outweighs any benefits put forward by the appellant.

22. For these reasons and having considered all matters raised the appeal on ground (a) fails.

The appeal on ground (f)

23. Section 173 of the 1990 Act indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. The first (s173(4)(a)) is to remedy the breach of planning control which has occurred. The second (s173(4)(b)) is to remedy any injury to amenity which has been caused by the breach. The requirements of the notice in this case seek the cessation of the use and a return to use as a single dwellinghouse. That covers everything in the alleged breach of planning control.

24. An appeal on ground (f) is that the steps required by the notice exceed what is necessary to remedy the breach of planning control or, as the case may be, to remedy any injury to amenity. Given the purpose of the notice is to remedy the breach of planning control, it falls within s173(4)(a). Therefore, any lesser requirements, such as reducing the number of bed spaces, would simply not meet the requirements of the notice and thus would not remedy the breach of planning control.

25. Thus the appeal on ground (f) fails.

The appeal on ground (g)

26. The appellant opines that the time given to comply should be extended to accommodate the end of the academic year to allow tenants to remain until

July 2012. Given the date of this decision that is now achievable and I see no reason to extend the compliance period further.

27. Thus, the appeal on ground (g) also fails.

Other matters

28. I have taken full and careful account of the views of local residents and other interested parties in reaching this decision. However, the appellant and Highfield Residents' Association have referred to a number of matters not related to the planning merits of the case; these include who is represented by the Association and the appellant's business interests. These matters have not formed part of my deliberations.

Richard Perrins

Inspector

APPENDIX 2
2013 APPEAL DECISION

The Planning Inspectorate

Appeal Decision

Site visit made on 16 July 2013

by Sukie Tamplin Dip TP Pg Dip Arch Cons IHBC MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 15 August 2013

Appeal Ref: APP/D1780/A/13/2190531
Grosvenor Rest Home, 13 Grosvenor Road, Southampton, SO17 1RU

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr H Singh against the decision of Southampton City Council.
- The application Ref 12/01449/FUL, dated 20 September 2012, was refused by notice dated 22 November 2012.
- The development proposed is conversion of existing building into 5 flats with associated parking, cycle and refuse stores.

Decision

1. I dismiss the appeal.

Main issues

2. The main issues in this appeal are:

    - noise and disturbance
    - parking effects
    - living conditions of future occupiers
    - the character of Grosvenor Road

Reasons

Noise and disturbance

3. The appeal site is located on the west side of Grosvenor Road, and is flanked by substantial detached and semi-detached houses. Nos 13 and 11 were previously linked in connection with their joint use as a nursing home, but in recent years the two properties have been separated and planning permission has been granted for their use as two houses. During the years as a nursing home a large single storey extension was added at the rear of no 13.

4. In recent years no 13 has been used as a House in Multiple Occupation (HMO) and it appears that many of the rooms may have been subdivided at that stage to facilitate that unauthorised use. At one point an interim injunction was granted to prevent occupation by up to 15 students but was not renewed. Following the issue of an enforcement notice, a subsequent appeal was dismissed on three grounds, including because the use of the property was over-intensive and resulted in harm and disturbance to neighbouring occupiers.

5. The development before me is for a different configuration of accommodation, namely 5 self-contained flats, 2 being 3 bed units, 2 of 2 bed size and one a 1 bed flat. But I do not consider it probable that these 11 bedrooms would result in the building being occupied by up to 22 people, as suggested by the Council and local residents. Firstly, the submitted plans show a total of 16 bed spaces and the size of several of the proposed single bedrooms is such that it would be almost impossible for them to accommodate a double bed and other furniture. Secondly, the Council's *Planning Obligations Supplementary Planning Document* (PO-SPD) indicative occupancy levels referred to by the appellant suggest that units of the size and mix proposed would be likely to result in only around 10 or 11 persons in the converted house. Therefore, despite its proximity to the University, which no doubt makes this road attractive to students seeking accommodation in the vicinity, it seems to me that the fears of this building being occupied by as many or more people than the 15 when it was in use as an HMO are unlikely to be realised.

6. Nevertheless, the proposed conversion would probably attract young professional couples such as first time buyers, and it maybe that some of the units would also contain one or two lodgers. But no evidence has been produced to indicate that occupiers of the 5 proposed flats would be likely to be especially noisy or be likely to cause more noise and disturbance than if the building were used for its authorised purpose as a single family dwelling. A building of the size of no 13, with some 18 rooms, could provide for occupation by an extended family with perhaps several teenage or grown-up children living at home, many with noisy sound systems or similar. The parental controls and pressures referred to by the Council in the case of single family use are in my view just as likely to be employed by couples to manage the behaviour of their lodgers in order to avoid trouble with neighbours, while on the other hand extended families may be as likely as young couples to hold large and noisy parties for friends and relations.

7. Therefore, whilst I accept that in the former HMO use with around 15 occupiers the building was the source of much noise and disturbance, that was a very different arrangement where each individual could be characterised as constituting a separate household with a differing lifestyle and subject to little or no overall restraint. By contrast, the arrangement now proposed is, as the Council acknowledge, spacious internally and externally, with a good layout and plenty of access to natural light. Hence it is likely, by reason of its larger unit size and better living conditions, to be able to command higher prices and be more attractive to those who seek to avoid the problems associated with the less favourable living arrangements of an HMO occupied by students.

8. It also seems to me that the layout of the proposed flats and their points of access are less likely to give rise to noise and disturbance to neighbours and to one another by comparison to that which I understand was the case when the building was in use as an HMO. Though the side entrance would remain facing no 11, it would be used solely by the occupiers of the proposed Flat G.02, and the occupiers of the other four flats would all use the front door as their only point of access to the building. Although access to the shared rear garden would result in the occupiers of those 4 flats passing close to the side of no 11, it seems to me this access would largely be used in the daytime. Hence it would be improbable that occupiers accessing the communal rear garden to put out washing, enjoy the space or carry out other garden activities would create any significant noise or disturbance to occupiers of no 11.

9. I thus, conclude on the first main issue that the proposals would not cause unacceptable noise and disturbance to adjacent occupiers and hence cannot be considered a noise-generating development within the terms of saved Policy SDP16(i) of the adopted *City of Southampton Local Plan Review 2006* (LPR). For similar reasons the development would not conflict with the aims of saved LPR Policy SDP 1(i) which seeks to ensure that development does not unacceptably affect the amenity of the city and its citizens. Neither do I find conflict with a core aim of the *National Planning Policy Framework* (the Framework) which seeks development providing a good standard of amenity for existing and future occupiers of the building[1]. Though referred to by the Council in the decision notice, I do not find saved LPR Policies H2 and H4, which deal with, on the one hand, vacant, derelict and underused land, and on the other hand with HMOs, to be material to my conclusions on this issue.

Parking

10. The Council's parking policy is contained in its Parking Standards Supplementary Planning Document PD (P-SPD) adopted in October 2011 and is part of the adopted Local Development Framework Core Strategy (LDF-CS); it thus attracts substantial weight. Although not referred to in the reason for refusal, I have been provided with this as part of the appeal documentation and because the appellant and the third parties are aware of its content no disadvantage would result if it is taken into account in my decision.

11. For residential development the P-SPD sets out maximum parking standards for Class C3 development which in this case seeks a maximum of 9 spaces for the proposed 5 units. The P-SPD says that this may be provided by both on- and off-street parking but that the latter should make up the majority of parking provision for larger developments. Whether the appeal proposals fall into this latter category is unclear but in any event two further considerations have to be taken into account.

12. Firstly, for schemes providing more than five bedrooms across all developments, some off-street parking is expected, and secondly, developers must demonstrate that the amount of parking provided will be sufficient, whether they provide the maximum or a lower figure. In this case the submitted plans show 3 parking spaces on the forecourt to the building, which would satisfy the first provision, but the appellant has produced no evidence to show that this would be sufficient to cater for the vehicular traffic likely to be generated by the 5 flats.

13. Therefore, although the Council may have made assumptions about the probable occupiers of the flats and the P-SPD may not provide typical traffic generation figures to be applied to planning proposals, the onus is plainly on the appellant to demonstrate adequacy of parking provision. This is supported by the response of the Highways Officer who, when consulted on the appeal proposals, would not give a formal reply until a parking survey had been undertaken to assess the situation in Grosvenor Road. The absence of such a survey thus weighs against the proposals.

14. Furthermore, in November 2012 a Residents Parking Zone (RPZ) was designated for Grosvenor Road and the surrounding area and, according to the Highfield Residents Association, this grants two on-street parking permits to

[1] National Planning Policy Framework paragraph 17

each household in the Zone. This would result in the issue of 10 parking permits to the occupiers of the proposed conversion which means that, together with the on-site spaces, up to 13 vehicles could be lawfully parked on and around the appeal premises. By way of comparison, if the building were used for its lawful use as a single dwellinghouse, no more than 5 vehicles could be parked lawfully on- and off-site.

15. Whether or not either of these figures would be realised depends on the nature and wishes of the presently unknown occupiers and it would be difficult to forecast accurately, especially in the absence of a parking survey. The imposition of the RPZ thus reinforces the need for such a survey and adds weight to my conclusion on this matter in paragraph 13 above. I have also taken into account my observations of parking in Grosvenor Road at the time of the site inspection (around 1130 hrs) when there were many on-street parking spaces available. However, a single observation in the middle of the day does not seem to me a reliable basis on which to assess maximum or even typical parking stress in this road. That is supported by the observations of the Inspector who dealt with the enforcement appeal on this property in 2012 and also noted that spaces for on-street parking were readily available but added that this is likely to be subject to periods of fluctuating demand.

16. The best evidence on this issue is that of the Highfield Residents Association who say that on-street parking in the road is already greatly in demand due in part to its proximity to the University and the Portswood local centre. They report that cars are habitually parked close to dropped kerbs causing obstruction to vision for those drivers who, as I saw, are in many cases accessing properties with no turning facility and who must either reverse onto or from their forecourt parking spaces. Hence, by being unsighted due to on-street parking, reversing vehicles pose a potentially serious danger both to other vehicles travelling along the road and to pedestrians, and especially children, using the footway.

17. On this second main issue I therefore conclude that in the absence of a parking survey and contrary evidence, the greatly increased parking permit provision which would arise from permission for the proposed conversion would give rise to an unacceptable risk of serious inconvenience and danger arising from increased parking demand in Grosvenor Road. This adds further weight to my earlier conclusion and I find that the proposals conflict with the guidance in Section 4.2 of the P-SPD and thus with the aims of Policy CS19, "Car and Cycle Parking"[2] of the Southampton LDF-CS. Such guidance and policy is consistent with the Framework which supports locally appropriate parking standards and the minimisation of conflicts between traffic and pedestrians[3]. Accordingly, this issue weighs heavily against permission.

Living conditions

18. I have already noted that the Council concedes the proposed flats would be of a good size and layout with plenty of access to natural light and an adequate quantum of amenity space, and I have no reason to disagree with that analysis. Accordingly it appears to me that the proposed density of the development would not be excessive or inappropriate in this area and therefore not conflict with LDF-CS Policies CS 5 and CS 13. I have also concluded that

[2] Parking Standards Supplementary Planning Document paragraph 2.1.1.1 refers
[3] National Planning Policy Framework paragraphs 35 and 39

the access to that part of the rear garden shared by 4 of the flats, though it would pass the bedrooms of the fifth flat, would not cause unacceptable noise and disturbance. Such an arrangement is not ideal, but in the case of conversions of existing property is often unavoidable due to the layout of the building.

19. In this case, the large rear extension, built when the property was in use as a nursing home, occupies most of the back of the original main building making access for any unit in the main building to the rear garden all but impossible without either passing through the flat in the rear extension or using the side access. To my mind the proposed arrangement using the side access is preferable to splitting the rear flat and would enable residents of the other 4 flats to share a separate access to a good-sized private garden. Though this access would be lengthy it is not unreasonably so and the proposed layout does not suggest that access problems would arise such that the conversion would be unacceptable.

20. Nor do I consider this arrangement would be unsafe for children playing in the shared rear garden. An occupier of any of the proposed flats who had young children would almost certainly be aware of the occupiers of the other flats and in a position to make a judgment as to the safety of his or her children in that context. Moreover, the close proximity of other occupiers in this and adjacent buildings makes it likely that there would be good natural surveillance so that any untoward event would be likely to be seen, with a high probability of intervention by an observer. In the case of very young children it is also not unreasonable to expect a close level of parental supervision, with one or both parents playing or being in the shared space at the same time, albeit engaged in other tasks.

21. Hence I conclude that the living conditions of future occupiers would not be seriously harmed by the appeal proposals, which comply with the aims of LPR Policy SDP 1(i) in that they would not unacceptably affect the heath, safety and amenity of the city and its citizens. I also find that the quality of the development would comply with guidance in the Framework that seeks development that would function well in the long term[4].

Character of the area

22. The appellant does not accept that Grosvenor Road is one of the few roads in this area which has managed to retain its family home character, and points to no 11 as an example of a nearby HMO, and he believes the area to be a mix of HMOs, flats and family houses. On the basis of what I saw during my site inspection, and in the absence of more precise evidence, it appears to me that the character of Grosvenor Road remains, as the Inspector in the 2012 enforcement appeal found, predominantly residential with a high proportion of family-occupied dwellings.

23. That being so, the changes which would be introduced by conversion to 5 flats would seem to be limited to some additional activity as a result of there being 5 separate households, plus the presence on the forecourt of a multiple bin store. The use of the left hand front room as a shared entrance and cycle store may also result in some change in appearance compared to use as for example, a lounge or dining room in family occupation. But though these

[4] National Planning Policy Framework paragraph 58

changes would affect the character of no 13 as a building, they are not so substantial as to radically alter the character of the entire street. No 13 is only one of many dwellings in Grosvenor Road, and no cogent evidence has been produced to show why a change to the proposed use should significantly affect the character of the street as a whole.

24. Moreover, the considerable size of no 13 compared to other houses nearby suggests that any use, including as a single family dwelling, would create a character which would not necessarily reflect the levels of activity and appearance of the other houses. Thus an extended family occupying the house would be as likely to generate comings and goings throughout the day and late at night as 5 separate households in the 5 proposed flats. Similarly, in single family use many vehicles would probably occupy the forecourt and multiple refuse bins would be required, perhaps housed for convenience on the forecourt.

25. Accordingly, whilst I agree that the proposals would result in the character of no 13 being different to that of most of the other dwellings in Grosvenor Road, it seems to me that those differences would not be so substantial as to affect the character of the road as a whole, nor would they be significantly different to what the character of this building would otherwise be, even if it were in single family occupation. Hence I conclude that no serious harm would be caused to the character of Grosvenor Road and the proposals do not conflict with the aims of LDF Policy C5(1) or LPR Policy SDP7(5) which respectively seek to protect and enhance the character of existing neighbourhoods and prevent material harm to the character and appearance of an area. I also find that the development would encourage a strong, vibrant and mixed community as supported by the Framework[5].

Conclusions

26. In reaching my conclusions I have borne in mind that, despite assertions that the proposals amount to the formation of an HMO, what is before me is a proposal for conversion to 5 self-contained flats within Class C3, and that the change of use to an HMO in Class C4 within the Southampton City Council area constitutes development requiring planning permission. Given this context and the understandable close interest of local residents in this site, it would be highly improbable that any attempt to use the premises as an HMO, which in any case the appellant strongly denies, could succeed even in the short term. I also note that the Council say that the officers would be likely to recommend for approval the subdivision of this building into two Class C3 dwellings, so that at some point subdivision of no 13 may well occur.

27. Furthermore, as accepted by the Council, the provision of 4 additional units would contribute towards fulfilling housing needs in Southampton through the conversion of an existing building. It would thus be in accordance with LPR Policy H1 (iv).

28. I have found the proposals acceptable in terms of noise and disturbance, the living conditions of future occupiers and their effect on the character of the area. However, they pose an unacceptable risk of causing inconvenience and danger to drivers and pedestrians in Grosvenor Road due to the increased traffic which would be likely to be generated by the occupiers of the flats, given

[5] National Planning Policy Framework paragraphs 7 and 69

the absence of evidence to the contrary in the form of a parking survey as required by the SPD in support of LDF-CS Policy CS19 and the recent designation of the RPZ in this area.

29. Therefore, for the reasons I have given and in the light of all other matters raised including the appeal decisions submitted as evidence, I dismiss the appeal.

Sukie Tamplin

INSPECTOR

APPENDIX 3

South Buckinghamshire CC v Porter (No.2) [2004] 1 WLR 1953

House of Lords

*South Bucks District Council and another *v* Porter (No 2)

[2004] UKHL 33

2004 May 24; July 1

Lord Steyn, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Carswell and Lord Brown of Eaton-under-Heywood

Planning — Development — Local authority's development plan — Green Belt land — Gipsy occupying mobile home on own land in breach of planning control — Inspector granting retrospective planning permission on grounds of special circumstances — Whether inspector giving adequate reasons — Whether unlawfulness of prior occupation material consideration

The applicant, a gipsy, bought land in a Green Belt area in 1985 and stationed her mobile home on it. She failed in an application for planning permission for retention of the mobile home on the site and the council issued enforcement notices against her. However, she continued to occupy the site in breach of planning control. In January 2000 the applicant applied again for planning permission, which was refused by the council. On appeal, the inspector concluded that there had been material changes in the circumstances since the previous application in that there was no alternative council site available for the applicant to move to and her health had deteriorated considerably in the intervening period. He concluded that the applicant's status as a gipsy, the lack of an alternative site in the area and her chronic ill health constituted very special circumstances which were sufficient to override Green Belt policies. Consequently, he granted the applicant planning permission which was personal to her so that the mobile home could remain on the site only for so long as she lived there and thereafter would have to be removed. The council challenged the inspector's decision. The judge refused to quash the decision but on appeal the Court of Appeal, reversing his decision, held that the inspector had failed to give adequate reasons for his decision and had failed to have regard to the material consideration that the applicant's continued occupation of the site had been unlawful and in persistent breach of planning control.

On appeal by the applicant—

Held, allowing the appeal, (1) that the reasons for a decision had to be intelligible and adequate and enable the reader to understand what conclusions were reached on the principal issues; that they could be briefly stated, the degree of particularity depending on the nature of the issues; that they should not give rise to doubt whether the decision-maker had erred in law, but adverse inferences would not readily be drawn; that the reasons did not need to refer to more than the main issues and should be read in a straightforward manner, recognising that they were addressed to parties familiar with the issues and arguments; and that for a reasons challenge to succeed the aggrieved party had to satisfy the court that he had been substantially prejudiced by the failure to provide an adequately reasoned decision; that there had been no challenge to the rationality of the inspector's decision and there was no basis for inferring a material misdirection whether of fact, law, policy or any other matter; that all that had been required of him was a value judgment as to whether the hardship which would result from removing the applicant from her land was sufficiently extreme to justify the environmental harm occasioned by allowing her to remain there as long as she needed; that personal circumstances were themselves capable of being a material consideration, and the standard of reasoning required was not dependent on the importance of the issues involved; and that since the inspector's reasoning had been both clear and ample there was no mystery as to what had moved him to reach the conclusion he did (post, paras 1–4, 35–36, 38–39, 41–42, 60).

Westminster City Council v Great Portland Estates plc [1985] AC 661, HL(E), *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153, HL(E) and *Bolton Metropolitan District Council v Secretary of State for the Environment* (1995) 71 P & CR 309, HL(E) applied.

(2) That the unlawfulness of development could militate against the retrospective grant of planning permission in circumstances where the occupier sought to rely on the very fact of the continuing use of the land or long period of residence; that the applicant's occupation of her land had been persisted in for many years despite enforcement proceedings against her and could properly be categorised as criminal; but that, although, the unlawfulness of her prior occupation of the site was capable of being a material consideration, her hardship claim had not been based on factors which owed anything to the length of her residence; and that, accordingly, the unlawfulness of the applicant's prior occupation of the site was of little if any materiality in the circumstances and required no detailed discussion in the inspector's decision letter (post, paras 1–4, 52–60).

Decision of the Court of Appeal [2003] EWCA Civ 687; [2004] JPL 207 reversed.

The following cases are referred to in the opinion of Lord Brown of Eaton-under-Heywood:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

Bolton Metropolitan District Council v Secretary of State for the Environment (1995) 71 P & CR 309, HL(E)

Chapman v United Kingdom (2001) 33 EHRR 399

Clarke Homes Ltd v Secretary of State for the Environment (1993) 66 P & CR 263, CA

Doncaster Metropolitan Borough Council v Secretary of State for the Environment, Transport and the Regions [2002] EWHC 808 (Admin); [2002] JPL 1509

Hope v Secretary of State for the Environment (1975) 31 P & CR 120

Poyser and Mills' Arbitration, In re [1964] 2 QB 467; [1963] 2 WLR 1309; [1963] 1 All ER 612

R v Leominster District Council, Ex p Pothecary [1998] JPL 335, CA

Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153; [1991] 2 All ER 10, HL(E)

Seddon Properties Ltd v Secretary of State for the Environment (Note) (1978) 42 P & CR 26

South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR1547; [2003] 3 All ER 1, HL(E)

South Somerset District Council v Secretary of State for the Environment [1993] 1 PLR 80, CA

Westminster City Council v Great Portland Estates plc [1985] AC 661; [1984] 3 WLR 1035; [1984] 3 All ER 744, HL(E)

The following additional cases were cited in argument:

Ayres v Secretary of State for the Environment (1997) 74 P & CR 246

Basildon District Council v Secretary of State for the Environment, Transport and the Regions [2001] JPL 1184

Elliott v Southwark London Borough Council [1976] 1 WLR 499; [1976] 2 All ER 781, CA

MJT Securities Ltd v Secretary of State for the Environment [1997] 3 PLR 43, CA

R (Chelmsford Borough Council) v First Secretary of State [2003] EWHC 2978 (Admin)

Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281; [1971] 1 All ER 65

Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636, HL(E)

APPEAL from the Court of Appeal

This was an appeal with leave of the House of Lords (Lord Bingham of Cornhill, Lord Steyn and Lord Hope of Craighead) given on 31 July 2003 by the applicant, Linda Porter, from a decision of the Court of Appeal (Pill, Mance, Longmore LJJ) dated 19 May 2003 allowing an appeal by South Bucks District Council from a decision of Judge Rich QC sitting in the Administrative Court of the Queen's Bench Division on 17 September 2002 by which he refused to quash a decision of a planning inspector to grant the applicant retrospective planning permission for retention of her mobile home on Green Belt land.

The facts are stated in the opinion of Lord Brown of Eaton-under-Heywood.

Charles George QC and *Stephen Cottle* for the applicant.
Timothy Straker QC and *Ian Albutt* for the local authority.
Nathalie Lieven for the Secretary of State.

Their Lordships took time for consideration.

1 July. **LORD STEYN**

1 My Lords, I have read the opinion of my noble and learned friend, Lord Brown of Eaton-under-Heywood. I am in complete agreement with it. I would also make the order which he proposes.

LORD SCOTT OF FOSCOTE

2 My Lords, I have had the advantage of reading a draft of the opinion of my noble and learned friend, Lord Brown of Eaton-under-Heywood, and am in full agreement with the reasons he has given for allowing this appeal.

LORD RODGER OF EARLSFERRY

3 My Lords, I have read the speech of my noble and learned friend, Lord Brown of Eaton-under-Heywood. I am in complete agreement with it. I too would make the order which he proposes.

LORD CARSWELL

4 My Lords, I have had the advantage of reading in draft the opinion prepared by my noble and learned friend, Lord Brown of Eaton-under-Heywood. I agree with his reasons and conclusion and I would allow the appeal and make the order which he proposes.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

Introduction

5 This is the fourth appeal before the House in recent years in which your Lordships have had to consider the adequacy of reasons given in decisions made under the Town and Country Planning legislation. The three previous decisions were *Westminster City Council v Great Portland Estates plc* [1985] AC 661 concerning an aspect of the council's adopted district plan, *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153

concerning the Secretary of State's grant of planning permission on appeal from the local planning authority's refusal of permission, and *Bolton Metropolitan District Council v Secretary of State for the Environment* (1995) 71 P & CR 309 concerning the Secretary of State's grant of planning permission on a called-in application. In each of those three cases the reasons challenge failed before the judge at first instance, succeeded before the Court of Appeal, but failed again before your Lordships. In the present case too your Lordships are asked to overturn a decision of the Court of Appeal, in this case allowing a local planning authority's appeal from the judge's dismissal of a statutory challenge and quashing an inspector's grant of planning permission, principally on the ground that he gave inadequate reasons for his decision. A further ground of the Court of Appeal's decision was that the inspector failed to have regard to the unlawfulness of the applicant's occupation of the land.

6 The second respondent, the Secretary of State for Transport, Local Government and the Regions ("the Secretary of State"), chose not to appear in either court below. Concerned, however, at the Court of Appeal's decision and regarding both issues as of general importance, he appears before your Lordships in support of the applicant's case.

The appeal

7 The appeal is brought against a decision of the Court of Appeal (Pill, Mance and Longmore LJJ) on 19 May 2003 [2004] JPL 207, allowing an appeal by South Bucks District Council ("the council") against the order of Judge Rich QC sitting in the Administrative Court on 17 September 2002 [2002] EWHC 2136 (Admin) dismissing the council's application under section 288 of the Town and Country Planning Act 1990 seeking to quash a decision of the Secretary of State given by his duly appointed inspector by letter dated 19 February 2002. The inspector had allowed an appeal by the applicant ("Mrs Porter") against a decision of the council on 5 September 2000 refusing planning permission for the retention of a residential mobile home at Willow Tree Farm, Love Lane, Iver, Bucks ("the site"). The permission granted by the inspector was subject to conditions including a condition that it was personal to Mrs Porter.

History

8 The appeal has something of a history. This is, indeed, the second time within just over a year that your Lordships have had to consider the circumstances of Mrs Porter's occupation of the site: see *South Bucks District Council v Porter* [2003] 2 AC 558.

9 Mrs Porter is a 62-year-old Romany gipsy who bought the site in 1985 and has ever since lived there with her husband in breach of planning control. The site lies within the South Bucks Green Belt, very close to its eastern boundary with the village of Iver and within the Colne Valley Park. As described in the inspector's decision letter:

> "[The] mobile home [provides] a kitchen, living room, bedroom and bathroom. It has the appearance of a permanent dwelling with a pitched roof and chimney. It forms part of a cluster of buildings made up of stables, tack room and a barn; there is a yard area with some touring

A caravans on it and, to the west, is a field also owned by [Mrs Porter] and her husband."

10 The detailed planning history of Mrs Porter's occupation of the site is set out, at pp 567–568, in para 7 of Lord Bingham of Cornhill's speech in the *South Bucks* case. For present purposes it is sufficient to record, as the inspector did, two previous planning decisions of relevance. The first, in B 1994, concerned Mrs Porter's appeal against six enforcement notices relating variously to her residential use of part of the site, the erection of some buildings and the construction of hardstanding. All the enforcement notices were upheld save for that directed to the hardstanding. The second decision was the dismissal of Mrs Porter's appeal in 1998 against the refusal of planning permission for the retention of her mobile home and associated C outbuildings.

11 It was following the 1998 refusal of planning permission that the council in December 1999 applied to the court for an injunction under section 187B of the 1990 Act requiring her to cease her residential use of the land, an application granted by Burton J on 27 January 2000 to take effect a year later. Burton J's order was made just two days after Mrs Porter's D application for planning permission (the application refused by the council on 5 September 2000) which began the history of the present appeal. On 12 October 2001, the Court of Appeal (myself, Peter Gibson and Tuckey LJJ) allowed Mrs Porter's appeal against Burton J's order—that being the decision unsuccessfully appealed by the council to your Lordships' House in the *South Bucks* case. The speeches in the *South Bucks* case were delivered on 22 May 2003, just three days after a differently constituted Court of E Appeal had allowed the council's appeal in the present proceedings.

The inspector's decision

12 In determining the appeal the inspector (just as the council on the original application) was required (a) by section 70(2) of the 1990 Act to "have regard to the provisions of the development plan, so far as material to F the application, and to any other material considerations", and (b) by section 54A of the 1990 Act, as inserted by section 26 of the Planning and Compensation Act 1991, to decide the matter "in accordance with the plan unless material considerations indicate otherwise".

