Neutral Citation Number: [2016] EWCA Civ 437

Case No: C1/2015/0721

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRTIVE COURT
HIS HONOUR JUDGE MILWYN JARMAN QC
CO42892013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2016

Before :

LADY JUSTICE ARDEN
LORD JUSTICE FLOYD
and
LORD JUSTICE SALES

- -

Between :

The Queen on the application of Jane Eastwood	**Appellants**
- and -	
The Royal Borough of Windsor and Maidenhead	**Respondent**

- -
- -

Stephen Cottle (instructed by **Lester Morrill Inc Davies Core Lomax**) for the **Appellants**
David Lintott (instructed by **Wokingham Borough Council and Royal Borough of Windsor**) for the **Respondent**

Hearing date: 26 April 2016

- -

Approved Judgment

Lord Justice Sales:

1. This is an appeal from the judgment of HHJ Milwyn Jarman QC sitting as a judge of the Administrative Court in which he dismissed the claim brought by the appellant and another seeking judicial review of a decision of the respondent local planning authority ("the Council") to use its powers under section 178 of the Town and Country Planning Act 1990 ("the TCPA") to clear agricultural land located in the Green Belt near Waltham St Lawrence ("the land") of caravans occupied by the appellant and family members which have been stationed there in breach of planning controls since 2009. The appellant and other occupants of the caravans are Romany Gypsies.

2. The appellant says, correctly, that the Council failed to make sufficient and appropriate provision in its area for traveller sites which could accommodate the caravans in issue. It is part of the occupants' traveller way of life that they would not regard provision of bricks and mortar accommodation as acceptable. The occupants of the caravans include children who attend the local school and an elderly lady who is a family member suffering from Alzheimer's disease. If enforcement action is taken by the Council to evict them from the land in exercise of its powers under section 178, the appellant says that they will be driven to camp at the road-side. That will be particularly disruptive for the children and very distressing for their elderly relative, given her mental condition.

Factual background

3. The procedural history is a significant part of the factual background to this appeal.

4. The appellant and others stationed their caravans on the land, which was then an open greenfield site, on about 19 December 2009. They did so and installed hardstandings without planning permission. The Council obtained an interim injunction on 22 December 2009 to prevent more caravans being brought onto the land and prohibiting further works of construction or development.

5. The Council issued an enforcement notice on 24 December 2009, requiring cessation of the use of the land for residential purposes, the removal of all caravans and hardstandings and the return of the land to grassland. The period for compliance was two months.

6. On 25 February 2010 the Council refused an application for planning permission to use the land as a residential caravan site. In parallel with that application, one of the occupants of the caravans (Mr Mark Picket) appealed to the Secretary of State against the enforcement notice under section 174 of the TCPA. The Secretary of State referred the appeal to an Inspector, Mr Paul Morris, for an inquiry and report.

7. The Inquiry was held over a number of days in November 2010 and January 2011. The Inspector's Report is dated 17 March 2011. The Inspector's Report is a lengthy document which carefully examines all material aspects of the case, including the personal circumstances of the occupants of the caravans, the failure of the Council to identify adequate placements for gypsies and travellers on approved sites and the likely impact upon the occupants if they were not granted permission to remain with their caravans on the land. The Inspector noted that new development plan

documents, including allocations relating to gypsy and traveller accommodation, were due to be prepared by the Council by the end of 2012. He found that the impact of the development on the Green Belt was material.

8. The Inspector considered whether, on the appeal, full planning permission should be granted for the development; alternatively whether temporary planning permission should be granted; alternatively, under ground (g) of the appeal, whether a period of grace should be allowed for compliance with the notice and before enforcement by way of eviction could proceed, e.g. pursuant to section 178.

