Neutral Citation Number: [2019] EWHC 1775 (Admin)

Case No: CO/406/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2019

Before :

MR JUSTICE DOVE

- -

Between :

Tewkesbury Borough Council	**Claimant**
- and -	
Secretary of State for Communities Housing and Local Government	**Defendant**
-and-	
R Keene & Sons	**1st Interested Party**
-and-	
Robert Hitchins Limited	**2nd Interested Party**

- -

James Pereira QC and Horatio Waller (instructed by **Borough Solicitor at Tewkesbury Borough Council**) for the **Claimant**
Tim Buley QC (instructed by **Government Legal Department**) for the **Defendant**
No appearances or representation for the **1st Interested Party**
Anthony Crean QC and John Hunter (instructed by **Shoosmiths LLP**) for the **2nd Interested Party**

Hearing dates: 3rd May 2019

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Approved Judgment

Mr Justice Dove :

The facts

1. On the 3rd May 2016 the First Interested Party made an application for outline planning permission for the erection of 40 dwellings with all matters reserved except access. That application was refused by the Claimant on the 14th March 2017. The First Interested Party appealed under section 78 of the Town and Country Planning Act 1990. That appeal was heard before an Inspector at a public inquiry from the 22nd to 25th May 2018. The Defendant recovered the appeal for his own determination on the 4th July 2018.

2. One of the issues before the Inspector at the public inquiry was whether or not the Claimant could demonstrate a five year housing land supply. Whilst at the time of the inquiry the requirement to maintain a five year housing land supply was contained in the policy of the National Planning Policy Framework ("the Framework") which was published in March 2012, by the time that the Inspector came to write his report the Framework had been reviewed, and a new edition of national policy had been published in July 2018. The operative policy from the Framework which the Inspector had to apply was contained in paragraphs 59, 60, 65 and 73 as follows:

> "59. To support the Government's objective of significantly boosting the supply of homes, it is important that a sufficient amount and variety of land can come forward where it is needed, that the needs of groups with specific housing requirements are addressed and that land with permission is developed without unnecessary delay.
>
> 60. To determine the minimum number of homes needed, strategic policies should be informed by a local housing need assessment, conducted using the standard method in national planning guidance- unless exceptional circumstances justify an alternative approach which also reflects current and future demographic trends and market signals. In addition to the local housing need figure, any needs that cannot be met within neighbouring areas should also be taken into account in establishing the amount of housing to be planned for.
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> …
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> 65. Strategic policy-making authorities should establish a housing requirement figure for the whole area, which shows the extent to which their identified housing need (and any needs that cannot be met within neighbouring areas) can be met over the plan period. With this overall requirement, strategic polices should also set out a housing requirement for designated neighbourhood areas which reflects the overall strategy for the pattern and scale of development and any relevant allocations. Once the strategic policies have been adopted, these figures should not need re-testing at the neighbourhood plan examination, unless there has been a significant change in circumstances that affects the requirement.

…

73. Strategic policies should include a trajectory illustrating the expected rate of housing delivery over the plan period, and all plans should consider whether it is appropriate to set out the anticipated rate of development for specific sites. Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies, or against their local housing need where the strategic policies are more than five years old. The supply of specific deliverable sites should in addition include a buffer (moved forward from later in the plan period) of:

a) 5% to ensure choice and competition in the market for land; or

b) 10% where the local planning authority wishes to demonstrate a five year supply of deliverable sites through an annual position statement or recently adopted plan, to account for any fluctuations in the market during that year; or

c) 20% where there has been significant under delivery of housing over the previous three years, to improve the prospect of achieving the planned supply."

3. The importance of maintaining and demonstrating a five year housing land supply is recognised by paragraph 11 of the Framework and the presumption in favour of sustainable development, which so far as material and along with footnote 7, provides as follows:

"11. Plans and decisions should apply a presumption in favour of sustainable development

…

For decision-taking this means:

c) approving development proposals that accord with an up-to-date development plan without delay; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date[7], granting permission unless:

i. the application of polices in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

> …
>
> 7- This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years. Transitional arrangements for the Housing Delivery Test are set out in Annex 1."

4. Further amplification of the policy is provided in the Defendant's Planning Practice Guidance (the "PPG") in relation to the calculation of five year housing land supply in circumstances where there has been a shortfall in completions against plan requirements prior to the calculation:

> " **"How can past shortfalls in housing completions against planned requirements be addressed**?
>
> Where shortfalls in housing completions against planned requirements have been identified, strategic policy-making authorities may consider what factors might have led to this and whether there are any measures that the authority can take, either alone or jointly with other authorities, which may counter the trend.
>
> Where relevant, strategic policy-makers will need to consider the recommendations from any action plans prepared as a result of past under-delivery, as confirmed by the housing delivery test.
>
> The level of deficit or shortfall will need to be calculated from the base date of the adopted plan and should be added to the plan requirements for the next 5 year period (the Sedgefield approach). If a strategic policy-making authority wishes to deal with past under deliver over a longer period, then a case may be made as part of the plan-making and examination process rather than on a case by case basis on appeal.
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> Where strategic policy-making authorities are unable to address past shortfalls over a 5 year period due to their scale, they may need to reconsider their approach to bringing land forward and the assumptions which they make. For example, by considering developers' past performance on delivery; reducing the length of time a permission is valid; re-prioritising reserve sites which are 'ready to go'; delivering development directly or through arms' length organisation; or sub-dividing major sites where appropriate, and where it can be demonstrated that this would not be detrimental to the quality or deliverability of a scheme.
>
> **How can past over-supply of housing completions against planned requirements be addressed?**

> Where areas deliver more completions than required, the additional supply can be used to offset any shortfall against requirements from previous years." (emphasis added)

5. At the inquiry there were three areas of dispute in relation to the five year housing land supply evidence. The first area of dispute was how previous over-supply within the relevant planning area fell to be treated when undertaking the calculation. In the present case the Claimant was responsible for preparing (along with other neighbouring planning authorities) a Joint Core Strategy ("the JCS") which had been recently adopted. The Claimant contended that the oversupply which had already occurred since the start of the plan period against the JCS requirement of 704 homes should be counted in calculating the five year housing land supply. The First Interested Party contended that the oversupply should be left out of account.