13 The statutory development plan consisted of the county structure plan and the council's local plan. Put shortly, both provide for a general G presumption against allowing inappropriate development in the Green Belt, reiterating national guidance in Planning Policy Guidance 2 ("PPG" 2), which states:

> "3.1. The general policies controlling development in the countryside apply with equal force in Green Belts but there is, in addition, a general presumption against inappropriate development within them. Such H development should not be approved, except in very special circumstances . . .
>
> "3.2. Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development

will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations." A

14 Having summarised those provisions the inspector continued:

"*Main Issue* 6. For [Mrs Porter] it was accepted that the appeal development constituted inappropriate development in Green Belt terms. The main issue in this case, therefore, is whether there are any very special circumstances why the appeal development should be permitted despite this." B

15 The inspector then turned to state his reasons for allowing Mrs Porter's appeal subject to conditions. The most material reasons for present purposes were these:

"7. [Mrs Porter] has occupied the appeal site as a home for a considerable period of time purchasing the land in 1985. However, the council does not dispute the gipsy status of [Mrs Porter] or her family either in the ethnic or statutory sense and I have, accordingly, given this some weight in my considerations" C

"9. . . . I consider that, bearing in mind the difficulties involved, the council has made reasonable provision for gipsy sites. Nevertheless, [Mrs Porter] has only just recently made an application for one of these, there are no vacancies at present and waiting lists are long. On this basis I conclude that there is no alternative location available to [Mrs Porter] at present and unlikely to be one for a considerable time. D

"10. It is also apparent from the evidence that [Mrs Porter] suffers from serious ill-health. The written evidence from those treating her medically is that she suffers from chronic asthma, severe generalised arthritis and chronic urinary tract infection: she also has diabetes and high blood pressure. I accept also that displacing her and her husband from their home on the appeal site would make it difficult for her to continue with the medical treatment she is currently undergoing and the stress involved would probably make her condition worse. E

"11. [The inspector here summarised the two previous appeal decisions of 1994 and 1998 to which I have referred above.] F

"12. I have considered whether there has been any material change in circumstances since these decisions, particularly that in 1998, that would lead me to a contrary view and I have concluded that there has been in two major respects. First, on the basis of the evidence before me, no alternative council based sites are available at present whereas, at the time of the 1998 case there was some, albeit limited, spare capacity. Second, the evidence suggests that [Mrs Porter's] state of ill-health has worsened considerably since the last appeal. G

"13. These changes in the situation since 1998 are sufficient for me to take a contrary view to that of the previous inspector. The status of [Mrs Porter] as a gipsy, the lack of an alternative site for her to go to in the area and her chronic ill-health constitute very special circumstances which are, in this case, sufficient to override national and statutory development [Green Belt] policies. H

"14. I have taken account of all the other matters raised but none of these has been of sufficient weight to override my conclusions on the main

A issue. . . . because of the very special circumstances which I consider apply, I shall allow the appeal subject to conditions to which I now turn."

16 The inspector then imposed two conditions, the first making the planning permission personal to Mrs Porter, the second concerning the landscaping of the site. The inspector expressly stated that a personal condition would be justified "because of the very special circumstances B which centre to some extent on [Mrs Porter] herself". The condition imposed was that:

> "When the residential mobile home the subject of this appeal is no longer required by [Mrs Porter] for living purposes it shall be removed, together with all fixtures and fittings, from the site and all service C connections stopped off."

The statutory challenge

17 The council challenged the inspector's grant of planning permission pursuant to section 288(1) of the 1990 Act, contending both that the decision was not within the powers of the Act (section 288(1)(b)(i)) and D (5)(b)), and also that a relevant requirement had not been complied with—namely the requirement under rule 19(1) of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 (SI 2000/1625) to "notify his decision . . . and his reasons for it, in writing"—(section 288(1)(b)(ii)), such failure having substantially prejudiced their interests (section 288(5)(b)). It is convenient to refer to these grounds of application respectively as "the vires challenge" and "the E reasons challenge".

18 Before Judge Rich the reasons challenge was put on the narrow ground that the inspector "fails to give any reasons as to why he has concluded in law that the issue of the status of [Mrs Porter] as a gipsy amounts to a very special circumstance", a challenge unsurprisingly rejected by the judge on the basis that it was not Mrs Porter's gipsy status *alone* F which the inspector regarded as a very special circumstance but rather that status in combination with her chronic ill-health and the unavailability of an alternative site. Her status was clearly of some significance: as recorded in the judgment, the council accepted that Mrs Porter, as a gipsy, "has a rooted fear of and objection to being put in permanent housing where she feared she would be unable to cope".

G **19** Although a number of grounds were advanced both to the judge and the Court of Appeal in support of the vires challenge the only one accepted by the Court of Appeal and still live before your Lordships is that already referred to: the inspector's alleged failure to have regard to the unlawfulness of Mrs Porter's occupation of her land as a material consideration in the case. In rejecting this ground of challenge the judge accepted, at para 7, that "it must be material whether [a person's occupation of premises] was at all H times in breach of planning control" because it "goes to the weight to be attached to this long period of occupation", but concluded that the inspector plainly had it in mind since he had expressly referred to the past planning history of the site and in any event recognised that the application was for *retrospective* planning permission.

The Court of Appeal's decision

20 The reasons challenge in the form advanced to the judge was not pursued before the Court of Appeal. Indeed we are told that no reasons challenge whatever was pursued in the grounds of appeal and that it was the Court of Appeal itself which took the point.

21 In a reserved judgment helpfully rehearsing the substance of the inspector's decision, the planning policies in play, the rival submissions on the appeal, the basis of the European Court of Human Rights' decision in *Chapman v United Kingdom* (2001) 33 EHRR 399, and the planning considerations in the case, Pill LJ—who gave the only reasoned judgment of the court—stated his conclusions [2004] JPL 207, 215–216:

> "31. The very special circumstances found by the inspector to be present are the personal hardships to Mrs Porter, if permission is refused. It is they which, in the language of paragraph 3.2 of PPG 2, are held 'clearly to outweigh' the terms of inappropriate development. The hardship is that she is a very unwell gipsy without another pitch to occupy. I do not seek to diminish the hardship involved but, if a planning authority is to decide that such hardship constitutes not merely special, but very special, circumstances so as to override planning policies, a much fuller analysis, in the planning context, is in my judgment required . . . if what the inspector recognised to be established planning policies are to be overridden, on grounds of the personal hardship to the applicant, a more comprehensive approach to the issue is required, as recognised in [the *Chapman* case] and [the *Westminster* case [1985] AC 661], than was followed in this case. As Sullivan J stated in [*Doncaster Metropolitan Borough Council v Secretary of State for Environment, Transport and the Regions* [2002] JPL 1509], it is important that the need to establish very special circumstances is not watered down. Clear and cogent analysis is required.
>
> "32. Conspicuously absent from the decision letter is a consideration of the unlawfulness of the applicant's occupation, which has been in persistent breach of planning control. That of itself requires the decision to be quashed. I would venture to mention other considerations. One is that the applicant has not, until recently, applied for an alternative site though sites have, in the recent past, been available. This is not a case where, on the inspector's findings, a lack of reasonable provision in the district of gipsy sites can be relied on to justify a grant, nor is it relied on; current hardship is the only factor present. The relevance to the application of the applicant's status as a gipsy, as compared with a similar application by a non-gipsy, is also material, especially when the development concerned has the 'appearance of a permanent dwelling with pitched roof and chimney'. The council were entitled to have the case for hardship considered in a broader context and with fuller reasoning. Merely to set out a list of hardships was not a sufficient way to deal with what was essentially a land use question. Even the personal circumstances, in themselves, are insufficiently dealt with by that listing."

22 Later in his judgment, at p 216, para 35, in the course of rejecting other grounds of the appeal, Pill LJ reiterated his earlier view as to the inadequacy of the inspector's reasoning:

A "If very special circumstances can be established simply by relying on a catalogue of hardship, the concept would be devalued and the planning system tend to be undermined. For reasons already given, a more comprehensive approach is required."

23 Before your Lordships both Mrs Porter and the Secretary of State take issue with those conclusions. They dispute both the suggested B inadequacy of the inspector's reasons and that the inspector failed to consider "the unlawfulness of [Mrs Porter's] occupation . . . in persistent breach of planning control" which "of itself requires the decision to be quashed".

I—The reasons challenge

C **24** As already noted, three previous decisions of this House have considered the reasons requirement in a planning context. In this, the fourth, it is I hope convenient to start by assembling a number of the more authoritative and useful dicta from the many cases in the field. I begin with Megaw J's oft-cited judgment in *In re Poyser and Mills' Arbitration* [1964] 2 QB 467, 478:

D "Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised."

25 In the *Westminster* case [1985] AC 661, 673 Lord Scarman set out E the above passage and continued:

"[Megaw J] added that there must be something 'substantially wrong or inadequate' in the reasons given. In *Edwin H Bradley & Sons Ltd v Secretary of State for the Environment* (1982) 264 EG 926, 931 Glidewell J added a rider to what Megaw J had said: namely, that reasons F can be briefly stated. I accept gladly the guidance given in these two cases."

26 In *South Somerset District Council v Secretary of State for the Environment* [1993] 1 PLR 80, 83, Hoffmann LJ, giving the only reasoned judgment in the Court of Appeal, quoted from Forbes J's judgment in *Seddon Properties Ltd v Secretary of State for the Environment (Note)* (1978) G 42 P & CR 26, 28—"Because the letter is addressed to parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument . . ."—and continued:

"The inspector is not writing an examination paper . . . One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he H must have misunderstood a relevant policy . . ."

27 Turning next to Lord Bridge of Harwich's leading speech in the *Save* case [1991] 1 WLR 153, one notes first his citation, at p 165, of Phillips J's judgment in *Hope v Secretary of State for the Environment* (1975) 31 P & CR 120, 123 as providing a "very similar indication of the scope of the

duty" to that given in *In re Poyser and Mills' Arbitration* [1964] 2 QB 467 and as being "particularly well expressed":

> "It seems to me that the decision must be such that it enables the appellant to understand on what grounds the appeal has been decided and be in sufficient detail to enable him to know what conclusions the inspector has reached on the principal important controversial issues."

28 Lord Bridge [1991] 1 WLR 153, 166

> "emphatically [rejected the proposition that in planning decisions the 'standard', 'threshold' or 'quality' of the reasons required to satisfy the statutory requirement . . . depends upon the degree of importance which attaches to the matter falling to be decided."

He held, in short, that a consistent standard of reasoning is required in all planning decisions, adding, at p 167C: "the degree of particularity required will depend entirely on the nature of the issues falling for decision."

29 Lord Bridge then turned to consider how the court should approach a reasons challenge advanced under section 245 of the Town and Country Planning Act 1971 (now section 288 of the 1990 Act):

> "There are in truth not two separate questions: (1) were the reasons adequate? (2) if not, were the interests of the applicant substantially prejudiced thereby? The single indivisible question, in my opinion, which the court must ask itself whenever a planning decision is challenged on the ground of a failure to give reasons is whether the interests of the applicant have been substantially prejudiced by the deficiency of the reasons given."

The burden of proof, Lord Bridge pointed out, at p 168B, lies on the applicant "to satisfy the court that he has been substantially prejudiced by the failure to give reasons".

30 As to the circumstances in which a deficiency of reasons would cause substantial prejudice, Lord Bridge said, at p 167:

> ". . . I should expect that normally such prejudice will arise from one of three causes. First, there will be substantial prejudice to a developer whose application for permission has been refused or to an opponent of development when permission has been granted where the reasons for the decision are so inadequately or obscurely expressed as to raise a substantial doubt whether the decision was taken within the powers of the Act. Secondly, a developer whose application for permission is refused may be substantially prejudiced where the planning considerations on which the decision is based are not explained sufficiently clearly to enable him reasonably to assess the prospects of succeeding in an application for some alternative form of development. Thirdly, an opponent of development, whether the local planning authority or some unofficial body like Save, may be substantially prejudiced by a decision to grant permission in which the planning considerations on which the decision is based, particularly if they relate to planning policy, are not explained sufficiently clearly to indicate what, if any, impact they may have in relation to the decision of future applications."

A **31** The first of those three possible causes of substantial prejudice—the developer's (or, as the case may be, his opponent's) uncertainty, through the inadequacy of the reasons, whether or not the decision is properly open to a vires challenge—Lord Bridge elaborated, at p 168:

> "If it was necessary to the decision to resolve an issue of law and the reasons do not disclose how the issue was resolved, that will suffice. If the
B decision depended on a disputed issue of fact and the reasons do not show how that issue was decided, that may suffice. But in the absence of any such defined issue of law or fact left unresolved and when the decision was essentially an exercise of discretion, I think that it is for the applicant to satisfy the court that the lacuna in the stated reasons is such as to raise a substantial doubt as to whether the decision was based on relevant
C grounds and was otherwise free from any flaw in the decision-making process which would afford a ground for quashing the decision."

32 Lord Bridge's final words on the subject, at pp 170–171, were that the requirement "is a salutary safeguard to enable interested parties to know that the decision has been taken on relevant and rational grounds and that any applicable statutory criteria have been observed", adding:

D

> "But I should be sorry to see excessive legalism turn this requirement into a hazard for decision-makers in which it is their skill in draftsmanship rather than the substance of their reasoning which is put to the test."

33 The *Save* case was followed by the decision of the Court of Appeal in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) E 66 P & CR 263 where, on another reasons challenge, Sir Thomas Bingham MR felicitously observed, at pp 271–272:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a
F straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

34 Passing finally to the *Bolton* case 71 P & CR 309, the last of the three earlier cases before the House concerned with the scope of the reasons requirement in the planning context, I need refer only to a short passage in Lord Lloyd of Berwick's speech, at pp 314–315:

G

> "in so far as [the Court of Appeal in that case] was saying that a decision letter must refer to 'each material consideration' I must respectfully disagree. This seems to go well beyond Phillips J's formulation in *Hope v Secretary of State for the Environment* 31 P & CR 120, 123. What the Secretary of State must do is to state his reasons in sufficient detail to enable the reader to know what conclusion he has
H reached on the 'principal important controversial issues'. To require him to refer to every material consideration, however insignificant, and to deal with every argument, however peripheral, would be to impose an unjustifiable burden . . . Since there is no obligation to refer to every material consideration, but only the main issues in dispute, the scope for

drawing any inference"—the inference suggested being 'that the decision-maker has not fully understood the materiality of the matter to the decision'—"will necessarily be limited to the main issues, and then only, as Lord Keith pointed out [in *R v Secretary of State for Trade and Industry, Ex p Lonhro plc* [1989] 1 WLR 525, 540], when 'all other known facts and circumstances appear to point overwhelmingly' to a different decision."

The law summarised

35 It may perhaps help at this point to attempt some broad summary of the authorities governing the proper approach to a reasons challenge in the planning context. Clearly what follows cannot be regarded as definitive or exhaustive nor, I fear, will it avoid all need for future citation of authority. It should, however, serve to focus the reader's attention on the main considerations to have in mind when contemplating a reasons challenge and if generally its tendency is to discourage such challenges I for one would count that a benefit.

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

The law applied

37 Having identified Mrs Porter's hardship as consisting of being "a very unwell gipsy without another pitch to occupy", the Court of Appeal decided that if this was to constitute "very special circumstances" which "clearly outweighed" this "inappropriate development", then the inspector had to provide what was variously described as "a much fuller analysis", "a more comprehensive approach to the issue", "clear and cogent analysis", "the case for hardship considered in a broader context and with fuller reasoning" and "a more comprehensive approach": see paras 21 and 22 above.

A **38** Mr George for Mrs Porter and Miss Lieven for the Secretary of State submit that this was substantially to overstate the reasons requirement upon the inspector. The main issue before him, really the only issue, was whether Mrs Porter's hardship constituted "very special circumstances" for granting her the personal planning permission she sought. There was no issue of law in the case; no issue of fact (certainly none once the inspector had concluded B that an alternative site was "unlikely" to be available to Mrs Porter "for a considerable time"); and no *Wednesbury* challenge (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), i e no suggestion that the inspector could not reasonably have reached his conclusion on the facts. What was required of him was above all a value judgment whether the hardship which would result from dispossessing Mrs Porter from her land was sufficiently extreme and unusual to justify the environmental harm C occasioned by her remaining there as long as she needed.

39 That personal circumstances are themselves capable of being a material consideration in a planning case is well established: see the *Westminster* case [1985] AC 661, 670F ("the human factor . . . can . . . and sometimes should, be given direct effect as an exceptional or special circumstance", per Lord Scarman), and the *South Bucks* case [2003] 2 AC D 558, 580, para 31 ("the Secretary of State was entitled to have regard to the personal circumstances of the gipsies", per Lord Bingham). Indeed Lord Clyde in the *South Bucks* case, at p 593, para 75, described Mrs Porter's (and Mr Berry's) circumstances as "quite special": in part because they owned the land in question and in part because, although the land lies within the Green Belt, "it is not suggested that there is any urgent environmental problem".

40 Whilst, however, acknowledging that personal hardship can give rise E to very special circumstances, Mr Straker for the council argues that more explanation was required than the inspector gave as to why he reached that particular judgment on the facts of this case. The Court of Appeal, he submits, was right to demand "a much fuller analysis".

41 I cannot accept that submission. To my mind the inspector's reasoning was both clear and ample. Here was a woman of 62 in serious ill- F health with a rooted fear of being put into permanent housing, with no alternative site to go to, whose displacement would imperil her continuing medical treatment and probably worsen her condition. All of this was fully explained in the decision letter (and, of course, described more fully still in the reports produced in evidence at the public inquiry). Should she be dispossessed from the site onto the roadside or should she be granted a G limited personal planning permission? The inspector thought the latter, taking the view that Mrs Porter's "very special circumstances" "clearly outweighed" the environmental harm involved. Not everyone would have reached the same decision but there is no mystery as to what moved the inspector.

42 Quite why the Court of Appeal thought that some fuller explanation was demanded is unclear. It may be that they focused so closely on the H importance of maintaining the Green Belt that they inflated the reasons requirement in this particular case. But this would be to offend against the principle established in the *Save* case [1991] 1 WLR 153 that the standard of reasoning required is not dependent upon the importance of the issues involved: see para 28 above. In any event the test to be satisfied under the

policy guidance in PPG 2—whether there exist very special circumstances which clearly outweigh the environmental harm resulting—of itself provides the Green Belt with its necessary protection. Or it may be that the Court of Appeal relied more heavily upon the *Doncaster* case [2002] JPL 1509 (referred to in para 31 of its decision—see para 21 above) than was appropriate here. The decision letter in the *Doncaster* case, it should be noted, "left [Sullivan J] in real doubt as to whether, in striking the Green Belt policy balance, the inspector applied the correct policy, as set out in PPG 2": p 1523, para 73. He added, at para 74:

> "Even if it cannot be categorised as perverse, this decision is so perplexing on its face that it is of particular importance that the inspector should be seen to have applied the correct test in Green Belt policy terms."

The personal circumstances in question there, one notes, consisted of no more than the gipsy's concern that his two children's education should not be disrupted by a move. Small wonder that the inspector's grant of planning permission was regarded as perplexing to the point of perversity, and the decision letter as leaving real doubt whether the inspector had erred in law. In the present case, by contrast, no rationality challenge was ever advanced and nor was there any basis in the inspector's reasoning for inferring a material misdirection whether of fact, law, policy, or anything else. This inspector was, I may point out, highly experienced and qualified both as a planner and a surveyor.

II—The vires challenge

43 The Court of Appeal found that the inspector had failed to have regard to a material consideration, namely "the unlawfulness of the applicant's occupation . . . in persistent breach of planning control".

44 It is, of course, plain that Mrs Porter's occupation of the site has been unlawful from the outset. What arises for decision under this head of challenge is, first, whether that was a material consideration, and secondly, if so, whether the inspector failed to have regard to it. As already indicated, the judge at first instance thought it material (going to "the weight to be attached to this long period of occupation"), but held that the inspector took account of it. Before your Lordships, however, both the Secretary of State and Mrs Porter question even the materiality of the unlawful occupation of the site. I shall therefore consider this question first.

The materiality of unlawful use

45 Miss Lieven for the Secretary of State points out that section 73A of the 1990 Act, as inserted by section 32 of and paragraph 16 of Schedule 7 to the Planning and Compensation Act 1991, expressly provides for the grant of retrospective planning permission for development carried out without permission prior to the date of the application. Nothing in the 1990 Act (or the predecessor legislation making like provision) suggests that a retrospective application should be treated any differently from an application for future development. True it is that by section 57(1) of the 1990 Act "planning permission is required for the carrying out of any development of land". But a breach of planning control is not itself a criminal offence and indeed, although unlawful, cannot be enforced against

A after (in most cases) four-years. Even within the four-year period, the Secretary of State's guidance on enforcement (contained in para 6 of PPG 18) provides:

> "In assessing the need for enforcement action, [local planning authorities] should bear in mind that it is not an offence to carry out development without first obtaining any planning permission required for
B it . . . Accordingly, where the [local planning authority's] assessment indicates it is likely that unconditional planning permission would be granted for development which has already taken place, the correct approach is to suggest to the person responsible for the development that he should at once submit a retrospective planning application (together with the appropriate application fee)."

C **46** The mere fact, therefore, that the development was in breach of planning permission and the application for permission was made retrospectively cannot of itself, submits Miss Lieven, be a material consideration militating against the grant of permission. Rather the question for the local planning authority (and, on appeal, the Secretary of State) is simply whether the development as carried out is acceptable in
D planning terms.

47 Miss Lieven's argument goes further. She points to the Court of Appeal's decision in *R v Leominster District Council, Ex p Pothecary* [1998] JPL 335 holding that the fact that a building has already been constructed before planning permission is sought can, in certain circumstances, lawfully be regarded as a consideration *in favour of* a permission which would not otherwise have been granted. Following the building's erection there, the
E local planning authority had chosen not to serve an enforcement notice but rather had invited an application for retrospective planning permission. Schiemann LJ, giving the leading judgment said, at p 345:

> "The authority are only empowered by section 172(1) to issue an enforcement notice if it appears to them that it is expedient to issue the notice, having regard to the provisions of the development plan and to
F other material considerations. I therefore reject the submission that a planning authority is never entitled to consider the likelihood of enforcement action at the time when the application for retrospective planning permission for a building erected without planning permission is before them. It is not rare that buildings are put up without the appropriate planning permission. Sometimes there is no planning
G objection at all. Sometimes there is an insuperable objection. There are many situations between the two ends of what is a continuum. There are situations where the authority would not have given permission for the development if asked for permission for precisely that which has been built, but the development is not so objectionable that it is reasonable to require it to be pulled down. To require this would be a disproportionate sanction for the breach of the law concerned. That is why Parliament has
H imposed the requirement of expediency. What weight the authority gives to the existence of the building is a matter for the authority. There are policy reasons . . . for not giving much weight to the existence of a building put up without the necessary planning permission, but these will not prevail in every case . . . there can . . . be cases where the authority

can say that, while it would not have granted the permission for that precise building there, it is not expedient to require it to be pulled down. Circumstances vary infinitely."

48 Robert Walker LJ agreed with that approach, at p 347:

"I agree that the planning authority was not merely entitled, but in practice bound, to take account of the existence of the [building] which had been constructed without planning permission having been granted. It was a relevant fact that had to be taken into account. The weight to be attached to the fait accompli was another matter."

49 I too agreed, at p 349:

"Reluctant though inevitably one is to allow a developer to be [advantaged] by having broken the law, that advantage must by definition accrue in certain cases—notably whenever the local planning authority do not think it 'expedient' to enforce against a breach of planning control—and yet it will be a rash developer who builds in expectation of such benefit: he is at risk of being ordered to pull down his development and thus stands to lose everything."

50 The Court of Appeal's view on this issue appears to have rested principally upon the European Court of Human Rights judgment in the *Chapman* case 33 EHRR 399, 428, para 102:

"Where a dwelling has been established without the planning permission which is needed under the national law, there is a conflict of interest between the right of the individual under article 8 of the Convention to respect for his or her home and the right of others in the community to environmental protection. When considering whether a requirement that the individual leave his or her home is proportionate to the legitimate aim pursued, it is highly relevant whether or not the home was established unlawfully. If the home was lawfully established, this factor would self-evidently be something which would weigh against the legitimacy of requiring the individual to move. Conversely, if the establishment of a home in a particular place was unlawful, the position of the individual objecting to an order to move is less strong. The court will be slow to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site. For the court to do otherwise would be to encourage illegal action to the detriment of the protection of the environmental rights of other people in the community."

51 But reliance upon that authority, submits Miss Lieven, was inappropriate: the *Chapman* case was concerned with an article 8 claim to respect for the individual's home and not, as here, with whether the individual has established very special circumstances outweighing the public interest in preserving the Green Belt.

52 In my judgment Miss Lieven's argument goes too far. I do not accept that the unlawfulness of development can never properly militate against the retrospective grant of planning permission (but only, as in *Ex p Pothecary* [1998] JPL 335, in its favour). Rather it seems to me that wherever the occupier seeks to rely upon the very fact of his continuing use of land it must

A be material to recognise the unlawfulness (if such it was) of that use as a consideration operating to weaken his claim. Take this very case and assume that Mrs Porter had been relying on her long period of residence to assert that her removal from the site now would cause her particular hardship beyond that resulting from removal after a substantially shorter period of occupation; hardship, for example, by breaking a number of local ties and B friendships. Such a claim would seem to me to raise issues closely analogous to those arising on an article 8 claim and to require substantially the same approach to the lawfulness or otherwise of the period of occupation as the European court adopted in the *Chapman* case 33 EHRR 399.

53 A further point should be made. A development without planning permission is one thing: it is unlawful merely in the sense of being in breach of planning control. Where, however, as here, it has been persisted in for C many years despite being enforced against, that is a rather different matter: it is then properly to be characterised as criminal.

54 I would find it impossible to say in such circumstances that the unlawfulness of Mrs Porter's prior occupation of the site was incapable of being of material consideration in the case. Whether in fact it was material, however, would depend on the way her hardship claim was advanced. If she D was seeking actually to pray in aid her long period of occupation, then to my mind Judge Rich was clearly right to say that the unlawfulness of that occupation would diminish the weight of the case. As it seems to me, however, that really was not the nature or strength of Mrs Porter's hardship claim. The inspector's only mention of her occupation of the site "for a considerable period of time" appears in para 7 of his decision (see para 15 above) and its consideration there was not as a possible point in Mrs Porter's E favour but rather as a possible point against her on the basis that it might have cost her her status as a gipsy (although in the event no such contention was advanced).

55 When the inspector came in para 13 of his decision to summarise the very special circumstances of Mrs Porter's case—her status as a gipsy, the lack of an alternative site in the area, and her chronic ill-health—none of F these factors appears to have owed anything to the length of her residence on the site; her case would have been no different even had she occupied the site for an altogether shorter period.

56 Certainly the inspector found her case for a retrospective planning permission strengthened since its last consideration in 1998 by two subsequent changes of circumstance which, obviously, would not have occurred but for the passage of time whilst she remained in unlawful G occupation of her mobile home. That is not to say, however, that she was relying on her continuing unlawful occupation in itself as constituting part of her hardship claim.

57 I therefore conclude that the unlawfulness of Mrs Porter's prior occupation of the site was of little if any materiality in the particular circumstances of this case.

H

Was regard had to this consideration

58 Assuming, however, in the council's favour that the unlawfulness (including, on the facts here, the actual criminality) of Mrs Porter's occupation of the site was a material consideration to which regard was

required to be had under section 70(2) of the 1990 Act—see para 12 above—was the Court of Appeal correct in concluding that it was overlooked?

59 This conclusion too I find unsustainable. The nature and extent of the unlawful use here was never in doubt. Even assuming it was a material consideration it did not give rise to a "main issue in dispute". Clearly, therefore, the inspector had no need to refer to it in terms: see Lord Lloyd's speech in the *Bolton* case 71 P & CR 309, 314–315, cited at para 34 above. How, then, can it properly be inferred that the inspector overlooked the point for what it was worth? He knew, indeed recorded, that the application was for the "retention" of the mobile home and that "retrospective planning permission is sought". He knew, and indeed summarised, the planning history of the site including Mrs Porter's unsuccessful appeal against the council's enforcement action. That is no basis upon which to infer that the inspector wrongly ignored this consideration. Of course Mrs Porter could gain no credit from her long period of unlawful occupation. But nor was her claim for a retrospective planning permission necessarily to be defeated by it. This element of the case required no detailed discussion in the decision letter. Again, therefore, I conclude that there was no substance in this ground of challenge.

60 It follows from all this that I would allow Mrs Porter's appeal and restore Judge Rich's order dismissing the council's statutory application with costs. The council should also pay Mrs Porter's costs both here and below. There will be no order as to the Secretary of State's costs.

