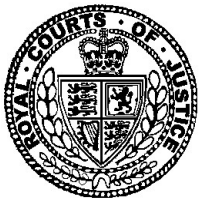

Neutral Citation Number: [2023] EWHC 2055 (Admin) Case No: CO/3097/2022

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

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 07/08/2023

Before :

MRS JUSTICE LIEVEN

- -

Between :

THE ROYAL BOROUGH OF KINGSTON UPON THAMES

Claimant

and

SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

Defendant

and

MRS LAURA WILLIAMS

Second Defendant

- -

Mr Daniel Kolinsky KC and Ms Annabel Graham Paul (instructed by **South London Legal Partnership**) for the **Claimant**
Mr Hugh Flanagan (instructed by **Government Legal Department**) for the **Defendant**
Mr Stephen Cottle (instructed by **Community Law Partnership**) for the **Second Defendant**

Hearing dates: **30 March 2023**

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 7 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This is a claim under s.288 Town and Country Planning Act 1990 ("TCPA") which challenges the decision of a Planning Inspector (appointed by the Secretary of State) dated 21 July 2022 to grant permission for the change of use of land to a private gypsy and traveller site for one mobile home and associated development.

2. The Claimant, the Royal Borough of Kingston was represented by Daniel Kolinsky KC and Annabel Graham Paul. The Secretary of State was represented by Hugh Flanagan and Laura Williams, the Second Defendant, was represented by Stephen Cottle.

3. The Claimant, the Local Planning Authority ("LPA"), submits that the Inspector erred in law in his application of Green Belt policy in the National Planning Policy Framework ("NPPF") and the Planning Policy for Traveller Sites August 2015 ("PPTS"). The First Defendant, the Secretary of State ("SoS"), concedes that there was an error of law and that the decision should be quashed. The Second Defendant, who was the appellant before the Inspector, seeks to uphold the decision and says the Inspector did not misdirect himself.

The relevant policy

4. The current (2021) version of the NPPF states:

> *"149. A local planning authority should regard the construction of new buildings as inappropriate in the Green Belt. Exceptions to this are:*
>
> *a) buildings for agriculture and forestry;*
>
> *b) the provision of appropriate facilities (in connection with the existing use of land or a change of use) for outdoor sport, outdoor recreation, cemeteries and burial grounds and allotments; as long as the facilities preserve the openness of the Green Belt and do not conflict with the purposes of including land within it;*
>
> *c) the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;*
>
> *d) the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;*
>
> *e) limited infilling in villages;*
>
> *f) limited affordable housing for local community needs under policies set out in the development plan (including policies for rural exception sites); and*
>
> *g) limited infilling or the partial or complete redevelopment of previously developed land, whether redundant or in continuing use (excluding temporary buildings), which would:*

> *– not have a greater impact on the openness of the Green Belt than the existing development; or*
>
> *– not cause substantial harm to the openness of the Green Belt, where the development would re-use previously developed land and contribute to meeting an identified affordable housing need within the area of the local planning authority.*
>
> *150. Certain other forms of development are also not inappropriate in the Green Belt provided they preserve its openness and do not conflict with the purposes of including land within it. These are:*
>
> *a) mineral extraction;*
>
> *b) engineering operations;*
>
> *c) local transport infrastructure which can demonstrate a requirement for a Green Belt location;*
>
> *d) the re-use of buildings provided that the buildings are of permanent and substantial construction;*
>
> *e) material changes in the use of land (such as changes of use for outdoor sport or recreation, or for cemeteries and burial grounds); and*
>
> *f) development, including buildings, brought forward under a Community Right to Build Order or Neighbourhood Development Order."* [emphasis added]

5. The NPPF expressly at paragraph 4 states that it should be read in conjunction with the PPTS.

6. Mr Flanagan in his Skeleton Argument set out the genesis of paragraph 150(e) of the NPPF. Originally there was no provision for changes of use for outdoor sport or recreation, or for cemeteries and burial grounds. This led to the decisions in *Fordent v SSCLG* [2014] 2 P&CR 12 and *Timmins v Gedling Borough Council* [2016] 1 All ER 895; where it was held that material changes of use of land to use for outdoor sport and recreation, and to use for a cemetery, were "inappropriate development", on the basis that they did not come within any of the categories of "not inappropriate development" within paragraphs 89 and 90 of the NPPF.