6. The Inspector's conclusions in respect of this specific issue were as follows:

> "Surplus from over delivery
>
> 201. It has already been identified in this Report that the annual housing completions between 2011 to 2018 total 4,169 against the JCS requirement of 3,465, thus leading to 704 more homes than required.
>
> 202. Both the Framework and PPG are silent on the matter of oversupply. However, the Appellant has provided two appeal decisions, both of which were tested at Inquiry. The respective Inspectors did not support an approach whereby an oversupply figure is 'banked' so as to reduce the annualised target in later years of the plan period. They concluded that this would run counter to the requirement to significantly boost the supply of housing.
>
> 203. TBC sought to make a case that the over-supply should not be "lost". However, the emphasis in the revised Framework is on determining the **minimum** number of homes and the requirement for local planning authorities is to demonstrate a **minimum** of 5 years' worth of housing against the requirement. Consequently, TBC's approach would run counter to that advocated in national planning policy and I do not therefore consider that an over-supply from previous years should be 'banked' so as to reduce the housing target in future years. This bears on the calculation of TBC's HLS which I address later on but the surplus should not be counted in the calculations.
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> …
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> Conclusion on HLS
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> 219. With the application of a 5% buffer, the Council considers it can demonstrate a 5.58 year HLS. However, as already noted, this is based on the calculations that include a reduction in

> requirement because of the notional surplus of dwellings and a number of sites that I have found should be discounted from the deliverable supply.
>
> 220. Pulling all of this together, the total housing requirement is 2,475 plus a 5% buffer (124) = 2,599. Set against a deliverable supply of 1,904 (2,075 minus a reduction of 171), this indicates that the Council is able to demonstrate a HLS of around 3.99 years.
>
> 221. I recognise that this is a very different picture than the one formed by the JCS Inspector, who found the HLS position to be more robust and indeed that the Council could demonstrate a 5 year HLS. However, things have moved on and the evidence that has led me to take an alternative view is persuasive. I also acknowledge that previous appeal decisions found that the Council had a 5 year HLS. However, my conclusions are based on the evidence I have been given, which includes a further year of monitoring, amongst other things."

7. It will, of course, be noted that had the figure of 704 dwellings been counted in setting the housing requirement the Claimant would have been able to demonstrate a five year housing land supply. Thus, the treatment of the oversupply in the years prior to those included in the five year housing land calculation made the difference between success and failure on this issue so far as the Claimant was concerned.

8. Having reached both the conclusion in relation to the housing land supply and also in respect of the other principle controversial issues in the appeal, the Inspector struck the planning balance which gave rise to his recommendation that the appeal should be dismissed as follows:

> "256. I have found that the Council is currently unable to demonstrate a 5 year HLS and thus paragraph 11 of the Framework is engaged. The parties accept that the proposal conflicts with JCS policy SD10. I have also found conflict with other development plan policies including those in the NP. The NP represents an expression of how the community wishes to shape its local environment. Accordingly, whilst it does not allocate sites, it is relevant to the assessment of whether the appeal proposal is acceptable or not.
>
> 257. The Appellant has put forward a number of considerations including suggested benefits of the scheme.
>
> 258. It is accepted by the parties that there will be a housing shortfall in later years of the JCS plan period. The Appellant's evidence, which is based on the Council's own information, indicates that deliverable supply will drop off sharply beyond year 2 of the 5 year period to 2022/23.

259. The Council is working on the TBP, which will allocate sites. It is envisaged that this would be adopted in spring/summer 2019. However, whilst it might be possible to adhere to this timetable, I learned at the Inquiry that it has already slipped, which casts doubt in my mind over whether the eTBP will in fact be adopted in 2019.

260. Having said that, it seems inconceivable that the existing or any future slippage would be so serious as to prevent adoption of the eTBP taking place well in advance of 2022/23. However, the need for housing is pressing given the Council's HLS shortfall and although there is likely to be a plan in place within the next 5 year period that will allocate sites, it is unlikely those sites would be built out before the end of 2022/23. Thus, at the present time, I can see no mechanism to address Tewkesbury borough's housing need.

261. The development would deliver 40 new homes. There would be a mix of housing whereas the existing settlement is made up primarily of detached dwellings. The scheme would also include the policy level of affordable housing in a borough where there is a considerable level of need that is worsening year-on-year. These comprise social benefits that attract significant weight in the context of a housing shortfall with no plan currently in place to address it.

262. There would be economic benefits during construction through the creation of jobs and afterwards through the residual support for the local shop. Although I accept that some of the development's occupants would shop in Gloucester and elsewhere, combining shopping trips with those to and from their places of work, the local shop would be within acceptable walking and cycling distance from the development. It would therefore still benefit economically from the increase in the village's population. Moreover, Highnam is defined as a Service Village in the JCS and development in this location is therefore envisaged. These benefits also have significant weight.

263. However, the clear identified harm to the landscape and the resulting development plan policy conflict is a matter to which I give very substantial weight. Whilst the other policy conflicts would have reduced weight due to the HLS position they still weigh negatively in the planning balance. .

