



Neutral Citation Number: [2023] EWCA Civ 514

Case No: CA-2023-000071

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
PLANNING COURT
THE HONOURABLE MR JUSTICE KERR
[2022] EWHC 3209 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 May 2023

Before:

LORD JUSTICE LEWISON
LORD JUSTICE PHILLIPS
and
LORD JUSTICE LEWIS

Between:

**SECRETARY OF STATE FOR LEVELLING UP,
HOUSING AND COMMUNITIES** **Appellant**
- and -
(1) STEPHEN SMITH **Respondent**
(2) LONDON BOROUGH OF HACKNEY

Paul Brown KC and Leon Glenister (instructed by **the Government Legal Department**) for
the **Appellant**

Katherine Traynor (instructed by **Thomson, Snell and Passmore LLP**) for the **1st**
Respondent.

The second respondent did not appear and was not represented.

Hearing date: 4 May 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 16 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns the role that may be played by individuals, known as appeal planning officers, in the process for determining certain types of appeals by planning inspectors. Kerr J. (“the Judge”) held that the process was unfair as the appeal planning officer had not restricted her role to reporting on facts, evidence, issues and contentions but had formed an evaluative planning judgment on whether the appeal should be allowed. The Judge concluded that it was unfair for an appeal planning officer to exercise such a judgment when, in his view, she was “seriously underqualified to exercise the evaluative professional judgment on visual amenity” which, in effect, determined the appeal. The appellant, the Secretary of State, appeals against that judgment on the single ground that the Judge was wrong to find that the process adopted in this case for determining the appeal was unfair.
2. At the conclusion of the hearing, the Court indicated that the appeal would be allowed for reasons to be given in writing. These are my reasons for allowing the appeal.

BACKGROUND

The Application for Planning Permission

3. The respondent, who runs an agency for clients wishing to place advertisements, applied for consent to erect an illuminated advertisement on Shoreditch High Street. Consent was refused by the local planning authority on 17 September 2021 on the ground that the proposed advertisement hoarding and associated lighting would adversely affect visual amenity by reason of its size, design and location.

The Appeal

4. The respondent appealed to the Secretary of State pursuant to section 78 of the Town and Country Planning Act 1990 (“the 1990 Act”). An inspector was appointed to determine the appeal in accordance with Schedule 4 to the 1990 Act. The appeal was determined under the written representations procedure provided for by Part 2 of the Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009. That provides for the submissions of written representations and documents supporting the appeal. The inspector may also have a completed questionnaire from the local planning authority. The inspector is not required to carry out a site visit but may do so out if, in his discretion, he considers it appropriate. An inspector may also, in his or her discretion, seek further information or receive representations from third parties.
5. The planning inspectorate has, in recent years, found it difficult to recruit sufficient inspectors. Following a review of the planning appeal inquiry system by Bridget Rosewell, the inspectorate has made arrangements for additional persons to be appointed to assist inspectors with a view to such persons being appointed as inspectors in due course. These persons are known as appeal planning officers. All current appeal planning officers have an undergraduate degree in a subject relevant to planning. They are allocated to work on the two least complex categories of cases (which include appeals in cases involving advertisement) and may work on a third

category. They have all received training on the category of cases on which they may work. The inspectorate also employs a small number of individuals, known as apprentices, on a permanent 3 year contract. These apprentices all have an undergraduate degree relevant to planning. The apprenticeship involves them spending approximately 80% of their time undertaking the role of an appeal planning officer. The remaining time is spent undertaking a Masters degree in urban planning during the first two years and then acquiring the knowledge and skills necessary to become a Chartered Member of the Royal Town Planning Institute during their final year.

6. In summary, in the present case, the inspector was Mr Taylor. Ms Long was assigned to the appeal as the appeal planning officer, working under the guidance of Mr Taylor. They discussed the case, reviewed the documents and discussed a site visit to be undertaken by Ms Long on behalf of Mr Taylor. After the site visit, Ms Long and Mr Taylor discussed the appeal and reviewed the documents.
7. On 15 March 2022, Ms Long provided a reasoned written recommendation and a decision template for Mr Taylor. The recommendation was to dismiss the appeal on the sole ground of visual amenity. In the reasons for the recommendation, Ms Long described the appeal site, and surrounding area, including the advertisements already displayed in the area. She drew attention to policy guidance on the meaning of “amenity”. She described the proposal, where the illuminated advertisement would be placed, and where it would be visible from. Then in paragraphs 8 to 14 of her written reasoned recommendation, Ms Long set out her views on the effect of the advertisement. In summary, she considered that the illuminated advertisement would be “an obtrusive feature in its immediate area” and “the lighting would further exacerbate the proposal’s overly prominent design”. She expressed the view that the illuminated advertisement would not preserve the character and appearance of the area. She dealt with other matters. She concluded that “the proposal would result in harm to the visual amenity of the area” and would be contrary to the development plan and recommended dismissal of the appeal.
8. The inspector’s decision letter is dated 22 March 2022. Paragraphs 1 and 2 provide that:

“Decision.