Appeal allowed with costs in House of Lords and below.
No order as to costs of Secretary of State.

Solicitors: Community Law Partnership, Birmingham; Sharpe Pritchard; Treasury Solicitor.

B L S

APPENDIX 4

CHILDREN ACT 2004 (Extract)

Status: ✅ Law In Force ❗ Amendment(s) Pending

Children Act 2004 c. 31

Part 2 CHILDREN'S SERVICES IN ENGLAND

General

This version in force from: **March 20, 2015** to **present**

(version 8 of 8)

11 Arrangements to safeguard and promote welfare

(1) This section applies to each of the following–

(a) a [local authority] [1] in England;

(b) a district council which is not such an authority;

[

(ba) the National Health Service Commissioning Board;

] [2]

[

(bb) a clinical commissioning group;

] [3]

[...] [4]

(d) a Special Health Authority, so far as exercising functions in relation to England, designated by order made by the Secretary of State for the purposes of this section;

[...] [5]

(f) an NHS trust all or most of whose hospitals, establishments and facilities are situated in England;

(g) an NHS foundation trust;

(h) the [local policing body] [6] and chief officer of police for a police area in England;

(i) the British Transport Police Authority, so far as exercising functions in relation to England;

[

(ia) the National Crime Agency;

] [7]

(j) a local probation board for an area in England;

[

(ja) the Secretary of State in relation to his functions under sections 2 and 3 of the Offender Management Act 2007, so far as they are exercisable in relation to England;

] [8]

(k) a youth offending team for an area in England;

(l) the governor of a prison or secure training centre in England (or, in the case of a contracted out prison or secure training centre, its director);

[

(la) the principal of a secure college in England;

] [9]

(m) any person to the extent that he is providing services [in pursuance of section 74 of the Education and Skills Act 2008] [10].

(2) Each person and body to whom this section applies must make arrangements for ensuring that–

(a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and

(b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need.

(3) In the case of a [local authority] [1] in England, the reference in subsection (2) to functions of the authority does not include functions to which section 175 of the Education Act 2002 (c. 32) applies.

(4) Each person and body to whom this section applies must in discharging their duty under this section have regard to any guidance given to them for the purpose by the Secretary of State.

Notes

1.

Words substituted by Local Education Authorities and Children's Services Authorities (Integration of Functions) Order 2010/1158 Sch.2(2) para.55(2) (May 5, 2010)

2. Added by Health and Social Care Act 2012 c. 7 Sch.5 para.129(a) (April 1, 2013 subject to savings and transitional provisons specified in SI 2013/160 arts 5-9)

3. Added by Health and Social Care Act 2012 c. 7 Sch.5 para.129(b) (April 1, 2013 subject to savings and transitional provisons specified in SI 2013/160 arts 5-9)

4. Repealed by Health and Social Care Act 2012 c. 7 Sch.5 para.129(c) (April 1, 2013 subject to savings and transitional provisons specified in SI 2013/160 arts 5-9)

5. Repealed by Health and Social Care Act 2012 c. 7 Sch.5 para.129(d) (April 1, 2013 subject to savings and transitional provisons specified in SI 2013/160 arts 5-9)

6. Words substituted by Police Reform and Social Responsibility Act 2011 c. 13 Sch.16(3) para.332 (January 16, 2012)

7. Added by Crime and Courts Act 2013 c. 22 Pt 1 s.8(1) (October 7, 2013: insertion has effect as SI 2013/1682 subject to savings and transitional provisions specified in 2013 c.22 s.15 and Sch.8)

8. Added by Offender Management Act 2007 c. 21 Sch.3(1) para.4(3) (April 1, 2008)

9. Added by Criminal Justice and Courts Act 2015 c. 2 Sch.9 para.14 (March 20, 2015)

10. Words substituted by Education and Skills Act 2008 c. 25 Sch.1(2) para.84 (January 26, 2009)

Subject: Family law

Keywords: Adaptations; Power to promote well-being; Safeguard measures

APPENDIX 5

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

Convention on the Rights of the Child

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their

own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy

throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute

a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any

amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.

APPENDIX 6

AZ v SSCLG and South Gloucestershire District Council [2012] EWHC 3660(Admin)

Neutral Citation Number: [2012] EWHC 3660 (Admin)

Case No: CO/55/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20th December 2012

Before:

HIS HONOUR JUDGE ANTHONY THORNTON QC
Sitting as a judge of the High Court

Between:

AZ	**Applicant**
- and –	
(1) Secretary of State for Communities and Local Government	
(2) South Gloucestershire District Council	**Respondents**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Michael Rudd (instructed by **Bramwell Browne Odedra**) for the **Applicant**
Miss Lisa Busch (instructed by **The Treasury Solicitor**) for the **First Respondent**
The Second Respondent did not appear and was not represented

Judgment
As Approved by the Court

.....

HIS HONOUR JUDGE THORNTON QC

His Honour Judge Anthony Thornton QC:

A. Anonymity order

1. Although this judgment is concerned with an application under section 288 of the Town and Country Planning Act 1990 ("TCPA") that is made in relation to a planning appeal made under section 78 of the TCPA, it involves a detailed discussion of the personal details of the personal circumstances of three adults and a child now aged 13 and of their family, private and home lives. These family members are the applicant, his wife, his son who is his wife's step-son, and his sister-in-law, being his wife's sister. Any court has the power in cases involving children, in whatever sphere the case is concerned, to anonymise the names of a child party or a child who is directly involved in the case that that court is concerned with so that he or she cannot be identified and to similarly anonymise the names of any other party or witness who, by being named in the case, will enable that child to be identified. There is no reason for not adopting the same practice in this application and, although anonymity has not been requested, I am exercising my power to direct anonymity. Since the child will be readily identifiable if his father, the applicant, is named, I am also directing anonymity of the applicant, his wife and his wife's sister. The applicant will be known for all purposes connected with these proceedings as "AZ".

2. I am making this order because it is not in the best interests of this child to have him publicly named or to be identifiable by anyone reading this judgment or any report of it as can be seen from a reading of the factual background to the issues that arise for decision. This anonymity is necessary in order to pay due respect to his rights to a private and family life. It is for this reason that AZ, his wife, his son and his sister-in-law referred to throughout the judgment as the applicant, the applicant's wife and the applicant's son and the applicant's sister-in-law.

3. I am making this order in the exercise of my powers under CPR 39.2(4) and Section 39 of the Children and Young Persons Act 1933 and in the exercise of my duty to pay due respect to the private life of the applicant's son provided for by section 6 of the Human Rights Act 1998 ("HRA") and article 8(1) of European Convention of Human Rights ("HCRA"). In adopting this course, I have relied on the decision of the House of Lords in *In re S (A Child) (Identification: Restrictions on Publication)*[1] and of the Supreme Court in *Guardian News and Media & Ors, Re HM Treasury v Ahmed & Ors*[2].

4. I am, therefore, in conformity with normal practice when an anonymity order is made in respect of a child, making the following direction:

> (1) The applicant is to be named and known as AZ for all purposes in connection with this judgment and these proceedings.
>
> (2) No newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of the child concerned in this application or in the planning appeal from which this application is brought, either as being one of the persons by or in respect of whom the planning appeal was brought or this application is made or as being a witness or providing evidence to the planning appeal or that is referred to in this application.

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1 [2005] 1 AC 593, HL(E).
2 [2010] UKSC 1, SC.

(3) No picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid; except in so far (if at all) as may be permitted by the direction of the court.

(4) This order extends to any subsequent hearing or inquiry held in connection with the planning appeal which this order relates to and which results from the quashing of the decision previously made that has been ordered as a result of the judgment in this application.

B. Introduction

5. This is an application brought under section 288 of TCPA. The applicant seeks to question the decision of an inspector appointed by the first respondent, the Secretary of State for Communities and Local Government ("the Secretary of State"), dismissing the applicant's appeal under section 78 of the TCPA. This decision was dated 19 November 2010. The appeal had been brought by the applicant against the failure of the second respondent, South Gloucestershire District Council ("SGDC"), to give notice within the prescribed period of a decision on his application for planning permission for the stationing for residential purposes of a mobile home in an open field in the green belt located approximately one mile north of Pucklechurch in South Gloucestershire. In other words, the applicant seeks to question the inspector's refusal to grant him planning permission to place his mobile home on his field in the green belt and to use it to live in as his home with his young son

6. The decision was made following a hearing at which the applicant was represented by a non-legally qualified planning consultant and SGDC by one of its planning officers. The applicant questions the appeal decision on the grounds that amount to complaints that the inspector did not comply with relevant requirements of the Town and Country Planning (Hearings Procedure) (England) Rules 2002[3] ("the Hearings Rules"), the Human Rights Act ("HRA") and the law and policy relating to the granting of permission subject to conditions[4]. In short, the applicant questions the inspector's refusal to grant either planning permission or a temporary planning permission for his mobile home on a green belt site as resulting from a failure to comply with various relevant requirements that it was required to comply with.

C. The background facts

7. **Source of the background facts.** The inspector's decision does not summarise the relevant factual background to the applicant's human rights claim in any detail. Moreover, neither the applicant's hearing statement nor the list of major issues that were or should have been identified by the inspector[5] were included in the application bundle. However, three detailed consultant forensic psychiatric reports that were concerned with the applicant's psychiatric and psychological conditions were supplied to the inspector for the appeal hearing and copies were provided in the application bundle. I have obtained my summary of the factual background from the contents of these reports in addition to the inspector's decision since the inspector accepted the conclusions reached by the report writers in these reports which were based on the factual background recorded in detail in them[6].

8. The first of these reports was dated 9 March 2004. It had been prepared by Dr Mason on the instructions of the applicant's then solicitor to assess the applicant in connection with the claim that he had started against the operators of the care home in Penarth where he had resided

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3 SI 2002/2684.

4 Section 72(1)(b) of the TCPA and DOE Circular 11/95: *Advice upon the imposition of conditions granting temporary permission*.

5 See paragraphs 101 - 105 below.

6 See paragraphs 12 and 15 of the decision.

for about 9 months many years previously when he was 12 years old. This report contained considerable detail about his life up to 2004. The other two reports, dated 3 February 2009 and 21 October 2010 respectively, were prepared by a different psychiatrist, Dr Reeves. The first was for use in connection with the applicant's plea in mitigation following his conviction in a criminal case in 2009 and the second, which was to be read with the first, was for use in the appeal hearing in 2010 that I am now concerned with. These two reports complimented Dr Mason's report and provided further details of the factual background up to the date of the second report.

9. All three reports are consistent with each other and they collectively provide considerable detail of the applicant's life and that of his wife and son as well as full assessments of his psychiatric and psychological conditions, none of which the inspector queried in her decision. That is why I have taken my summary of the factual background to both the appeal and this application from these reports. I have also relied, for the planning history of the appeal site, on the hearing statement of the applicant's representative that was used at the hearing and which was also contained in the application bundle.

10. **The applicant.** The applicant was born on 4 March 1957 and, at the date of the inspector's hearing, he was 53. His early years appear to have been uneventful with no unhappy memories. However, others appear to have taken a different view since he was subsequently assessed at the age of 12 as being emotionally inadequate and insecure, possibly it was suggested as a maladjusted response to a combination of familial rejection, overindulgence and frequent changes of home which included periods when the family were living in a mobile home. It would also seem that he witnessed, and was himself subjected to, frequent bouts of domestic strife and violence.

11. When he was 11, he fractured his skull and was in hospital for a lengthy period and the resulting injury left him with typical symptoms of post-concussional syndrome with headaches, memory loss, irritability and dizziness. He was bullied when he started secondary school to such an extent that he refused to attend school and as a result was sent to an approved school for a short period when he was 12. On his release, he spent time in two care homes. At the second, in Penarth where he resided for nearly 8 months, he was very badly treated physically and emotionally and was frequently excessively beaten. He remained and still remains subject to flashbacks and other severe symptoms so that, years later, he made the claim for this treatment that I have already referred to which was settled in 2004 by his receiving a payment of £10,000.

12. The applicant returned home when he was 13 and left school when he was 15 without any qualifications and, at about that time, was assessed as being illiterate with an IQ of 91. He left home soon afterwards, lived with his grandparents for a time and went to work in the mines for about 7 years as a blacksmith striker. Whilst working underground, he developed white finger and other damage to his hands from the pneumatic tools which he worked with. This has resulted in his permanent disability which remains extremely painful for which he is still in receipt of disability living allowance which is his only source of income. He met the woman who became his first wife when he was 18 and they married when they both were 21. This short marriage only lasted 10 months.

13. Soon after his first marriage ended, the applicant decided that he could no longer stand working underground with the constant fear of another of the occasional occurrences of the roof collapsing. He ceased working in the mines and moved to Bristol and lived with an extended itinerant family in their mobile homes for about 3 years before moving into his own mobile home and becoming a nightclub doorman. He had two short and, on his account, tempestuous marriages in this period whilst still in his 20s. The first of these occurred when he

married his second wife when he was in his mid-20s in the early 1980s. After a particularly stormy marriage which lasted for about 4 years, he moved another woman into his mobile home and, having divorced his second wife, he married that woman as his third wife when he was 28 in 1985. The marriage did not last long and his third wife then left him.

14. By his own account, the applicant led an unstable and promiscuous lifestyle throughout his 20s and had been extremely violent to each of his first three wives during his three marriages. Moreover, he was convicted on four separate occasions between 1982 and 1986 for violent behaviour and had had to be operated on for a fractured jaw that he had sustained in a fight. He met his fourth and current wife in 1988 when he was 31 and has been married to her ever since. In 2004, he told his psychiatrist that this was a happy marriage which was not punctuated with any domestic violence and that he still loved his wife to bits.

15. Before her marriage, his wife had lived in a rented house in Bristol which became their matrimonial home. Following their marriage, the couple initially lived a nomadic life for a short time in a mobile home. On their return to Bristol, he worked as a nightclub bouncer and although he controlled his violence, he continued with his promiscuous lifestyle and was unfaithful on numerous occasions. After a number of years, he took a job in a nightclub in South Wales, partly because of his wife's dissatisfaction with his behaviour, and for the next 4 years he lived in a mobile home working as a bouncer. His wife continued to live in Bristol in the matrimonial home during the week and with him in his mobile home at the weekend.

16. The applicant's son was born in 2000 to one of the women that he had had a relationship with whilst working in South Wales. The applicant helped to care for him from a very young age and the infant lived with his biological mother during the week and with his father and step-mother in his father's mobile home at the weekends. His wife worked in Bristol and stayed in the matrimonial home during the week and visited the applicant and her step-son at the weekend. For a relatively short period when his son was aged 2, the son's biological mother insisted that he lived exclusively with her. This arrangement soon changed because his mother dropped out of his life even though a court and previously awarded both of them joint custody. The applicant's son has been cared for by him ever since and he subsequently stated that his son's biological mother took the decision to stop looking after their son because she didn't want any further part in his upbringing.

17. In 2002, the applicant left South Wales with his son and returned with him to live in the matrimonial house in Bristol. He took this step when the nightclub that he was working in was sold as well as for other unspecified reasons. His wife had remained throughout her marriage in full-time employment with the NHS and living in the matrimonial home when, in 2004, she moved to South Gloucestershire to live with her sister in her sister's house. She is a chronically disabled multiple sclerosis sufferer and the applicant's wife moved in with her in order to care for her on a full-time basis. Her house is located in the vicinity of Pucklechurch.

18. At about the same time that the applicant's wife moved in with her sister, he found that he could no longer bear to live in a house or an enclosed environment. The applicant and his wife learned soon afterwards that the appeal site had come up for auction. It is an open field located reasonably close to the applicant's wife's sister's house. They decided that it was an ideal location for the applicant to pitch his mobile home to enable him and his son to live close to the applicant in a location which would provide a solution to his fear of enclosure, his need for an open-air lifestyle and the impossible task his wife had to care for him and his son on a daily basis as well as caring for her sister. By then, both the applicant and his son had become very dependent on his wife's care. They bought this field at auction with the help of the abuse damages he had recently received and his wife's personal resources.

19. This site was bought in his wife's name but the applicant would have acquired both an equitable and a matrimonial interest in the site as well as owning the mobile home parked on the site. Both the applicant and his wife were unaware that the site was located in the green belt and that the mobile home could only be lived in with planning permission which it was very unlikely that they would obtain.

20. **The applicant's psychiatric and psychological conditions and lifestyle.** The psychiatric assessments of the applicant were provided by Dr Mason's 2004 report and Dr Reeves's 2009 and 2010 reports. Dr Reeves attended the hearing but the decision does not suggest that he added to his reports during the hearing. The inspector was also provided with a letter from the applicant's General Practitioner whose contents were not discussed in the decision and a copy was not provided in the application bundle.

21. The applicant continues to suffer from an apparently untreatable chronic anxiety state or condition which overcomes him when he is in any enclosed space. This fear or phobia had been induced by a combination of his personality problems and the consequences of both his childhood ill-treatment and the mine working conditions that he had experienced in his youth. Its enduring pattern has led to his being clinically depressed and impaired in social, occupational and other areas of functioning. This phobic condition started his childhood and as a result, from the early 20s onwards, he has lived mostly in a mobile home. He lived with his wife in Bristol after they had married in her house until he moved to a mobile home in South Wales because of his growing difficulty in living in an enclosed environment. He lived there until his return to his matrimonial home in Bristol with his son but soon afterwards he found that his phobia had intensified and that living in an enclosed environment had become unbearable for him.

22. The applicant therefore now needs to live permanently in a mobile home located in a rural environment where he can eat in the open air or on an adjoining covered deck. If the applicant is confined in a building or an enclosed space for more than a short period, he becomes stressed and starts to sweat profusely, palpitate and suffer from flashbacks of his traumatic childhood ill-treatment and his years working underground. He also becomes severely depressed during these palpitating and depressive bouts. These symptoms are characteristic of Post-Traumatic Stress Disorder, although there is uncertainty whether he is a full PTSD sufferer, and they are related both to his childhood ill-treatment and his underground working experiences as well as his personality disorder which now manifests itself by his difficulties with cognition, interpersonal functioning and impulse control.

23. He has been prescribed with and has taken antidepressants continuously since 2005 and attends his GP surgery once a month. When particularly stressed and depressed, he experiences suicidal ideation and has been known to forego eating for 2 to 3 days at a time and to suffer from consequent weight loss. These symptoms have been recurrent throughout the long period of uncertainty about his future and he has explained that he would commit suicide if he was expelled from the site save for his great love for his son and the knowledge of how upset his son would be to lose his father. He is also in constant pain from his long-term hand and white finger disabilities caused by his time working underground with pneumatic tools.

24. He has suffered from these separate but inter-related conditions throughout his adult life but they appear to have intensified in the last ten years or so. He is able to look after himself but is heavily reliant on his wife's daily visits. He spends most of his waking hours out of doors and finds even short car journeys and any time spent in shops difficult to cope with. He is able to care for his son who has been brought up in a mobile home since he was about 5 and who appears to be thriving at school and in the natural environment that he is being brought up in. Father and son have a close relationship and the applicant is devoted to his son although both

are clearly heavily dependent on the regular daily contact that they have with the applicant's wife who is, of course, his son's step-mother. The appeal site was acquired in order to provide both father and son with the outdoor home that he requires and which can be readily visited by his wife. The possibility of his being evicted from his mobile home or of his having to re-locate it from the appeal site to any other site regularly causes him acute and debilitating anxiety and suicidal ideation which is only controlled by his overriding love for his son.

25. Apart from his regular visits to his GP's surgery to collect his anti-depressant prescription, the applicant is not under any psychiatric, psychological or medical care. SGDC's social, children's, housing and planning services have never had any involvement with either the applicant or his son and it would appear that none of these departments have assessed the family's collective and individual needs or to have given any advice as to relocation or on planning, housing or social matters. The applicant's only apparent source of income is his disability living allowance and he and his wife share his son's child allowance which is spent on his son's needs. The applicant spends his days tending the appeal site, looking after his son and undertaking open air country pursuits. The inspector found that he had a good support system albeit that that finding was based solely on his answer to a question about how he would construct the structures associated with the proposed development after his mobile home has been resited. His answer was to the effect that he had many friends who would help him.

26. Dr Reeves, when interviewing the applicant on 31 January 2009, considered that he had little comprehension of the fact that he was living unlawfully on the appeal site and that he had acquired it without understanding that he would not get planning permission to live there. He has clearly been unable, given his disabilities, personality disorder and illiteracy, to look for an alternative site to pitch his mobile home or to plan his future away from the appeal site and he and his wife do not appear to have given any thought to his and his son's possible need to move away from the area and, hence, away from her support and assistance. It would seem from the available evidence that no alternative site would be suitable for him and his son unless it could readily be visited on a daily basis by his wife and which was located in a secluded spot that enabled him to lead an open-air lifestyle and his son to attend secondary school nearby and to continue growing up.

27. The applicant is clearly also of the view that no other site was available to him that was suitable for his needs and that, if he was evicted from the appeal site, he would be homeless. SGDC provided no evidence to show that other suitable open air sites were available where the applicant could continue to live in the open air and he and his son could continue to receive daily support with overnight stays from his wife and his son's schooling and upbringing would not be interrupted or disrupted. The absence of any evidence from the applicant or SGDC of available alternative suitable sites for the applicant and son to relocate to would suggest that the applicant's view that he would have nowhere else to go to if he was evicted from the appeal site was and remains a realistic one.

28. There is independent evidence that corroborates the applicant's evidence that he cannot live or be relocated in a house and needs an open-air lifestyle. When the applicant was sentenced in 2008 for his part in cannabis cultivation activities that were discovered in the former matrimonial home in Bristol after it had been sub-let to tenants, he was given a suspended sentence after the sentencing judge had been provided with a copy of Dr Reeves's first report. This unusually light sentence for the type of offence he was sentenced for is explained by the sentencing judge stating that he would not go to prison on compassionate grounds due to his chronic claustrophobic condition. He appears similarly to have been given a very light sentence by the judge who sentenced him following his pleas of guilty for non-compliance with the enforcement notices he had been served with since he was given a

conditional discharge. The sentencing remarks and the basis of this sentence were not summarised in the evidence before the inspector but it is reasonable to infer that that vey lenient sentence reflected the judge's acceptance of the applicant's psychiatric condition.

29. **The applicant's son.** The applicant's son has lived with his father until he was about 2 and then, after a short period of separation, permanently ever since. Although his biological mother still has joint custody of him, he has not lived with her since about 2002, has not seen her at all for some years and has only had very infrequent contact with her in other ways since he ceased to live with her. The applicant's son is reported to have done well at primary school and in September 2011 he moved to a local secondary school. The applicant drives his son to school on most days and he or his wife pick him up from there. There was little evidence as to what would happen to the applicant's son if he was required to move off the site. It is clear that he could not go to live with his step-mother given her circumstances as her sister's full-time carer and the applicant's only solution was that he would have to go to live with his biological mother notwithstanding the fact that his has not seen her for many years and nothing is currently known of her family circumstances or inclinations.

30. **The applicant's wife.** The applicant's wife comes from a gypsy family given that both her grandparents were gypsies. These grandparents lived at Hawkesbury Upton about 11 miles away from the appeal site. According to Dr Reeves's first report, the applicant's wife became estranged from her husband in or before 2000 but they have remained and still remain married and close friends and she cares for both her husband and her step-son as much as she is able to whilst acting as her sister's full-time live-in carer close at hand. This care is provided during her daily visits to the mobile home, her regular sleep-overs there and collecting her step-son from school. She left her employment in the National Health Service when she moved in with her sister. She has retained ownership of their former matrimonial home in Bristol when she moved to her sister's home and she has sub-let it and the rent that she is paid is her only source of income. The inspector's decision provided no further details of her, her lifestyle or her financial resources save that Dr Reeves, in his second report dated 21 October 2010, reported that she was building a house in Bristol which was then almost complete.

31. **The applicant's son's biological mother**. The applicant told Dr Mason that his son's biological mother handed care of their son over to him soon after he was born in order to tie him down and stop him being unfaithful to her. When his son was two, his mother demanded him back and, after court proceedings, the court ordered that the son's custody should be joint. For a time, the son lived part of the time with each of his parents but then his mother lost interest in him and he has remained with the applicant from then on. There is no other evidence of the biological mother's home and family situation or what she and the son respectively think about the possibility of him returning to live with her after so many years living apart with little indirect contact.

32. **The applicant's sister-in-law**. The inspector did not obtain any information about the applicant's sister during the discussion at the hearing save that she suffers from a chronic disabling condition necessitating her sister to act as her full-time live-in carer. Since her sister was also caring for the applicant and his son and sharing a family life with them in their home, a refusal decision could engage the article 8 rights of the applicant's sister-in-law since she is wholly dependent on her sister and that dependency could be affected by any need for the applicant and his son to move away from the appeal site.

33. **The applicant's family.** The applicant's family consisted of the applicant, his wife and son and their family life also involved, albeit very indirectly through the applicant's son, his son's biological mother and, much more directly through the applicant's wife, her sister. Dr Reeves in his second report described how he had asked the applicant why he didn't live with

his wife and he replied that she found him too volatile and furthermore he could not stand living in a house. He has remained heavily dependent on her and she spends nights in the mobile home on a regular basis.

34. The applicant's wife has had a significant role in looking after the applicant's son throughout their marriage. From infancy, she helped care for him because his son always stayed with his father at weekends when custody was shared and his wife always stayed with both of them at the weekends. Whilst the applicant lived in the matrimonial home, all three family members lived as a family and his wife claimed tax credit for her step-son since she was the only bread-winner and she also received the child allowance payments. This living arrangement was only broken up because his wife went to care for her sister and needed to sub-let the matrimonial home to support herself since she had no other income.

35. Since her step-son son has not seen his biological mother since he was about 4 years old and has only had occasional contact with her since, it is clear that his step-mother has always played a significant maternal role in his life and that the son's biological mother has not been involved in her son's life since she stopped seeing and caring for him and she has, in effect, dropped out of his life.

36. **Planning history of the appeal site.** The appeal site is jointly owned by the applicant and his wife[7] and was paid for by the wife in late 2005 for £21,000. These funds were provided by the applicant's wife who is also the registered proprietor of the site in the Land Registry. However the funds were provided, it is clear that the applicant and his wife have always treated their funds and resources as being jointly available to maintain both of them and the applicant's son so that both the applicant and his wife have occupational, equitable and matrimonial rights in both the site and the mobile home.

37. Following the acquisition of the appeal site, the applicant constructed a day room, sheds, fencing and associated paraphernalia around the mobile home he had parked there and he and his son moved into it. The site is bounded by agricultural land on its north, east and south sides and on its west side by a residential dwelling that is located on the road leading north out of Pucklechurch with agricultural land beyond. There is an access into the north western corner of the site from the side road that it fronts. The site of the mobile home and its associated buildings has an area of 0.25 of an acre within an appeal site area of 2.4 acres.

38. SGDC became aware of what was clearly and obviously unauthorised development in the green belt soon after the applicant had acquired the site and moved into the mobile home with his son. No doubt in consequence of SGDC's awareness, the applicant served a planning application on SGDC dated 7 April 2006 for the location of 2 mobile homes on the site for the use of a gypsy family. This was clearly a reference to himself, his wife and his son and to their wish to have permission for two mobile homes for their use. This application was refused on 26 September 2006. Meanwhile, SGDC served a stop order on the applicant dated 11 July 2006 which expired on 8 August 2006 and a second stop order dated 9 August 2006 which expired on 12 August 2006. SGDC also served two enforcement notices dated 9 August 2006 and two further enforcement notices dated 4 September 2006. The cumulative effect of these two stop orders and four enforcement notices was to require the applicant to remove his mobile home and the unauthorised development from the site. The applicant appealed against the refusal of

[7] The joint ownership must have been an equitable interest in the proceeds of sale since legal title is vested in the applicant's wife's name. However, the circumstances of the purchase suggest that the applicant and his wife both have a joint interest in the appeal site pursuant to a resulting trust. The applicant also had a statutorily imposed matrimonial interest and both have an occupational, equitable and matrimonial interest in the mobile home.

his planning application and all four enforcement notices. These appeals were dismissed on 11 July 2007.

39. Following those dismissals, SGDC prosecuted the applicant for non-compliance with the enforcement notices. The only details of this prosecution are provided in Dr Reeves's second psychiatric report which suggests that the applicant pleaded guilty to the charge or charges in the Crown Court and was given a conditional discharge and ordered to pay the costs of the prosecution in the sum of £8,000. The report states that the applicant was told by the sentencing judge that he would have to vacate the site but there are no other details of the applicant's basis of plea or of sentence.

