Neutral Citation Number: [2014] EWHC 279 (Admin)

Case No: CO/6087/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2014

Before :

ROBIN PURCHAS QC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

NORTH NORFOLK DISTRICT COUNCIL	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendants**
(2) DAVID MACK	

- -
- -

Estelle Dehon (instructed by **North Norfolk District Council**) for the **Claimant**
Daniel Kolinsky (instructed by **Treasury Solicitor**) for the **1st Defendant**
Jeremy Pike (instructed by **Butcher Andrews Solicitors**) for the **2nd Defendant**

Hearing dates: 21 January 2014

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Approved Judgment

Robin Purchas QC sitting as a Deputy High Court Judge:

Introduction

1. In this application North Norfolk District Council ("the Council") applies to quash the decision of an inspector appointed by the First Defendant, allowing the appeal of the Second Defendant from the refusal of the Council of planning permission for a wind turbine at Pond Farm, Bodham in Norfolk.

The Grounds

2. Ms Estelle Dehon, who appears for the Council, relies upon two grounds:

   i) that the inspector failed to attach proper weight to the development plan as required by Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") or failed to give any or any adequate reasons for departing from it (the Development Ground); and

   ii) that the inspector failed to have special regard to the desirability of preserving the setting of listed buildings, contrary to Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the LBA 1990") (the Listed Building ground).

Background

3. The wind turbine was to be erected in open countryside on the side of Cromer Ridge, which is one of the highest points in North Norfolk with implications both for visibility and for wind performance. The mast would be a maximum of 60 metres to hub and 86.5 metres to blade tip. There were a number of listed buildings in the area, including the Grade I Barningham Hall of Jacobean origin but enlarged and landscaped by Humphrey Repton with a Grade II registered park, the Grade I Baconsthorpe Castle and a number of Grade II* churches.

4. The application for planning permission was refused by the Council on the 30th August 2012 on grounds of its impact on landscape and heritage assets. The Second Defendant appealed and the appeal was dealt with by a hearing on the 29th January 2013 with a site visit on the following day. The appeal was allowed by decision letter dated the 8th April 2013.

Statutory Framework

5. So far as relevant, by Section 70(2) of the Town & Country Planning Act 1990 ("the TCPA 1990"):

> *"... in dealing with such an application, the authority shall have regard to*
>
> *(a) the provisions of the development plan so far as material to the application;*
>
> *(b) any local finance considerations so far as material to the application; and*

(c) any other material considerations."

6. By Section 38(6) of the 2004 Act:

> *"If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."*

7. By Section 66(1) of the LBA 1990:

> *"In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."*

Policy Context

8. The development plan comprises the North Norfolk Core Strategy adopted in September 2008. While that preceded the National Planning Policy Framework published in March 2012 ("the NPPF"), it was common ground that the relevant policies were consistent with the NPPF and that full weight should be given to them.

9. The relevant policies in the Core Strategy were as follows:

   i) Policy EN2, which required development proposals to demonstrate that their location, scale, design and materials will protect, conserve and where possible, enhance, inter alia, 'the special qualities and local distinctiveness of the area (including its historical, biodiversity and cultural character),' 'visually sensitive skylines, hillsides' and 'the setting of and views from historic parks and gardens.'

   ii) Policy EN8 which provided that development proposals should preserve or enhance the character and appearance of designated assets and their settings and that development which would have an adverse impact on their special historic or architectural interest would not be permitted.

   iii) Policy EN7, which dealt with renewable energy. As it is in issue in this application, I will set out the relevant part in full.

> *"Renewable energy proposals will be supported and considered in the context of sustainable development and climate change, taking account of the wide environmental, social and economic benefits for renewable energy gain and their contribution to overcoming energy supply problems in parts of the district.*

> *Proposals for renewable energy technology, associated infrastructure and integration of renewable technology on existing or proposed structures will be permitted where individually, or cumulatively, there are no significant adverse effects on:*
>
> - *the surrounding landscape, townscape and historical features/areas;*
> - *residential amenity (noise, fumes, odour, shadow flicker, traffic, broadcast interference); and*
> - *specific highway safety, designated nature conservation or biodiversity considerations.*
>
> *…"*

10. The justification for the policy included reference to the then Government policy for promotion and encouragement of renewable energy sources and that the Core Strategy aimed to include mitigating and adapting to the effects of climate change and encouraging renewable energy production. It continued:

> *"3.3.34. Policy EN7 is intended to increase the supply of renewable energy production in North Norfolk and contribute to regional targets. The production of renewable energy could also help alleviate energy supply problems in parts of the District.*
>
> *3.3.35 There is, however, a need to ensure sufficient protection for the distinctive and sensitive landscape and environment in North Norfolk ... All proposals should compliment the particular characteristics of the surrounding landscape and the Landscape Character Assessment will assist in assessing the impact of individual proposals."*