1. The appeal is dismissed.

Appeal Procedure

2. The site visit was undertaken by an Appeal Planning Officer whose recommendation is set out below and to which the Inspector has had regard before deciding this appeal.”

9. Paragraph 3 deals with procedural matters and paragraph 4 identifies the main issue as “the effect of the proposal on the visual amenity of the area.”. Paragraphs 5 to 16 set out the reasoned recommendation of Ms Long. Paragraph 17 is in the following terms:

“Inspector’s Decision

17. I have considered all the submitted evidence and the Appeal Planning Officer's report and on that basis the appeal is dismissed."

10. The decision then bears the electronic signature of Mr Taylor.

The Claim for Judicial Review and the Judgment

11. The respondent applied for a statutory review of the inspector's decision. The material ground of challenge was ground 1 (two other grounds were dismissed and nothing more needs to be said about those grounds). Ground 1 was that the inspector failed, or appeared to fail, to determine the appeal independently when he adopted in full a recommendation by the appeal planning officer and/or failed to determine the appeal with transparency when he relied on that recommendation.

12. The Judge held that there could be no objection to appeal planning officers assisting with reporting, document handling and carrying out site visits. However, he concluded that the process was unfair, and therefore unlawful, as the appeal planning officer had formed a judgment on the planning issue in the case, that is the effect of the proposed illuminated advertisement on the area. The essence of his reasoning can be seen in the following paragraphs:

"91. Next, if Ms Long had confined her reporting role to ascertaining the facts, marshalling the evidence, documenting the case and explaining the facts, evidence, issues and contentions to the inspector, there could be no objection to her role. However, I have come to the conclusion that the process was not fair because she was required to exercise a professional judgment she was not, with the greatest respect to her, professionally equipped to exercise."

92. Ms Long was not "unqualified", as the claimant suggested. She had a university degree and she had received training. But she was seriously underqualified to exercise the evaluative professional judgment on visual amenity, which was required to determine this appeal. Yet, she was given the task of doing so, albeit on a provisional basis and subject to the inspector's decision whether to agree or disagree with her judgment.

and

"97. In my judgment, fairness will often require, and required in this case, that APOs refrain from exercising such judgments. Their role should be restricted to reporting on fact, evidence, issues and contentions. It should not include resolving the issues on their merits. The fruits of their labour may or may not need to be disclosed to an appellant or applicant before the decision is taken. That will depend on the factual context."

98. In the present case, if Ms Long's role had been confined in the way I have suggested, I would not have decided that

fairness required her factual report to be disclosed to the claimant for comment, before the decision was reached by the inspector. I do not need to decide, and do not decide, whether fairness would have been satisfied in this case if Ms Long's draft report, including her exercise of judgment, had been disclosed to the claimant for comment to the inspector before the latter reached his decision.

99. However, I am doubtful whether the unfairness here would have been cured if that had been done. In any case, it was not done. The better practice, to ensure fairness, is for the APO to address the facts, avoiding planning judgments and avoiding discussion of the merits with the inspector; for the template to record the APO's findings; and for the decision maker then to fill in the planning judgment parts addressing the merits. The whole decision can then be in the name of the right person, as it was in *Harris*.

100. The SoS accepts that Ms Long's role included the exercise of planning judgment. Mr Glenister said that did not matter because her judgment was provisional and only a recommendation. It did not usurp the function of the inspector, who alone made the final decision. With the greatest respect to Ms Long and other APOs who undoubtedly perform a useful role, the unfairness here is the initial planning judgment being made by such a junior and inexperienced person. It provides the inspector with a powerful steer.

101. I do not think that unfairness is cured by the right person revisiting that judgment and having the opportunity to reverse it. Nor do I accept that the SoS is assisted by any analogy with the procedure used when planning applications are determined by the planning committee of a local planning authority, or by the portfolio holder exercising delegated powers. The factual and legal context is different in that situation, as Ms Williams pointed out. Nor is the procedure in the case of a called in appeal comparable. That procedure usually includes a public inquiry with the prospect of public participation.”

THE APPEAL AND SUBMISSIONS

13. Permission was granted on one ground of appeal, namely that Judge was wrong to conclude that the process was unfair as the appeal planning officer had only provided recommendations for the inspector. The inspector personally considered all documentation and the decision to dismiss the appeal was his.
14. Mr Brown KC, with Mr Glenister, for the Secretary of State, submitted that the inspector in the present case had read all the documentation and considered the photographs that had been submitted, and had discussed the case with the appeal

planning officer. The inspector had exercised his own judgment in deciding to dismiss the appeal. He submitted that it was permissible, in principle, for a decision-maker to be assisted in reaching a decision, relying on, amongst others, *R (Reckless) v Kent Policy Authority* [2010] EWCA Civ 1277, *R (Varma) v HRH Duke of Kent* [2004] EWHC 1705 (Admin), and in this context, *Harris v Secretary of State for Communities and Local Government* [2014] EWHC 3740 (Admin) where the High Court held that it was lawful for an appeal planning officer to conduct a site visit on behalf of an inspector. There was no reason why an appeal planning officer could not provide a reasoned recommendation, setting out his or her evaluation of the planning issues, for the inspector to consider.