264. Placing these factors and all of the relevant material considerations in the balance, I find that the adverse impacts of the proposal significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole. A decision other than in accordance with the development plan is not justified and the proposal would not represent sustainable development."

9. The Inspector's report was dated the 28th September 2018. It was published alongside the Defendant's decision in relation to the appeal given by a letter dated the 20th December 2018. The Defendant agreed with the Inspector's conclusions and his recommendation that the appeal should be dismissed. The Defendant's consideration of the five year housing land supply issue and his overall conclusions on the planning balance were as follows:

> "Housing Land Supply
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> 14. The Secretary of State has carefully considered the Inspector's assessment of housing demand and of housing land supply, as set out at IR198-221. For the reasons given in that assessment, he agrees with the Inspector's conclusions that 520 homes per year are required (IR209), and that, considering the definition of "deliverable" and "developable" in the glossary of the revised National Planning Policy Framework, the housing land supply is 3.99 years (IR220). He considers that, without a five-year supply of housing land, the presumption in favour of sustainable development, as set out in paragraph 11 of the Framework, applies.
>
> 15. In the absence of a five-year land supply, and as set out at IR261-262, the Secretary of State agrees that there would be clear benefits to the proposal, including the provision of 40 new affordable and market homes and the creation of jobs during construction and afterwards through residual support for the local shop. He agrees with the Inspector that both the new homes and the economic benefits attract significant weight.
>
> …
>
> Planning balance and overall conclusion
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> 25. For the reasons given above, the Secretary of State considers that the proposed development is not in accordance with JCS policy SD6 (covering the protection of landscape character) and NP policy H2 (covering design and visual character) of the development plan, and is not in accordance with the development plan overall. He has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan.
>
> 26. As the Secretary of State has found that the local authority cannot demonstrate a five year supply of housing land, paragraph 11(d) of the Framework indicates that planning permission should be granted unless: (i) the application of policies in the Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or (ii) any adverse impacts of doing so significantly and

> demonstrably outweigh the benefits, when assessed against policies in the Framework taken as a whole.
>
> 27. The Secretary of State considers that the housing benefits of the proposal carry significant weight, and the economic benefits of the proposal also carry significant weight.
>
> 28. However, the Secretary of State considers the conflict with the development plan on matters of character and landscape impact to carry very substantial weight.
>
> 29. Paragraph 12 of the Framework states that where a planning application conflicts with a Neighbourhood Plan that has been brought into force, planning permission should not normally be granted. Although the Neighbourhood Plan does not allocate sites, meaning that paragraph 14 of the Framework is not engaged, or set a settlement boundary, it represents an expression of how the community wishes to shape its local environment, and is relevant to the assessment whether the appeal proposal is acceptable or not.
>
> 30. The Secretary of State considers that there are no protective policies which provide a clear reason for refusing the development proposed. However, taking into account the material considerations set out above, including that there is conflict with a recently made Neighbourhood Plan, he considers that the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits. He considers that there are no material considerations which indicate that the proposal should be determined other than in accordance with the development plan.
>
> 31. The Secretary of State therefore concludes that the appeal should be dismissed and planning permission refused."

10. In the event, therefore, the Claimant was successful in the appeal and planning permission was refused. The Claimant remains, however, concerned about the way in which the decision treated the oversupply of housing land in the calculation of the five year housing land supply. Since the Claimant was not a person aggrieved by the substance of the decision the Claimant was unable to bring a claim under section 288 of the 1990 Act. This claim has been brought by way of judicial review and challenges the reasoning of the Defendant (and of necessity the Inspector) in the decision, in so far as it relates to the assessment of the five year housing land supply. Permission to apply for judicial review was granted by Andrews J by order dated the 27th February 2019. She concluded both that the claim was arguable and, further, that it was arguable that the issue raised by the Claimant and disputed by the Defendant as to the proper approach to oversupply when calculating the five year housing land supply was a matter that was not theoretical or academic, and which the court arguably had jurisdiction to address.

Submissions

11. The Claimant seeks a declaration that the proper interpretation of paragraph 73 of the Framework is that net oversupply within the plan period prior to the calculation of the five year housing land supply is to be credited against the annual requirement when undertaking that calculation. Alternatively, the Claimant seeks a declaration that there is no policy which prevents the taking into account of net oversupply in previous years within the plan period when assessing the annual requirement for the purposes of the five year housing land supply calculation. A further alternative form of relief is sought by way of a narrative judgment from the court addressing the issues raised in the case.

12. Mr James Pereira QC, on behalf of the Claimant, submits that a proper understanding of paragraph 73 of the Framework, and the aim of identifying a five year housing land supply, requires taking into account any net oversupply from previous years, on the basis that the purpose of the calculation is to meet the housing requirement over the entirety of the plan period. Oversupply in previous years is, he submits, plainly pertinent to ensuring that the housing requirement across the totality of the plan period is met; simply addressing the calculation deploying annualised targets without reference to previous oversupply is an artificial exercise which is not directed towards meeting the requirement over the plan period as a whole.

13. He further submits that this interpretation is supported by the way in which the PPG addresses shortfalls in housing completions against planned requirements, which indicates they should be taken into account in identifying the requirement for the purposes of the calculation. The PPG also mandates the taking into account of additional supply to offset any earlier shortfalls when meeting the requirement. Thus Mr Pereira submits that the Inspector, and thereafter the Defendant, misinterpreted the Framework and the PPG when the oversupply from earlier years was left out of account in calculating the five year housing land supply. Alternatively, Mr Pereira submits that even if he is wrong in his contention that the correct interpretation of paragraph 73 requires any oversupply to be taken into account, there is, nevertheless, no policy in the Framework which precludes the counting of previous years' oversupply in calculating the future requirement.