7. National policy was amended in response. The Government's White Paper entitled *Fixing our broken housing market* (February 2017) stated:

> *"A.64 The Government considers that a number of other changes to Green Belt policy could also be made for the purposes of clarity and consistency. It proposes to amend the National Planning Policy Framework to make clear that:*
>
> *...*

> *• appropriate facilities for existing cemeteries are not to be regarded as 'inappropriate development' in the Green Belt;"*

8. The footnote at the end of that bullet point stated:

> *"Following the Court of Appeal judgment in R (Timmins and Lymn Family Funeral Service) v. Gedling Borough Council and Westerleigh Group Limited [2015 EWCA Civ 110]."*

9. The Government response to the housing White Paper consultation: *Fixing our broken housing market* (March 2018) stated at page 25 (emphasis added):

> *"We are proposing to make it explicit that rural exception sites can be created in Green Belt, and that development under neighbourhood development orders and* ***changes of land-use for outdoor sport and recreation or provision of burial grounds is 'not inappropriate' in Green Belt if it preserves its openness and would not conflict with its purposes."***

10. The Government's consultation paper on the NPPF (March 2018), in chapter 13 on protecting the Green Belt, stated (page 20):

> *"The housing White Paper also proposed a number of other changes to Green Belt policy that are reflected in the chapter – to:*
>
> *c) provide that facilities for existing cemeteries, and development brought forward under a Neighbourhood Development Order, should not be regarded as 'inappropriate development' (paragraphs 144b and 145f)."*

11. It further stated (page 21):

> *"Current policy allows buildings in the Green Belt in association with uses such as outdoor sport and cemeteries, but does not allow material changes in the use of land for such purposes, even if there would be no harm to openness. To allow a more consistent approach, paragraph 145e provides that material changes of use that preserve openness are not inappropriate development in the Green Belt."*

12. Paragraph 145e in the revised draft of the NPPF that was published alongside the March 2018 consultation paper stated:

> *"e) material changes in the use of land that would preserve the openness of the Green Belt and not conflict with the purposes of including land within it (such as changes of use for outdoor sport or recreation, or for cemeteries and burial grounds, so long as the development would preserve openness); and"*

13. A revised NPPF was published in July 2018. Paragraphs 145 and 146 stated, so far as relevant:

> *"145. A local planning authority should regard the construction of new buildings as inappropriate in the Green Belt. Exceptions to this are:*
>
> *...*
>
> *b) the provision of appropriate facilities (in connection with the existing use of land or a change of use) for outdoor sport, outdoor recreation, cemeteries and burial grounds and allotments; as long as the facilities preserve the openness of the Green Belt and do not conflict with the purposes of including land within it;*
>
> *...*
>
> *146. Certain other forms of development are also not inappropriate in the Green Belt provided they preserve its openness and do not conflict with the purposes of including land within it. These are:*
>
> *...*
>
> *e) material changes in the use of land (such as changes of use for outdoor sport or recreation, or for cemeteries and burial grounds); and*
>
> *..."*

14. There is one paragraph in the Response to the Consultation on the Housing White Paper which Mr Cottle relies upon and which is less than entirely clear.

The Planning Policy for Traveller Sites

15. The current version of the PPTS was published in August 2015. It sets out the Government's planning policy for traveller sites (paragraph 1) and explains that:

> *"5. To benefit those engaged in planning for traveller sites, specific planning policies for traveller sites are clearly set out in this separate document. ..."*

16. The PPTS states that it is to be read in conjunction with the NPPF (paragraph 1). At paragraph 23, it is stated:

> *"23. Applications should be assessed and determined in accordance with the presumption in favour of sustainable development and the application of specific policies in the National Planning Policy Framework and this planning policy for traveller sites."*

17. The PPTS includes "Policy E: Traveller sites in Green Belt" and under that heading provides that (emphasis added):

> *"16. Inappropriate development is harmful to the Green Belt and should not be approved, except in very special circumstances.* ***Traveller sites (temporary or permanent) in the Green Belt are inappropriate development.*** *Subject to the best interests of the child, personal*

> *circumstances and unmet need are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances."*

18. The original version of the PPTS (which the current 2015 version replaced) was published in March 2012, alongside the first version of the NPPF. Paragraph 14 of the original version of the PPTS was in identical terms to the first two sentences of paragraph 16 of the current version set out above (the third sentence was an addition in 2015).

