Neutral Citation Number: [2022] EWHC 3209 (Admin)

Case No: CO/1568/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

IN THE MATTER OF AN APPLICATION FOR STATUTORY REVIEW UNDER SECTION 288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2022

Before :

MR JUSTICE KERR

- -

Between :

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

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- -

Ms Anne Williams and **Ms Angelica Rokad**, instructed on a direct access basis, appeared for the **Claimant**
Mr Leon Glenister, instructed by **Government Legal Department**, appeared for the **First Defendant**
The **Second Defendant** did not appear and was not represented

Hearing date: 8 December 2022

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Approved Judgment

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This judgment was handed down remotely by circulation to the parties' representatives by email and will be released for publication on the National Archives caselaw website. The date and time for hand-down is 10am on 16 December 2022. I direct that copies of this version as handed down may be treated as authentic.

Mr Justice Kerr :

Introduction

1. In this application for statutory review, permission to proceed was granted by Johnson J on 24 June 2022. The claimant operates an agency for clients wishing to place advertisements. He applied unsuccessfully to the second defendant (**the council**) for permission to erect what is called an externally illuminated advertisement wrap - which means a large advertising billboard with lights round it – in Shoreditch High Street.

2. He appealed to the first defendant (**the SoS**) who appointed an inspector. The appeal failed. The main issue is whether the inspector unlawfully sub-delegated his functions to an inexperienced junior officer, whose recommendation and reasoning he adopted without alteration; and whether that was an unfair process. Johnson J thought it was "arguable that the inspector was not entitled to delegate his decision-making powers (as opposed to evidence collection / summary) and that that is what happened here".

Law and Guidance

3. There is no dispute about the relevant law and guidance. I summarise it, mainly drawing on SoS's account in the detailed grounds of resistance. I omit all but what is essential for this case. The main point that emerges from the legal framework is that, as the parties agree, this appeal had to be determined by the appointed inspector. It is not suggested he was entitled to delegate his decision making functions.

4. The Town and Country Planning (Control of Advertisements) (England) Regulations 2007 (**the Advertisements Regulations**) were made by the SoS under section 220 of the Town and Country Planning Act 1990 (**the 1990 Act**). The Advertisements Regulations state that consent is required for particular advertisements (regulation 4).

5. Consent is decided by the local planning authority (regulation 16). If it is refused, the applicant may appeal to the SoS, who may appoint an inspector to determine the appeal (regulation 17 read with sections 78 and 79 of and Schedules 4 and 6 to the 1990 Act and regulation 3 of the Town and Country (Determination of Appeals by Appointed Persons (Prescribed Classes) Regulations 1997)).

6. In the case of advertisement appeals, the Planning Practice Guidance on Advertisements (22 July 2019) (**the PPG**) states at the outset (paragraph 001) that "[a]dvertisements are controlled with reference to their effect on amenity and public safety only, so the regime is lighter touch than the system for obtaining planning permission for development."

7. The procedure in this advertisement appeal was governed by the Part 2 of the Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009 (**the WR Regulations**), made under section 323 of the 1990 Act. The main element of the procedure is that the appellant submits one round only of representations and documents supporting the appeal. The inspector will have a completed questionnaire from the local planning authority.

8. The inspector may, in his or her discretion, receive representations from third parties or seek further information from the appellant; or the inspector may proceed straight to a written decision based on the representations and supporting documents provided by the appellant. The procedure under Part 2 of the WR Regulations is, therefore, clear and simple.

9. The legislation does not require a site visit to be carried out. It is a matter within the inspector's discretion. Inspectors are employed by the Planning Inspectorate (**the PINS**). They are not required by law to have any particular qualifications but in practice are highly qualified professionals such as solicitors, architects, surveyors or chartered town planners. The PINS publishes a "Procedural guide" (with no statutory status) (**the Procedural Guide**).

10. Paragraph 1.1.1 of the Procedural Guide advises that it should be read alongside the PPG. Annexes C and Q to the Procedural Guide deal with advertisement appeals. Site visits are "normally" carried out where visual amenity is in issue, i.e. "where it is necessary to assess the impact of a development on its surroundings" (Annexe C, at C.9.1). The site visit is carried out by "the inspector or his/her representative" (C.9.3 and C.9.6).

Facts

11. In recent years, there has been a shortage of planning inspectors. This has led to a practice of recruiting lower ranking staff to assist them, as explained by Ms Rebecca Phillips who is in charge of planning appeals at the PINS. Under a pilot scheme in 2013 and 2014, planning officers were hired to help inspectors by undertaking site visits and helping to draft decision letters. An inspector would act as their mentor.

12. The planning officers would discuss their findings with the inspector, who would make the decision, either agreeing with or altering the draft decision produced by the planning officer. The decision was in the name of the inspector only, not mentioning the planning officer. The SoS considers that the system was endorsed by HHJ David Cooke in *Harris v. Secretary of State for Communities and Local Government* [2014] EWHC 3740 (Admin).

13. HHJ Judge David Cooke decided that the challenge in that case should fail. One of the grounds of challenge was that the defendant Secretary of State was relying on a site visit having been carried out. The judge said, among other things, that the site visit was carried out, not by the inspector but by a Mr Sweet, described as a "planning officer" lower in rank than the inspector.