14. In response to these submissions Mr Tim Buley, on behalf of the Defendant, contends that, as the Inspector observed, the Framework and the PPG are completely silent on the issue of whether or not any oversupply should be taken into account when calculating the five year requirement. Since the task of the court is one of textual interpretation of existing policy, and not the creation of policy by filling gaps where policy might have been created, there is, in the present case, simply no policy to interpret. He submits that there are a number of potential alternative approaches which might be taken by any policy maker in respect of the treatment of oversupply, but that it is not the job of the court to select which policy approach should be taken so as to fill what is an accepted gap in the Defendant's national policy. In the absence of any text to interpret, the court has no task of interpretation to perform; since the Framework is silent and there is no guidance in the PPG, Mr Buley submits that the matter of the treatment of any oversupply is left to the decision-taker based on the particular facts of any given case.

15. In response to these submissions Mr Pereira seeks to raise a further ground of challenge on the basis that if the Defendant is correct, and there is no policy and the matter is left

to the planning judgment of decision-takers, in the present decision the Inspector erred. He did so firstly, because he failed to exercise planning judgment in taking the decision in the way that he did and failed to have regard to other appeal decisions in which the oversupply was taken into account. Secondly, the Inspector erred in failing to provide reasons in relation to the earlier appeal decisions to which he makes reference. Thirdly, the Defendant erred in failing to address an earlier decision which he had taken in respect of land West of Castlemilk, Buckingham.

16. Initially the Second Interested Party contended in its written submissions that the correct interpretation of the policy required the oversupply to be left out of account in all circumstances. Having observed the discussions during the course of argument, by the time Mr Anthony Crean QC came to make his oral submissions on behalf of the Second Interested Party this proposition was not pursued. Mr Crean submitted that both the Claimant's submission that the oversupply should always be taken into account, and the Second Interested Party's prior submission that it should never be taken into account, were unwarranted and unrealistic. He submitted that in the absence of any policy bearing upon the point it was, as the Defendant contended, a matter of planning judgment or discretion as to how the decision-taker treated an element of oversupply in the particular circumstances of any case.

17. In addition to submissions on the substantive arguments in the case the Defendant and the Second Interested Party raised concern as to whether or not this case was judicable by way of judicial review in any event. Mr Buley submits that the claim is academic, on the basis that the decision was favourable to the Claimant in its outcome, and that there is no proper basis upon which the jurisdiction to allow academic claims in exceptional circumstances arises in the present case. Based on the authorities set out below, he submits that there are three compelling reasons why a claim for judicial review of the present sort should not be permitted and why considerable caution should be exercised in allowing the issues raised by the Claimant to be adjudicated upon. Firstly, he submits that the intention of Parliament in the 1990 Act is clear, in that planning appeal decisions should only be challenged by the bespoke procedure in section 288 of the 1990 Act. Secondly, there is a danger in cases of this kind that the court may not be provided with any proper opposing argument. The Defendant may or may not agree with the reasons of the Inspector, but any concession of the claim would lead to an unsatisfactory outcome; there may well be cases where, unlike the present case, a developer is not present to put the alternative argument before the court. Thirdly, on the basis that decisions under section 78 of the 1990 Act do not create precedents, and can be departed from applying the well known principles set out in North Wiltshire District Council v Secretary of State (1993) P&CR 137, there is a clear alterative remedy for the Claimant in a case of this kind in the form of refocusing and returning to the argument in a subsequent appeal from which, if it were properly to be aggrieved at an adverse decision, a challenge procedure would be available. Fourthly, and finally, Mr Buley relies upon section 31 of the Senior Court Act 1981 as providing in effect a codification of the approach to be taken by this court to academic cases. They are only to be considered by the court where there is "exceptional public interest" in doing so.

18. In response to these submissions Mr Pereira relies upon the fact that permission has been granted to pursue the application. He further submits, against the background of the authorities, that exceptional circumstances are demonstrated as the case raises an issue of regional if not national importance in relation to the correct approach to

calculating housing land supply. It is not an academic or hypothetical question, he submits, because it is clear that the question has arisen in other cases, and in the present case arises upon specific facts.

19. Mr Pereira disputes that the alternative remedy described by Mr Buley is in truth anything of the sort. He submits that in the interests of certainty the court should engage in resolving the planning policy issue now, rather than leaving it to be debated in a subsequent appeal. This submission is supported by reference to the background to the bringing of this claim which is set out in a witness statement from Ms Annette Roberts (one of the Claimant's officers) as follows:

> "20. D's decision in relation to C not having the five year supply puts Tewksbury Borough, which is an area of significant development pressure, at risk of sporadic, unplanned and piecemeal development. This position will be exploited. C currently has a number of appeals which it is defending, most notably an appeal against the non-determination of an application at Fiddington for up to 850 homes which is clearly not in conformity with the Development Plan and has the potential to jeopardize the proper planning of the area. The appeal is being heard at Public Inquiry.
>
> 21. C has sought to bring forward sites at pace, in line with the Framework and associated guidance, with success, evidenced by the over-supply in recent years; with C delivering an over-supply of 704 dwellings in the first 7 years of the plan in delivering total of 4,169 dwellings against a plan requirement of 3,465 for that period. It is simple perverse that C's positive delivery and success in delivery of sites which it has managed in a proactive and responsible manner should result in it now being unable to defend its strategic position in the context of development in the Borough.
>
> 22. This is a position that is seen as comparable in other Local Authorities. By way of example many Local Authorities have stepped trajectories which rather than simplifying an annualised target are lower at the start of the plan period and higher at the later end of the plan period. In these circumstances it would be completely irrational to employ this method of calculating supply as it would be impossible to deliver further numbers if they had already been developed."