9. At paragraphs 235 and 236 of the Inspector's Report he assessed the position in relation to alternative sites as follows (omitting cross-references to the evidence on which he relied):

> "235. In relation to the availability of alternative sites, it is clear that the occupants themselves had not investigated any alternatives as a group. The Council accepted that, on current knowledge, there was no site in its area to which they could be directed. New sites will be addressed in the preparation of the Development Plan Documents which will include site allocations. It has to be borne in mind, however, that the appellant did not consult the Council about prospective sites which might have given rise to any alternatives. Although emphasis was given to the togetherness of the occupants, I am doubtful from the evidence that this is so compelling as to preclude alternatives.
>
> 236. However, there seems to be no prospect of suitable and available sites coming forward in the short term. Consequently, accommodation arrangements would be uncertain and unsatisfactory for a period if the appeal is dismissed. There would be a risk of some of the occupants returning to unauthorised occupation, although this may not be the case for all as there were family connections in the wider area. This is, however, a matter which could impact on the occupants' ECHR [European Convention on Human Rights] Article 8 rights, and unauthorised roadside camping has implications for the wider public interest."

10. Although the Inspector regarded the absence of a local plan policy dealing with gypsy and traveller sites as an omission, he considered that overall the failure of policy was in itself a matter of little weight (paras. 237-240). At paras. 241-248 of his Report the Inspector made his assessment of "The overall balance, human rights and race relations." He acknowledged that dismissal of the appeal and upholding the enforcement notice, so that the occupants might have to move from the land, would result in a significant interference with their rights to respect for their private life, family life and home under Article 8 of the ECHR. However, he found that the harm to the Green Belt from the caravan site on the land was considerable and that the grant of planning permission for it could not be justified; accordingly he recommended that the deemed application for such permission should be refused (para. 243). In his

assessment, the interference with the Article 8 rights of the occupants would be proportionate.

11. At para. 244 the Inspector said:

> "If the Secretary of State agrees, this will be likely to require the occupants to leave the site. However, the harm which has been caused by the development to matters of local and national importance, including the protection of the environment and the protection of the rights and freedoms of others, is considerable. The protection of the public interest cannot be achieved by means which are less interfering of the occupants' rights. I have also taken into account the finding in *Chapman v UK* [(2001) 33 EHRR 18] that, when considering whether action to require a person to leave a home is proportionate to the legitimate aim pursued, it is highly relevant whether or not the home was established unlawfully. In this case, the consequences arising from the Council's enforcement action are, to a significant extent, of the occupants' own making. Circular 01/2006 emphasises that gypsy and traveller communities should have the same rights and responsibilities as every other citizen, and that the obligation on public authorities to act compatibly with Convention rights does not give gypsies and travellers a right to establish sites in contravention of planning control."

12. At paras. 249-254 of his Report, the Inspector considered the appellant's alternative submission that temporary planning permission should be granted. The argument for the appellant was that there was unmet need for gypsy and traveller site provision in the Council's area, but a reasonable expectation that new sites were likely to become available to meet that need after a period, so temporary planning permission should be granted so as to avoid the adverse effects of the absence of suitable alternative accommodation in that intervening period; the appellant argued that temporary permission for four years would be appropriate to achieve this: paras. 249-251.

13. However, the Inspector dismissed the application for the grant of temporary planning permission because the harm from the development was so severe. In the Inspector's view, "the unmet need and the absence of alternative sites should be left to the balance to be struck in ground (g) of the appeal": para. 253. Nonetheless, against the possibility that the Secretary of State might balance these matters differently and decide to grant temporary planning permission on the basis of the appellant's argument, the Inspector gave his opinion that temporary planning permission should be given only for three years, "which should tie in with progress on site allocations within the local development framework up to 2014": para. 254.

14. At paras. 256-259 of his Report, the Inspector considered ground (g) in the appeal, the question of the time for compliance with the enforcement notice, which would also constitute a period of grace before enforcement action by use of the Council's powers under section 178 would be taken. The time for compliance with the enforcement notice as stipulated in the notice was two months, which the Inspector considered to be too short. The appellant submitted that the time for compliance should be two

years "to avoid the consequences of being made homeless as no alternative accommodation is available". The Inspector did not accept that submission. Instead, he said this at paras. 258 and 259:

> "258. I find that a period of 18 months would be more reasonable as this would enable alternative accommodation and site provision arrangements to be progressed. The Council indicated that the Development Plan Documents, which will result in the identification of sites, will be reaching fruition by 2013, and the extended period of compliance will provide a period of settlement, and provide an opportunity for the occupants to be fully involved in this process.
>
> 259. It would also avoid the adverse consequences of short-term displacement, which have weight because of the personal circumstances of the occupiers, particularly the continuing education of the children and access to health care."

