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	

- -
- -

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

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Approved Judgment

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.
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> (iii) This requires the decision-maker, first, to identify what the child's best interests are. In a planning context, they are likely to be consistent with those of his parent or other carer who is involved in the planning decision-making process; and, unless circumstances indicate to the contrary, the decision-maker can assume that that carer will properly represent the child's best interests, and 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.
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> (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.
>
> ...
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> 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:

> "The accommodation needs of the occupants of the site and the availability of alternative sites
>
> 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).
>
> The personal circumstances of the occupants of the site
>
> 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.