20. The appeal to which she refers at Fiddington is being promoted by the Second Interested Party, hence explaining the interest of the Second Interested Party in taking part in the proceedings, as the outcome of this case could be relevant to the calculation of the five year housing land supply in that appeal.

Justiciability: the law

21. The first issue which falls to be determined is the question of whether or not this is a claim that the court should entertain. The starting point for considering this issue is that

the power provided by section 31 of the Senior Courts Act 1981 is to be understood in terms of its scope by reference to CPR 54.1, which defines a claim for judicial review in the following terms

> " "CPR 54.1: (1) this Section of this Part contains rules about judicial review. (2) in this Section-
>
> (a) a "claim for judicial review" means a claim to review the lawfulness of-
>
> (i) an enactment; or
>
> (ii) a decision, action or failure to act in relation to exercise of a public function."

22. Notwithstanding this definition contained in the CPR, it was accepted on all sides that the court does have jurisdiction to consider a claim and grant relief in a claim which is or has become academic or hypothetical. The difficulties with this kind of case were alluded to by Lord Goff in his speech in R v Secretary of State for the Home Department Ex Parte Wynne [1993] 1 WLR 115 in which he observed that it was well established that the House of Lords did not decide hypothetical situations, and if they were to do so any conclusions could constitute no more than obiter dicta "expressed without the assistance of a concrete factual situation, and would not constitute a binding precedent for the future."

23. In R v Secretary of State for the Home Department Ex Parte Salem [1999] 1 AC 450; [1999] 2 WLR 483 the House of Lords was faced with an appeal in relation to an asylum seeker, who contended in his application for judicial review that the decision of the Defendant to notify the Department of Social Security that his asylum claim had been recorded as determined should be quashed, which had become academic by the time the matter came on for hearing before the House of Lords. This was on the basis that in the intervening period he had been recognised as a refugee following an appeal to a Special Adjudicator. Nonetheless, it was urged on behalf of the Appellant that the House of Lords should consider and hear his case in the light of the submission that the case contained questions of general public importance which should be resolved. Lord Slynn recognised that there was a discretion to hear an appeal even where there was no longer a lis to be decided, but expressed his views as to the caution which needed to be exercised in the following terms:

> "My Lords, I accept, as both counsel agree, that in a case where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. The decisions in the *Sun Life* case and *Ainsbury v Millington* (and the reference to the letter in rule 42 of the Practise Directions applicable to Civil Appeals (January 1996) of your Lordships' House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.

> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (by only way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

24. This line of authority was considered by Silber J in R (on the application of Zoo Life International Limited) v Secretary of State for Environment, Food and Rural Affairs and Others [2000] EWHC 2995 (Admin) in which, having observed the approach of the authorities in the House of Lords, Silber J concluded there was no reason why those principles should not apply to other courts. In particular in relation to the Administrative Court he observed as follows:

> "35. Similar principles have been applied in the Administrative Court, for example, by Munby J in *Smeaton v Secretary of State [2002] 2 FLR 146*, 244 [420] ("the facts remain that the court-including the Administrative Court- exist to resolve real problems and not disputes of merely academic significance") and by Davis J in *BBC v Sugar [2007] 1 WLR 2583*, 2606 [70] ("to grant remedies by reference to a decision make in now outmoded circumstances seems to be to be an arid and academic exercise. It is not something that, as an Administrative Court Judge, I would have been minded to do"). Although these statements indicate that if an issue is academic, the court cannot determine it, these statements must be subject to what was said in Salem and which has, as far as I can discover, not been disapproved of or qualified in any manner in any later case.
>
> 36. In my view, these statements show clearly that academic issues cannot and should not be determined by courts unless there are exceptional circumstances such as where two conditions are satisfied in the type of application now before the court. The first condition is in the words of Lord Slynn in Salem (supra) that "a large number of similar cases exist or anticipated" or at least other similar cases exist or are anticipated and the second condition is that the decision in the academic case will not be fact-sensitive. If the courts entertained academic disputes in the type of application now before the court but which did not satisfy each of these two conditions, the consequence would be a regrettable waste of valuable court time and incurring by one or more parties of unnecessary costs.
>
> 37. These points are particularly potent at the present time where the Administrative Court is completely overrun with immigration, asylum and other cases where it would be contrary to the overriding objectives of the CPR for an academic case to

> be pursued. After all one of those overriding objectives is "dealing with a case justly [which] includes, so far as is practicable… (e) allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases" (CPR Part 1.1)… "

25. Subsequent to Silber J's decision in Zoo Life the Court of Appeal considered another claim in which it was contended that their jurisdiction should not be engaged because there was no lis between the parties. The factual circumstances of the case of Rolls-Royce PLC v Unite the Union [2009] EWCA Civ 387; [2010] 1 WLR 318 were that the Claimant employer had entered into collective agreements with the Defendant union in relation to selection criteria for redundancy which included within the matrix for selection a criteria concerned with length of service. The employer issued proceedings to determine whether the inclusion of that criterion would be a breach of the Employment Equality (Age) Regulations 2006. The union were of the opinion that the inclusion of the criterion was not unlawful. In concluding that the Court of Appeal should hear the case Wall LJ expressed himself as follows:

> "52. I say at once that I do not think this an academic appeal: to the contrary my anxiety about hearing it has throughout been driven by my concern that its outcome could directly affect a large number people (those made redundant in the future by the company) without any of those people having any say in it. That, in my judgment, is the principle argument against entertaining the appeal.
>
> …
>
> 54. My reasons, however, for entertaining this appeal are, firstly, that we are being asked to construe a statutory instrument deriving from *Council Directive 2000/78/EC of 27 November 2000* on establishing a general framework for equal treatment in employment and occupation (OJ 2000 L303, p 16) ("The Equal Treatment Directive"). In my judgment, the construction and interpretation of material emanating from Parliament is both a matter of public importance, and one of this court's proper functions.
>
> 55. Secondly, although these are private as opposed to public law proceedings, and although there is no immediate lis between the parties, the point is not academic, and if not resolved by this court will lead to a dispute between the company and the union, who do not agree on it. In this respect, the case seems to me to be analogous with *R (Kay) v Comr of Police of the Metropolis [2008] 1 WLR 2737*.
>
> 56. Thirdly, the point is one of some importance, and is likely to affect a large number of people both employed by the company and beyond. Fourthly, the propriety of the proceedings has been considered by two judges of the High Court, Bean J and Sir Thomas Morison *[2009] IRLR 49*. The former deemed the

> Part 8 procedure appropriate: the latter determined the issues before him. There has been no appeal against or challenge to Bean J's decision.
>
> 57. Finally, and I accept that this is a pragmatic point, we are being asked (by both parties) to hear the appeal, and it has been fully argued both before the judge and before us. Both we and counsel have invested a substantial amount of time in it.
>
> 58. In general terms, therefore, I have come to the conclusions that it would be unduly purist for this court to decline to adjudicate on a point which has been brought before us by means of a procedure which has been deemed by the parties and by the court below to be appropriate. It seems to me further that the thrust of modern authority favour engagement rather than abstention."

26. Agreeing with the conclusions of Wall LJ, Arden LJ expressed herself as follows:

> "151. I agree with the judgment of Wall LJ that this court should entertain this appeal for all the reasons that Wall LJ has given. I would add that I have read his reference to there being no "lis" to there being no immediate claim brought by an alleged victim of age discrimination. But there is a "lis" in the sense of a dispute between the respondent union and appellant employer as to the lawfulness of the length of service criterion in the assessment matrices provided for in the collective agreements on which individual employment contracts are based. The collective agreements are not legally enforceable agreements, by that point only matters if the parties do not comply with them.
>
> 152. In my judgment, the parties to the collective agreements are entitled to know whether it would in fact be unlawful for the employer to rely on the length of service criterion. There are strong practical reasons why the employer should want to have that dispute resolved as between it and the union. Its resolution will provide guidance to the employer in formulating any scheme of redundancy. Of course employees may challenge the scheme after the event, and further evidence may be adduced. None the less, it is highly desirable that the legal system should provide some level of anterior assurance. There are large numbers of employees involved and the personal cost to them, their families and communities of redundancy is likely to be considerable, not to mention the financial cost to the employer. There has been no change in circumstances since the matter was before the judge, and in the situation, it would be in my judgment be wrong to deny whichever party seeks to do so the opportunity to argue that the order made was wrong. There is no dispute of that fact."

27. The question of whether or not cases of this kind should be decided in a planning and environmental law context has also been previously addressed by this court in GLC v Secretary of State for the Environment and Another [1985] JPL 868. Woolf J (as he then was) heard an appeal by the GLC against a decision of the Senior Master to strike out the GLC's application under section 245 of the Town and Country Planning Act 1971 (the predecessor of s288 of the 1990 Act). The basis of the Master's decision was that the GLC were not a person aggrieved because the appeal, which they had resisted, had been refused. The reason for them pursuing the application related to the reasoning adopted by the Inspector. The Inspector had indicated in refusing permission that permission should be granted on a subsequent application if a planning obligation were entered into containing conditions agreed between the developer and the local planning authority. Thus, it was contended on behalf of the GLC that, although the decision was technically favourable to them, in fact it constituted approval of the development in principle which, if allowed to stand, would seriously prejudice any ability they had to resist a subsequent application.

28. Woolf J accepted that the GLC were not a person aggrieved in relation to the Inspector's decision under the relevant provisions of the 1971 Act. Wolfe J noted that there would be grave disadvantages if the position were otherwise since if it were accepted there was a right of application to quash a decision merely because the reasoning was objectionable "there could be a vast increase in applications trying to put right alleged defects in reasoning which might be solely of academic interest which could unnecessarily delay planning procedures". In respect of the particular case before him, having concluded that it should be treated as in effect an application for permission to apply for judicial review, Wolfe J concluded as follows in deciding that he would grant permission to apply for judicial review:

> "However, in this particular case, he did accept that there were special considerations which made it desirable that the approach of this inspector in relation to the reasoning of his decision on the appeal in question should be tested. If his reasoning was wrong, it would indeed be cumbersome for the whole of the procedure of refusing planning permission and an appeal to be gone through before the matter could be decided. It was for this reason that he had encouraged an application for leave to apply for judicial review. If the matters of which the G.L.C wished to complain were not ones which fell within section 242, then that section did not prevent an application for judicial review. If, on an application for judicial review, the court decided it was appropriate to so do, it could grant a declaration which would decide the point of principle without inhibiting the planning authority and the Secretary of State exercising their proper statutory functions on any further application for planning permission. In the circumstances of this case, that could well save unnecessary delay and expense."