15. By his decision letter dated 11 August 2011 the Secretary of State accepted the principal findings, reasoning and recommendations of the Inspector. The Secretary of State specifically agreed with the Inspector's Report at paras. 234-236 regarding the position in respect of alternative sites (see above), at para. 28 of the decision letter; gave greater weight to the failure of policy on the part of the Council, at para. 29 of the decision letter; agreed that the dismissal of the appeal would affect the occupants' rights under Article 8 ECHR, but also agreed that it would be proportionate to refuse to grant planning permission by reason of the harm involved with the development, as explained at para. 244 of the Inspector's Report (see above), at paras. 35-37 of the decision letter; agreed that it would be inappropriate to grant temporary planning permission, at para. 39 of the decision letter, with the result that the validity of the enforcement notice was upheld; and specifically agreed at para. 42 of the decision letter with the Inspector's Report at paras. 256-259 (see above) that a period of 18 months for compliance would be appropriate. There has been no challenge to the Secretary of State's decision.

16. At this point it is convenient to address one of the primary contentions by Mr Cottle for the appellant in the present appeal. He submitted that it was a fundamental premise for the Secretary of State's decision and the recommendation in the Inspector's Report to allow a period of 18 months for compliance with the enforcement notice that this was the period which would mean that the occupants of the caravans would have another site available for them to move to before the enforcement notice took effect and before any enforcement action under section 178 was taken pursuant to it.

17. In my opinion, however, that is an unsustainable interpretation of the Inspector's Report and the decision letter. The Inspector's view was that, if the objective of the Secretary of State was to avoid displacement of the occupants before a proper caravan site became available for them, temporary planning permission of three years should be granted (para. 254 of the Report); so plainly a period of 18 months for compliance with the enforcement notice was not predicated on any assumption that a proper alternative site would necessarily have been found by the time the notice took effect. At para. 253 the Inspector said in terms that "the unmet need and the absence of

alternative sites should be left to the balance to be struck in ground (g) of the appeal" (i.e. not as problems to be *solved* by allowing extra time for compliance with the enforcement notice, but to be treated as a factor to be weighed against other factors, such as the environmental harm to the Green Belt, when striking a balance to find a reasonable period for compliance with the enforcement notice). Similarly, at para. 258 the Inspector declined to allow even a period of two years for compliance with the notice, which the appellant had suggested would be necessary to ensure an alternative site was found. At para. 236 and again at paras. 241-244 the Inspector expressly contemplated that if the appeal were dismissed there would be a risk that the occupants might be expelled from the land with no alternative site to go to, and he did not suggest that this problem would be met by the limited additional period of 18 months to be granted for compliance with the enforcement notice. Further, at para. 258 the Inspector did not say that identification of sites would have been achieved by 2013, only that it would be "reaching fruition"; and, of course, the fact that possible sites for gypsy caravan emplacements might be identified in a local plan did not mean that full planning permission for any such site would necessarily have been achieved by that stage.

18. On a fair reading of the Inspector's report and the Secretary of State's decision letter, all that the allowance of a period of 18 months for compliance with the enforcement notice was intended to achieve was the allowance of a reasonable period for "alternative accommodation and site provision arrangements to be progressed" (para. 258); that is to say, it was a period of grace to give the occupants a reasonable opportunity to make alternative arrangements, including by engaging with the Council by, e.g., suggesting alternative viable sites (something which they had failed to do up to that point: see para. 235; also see para. 251, where the Inspector said that if temporary planning permission were to be granted it should be for the shortest possible period, having regard to, among other things, "the expectation that the occupiers will be involved in the process of finding alternative accommodation"). In that regard the additional time allowed for compliance with the enforcement notice was to operate rather like a reasonable period of notice under a lease, which provides the tenant with a reasonable period to make alternative arrangements before being evicted but no guarantee that such arrangements will have been put in place before he has to leave the property. The 18 month period would also avoid the immediate adverse consequences for the occupants if they had to leave without having a reasonable opportunity, on fair notice, to make suitable arrangements: hence the Inspector's reference at para. 259 to avoiding "the adverse consequences of short-term displacement." Contrary to the contention of Mr Cottle, in the context of the Report as a whole this plainly did not mean that the Inspector thought they could only be removed once an appropriate alternative site had been found. I return to the significance of this in the discussion below.