The Law

19. There is no dispute that the approach to the construction of planning policy is set out in *Tesco v Dundee CC* [2012] PTSR at [19]. A summary of the principles regarding the distinction between the interpretation and application of planning policies is contained in *Canterbury CC v SSCLG* [2019] PTSR 81 at [23]:

> *"23. In my view in the light of the authorities the following principles emerge as to how questions of interpretation of planning policy of the kind which arise in this case are to be resolved:*
>
> *i) The question of the interpretation of the planning policy is a question of law for the court, and it is solely a question of interpretation of the terms of the policy. Questions of the value or weight which is to be attached to that policy for instance in resolving the question of whether or not development is in accordance with the Development Plan for the purposes of section 38(6) of the 2004 Act are matters of judgment for the decision-maker.*
>
> *ii) The task of interpretation of the meaning of the planning policy should not be undertaken as if the planning policy were a statute or a contract. The approach has to recognise that planning policies will contain broad statements of policy which may, superficially, conflict and require to be balanced in ultimately reaching a decision (see Tesco Stores at paragraph 19 and Hopkins Homes at paragraph 25). Planning policies are designed to shape practical decision-taking, and should be interpreted with that practical purpose clearly in mind. It should also be taken into account in that connection that they have to be applied and understood by planning professionals and the public for whose benefit they exist, and that they are primarily addressed to that audience.*
>
> *iii) For the purposes of interpreting the meaning of the policy it is necessary for the policy to be read in context: (see Tesco Stores at paragraphs 18 and 21). The context of the policy will include its subject matter and also the planning objectives which it seeks to achieve and serve. The context will also be comprised by the wider policy framework within which the policy sits and to which it relates. This framework will include, for instance, the overarching strategy within which the policy sits.*

> *iv) As set out above, policies will very often call for the exercise of judgment in considering how they apply in the particular factual circumstances of the decision to be taken (see Tesco Stores at paragraphs 19 and 21). It is of vital importance to distinguish between the interpretation of policy (which requires judicial analysis of the meaning of the words comprised in the policy) and the application of the policy which requires an exercise of judgment within the factual context of the decision by the decision-taker (see Hopkins Homes at paragraph 26).”*

The Decision Letter

20. In DL2 the Inspector accepted that the Second Defendant met the definition of Gypsy and Traveller in Annex 1 of the PPTS.

21. In DL4 he set out the first main issues as being “whether or not the proposal would be inappropriate development in the Green Belt having regard to the NPPF and any relevant development policies, including the effect of the proposal on the openness of the Green Belt”. I note that the Inspector does not, in framing the main issue, refer to the PPTS.

22. This is addressed by the Inspector in DL5-26. The critical part of his analysis was as follows:-

    a. In para 8 of DL he referred to para 150(e) of the NPPF. He observed: “Paragraph 150 lists other forms of development which may be considered not inappropriate. This includes material changes of use of land under paragraph 150(e). This criterion includes within the accompanying brackets, examples of the type of use which may be applicable. However, this is not a closed list, and the wording says “such as” and therefore highlights examples. I have not been presented with persuasive or clear evidence that demonstrates that the criterion would exclude the change of use of land for a caravan form consideration under paragraph 150(e)”.

    b. In para 9 of DL, the Inspector stated: “Indeed, my conclusion is that the proposal can be considered under para 150(e) of the Framework”.

    c. In paras 10-16 the Inspector considered the impact of the proposal on openness. He concluded in para 16 that the proposal would preserve the openness of the Green Belt in both spatial and visual terms. The Claimant does not challenge that planning judgment in these proceedings.

    d. In paras 17-20 the Inspector considered whether the development conflicted with the purposes of including land within the Green Belt. He concluded that it would not. The Claimant does not challenge that planning judgment in these proceedings.

e. The Inspector therefore approached Green Belt issues on the basis that the "requirements of paragraph 150 of the Framework would be met and the scheme would not be inappropriate development. Consequently, there would not be the need to demonstrate very special circumstances to justify the development" (paras 21).

f. Having so concluded, the Inspector referred to the PPTS in paras 2226 of DL. He held that it did not alter his conclusion because the NPPF post-dated the PPTS (see para 25 of DL).

g. Thus, the Inspector's planning balance was struck on the basis that the proposal would not be inappropriate development in the Green Belt (para 57 of DL) (and there was no need for the Second Defendant to demonstrate very special circumstances to justify the development).

h. On that basis, the Inspector allowed the Second Defendant's appeal and granted planning permission.