14. In the transcript at [40] and [41], HHJ Cooke observed:

> "40. … It cannot, in my view, be said to be a material error of procedure if he does not in every case make the site visit himself. In some cases it may be necessary for him to do so, in others, and it must be a matter for his judgment, it is perfectly acceptable it seems to me for him to delegate that to somebody within his service to make and report back to him, in the same way he would be entitled to delegate somebody in his service to review documents and to produce a report for his benefit on the basis of which he can make his decision.
>
> 41. I conclude therefore that the fact that the visit was not made by the inspector himself does not constitute a material procedural irregularity… ."

15. A review of the whole planning appeal inquiry system was then carried out by Ms Bridget Rosewell, leading to her review report published in December 2018. It included a recommendation that "Appeal Planning Officers" or **APOs** should be recruited to address delay and free up inspectors' time. The APOs act as caseworkers doing preparatory document work for a decision, conducting site visits and producing draft decisions.

16. The APOs are graduates who are likely to have a degree relevant to planning. They receive training. They may later become inspectors. The APOs produce written recommendations in their own name, which are included in decision letters and endorsed or rejected by the inspector. I have seen an example of a decision in a different case, where the inspector rejected the APO's recommendation. That recommendation was, nonetheless, included in the decision letter, followed by the inspector's reasons for disagreeing with it.

17. Some APOs are employed by the PINS on permanent contracts. These are called "Appeal Planning Officer Managers" or **APOMs**. Or, they may be "Chartered Town Planner Apprentices" (**CTPAs**) employed on temporary three year contracts. The CTPAs spend 20 per cent on their time on learning and development and the rest on APO work for the PINS. A CTPA often aspires to become a chartered member of the Royal Town Planning Institute, or "MRPTI".

18. The claimant's planning consultant, Mrs Susan Jones, has provided witness evidence expressing concern about the role of an APO in this case, as I shall relate. Mrs Jones' researches unearthed a PINS website document dating from about early 2021, including the following statement:

> "Appeals Planning Officers and Apprentice HEOs [*higher executive officers*] assist in processing and determining Planning, Enforcement and a range of other appeals … ."

19. Ms Madeleine Long was recruited as a CTPA in about early 2021. She has an honours degree. She received APO training in February and March 2021, including training relevant to advertisement appeals and undertaking site visits. She undertook case work as an APO from about March 2021. Her mentor was Mr Ken Taylor, an inspector employed by the PINS.

20. On 5 July 2021, the claimant applied to the council, through Mrs Jones, for permission to erect the advertisement wrap. The application was accompanied by documents of the usual kind: a planning statement, a highway statement, a site location plan, an existing site plan, a proposed site plan, and drawings showing the street frontage elevation.

21. On 17 September 2021, the council refused the application on the ground that the advertisement would impact adversely on the visual amenity of the area. Mrs Jones, the claimant's agent, appealed to the SoS. The appeal was submitted on 10 November 2021. The appeal documents consisted of an appeal form, a planning statement, a plan and appendices marked A-P. The appeal was accepted as valid, in a letter of 25 January 2022 from Mr Liam Collins of the PINS to Mrs Jones.

22. The letter explained that Mr Collins was the case officer and that the appeal would be determined by the "Commercial Appeals Service" procedure. Under the heading "Site Visit", the letter continued:

> "We will arrange for one of our Inspectors, or their representative, to visit the appeal site. The Inspector, or representative, will conduct the site visit alone. If it is decided that he or she should be accompanied by the main parties, we will send you details nearer the time. Inspectors will not accept any documents or discuss the appeal at the site visit."

23. Ms Long was assigned to the appeal as the APO, under the guidance of Mr Taylor. They discussed the case, reviewed the appeal documents and discussed a forthcoming site visit. That was undertaken by Ms Long, at Mr Taylor's request. Clearly, she was considered to be his "representative", as described in Mr Collins' letter. Ms Long carried out the site visit on 23 February 2022, in daylight hours, from about 2.30pm to 3pm.

24. I have seen photographs of the site submitted in support of the appeal. Mrs Jones said the view of the (vertical) advertisement wrap site was obstructed by certain street furniture: a sign board and a parking ticket machine in use at the outdoor car park beneath the vertical site. For occupants of cars driving past, the view would indeed be partially obstructed at the bottom of the vertical site, though not in the middle or at the top. To have an unobstructed view, you have to walk or drive within the outdoor car park, past the parking ticket machine, towards the site.

25. After the site visit, Mr Taylor and Ms Long again discussed the appeal, reviewed the documents and identified some documents that appeared to be missing. Mrs Jones' evidence is that she had supplied all the documents required and that any missing documents must have gone missing internally within the PINS. The missing documents, including photographs, were provided by Mrs Jones, at the request of the PINS case officer, on 3 March 2022.

26. On 15 March 2022, Ms Long provided a reasoned written recommendation and decision template for Mr Taylor. The recommendation was to dismiss the appeal on the sole ground of visual amenity. Mr Taylor accepted the recommendation and Ms Long's reasoning in full. He "topped and tailed" the decision without adding any further reasoning and signed it electronically. It was then sent to Mrs Jones, on behalf of the claimant. The decision document stated the following.