40. The applicant was, in late 2008, convicted of offences concerned with the cultivation of cannabis in his wife's rented house in Bristol that his wife had sub-let when going to live with her sister. According to the applicant, he had been found by chance in the house when it had been raided by the police. He was there, according to his account, during one of his infrequent visits to the house to have a shower. He denied any knowledge or involvement in the cannabis cultivation that was taking place on the premises but the jury did not accept his defence and he was convicted. He was sentenced to two years imprisonment. However, the sentencing judge is reported to have suspended this sentence for two years having considered Dr Reeves's first psychiatric report prepared on the applicant and its assessment of his acute fear of living or remaining inside any building including, in particular, a prison.

41. The applicant, with the assistance of the planning consultant he had then recently engaged, served a further application for planning permission on SGDC dated 13 October 2009 seeking permission to stand a mobile home in a different and more secluded area of the appeal site from that which his mobile still occupies. Presumably the proposed re-siting of the mobile home was intended to reduce the planning harm that would be occasioned by the siting of a mobile home in its current position. For reasons that were not explained, SGDC never determined this application and a notice of appeal was served on the Secretary of State dated 8 June 2010 as a result. At the same time, the applicant served a second further planning application for a mobile home on SGDC which was refused on 12 August 2010. The appeal proceeded only in relation to the non-determination of the first of these two applications and it was dismissed in the decision dated 19 November 2010 that is the subject of this application.

42. **SGDC.** Although the applicant and his son have lived unlawfully in SGDC's area since 2006, there has been no reported contact between either of them and SGDC's housing, homelessness, social, children's or mental health services and its planning services do not appear to have given the applicant any advice about possible relocation sites. Similarly, neither the applicant nor the son have been visited or assessed by anyone from SGDC even though the son might become a child in need if he was evicted from the appeal site, particularly if that made him homeless. In the case of the applicant, no-one from or on behalf of SGDC appears to have assessed his psychiatric, psychological or medical conditions even though, as the inspector recognised, he has serious mental health problems.

D. The appeal

43. SGDC should have decided the planning application that was dated 13 October 2009 within 8 weeks starting with the day after it received it[8]. It did not explain to the inspector why this application had not been determined by 8 June 2009 which was the date on which the applicant exercised his right of appeal by serving a notice of appeal on the Secretary of State. The appeal was brought under section 78 of the TCPA and the Secretary of State had to deal

[8] Article 7 of the Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2006.

with the appeal as if the application had been dismissed and had been made to him in the first instance[9]. The appeal process therefore considered and determined the application as one that had not previously been considered by anybody.

44. The Secretary of State directed a hearing and the applicant's planning consultant representative, Mr Matthew Green, submitted a hearing statement that identified the main issues that arose for determination. This contains the following extract:

> "95. Article 8 rights are engaged and are relevant as any dismissal of this appeal could result in the loss of [the applicant's] home, … the loss of a home wold also have a clear detrimental effect on [the applicant's] family life.
>
> 96. In order for an interference with human rights to be justified, it must be shown that the harm caused by the interference is proportionate and necessary.
>
> 97. It is difficult to see how the loss of [the applicant's] home, the potential harm to [the applicant's] mental health and the potential harm to the family relationships can be regarded as proportionate when set against the totality of harm caused.
>
> 98. This is a case where Human Rights are intrinsic to the overall decision as to the test of whether the harm was proportionate given the peculiar circumstances of the case …."

45. Although this summary only provided outline details of the article 8 issues that had to be determined, it can be seen from what it contained, when read with the psychiatric reports and the other documents that Mr Green submitted to the Secretary of State, that these issues would include both the hearing and the inspector considering of the following matters at the hearing and in her decision:

(1) Whether the applicant's mental and physical health had the effect that he had to remain living with his son on the appeal site, as opposed to living on any other site, in a mobile home;

(2) Whether it was correct that no clear alternative accommodation options were available to the applicant and his son;

(3) Whether the refusal of planning permission amounted to an unreasonable and disproportionate interference with his, his son's and his wife's article 8 rights relating to their family lives and their home so as to amount to very special circumstances justifying a permission on compassionate grounds or because a refusal would be a disproportionate interference with the various family members' article 8 rights;

(4) What the son's best interests were in relation to the possible decision to be reached by the inspector on the planning application; and

(5) Whether, on the assumption that permission was not granted with or without a personal condition, a temporary permission of appropriate length should be permitted, again whether with or without a personal condition.

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[9] Ibid., section 79(1).

(6) What considerations and possible future changes in the applicant's circumstances should be taken into account in considering whether he should be granted a temporary permission.

46. The hearing took place in the presence of the applicant and his representative, Dr Reeves and a planning officer representing SGDC and was conducted by the inspector as a discussion without cross-examination as required by the Hearing Rules.

E. **The appeal decision**

47. The appeal decision, dated 19 November 2010, refused planning permission and dismissed the appeal. It first considered the nature and form of the proposed development and decided that it would create a harmful effect on the character and appearance of the area and that it was in conflict with the green belt. This decision, on planning grounds was one that was both in conformity with applicable planning policy and unchallengeable.

48. The decision then dealt with the remaining issues as follows:

> "12. The appellant submits that there is a 'substantial material consideration that alone clearly outweighs the combined harm, so that very special circumstances exist'. I have read a Report from 2004 from Dr F Mason; letters from [applicant's] local doctor and 2 later Reports from Dr R Reeves who attend the hearing. These all concern the anxiety state of the appellant, possibly post traumatic stress and depression: I have read these carefully. [the applicant] has an aversion to live in a house. He becomes panicky, and cannot stand being confined. This is why living in a mobile home is so important to him; even on rainy days he lives and eats outside on his decking under a canopy. The Reports state that, if [the applicant] is forced to leave his site, he contemplates suicide but Dr Reeves continues 'he will not do it because of [the] son who would miss him so much'.
>
> 13. I do not underestimate the severity of the mental state described in the reports. Nevertheless, anyone troubled by such serious thoughts should, it seems to me, be receiving appropriate treatment. There is no evidence to indicate that this site, and this site alone, is the only place that the applicant could live the outdoor-life that he desires.
>
> 14. The applicant argued that, if he has to leave his site, his son would have to move back to live with his biological mother, but I have seen no evidence that this is inevitable. According to the first report of Dr Reeves, a judge awarded joint custody of the child. This history might well be taken into account *if*[10] any decision needs to be made at all about the child's home. I fully accept that the son is progressing well at a local school but, as I established at the hearing, he will be moving to secondary school in September 2011 (possibly in Yate) and so another place to live could be sought which would permit the appellant and his son to remain together and for his son to continue his education.
>
> 15. I note the outcome of the appeal decisions of July 2007 regarding the Enforcement Notices. It would appear that despite these and subsequent prosecution in the Courts, the appellant has done nothing to look for an alternative site, during this considerable period of time. In answer to my question at the hearing, he said that his wife helps him daily and is a friend to him; it appears she bought him this field. [the

[10] The use of italics was the inspector's – see paragraph 139 below.

applicant's] life and that of his wife seem closely intertwined; [the applicant] goes to her house to have a shower; he "did the letting" of his wife's house in Bristol. Dr Reeves states that "she comes over every day and sometimes spends the night". In answer to my question at the hearing, the appellant also stated that he had many friends who would help him construct the appeal proposals; he therefore appears to have a good support system. I acknowledge that the appellant has severe mental health problems but these are of long standing; he has made no attempt to find another site despite knowing since 2007 that he would have to move. Accordingly, for all the reasons given above, I am only able to attach moderate weight to those factors; there is nothing to suggest that a less harmful site might not have been identified;

Conclusions

…

17. Overall, I conclude that the other considerations do not clearly outweigh the totality of harm to the green belt and the other harm I have identified; …

18. Submissions were made concerning a temporary permission, in the event that I did not consider a permanent permission justified and taking into account any reduced harm arising from a limited period of permission. Dr Reeves expressed the view that the appellant's condition was unlikely to change substantially in the short/medium term. If there is no realistic prospect of a change in circumstances, then a temporary permission would be inappropriate. …

19. Submissions were made relating to Article 8 of the ECHR and I recognise that dismissal of this appeal would interfere with [the applicant's] home and family life, particularly in the light of the history regarding the Enforcement Notices. However, this must be weighed against the wider public interest. For the reasons given above, I have found that this proposal would be harmful to the need to protect the openness of the green belt and I am satisfied that this legitimate aim can only be adequately safeguarded by the refusal of permission. On balance, I consider that the dismissal of the appeal would not have a disproportionate effect on [the applicant].

20. I have taken account of all other matters raised, including the use of any of the conditions suggested but find nothing that changes my decision on this appeal."

F. **The issues arising in this application**

49. On behalf of the applicant, it was contended that three issues arose for decision on this application. These were:

(1) Whether the inspector failed properly to consider and assess the psychiatric evidence and thereby failed properly to assess the weight to be given to this evidence;

(2) Whether the inspector failed to consider the applicant, his son's, his wife's, his sister-in-law's and his son's biological mother's article 8 rights; and

(3) Whether the inspector failed properly to consider the imposition of a personal condition and the claim for temporary planning permission.

G. **The law**

(1) **Planning application in the green belt**

50. **The policy.** Green belt policy is set out in a Planning Policy Guidance document[11] which has always been considered to be a cornerstone of the Secretary of State's planning policies. The relevant purpose of preserving green belts is to assist in safeguarding the countryside from encroachment[12] and the relevant objectives for the appeal site were to provide access to the countryside for the urban population, opportunities for outdoor recreation near urban areas, to retain attractive landscapes and enhance landscapes near urban areas, to secure nature conservation interest and to retain land in agricultural use[13]. The purposes of including land in green belts are of paramount importance so as to ensure their continued protection and should take precedence over other land use objectives[14].

51. There is a general presumption against inappropriate development within a green belt and such development is, by definition, harmful to the green belt. Inappropriate development is any development except that defined as not being inappropriate. Such development should not be approved save in very special circumstances. PPG2 defines how an application for inappropriate development should be approached as follows:

> "3.2 Inappropriate development is, by definition, harmful to the green belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the green belt when considering any planning application or appeal concerning such development."

The applicant's and the Secretary of State's[15] hearing statement referred to this policy and to the other relevant green belt and SGDC policies.

52. **Only possible site.** The applicant, when submitting an application, did not have to show that there was an absence of alternative sites in order to gain consent unless, amongst other factors, his proposal would otherwise cause harm or conflict with policy to a degree which would justify refusal and it was argued on his behalf that there were reasons why a site had to be found to accommodate the use he proposed. In such a case, the absence of an alternative site might be considered by the decision-maker to outweigh the harm done. This approach was clearly set out by Judge Gilbart QC in *McCarthy and another v Secretary of State for Communities and Local Government*[16]. As the judge pointed out:

> "16. Plainly the greater the harmful effects, or the more serious the breach of policy, the harder the applicant will have to work to show that there is no realistic alternative, … Thus it is, at the top end of the scale, in the case of proposed inappropriate development in green belt the evidential and persuasive burden on the applicant is very substantial."

53. **Very special circumstances.** It was always open to a decision-maker considering an application for green belt development to grant permission in an exceptional case on the

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11 PPG2 green belts (1995).
12 Ibid., paragraph 1.5.
13 Ibid., paragraph 1.6.
14 Ibid., paragraph 1.7.
15 Presented in the form of SGDC's planning officer's report for the hearing.
16 [2006] EWHC 3287 (Admin) at paragraphs 15 – 16.

grounds that there were very special compassionate circumstances to justify a departure from green belt development. Thus, in *South Bucks DC v Porter (No 2)*[17], an inspector granted a gypsy planning permission that was personal to her for the retention of her mobile home on a green belt site on the grounds of her chronic ill health, her status as a gypsy and a lack of alternative sites in the area notwithstanding her unlawful occupation of the site for many years and her persistent breaches of planning control. The inspector's conclusion that that applicant's personal hardship amounted to very special circumstances was upheld by the House of Lords without the need for any reference to article 8. This exceptional case was dealt with under the prevailing green belt policy.

54. **Inspector's decision as to very special circumstances.** In this case, the inspector's decision was to the effect that the applicant's application amounted to an attempted re-siting of his mobile home so that it was located deeper into the site in what was intended to be a less obtrusive location. Since the existing development was unlawful, the proposed development was accepted by the applicant's representative and the inspector as being a new development and not a replacement development in the green belt so that the existing development would have to be removed if the application succeeded. The inspector concluded that the scheme would reduce the openness of the green belt and that that reduction would be intensified by the likelihood that the applicant would erect a 2m high fence around the living quarters, the patio and the other associated paraphernalia. She also concluded that there was no realistic possibility of planting a small copse to mask the development.

55. The decision then considered whether the applicant's circumstances amounted to very special circumstances given his ill-health and the need for his son to return to live with his biological mother if they were forced off the appeal site. The inspector found that there was no evidence to indicate that the appeal site was the only place that the applicant could lead the outdoor life and, taking that into consideration with the applicant's failure to take any steps to find another site and the support he received from his wife and others, she concluded that his hardship did not amount to very special circumstances.

(2) **Article 8**

56. **General.** Article 8 of the ECHR provides as follows:

> "8(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

57. These rights are directly enforceable against public authorities by section 6 of the HRA which provides that it is unlawful for a public authority to act in a way which is incompatible with a European Convention of Human Rights ("Convention") right. The term "public authority" is not defined by the HRA but, as an appointee of the Secretary of State to determine the appeal, the inspector was clearly acting in that capacity. She therefore had a statutory duty to consider all relevant article 8 rights of anybody directly affected by her decision on the appeal whether or not she was asked to do so.

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17 [2004] 1 WLR, 1953, [2004] UKHL 33, HL(E).

58. Article 8 is intended to protect individuals from arbitrary interference by the state. This protection is given effect to by article 8(1) that imposes an obligation on a public authority to promote respect for family life and the home. A public authority must, therefore, equip itself or herself with sufficient information about the proposed interference and then carry out a decision-making process which balances the article 8 rights and interests of the applicant with those of the community if article 8 is engaged by the decision. The decision-maker is permitted a wide margin of appreciation, or discretion to use the more familiar common law concept, in deciding whether the proposed interference is justified by planning policy considerations. That is why great importance is placed on the quality of the assessment process that is required when article 8 is engaged to determine whether or not that interference is proportionate.

59. An article 8 proportionality assessment is not the same as a consideration of whether the personal circumstances of the applicant amount to very special circumstances. A proportionality assessment must consider a wider range of circumstances, the decision must balance all relevant circumstances in the round and the onus is placed on the decision-maker, taking reasonable steps, to identify the circumstances that should be considered. By way of comparison, consideration of very special circumstances in a PPG green belt context is more confined in scope. These may be considered piecemeal in a less structured decision-making process. Moreover, the onus of demonstrating the existence of the relevant very special circumstances, such as that there is no other site available, is placed on the applicant.

60. In practice, it will usually only be necessary to undertake an article 8 proportionality assessment in cases involving green belt development decisions where a person's article 8 rights are engaged, In such a case, a finding that the circumstances are such that the proposed refusal decision is disproportionate will almost inevitably be one that also amounts to a finding that the circumstances are very special.

61. **Home.** In the context of article 8, a home is a reference to anywhere that can reasonably be regarded as the relevant person's home and a person such as the applicant's wife can have more than one home that is protected, in the applicant's wife's case, for example, her relevant homes at the time of the hearing might well have been considered to be both her sister's home and the mobile home on the appeal site.

62. **Family life.** In the context of article 8, a family life is a reference to those matters that are essential in order to enjoy a family relationship. Thus, enforced separation from other family members, support and assistance provided by a family member to other family members, particularly to children of the family, and an ability to associate freely with other family members are protected by article 8 and any interference with them must not be disproportionate.

63. "Family life" is not confined to nuclear families but incorporates other forms of relationship including unmarried couples, step and adopted children and close relatives of a family member. The existence of "family life" depends on the nature of the relationship and not on its legal status. It is, therefore, a question of fact which must be considered by the decision-maker as part of the consideration of whether a particular decision will interfere with family life. In this case, the applicant, his wife and son are clearly leading a family life together and it would be a question of fact, which was not investigated by the inspector, whether the applicant's sister-in-law also formed part of the family life being lived by these three family members.

64. **Unlawful use of home - general.** The applicant moved his mobile home onto the appeal site unlawfully, was served with enforcement notices requiring him to cease that use, had been prosecuted for non-compliance with those notices and, as the inspector found, had

done nothing since being served with them to comply with them or look for an alternative site for his mobile home. The chronology was that the two stop orders and four enforcement notices had been served on various dates between 11 July 2006 and 4 September 2006, the decision dismissing the applicant's appeals against the enforcement notices was dated 11 July 2007 and the inspector's appeal decision relating to the applicant's planning application was dated 19 November 2010. Thus, the applicant and his son had been living unlawfully on land he had an interest in for 4½ years, had been living there for 4 years after being served with enforcement notices and for 3¼ years after the dismissal of the appeal against those notices.

65. **Initial use unlawful.** On behalf of SGDC, it was submitted that the applicant's use of his mobile home was not protected by article 8 because its use was unlawful when it started and it remained unlawful until the present day. However, the test for deciding whether article 8 was engaged in this case was not whether the applicant's use of the mobile home as a home was lawful but whether he had, as a matter of fact, been using it as a home. He had to show that the nature, length of time and degree of permanence of his and his son's occupation was sufficient for the mobile home to have become their home. Since they had been living in the mobile home on the appeal site for 4½ years, had nowhere else to live and regarded the mobile home as their home, it was clearly their home throughout the time that they have been living on the site.

66. The applicant's situation was similar to that of the applicant in *Buckley v UK*[18]. In that case, the ECHR held that, although the applicant had sited her mobile home without planning permission on her own land, it was nonetheless her home since she had lived there for a number of years and had no residence or intended residence elsewhere. In this case, the inspector did not address the question of whether the mobile home was also one of the wife's homes but since she visited it every day to lead a family life with her husband and step-son, stayed over on a regular basis, owned the site and had a matrimonial interest in the mobile home, it would appear that it was one of her homes and therefore her interest in it was also protected by article 8.

67. **Unlawful continuation of use.** The next question is whether the applicant can still rely on article 8 even though his unlawful use had been enforced against and he had ignored the relevant notices such that he had been convicted for his non-compliance. This question can only be answered by recourse to the protection provided by article 8(1) which was that the inspector to show "respect for the applicant's family life and his home"[19]. This meant that SGDC could not remove the applicant and his son from their home or refuse a planning application to site their mobile home on the appeal site without first considering whether that decision would cause them disproportionate interference with their family life and their home. A decision which failed to consider that question where it was clear that article 8 rights might be affected it could not reasonably be relied on subsequently to enable SGDC and the inspector to take action which would undermine the applicant's family and home rights.

68. It follows that earlier adverse decisions could only undermine the applicant's reliance on article 8 if SGDC could satisfy the inspector that it had paid due respect to his home and family life in taking those decisions, that those decisions were proportionate and that any delay in enforcing them or any change in his and his son's circumstances had not undermined his article 8 rights.

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18 (1996) 23 EHRR 101 at paragraph 54, ECHR.

19 The appropriate words of article 8(1).

69. This approach is in accord with the speech of Lord Brown in *South Bucks DC v Porter (No 2)*[20] where he stated that the unlawful use that was without planning permission was capable of being a material consideration in circumstances where the occupier sought to rely on the fact of continuing use and the long period of residence[21]. That particular occupier's unlawful occupation had persisted for many years despite enforcement proceedings and non-compliance that could properly be described as criminal. However, she did not rely on the fact or length of her residence as an element of her hardship claim so that her unlawful occupation of the site was of little or any materiality to the grant or refusal of her application for planning permission based on her hardship of a kind which the inspector found as amounting to very special circumstances. There was no reference in the speech to article 8 but the principle explained by Lord Brown would be equally applicable to an article 8 proportionality assessment.

70. **Failure to look for alternative sites.** Had the only consideration been whether or not the applicant's situation amounted to very special circumstances, the applicant's failure to look for other sites might well have resulted in a finding that no very special circumstances existed albeit that the applicant was maintaining that there were no alternative sites suitable for the combined needs of him and his wife and son and there were no suitable alternative sites anywhere in SGDC's planning area. However, it is not necessarily fatal that an alternative site had not been looked for in a PPG green belt development case albeit that it would be very unlikely that a decision-maker would find that there were very special circumstances present.

71. However, in this case, the inspector had to undertake a proportionality assessment which involved an inclusive assessment of all relevant circumstances and required her to identify those circumstances and then be satisfied, following an inquisitorial hearing, that the proposed decision was proportionate. Furthermore, SGDC did not provide any evidence to show that alternative sites were available or attempt to advise the applicant of where he might find one. Moreover, the applicant gave evidence that there were no suitable sites available anywhere and the inspector merely found that "there is no evidence to indicate that this site and this site alone is the only place that the applicant could lead the outdoor-life that he desires".

72. There was, however, evidence which the inspector did not make findings about, that no other suitable site was available for the applicant and his family's wide range of requirements. These needs included his need for an outdoor-life and a home located in a secluded spot, his fear of enclosure, his and his son's need for the care and support provided by his wife, his need for a family life with his wife, the needs of his son including a family life with his step-mother, the needs of his sister-in-law which required the presence of the applicant's wife at the sister-in-law's home on a permanent basis to care for her, the applicant's illiteracy, mental health, personality and physical problems and his inability to afford to buy or to rent somewhere else to pitch his mobile home.

73. **Conclusion.** The unlawful use of the site, the enforcement measures that had been taken and ignored, the lack of evidence that the applicant had looked for alternative sites and the suggestion that this was not the only site which he could live on were not reasons why article 8 was not engaged, a proportionality assessment was not needed or a disproportionality finding could not be made. All of the matters relating to historical unlawfulness or lack of attempts to relocate matters referred to by the inspector and the submissions made on behalf of the Secretary of State could, of course be weighed up in the proportionality assessment as

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20 [2004] 1 WLR 1953, HL(E).

21 The applicant's application for planning permission was considered on the basis that the claimant's compassionate circumstances, being his chronic ill-health and other personal circumstances, amounted to a very special reason so as to justify planning permission.

considerations telling against the grant of permission but, on the facts of this case, these considerations did not weigh heavily or at all against the grant of permission or a finding of disproportionality.

(3) **The son's article 8 rights**

74. The applicant is claiming article 8 protection for his son to live a family life with him and his step-mother and for his wife to live a family life with him and his son in his home on the appeal site. This claim gives rise to two questions: (a) whether he is entitled to rely on his son's and his wife's article 8 claims on their behalf as part of his appeal to the inspector and (b) the nature of their claims.

75. **The applicant's entitlement to rely on the son's article 8 claim.** The question of how a family member's article 8 rights that are potentially affected by a decision or other action of a public authority can be protected when that family member is not a party to the relevant application or appeal was resolved by the decision of the House of Lords in *Beoku-Betts v Secretary of State for the Home Department*[22]. Lord Brown delivered the principle speech in which he concluded that the decision-maker, in this case the inspector, had to take account of the article 8 rights of any family member whose article 8 rights might be interfered with by the proposed decision. The relevant passages of Lord Brown's speech are as follows[23]:

> "*The rival arguments*
>
> 20. (a) The appellant's case
>
> The appellant submits that the legislation allows, indeed requires, the appellate authorities, in determining whether the appellant's article 8 rights have been breached, to take into account the effect of his proposed removal upon all the members of his family unit. Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims.
>
> 21. In making her initial decision on removal *[planning permission]* the Secretary of State *[and the inspector appointed by him and, if the decision is being taken by the planning authority, that planning authority]* must necessarily have regard to the article 8 rights of each and all of the family members. So too the European Court of Human Rights on a complaint by the family of an article 8 violation by the United Kingdom's removal of a family member would look at the overall impact on family life. So too, therefore, should the immigration appeal authorities *[the Secretary of State and the Administrative Court]* consider the matter on appeal *[on an application relating to an appeal]*. Otherwise, other family members would have no alternative but to bring separate proceedings under section 7 of the Human Rights Act 1998, parallel or sequential to the section 65 appeal *[original application, the section 78 appeal and the section 288 application]*.

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22 [2008] UKHL 39, HL(E).

23 The words in bracketed italics have been added as alternatives for the words in the original speech so that references to the immigration appeal process in Lord Brown's speech which are underlined and which related to an immigration appeal can be seen to be of general application and are clearly referable to the planning appeal process even though they refer to and are given in the context of an immigration decision.

…

The Strasbourg case law

37. Plainly the present issue could not arise on a Strasbourg application: as Sedley LJ pointed out in *AB (Jamaica)*[24], from Strasbourg's point of view the husband's Convention rights were as fully engaged as the wife's. Time and again the Strasbourg case law emphasises the crucial importance of family life.

38. *Sezen v Netherlands*[25] is a case in point. Noting that the case concerned "a functioning family unit where the parents and children are living together", paragraph 49 of the judgment continued:

> "The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by article 8 of the Convention and that to split up a family is an interference of a very serious order. Having regard to its finding . . . that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same [as when a 10 year exclusion order remained in force] as long as the first applicant continues to be denied the right to reside in the Netherlands."

39. True, unlike *Sezen*, the present case is not concerned with young children. But the dependency between the appellant and his mother here clearly engages article 8. As the Court stated in *Mokrani v France*[26]:

> "[R]elationships between adults do not necessarily benefit from protection under article 8 of the Convention unless the existence of additional elements of dependence, other than normal emotional ties, can be proven."

On the adjudicator's findings of fact, such additional elements of dependence can properly be said to exist in the present case.

40. All of this, moreover, is entirely consistent with the approach taken by the House in *Huang v Secretary of State for the Home Department*[27]:

> "[T]he main importance of the [Strasbourg] case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant."

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24 [2007] EWCA Civ 1302, CA.
25 (2006) 43 EHRR 30, ECHR.
26 (2003) 40 EHRR 123, ECHR at paragraph 33.
27 [2007] 2 AC 167, HL (E), at page 186.

Conclusions

41. Whilst it is no doubt true that only infrequently will the present issue affect the outcome of an appeal, clearly on occasion it will and in any event that could provide no reason for maintaining the present narrow approach if it is wrong—indeed, quite the contrary.

42. Ouseley J in ***AC*'s** case[28] envisaged as a disadvantage of the wider construction that the appellant might make claims relating to other family members which they might not agree with. To my mind the risk of this is small: generally the appellant would be advised to adduce signed statements from other affected family members if not indeed to call them. The greater risk surely arises upon the narrower construction: if the impact of removal on other family members is relevant only in so far as it causes the appellant distress and anxiety, that puts a premium on the appellant exaggerating his feelings.

43. The disadvantages of the narrow approach are manifest. What could be less convenient than to have the appellant's article 8 rights taken into account in one proceeding (the section 65 *[78 appeal or the section 288 application]*), other family members' rights in another (a separate claim under section 7 of the Human Rights Act)? Is it not somewhat unlikely that the very legislation which introduced "One-stop" appeals—the shoulder note to section 77 of the 1999 Act—should have intended the narrow approach to section 65?[29] Surely Parliament was attempting to streamline and simplify proceedings. And would it not be strange too that the Secretary of State (and the Strasbourg Court) should have to approach the appellant's article 8 claim to remain on one basis, the appellate authorities on another? Unless driven by the clearest statutory language to that conclusion, I would not adopt it. And here the language seems to be far from decisive. Once it is recognised that, as recorded in the eventual consent order in *AC's* case, "there is only one family life", and that, assuming the appellant's proposed removal would be disproportionate looking at the family unit as a whole, then each affected family member is to be regarded as a victim, section 65 *[sections 78 and 288]* seem comfortably to accommodate the wider construction.

44. I would accordingly adopt the wider construction to section 65 *[sections 78 and 288]* contended for by the appellant, and, in the result allow the appeal ...."

76. Baroness Hale added this pithy summary of this decision in her short speech of assent:

"4. I am in full agreement with the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood and for the reasons he gives I too would allow this appeal and reinstate the adjudicator's decision in the appellant's favour. To insist that an appeal to the Asylum and Immigration Tribunal *[Secretary of State]* considers only the effect upon other family members as it affects the appellant, and that a judicial review brought by other family members considers only the effect upon the appellant as it affects them, is not only artificial and impracticable. It also risks missing the central point about family life, which is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily

[28] [2004] Imm. AR 573.

[29] This passage is only applicable for immigration appeals.

encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed."