15. Mr Brown further submitted that there was no proper basis for the Judge to conclude that appeal planning officers were seriously unqualified to make planning judgments in the category of appeals on which they worked. Appeal planning officers had an undergraduate degree in a relevant subject, and had undergone training suitable for the types of cases that they were dealing with. Nor did the requirements of procedural fairness require that the appeal planning officer's recommendation be disclosed to the parties for them to comment on it prior to the decision of the inspector. The provision of a reasoned recommendation was all part of the internal machinery for considering an appeal under the written representation procedure.
16. Ms Traynor, for Mr Smith, indicated that Mr Smith did not contest the appeal and did not make submissions on the substance of the appeal.

ANALYSIS AND CONCLUSION

17. The starting point is that the decision on whether or not to allow the appeal was taken by the inspector. He was the person appointed to take the decision and he did, in fact, take the decision to dismiss the appeal. In doing so, he read the documentation, considered the photographic evidence and also read the reasoned recommendation of the appeal planning officer which described the site and gave her reasons for considering that the proposed advertisement would have an adverse effect on visual amenity. There was no question here of unlawful delegation, that is, there is no question here of the decision being taken by a person other than the appointed decision-maker.
18. The next question, therefore, is whether the process adopted by the decision-maker was fair. It is for the decision-maker to decide on the procedure to be followed provided that the procedure is fair and that it provides the decision-maker with the material necessary to make a decision: see *R (Reckless) v Kent Policy Authority* at paragraph 29 (per Carnwath LJ).
19. In the present case, as accepted by the Judge, there was nothing unfair in the appeal planning officer carrying out a site visit and reporting on the facts, the evidence and the contentions of the parties. Similarly, there is nothing objectionable in principle in the appeal planning officer making a recommendation as to whether or not the appeal should be allowed and providing reasons for that recommendation. The decision remains that of the inspector. It is for the inspector to determine whether he agrees with the recommendation and the reasons. If the inspector does not agree, or if he considers that the reasoning is not adequate, he will not accept that recommendation or will not rely on that reasoning. There is no reason why, as a matter of procedural

fairness, an appeal planning officer cannot provide reasoned recommendations as part of the decision-making process. That is consistent with the case-law in this area as appears from the decision in *Reckless* and the case law summarised at pages 255 to 258 of Wade & Forsyth *Administrative Law* (12th ed.)

20. I do not accept that the reasons identified by the Judge justify a different conclusion. First, there is no evidential basis for the Judge's conclusion that the appeal planning officer "was seriously unqualified to exercise the evaluative professional planning judgment on visual amenity". The appeal planning officer had an undergraduate degree in a relevant subject and had received training on the categories of appeals with which she was dealing. Furthermore, it is not a matter for a court, exercising supervisory functions by way of judicial or statutory review to determine the appropriate level of qualifications for appeal planning officers. Secondly, and more significantly, the ultimate decision on whether to allow or dismiss the appeal was the inspector's. If he considered that the appeal planning officer's reasoned recommendation was inadequate (for whatever reason), he would not have relied upon it. It is difficult, therefore, to see on what basis considerations of qualification or training justify a conclusion that the process was unfair.
21. I do not accept the Judge's general conclusions that it would "be better practice, to ensure fairness" for the appeal planning officer to address the facts and avoid planning judgments. In this case, the appeal planning officer provided reasoned recommendations. She did not take the decision. The inspector did. There is nothing inherently objectionable as a matter of principle in making a reasoned recommendation based on a view of the planning merits of the appeal. That does not give rise to procedural unfairness. Nor does it assist to refer to the appeal planning officer providing "a powerful steer" or to suggest that the appeal planning officer was determining the key issue of visual amenity, "albeit on a provisional basis and subject to the inspector's decision whether to agree or disagree with her judgment". That, with respect, is not a correct analysis of what happened or a relevant description of what the appeal planning officer did. More accurately, as part of the process of the inspector determining an appeal under the written representations process, an internal officer carried out a site visit and described the site, reviewed the documentation, and made a reasoned recommendation. It was up to the inspector to decide whether or not he accepted the recommendation. It was up to the inspector to decide whether or not to allow the appeal. The appeal planning officer was not "deciding" any issue. The reference to her view being a steer (or a powerful steer) does not alter the analysis.
22. Finally, in the context of this case, the principles of procedural fairness did not require the reasoned recommendation of the appeal planning officer to be provided to the parties for comment prior to the inspector taking his decision. This was an appeal using the written representations procedure. The appeal planning officer was part of the internal machinery within the planning inspectorate for enabling the inspector to deal with that appeal. She was not a witness or a party giving evidence or making representations. Rather, she was part of the process by which the inspector considered the appeal. The inspector considered the written representations, documents and photographs supplied, and the appeal planning officer's written reasoned recommendation, in order to reach a decision. In those circumstances, there was no procedural unfairness in her reasoned recommendation not being disclosed to the parties for comment.

23. I would allow this appeal for those reasons.

LORD JUSTICE PHILLIPS

24. I agree.

LORD JUSTICE LEWISON

25. I also agree.