19. The 18 month period of grace allowed by the Secretary of State for compliance with the enforcement notice expired on 11 February 2013. By that time, no new sites for gypsy caravan emplacements had been identified. The appellant and other occupants did not move out and clear the land as they were required to do. From that time, they have again been in acute breach of planning controls and their continued occupation of the land has been in violation of the criminal law, as Mr Cottle accepts.

20. The Council resolved in February 2013 to use its enforcement powers under section 178 to clear the land, and gave notice of this to the occupants. The appellant and another occupant commenced judicial review proceedings. The judge was critical of the decision taken in February 2013, since it did not take all relevant considerations into account: see [14]. But it was superseded by a later decision of the Council taken by its Cabinet Prioritisation Sub-Committee on 10 April 2013 at which it was again resolved that the land should be cleared using the Council's powers under section 178, and this is the operative decision which became the appellant's target in the judicial review and was the focus for the judgment below.

21. The Sub-Committee's consideration of the question of the use of section 178 was on the basis of reports from officers. These drew attention to the position of the children and the elderly relative living in the caravans and explained that provision would be made by the children's services and social care departments to assist in coping with their needs should an eviction proceed (it deserves emphasis that their needs had also, of course, been considered carefully by the Inspector in his Report and in making his recommendations and by the Secretary of State in his decision letter, in a manner which the appellant has not sought to challenge). The reasons for the Sub-Committee's decision are summarised in the minute of its meeting:

> "The Head of Planning and Property Services stated that he believed the council position to be proportionate in relation to enforcement. However he recognised that the overall position of the council in relation to the provision of Traveller sites across the borough left a lot to be desired. A number of potential pitches had been identified in Datchet, but these were subject to the planning process which had yet to commence. The council's policy was in accordance with the national policy but as yet no deliverable sites were available.
>
> The Lead Member for Planning and Property stated that he was now more confident than when he took over the portfolio that the council would be able to fulfil the intentions of its policy. Significant progress had been made in terms of consultation on the potential sites in Datchet but it was decided that there was no certainty that applications would materialise or be suitable for those occupants on site. It was confirmed that there are no current pitches to accommodate those on site and it would not be proportionate to defer a decision to a later time.
>
> The Inspector's decision in 2010 was discussed that an 18 month extension be granted in light of the council's expectation of the availability of deliverable sites by 2013. The Head of Planning and Property Services commented that the potential new site at Datchet would not necessarily meet the needs of the occupants of [the land] due to previous family disputes. However the planning process required the council to identify sites for the wider general need of the Traveller community. He also commented that in 2010 the council had drawn up a list of about 70 potential sites, which had been shortlisted to about 20. Of these, all bar one landowner had indicated they did not wish

> to consider development to allow Traveller sites on their land. This final location (at Old Windsor) was currently subject to a planning inquiry. Since 2010 the list had been revised and updated. The Borough Local Plan Member Working Group had the previous evening received a list of potential sites for housing and other development put forward by owners. At this stage the list had not be analysed to see if any of the proposed lands would be suitable for Traveller sites and it was considered not to be proportionate to defer a decision."

22. In the Administrative Court, permission to apply for judicial review was refused on the papers. The appellant and her fellow claimant renewed their application for permission on a number of grounds at an oral hearing before Mostyn J on 7 November 2013. He handed down judgment on their application on 13 November 2013. He refused permission to apply for judicial review on all grounds save one, namely that the decision of 10 April 2013 was perverse in that it failed to give any meaningful weight to the failure of the local authority to provide alternative pitches in circumstances where both the Inspector and the Secretary of State in 2011 had expected that it would. Mostyn J was only deciding that this was an arguable contention. As I have explained above, this formulation somewhat mis-states what the Inspector and the Secretary of State actually contemplated would happen, as set out in the Inspector's Report and the decision letter. Mostyn J refused permission in relation to a distinct ground of challenge, that the decision to take action under section 178 to evict was disproportionate.