77. I have added to the extracts from both Lord Brown and Baroness Hale's speeches so that they refer directly to the planning appeal process in addition to the immigration appeal process[30] that the case was concerned with. I have done so to show that the decision and its reasoning is directly applicable to section 78 TCPA appeals. As Lord Brown's speech makes clear, a public authority taking a decision that affects a person's home or family life is required to give effect to that applicant's article 8 rights. Thus, a public authority making a planning decision of that kind must take account of affected individual's article 8 rights in exactly the same way and for exactly the same reasons as an appeal tribunal is required to give effect to an applicant's rights in the immigration field.

78. Miss Busch, who appeared for the Secretary of State, submitted that article 8 rights were not the concern of an inspector when deciding a planning appeal or, at best, were not matters which undue regard had to be paid to. She submitted that the extent to which such rights had to be taken account of depended on the type of decision that was being taken and that an immigration decision was one which had to pay due regard to the article 8 rights of affected parties whereas a planning decision was different and either did not engage article 8 or only did so in some unspecified lesser manner.

79. I do not accept Miss Busch's submission. Article 8 is capable of being engaged by a planning appeal or an enforcement notice decision or appeal or by any other decision or action of a public authority if and to the extent that any of these decisions or actions could result in the interference with a person's home or family life. Miss Busch's submission is correct in suggesting that each case must be decided on its own facts and that the application of article 8 involves a consideration that is fact sensitive and which must be decided on a case by case basis. However, she is not correct in suggesting that the nature or intensity of its application varies depending on the subject-matter of the decision. Every public authority is required to give effect to the Convention rights of anyone affected by that public authority's decisions or actions regardless of the sphere of activity affected. Each case that involves the potential for interfering with a person's Convention rights requires an appropriate proportionality assessment to be undertaken so that the intensity of scrutiny will vary from case to case but not from subject-matter to subject-matter. The only gloss that I would put on that general principle is that since planning decisions are usually dependent on the application of planning policies to decisions that do not engage Convention rights, a planning case only very infrequently requires a proportionality assessment and even more infrequently a finding that the proposed decision would amount to disproportionate interference with article 8 rights..

80. **The nature of the son's article 8 claim.** The article 8 rights of children inevitably require greater consideration and protection than those of most adults given their vulnerability and dependency and their many and varied social, health, education and welfare needs. The jurisprudence of the European Court of Human Rights has always recognised that the Convention provides greater and more intense protection for children than for adults and that the needs of children vary and alter as they are growing up and maturing.

81. Four milestones along this route of the development of Convention protection for children should be briefly mentioned:

(1) In 1989, the *United Nations Convention on the Rights of the Child*, which the United Kingdom is a signatory to, came into force. This international Convention built on

[30] See footnote 23 above.

earlier work in both the United Nations and the European Union and it contains Article 3 which provides that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

(2) In 2004, the *Children Act 2004* was enacted and section 11 gives effect in England and Wales to the United Kingdom's obligations provided for in Article 3 of the UNCRC. This provides, in what is for this case its most material of its provision, that:

> "**Arrangements to safeguard and promote welfare**
>
> 11(1) This section applies to each of the following—
>
> (a) a local authority in England;
> (b) a district council which is not such an authority; ...
>
> (2) Each person and body to whom this section applies must make arrangements for ensuring that—
>
> (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; … ."

In principle, this duty extends to all sections and departments of SGDC including its planning department when undertaking planning functions such as granting planning permissions and issuing stop orders and enforcement notices.

(3) In 2010, in *Neulinger v Switzerland*[31], the ECHR observed that:

> "…the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken … of 'any relevant rules of international law applicable in the relations between the parties' and in particular the rules concerning the international protection of human rights."

(4) In 2011, in *ZH (Tanzania) v Secretary of State for the Home Department*[32], the Supreme Court, applied the principles extracted from the earlier developments that I have listed as well as from other developments in international, domestic and Commonwealth jurisprudence and from general principles now applicable to the application of article 8. In doing so, it held that when a public authority in England and Wales is undertaking a proportionality assessment under article 8 in relation to a child, that child's best interests must be a primary consideration and that, in discovering what those interests are, the public authority must ask the right questions of the right people and must additionally give the views of the child due weight in accordance with the age and maturity of that child having, where possible, given consideration to hearing directly from him or her. It is clear from this decision, if it had not been clear previously, that the duty to give the best interests of the child a primary consideration and to consult the child as appropriate

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31 (2010) 28 BHRC 706, ECHR, paragraph 131.
32 [2011] UKSC 4, SC.

extends to every function undertaken by a public authority which engages a child's article 8 rights and which involves a proportionality assessment in relation to that child.

82. These inter-related duties are confirmed by the judgment of Baroness Hale. These extracts from her judgment confirm this with great clarity:

> "25. Further, it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as "a primary consideration". Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration". …
>
> …This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first. That seems, with respect, to be the correct approach to these decisions in this country as well as in Australia."
>
> "34. Acknowledging that the best interests of the child must be a primary consideration in these cases immediately raises the question of how these are to be discovered. An important part of this is discovering the child's own views. Article 12 of UNCRC provides:
>
> > "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> >
> > 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."
>
> … In most cases, however, it will be possible to obtain the necessary information about the child's welfare and views in other ways [than by separate representation]. …
>
> 36. The important thing is that those conducting and deciding these cases should be alive to the point and prepared to ask the right questions. …
>
> 37. In this case, the mother's representatives did obtain a letter from the children's school and a report from a youth worker in the Refugee and Migrant Forum of East London (Ramfel), which runs a Children's Participation Forum and other activities in which the children had taken part. But the … authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so. While their interests may be the same as their parents' this should not be taken for granted in every case.
> …
> Children can sometimes surprise one."

(4) **The applicant's wife's article 8 rights**

83. The applicant's wife also has article 8 rights that were engaged by the inspector's decision and the applicant has the right to make her claim part of his own article 8 claim. The wife is the owner of the site and she was enjoying a family life with her husband and step-son in the mobile home during her daily visits and periodic sleep-overs there. The applicant can rely on his family life with his wife as part of his article 8 claim, particularly given the considerable support and care that she has given him and her step-son since she married the applicant and her step-son was born. Equally, he can rely on her right to her family life with him and his son and to her home in the mobile home in similar way to his reliance on his son's article 8 rights.

(5) The applicant's sister-in-law's article 8 rights

84. The applicant's sister-in-law, given her chronic disabilities and her almost complete reliance on her sister for care and support, has rights of both a family and private nature that are potentially engaged by the inspector's decision. The applicant was entitled to rely on the interference or potential interference with these rights as well as the other interferences that he was entitled to rely on.

(6) The son's biological mother's article 8 rights

85. The son's biological mother's rights to share a family life with her son were not, on the available facts of this case, engaged.

(7) The article 8 structured proportionality decision

86. It was always clear that the planning application to SGDC and the subsequent appeal would engage article 8 for the applicant and his three family members. When the inspector conducted the hearing and then considered her decision, she should have first considered it as if it was a decision arising out of a green belt planning application that involved the unlawful use of a mobile home. She should then have decided whether her potential decision engaged article 8 and if it did, she should then have conducted a proportionality assessment. Finally, she should have fitted her assessment decision into her provisional decision as a very special reason for allowing the appeal and granting permission if, but only if, she considered that the applicant and his family's article 8 rights should prevail over the public interest in upholding green belt planning controls.

87. This approach to the inspector's decision in this case accords with *R (Samoo) v Secretary of State for the Home Department*[33] and *Lough v First Secretary of State*[34]. In *Lough*, Pill LJ stated that, in conducting the balancing or proportionality exercise, the competing interests of the individual, other individuals and the community as a whole had to be considered and that a planning authority, or in this case the inspector on behalf of the Secretary of State, was granted a certain margin of appreciation, which might be a wide margin when implementing planning policies were concerned, in determining the steps to be taken to ensure compliance with article 8[35].

88. Lord Bingham in his speech in the House of Lords in *Razgar v Secretary of State for the Home Department*[36] set out the approach that should be adopted by a public authority decision-maker when reaching a decision that potentially engaged a person's article 8 rights. The case involved an immigration appeal decision in an immigration case but the case is applicable

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33 (2001) UKHRR 1150, CA.
34 [2004] 1 WLR 2557, CA.
35 At paragraph 43.
36 [2004] UKHL 27, HL(E).
16 (1993) 19 EHRR 112, ECHR.

generally to all public authority decisions as can be seen by this extract from Lord Bingham's speech which I have interpolated to show how his references to the immigration process are equally applicable to the planning appeal process[37]:

> "17. In considering whether a challenge to the Secretary of State's decision to remove a person *[refuse planning permission]* must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator *[inspector]*, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator *[inspector]*. In a case where removal is resisted *[refusal of permission and consequent removal from the appeal site]* is resisted in reliance on article 8, these questions are likely to be:
>
> (1) Will the proposed removal *[refusal of permission]* be interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life *[or home]*?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (2) If so, is such interference proportionate to the legitimate public end sought to be achieved?
>
> 18. If the reviewing court is satisfied in any case, on consideration of all the materials which are before it and would be before an adjudicator *[inspector]* that the answer to question (1) clearly would or should be negative, there can be no ground at all for challenging the certificate of the Secretary of State *[decision to refuse permission]* of the adjudicator *[inspector by way of an application to the Administrative Court]*. Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention: see, for example, *Costello-Roberts v United Kingdom*[38]. If the reviewing court is satisfied that the answer to this question clearly would or should be negative, there can again be no ground for challenging the certificate *[refusal]*. If question (3) is reached, it is likely to permit of an affirmative answer only.
>
> 19. Where removal *[refusal of permission]* is proposed in pursuance of a lawful immigration *[planning]* policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens *[such matters as the control*

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[37] I have underlined the passages that are particularly linked to the immigration appeal process and have then added in italicised brackets the corresponding equivalent reference to the planning appeal process. See, further, footnote 23 above.

[38] (1993) 19 ECHH 112 (ECHR).

of development in the green belt] is recognised in the Strasbourg jurisprudence … and implementation of a firm and orderly immigration *[planning]* policy is an important function of government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator *[inspector]* answering this question other than affirmatively.

20. The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. *[The inspector must make her own assessment at the first section 78 appeal stage ... The Administrative Court dealing with an application under section 288 of the TCPA]* must assess the judgment *[decision]* which would or might be made by an adjudicator *[inspector on appeal]*. …

21. … Decisions taken pursuant to the lawful operation of immigration *[planning]* control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."

89. In the present application, there was no dispute, and it is in any event clear, that the first, second and fourth stages in Lord Bingham's check list should be answered in the affirmative. This application is concerned the fifth stage which has meant that it has not additionally been concerned with the third stage[39]. I will set out the relevance of each stage to the inspector's decision.

90. **Stage (1).** The inspector's dismissal of the applicant's appeal against the non-determination of his planning application amounted to an interference with his family life and home by a public authority. This can readily be seen from the previous planning history of the appeal site. The inspector's decision was the second refusal of planning permission for the use of a mobile home on the appeal site. The second application for permission had been made on the basis that the presently unlawfully sited mobile home and associated paraphernalia would be removed and the proposed development located on a different and, it was claimed, more suitable pitch on the appeal site.

91. There had previously been two stop orders and four enforcement notices which cumulatively required the applicant's existing unlawful residential use to cease and the mobile home and associated paraphernalia to be removed from the site. The four enforcement notices had been the subject of a consolidated appeal[40] and those appeals had been dismissed. There had also been a successful criminal prosecution in relation to the applicant's non-compliance with the enforcement notices and he had pleaded guilty and had been sentenced to a conditionally discharge.

92. It followed that SGDC would take removal action to enforce the enforcement notices that had taken effect 3 years previously as soon as the applicant's planning application was refused and both he and his son and their mobile home would be removed from the appeal site. In those circumstances, the inspector's refusal decision would inevitably interfere with the exercise of the applicant's and his wife's and son's enjoyment of their family life and their mobile home

[39] See paragraphs 99 - 100 below.

[40] Presumably under section 174 of the TCPA.

and would possibly interfere with the applicant's sister-in-law's exercise of her family and private life.

93. **Stage (2).** It is obvious that the applicant's and his son's removal from the site would have grave consequences for both of them that would involve a grave interference with their article 8 rights. This would involve the loss of their home on the site, the unlikelihood of finding another suitable site for their mobile home, the possible need for them move to an unsuitable site, their possible homelessness and the possible splitting up of the applicant from his son and the consequent loss of his son's family life with both his father and step-mother. In short, article 8 would undoubtedly be engaged in this case.

94. **Stage (3).** The interference with the applicant's and his son's article 8 rights would possibly have been in accordance with the law since the refusal decision would be seen to have resulted from a valid exercise by the inspector of her discretion to decide that the application for the proposed development should be refused. This decision would have been based on an apparently unchallengeable decision that the development was harmful green belt development and there were no very special circumstances that would enable it to proceed notwithstanding its green belt location. This would have been a decision that conformed to the Secretary of State's well-publicised policy relating to green belt development which was clearly lawful and in the public interest.

95. However, the inspector's discretionary decision that the applicant's hardship resulting from his mental health and other problems did not amount to a very special reason so as to result in his planning application succeeding on compassionate grounds could well have been one which was not in accordance with the law because the inspector's consideration of the applicant's mental, psychological and physical health problems was inadequate and possibly *Wednesbury* unreasonable[41]. These errors might well have been challengeable under the second limb of section 288 but, given the limitations of such a challenge[42], it was not inevitable that such a challenge would succeed. However, I have not had to consider that difficult issue since the applicant's principal challenge has been brought against the inspector's article 8 proportionality assessment.

96. Logically, I should only embark on a consideration of whether the inspector's proportionality assessment was correctly carried out if I had first decided that the inspector's very special circumstances decision was in accordance with the law. If that decision was *Wednesbury* unreasonable, her decision would be set aside without there being any need to consider whether the decision was proportionate. However, since it is unlikely that her decision was irrational despite its misuse of the psychiatric evidence, and since the applicant's challenge was concentrated on challenging the inspector's article 8 decision, I will adopt the same course and move straight to a consideration of her proportionality assessment.

97. **Stage (4).** The interference created by the refusal of planning permission is necessary since it is of the kind referred to by Lord Bingham as amounting to: (1) the regulation of land use that is recognised as falling within the ambit of permissible restrictive activities that may be performed by Sovereign States and (2) development control measures that are recognised as an important function of Government. Moreover, the inspector did not decide to apply green belt policies for any reason of bad faith, ulterior motive or deliberate abuse of power.

98. **Stage (5)**. Since the applicant's article 8 rights were engaged, the inspector's proposed decision had to be subjected to a proportionality assessment. There is no express reference in the Convention to the principle of proportionality. However, the ECHR has consistently held

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41 See paragraph 41 below.

42 See paragraphs 116 - 120 below.

that this principle is inherent in the application of Convention rights so that the right to respect for a family life and a home are inherently rights which are subject to considerations of proportionality. It follows that the inspector was required to undertake the balancing or proportionality exercise required by article 8(2) that is referred to as stage (5) in the Bingham checklist.

99. **The proportionality assessment.** The structured proportionality assessment or balancing exercise required by stage (5) involved:

(1) The identification of all relevant considerations relating to the applicant's, his wife's, his son's and his sister-in-law's exercise of their respective rights of enjoyment of a family life and a home. This would involve an appropriate factual inquiry into those considerations where the factual background was not clear and obvious;

(2) The identification of what the best interests of the applicant's son were by an appropriate process of identification which included, where possible, the ascertainment and consideration of the son's own wishes and views as to his best interests;

(3) The identification of the particular public or community interests that had to be balanced against the applicant's and his family's various interests; and

(4) A structured weighing up and balancing of all these interests. This balancing exercise should involve a consideration of the son's best interests first and it should strike a fair balance between the rights of the four individuals concerned and the interests of the community.

100. The decision-making process would only identify disproportionate consequences resulting from a refusal decision if this fact sensitive case was one of a small minority of exceptional cases that required the inspector to give effect to section 6 of the HRA by a careful examination and weighing up of all relevant facts.

(8) **The Hearings Rules**

101. **The Hearings Rules.** The Secretary of State, since 2000, has had the option to direct that a section 78 appeal should be conducted by way of a hearing which is a procedure that is a half-way house between the written representations procedure and a full inquiry. Criteria have been published which identify when it appropriate to direct a hearing[43]. The relevant criteria are that: there is no need for evidence to be tested by formal cross-examination, the issues are straightforward and do not require legal or other submissions to be made and the applicant should be able to present his or her own case although he or she may choose to be represented. Furthermore, the case should be one that is unlikely to take more than one day to be heard. A hearing would, if it was appropriate, be of particular benefit for this applicant since he had limited means and could not afford legal representation and was therefore relying on a non-lawyer planning consultant to act for him at the hearing

102. There is no challenge to the decision to hold a hearing although, as it has turned out, the appeal might be thought to have needed both cross-examination and legal and other submissions.

103. **Applicable procedural rules.** The hearing procedure required the applicant to submit a hearing statement and the second respondent to submit comments on that hearing statement. Either of the parties could have informed the Secretary of State before the hearing or

[43] Annexe C of procedural guidance published by the Planning Inspectorate entitled "*Planning appeals and called-in applications"*(PINS01/2009) with further information about the application of the criteria in PINS Good Practice Advice Note 01/2009.

the inspector at the hearing that a hearings procedure was inappropriate and the Secretary of State or the inspector could then have decided in consultation with the parties whether an inquiry should be held instead. Similarly, the inspector could herself have decided at the hearing, in consultation with the parties, that an inquiry should be held instead of a hearing and have adjourned the hearing to be restarted as an inquiry.

104. At the hearing, the following relevant provisions applied to this appeal:

(1) The hearing should take the form of a discussion led by the inspector at which cross-examination would not be permitted unless the inspector thought that it was necessary to ensure a thorough examination of the main issues;

(2) At the start of the hearing, the inspector should identify the main issues, that in her opinion arose;

(3) The calling of evidence was at the inspector's discretion; and

(4) The inspector could refuse to hear (but not receive in written form) what she considered to be relevant or repetitious evidence[44].

105. **Inquisitorial nature of the hearing.** These Hearing Rules gave the inspector a significant role in deciding what was raised for discussion and how the necessary facts, issues and law arising for consideration should be dealt with. She had to identify the main issues which needed to be decided and had to identify for discussion any issues of that kind even if they had not been identified or raised in the hearing statement. She then had to lead the discussion which had to explore all the issues that she had identified without the benefit of cross-examination of any witness unless she considered this was necessary to enable there to be a thorough examination of these issues. In other words, the inspector had to act inquisitorially and had to make sure that all the main issues were discussed and, by exercising her discretion about the evidence that was called, also had to make sure that all the evidence that was needed to discuss the main issues was also identified and then obtained if the parties had not produced it already.

106. In summary, therefore the inspector during the discussion that she has to conduct at the hearing has the responsibility to bring out such evidence as is required in order for her to decide the main issues that she has identified. That requires her, if necessary, to give the parties an opportunity to introduce evidence or documents or other information into the hearing which had not previously been referred to, to obtain and adduce any relevant or significant evidence, to permit cross-examination of all those present or of a particular witness or witnesses or, in an extreme case, to abandon the hearing so as to allow the appeal to be determined as an inquiry. The inspector's overriding objective is to conduct the hearing fairly, expeditiously and economically so as to determine the appeal in a single hearing lasting no more than about one day having addressed the main issues and given the applicant and the planning authority a reasonable opportunity of explaining their respective points of view in a non-technical environment.

107. It follows from this that the inspector was required to take an active part in the formulation of the agenda or list of the main issues she had to decide and in the decision of what material should be brought out, discussed and considered to enable her to decide them. Her role required her to lead the discussion, decide in her discretion what evidence should be called and take the initiative in deciding during the hearing whether, after all, cross-examination or the inquiry procedure were necessary. This inquisitorial role is one which planning inspectors and many statutory tribunals have traditionally played and it has now been

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[44] Rule 11 of the Town and Country Planning (Hearings Procedure)(England) Rules 2002, SI 2002/2684.

given structure and coherence in the Hearings Rules which were introduced in 1990. The inquisitorial approach therefore requires the inspector to take a pro-active role and she cannot sit back and leave these procedural issues to the parties. In an extreme case in which the inspector has been unable to identify some of the main issues, bring out the relevant features of those issues or identify and call for relevant evidence, her decision will be quashed since she would not have complied with the mandatory requirements of the Hearings Rules and, as contended in this case, her mandatory duty not to interfere with the appellant's and his family's right for respect for their family life and their home.

108. **Secretary of State's submissions.** It was submitted on behalf of the Secretary of State that the highly relevant decisions of *Beoku-Betts* and *ZH (Tanzania)*45 and the need for the inspector to consider the article 8 rights of the applicant's wife, son and sister-in-law was not drawn to her attention and the lack of evidence about significant matters was the sole responsibility of the applicant's representative. Indeed, Miss Busch submitted that the inspector could not have been expected to have searched out the various relevant decisions, issues and evidence and was not required to do so. However, given the inquisitorial and statutory duties imposed on the inspector, she was required to do so.

109. **Discussion.** The applicant had previously been unrepresented in relation to his initial planning application and the enforcement notice appeals and he was not legally represented at the hearing. He was also illiterate and without resources. In consequence, he and his lay representative were heavily dependent on the inspector to conduct the hearing in a way that enabled his appeal to be fully and fairly determined in accordance with the statutory requirements of the HRA.

110. In fairness to the applicant's lay representative and the hearing statement that he had prepared, sufficient notice of the applicant's article 8 case was provided to place SGDC and the inspector on notice that a difficult proportionality exercise involving a detailed factual investigation and a consideration of difficult psychiatric and psychological issues arose for consideration and decision. These were issues that could be brought out fully at the hearing discussion since the applicant was present with Dr Reeves and a lay representative who specialised in appearing for lay applicants in similar appeals and the Secretary of State was represented by the planning officer of SGDC who had knowledge of the application under appeal. The inspector therefore was on notice of the importance of her exercising her powers under the Hearings Rules and of her need to take the lead in identifying what had to be decided, what evidence and other materials were needed to enable the necessary proportionality assessment to take place, what should be brought out in the discussion with the applicant, his psychiatrist who had prepared two of the three psychiatric reports and the two appropriately qualified professional representatives who were present.

111. It follows that, if the inspector failed to identify and consider some of the main issues or did not identify significant gaps in the evidence needed to decide those issues, she had not properly applied the Hearing Rules to this appeal or complied with her duty to the applicant in relation to his article 8 rights. In short, she would not have complied with her duty to act in proactive manner that had arisen in this case as a result of the inter-relationship between the Hearings Rules and the mandatory requirements of the HRA that she was required to show respect for.

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45 *Beoku-Betts v Secretary of State for the Home Department* and *ZH (Tanzania) v Secretary of State for the Home Department* see paragraphs 66 -68 above. Reference could, in this context also have been made to a third decision, *Razgar v Secretary of State for the Home Department* which was also an immigration case of general application to any consideration of article 8, see paragraphs 88 - 99 above and a fourth decision, *South Bucks DC v Porter (No 2)*, see paragraphs 69 above and 112 - 115 and 147 below.

(9) **Duty to give reasons**.

112. The inspector's decision had to contain sufficient reasons to explain the conclusions that it reached and the evidence on which those conclusions were based. Given the informal and inquisitorial procedure that was involved and the unminuted and unrecorded discussion that the inspector had conducted during the hearing, the decision should have included a reference to the major issues that had been discussed and have summarised the salient points that had emerged during the discussion.

113. This duty and how it should be fulfilled is helpfully explained and set out in the speech of Lord Brown in *South Bucks DC v Porter (No 2)*[46] *as follows:*

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

114. When the reasons for the decision are given following a hearing conducted by reference to the Hearing Rules or similar rules of procedure, they should, therefore, identify the main issues that the inspector had herself identified at the outset of the hearing and summarise the salient parts of the discussion that bear upon the main issues. This is because an inspector's duty to provide adequate reasons extends beyond her duty to inform the parties of how her decision was arrived at.

115. There are two further purposes for the obligation to give sufficient reasons, both of which are highly important to the parties. Firstly, the obligation is intended to provide the parties with the means of satisfying themselves that every material consideration has been taken into account in the decision-making process and that nothing that is immaterial that has nonetheless been taken into account might have led to significant error in that process. Secondly, it is a means of ensuring that the decision-maker identifies and then decides all the issues in dispute in a structured and coherent manner. The most effective way for a decision to achieve these objectives is for the decision-maker to set out her decision in writing with short but adequate reasons to explain it.

(10) Section 288 of the TCPA

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[46] See paragraph 69 and footnote 21 above.

116. **Relevant requirements**. The Administrative Court, when sitting as a first-tier reviewing court of a planning inspector's appeal decision pursuant to a section 288 application, may only consider the applicant's application to question the inspector's decision on either of these two grounds:

(1) That it was not within the powers of the TCPA; and

(2) That any of the relevant requirements have not been complied with in relation to that decision.

117. The basis of the application in this case is that the inspector did not comply with the requirements of the Hearings Rules, the HRA and the Secretary of State's policy with regard to temporary permissions in reaching her decision. In particular, she did not conduct an inquisitorial discussion and hearing in relation to the HRA issues as required by the relevant hearings rules and did not undertake a structured proportionality assessment as required by article 8(1). Furthermore, in relation to her consideration of a temporary permission, she did not properly consider or apply the Secretary of State's policy on *The Use of Conditions in Planning Permissions*[47].

118. **Weight to be attached to the evidence.** It was submitted by Miss Busch that the applicant's challenge to the inspector's decision amounted to a challenge that she had given inappropriate weight to particular features of the evidence, in particular to the medical evidence. That challenge was impermissible since it was clear from the well-known decision of the House of Lords in *Tesco Stores Ltd v Secretary of State*[48] that the inspector was entitled to attach such weight as she saw fit to the evidence or any part of it and, unless she rendered a perverse decision, her findings were not open to challenge.

119. It is important to consider the context in which the House of Lords concluded in *Tesco* that the weight that was to be given to a particular planning or policy consideration was a matter exclusively for the decision-maker. In the *Tesco* case, the issue concerned the decision-maker's need to have regard to a proposed planning obligation if, but only if, it was a material consideration that was relevant to the development. The challenge to the refusal of permission was that the relevant proposal that had been made was not considered by the decision-maker. The House of Lords decided that the proposed planning obligation was taken into account but it had then been decided that little weight should be placed on it. That decision as to the weight to be placed on the proposed obligation related to the application of planning policy which was a matter exclusively for the decision-maker.

120. In this case, the challenge does not, on analysis, involve planning policy but is a challenge to the manner in which the inspector undertook the proportionality assessment. It is contended on behalf of the applicant that the inspector failed to take into account material considerations which she should have taken into account and vice versa. If that challenge can be made good, the relevant decision would not be in accordance with the HRA since it would not have weighed up and balanced the considerations that the applicant contended should allow his article 8 rights to prevail over the legitimate interest of the community in the strict observance of green belt policies. This required the inspector to arrive at a reasonable decision having concluded a reasonable decision-making process and the challenge in this case is, on analysis, a challenge based on the contention that the requirement to undertake a reasonable and thorough proportionality assessment was not complied with. It is, therefore, a challenge that falls squarely within the permitted range of challenges provided for by the second limb of section 288.

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47 Circular 11/95.

48 [1995] 1 WLR 759, HL(E).

G. **Summary of the relevant law**

121. I will now draw together these diverse strands into a summary of the relevant applicable law that the inspector should have applied and given effect to:

(1) The applicant's appeal was to be dealt with by the inspector as if the application had been dismissed and had been made to her in the first instance[49].

(2) The proposed development, being for a change of use and the siting of a mobile home in the green belt, was one where there was a general presumption against inappropriate development so that the application should not be approved unless the applicant could show that there were very special circumstances why permission should be granted. Such circumstances would not be shown to exist unless the harm by reason of the inappropriateness and any other harm was clearly outweighed by other circumstances. It was for the applicant to show whey permission should be granted[50].

(3) The applicant was contending that the development site was the only site on which he could pitch his mobile home as his home. In order to establish that there were very special circumstances so as to justify his being granted permission, he had to show that there was an absence of alternative sites or that there were compassionate reasons amounting to very special circumstances since his proposed development would otherwise cause harm or conflict with a policy to a degree which would justify refusal. The applicant had to overcome a substantial burden to show this given that the proposed development was otherwise inappropriate development in the green belt[51].

(4) However, if planning permission was not granted on the basis of there being very special reasons for its grant, it was open to the applicant to seek to satisfy the inspector that, exceptionally, the refusal decision would constitute an unfair and disproportionate interference with the applicant's, his son's, his wife's and his sister-in-law's right to respect for a family life and a home notwithstanding the interests of the community in pursuing the green belt policy. In such a case, the finding of disproportionality would amount to a very special circumstance for permitting the proposed development[52].