The submissions

23. Mr Kolinsky submits that the Inspector plainly went wrong in his approach to the PPTS. Paragraph 16 of the PPTS is explicit in stating that traveller sites in the Green Belt are inappropriate development. Paragraph 4 of the NPPF says in terms that it should be read in conjunction with the Government's planning policy for traveller sites. The Inspector at DL24 and 25 seems to take the approach that because the 2021 NPPF postdated the PPTS, the correct approach is to construe paragraph 150(e) without regard to para 16 of the PPTS. However, this is plainly wrong in the light of paragraph 4 of the NPPF.

24. He submits that the fact that the development included demolition of the stables and tack room, as referred to in DL26, does not affect the requirement to consider whether the rest of the development, i.e. the siting of a residential caravan, is itself appropriate or inappropriate development. The Inspector misdirected himself on the effect of the relevant policies.

25. He submits that what development can fall within paragraph 150(e) is limited by the words in brackets and is not open ended.

26. Mr Cottle submits that the Inspector was correct in his interpretation of paragraph 150(e) of the NPPF. His submission turns on the words "such as" in the brackets in that paragraph. He submits that the list in the brackets is not exhaustive and allows any other change of use to be appropriate development, so long as it preserves openness and does not conflict with the purposes of the Green Belt. Therefore any residential use could fall within paragraph 150(e) so long as it preserved the openness of the Green Belt.

27. Mr Cottle points to the background to the NPPF and the policy on traveller sites in the Green Belt, going back to Circular 1/94. However, I did not consider this analysis was particularly useful. The policy is as now set out in the 2021 NPPF and the PPTS. There

have been various changes over the years to the policy approach to traveller sites in the Green Belt, but those changes do not inform the current policy.

28. Mr Cottle places reliance on *R (Samuel Smith) v North Yorkshire CC* [2020] UKSC 3. In that case the Supreme Court were considering the meaning of "openness" within the Green Belt section of the 2018 NPPF. Mr Cottle relies on [11] and [12], where Lord Carnwath said:

> *"11. It will be noted that a possible textual issue arises from the way in which the PPG2 policies have been shortened and recast in the NPPF. In the PPG the openness proviso is in terms directed to forms of development other than mineral extraction (it also appears in the section on re-use of buildings: para 3.8). By contrast, mineral extraction is not expressly subject to the proviso, but may be regarded as not inappropriate, subject only to "high environmental standards" and the quality of restoration. In the shortened version in the NPPF these categories of potentially appropriate development have been recast in para 90, and brought together under the same proviso, including the requirement to preserve openness.*
>
> *12. I do not read this as intended to mark a significant change of approach. If that had been intended, one would have expected it to have been signalled more clearly. To my mind the change is explicable as no more than a convenient means of shortening and simplifying the policies without material change. It may also have been thought that, whereas mineral extraction in itself would not normally conflict with the openness proviso, associated building or other development might raise greater problems. A possible example may be seen in the Europa Oil case discussed below (para 26)."*

29. However, I accept Mr Kolinsky's submission that Lord Carnwath was addressing an entirely different issue, namely the approach to "openness" in the context of mineral extraction in the NPPF and its relationship to PPG2. Lord Carnwath was not making any broad finding that there was no significant change between PPG2 and the NPPF, in respect of Green Belts. He was making a much narrower point in a very specific context.

30. Mr Cottle relies upon what was said by Lewison LJ in *Dartford BC v Secretary of State for Communities and Local Government* [2017] EWCA Civ 141. In that case the issue was the meaning of "previously developed land" within the NPPF. The definition includes the following; *"land in built-up areas such as private residential gardens, parks, recreation grounds and allotments…."*. At [9] Lewison LJ said:

> *"In my judgment the words "such as" state clearly that what follows are examples of something. Examples of what? They can only be examples of the more general expression that precedes them, namely "land in built-up areas". As a matter of ordinary English I cannot see that any other meaning can be given to this sentence. "Land in built-up areas" cannot mean land not in built-up areas. It is argued that this interpretation means that other parts of the NPPF are in conflict with each other. Even if that*

> *were true it is not the business of an interpreter to go searching for possible ambiguities or conflicts in order to detract from the obvious meaning of the words to be interpreted."*

31. Mr Kolinsky, supported by Mr Flanagan, submits that although the list of categories in paragraph 150(e) is not a closed list limited to sport or recreation, cemeteries and burial grounds, there must be a commonality of use to fall within the subparagraph. He relies upon *Prestcold v Minister of Labour* [1969] 1 WLR 89, where at 98B Lord Diplock said:

> *"I have already pointed out in C. Maurice & Co. Ltd. v. Minister of Labour [1968] 1 W.L.R. 1337 , 1345, though regrettably in a dissenting judgment, that the rule of construction "expressio unius exclusio alterius" is not appropriate where that which is expressed is introduced by a phrase such as "such as." And that applies whether the draftsmanship is legal or non-legal. But before you include in the expression introduced by "such as" an activity which is not expressly described you must discover from the context in which the expression appears what are the relevant common characteristics of the activities expressly described, and then decide whether the undescribed activity shares those characteristics. The sections of construction work in relation to an industrial building which are expressly described are in my view all concerned with the construction of a building in which, upon completion, industrial activities will take place. They are not concerned with the assembly on the site from its component parts of machinery to be used for carrying out those industrial activities. They are concerned with making a building suitable to work in — not with the machinery to be used for the particular kind of work which will be done there."*

32. Mr Flanagan also relies upon the context of paragraph 150(e), in particular the parallel categories in paragraph 149 covering built development. Paragraph 149(b) is the counterpart of paragraph 150(e) and does not include new residential uses. I do not consider this is a particularly powerful point given that new built development is likely to have very different impacts on the Green Belt to a change of use and therefore there is not necessarily any correlation between the two paragraphs.

33. He also relies upon the genesis of the paragraph 150(e) which developed after the decision in *Timmins*, as set out above. The changes that were introduced and became paragraph 150(e) were dealing with the specific issue in *Timmins* and not to create some much broader category of change of use to be treated as appropriate development. In my view this is a compelling point. It is quite clear from that background material that the Government's intention was a narrow one, as Mr Flanagan submits and there is no suggestion of the broad and somewhat surprising consequences that Mr Cottle suggests.

34. Mr Cottle submits that the Inspector was correct to say that the development (stationing of a caravan for residential purposes and the demolition of certain buildings) could fall within para 150(e). He then goes on to submit that the effect of the PPTS is discriminatory and thus contrary to Article 14 read together with Article 8 of the European Convention on Human Rights, and s.19 of the Equality Act 2010. This is

because if he is correct on paragraph 150(e) then an application for stationing a residential caravan, which did not fall within the PPTS, could be appropriate development in the Green Belt. The effect of this would be that a gypsy or traveller would be placed at a significant disadvantage compared to someone from the settled community who stationed a caravan. He submits this would be unlawful discrimination.

35. Both Mr Kolinsky and Mr Flanagan say that discrimination does not arise here because the stationing of residential caravans or mobiles homes do not fall within paragraph 150(e), whoever chose to do the stationing. Residential use does not fall within the brackets because there is no commonality with the other uses listed (see *Prestcold*) and for all the other reasons set out above. There is therefore no discrimination because the settled community would be treated no differently from the traveller community.

Conclusions

36. It is in my view entirely clear that the Inspector erred in law in the Decision Letter. At its most simple, this is because he failed to take into account paragraph 4 of the NPPF which states in terms that it must be read with the PPTS. The PPTS is clear that the stationing of caravans for a travellers' site is inappropriate development in the Green Belt. Therefore, when the Inspector found the use was not inappropriate, by reason of his reading of paragraph 150(e), he either failed to take into account a material consideration or materially misdirected himself on the interpretation of policy. The error is manifest.

37. Further, in my view there is no doubt that residential uses do not fall within paragraph 150(e) in any event. As is set out in *Prestcold* one would normally expect a list which started with the words "such as" to be a list which took its flavour or extent from the examples given. If it was simply an open ended category then it is not clear why examples would be given at all.

38. This is made even clearer by the q which show beyond any doubt that the purpose of paragraph 150(e) was to deal with the problem thrown up by *Timmins*, and not to open up a broad category of change of use where the only limitation was that there was no impact on openness and no conflict with the purposes of the Green Belt.

39. It also seems to me to be highly unlikely, if not to say incredible, that the SoS would have widened the category of not inappropriate change of use in the Green Belt to cover residential changes of use without making that absolutely clear. Any sensible reading of the context can only lead to the conclusion that the uses permitted were to be read as being very closely aligned to the examples given.

40. For these reasons Mr Cottle's discrimination argument does not arise. Residential changes of use do not fall within paragraph 150(e) and therefore there is no discriminatory treatment of gypsies and travellers by the application of the PPTS.

41. For these reasons I will quash the decision letter and remit the matter to the Secretary of State.