23. The appellant sought permission to appeal to this court in relation to Mostyn J's refusal of permission to apply for judicial review on the ground that the Council's decision to take action under section 178 was disproportionate and so contrary to the appellants' rights under Article 8 ECHR. The application for permission to appeal was refused on the papers, but was renewed at an oral hearing before Sullivan LJ on 24 June 2014. At that hearing Mr Cottle relied in particular on the decision of the Supreme Court in *Pinnock v Manchester City Council* [2011] UKSC 6; [2011] 2 AC 104 in support of a submission that it was incumbent on the court to form its own view whether the action under section 178 would be disproportionate, and that if it failed to do so the appellant's and occupants' Article 8 rights would not be adequately protected.

24. Sullivan LJ dismissed the application for permission to appeal: [2014] EWCA Civ 963. He said this at paras. [6]-[8]:

> "6. It is important to keep in mind that *Pinnock* was decided within a particular statutory context in which there was no express opportunity for the proportionality of eviction to be considered by any independent tribunal. That is not the position under the Act. A Local Planning Authority may invoke the powers conferred upon it by section 178 only when an enforcement notice has come into force and has not been complied with.
>
> 7. Thus, in every case in which section 178 is engaged, there will have been an opportunity to appeal against the

> enforcement notice and to argue that the period for compliance and the steps required by the enforcement notice are disproportionate. That was precisely what was done in the present case with the consequence that the Secretary of State extended the period of compliance to 18 months.
>
> 8. In these circumstances, it simply is not necessary in order to secure compliance with Article 8 to provide an Appellant against an enforcement notice with a second opportunity for the issue of proportionality to be considered. It is sufficient that the lawfulness of a Council's decision to take action under section 178 can be challenged, as it has been in this case, on conventional judicial review grounds which do not include the court being able to form its own view as to proportionality."

25. Accordingly, it was by this stage authoritatively decided that the appellant's judicial review claim was limited to a perversity or irrationality challenge to the Council's decision to use its section 178 powers to evict the occupants of the caravans and clear the land. The appellant had been refused permission to bring a distinct proportionality challenge and had failed in her attempt to appeal against that refusal.

26. The judicial review claim was in due course tried by HHJ Jarman QC, who dismissed it in the judgment now under appeal. The judge simply had to consider the one extant ground of challenge, namely that the Council's decision in April 2013 to use its section 178 powers to clear the land was irrational or perverse.

27. The judge held that the Council's decision was not irrational or perverse. He dismissed the claim.

28. The appellant appeals on the rationality issue with permission granted by Lewison LJ on the papers.

29. The appellant also included in her proposed grounds of appeal an additional ground to the effect that the judge's decision was flawed because he did not consider the appellant's case based on the issue of disproportionality. Lewison LJ refused to grant permission to appeal on this ground since Sullivan LJ had already ruled in this court that permission to appeal should be refused on the point when the appellant had sought permission to include it in her judicial review claim and it was an abuse of process to try to resurrect it on appeal from the substantive judgment on judicial review. Lewison LJ also gave as a further reason, "The Appellant is not entitled to appeal on an issue that was not before the judge."

Application to widen the scope of the appeal

30. The appeal hearing began with Mr Cottle orally renewing the application for permission to appeal on the proportionality point. We refused this application at the hearing with reasons to follow.

31. The application was hopeless, for both the reasons given by Lewison LJ.

32. The application fails for other reasons as well. Mr Cottle sought to suggest that there would be a breach of the appellant's rights under Article 8 if the eviction through use of the Council's powers under section 178 proceeded now, i.e. in 2016, without this court reviewing the proportionality of that measure and deciding the issue of proportionality for itself. But it is not the function of this court to operate as a first instance trial court. If there were good grounds to say that under current circumstances there would be a breach of Article 8 rights in removing the occupants from the land, that would have to be a case put to the Administrative Court, presumably by way of a new claim. This court would then exercise its ordinary appellate function in relation to any decision of the Administrative Court in the usual way, and with the benefit of a considered judgment by that court.