27. It began by stating that a site visit by "M Long", i.e. Ms Long, had been made on 23 February 2022. It then stated that the decision was by Mr Taylor and stated his qualifications (BSC (Hons), PGDip and MRTPI). The decision date was 22 March 2022. Details of the nature of the appeal and the reference number were given.

28. The decision was at paragraph 1, which stated succinctly: "[t]he appeal is dismissed." Under the heading "Appeal Procedure", paragraph 2 stated that the APO had carried out the site visit and that her recommendation "is set out below and to which the Inspector has had regard before deciding the appeal". The criteria of visual amenity and public safety were set out at paragraph 3.

29. Paragraphs 4-16 then follow and were provided in the name of Ms Long, whose electronic signature appears beneath paragraph 16. Those paragraphs set out the reasoning of Ms Long as follows. The "Main Issue" is stated at paragraph 4 to be visual amenity and Ms Long had "no reason to disagree" that it was the main issue. No issue of public safety arose.

30. Paragraphs 5-14 then state her "Reasons for the Recommendation". Those paragraphs need quoting in full (omitting the footnotes in paragraph 12):

> "5. The appeal site is located in the South Shoreditch Conservation Area, where special attention must be paid to the desirability of preserving or enhancing the character or appearance of the area. The site relates to the southern elevation of Boundary House, a tall vacant building on the western side of Shoreditch High Street. This blank brick elevation faces onto a surface car park and is considerably covered by graffiti, most of which is concentrated at ground floor level. Boundary House has very large, illuminated advertisements on its northern and eastern elevations as well as a large digital display on its north-eastern elevation. The surrounding area has a largely commercial character and a high volume of pedestrians and traffic passing the site. I observed that large, high-level and illuminated advertisements form part of the character of this location. This includes a large digital display on the eastern boundary of the car park, a high-level digital display installed on the building on the opposite side of Shoreditch High Street, as well as smaller-scale displays erected on both the western and eastern pavements and nearby bus shelter.
>
> 6. The Planning Practice Guidance sets out that in practice, 'amenity' is usually understood to mean the effect on visual and aural amenity in the immediate neighbourhood of an advertisement, and the local characteristics of the neighbourhood should always be considered. The National Planning Policy Framework (the Framework) sets out that the quality and character of places can suffer when advertisements are poorly sited and designed.
>
> 7. The proposal is a very large, illuminated advertisement wrap that would be installed on the southern elevation of Boundary House; it would be most visible to those approaching from the south. It would be positioned above the ground floor level and extend close to the roofline. The advertisement would be illuminated by external lights that would project out from the banner face.
>
> 8. The existing large scale advertisements at Boundary House are orientated towards the street, and the display on the northern elevation is somewhat screened by the adjacent building. In contrast, the proposal's positioning on the southern elevation would have a more prominent orientation to those approaching from the south and would be highly visible above the surface car park. While the curve in the highway and tall buildings on its western side would prevent long distance views, due to the proposal's size, orientation and unobstructed position above the car park area, it would be an obtrusive feature in its immediate area. Although illuminated advertisements form part of the character of advertising at this site, in this instance, the lighting would further exacerbate the proposal's overly prominent design.

> 9. The Framework advises that cumulative impacts of advertisements should be taken into account. The wrap, in combination with the surrounding advertisements, would appear as an obtrusive amount of large scale advertising in the streetscene. Moreover, at points along Shoreditch High Street, the digital display at the car park's boundary would be directly in the line of sight with the proposal behind, which would further appear as an excessive amount of advertising at this location. While the harm arising from the cumulative impact of the advertisements was raised in the officer report and not directly in the decision notice, the appellant has had the opportunity to respond to this issue at the appeal stage.
>
> 10. The introduction of a very large, high-level and illuminated advertisement to a long-established blank brick wall would not preserve the character and appearance of this part of the Conservation Area. The Shopfront Design Guide Supplementary Planning Guidance states that a proposal's design must contribute positively to the neighbouring buildings and streetscene, as such the scheme would conflict with the overarching aims of this document.
>
> 11. It appears there are economic circumstances delaying the refurbishment of the site. However, given that the scheme would result in harm to visual amenity rather than improving the appearance of the building, in itself this matter does not carry any substantive weight.
>
> 12. The appellant has referred to case law relating to consistency in decision-making and has submitted documents pertaining to a number of advertisement consents granted by the Council and allowed at appeal. Given the above and considering the proposal on its own individual merits and impacts on visual amenity, including the cumulative impact of large scale advertising in this area, the scheme would be different to the other cited decisions. As such, dismissing this appeal would not, in my view, result in an unreasonable lack of consistency in decision-making.
>
> 13. Mechanisms to secure the removal of graffiti at the site, as well as its ongoing management, have been suggested. However, given that the graffiti is largely concentrated below the proposed positioning of the wrap, the link between its necessary removal and allowing the advertisement is tenuous. Even if the benefits of removing the graffiti in the long-term were taken into account, these would not outweigh the harm to visual amenity that would arise from the proposal's overall scale and cumulative impact.
>
> 14. Given the above, the proposal would result in harm to the visual amenity of the area. It would be contrary to the Hackney Local Plan 2033, adopted July 2020, specifically Policy LP7 which seeks to prevent advertisements that detract from the amenity of the streetscene. It would also be contrary to Policy LP1 which seeks to ensure development that is compatible with the existing townscape and Policy LP3 which seeks to ensure development proposals affecting conservation areas preserve or enhance the character and appearance of the area. There would be further conflict with The London Plan, adopted March 2021, specifically Policy HC1 which seeks to ensure that development proposals affecting heritage assets conserve their significance. Although the Council have mentioned conflict with Policy D4, this Policy is primarily strategic in nature and focuses on the design process and scrutiny, it does not appear to be directly relevant to the nature of the appeal scheme."