29. In R (on the application of Reddich BC) v Secretary of State [2003] EWHC 650 Admin; [2003] 2 P&R 25 Wilson J (as he then was) dealt with an application for permission to apply for judicial review in relation to an Inspector's reasoning on an appeal relating to the interpretation of a policy in the Claimant's Local Plan which designated the appeal

site as an Area of Development Restraint. The Inspector refused the appeal on the basis of highway safety, but did not accede to the Claimant's other arguments relating to the interpretation of the planning policy which had also underpinned their refusal of planning permission. In refusing the Claimant's application for permission to apply for judicial review Wilson J observed as follows:

> "28. The trouble is that a presentation of this issue to the court now is academic; it is hypothetical. The possible further application, whether by this developer or otherwise, referable to this site may never materialise. The court has enough difficulty in despatching the work which it is required to do in relation to live issues. What is wrong, asks Mr Coppel on behalf of the Secretary of State, with a situation where a further application refused by the local authority is the subject of a successful appeal and where there is then a live issue which can be brought back to this court by way of an application appeal under s.288 of the Act of 1990? Indeed, he adds, such would be a proceeding in which the developer, as a party directly interested by the outcome of the issue, would have a standing to take full role as a respondent.
>
> 29. I have come to the clear conclusion that in those circumstances, and in light of my hope that the whole problem is short lived in that Local Plan No.2 will soon be replaced by Local Plan No. 3, my colleague was right in his conclusions on paper that the time for the resolution of this issue is when it has arisen as the pivotal feature of a decision. For that reason, I refuse this application."

30. In R (on the application of Bramford Royal British Legion Club) v Ipswich Magistrates Court [2014] EWHC 526 (Admin); [2015] Env LR 1 the Claimant sought a judicial review of the decision of a District Judge in the Magistrate's Court in relation to an abatement notice served in respect of noise nuisance. Although the District Judge had quashed the abatement notice the Claimant nonetheless objected to the findings which were reached that a statutory nuisance had occurred and that the Claimant had failed to show that best practicable means had been used to counteract the nuisance. The Claimant also challenged the refusal to award the Claimant's costs. Simler J concluded that there was a need to hear the judicial review on the substantive grounds related to statutory nuisance and best practicable means since those matters had to be examined in order to resolve the challenge to the costs order. Thus, she concluded that the case was an exceptional case where, notwithstanding the fact that the Claimant was the winning party, they should be entitled to challenge the District Judge's reasons as part and parcel of the resolution of the adverse decision which the District Judge reached in relation to costs.

31. Finally, it will be recalled that Mr Buley submitted that the revisions to section 31 of the Senior Court Act 1981, by the inclusion of section 31(2A) and (3C), provides, to some extent, a codification to the approach to academic cases. These provisions provide as follows:

> "31. (2A) The High Court-

> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application, if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> (2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
>
> (2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied.
>
> …
>
> (3C) When considering whether to grant leave to make an application for judicial review, the High Court
>
> (a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and
>
> (b) must consider that question if the defendant asks it to do so.
>
> (3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.
>
> (3E) The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.
>
> (3F) If the court grants leave in reliance on submission (3E), the court must certify that the condition in subsection (3E) is satisfied."

Justiciability: conclusions

32. Having reflected on both the authorities and these submissions I have come to the clear and concluded view that the court should not proceed to determine this application, as it does not fall within the class of exceptional cases where the determination of an academic dispute about the reasons for a decision, rather than the decision itself, is warranted. I appreciate that in reaching this conclusion I am differing from the conclusions reached at the permission stage by Andrews J; I mean no disrespect to her in reaching a different decision, but unlike her I have had the advantage of full and extensive oral submissions in relation to the relevant issues arising in the case. The reasons for me concluding that the court ought not to entertain this case are as follows.

33. Firstly, it is important in my view to take account of the specific statutory regime within which the decision which is under review was made. That statutory Framework provides for a bespoke remedy in relation to appeal decisions of this kind within section 288 of the 1990 Act. That bespoke remedy is specifically one which can only be exercised by those who are a "person aggrieved". In designing the statutory review process it is clear, therefore, that Parliament had no intention to provide any form of remedy to a person who may have succeeded in an appeal for what they consider to have been legal errors on the route to winning. The fact that there is such a specific and bespoke remedy provided for in the statutory Framework governing decisions of the kind under challenge is a feature which distinguishes this type of case from, for instance, the Rolls-Royce case. In any event, it is clear from the extracts of the judgments set out above the Court of Appeal did not consider that the case in Rolls-Royce was academic: the concern in that case was rather the number of potential people whose interests might be affected by the judgment who were not before the court. The point in relation to the bespoke remedy is clearly reinforced by the apt observations in this connection by Wilson J in paragraph 28 of his judgment in Reddich.

34. I recognise that there is force in the submission made by Mr Pereira that when the court faces a question of the interpretation of national planning policy it could be contended that the two conditions set out in paragraph 36 of Zoo Life might be satisfied. Interpretation of national planning policy is a question of law and not fact, and given its national coverage it is possible to contemplate that the point of interpretation will arise in a number of other similar cases. However, it is important, in my view, to recognise that in paragraph 36 of Zoo Life Silber J was not laying down an exhaustive or comprehensive list of the conditions giving rise to when exceptional circumstances might exist. The two conditions are identified as examples of when exceptional circumstances might exist rather than as a test of exceptionality itself. His use of the language "such as" reinforces this. The examination of whether or not this is an exceptional case will not be limited to whether or not the two conditions from paragraph 36 could be said to be engaged, but must examine all of the circumstances in which the case arises.