(5) The applicant, his son, his wife and his sister-in-law had joint and several rights to respect for their family life and their home. These rights were, in this case, rights involving the enjoyment of a family life together and the enjoyment of the mobile home on the appeal site as their home. The applicant was entitled to rely on his son's and his wife's and his sister-in-law's individual rights protected by article 8(2) in addition to, and as a support for, his reliance on his own entitlement in that regard[53].

(6) The fact that the site had already been unlawfully used for 4½ years already, had already been the subject of enforcement action for that unlawful use which had been continued despite it having been found to be criminal and the applicant had disregarded the unlawful use, enforcement action and his criminal conviction and had not attempted to find alternative accommodation or sites for his mobile home did not prevent his article 8 rights from being engaged and these facts were of little material relevance to the grant or refusal of his application based on either hardship or article 8 grounds[54].

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49 See paragraph 43 above.
50 See paragraphs 50 – 51 above.
51 See paragraph 52 above.
52 See paragraphs 98 - 100 above.
53 See paragraphs 80 - 85 above.
54 See paragraphs 64 - 73 above.

(7) The applicant's wife appeared on the facts taken into account by the inspector to enjoy use of the mobile home as her home for the purposes of article 8 protection in addition to the enjoyment of such use by the applicant and his son and all three applicants enjoyed a family life together in the mobile home on the appeal site. The applicant's, his son's and his wife's article 8 rights to a family life and a home were, therefore engaged by the appeal decision[55].

(8) The applicant's sister-in-law appeared on the limited facts taken into account by the inspector to enjoy a family and private life with the applicant's wife which was engaged by the appeal decision and she was entitled to have those rights taken into account by the inspector[56]

(9) The son's article 8 protected rights included, additionally, the right to have his best interests and his own views as to those best interests taken into account as a primary consideration by the inspector and weighed in the balancing exercise involved when deciding whether the application should, exceptionally be allowed[57].

(10) The inspector was required to undertake a structured proportionality assessment involving the weighing up and balancing of all relevant factors[58]. The purpose of this assessment was to determine whether the protected rights of the applicant and his family members were disproportionately interfered with by the inspector's decision upholding the rights of the community to the maintenance of green belt policies and, if they were, what the decision should be in order for there to be a proportionate interference with those rights[59]

(11) Since the Secretary of State had directed that a hearing should be held by the inspector pursuant to the Hearings Rules, the inspector was obliged to undertake an inquisitorial exercise involving the identification of the major issues that arose, a discussion which would inevitably involve identifying any gaps in the evidence and other materials presented to her and her drawing out that material from the parties during the discussion and, if this proved to be necessary, permitting cross-examination, the obtaining of further evidence or even the abandonment of the hearing so that the appeal could restart as an inquiry[60].

(12) The inspector was also required to provide adequate reasons for her decision[61].

(13) This challenge to the inspector's decision is made under section 288(2) of the TCPA and is based on alleged failures to comply with requirements of the Hearings Rules, article 8 of the ECHR, section 6 of the HRA and the relevant principles to be found in the relevant case-law; and the policy set out in the *Use of Conditions in planning permissions* circular.[62].

(14) This challenge is a permissible use of section 288(2). It is not an impermissible challenge that is based on the applicant's disagreement with the inspector's factual

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55 See paragraphs 61, 80 – 81 and 83 - 85 above.
56 See paragraph 84 above.
57 See paragraph 82 above.
58 See paragraph 99 above.
59 See paragraphs 88 & 98 above.
60 See paragraph 101 - 111 above.
61 See paragraph 112 - 125 above.
62 See paragraphs 116 - 117 above.

findings, the weight that her decision placed on matters that it took into consideration or on her discretionary application of planning policy[63].

H. Issue 1 - Whether the inspector failed properly to consider and assess the psychiatric evidence and thereby failed properly to assess the weight to be given to this evidence

122. **The parties' respective cases.** On behalf of the applicant, it was submitted that the inspector accepted the psychiatric, psychological and medical evidence that she was provided with by the applicant's representative but she failed to take essential elements of it into account. Mr Rudd submitted that the only part of this evidence that was considered and on which any weight was placed was the applicant's wish to "live the outdoor lifestyle". This inadequate consideration of the professional evidence was demonstrated by the inspector's conclusion that there was no evidence that the only site that could accommodate that lifestyle was the appeal site and that another site could be sought (as opposed to, it was to be noted, "could be found") which would enable the applicant and his son to stay together and for his son to continue with his education.

123. On behalf of the Secretary of State, it was contended that the complaints made by Mr Rudd about the inspector's treatment of the professional evidence amounted to an impermissible challenge about matters that were left exclusively to the inspector since they amounted to no more than a challenge to the weight that the decision had placed on the medical evidence and to the way in which it had applied relevant planning policy in dismissing the appeal.

124. Ms Busch also submitted that the inspector's decision demonstrated that she had understood and fully taken into account all expert professional evidence and that the applicant's challenge amounted to no more than a disagreement with the weight that the inspector placed on it. The inspector's decision demonstrated that she had a good understanding of the psychiatric reports and that she had concluded that there was no evidence to show that the appeal site was the only site on which the applicant could lead an open air lifestyle. Moreover, the inspector had reasonably concluded that the applicant had not availed himself of the opportunity to look for another site. In consequence, she had decided, again reasonably, that his personal circumstances did not amount to very special reasons or an unwarranted interference with his article 8 rights was not open to challenge.

125. **Discussion.** Mr Rudd's submissions have considerable force. The decision neither mentions nor takes into account much of the professional evidence. In particular, there is no reference to the fact that the applicant suffers from a serious personality disorder which affects his cognitive ability, affectivity, interpersonal functioning and impulse control. It takes no account of the applicant's illiteracy and relatively low IQ; his potentially enduring brain damage originally suffered when he was a child; his propensity to both depressive bouts and suicidal ideation; his recurrent pain from the permanent white finger and other hand damage suffered when working with pneumatic tools in his late teens and his marked inability, without the daily care and assistance of his wife, to cope with the pressures and exigencies of daily living and to care for his son. The applicant's chronic and apparently untreatable PTSD-type symptoms, his phobia of being situated in an enclosed space and his need for an open-air lifestyle need to be considered in conjunction with all his other psychiatric, psychological and medical complaints since they are obviously affected and enhanced by the other complaints which are not referred to in the decision from which he also suffers.

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[63] See paragraphs 118 - 120 above.

126. This failing led the inspector to conclude that there was no evidence to show that the appeal site was the only site on which the applicant could live. The evidence that was available to her included the very significant evidence adduced on behalf of the applicant that his claustrophobic-type condition, taken in conjunction with his personality disorder, the constant pain he lived with from his hand injuries, his recurrent flashbacks, his depressive and suicidal tendencies, his low IQ and illiteracy and his difficulties coping with life all coalesced into the need to live in a secluded and open-air environment close to his wife who, from necessity, was living with her sister nearby in order to provide her with the full-time care that she needed but could not otherwise obtain. It is not for me to express any view as to whether this case was made out. What I am asked to do, however, is to consider whether it was a case which was taken into account by the inspector in reaching her decision.

127. **Conclusion.** The inspector erroneously confined her consideration of the psychiatric, psychological and medical evidence to the applicant's fear of enclosed spaces. As a result, her conclusion that there was no evidence that the only site that the applicant could live on was the appeal site was based on an incomplete evaluation of the available evidence and her proportionality assessment was both incomplete and inadequate

I. Issue 2 - Whether the inspector failed to consider the applicant and his son's and wife's and sister-in-law's article 8 rights

(1) Parties' cases

128. On behalf of the applicant it was contended that the proportionality assessment was fundamentally flawed whereas, on behalf of the Secretary of State it was contended that there was no obligation to consider the applicant's son's, wife's or sister-in-law's article 8 rights but that, in any event, the article 8 rights of the applicant's son were taken into account. Moreover, all other relevant considerations were taken into account and the inspector's proportionality assessment was satisfactorily undertaken in a way that was not open to challenge.

(2) The decision's structure

129. **Structural error in the decision-making process.** The relevant paragraphs of the inspector's decision are set out above[64]. It is structured into two parts. The first part considered the applicant's belief that he could not leave the site because of his mental health problems and his evidence that if he was forced to leave it, his son would inevitably have to go and live with his biological mother. The inspector concluded that these factors and the support he received from his wife and friends did not constituted a "substantial material consideration" that outweighed the planning harm the development would provide. It followed that there were no "very special circumstances" that justified her granting permission. The second part of her decision re-considered the same considerations without elaboration and concluded that they were not sufficient to outweigh the public interest in protecting the green belt.

130. I have doubts as to the lawfulness of the inspector's "very special circumstances" conclusion given its failure fully to consider the applicant's mental and physical health but, as I have already decided, it is not necessary to reach a conclusion on that issue and I will say no more about it[65]. It was, however, unfortunate that the inspector split up her decision in the way that she did because it appears that the result of doing was that she carried out her proportionality assessment under article 8 in an erroneous manner by failing to take account of a range of relevant considerations[66]. This occurred because she had concluded that the required proportionality assessment amounted to no more than a repeat of her planning or

64 See paragraph 48 above.
65 See paragraphs 94 - 96 above.
66 See paragraph 95 above.

compassionate circumstances decision which had been to the effect that there were no very special circumstances requiring her to give consent. This error may well have occurred because she had overlooked the fact that the considerations giving rise to a finding of disproportionality could also, but need not necessarily, amount to very special circumstances.

131. **Applicant's son's best interests a primary consideration.** The two sections of the decision concerned with the family and home circumstances of the applicant and his wife and son briefly refer to his son's possible need to return to his biological mother if the planning application was refused. However, she concluded that these were not matters that carried any weight because she had not been shown any evidence that the appeal site was the only one on which the applicant could live.

132. However, before those findings could be reached, it was incumbent on the inspector to identify what were the best interests of the applicant's son and then give those interests a primary consideration. For example, it might not have been in his best interests to be moved off the site and if this was so, it had to be taken into account as a primary consideration even if other suitable sites were available. In ascertaining these best interests, it was also incumbent on the inspector to ensure that she had been provided with a reliable summary of what the applicant's son considered to be in his best interests and, in consequence, to ascertain what alternative sites were available to enable him to express his views about his best interests in the light of those alternatives.

133. **Structured assessment - general.** In undertaking an assessment of what was in the son's best interests and a proportionality assessment, the various contributing considerations that had to be taken into account should have been assessed together in a structured and balance assessment once the necessary circumstances relating to each consideration had been ascertained and it had been decided what relative weight should be given to each circumstance. The inspector's proportionality assessment was not structured, largely because she had decided that the incomplete considerations that she took into account should carry little if any weight.

(3) **Matters that should have been taken into account – the applicant**

134. **The applicant's case.** The decision failed to account of many features of the applicant's case for contending that the inspector's decision was a disproportionate interference with his family life and home. His case was, in summary, that:

(1) The appeal site was the only site where the applicant could enjoy a family life and his home with his son and share that life with his wife in a way that did not result in an interference with his sister-in-law's family and private life.

(2) The applicant suffered from an incurable claustrophobic-type complaint and other disabilities which required an unusual, if not unique, open-air lifestyle which needed to be lived in seclusion and close to his sister-in-law's house in a location where both he and his son could be cared for and supported by his wife.

(3) There was no realistic likelihood of the applicant's disabling conditions being treated or being cured or reduced in severity.

(4) The applicant and his wife owned the appeal site and the mobile home and there was no good reason for their being moved off site notwithstanding that the use of the mobile home on the site had been unlawful from the start and had been enforced against and was now criminal in nature.

(5) Furthermore there were no other alternative comparable sites so the applicant had not looked for any and, besides, his illiteracy and personality problems precluded him taking any meaningful steps to investigate or search for alternative sites.

(6) The applicant had no resources of his own to put towards an alternative home and his wife's resources were limited to the value of the house she was building for herself in Bristol and the rental income from the matrimonial home that they have now both vacated.

(7) SGDC, as the relevant planning, housing, homelessness, social and children's authority and pursuant to its duties to him and his child under the HRA and the children, housing and social services and welfare legislation, had never undertaken assessments of his and his son's planning, housing, welfare and social needs as they were required to do and they had not provided any information to the inspector to enable her to undertake her statutory duties that she was required to undertake by virtue of the HRA.

(8) The applicant's son's best interests pointed to his being able to live with his father on the appeal site at least until he ceased to be a child. His best interests involved his living near his present secondary school with his father on the appeal site. If he was moved away from the appeal site, he might have to move back to his biological mother despite his lack of contact with her for many years or change his school and lifestyle. However, no attempt had been made to ascertain what was in his best interests or his views as to what was in his best interests.

(9) His wife not only provided the applicant and her son-in-law with significant support, she shared their home which was a necessary part of the family life she enjoyed with them. However, she was committed to providing full-time care for her severely disabled sister who she lived with nearby. Her sister was also living in the SGDC area and that authority had social and care responsibilities for her sister which she was helping it to fulfil.

(10) If the applicant and his son moved away from the appeal site, if this was practicable, his wife would have to choose between her family and her sister with the possible interference with the family and private lives of all of them including her own.

135. **Psychiatric, psychological and medical factors.** The list of psychiatric, psychological and medical factors that were not taken into account has already been identified[67]. The list is both lengthy and significant. The inspector considered that someone with the psychiatric difficulties of the applicant should be seeking professional help. That view was not supported by the experts' reports she was provided with which indicated that there was no long-term help that he could receive which would minimise or eradicate his phobia and his other disabling propensities.

136. **Dependency.** The applicant was very significantly dependent on his wife's daily visits to the site and her overnight stays and on the contribution she made to looking after her step-son and to his life and welfare. These matters were not taken account of at all.

137. **Applicant's interest in the appeal site.** Although it was stated and accepted that the site was acquired exclusively by his wife using only her own funds, nonetheless the applicant appeared to have an equitable interest in the site and its proceeds of sale as well as an interest arising from the matrimonial homes legislation and as his wife's husband. He was, therefore, living on land that he had a significant interest in which had been acquired without any thought given to the planning consequences.

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[67] See paragraph 125 above.

138. **Applicant's inability to search.** No account was taken of the applicant's case that he had not searched for alternative sites because there were no available alternative sites nor of the psychiatric evidence that his personality and other problems had impaired his ability to look for other sites or to manage his affairs in a way that enabled rational decision-making about his and his son's future to be undertaken.

(4) **The applicant's son**

139. **Son's best interests.** The applicant's son's best interests were not identified. In addition, there was no consideration of what alternative home for him would be in his best interests if he was required to leave the appeal site. As part of that consideration, no-one investigated whether it was feasible for him to go to live with his biological mother, or to find out whether she would accept him. It seemed highly unlikely that this was an option since he had not lived with her since he was an infant some years ago and she had apparently lost interest in him and his contact with her since he moved to Bristol at least eight years earlier had been indirect and intermittent. Of much greater significance was the fact that the inspector was not informed that any attempt had been made to ascertain his views about his future or as to what he considered to be his best interests and SGDC had apparently made no attempt to find these out or to investigate the feasibility of his going to live with his biological mother.

140. **The applicant's son's future home.** The inspector concluded that there was no present need to consider whether or not the applicant's son could and would return to his biological mother. This was an error since it was necessary for the inspector, in assessing what was in the best interests of the applicant's son, to consider all possible alternatives in the event of a refusal decision. Clearly one such alternative would be for him to be rehoused with another family member since it was not inevitable that a suitable site could be found for the applicant and his son to live together in a mobile home.

141. **Homelessness and child in need.** One possible option facing both the applicant and his son was that they became homeless with the need for SGDC to consider whether it would treat father and son as a family unit in priority need and, if so, where they would be offered accommodation if the application for permission was refused. Equally, it had not considered how it would accommodate the applicant's son if it would not or could not accommodate the applicant since, in such circumstances, he would be a child in need who SGDC would have a statutory duty to support. SGDC should have provided the inspector with answers to these questions.

(5) **The applicant's wife**

142. **Wife's role as carer.** The applicant's wife was acting as the full-time carer of her sister. This necessitated her living with her sister save for her nights over at the family home and her daily visits there to look after her husband and step-son. Her role as her sister's live-in full-time carer appeared to be the only way that her sister could continue to live in her home which the house in which her family had lived for many years. SGDC had not assessed her needs or the need for the applicant's wife to act as her full-time live-in carer or how the applicant and his son would be cared for in the event of their moving away from the area whilst the applicant's wife stayed with her sister. Furthermore, no-one appears to have given the inspector any information about the applicant's wife's views as to the future or the extent of her caring role for both her husband and step-son.

(6) **The applicant's sister-in-law**

143. **Applicant's disabilities.** No account was taken of the applicant's sister-in-law's disabilities which apparently required full-time care which could only be provided by her sister and only by her sister living with her on a full-time basis. It was possible that, if the

applicant and his son were to move away from the site, the applicant's wife and sister-in-law would be unable to share their family life together, the sister-in-law's private life might be interfered with and the applicant's wife might have to take the very difficult decision of whether to support her sister at the expense of her husband and son-in-law or vice versa.

(7) **SGDC**

144. In addition to its role as an authority concerned with both homelessness and children in need, SGDC was the planning authority who was concerned to remove both the applicant and his son from the site to an alternative pitch. It would appear that it had not carried out any assessment of where father and son could be relocated in a way that would ensure that their dependence on the applicant's wife could be accommodated and that the applicant could continue to enjoy his secluded open-air lifestyle. SGDC should have provided the inspector with answers to these questions as the planning authority seeking the applicant's removal from the site and in conformity with its duties under section 11 of the Children Act[68] and section 6 of the HRA.

(8) **Previous planning history.**

145. No account was taken of the extent to which previous enforcement decisions taken by SGDC had taken account of the article 8 rights of the applicant or his son, wife or sister-in-law, of why no attempt had been made since their arrival on the appeal site to remove them from the site or of what alternative sites the applicant could have come up with had he sought them out. Furthermore, the inspector was not provided with copies of each planning decision made by SGDC, there having been two refusals of permission, two stop orders and four enforcement notices, nor was she provided with copies of the planning officer's reports to the planning committee that had led to each of these decisions being taken.

(9) **Inspector's inquisitorial role.**

146. The lack of evidence on the matters that I have summarised above should have been made good in the discussion conducted by the inspector and brought out in the list of major issues that she had formulated, or should have been formulated, at the outset of the hearing. For those matters where it was clear that the available evidence and information was inadequate or not available, for example appropriate assessments of the family's long-term health, welfare and housing needs, an adjournment should have been considered or a decision taken to abort the hearing so that the appeal could be restarted afresh as an inquiry.

(10) **Inspector's reasons.**

147. The inspector's reasons do not adequately explain her reasoning for dismissing the appeal in these respects:

(1) The reasons did not identify the issues that the inspector had identified as being the main issues that she considered had arisen for discussion and did not, save in an incomplete and oblique fashion, summarise the discussion on those main issues.

(2) The reasons showed that material issues were not discussed and material evidence and information was not obtained from or explored with the parties.

(3) The reasons also showed that the vital decisions concerned with the proportionality of the refusal decision and the rejection of a temporary and personal permission were not arrived at in a structured manner and in compliance with the HRA and relevant planning policies, did not take account of highly relevant considerations and were not reached after

[68] See paragraph 81(2) above.

an appropriate balancing of the applicant's and his wife's, son's and sister-in-law's respective interests against the community interests involved.

(11) **Overall**

148. The inspector did not consider the applicant's family life to any significant extent and certainly did not consider each of the four family members' enjoyment of family life with the other three. Furthermore, she did not pay any respect to the son's and the wife's home in the mobile home on the appeal site. Finally, there were significant gaps in the consideration of each of the family's entitlement to respect for their respective home lives on the appeal site and the applicant's wife and sister-in-law's family and private lives and home life at the applicant's sister-in-law's home.

J. **Issue 3 - Whether the inspector failed properly to assess the claim for temporary planning permission**

(1) **The law.**

149. This issue is concerned with the use of conditions to limit the grant of planning permission if a full permission was not granted. It involves a consideration of what is informally but inaccurately called a temporary permission which is a permission subject to a condition that the development or permitted change of use must be discontinued after a stated time limit. It is also concerned with the use of a personal condition which would limit the use of the development to a named individual, in this case the applicant. The Secretary of State's policy on these matters is set out in the Circular: *The Use of Conditions in Planning Permissions*[69], the salient parts of which are as follows:

"Conditions Restricting the Occupancy of Buildings and Land

Occupancy: general considerations

92. Since planning controls are concerned with the use of land rather than the identity of the user, the question of who is to occupy premises for which permission is to be granted will normally be irrelevant. Conditions restricting occupancy to a particular occupier or class of occupier should only be used when special planning grounds can be demonstrated, and where the alternative would normally be refusal of permission.

Personal permissions

93. Unless the permission otherwise provides, planning permission runs with the land and it is seldom desirable to provide otherwise. There are exceptions, however, where it is proposed exceptionally to grant permission for the use of a building or land for some purpose which would not normally be allowed at the site, simply because there are strong compassionate or other personal grounds for doing so. In such a case, the permission should normally be made subject to a condition that it should endure only for the benefit of a named person – usually the applicant (model condition 35) … ."

108. Section 72(1)(b) of the TCPA gives power to impose conditions requiring that a use be discontinued or that buildings or works be removed at the end of a specified period …

[69] Circular No. 11/95.

Short-term buildings or uses

110. Where a proposal relates to a building or use which the applicant is expected to retain or continue only for a limited period, whether because they have specifically volunteered that intention, or because it is expected that the planning circumstances will change in a particular way at the end of that period, then a temporary permission may be justified. For example, permission might reasonably be granted on an application for the exercise of a temporary building to last seven years on land which will be required for road improvements eight or more years hence, although an application to erect a permanent building would normally be refused."

150. No mention was made during the hearing or during the hearing of this application of the possible use of a personal condition despite its obvious potential relevance to the applicant's position and personal circumstances. Such a condition would, nonetheless, be a possible option given the applicant's case and the evidence of his and his family's circumstances and article 8 claims. It was therefore an option that the inspector, pursuant to her obligation to conduct the hearing in the inquisitorial manner required by the Hearings Rules, should have raised for consideration and discussion at the hearing and dealt with in the decision.

(2) **The inspector's decision**

151. It is helpful to set out again the inspector's brief reasoning on this issue:

"18. Submissions were made concerning a temporary permission, in the event that I did not consider a permanent permission justified and taking into account any reduced harm arising from a limited period of permission. Dr Reeves expressed the view that the appellant's condition was unlikely to change substantially in the short/medium term. If there is no realistic prospect of a change in circumstances, then a temporary permission would be inappropriate."

152. The applicant's representative asked the inspector to consider a temporary permission condition if she did not grant a full permission. Having decided that a full permission was not justified, she should then have considered all the lesser alternatives including whether to impose a personal condition limiting any permission to the personal use of the applicant and his family and a time-limited condition. The imposition of a personal condition with or without a time-limited permission and the length of that time-limit if a time-limited condition was to be imposed would depend on her consideration of all the personal and compassionate factors that she concluded merited a condition or conditions.

153. The inspector dealt with the question of a temporary permission very briefly and did not deal with the possibility of a personal condition, whether linked to a permission or a temporary permission. She considered that a temporary permission should normally be considered only if there was likely to be a change of circumstance in the short to medium term and concluded that there was only one relevant circumstance of that kind, being the applicant's psychiatric condition. She decided that a temporary condition was not appropriate since she considered that the psychiatric evidence was to the effect that the applicant's psychiatric condition was unlikely to change.

(3) **The parties' respective cases**

154. On behalf of the applicant, it was contended that the inspector failed to apply the relevant policy that I have set out above[70] in only considering one of several major factors which would inevitably change with time. On behalf of the Secretary of State it was contended that the inspector had the relevant policy in mind and decided that the only factor which should bear any weight did not justify a temporary permission, particularly since the applicant had already had three years by the date of the hearing to sort out and move to an alternative site with his son.

(4) **Discussion**

155. **Personal condition.** The inspector should first have considered imposing a personal condition as an adjunct to a full permission if a full permission was not justified. Such a condition, although rare, is clearly envisaged by the relevant policy as being one that is available on compassionate grounds or, it could now be added, on proportionality grounds. Such a condition was imposed in *South Bucks DC v Porter (No 2)*[71] and upheld by the House of Lords in not dissimilar circumstances to those present in this case and its use in this manner was something that should have been considered. There were a number of inter-related circumstances that existed, or might have been considered to exist, which could have given rise to a personal permission on compassionate grounds. This could well have been considered to be a proportionate approach to the applicant's article 8 claims.

156. **Time limited condition.** If the inspector concluded that it was not appropriate or possible to grant a full permission with or without a personal condition, she should have then considered granting a temporary permission after a consideration of all relevant circumstances that would or might alter with time. However, she only considered one such circumstance, being the possibility of the applicant's psychiatric condition changing with time with professional intervention and she concluded that this would not happen. However, a number of highly relevant circumstances were likely to change over time, none of which were considered by the inspector in the context of either a time-limited condition or a personal condition coupled with a time limited one. In these circumstances, a personal condition would be used to fashion an appropriate time-limited condition on compassionate grounds.

157. The relevant circumstances that should have been considered in this context included the following:

(1) The applicant's claustrophobic-like condition appeared to be linked to his personality, the PTSD-type symptoms he presented with, his stress and depression and the levels of extraneous support in practical matters affecting his life. Each of these was variable and subject to change for the better or for the worse and, despite current prognosis, with future psychiatric intervention.

(2) The support that he and his son required that was provided by his wife might decrease with time.

(3) The applicant might accompany or follow his wife to a different location if she ceased to be the full-time carer of her sister or to reside at her sister's house.

(4) The applicant's son's dependency and his need to reside on the appeal site would cease when he reached 18 or possibly later.

(5) Alternative accommodation might be discovered in the SGDC planning area or elsewhere that would be suitable for the applicant's, his son's and his family's needs.

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70 See paragraph 149 above.

71 See paragraph 69 and footnote 21 above.

158. **Unlawfulness and other sites.** It was not material, as was submitted on behalf of the Secretary of State, that the was considering a time-limited condition some 4 years after the imposition of enforcement notices and some 3 years after the appeal against these notices was dismissed or that the applicant had not looked for alternative sites since these events. However, there were good reasons why the applicant had not looked elsewhere given his need for a site located close to his sister-in-law's house and his psychiatric, psychological, personality problems and illiteracy which made it difficult if not impossible to undertake such measures. Further, there were good reasons why the historic enforcement action did not diminish the applicant's article 8 claim and were matters that should not be held against him when the inspector considered the hardship elements of the applicant's appeal and the proportionality of a refusal decision[72].

159. Each of the circumstances that I have listed, whether individually or in combination, might well have suggested that if a full permission was not appropriate that a permission linked to an amended application which reduced the perceived harm or a personal or time-limited condition would be appropriate and in conformity with the published policy concerning personal or temporary permissions. They certainly point to an error of approach by the inspector in only focusing on the unlikelihood of the applicant's health improving, in concluding that that factor was unlikely to change and in failing to consider whether any other relevant factor would be likely to change or indeed, considering whether there were compassionate grounds for granting a permission linked to a personal condition. In other words, it was an error to exclude consideration of the possibility of a temporary permission without first considering whether and to what extent the applicant's and his family's circumstances might change with time.

(5) **Conclusion**

160. The inspector should have considered four linked possibilities having ruled out a full permission:

(1) Amending the terms of the permission so as to reduce the perceived harm caused by the proposal;

(2) A personal condition;

(3) A time-limited condition; and

(4) The appropriate length of a time-limited condition.

The inspector failed to consider three of these possibilities and erroneously limited her consideration of a time-limited condition to the possibility of a change in the applicant's psychiatric condition.

K. **Overall conclusions**

161. For all the reasons set out in section I above[73], the inspector's decision cannot stand since it did not take into account a series of requirements that it should have complied with. It must therefore be quashed and the Secretary of State must reconsider the applicant's in the light of this judgment.

L. **The order to be made on the application**

162. The proposed order that should be made is as follows[74]:

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72 See paragraphs 64 - 72 above.

73 See paragraphs 128 - 148 above.

74 Subject to the comments or agreement of the parties as to any changes in this proposed wording.

(1) The applicant is to be named and known as AZ for all purposes in connection with this judgment and these proceedings.