31. Under the heading "Other Matters", at paragraph 15, Ms Long referred to concerns about the council's processing of the case. These did not relate to "the specific planning merits of the appeal scheme, which must be the focus of this recommendation". The recommendation was then stated at paragraph 16, above Ms Long's electronic signature:

> "For the reasons given above and having regard to all other matters raised, I recommend that the appeal is dismissed."

32. Paragraph 17 was then added by Mr Taylor in the following terms, beneath the heading "Inspector's Decision" and followed by his electronic signature:

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

33. It is common ground that the personal pronoun "I" in paragraph 4 ("I have no reason to disagree"), paragraph 5 ("I observed") and paragraph 16 ("I recommend") refers to Ms Long; while the same pronoun in paragraph 17 ("I have considered") refers to Mr Taylor.

34. Mr Taylor's evidence of the decision making process and his interactions with Ms Long on this appeal is as follows:

> "Ms Long undertook a site visit in the present case on 23 February 2022. She provided the recommendation in the decision template to me on 15 March 2022. Her recommendation is set out in paragraphs 3 – 16 of the Decision Letter.
>
> I did discuss this appeal case with Ms Long prior to the site visit. My calendar indicates that this was likely on the Monday before the Wednesday when site visit took place. This would have included an initial review of the case documentation and a discussion focussed on the site visit.
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> I recall that, following the site visit, I discussed this appeal with Ms Long on a number of occasions. The initial conversations were focused on the missing and incomplete documentation submitted by the appellant and how to deal with this. As the appellant had referred to some case law, I recall discussing how to make appropriate reference to this in terms of the structure and formatting of the recommendation. Throughout this period, I reviewed the relevant appeal documentation both individually and with Ms Long.
>
> Upon receiving the recommendation from Ms Long, it was then a matter for my judgment as to what I required in order to determine the appeal myself – including whether I wanted to speak further about the recommendation with Ms Long and whether I wanted to undertake a site visit personally.
>
> I reviewed the appeal documentation and the recommendation. I did have available to me the photos of the existing and proposed images [PB/56], other site photographs [105-119], and views of the site [PB/237-239]. I did not consider it necessary to visit the site myself given the nature of the information (including the photographs) available to me. In addition, I considered that Ms Long's description of the site/area was clear and reasonable. My recollection is that, after Ms Long submitted the recommendation, I did not speak with her further about the case.
>
> In reaching the Decision, I saw all the documents that were submitted. After reviewing the documentation, I considered the recommendation to be robust and well-reasoned. Having regard to the facts of the case, I agreed with the recommendation.
>
> Therefore, I amended the decision template to ensure that the formal decision (namely paragraph 1) was consistent with my conclusion (namely paragraph 17) and added my (electronic) signature under paragraph 17. I did not provide further reasons of substance, as the recommendation was set out in full and my Decision was consistent with those reasons. I can confirm that I myself considered all of issues raised in paragraphs 3-15 of the Decision and had regard to those considerations, with reference to the documentation and information.

The Decision to dismiss the appeal was mine."

35. The claimant's consultant Mrs Jones noticed the name "M Long" and that he or she was described as the Appeal Planning Officer. Mrs Jones did not know who M Long was, but was not happy about the apparent role of that person in the decision making process. She started to make enquiries which eventually led to the present statutory review challenge.

Grounds of Challenge

36. There are three grounds of challenge. The first is that the inspector failed to determine the appeal independently of the APO or failed to determine the appeal with "transparency" by relying on recommendations of an unknown party without the proper qualifications and experience of an inspector; and that the inspector had no power to do so.

37. The claimant complains that at no point prior to receiving the decision letter the claimant other than the inspector would be "key to the decision-making process" (as it was put in the statement of facts and grounds). The complaint advanced in the first ground is therefore one of improper delegation of power combined with use of an unfair process.

38. The second ground is that the inspector breached what was said to be a legitimate expectation that he would carry out a site visit before reaching his decision; and that in choosing not to do so and relying instead on the report of Ms Long's site visit, the inspector acted unlawfully.

39. The third ground is that the APO, Ms Long, did not have all the relevant documents submitted to the PINS by the claimant when she conducted the site visit. She and the inspector, Mr Taylor, only saw some of them later, after the site visit had been completed.

Summary of Parties' Submissions

40. Ms Anne Williams, for the claimant, submitted as follows. On the first ground, she says that an improper delegation of power occurred. She submitted that the decision letter and the way in which it was prepared and expressed did not support the proposition that the inspector had fully and properly exercised his own professional judgment; instead, he had chosen to rely on that of a person not qualified to make the judgment.

41. As for the process, Ms Williams submitted that it was unfair for an unqualified person to be involved in the decision making process, without the claimant having knowledge of her involvement until receipt of the decision letter, nor any opportunity of challenging her involvement or addressing the findings she made in her report before the inspector adopted it.