33. Further, Sullivan LJ has already given reasons as set out above why there is no requirement under Article 8 for a further separate examination by the court of proportionality issues which have already been properly and lawfully determined on the appeal against the enforcement notice. I agree with him.

34. The Article 8 rights of the appellant and other occupants of the land have already been taken properly into account in the Secretary of State's decision on that appeal, the lawfulness of which has not been challenged. The Council's proposed exercise of its powers under section 178 will simply give effect to that decision. The courts are on hand to check that the Council's decision accords with ordinary public law standards, but in doing so, absent a material change of circumstances, it is legitimate for everyone to proceed on the basis that the proposed action will properly satisfy the requirements of Article 8 and hence that no further, separate consideration of proportionality is required.

35. I can see that in an exceptional case there might be so material a change of circumstances between the decision to uphold an enforcement notice (after due consideration of rights under Article 8 on an appeal against that notice) and the decision to implement the notice by use of powers under section 178, that it could then become necessary for a court asked judicially to review the decision to proceed under section 178 to examine the proportionality question afresh when deciding whether it was lawful to proceed. But in this case there is nothing in the material before us to suggest that there has been a material change of circumstances. It may be that the medical condition of the elderly relative of the appellant has deteriorated somewhat, but her condition was already poor in 2011 when the Inspector and the Secretary of State considered the case and took her Article 8 rights properly into account and there is no suggestion that her condition has deteriorated beyond what was in contemplation then as likely to happen by the time of implementation of the enforcement notice. As I have noted above, the Council has taken appropriate steps to ensure proper social services and child services support will be available to help this lady and any children to cope with the removal of the caravans from the land, and Mr Cottle made no complaint about this support.

The appeal: discussion

36. I now turn to consider the arguments presented by Mr Cottle on the appeal on the rationality issue. As I understood Mr Cottle's oral submissions, he put his case on the appeal in four ways.

37. First, Mr Cottle submitted that the Council had made an irrational decision in April 2013 because it failed to take properly into account what he maintained was the fundamental premise of the Secretary of State's decision in 2011 to uphold the enforcement notice, namely (he says) that removal of the caravans and their occupants from the land should only take place when a suitable alternative site had been identified for them to go to.

38. In my judgment, this submission is unsustainable on the facts. There was no such fundamental premise of the Secretary of State's decision: see paras. [16]-[18] above. It is clear from the evidence that the Council did not fail to accord proper weight to the Secretary of State's decision.

39. Secondly, Mr Cottle submitted that it was irrational when the Council took its decision on 10 April 2013 for it not to wait until it had investigated more fully whether an alternative site might be found for the caravans, particularly when the Council had just received a new list of potential sites the previous evening. When deciding to grant permission to apply for judicial review, Mostyn J said that he had difficulty understanding the logic of the Council's reasoning as set out in the minute of the meeting on that date, set out above. HHJ Jarman QC, however, found at [22] that it was possible to draw out the logic of the Council's reasoning from what was recorded in the minute. I agree with him. I consider it is tolerably clear why the Council decided that it should not wait any longer before acting: the Council had already waited a considerable period of time to implement the enforcement notice which it had issued in 2009, during which period serious harm to the public interest had continued by reason of the location of the appellant's caravan encampment on this Green Belt land; the 18 month period for compliance with the notice allowed by the Secretary of State had expired; there was from the expiry of that period a continuing breach of planning control in contravention of the criminal law; it was speculative whether any new site on the list would even be suitable for a traveller site, let alone result in a new location with proper planning permission to which the appellant and other occupants could move in the near future, and in fact experience as recounted in the minute showed that it was highly unlikely that would occur; it was therefore proportionate in the view of the Council that it should proceed at that stage to implement the enforcement notice and put an end to the harm to the public interest which the notice was intended to rectify.

40. HHJ Jarman QC observed at [36] that "it is difficult to see that further information as to the likely timescale of the provision of pitches or sites would have removed to any significant extent the uncertainty relating to such provision which was plainly before the members". I agree with that assessment.