(2) No newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of the child concerned in this application or in the planning appeal from which this application is brought, either as being one of the persons by or in respect of whom the planning appeal was brought or this application is made or as being a witness or providing evidence to the planning appeal or that is referred to in this application.

(3) No picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid; except in so far (if at all) as may be permitted by the direction of the court.

(4) The application should be allowed, the inspector's decision should be quashed and the Secretary of State should reconsider the appeal in the light of the judgment.

(5) The first respondent should pay the claimant's costs on the standard basis to be subject to detailed assessment if not agreed.

(6) No order as to the costs of the second respondent.

HH Judge Anthony Thornton QC

APPENDIX 7

Collins v SSCLG & Fylde Borough Council [2013] EWCA Civ 1193

Neutral Citation Number: [2013] EWCA Civ 1193

Case No: C1/2012/2806

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
His Honour Judge Pelling QC
[2012] EWHC 2760 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2013

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE FLOYD
and
SIR DAVID KEENE

- -

Between :

Elizabeth Collins	**Appellant**
- and -	
(1) Secretary of State for Communities and Local Government	**Respondent**
(2) Fylde Borough Council	

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Stephen Cottle (instructed by **Lester Morrill Solicitors**) for the **Appellant**
Rupert Warren QC (instructed by **The Treasury Solicitor**) for the **Respondent**
Fylde Borough Council did not appear on the appeal

Hearing date : 18 July 2013

- -

Approved Judgment

Judgment
As Approved by the Court

Lord Justice Richards :

1. The appellant is one of a group of 78 travellers (including 39 children) who since November 2009 have been living in caravans on a site of about 2.4 hectares to the south east of the village of Hardhorn, near Blackpool. Fylde Borough Council, the local planning authority, issued an enforcement notice alleging that the use of the land had been changed without planning permission from equestrian and agricultural use to use as a residential caravan site. An application for planning permission for that change of use was refused. Appeals were then brought both against the enforcement notice and against the refusal of planning permission. The appeals were recovered for determination by the Secretary of State, who appointed an inspector to hold a public local inquiry. The inspector's report recommended that the appeals be dismissed and that the enforcement notice be upheld, subject to immaterial corrections and variations. In a decision letter dated 18 August 2011 the Secretary of State agreed with the inspector's recommendations.

2. The next phase of the case was a challenge under section 288 of the Town and Country Planning Act 1990 against the refusal of planning permission, and an appeal under section 289 of the Act against the decision to uphold the enforcement notice. In a characteristically clear and robust judgment, HHJ Pelling QC, sitting as a deputy High Court Judge in the Administrative Court, dismissed the section 288 challenge and, although granting permission to appeal under section 289, dismissed the substantive appeal.

3. The appellant then sought permission to appeal to this court against the judge's order. McCombe LJ directed that the application for permission in respect of the section 288 challenge be adjourned to a "rolled-up" hearing but granted permission in respect of the section 289 appeal. It is unnecessary to go into the procedural reasons why he adopted that course. Before us, Mr Warren QC for the Secretary of State disavowed any procedural concerns and raised no objection to our hearing both matters as substantive appeals. That is plainly the appropriate course, and in my view permission to appeal in respect of the section 288 challenge should be granted accordingly.

4. It is uncontroversial that the refusal of planning permission for, and enforcement against, use of the appeal site for residential caravans was likely to leave the traveller families without a permanent base and having to resort to a roadside existence. The question that arises in that context, and the central issue on the appeal to this court, is whether the best interests of the children were taken properly into account by the Secretary of State in reaching his decision. To answer that question it is necessary to examine (i) the correct general approach towards consideration of the best interests of children in planning decisions of this kind, and (ii) the specific reasoning in the decision letter and in the passages of the inspector's report adopted in the decision letter.

5. In relation to general approach, there is a substantial measure of common ground between the parties but the areas of disagreement are important.

6. In relation to specific reasoning, the problem is that neither the inspector nor the Secretary of State referred in terms to the best interests of the children – the decision

preceded the recent planning case-law on the subject – and it is necessary to decide whether the correct approach was nevertheless followed in substance.

General approach

7. Article 3.1 of the United Nations Convention on the Rights of the Child provides: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". The way in which that international obligation has been translated into, and is to be given effect in, our national law has been the subject of detailed examination by the Supreme Court in the context of immigration and asylum in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, and in the context of extradition in *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2012] 3 WLR 90. Both those cases explain in particular how the best interests of the child should be taken into consideration when considering the proportionality of interference with rights under article 8 of the European Convention on Human Rights.

8. The Secretary of State has conceded in recent cases at first instance, and conceded before us, that the principle articulated in those cases should also be applied in the context of planning. As it was put in the skeleton argument of Mr Rupert Warren QC on the present appeal, "the [Secretary of State for Communities and Local Government] accepts that in light of the reasoning in *ZH* in particular (at [21]), there is a broad consensus in support of the idea that in all decisions concerning children, their best interests must be of primary importance, and that planning decisions by him ought to have regard to that principle".

9. 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.

10. In *Stevens v Secretary of State for Communities and Local Government* [2013] EWHC 792 (Admin), which is perhaps the first occasion on which the Secretary of State made a clear concession that the principle in *ZH (Tanzania)* and *H(H)* applies in the planning context, Hickinbottom J considered at some length the judgments in those cases and how they affect the approach to be taken by a planning decision-maker. He derived the following propositions from the authorities (at [69]):

> "(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.
>
> (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.
>
> (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 can 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 a 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 this 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 impact is in all the circumstances proportionate …."

11. In my judgment, that list of propositions is an accurate and helpful summary. Mr Cottle took issue with some of it, but for reasons given below I do not accept his criticisms.

12. Mr Cottle submitted that proposition (iii), in particular, was deficient in failing to list the factors that a decision-maker needs to address when determining a child's best interests. He referred to the provisions of section 1 of the Children Act 1989 concerning the welfare of a child. The section includes, in subsection (3), a list of factors to which the court shall have regard when considering whether to make, vary or discharge certain orders under that Act. The first four of the factors listed are "(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding); (b) his physical, emotional and educational needs; (c) the likely effect on him of any change in his circumstances; and (d) his age, sex, background and any characteristic of his which the court considers relevant". Mr Cottle submitted that although the section is not directly applicable, the list (or that part of it) provides a useful aide-memoire for decision-makers in the planning context. He made a similar point in relation to factors identified in section 10 of the Children Act 2004, which again has no direct application: it concerns arrangements to be made by local authorities to promote cooperation between them and others with a view to improving the well-being of children. He referred also to paragraph 1.1 of the UNHCR Guidelines on Determining the Best Interests of the Child (considered in *ZH (Tanzania)* at [25]), which states that the term "best interests" broadly describes the well-being of the child, and to the checklist of factors at Annex 9 to those Guidelines, under the headings of "Views of the Child", "Safe Environment", "Family and Close Relationships", and "Development and Identity Needs".

13. Mr Cottle's submissions sought to bring into this area a greater degree of elaboration than in my view is appropriate. I would avoid specific aide-memoires or checklists. Hickinbottom J's proposition (iii) is not, and does not purport to be, a complete statement of what may be relevant to the evaluation of a child's best interests in a particular case, but as a broad statement of the likely position in the general run of planning decisions it seems to me to be unobjectionable. It leaves open for consideration any factor that is relevant to the well-being of a child in the circumstances of a particular case.

14. Mr Cottle also sought to bring into play section 11 of the Children Act 2004 and the statutory guidance issued in relation to it. By subsection (2) of section 11, each person and body to whom the section applies must make arrangements for ensuring that their functions are discharged having regard to the need to safeguard and promote the welfare of children; and by subsection (4), each such person and body must in

discharging their duty under the section have regard to any guidance given to them for the purpose by the Secretary of State. It is common ground, however, that the section does not apply to the Secretary of State in relation to his planning functions and that it cannot therefore have any direct application in this case, though it does apply to local authorities in relation to the exercise of their functions generally (see subsection (1)). I do not think that section 11 would add materially to the analysis in any event. It was one of the provisions of national law taken into account in *ZH (Tanzania)* in discussing the importance of the best interests of the child in the application of article 8 (see [23], per Lady Hale). The statutory guidance under section 11 underlines the breadth of the general requirement to safeguard and promote the welfare of children (it refers in paragraph 2.8 to protection from maltreatment, prevention of impairment of health of development, ensuring that children are growing up in circumstances consistent with the provision of safe and effective care, and enabling them to have optimum life chances and to enter adulthood successfully), but it contains nothing specific in relation to planning functions.

15. A further point raised by Mr Cottle concerns the ascertainment of the child's own wishes. Article 12 of the UNCRC states that a child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body; and I have referred already to Mr Cottle's reliance on the factors in section 1 of the Children Act 1989, which include "the ascertainable wishes and feelings of the child concerned …". It is highly unlikely that a planning decision-maker (or, as here, an inspector appointed to hold a public inquiry and make recommendations to the Secretary of State) will need to hear directly from any children affected by the decision. The child's wishes, and matters relating to the child's best interests generally, will normally be conveyed sufficiently through evidence from other sources, including social enquiry reports and the evidence of parents or carers.

16. Decision-makers must of course be equipped with sufficient evidence on which to make a proper assessment of the child's best interests. At least in a case where the applicant is professionally represented, however, they are entitled to assume that the relevant evidence has been placed before them unless something shows the need for further investigation. If it is thought that the issue has not been adequately addressed by the parties they can be invited to give further consideration to it, for example by the letter sent out by the inspector with questions for the parties before a public inquiry. But as Hickinbottom J said at [58] of *Stevens*, disagreeing to this extent with the observations of HHJ Thornton QC in *Sedgemoor District Council v Hughes* [2012] EWHC 1997 (QB), it will not usually be necessary for the decision-maker to make their own enquiries as to evidence that might support the child's best interests.

17. The discussion of how children's best interests are to be taken into account in planning decisions gains no assistance from national planning guidance. For example, the guidance directly relevant to this case, namely *Planning policy for traveller sites*, issued by the Department for Communities and Local Government in March 2012, does not refer to children's best interests in the (non-exhaustive) list of issues that local planning authorities should consider when considering planning applications for traveller sites. The guidance was issued before the Secretary of State's concession that the principle in *ZH (Tanzania)* and *H(H)* applies in the planning context, and it plainly needs revision to take account of the point. The

Secretary of State may also wish to consider the provision of guidance to inspectors on the issue, including the possible inclusion of reference to children's best interests in the letters sent out to the parties in advance of a public inquiry.

18. In the present case, as I have said, the inspector's report and the Secretary of State's decision letter also pre-dated the recent planning case-law on the subject, and the arguments and evidence were not addressed in terms to the best interests of the children on the site. I turn to consider whether, in substance, the decision nevertheless took proper account of their best interests.

Whether due consideration was given to the best interest of the children in this case

The inspector's report

19. In order to understand the balancing exercise carried out by the inspector, it is necessary to refer first, though briefly, to his conclusions as to the harm resulting from the development. He found that (i) the development resulted in a significant and substantial adverse impact on the landscape and a significant and substantial impact on visual amenity, and that this harm could not be overcome by effective landscaping measures within a reasonable period of time; (ii) a residential caravan site of this scale did not respect the small scale of Hardhorn village; and (iii) the development would result in material harm to highway safety. Other potentially adverse matters considered by him were found to be of little or no weight. They included the problem of criminal and anti-social behaviour related to the appeal site.

20. In a detailed examination of the need for and provision of sites for gypsies and travellers, he referred to the lack of an identified need for sites in the Fylde Borough but found that the evidence of need in the wider area was a significant material consideration weighing in the appellants' favour.

21. The inspector then turned to consider the accommodation needs and personal circumstances of the occupants of the appeal site:

> "*The accommodation needs of the occupants of the site and the availability of alternative sites*
>
> 118. The site is occupied by 78 people, including 39 children. With the exception of two Scottish Travellers, they are all Irish Travellers. Irish Travellers are a distinct ethnic and cultural group with a long history of travelling around Britain and Ireland in large groups. Mrs Heine's evidence summarises (at paragraph 6.10) the results of a study of Irish Travellers. It refers to problems of disadvantage and marginalisation, high levels of discrimination, harassment, a lack of sites and insecure, unhealthy living conditions. Irish Travellers are less likely to have a settled base than many Romany Gypsies.
>
> 119. Irish Travellers in general and this group in particular attach great importance to travelling and living together as an extended family. This group has been unable to do so until now because no site has been available. They comprise four

> closely related family groups and have led a highly nomadic life, never living in houses. They have travelled extensively, mostly in the north of England and particularly in the area between Stockport in the south and Blackpool and Fleetwood in the north. They have lived on the roadside or on other unauthorised sites, including land in Blackpool, Fylde and Wyre districts. They have frequently been moved on by the police, often at short notice. Their need is for a site of sufficient size to accommodate the group in order to allow easy access to basic sanitary facilities and to provide a settled base from which to travel for work purposes and allow better access to health, education and other services.
>
> …
>
> 121. There are no alternative sites realistically available within Fylde, either for the group as a whole or for its component families. Nor has the Council suggested that sites are available in the wider surrounding area. … Their need for accommodation and the lack of suitable realistically available alternative sites weigh in favour of the development.
>
> *The personal circumstances of the occupants of the site*
>
> 122. A roadside existence does not preclude all access to education. Nevertheless, it is very likely that if the travellers were obliged to leave the appeal site with no alternative site to go to there would be serious disruption to the education of the 22 children currently attending school. It is also likely that the education of those on school waiting lists would be disrupted. Mrs Hartley has no medical qualifications but her work requires close liaison with health professionals. Her evidence on medical matters is detailed and credible. A roadside existence would make access to health care considerably more difficult, with the potential for a harmful effect on the health of some members of the group, including those with significant existing medical conditions."

22. He went on to note in paragraph 123 that sustainability was enhanced by the benefits of a settled site in terms of access to health and education, and avoidance of long-distance travelling and environmental damage associated with unauthorised encampments.

23. Turning to the overall balance in respect of permanent or temporary permission, he considered that substantial weight should be given to the harm to the landscape and the harm to visual amenity; moderate weight to the failure of the development to respect the scale of the nearest settled community; and considerable weight to the harm to road safety. On the other hand, the unmet need for sites in the wider area was worthy of considerable weight, and there was also considerable uncertainty as to when and how that wider need would be addressed and met. There were no available

and suitable alternative sites for this large group of travellers either in Fylde or in the wider area. Further:

> "… They have a strong personal need for a settled base from which to access work, education, medical and other services and this site is in a reasonable sustainable location. Eviction from this site would probably lead to a roadside existence and that would be likely to adversely affect those on the site with significant medical conditions and the children's access to education. Reversion to a roadside existence could also have adverse environmental and other impacts elsewhere. These are also considerations worthy of substantial weight in the appellants' favour."

Nevertheless, having particular regard to the effect on the landscape, visual amenity and highway safety, he considered that the overall balance did not justify the granting of permanent planning permission for the development.

24. He then turned to consider whether temporary planning permission should be granted. He referred to guidance that a temporary permission may be justified where it is expected that the planning circumstances will change at the end of the period of temporary permission. But he found that in this case it was "not reasonably clear that planning circumstances would change at the end of a defined period leading to a reasonable likelihood of an alternative site being available". He said that a temporary permission would limit the harm caused by the development by limiting its duration, and would avoid the prospect of the appellants having to leave the site in the near future with no alternative site to go to. However, having regard to what he had already said and to the nature and extent of the harm to the landscape, visual amenity and highway safety, he did not consider that a temporary permission could be justified even if substantial weight were given to unmet need.

25. He dealt next with the time for compliance with the enforcement notice, concluding that it should be extended to 12 months.

26. There followed a section of the report headed "Human Rights". The inspector referred first to the need to take rights under article 8 into consideration. He stated that the likelihood that, if the appeals were dismissed, the families would be required to vacate their homes without any certainty of suitable alternative accommodation meant that there would be an interference with their homes and with their private and family lives. He appreciated the difficulties they would face without an authorised site in pursuing their traditional way of life. He continued:

> "135. This interference with the rights of the appellants and their families must be balanced against the wider public interest in pursuing the legitimate aims stated in Article 8. With regard to both permanent and temporary permissions, the harm which would continue to be caused by the development, particularly in terms of the protection of the environment and safety, is considerable. Taking into account all the material considerations, including the appellants' personal circumstances, I am satisfied that this legitimate aim can only

> be safeguarded by the dismissal of these appeals combined with the extension of the period for compliance with the requirements of the enforcement notice to which I refer above …. The protection of the public interest cannot be achieved by means which are less interfering of the appellants' rights. Such a decision would therefore be proportionate and necessary in the circumstances and hence would not result in a violation of the appellants' rights under Article 8 of the European Convention on Human Rights."

27. The inspector's report went on to consider points raised under articles 6 and 14 of the European Convention on Human Rights.

The decision letter

28. The decision letter was addressed to the appellants' planning consultant, Mrs Heine. It tracked the inspector's report. The Secretary of State agreed with the inspector's principal conclusions on harm caused by the development, though he considered that the incidents of criminal and anti-social behaviour attracted somewhat greater weight than suggested by the inspector. Like the inspector, he concluded that the evidence of need for sites for gypsies and travellers in the wider area was a significant material consideration weighing in the appellants' favour. The decision letter continued:

> "<u>The accommodation needs of the occupants of the site and the availability of alternative sites</u>
>
> 19. The Secretary of State agrees with the Inspector's reasoning and conclusions at IR118-121, with regard to the accommodation needs of the occupants of the site and the availability of alternative sites. He agrees that there are no alternative sites realistically available within Fylde, whether for the group as a whole or for its component families, and he notes that the Council did not suggest that sites are available in the wider surrounding area (IR121). He further agrees that the need of the appellants for accommodation and the lack of suitable and realistically available alternative sites weighs in favour of the development (IR121).
>
> <u>The personal circumstances of the occupants of the site</u>
>
> 20. The Secretary of State has given careful consideration to the evidence submitted on personal circumstances, including your proof of evidence (dated January 2011) and the written health assessment from Nicola Hartley of 'Making Space' (dated December 2010). He agrees with the Inspector that, if the travellers were obliged to leave the site with no alternative site to go to, there would be serious disruption to the education of the children currently attending school (IR122). The Secretary of State is satisfied that the evidence in this case justifies attributing significant weight to continuity of education. The Secretary of State shares the Inspector's view

> that a roadside existence would make access to health care considerable more difficult, with the potential for a harmful effect on the health of some members of the group, including those with significant existing medical conditions (IR122). He attributes moderate weight to the health needs of the site occupants."

29. The reference in that paragraph to specific consideration of the evidence is of some significance. The proof of evidence of Mrs Heine contained lengthy passages relating to "the personal needs of the site occupants to be settled" (referring *inter alia* to the importance attached by them to the extended family, to the need to live and travel together as a group, and to the distress and disruption caused by roadside camping), to "the education needs of the children" (including the numbers at school and the benefits of schooling) and to "the health needs of site occupants" (with a cross-reference to the detail in Ms Hartley's health assessment). Ms Hartley's assessment, in turn, referred to the benefits of access to consistent healthcare, education and local services and amenities through living on the appeal site, and expressed concern about the physical and mental wellbeing of the families if they were required to leave the site. It gave specific, anonymised information about the health problems of a number of families on the site.

30. To return to the decision letter, the Secretary of State went on to express agreement with the inspector's conclusions on sustainability, before turning to the overall balance. As to the balance, the decision letter stated that the Secretary of State had given very careful consideration to the inspector's reasoning and conclusions. He agreed with the inspector as to the weight to be given to the various elements of harm resulting from the development. The decision letter continued:

> "24. With regard to the matters put forward in support of the appeals, the Secretary of State has concluded that unmet need is a significant material consideration weighing in the appellants' favour …. He has also concluded that the accommodation needs of the site occupants and the availability of alternative sites weighs in favour of the development (paragraph 19 above). The Secretary of State has attributed significant weight to continuity of education and moderate weight to the occupants' health needs (paragraph 20 above). These matters, and the avoidance of potential adverse impacts which may arise if the appellants were to take up a roadside existence, are all considerations which the Secretary of State weighs in support of the appeal scheme."

31. The decision letter stated that having carefully balanced those considerations, the Secretary of State concluded that the overall balance did not justify the granting of permanent planning permission. In relation to temporary permission, he took the view, for the reasons given by the inspector, that it was not reasonably clear that planning circumstances in Fylde Borough would change for the occupants of the site at the end of a defined period. However, for the avoidance of doubt, he had considered the appellants' contention that a five year temporary permission should be considered. He agreed with the inspector that a temporary permission would limit the harm caused by the development by limiting its duration, and would also avoid the

prospect of the appellants having to leave the site in the near future with no alternative site to go to. However, having regard to those matters and to the nature and extent of the harm to the landscape, visual amenity and highway safety, he agreed with the inspector that a temporary permission could not be justified and that the planning balance would not alter even if substantial weight were given to unmet need.

32. Under the heading "Human Rights", the decision letter stated:

> "28. The Secretary of State has given careful consideration to the Inspector's reasoning and conclusions at IR134-139 with regard to the site occupants' rights under Articles 6, 8 and 14 of the European Convention on Human Rights. For the reason given by the Inspector, he agrees that dismissal of the appeals would be an interference with the occupants' homes and with their private and family lives (IR134). However, such interference must be balanced against the wider public interest and, like the Inspector, he is satisfied that the legitimate aim of protecting the environment and safety can only be safeguarded by the dismissal of these appeals combined with the extension of the period for compliance with the requirements of the enforcement notice (IR135). He agrees with the Inspector that such a decision would be proportionate and necessary in the circumstances and hence would not result in a violation of the appellants' rights under Article 8 of the European Convention on Human Rights (IR135)."

33. The decision letter then considered articles 6 and 14, and the proposed conditions, before setting out "Overall Conclusions", as follows:

> "31. The Secretary of State considers, overall, that the appeal development is not in accordance with the development plan as it would cause harm to the landscape character of the area, visual amenity and highway safety. He has gone on to consider whether there are any material considerations which would outweigh this conflict. He has taken into account the factors that weigh in favour of the appeals which include the unmet need for sites in the wider area, the lack of available and suitable alternative sites, the strong personal need of the appellants for a settled base and the likely adverse effects on the appellants of a reversion to a roadside existence. However, he considers that these factors do not outweigh the conflict with the development plan."

The appellant's submissions

34. Mr Cottle made clear in his oral submissions that the appeal to this court was limited to the refusal of *temporary* planning permission. His case was that the decision was legally flawed and that there existed a realistic possibility that temporary permission would have been granted if there had been a lawful assessment under article 8, taking the best interests of the children properly into account.

35. He submitted that no consideration of the best interests of the 39 children on the site was in fact sought or undertaken. The Secretary of State simply failed to ask the right questions. The exercise undertaken was along the traditional lines illustrated by *Basildon District Council v Secretary of State for the Environment, Transport and the Regions* [2001] JPL 1184, at [33], taking into account the personal circumstances of the traveller families as material considerations. It did not identify all the factors relevant to an assessment of the children's best interests or take those best interests into account as a primary consideration.

36. He submitted further that the article 8 balancing exercise was undertaken at too late stage, after the overall decision had already been made not to grant planning permission. Article 8 should normally be considered as an integral part of the decision-maker's approach to material considerations and not in effect as a footnote: see *Lough v First Secretary of State* [2004] EWCA Civ 905, [2004] 1 WLR 2557, at [48].

37. An alternative submission was that there was a deficiency in the reasons given for the refusal of temporary planning permission, in that the decision letter did not make clear that the decision was informed by a correct understanding of the content or legal importance of the children's best interests.

Discussion

38. I do not accept that there was a failure to consider article 8 as an integral part of the decision-making process. All the matters relevant to article 8 were considered in detail in the course of the reasoning that led to the view that neither permanent nor temporary planning permission was justified. The view was then taken, with due regard to those matters, that such a refusal would be a proportionate interference with the article 8 rights of the occupiers of the site. The section on article 8 was not a footnote. It came towards the end of the decision letter but built on what had come before, and it preceded the overall conclusion that planning permission should be refused.

39. Equally, there is no substance to the reasons challenge. It is clear in particular that the decision in relation to temporary permission factored in all the points already considered in relation to permanent permission, as well as taking into account the specific additional considerations relevant to the question of temporary permission. Whether the best interests of the children were taken properly into account in the overall exercise is a question of substance, to be answered by reference to the detailed reasoning of the decision letter as a whole (including the passages of the inspector's report to which it refers). That reasoning is sufficiently clear to enable the question to be answered one way or the other. The appeal cannot succeed on the basis of a deficiency in the reasons given.

40. Judge Pelling found that the children's best interests had been taken properly into account:

> "26. In my judgment, once it is accepted that the question is one of substance not form, and once it is accepted that the decision letter and Inspector's report have to be read together, the claimant's submission that the decision maker failed to treat

the best interests of the children as a primary consideration cannot be maintained. The personal circumstances and accommodation needs of the occupants of the site necessarily included the children who lived at the site, and that issue was expressly identified by the Inspector as being two of the main considerations relevant to the appeal – see the report at paragraph 83. The Inspector identified expressly that there were 39 children who lived at the site – see paragraph 118 of the report. He referred in terms to the problems of disadvantage and marginalisation, and insecure and unhealthy living conditions – see paragraph 118 of the report. He acknowledged that the claimants had frequently been moved on by the police, often at short notice – see again paragraph 118 of the report [in fact paragraph 119] – and that the claimants, and, therefore, by necessary implication, the children, had a need for a site with easy access to sanitary facilities and which provided a settled base allowing better access to health and education. This latter point was necessarily a reference specifically to the needs of the children who lived at the site.

27. At paragraph 122 the Inspector acknowledged the serious adverse effect on the education needs of the children on site and the deleterious effect on the health of the claimants, and therefore their children, of not having homes on a settled site …. The Secretary of State's approach was to attribute 'significant weight' to the education issue and 'moderate weight' to the health issue.

28. … I conclude that it is difficult to read either the report of the Inspector or the decision letter as treating the education and health issues as anything other than primary considerations. They were considered as such. In paragraph 24 of the decision letter, the first defendant said in terms that significant weight had been attached to the continuity of education, and moderate weight to the occupants' health needs, as supporting the scheme. The judgment of the first defendant was, however, that substantial weight was to be given to the harm to the landscape resulting from the development and the harm to visual amenity. He also attached considerable weight to the harm to road safety. This led the first defendant to conclude that the overall balance of these issues did not justify the grant of permission.

29. In my judgment, there was nothing wrong in substance with this approach. Neither the first defendant nor the Inspector treated those considerations that pointed towards a refusal as '… inherently more significant …' than the interests of the children on site. Thus there was not a departure by the first defendant or the Inspector from the approach set out by Baroness Hale in *ZH* as a matter of substance. Rather, the

> approach of the decision-maker was that contemplated by Baroness Hale, namely that following a fact-sensitive analysis of all the material considerations relevant to the particular appeals under considerations, he had concluded that the negative factors identified outweighed cumulatively the best interests of the children, being primarily their education and health needs."

41. I have had doubts as to the correctness of Judge Pelling's conclusion. Nobody concerned in the case was thinking at the material time about the way in which the best interests of the children should be addressed; and whilst the question is one of substance, not form, I feel cautious about concluding that the decision-maker happened nonetheless to adopt the correct approach in substance. I have been troubled in particular about whether the best interests of the children can be said to have been identified as such and to have been kept at the forefront of the mind as a primary consideration in reaching the decision.

42. In the end, however, I have come down in agreement with Judge Pelling. I accept that in substance the Secretary of State was of the view that the best interests of the children coincided with those of their families as a whole and lay in remaining on the site, because of the general advantages of a settled home and because of the particular considerations of continuity of education and access to health care; but that the children's best interests and the other factors telling in favour of the grant of planning permission were outweighed by the harm that would be caused by such a grant. The allocations of weight to the various individual factors, and the carrying out of the overall balancing exercise, were consistent with treating the children's best interests as a primary consideration throughout: those best interests were not necessarily determinative and could properly be found to be outweighed by the identified harm. Importantly, I do not see how the analysis might realistically have been different in substance if the best interests of the children had been dealt with in express terms that would now be considered appropriate. In so far as it was suggested by Mr Cottle that there might have been other matters bearing on the children's best interests, I take the view that the inspector and the Secretary of State were entitled to proceed in this case by reference to the material put before them by the applicants for planning permission, and they evidently gave careful consideration to that material. Moreover, nothing concrete has been put forward in the subsequent legal challenge to show that there was any material omission in relation to the best interests of any of the children concerned.