42. Ms Williams addressed the authorities relied on by the SoS in his detailed grounds of resistance, in particular the *Harris* case which, the SoS asserted, is on all fours with the present case and should be followed. She submitted that *Harris* was authority only for the proposition that a site visit need not be carried out by the inspector himself in every case.

43. That reflects the guidance, which now states that a site visit may be carried out by an inspector or "his/her representative". However, the inspector's appeal decision in *Harris* was in his own name. It was not then the practice for the decision, stated to be in the form of a recommendation, to be in the name of an APO. *Harris* does not, Ms Williams submitted, license an inspector to delegate to an officer anything more than carrying out a site visit and reporting back what the officer observed.

44. The other authorities relied upon by the SoS, Ms Williams contended, were all in one way or another different and distinguishable from the present case. They were not authority – any more than *Harris* – that the arrangements here were proper and lawful. I will return to these authorities when considering my reasoning and conclusions.

45. Ms Williams did not accept the suggestion that the procedure was analogous to that followed in the case of an ordinary local planning authority decision on planning permission, where the officers who write the report to committee freely express their own views, which the committee may decide to adopt without adding to the reasoning in the officers' report. That was different because objectors and applicants had sight of the report and an opportunity to comment on it.

46. Nor, she submitted, was the position analogous to the procedure in a called in planning appeal, where the inspector reports to the Secretary of State and the latter may, similarly, accept the report of the inspector and the latter's recommendation and reasoning, without adding any further reasoning in the decision letter than necessary to meet the standard referred to in the celebrated speech of Lord Brown in *South Bucks DC v. Porter (No 2)* [2004] 1 WLR 1953, at [35]-[36].

47. The difference was, said Ms Williams, that in the case of a called in appeal the inspector's report, even if unavailable to interested parties before the Secretary of State's decision is issued, is preceded by an inquiry at which there is ample opportunity to make written and often oral representations; which is not the case where, as here, the written representations procedure is used.

48. On the second ground, Ms Williams relied on Mrs Jones' evidence that she had never before come across a site visit not being carried out by the inspector himself or herself. She accepted that both the guidance and the letter of 25 January 2022 acknowledging the appeal, referred to the possibility of a person other than the inspector carrying out the site visit, but not that it was lawful for him to delegate that task in this case where visual amenity was the sole issue in the appeal.

49. On the third ground, the claimant's submission was that the APO was led astray during the site visit because she did not have available to her before making that visit the photographs that would have shown that an unobstructed view of the vertical site was shown in some of the photographs. Ms Long, Ms Williams argued, had erred in point of fact due to not having the correct photographs, when Ms Long stated in the decision letter (at paragraph 8) that:

> "While the curve in the highway and tall buildings on its western side would prevent long distance views, due to the proposal's size, orientation and unobstructed position above the car park area, it would be an obtrusive feature in its immediate area."

50. For the SoS, Mr Leon Glenister submitted as follows. He said that HHJ Cooke's decision in *Harris* provides a complete answer to the first and second grounds; and that even aside from that decision, the process was no different in substance from that followed in the case of called in appeals or ordinary local planning authority decisions on applications for planning permission.

51. As for ground 1, Mr Glenister submitted that there was no unlawful delegation of power nor any procedural unfairness. He accepted that the inspector must take the decision personally and submitted that that is exactly what he did. As for the procedure to be adopted, the inspector had a broad discretion and it was open to him to consider the report of the APO in reaching his decision. He had also considered all the relevant documents before making his decision.

52. As for the second ground, there was no possible basis for a legitimate expectation that any site visit would be carried out by the inspector personally. The guidance was to the contrary effect and so was the letter acknowledging the appeal. The third ground lacked merit because the inspector had read and considered all the documents, not just some of them, before taking the decision to dismiss the appeal. It does not matter at what point he read each document.

53. The submissions on ground 1 were developed by reference to other authorities among those found in the compendium of cases in Sir Michael Fordham's *Judicial Review Handbook*, 7th ed (2020) at 50.3 and 50.3.1 to 50.3.11. Mr Glenister submitted that the cases he cited, as well as *Harris*, supported his proposition that it was for the decision maker here to decide what procedure to adopt and that the procedure adopted was not unfair. I will come back to those cases when considering my reasoning and conclusions.

54. In relation to the decision in *Harris*, Mr Glenister submitted that it was authority not just for the carrying out of a site visit by an officer reporting to the inspector; it was also authority for the proposition stated by HHJ Cooke at [40]; that it is "perfectly acceptable for him to delegate that [*a site visit*] to somebody within his service to make and report back to him, in the same way he would be entitled to delegate somebody in his service to review documents and to produce a report for his benefit on the basis of which he can make his decision".

55. Mr Glenister said that those concluding words of the judgment at [40] describe the same factual position as what happened here: Mr Taylor delegated to Ms Long the task of carrying out a site visit and required her to "review documents and to produce a report for his benefit on the basis of which he can make his decision". There was no material factual distinction, he submitted, between Mr Long's role in this case and the example given by Judge Cooke of a person asked to write a report to be used by the decision maker to make the decision.