41. In the light of this state of affairs, the judge held that it could not be said that it was irrational or perverse for the Council to decide to proceed to exercise its section 178 powers to clear the land without waiting any longer: [35]-[38]. Again, I agree with him. The appellant has failed to show that it was irrational for the Council to decide

that enough was enough and that the time had now arrived at which it would be reasonable and proportionate in light of all relevant interests to proceed to implement the enforcement notice, the validity of which had been upheld on the appeal to the Secretary of State.

42. Thirdly, Mr Cottle submitted that the judge erred in treating the decision of the Council to proceed to implement the enforcement notice using its powers under section 178 as a matter of planning judgment for the Council. In his submission, a decision to enforce planning controls is not a matter of planning judgment in which a significant degree of discretion should be allowed to the local planning authority, but is a matter in relation to which the court should make up its own mind and give little or no weight to the decision of the planning authority. In support of this contention, he relied on observations of Lord Clyde and Lord Hutton in *South Bucks District Council v Porter* [2003] UKHL 26; [2003] 1 AC 558 at [70] and [86], respectively.

43. In my view, Mr Cottle's reliance on the *South Bucks* case is misplaced, for reasons already previously explained by Sullivan LJ and correctly followed by the judge in the judgment under appeal at [30]. The *South Bucks* case was concerned with the exercise of jurisdiction by a court to grant injunctive relief pursuant to section 187B of the TCPA, and the point made by Lord Clyde and Lord Hutton was the unsurprising one that when a court is invited to decide whether it should grant an injunction it should make up its own mind on the evidence before it whether it is appropriate to do so, rather than act merely as a rubber stamp to endorse a decision by the local planning authority which has applied to the court for such an injunction. By contrast, in the present case the court is not being asked by the local planning authority to exercise its (the court's) own powers to grant injunctive relief in support of enforcement action; it is the local planning authority which is the relevant public authority deciding how it should act in the exercise of enforcement powers which have been directly conferred upon it by Parliament under section 178 of the TCPA. In deciding how to exercise its own powers under section 178, the Council has a discretion. It acts lawfully if its decision falls within the proper scope of that discretion, and in the present context it will have done so if its decision is a rational one. As already pointed out above, the Council's decision was a rational and lawful one. As Sullivan LJ and the judge also observed, a further point of distinction from the *South Bucks* case is that it is possible for an injunction to be granted where no enforcement notice has been served, and in such a case it would be necessary for the court to form its own view of proportionality. But here the necessary proportionality assessment had already been carried out by the Inspector and the Secretary of State.

44. Finally, Mr Cottle sought to suggest that the judge erred by applying too generous a rationality standard in favour of the Council in the circumstances of this case. Mr Cottle said that recent authority in the Supreme Court shows that the rationality standard is a flexible standard which falls to be adjusted according to the context, and the present context is one in which the judge should have held that there was not a wide discretion for the Council, but rather only one decision which could rationally have been taken by it, namely a decision not to exercise its section 178 powers in April 2013. In the course of this submission Mr Cottle referred to, but did not take us to, *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455.

45. I am not persuaded that it is open to Mr Cottle to advance this submission on this appeal. It seems to me to fall outwith the single ground on which Mostyn J gave

permission to the appellants to seek judicial review. Moreover, *Kennedy* was not relied upon in the argument before the judge.

46. But even if the submission were open to Mr Cottle, I would have rejected it. The judge was correct to regard the decision for the Council as one turning essentially on matters of planning judgment, weighing up as it had to do the desirability of acting promptly to end the harm to the Green Belt and the public interest against the interests of the occupants of the land, assessed in the context where those interests had already been brought into account by the Inspector and by the Secretary of State in his decision to uphold the enforcement notice with some additional time for compliance, which had expired by the time of the Council's decision. The judge was therefore correct in allowing the Council as local planning authority significant latitude in application of the rationality standard, in an entirely conventional way. The case is very far from the context of the *Kennedy* decision and calls for no adjustment of the ordinary rationality standard of the kind discussed in that case.

Conclusion

47. For the reasons I have given, I would dismiss this appeal.

Lord Justice Floyd:

48. I agree.

Lady Justice Arden DBE:

49. I also agree.