43. It is difficult to see what basis there could have been in any event for the grant of *temporary* planning permission in this case. The inspector drew attention, at paragraph 129 of his report, to the guidance in paragraph 45 of Circular 01/2006 that a temporary permission may be justified where it is expected that the planning circumstances will change in a particular way at the end of the period of the temporary permission, as for example where a local planning authority is preparing its site allocations DPD. The inspector made a finding at paragraph 130 that it was not reasonably clear that the planning circumstances would change so as to lead to a reasonable likelihood of an alternative site being available at the end of a defined period. There was, as it seems to me, no other feature of the case that might have justified the grant of temporary permission in the event of permanent permission

being refused. The arguments concerning the best interests of the children apply to the duration of their childhood and would apply also to the childhood of other children born in the future. If those arguments told in favour of the grant of planning permission, it would realistically have to be a permanent permission, not a permission limited in time to, say, three or five years. That, however, was not the basis on which the case was pursued in this court.

Conclusion

44. For those reasons I would dismiss the appeals.

Lord Justice Floyd :

45. I agree.

Sir David Keene :

46. I also agree.

APPENDIX 8

ZH(Tanzania) v SSHD [2011]UKSC 4

Hilary Term
[2011] UKSC 4
On appeal from: [2009] EWCA Civ 691

JUDGMENT

ZH (Tanzania) (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Hope, Deputy President
Lady Hale
Lord Brown
Lord Mance
Lord Kerr

JUDGMENT GIVEN ON

1 February 2011

Heard on 9 and 10 November 2010

Appellant
Manjit Gill QC
Benjamin Hawkin
(Instructed by Raffles Haig Solicitors)

Respondent
Monica Carss-Frisk QC
Susan Chan
(Instructed by Treasury Solicitors)

Interveners (for the Appellant's children)
Joanna Dodson QC
Edward Nicholson
(Instructed by Raffles Haig Solicitors)

LADY HALE (with whom Lord Brown and Lord Mance agree)

1. The over-arching issue in this case is the weight to be given to the best interests of children who are affected by the decision to remove or deport one or both of their parents from this country. Within this, however, is a much more specific question: in what circumstances is it permissible to remove or deport a non-citizen parent where the effect will be that a child who is a citizen of the United Kingdom will also have to leave? There is, of course, no power to remove or deport a person who is a United Kingdom citizen: see Immigration Act 1971, section 3(5) and (6). They have a right of abode in this country, which means that they are free to live in, and to come and go into and from the United Kingdom without let or hindrance: see 1971 Act, sections 1 and 2. The consistent stance of the Secretary of State is that UK citizens are not compulsorily removed from this country (eg Phil Woolas, *Hansard*, Written Answers, 15 June 2009). However if a non-citizen parent is compulsorily removed and agrees to take her children with her, the effect is that the children have little or no choice in the matter. There is no machinery for consulting them or giving independent consideration to their views.

The facts

2. The facts of this case are a good illustration of how these issues can arise. The mother is a national of Tanzania who arrived here in December 1995 at the age of 20. She made three unsuccessful claims for asylum, one in her own identity and two in false identities. In 1997 she met and formed a relationship with a British citizen. They have two children, a daughter, T, born in 1998 (who is now 12 years old) and a son, J, born in 2001 (who is now nine). The children are both British citizens, having been born here to parents, one of whom is a British citizen. They have lived here with their mother all their lives, nearly all of the time at the same address. They attend local schools.

3. Their parents separated in 2005 but their father continues to see them regularly, visiting approximately twice a month for 4 to 5 days at a time. In 2007 he was diagnosed with HIV. He lives on disability living allowance with his parents and his wife and is reported to drink a great deal. The tribunal nevertheless thought that there would not "necessarily be any particular practical difficulties" if the children were to go to live with him. The Court of Appeal very sensibly considered this "open to criticism as having no rational basis". Nevertheless, they upheld the tribunal's finding that the children could reasonably be expected to follow their mother to Tanzania: [2009] EWCA Civ 691, para 27. They also declined to hold that there was no evidence to support the tribunal's finding that

the father would be able to visit them in Tanzania, despite his fragile health and limited means: para 32.

4. As it happens, this Court has seen another illustration of how these issues may arise, in the case of *R (WL) (Congo) v Secretary of State for the Home Department* [2010] 1 WLR 2168 (Supreme Court judgment pending). Both father and mother are citizens of the Democratic Republic of Congo. Their child, however, is a British citizen. The Secretary of State intends to deport the father under section 3(5) of the 1971 Act and also served notice of intention to deport both mother and child. There is power to deport non-citizen family members of those deported under section 3(5) but there is no power to deport citizens under that or any other provision of the 1971 Act. It is easy to see how a mother served with such a notice might think that there was such a power and that she had no choice. Fortunately, it appears that the notice was not followed up with an actual decision to deport in that case.

These proceedings

5. This mother's immigration history has rightly been described as "appalling". She made a claim for asylum on arrival in her own name which was refused in 1997 and her appeal was dismissed in 1998, shortly after the birth of her daughter. She then made two further asylum applications, pretending to be a Somali, both of which were refused. In 2001, shortly before the birth of her son, she made a human rights application, claiming that her removal would be in breach of article 8 of the European Convention on Human Rights. This was refused in 2004 and her appeal was dismissed later that year. Also in 2004 she and the children applied for leave to remain under the "one-off family concession" which was then in force. This was refused in 2006 because of her fraudulent asylum claims. Meanwhile in 2005 she applied under a different policy known as the "seven year child concession". This too was refused, for similar reasons, later in 2006 and her attempts to have this judicially reviewed were unsuccessful.

6. After the father's diagnosis in 2007, fresh representations were made. The Secretary of State accepted these as a fresh claim but rejected it early in 2008. The mother's appeal was dismissed in March 2008. However an application for reconsideration was successful. In May 2008, Senior Immigration Judge McGeachy held that the immigration judge had not considered the relationship between the children and their father (it being admitted that there was no basis on which he could have found that they could live here with him), the fact that they had been born in Britain and were then aged nine and seven and were British. It was a material error of law for the immigration judge not to have taken into account the rights of the children and the effect of the mother's removal upon them.

7. Nevertheless at the second stage of the reconsideration, the tribunal, having heard the evidence, dismissed the appeal: Appeal Number IA/01284/2008. They found that there was family life between the mother and the children and between the father and the children, although not between the parents, and also that the mother had built up a substantial private life in this country (para 5.3). Removal to Tanzania, if the children accompanied the Appellant, would substantially interfere with the relationship with their father; staying behind would substantially interfere with the relationship with their mother (para 5.4). Removing the mother would be in accordance with the law for the purpose of protecting the rights and freedoms of others. The only question was whether it would be proportionate (para 5.5).

8. The Tribunal found the mother to be seriously lacking in credibility. She had had the children knowing that her immigration status was precarious. Having her second child was "demonstrably irresponsible" (para 5.8). However, the children were innocent of their parents' shortcomings (para 5.9). The parents now had to choose what would be best for their children: "We do not consider that it can be regarded as unreasonable for the respondent's decision to have that effect, because the eventual need to take such a decision must have been apparent to them ever since they began their relationship and decided to have children together." (para 5.10).

9. The Tribunal found it a "distinct and very real possibility" that the children might remain here with their father (para 5.11). This might motivate him to overcome his difficulties. People with HIV can lead ordinary lives. The daughter was of an age when many African children were separated from their parents and sent to boarding schools. The son, had he been a Muslim, would have been regarded as old enough to live with his father rather than his mother. Hence the tribunal could not see "any particular practical difficulties" if the children were to go and live with their father (para 5.15).

10. Equally, it would be "a very valid decision" for the children to go and live with their mother in Tanzania (para 5.16). It is not an uncivilised or an inherently dangerous place. Their mother must have told them about it. There were no reasons why their father should not from time to time travel to see the children there. They did not accept that either his HIV status or his financial circumstances were an obstacle. Looking at the circumstances in the round, therefore, "neither of the potential outcomes of the appellant's removal which we have outlined above would represent such an interference with the family life of the children, or either of them, with either their mother on the one hand or their father on the other as to be disproportionate, again having regard to the importance of the removal of the appellant in pursuance of the system of immigration control in this country" (para 5.20). They had earlier said that this was "of very great importance and considerable weight must be placed upon it" (para 5.19).

11. Permission to appeal was initially refused on the basis that, even if the Tribunal had been wrong to think that the children could stay here with their father, they could live in Tanzania with their mother. Ward LJ eventually gave permission to appeal because he was troubled about the effect of their leaving upon their relationship with their father: "how are we to approach the family rights of a broken family like this?" Before the Court of Appeal, however, it was argued that the British citizenship of the children was a "trump card" preventing the removal of their mother. This was rejected as inconsistent with the authorities, and in particular with the principle that there is no "hard-edged or bright-line rule", which was enunciated by Lord Bingham of Cornhill in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2009] 1 AC 1159, and is quoted in full at para 15 below.

12. Mr Manjit Gill QC, on behalf of the appellant mother, does not argue in this Court that the citizenship of the children should be dispositive in every case. But he does argue that insufficient weight is given to the welfare of all children affected by decisions to remove their parents and in particular to the welfare of children who are British citizens. This is incompatible with their right to respect for their family and private lives, considered in the light of the obligations of the United Kingdom under the United Nations Convention on the Rights of the Child. Those obligations are now (at least partially) reflected in the duty of the Secretary of State under section 55 of the Borders, Citizenship and Immigration Act 2009.

13. The Secretary of State now concedes that it would be disproportionate to remove the mother in the particular facts of this case. But she is understandably concerned about the general principles which the Border Agency and appellate authorities should apply.

The domestic law

14. This is the mother's appeal on the ground that her removal will constitute a disproportionate interference with her right to respect for her private and family life, guaranteed by article 8 of the European Convention on Human Rights:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for

> the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

However, in *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2009] AC 115, the House of Lords held that both the Secretary of State and the immigration appellate authorities had to consider the rights to respect for their family life of all the family members who might be affected by the decision and not just those of the claimant or appellant in question. Lord Brown of Eaton-under-Heywood summarised the argument which the House accepted thus, at para 20:

> "Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims."

I added this footnote at para 4:

> "To insist that an appeal to the Asylum and Immigration Tribunal consider only the effect upon other family members as it affects the appellant, and that a judicial review brought by other family members considers only the effect upon the appellant as it affects them, is not only artificial and impracticable. It also risks missing the central point about family life, which is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed."

15. When dealing with the relevant principles in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2009] AC 1159, Lord Bingham of Cornhill said this, at para 12:

> "Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for

> removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied in the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."

Thus, of particular importance is whether a spouse or, I would add, a child can reasonably be expected to follow the removed parent to the country of removal.

16. Miss Monica Carss-Frisk QC, for the Secretary of State, was content with the way I put it in the Privy Council case of *Naidike v Attorney-General of Trinidad and Tobago* [2004] UKPC 49, [2005] 1 AC 538, at para 75:

> "The decision-maker has to balance the reason for the expulsion against the impact upon other family members, including any alternative means of preserving family ties. The reason for deporting may be comparatively weak, while the impact on the rest of the family, either of being left behind or of being forced to leave their own country, may be severe. On the other hand, the reason for deporting may be very strong, or it may be entirely reasonable to expect the other family members to leave with the person deported."

The Strasbourg cases

17. These questions tend to arise in two rather different sorts of case. The first relates to long-settled residents who have committed criminal offences (as it happens, this was the context of *WL (Congo) v Secretary of State for the Home Department*, above). In such cases, the principal legitimate aims pursued are the prevention of disorder and crime and the protection of the rights and freedoms of others. The Strasbourg court has identified a number of factors which have to be taken into account in conducting the proportionality exercise in this context. The leading case is now *Űner v The Netherlands* (2007) 45 EHRR 421. The starting point is, of course, that states are entitled to control the entry of aliens into their territory and their residence there. Even if the alien has a very strong residence status and a high degree of integration he cannot be equated with a national. Article 8 does not give him an absolute right to remain. However, if expulsion will interfere with the right to respect for family life, it must be necessary in a

democratic society and proportionate to the legitimate aim pursued. At para 57, the Grand Chamber repeated the relevant factors which had first been enunciated in *Boultif v Switzerland* (2001) 33 EHRR 50 (numbers inserted):

> "[i] the nature and seriousness of the offence committed by the applicant;
>
> [ii] the length of the applicant's stay in the country from which he or she is to be expelled;
>
> [iii] the time elapsed since the offence was committed and the applicant's conduct during that period;
>
> [iv] the nationalities of the various persons concerned;
>
> [v] the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
>
> [vi] whether the spouse knew about the offence at the time when he or she entered into a family relationship;
>
> [vii] whether there are children of the marriage, and if so, their age; and
>
> [viii] the seriousness of the difficulties which the spouse is likely to encounter in the country to which the appellant is to be expelled."

Significantly for us, however, the Grand Chamber in *Üner* went on, in para 58, "to make explicit two criteria which may already be implicit" in the above (again, numbers inserted):

> "[ix] the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

> [x] the solidity of social, cultural and family ties with the host country and with the country of destination".

The importance of these is reinforced in the recent case of *Maslov v Austria* [2009] INLR 47, para 75 where the Grand Chamber emphasised that "for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile".

18. The second sort of case arises in the ordinary immigration context, where a person is to be removed because he or she has no right to be or remain in the country. Once again, the starting point is the right of all states to control the entry and residence of aliens. In these cases, the legitimate aim is likely to be the economic well-being of the country in controlling immigration, although the prevention of disorder and crime and the protection of the rights and freedoms of others may also be relevant. Factors (i), (iii), and (vi) identified in *Boultif* and *Üner* are not relevant when it comes to ordinary immigration cases, although the equivalent of (vi) for a spouse is whether family life was established knowing of the precariousness of the immigration situation.

19. It was long ago established that mixed nationality couples have no right to set up home in whichever country they choose: see *Abdulaziz v United Kingdom* (1985) 7 EHRR 471. Once they have done so, however, the factors relevant to judging the proportionality of any interference with their right to respect for their family lives have quite recently been rehearsed in the case of *Rodrigues da Silva, Hoogkamer v Netherlands* (2007) 44 EHRR 729, at para 39:

> ". . . Article 8 does not entail a general obligation for a state to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a state's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the person involved and the general interest [the reference is to *Gűl v Switzerland* (1996) 22 EHRR 93, at [38]]. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the contracting state, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (eg a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion [the reference is to *Solomon v The Netherlands*,

> App No 44328/98, 5 September 2000]. Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 [the reference is to *Mitchell v United Kingdom*, App No 40447/98, 24 November 1998; *Ajayi v United Kingdom*, App No 27663/95, 22 June 1999]."

Despite the apparent severity of these words, the Court held that there had been a violation on the facts of the case. A Brazilian mother came to the Netherlands in 1994 and set up home with a Dutch national without ever applying for a residence permit. In 1996 they had a daughter who became a Dutch national. In 1997 they split up and the daughter remained with her father. It was eventually confirmed by the Dutch courts that it was in her best interests to remain with her father and his family in the Netherlands even if this meant that she would have to be separated from her mother. In practice, however, her care was shared between the mother and the paternal grandparents. The court concluded at para 44 that, notwithstanding the mother's "cavalier attitude to Dutch immigration rules",

> "In view of the far reaching consequences which an expulsion would have on the responsibilities which the first applicant has as a mother, as well as on her family life with her young daughter, and taking into account that it is clearly in Rachael's best interests for the first applicant to stay in the Netherlands, the Court considers that in the particular circumstances of the case the economic well-being of the country does not outweigh the applicants' rights under article 8, despite the fact that the first applicant was residing illegally in the Netherlands at the time of Rachael's birth."

20. It is worthwhile quoting at such length from the Court's decision in *Rodrigues de Silva* because it is a relatively recent case in which the reiteration of the court's earlier approach to immigration cases is tempered by a much clearer acknowledgement of the importance of the best interests of a child caught up in a dilemma which is of her parents' and not of her own making. This is in contrast from some earlier admissibility decisions in which the Commission (and on occasion the Court) seems to have concentrated more on the failings of the parents than upon the interests of the child, even if a citizen child might thereby be deprived of the right to grow up in her own country: see, for example, *O and OL v United Kingdom*, App No 11970/86, 13 July 1987; *Sorabjee v United Kingdom*, App No 23938/94, 23 October 1995; *Jaramillo v United Kingdom*, App No 24865/94, 23 October 1995, and *Poku v United Kingdom*, App No 26985/95, 15

May 1996. In *Poku*, the Commission repeated that "in previous cases, the factor of citizenship has not been considered of particular significance". These were, however, cases in which the whole family did have a real choice about where to live. They may be contrasted with the case of *Fadele v United Kingdom*, App No 13078/87, in which British children aged 12 and 9 at the date of the decision had lived all their lives in the United Kingdom until they had no choice but to go and live in some hardship in Nigeria after their mother died and their father was refused leave to enter. The Commission found their complaints under articles 3 and 8 admissible and a friendly settlement was later reached (see Report of the Commission, 4 July 1991).

The UNCRC and the best interests of the child

21. It is not difficult to understand why the Strasbourg Court has become more sensitive to the welfare of the children who are innocent victims of their parents' choices. For example, in *Neulinger v Switzerland* (2010) 28 BHRC 706, para 131, the Court observed that "the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken . . . of 'any relevant rules of international law applicable in the relations between the parties' and in particular the rules concerning the international protection of human rights". The Court went on to note, at para 135, that "there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount".

22. The Court had earlier, in paras 49 to 56, collected references in support of this proposition from several international human rights instruments: from the second principle of the United Nations Declaration on the Rights of the Child 1959; from article 3(1) of the Convention on the Rights of the Child 1989 (UNCRC); from articles 5(b) and 16(d) of the Convention on the Elimination of All Forms of Discrimination against Women 1979; from General Comments 17 and 19 of the Human Rights Committee in relation to the International Covenant on Civil and Political Rights 1966; and from article 24 of the European Union's Charter of Fundamental Rights. All of these refer to the best interests of the child, variously describing these as "paramount", or "primordial", or "a primary consideration". To a United Kingdom lawyer, however, these do not mean the same thing.

23. For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3(1) of the UNCRC:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".

24. Miss Carss-Frisk acknowledges that this duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8(2). Both the Secretary of State and the tribunal will therefore have to address this in their decisions.

25. Further, it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as "a primary consideration". Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration". Miss Joanna Dodson QC, to whom we are grateful for representing the separate interests of the children in this case, boldly argued that immigration and removal decisions might be covered by section 1(1) of the Children Act 1989:

> "When a court determines any question with respect to –
>
> (a) the upbringing of a child; or
>
> (b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration."

However, questions with respect to the upbringing of a child must be distinguished from other decisions which may affect them. The UNHCR, in its Guidelines on Determining the Best Interests of the Child (May 2008), explains the matter neatly, at para 1.1:

> "The term 'best interests' broadly describes the well-being of a child. . . . The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interests of the child, but stipulates that:
>
> > the best interests must be **the determining factor for specific actions,** notably adoption (Article 21) and separation of a child from parents against their will (Article 9);
> >
> > the best interests must be **a primary** (but not the sole) **consideration for all other actions** affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3)."

This seems to me accurately to distinguish between decisions which directly affect the child's upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents are to live. Article 9 of UNCRC, for example, draws a distinction between the compulsory separation of a child from her parents, which must be necessary in her best interests, and the separation of a parent from his child, for example, by detention, imprisonment, exile, deportation or even death.

26. Nevertheless, even in those decisions, the best interests of the child must be a primary consideration. As Mason CJ and Deane J put it in the case of *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20, (1995) 183 CLR 273, 292 in the High Court of Australia:

> "A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it."

As the Federal Court of Australia further explained in *Wan v Minister for Immigration and Multi-cultural Affairs* [2001] FCA 568, para 32,

> "[The Tribunal] was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration."

This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first. That seems, with respect, to be the correct approach to these decisions in this country as well as in Australia.

27. However, our attention was also drawn to General Comment No 6 of the United Nations Committee on the Rights of the Child (2005), on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin. The context, different from ours, was the return of such children to their countries of origin even though they could not be returned to the care of their parents or other family members (para 85). At para 86, the Committee observed:

> "Exceptionally, a return to the home country may be arranged, after careful balancing of the child's best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights based arguments such as those relating to general migration control, cannot override best interests considerations."

28. A similar distinction between "rights-based" and "non-rights-based" arguments is drawn in the UNHCR Guidelines (see, para 3.6). With respect, it is difficult to understand this distinction in the context of article 8(2) of the ECHR. Each of the legitimate aims listed there may involve individual as well as community interests. If the prevention of disorder or crime is seen as protecting the rights of other individuals, as it appears that the CRC would do, it is not easy to see why the protection of the economic well-being of the country is not also protecting the rights of other individuals. In reality, however, an argument that the continued presence of a particular individual in the country poses a specific risk to

others may more easily outweigh the best interests of that or any other child than an argument that his or her continued presence poses a more general threat to the economic well-being of the country. It may amount to no more than that.

Applying these principles

29. Applying, therefore, the approach in *Wan* to the assessment of proportionality under article 8(2), together with the factors identified in Strasbourg, what is encompassed in the "best interests of the child"? As the UNHCR says, it broadly means the well-being of the child. Specifically, as Lord Bingham indicated in *EB (Kosovo),* it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away.

30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8). In *Wan*, the Federal Court of Australia, pointed out at para 30 that, when considering the possibility of the children accompanying their father to China, the tribunal had not considered any of the following matters, which the Court clearly regarded as important:

> "(a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, 'and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle' (*Vaitaiki v Minister for Immigration and Ethnic Affairs* [1998] FCA 5, (1998) 150 ALR 608, 614);
>
> (b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland;
>
> (c) the loss of educational opportunities available to the children in Australia; and
>
> (d) their resultant isolation from the normal contacts of children with their mother and their mother's family."

31. Substituting "father" for "mother", all of these considerations apply to the children in this case. They are British children; they are British, not just through the "accident" of being born here, but by descent from a British parent; they have an unqualified right of abode here; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community (as might have been the case, for example, in *Poku*, para 20, above). But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well.

32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. As Jacqueline Bhaba (in 'The "Mere Fortuity of Birth"? Children, Mothers, Borders and the Meaning of Citizenship', in *Migrations and Mobilities: Citizenship, Borders and Gender* (2009), edited by Seyla Benhabib and Judith Resnik, at p 193) has put it:

> 'In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children.'

33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is as least as strong a case as *Edore v Secretary of State for the Home Department* [2003] 1 WLR 2979, where Simon Brown LJ held that "there really is only room for one view" (para 26). In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer.

Consulting the children

34. Acknowledging that the best interests of the child must be a primary consideration in these cases immediately raises the question of how these are to be discovered. An important part of this is discovering the child's own views. Article 12 of UNCRC provides:

> "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

35. There are circumstances in which separate representation of a child in legal proceedings about her future is essential: in this country, this is so when a child is to be permanently removed from her family in her own best interests. There are other circumstances in which it may be desirable, as in some disputes between parents about a child's residence or contact. In most cases, however, it will be possible to obtain the necessary information about the child's welfare and views in other ways. As I said in *EM (Lebanon)* v *Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 AC 1198, at para 49:

> "Separate consideration and separate representation are, however, two different things. Questions may have to be asked about the situation of other family members, especially children, and about their views. It cannot be assumed that the interests of all the family members are identical. In particular, a child is not to be held responsible for the moral failures of either of his parents. Sometimes, further information may be required. If the Child and Family Court Advisory and Support Service or, more probably, the local children's services authority can be persuaded to help in difficult cases, then so much the better. But in most immigration situations, unlike many ordinary abduction cases, the interests of different family members are unlikely to be in conflict with one another. Separate legal (or other) representation will rarely be called for."

36. The important thing is that those conducting and deciding these cases should be alive to the point and prepared to ask the right questions. We have been told about a pilot scheme in the Midlands known as the Early Legal Advice Project (ELAP). This is designed to improve the quality of the initial decision, because the legal representative can assist the "caseowner" in establishing all the facts of the claim before a decision is made. Thus cases including those involving children will be offered an appointment with a legal representative, who has had time to collect evidence before the interview. The Secretary of State tells us that the pilot is limited to asylum claims and does not apply to pure article 8 claims. However, the two will often go hand in hand. The point, however, is that it is one way of enabling the right questions to be asked and answered at the right time.

37. In this case, the mother's representatives did obtain a letter from the children's school and a report from a youth worker in the Refugee and Migrant Forum of East London (Ramfel), which runs a Children's Participation Forum and other activities in which the children had taken part. But the immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so. While their interests may be the same as their parents' this should not be taken for granted in every case. As the Committee on the Rights of the Child said, in General Comment No 12 (2009) on the Right of the Child to be Heard, at para 36:

> "in many cases . . . there are risks of a conflict of interest between the child and their most obvious representative (parent(s)). If the hearing of the child is undertaken through a representative, it is of utmost importance that the child's views are transmitted correctly to the decision-maker by the representative."

Children can sometimes surprise one.

Conclusion

38. For the reasons given, principally in paragraphs 26 and 30 to 33 above, I would allow this appeal.

LORD HOPE

39. I am in full agreement with the reasons that Lady Hale has given for allowing this appeal.

40. It seems to me that the Court of Appeal fell into error in two respects. First, having concluded that the children's British citizenship did not dispose of the issues arising under article 8 (see [2010] EWCA Civ 691, paras 16-22), they did not appreciate the importance that was nevertheless to be attached to the factor of citizenship in the overall assessment of what was in the children's best interests. Second, they endorsed the view of the tribunal that the question whether it was reasonable to expect the children to go with their mother to Tanzania, looked at in the light of its effect on the father and the mother and in relation to the children, was to be judged in the light of the fact that both children were conceived in the knowledge that the mother's immigration status was precarious: para 26.

41. The first error may well have been due to the way the mother's case was presented to the Court of Appeal. It was submitted that the fact that the children were British citizens who had never been to Tanzania trumped all other considerations: para 16. That was, as the court recognised, to press the point too far. But there is much more to British citizenship than the status it gives to the children in immigration law. It carries with it a host of other benefits and advantages, all of which Lady Hale has drawn attention to and carefully analysed. They ought never to be left out of account, but they were nowhere considered in the Court of Appeal's judgment. The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood.

42. The second error was of a more fundamental kind, which lies at the heart of this appeal. The tribunal found that the mother knew full well that her immigration status was precarious before T was born. On looking at all the evidence in the round, it was not satisfied that her decisions to have her children were not in some measure motivated by a belief that having children in the United Kingdom of a British citizen would make her more difficult to remove. It accepted that the children were innocent of the mother's shortcomings. But it went on to say that the eventual need to take a decision as to where the children were to live must have been apparent both to the father and the mother ever since they began their relationship and decided to have children together. It was upon the importance of maintaining a proper and efficient system of immigration in this respect that in the final analysis the tribunal placed the greatest weight. The best interests of the children melted away into the background.

43. The Court of Appeal endorsed the tribunal's approach. When it examined the effect on the family unit of requiring the children to go with the mother to Tanzania, it held that this had to be looked at in the context of the fact that the children were conceived when the mother's immigration status was precarious:

para 26. It acknowledged that what was all-important was the effect upon the children: para 27. But it agreed with the tribunal that the decision that the children should go with their mother was a very valid decision. The question whether this was in their best interests was not addressed.

44. There is an obvious tension between the need to maintain a proper and efficient system of immigration control and the principle that, where children are involved, the best interests of the children must be a primary consideration. The proper approach, as was explained in *Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568, para 32, is, having taken this as the starting point, to assess whether their best interests are outweighed by the strength of any other considerations. The fact that the mother's immigration status was precarious when they were conceived may lead to a suspicion that the parents saw this as a way of strengthening her case for being allowed to remain here. But considerations of that kind cannot be held against the children in this assessment. It would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held to be responsible.

LORD KERR

45. I have read and agree with the judgments of Lady Hale and Lord Hope. For the reasons they have given, I too would allow the appeal.

46. It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result.

47. The significance of a child's nationality must be considered in two aspects. The first of these is in its role as a contributor to the debate as to where the child's best interests lie. It seems to me self evident that to diminish a child's right to assert his or her nationality will not normally be in his or her best interests. That

consideration must therefore feature in the determination of where the best interests lie. It was also accepted by the respondent, however, (and I think rightly so) that if a child is a British citizen, this has an independent value, freestanding of the debate in relation to best interests, and this must weigh in the balance in any decision that may affect where a child will live. As Lady Hale has said, this is not an inevitably decisive factor but the benefits that British citizenship brings, as so aptly described by Lord Hope and Lady Hale, must not readily be discounted.