56. In the absence of any material distinction between *Harris* and the present case, Mr Glenister said, I should be mindful of my duty of judicial comity not to depart from the decision in *Harris* other than for very good reason: *Willers v. Joyce (No 2)* [2016] UKSC 44, per Lord Neuberger at [9]. There was no good reason to do so here, he said. The decision was correct and had properly informed the reasoning of the Rosewell review which followed *Harris*.

57. The approach in *Harris* was also in line with other authorities, Mr Glenister said. Thus, the use of mentors to help improve drafting, without usurping the decision maker's role, was approved by Mr C. M. G. Ockleton, Vice-President of the Upper Tribunal, sitting as a deputy High Court judge, in *Billy Smith v. Secretary of State for Communities and Local Government* [2014] EWHC 935 (Admin), at [27]-[31]. And in other contexts delegation of a reporting function has been found not to infringe the rule against delegation of the function of making the decision.

58. Thus, in the university visitor case of *R (Varma) v. HRH Duke of Kent* [2004] EWHC 705 (Admin), Collins J at [12] recognised that "the prohibition against delegation relates to the decision and not necessarily to the process leading to the decision, save in the case of courts …". And at [16], he held that "[p]rovided that he acts fairly, and the visitor makes the final decision, there is no delegation which could be regarded as unlawful." The visitor Duke was entitled to accept the recommendation of an eminent Queen's Counsel appointed to advise him.

59. Mr Glenister relied on the similar reasoning adopted by the majority of the Court of Appeal in *R (Reckless) v. Kent Police Authority* [2010] EWCA Civ 1277. As Carnwath LJ (as he then was) put it at [25]: "[t]he fact that the decision has to be made by 'the existing members', and cannot be delegated, tells one nothing about the process which they are to adopt." It was not unlawful, the majority held, for the authority to appoint a selection panel to consider the matter and issue a recommendation, even though, as Rimer LJ (dissenting) pointed out at [40]: "[t]he members were given just one name and a recommendation".

60. Both counsel commented on two other authorities mentioned by Johnson J in his permission decision on the papers: the Hong Kong Court of Appeal's decision in *Dato Tan Leong Min v. the Insider Dealing Tribunal*, (1998) Appeal No 162 (Civil); and that of Murray J in *R (Clarke) v. Holliday (Chairman of the Magnox Public Inquiry* [2019] EWHC 3596 (Admin). In the former case, counsel to the tribunal became wrongly over-involved in the decision making process, leading to the tribunal's decision being quashed.

61. In the latter, Murray J at [33]-[65], accepting the evidence of the inquiry chairman and leading counsel's submissions, agreed in a permission application that - though the point was arguable - the assistance given to the public inquiry chairman had not crossed the line into impermissible delegation of a decision making function. The terms of reference, as Ms Williams pointed out, required him to lead the inquiry, not to conduct it on his own.

62. Returning to the facts here, Mr Glenister submitted that it was for the inspector to decide what procedure to adopt, what assistance to obtain and from whom, and what weight to give to an APO's report. It was not irrational for him to decide in this case that he agreed with her reasoning and did not need to expand on it. The process was fair; the claimant had the opportunity to make written representations and did so. There was no duty on the SoS to disclose the APO's report to the claimant for his comment, prior to issuing the decision.

63. As for the second and third grounds, Mr Glenister submitted that there was no possible basis for finding any legitimate expectation. There was no clear and unequivocal promise or representation, nor any practice, that the inspector would

personally visit the site. The Procedural Guide and the case worker's letter of 25 January 2022 were to the contrary. The documents were all in the inspector's possession by the time he made the decision. There was no unfairness or flaw in the decision making process.

64. Finally, Mr Glenister submitted (echoing a similar submission in *Varma*) that the issue of visual amenity was one of planning judgment and the claimant had not contended that the exercise of that judgment was wrong or perverse. As the basis of the objection was impermissible delegation of power, the court should recognise that even if that were made out, there was nothing the claimant could have said that would have persuaded to inspector to take a different view, had he been permitted to comment on the APO's report.

65. As for the point that the view of the vertical advertisement site was obstructed by street furniture, that was not a pleaded point for which permission to proceed had been granted; and in any case, the view of the site was indeed unobstructed when viewed from the road and not from within the car park. Furthermore, the APO's report had said only that the view of the site was unobstructed "above the car park area", which was incontestably correct.

Reasoning and Conclusions

66. I will start by disposing of the second and third grounds of challenge. There is no merit in either of them. A legitimate expectation that a site visit would be carried out by the inspector personally cannot possibly have arisen. As Mr Glenister observed, there is nothing to sustain the proposition that an unequivocal assurance or promise to that effect was given. Mrs Jones' past experience does not establish any longstanding practice to that effect.

67. The third ground has no merit either. The documents submitted by the claimant were all read and considered by the inspector, Mr Taylor, before he made his decision. It does not assist the claimant if Mr Taylor read some of the documents near the end of the process, after the site visit and after discussing it with Ms Long; provided he read them all before making his decision. He did. The third ground of challenge fails, like the second.

68. I come to the first ground of challenge. There are two linked aspects to it: unlawful delegation of power and use of an unfair process. It is said that the delegation was unlawful because of the APO's role in the process and that her role in the process was unfair and rendered the process unfair. Whether that is right is the only issue of substance in this case. It is the point Johnson J considered arguable: that the inspector unlawfully delegated his decision making powers, as opposed to the task of evidence collection and summarising.