35. In my view it is a particularly important feature of the evaluation in this case to note the particular context and nature of appeal decisions. As noted above, appeal decisions do not amount to binding precedents, and, within the scope of the North Wiltshire principles, it is a common feature of the appeal process that issues such as the interpretation of planning policy are resolved by Planning Inspectors and, if there are reasons and it is appropriate to do so, also reviewed in subsequent appeals by Planning Inspectors. Whether this is described as an alternative remedy or an inherent feature of the decision-taking process in planning cases, it is nonetheless obvious that the court is not the only means of resolving a dispute as to the meaning of planning policy. Indeed, quite to the contrary, Lord Carnwath had the following to say in relation to the resolution of disputes over policy interpretation in Hopkins Homes v Secretary of State [2017] UKSC 37:

> "25. It must be remembered that, whether in a development plan or in a plan or in a non-statutory statement such as the NPPF, these are statements of policy, not statutory texts, and must be read in that light. Even where there are disputes over interpretation, they may well not be determinative of the

> outcome. (As will appear, the present can be seen as such a case.) Furthermore, the courts should respect the expertise of the specialist planning inspectors, and start at the least from the presumption that they will have understood the policy framework correctly. With the support and guidance of the planning inspectorate, they have primary responsibility for resolving disputes between planning authorities, developers and others, over the practical application of the policies, national or local. As I observed in the Court of Appeal (Wychavon District Council v Secretary of State for Communities and Local Government [2009] PTSR 19, para 43) their position is in some way analogues to that of expert tribunals, in respect of which the courts have cautioned against undue intervention by the courts in policy judgments within the areas of specialist competence: see AH (Sudan) v Secretary of State for the Home Department (United Nations High Comr for Refugees intervening) [2008] AC 678, para 30, per Baroness Hale of Richmond.
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> 26. Recourse to the courts may sometimes be needed to resolve direct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the Tesco case. In that exercise the specialist judges of the Planning Court have an important role."

36. These observations reinforce that whilst the court may have a final say in relation to the interpretation of planning policy, in the first instance and in many cases the interpretation of policy will be resolved by specialist Planning Inspectors who are accustomed to undertake the task of interpreting planning policy as a regular part of their role in reaching appeal decisions. The Claimant's dissatisfaction with the Defendant or his Inspector's interpretation of planning policy is a matter which can be perfectly properly ventilated and re-examined in a subsequent appeal if there is good reason to do so; if the interpretation is persisted in and a decision adverse to a Claimant arises then the Claimant has at that stage the right to ask the court to intervene. Even if, therefore, one were to accept that a dispute about the interpretation of national planning policy may have a reach or coverage which might engage a significant number of other cases, that would not in my view be sufficient to justify the courts intervention in circumstances where the structure of the appeal decision-taking process is such that no conclusion as to the interpretation of planning policy in an appeal decision is a binding precedent and, when the interpretation complained about actually has a decisive impact on the appeal decision the appropriate procedure under section 288 of the 1990 Act can be engaged.

37. There are also in my view difficulties with the court engaging in what are effectively section 288 challenges brought by a party who is not a "person aggrieved" in terms of relief and procedure. As set out above, Mr Pereira seeks relief in the form of the grant of a declaration, or alternatively a narrative declaration in the form of a judgment. However, the court plainly has to consider whether or not the strictures in relation to the refusal of the grant of relief contained in section 31(2A) of the 1991 Act are engaged. The grant of relief must be refused "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the

conduct complained of had not occurred". In a case such as this the conduct complained of is the reasoning in relation to a point which was not ultimately decisive, and therefore it is difficult to see how the outcome for the applicant would have been at all different. It may be argued that the "outcome" in the case is to be taken as the totality of the reasons given, including those which are complained about. However, it is difficult to see why "outcome" should bear such a wide meaning. In my view, the clear intention of section 31(2A) is to require the court to withhold relief when it is highly likely that the decision would not have been substantially different if the illegality had not occurred. It follows, since the reasoning which is the subject matter of the Claimant's complaint was not decisive, that in accordance with section 31(2B) relief should be refused in this case unless there are reasons of exceptional public interest making it appropriate not to do so. For the reasons which have already been given I am not satisfied that this case meets any test of exceptional public interest.

38. I also consider that there is substance in the procedural concern raised by Mr Buley. Whilst in the present case the court had the advantage of hearing full argument from each available perspective on the question of policy interpretation raised, that will not always be the position in cases of this kind. There may be cases where no opposition is raised, or where, for instance, a developer which has lost a planning appeal may play no part in defending the argument it made to the Inspector. As Wilson J observed there is a far greater chance of a full argument being rehearsed if the case is one brought by a "person aggrieved" and defended by the Defendant.

39. For all of these reasons, in the particular circumstances of a decision in relation to a section 78 planning appeal, where the successful party wishes to bring a judicial review in relation to an issue of planning policy interpretation with which it disagrees, having lost that particular battle but won the war in relation to the outcome of the appeal, I do not consider that the principles in relation to dealing with such an academic judicial review are engaged. The circumstances of such a case are clearly different from those with which the Court of Appeal dealt in Rolls-Royce. The case is clearly distinguishable from the circumstances of the Bramford case where, exceptionally, an issue in relation to costs required the investigation of the academic issues. I appreciate that in reaching this decision I am arriving at a different conclusion from that of Woolf J in the GLC case. It needs to be observed that Woolf J's decision was one which related solely to the issue of arguability, and was not a conclusion on the substantive question. Moreover, the GLC case was noted by the judge to arise in very particular and unusual circumstances. For the reasons which I have set out above, having heard full argument on the point on the substantive issue, I am not dissuaded from the outcome that I have concluded is required in the circumstances of this case by the views expressed by Woolf J in the GLC case in granting permission to apply for judicial review.

40. For all of these reasons I am not satisfied that it is appropriate in this case for the court to exercise its jurisdiction to adjudicate upon an academic dispute in a judicial review claim. In the circumstances, therefore, my decision on the issue of justiciability of this case determines the matter and the Claimant's claim must be dismissed. I have considered the various elements of correspondence which the court has received subsequent to the hearing of this matter and concluded that they make no difference to any of the conclusions that I have reached.