69. I agree with the SoS that it is for the inspector to decide what process to adopt. The legislation does not specify any particular procedure except that the appellant is entitled to submit written representations and supporting documents. That is all. The inspector could simply read the written representations and documents and issue a written decision, without a site visit or any other procedural steps. That would, in principle, be fair and lawful.

70. However, as Mr Glenister rightly accepted, the inspector must not exercise his discretion to decide what procedure to adopt in a manner that is unfair. A decision maker with discretion as to procedure must not decide on a procedure that is unfair, as Collins J pointed out in *R (Varma) v. HRH Duke of Kent*, at [16] (with my italics): "*[p]rovided that he acts fairly*, and the visitor makes the final decision, there is no delegation which could be regarded as unlawful".

71. As I mentioned at the hearing, the requirements of fairness or natural justice, as it used to be called, are often determined by reference to Lord Mustill's speech in *R. v. Secretary of State for the Home Department* [1994] 1 AC 531. His six seminal propositions are found at page 560D-H. They are too well known to need setting out in full here, but I will cite just the third and fourth:

> "(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken."

72. With that introduction, I turn next to the cases that were cited to me, starting with *Harris* which, the SoS submitted, is a complete answer to the first ground of challenge and should be followed. However, I find certain difficulties with the decision in *Harris*. The first is that the question of unlawful delegation was not dealt with in an orthodox manner, against a properly pleaded allegation and with the benefit of full reasoned argument on each side.

73. Rather, the issue emerged from the judge's distillation of the challenger's diffuse arguments. The claimant litigant in person did not accept that a site visit had occurred at all, though it was stated in the decision document that it had. At the hearing it emerged, not from evidence but from observations by counsel and passages from her skeleton argument (not quoted verbatim in the judgment) that a planning officer (in a forerunner of the present APO role) had been involved.

74. It transpired that this officer, Mr Sweet, had conducted the site visit, as the judge found (see the judgment at [35]-[36]). It was in that context that the judge observed at [39] that he was informed by counsel of a new procedure which involves an "inspector" (which the parties agree is an error, and should read "planning officer") "visiting the site rather than the inspector himself, who is a more senior officer… ."

75. The judge continued by observing that the procedure then involved the junior officer, having carried out the site visit, "subsequently reporting orally and in writing to the inspector so that the inspector has available to him that report when reaching his own decision". The decision itself, unlike in this case, was wholly in the name of the inspector. The planning officer's role in the process emerged in the course of the hearing, in the manner I have just described.

76. The judgment does not reveal the content of Mr Sweet's reporting to the inspector who made the decision in *Harris*. It is not clear that there was evidence before the court what the content of Mr Sweet's contribution to the exercise was. If that evidence was before the court, recourse to counsel's observations and skeleton argument would probably not have become the judge's source of information.

77. It was in that context that the judge found no objection to Mr Sweet having carried out the site visit, rather than the inspector, observing at [40] that the inspector need not always conduct a site visit himself:

> "In some cases it may be necessary for him to do so, in others, and it must be a matter for his judgment, it is perfectly acceptable it seems to me for him to delegate that to somebody within his service to make and report back to him, in the same way he would be entitled to delegate somebody in his service to review documents and to produce a report for his benefit on the basis of which he can make his decision."

78. There is nothing to suggest that the planning officer, Mr Sweet, himself exercised any professional judgment on what the outcome of the appeal by Mr Harris should be. The decision was issued wholly in the name of the inspector. What the judge considered acceptable was for a planning officer, subordinate to the inspector, to help assemble the evidence and provide a report to the inspector. If such a report sets out the facts, evidence, issues and contentions, I agree that there can be no objection.

79. If, however, a planning officer's report includes an evaluative assessment of the issues and a provisional or recommended decision on those issues, the position may be different. Judge Cooke did not address that issue. I conclude that *Harris* is not on all fours with this case. Here, there is no doubt that the APO, Ms Long, formed and expressed as part of her recommendation a professional judgment on the planning merits of the visual amenity issue, the sole issue in the appeal.

80. None of the other cases cited to me is decisive of the issue raised in the first ground of challenge. The decision of the Vice-President of the Upper Tribunal in *Billy Smith* supports the propriety of a mentor making drafting suggestions with a decision maker and discussing the merits, while not deciding them. I respectfully agree that there is nothing untoward in such a practice; but it is not what happened in this case.

81. The Court of Appeal's decision in the *Reckless* case was relied on by Mr Glenister. It is a difficult case which divided the members of the court. The extent of permissible delegation depended on the view taken of the statutory provisions in play. I do not think it is authority for any wider proposition than that the process was fair and lawful on the facts of that case and in the light of the applicable statutory provisions.

82. The *Varma* case, also relied on by the SoS, has certain distinctive features. The visitor to a university, the Duke of Kent, appointed an eminent Queen's Counsel and circuit judge to conduct a hearing to determine whether a student should be allowed to remain on his course. The judge conducted a full and fair judicial process, including oral representations. The judge then reported to the Duke in writing, recommending that the student's petition should be dismissed, advice which the Duke accepted.

83. Collins J, dismissing the student's claim for judicial review, accepted that the visitor was entitled to appoint a lawyer of standing to consider the evidence and arguments and advise him in a written report. To do so was not an unlawful delegation. Collins J examined the position of a visitor in its historical context, including some of the cases establishing the limited availability of judicial review of visitors' decisions, which (in brief and at the risk of oversimplifying) does not extend to cases of error of law within the visitor's jurisdiction.

84. There is no doubt that in *Varma*, the person who reported to the decision maker exercised professional judgment. That was what he was appointed to do; indeed, it was the whole purpose of his appointment. But in *Varma*, the person appointed to advise was more qualified and experienced than the decision maker. The reverse is the case here. The claim failed also because the claimant student "could not have made any representation which could have affected the result" ([27]).

85. Nonetheless, Collins J accepted, also at [27], that "the claimant should have seen the advice before it was put to the defendant to enable him to make his decision". There was, he therefore found, some unfairness in the process but it was not material because it could not have affected the outcome. Furthermore, it was not suggested that the circuit judge had conducted anything other than a fair process, of which no criticism was made.

86. The other cases cited to me turned largely on their facts. *Dato Tan Leong Min* was an unusual case with extreme facts. The prolonged and deep involvement of counsel to a tribunal in private, behind the scenes, at what should have been a public process, was unfair to the defendants seeking to defend themselves before that tribunal. In *R (Clarke) v. Holliday (Chairman of the Magnox Public Inquiry*, the decision that there had been no impermissible delegation turned significantly on the inquiry's terms of reference.

87. I have commented on the cases cited to me. There are many others. The decisions turn on their facts, but the principles are clear enough. The question in each case is what the extent is of permissible delegation by a decision maker who is herself a delegate, appointed by another to make a decision. The maxim *delagatus non potest delegare* may apply, but the outcome depends on an analysis of the legal and factual context.

88. The legal context includes the applicable provisions and their true meaning. If the provisions expressly permit or forbid what happened, that will dictate the result. If the process to be followed is at large and within the decision maker's discretion, it is for him or her to decide on the process, provided it is fair. Whether or not the process is fair is a matter for the court, not the decision maker. The test of fairness is not whether it is rational to have adopted the particular procedure decided upon.

89. The factual context includes the nature of the decision to be taken, the considerations relevant to the decision, the experience and qualifications (both required in law and needed in practice) to be appointed to make the decision; and the characteristics and role played by, respectively, the decision maker and the person giving assistance to the decision maker.

90. I turn to consider this case, applying those principles, which flow from Lord Mustill's speech in the *Doody* case. First, there can be no possible objection to the recruitment of APOs to assist with reporting, document handling and carrying out site visits representing the inspector. The decision of HHJ David Cooke in *Harris* is authority for that proposition, with which I respectfully agree. It was lawful for Ms Long to carry out the site visit in this case.

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.

93. Ms Long was required not just to ascertain and report the facts and gather the evidence. She discussed the case with Mr Taylor. The latter does not say in his evidence that the merits were "off limits" in their discussions. The extent of her exercise of judgment is shown in the passages she contributed to the decision letter. She starts to do so at the end of paragraph 8 with the opinion that "the lighting would further exacerbate the proposal's overly prominent design".

94. In paragraph 9, she described the advertisement wrap as "an obtrusive amount of large scale advertising in the streetscene". In the next sentence, she says the digital display at the boundary of the car park would be directly in the line of sight with the proposal behind and this "would further appear as an excessive amount of advertising at this location". In paragraph 10, the judgment is made that the introduction of this advertisement wrap "would not preserve the character and appearance of this part of the Conservation Area".

95. At paragraph 11, Ms Long observes that economic circumstances were delaying the refurbishment of the site; but that matter, in her judgment, "does not carry any substantive weight" because "the scheme would result in harm to visual amenity rather than improving the appearance of the building". In paragraph 12, Ms Long addressed a legal point raised by the appellant and opined at the end of the paragraph that "dismissing the appeal would not, in my view, result in an unreasonable lack of consistency in decision-making".

96. Her conclusions in paragraphs 13 and 14 are an exercise of her judgment: that the benefits of removing the graffiti in the long-term, if taken into account, would not outweigh the harm to visual amenity that would arise from the proposal's overall scale and cumulative impact. The proposal would result in harm to the visual amenity of the area, Ms Long concluded at paragraph 14. Hence her recommendation that the appeal should be dismissed.

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.

102. Finally, I do not accept that the claim should be dismissed on the basis that nothing the claimant could have said could have made any difference. First, that is not pleaded either in the summary or detailed grounds of resistance. Secondly, I do not know whether it is correct or not. If the inspector had brought his professional judgment to bear without a prior steer from an underqualified junior colleague, he might for all I know have reached a different conclusion.

Concluding Observations

103. For those reasons, the claim succeeds on the first ground. The inspector did not fail to determine the appeal, but he unfairly failed to do so independently of his APO. The second and third grounds fail. I will quash the inspector's decision dismissing the claimant's appeal. The appeal will have to be redetermined, by a different inspector. I thank counsel for their helpful submissions.

104. I conclude by emphasising that no criticism whatever of Ms Long or any APO should be taken to arise from this judgment. It is absolutely plain that her role was that of a good civil servant properly doing her job. It is no reflection on her personally or professionally that I have found that her role should have been more limited than it was.