11. Section 10 of the NPPF sets out the Government's policies for encouraging the use and supply of renewable and low carbon energy sources. In Section 11 it sets out policies for conserving and enhancing the natural environment, including valued landscapes. In Section 12 it deals with policies for conserving and enhancing the historic environment. As it is of particular relevance to the second ground in this application, I will set out the relevant paragraphs in full:

> *"131. In determining planning applications, local planning authorities should take account of:*
>
> - *the desirability of sustaining and enhancing the significance of heritage assets putting them to viable uses consistent with their conservation; ....*

> *132. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification."*

The NPPF then sets out the approach to be taken where a proposed development would cause substantial harm to or total loss of the significance of a designated heritage asset. It continues at paragraph 134:

> *"Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use…."*

The NPPF defines a designated heritage asset as including listed buildings and registered parks and gardens.

The decision letter

12. As the application to a large extent turns on the approach taken by the inspector in determining the appeal, I will set out passages from the decision letter more extensively than might otherwise be the case. Having referred to the appeal proposal, at paragraph 2 he set out preliminary matters, including the role of the Core Strategy in the context of the 2004 Act. The inspector noted that due weight should be given to relevant policies of the Core Strategy according to their consistency with the NPPF.

13. At paragraph 3 he set out the main issues as:

> *"*
> - *The effect of the proposal on the character and appearance of the landscape.*
> - *The effect of the proposal on the settings of historic assets.*
> - *Other matters, including the effect of the proposal on living conditions, ecology, television and telecoms, and the local economy.*
> - *The balance of public benefit and harm."*

14. He dealt with his first issue relating to the character and appearance of the landscape at paragraphs 4 to 11, drawing attention at paragraph 4 to the character of the landscape as large expansive open gently rolling or undulating land with a large domed plateau and long uninterrupted views. The landscape character assessment draws attention to the fact that wind turbines could have severe impacts in certain areas specifically within the context of Cromer Ridge. He drew attention to the advice

for small scale wind turbines "taking care not to place them so prominently that they are apparent for miles (i.e near the Cromer Ridge)". The parenthesis is the inspector's comment rather than a quote from the assessment.

15. Having reviewed the individual effects of the proposed turbine, at paragraphs 10 and 11 he concluded:

> *"10. Nevertheless, it is unlikely that the basic characteristics of the landscape will be altered by the proposal, nor would there be a cumulative effect since no turbines exist or have been granted planning permission in the vicinity. The landscape's main vulnerability lies in the effect of the turbine on the skyline, thrown into prominence by the characteristic landscape feature of churches seen on the horizon. Here, although already subject to some disturbance by transmission lines, ... an accepted subtle and much appreciated focus of attention will be disrupted to a certain extent.*
>
> *11. This is an aspect discussed in relation to the settings of heritage assets, but harm would also arise to the character and appearance of the landscape, contrary to the intentions of CS policy EN2 ... and CS policy EN7 ... . The aims of these policies accord with the core principles of the NPPF. The harm to the landscape, alongside other harm, is balanced against the public benefits of the proposal in the final issue."*

16. The inspector dealt with the second issue relating to the settings of historic assets in paragraphs 12-29. In respect of the Grade II* All Saints Church at Bodham, he concluded at paragraph 17:

> *"The harm identified would not meet the intentions of CS policy EN8 ... or CS policy EN7, which are consistent with the aims of Section 12 of the NPPF. Overall, I find the proposal would not preserve the setting of the listed building. However I agree with the officer's opinion in their report to committee that it would lead to less than substantial harm, engaging paragraph 134 of the NPPF. The harm will be weighed against the public benefits of the proposal in the final issue."*

17. The inspector addressed the Grade II* listed St Peter's Church in paragraphs 18-19, concluding:

> *"However the opportunities for experiencing the juxtaposition are relatively limited. VP46 catches it through a relatively small gap in the tree screen, with more glimpses further to the west, harming the significance of the church and the landscape, but there are few other instances where the turbine and the church would be seen together. Views of*

> *the turbine from the church will be masked by dense mature foliage. The harm identified would be less than substantial. It would not be consistent with the development plan policies referred to above. The setting of St Peter's Church would not be preserved."*

18. The inspector then considered the Grade I listed Barningham Hall and its Grade II listed park at paragraphs 20-24, concluding at paragraph 24:

> *"Although, at the distances involved, a relatively small scale intrusion, often masked by tree screening, the turbine would make its presence felt probably most critically on the southern approach to the house. Here it might be glimpsed early on, pre-empting intimations of the house before the fully revealed view. This and other views of the turbine would be harmful to the landscape and architectural significance of the registered park and listed buildings, whose setting would not be preserved. The harm identified would not be consistent with the development plan policy indicated above but, in my view, lead to less than substantial harm."*

19. The inspector dealt with Baconsthorpe Castle at paragraphs 25 to 27, concluding at paragraph 27:

> *"Overall, the setting of the historic assets would not be preserved, and the harm arising will not be consistent with the development plan policy indicated above. However, the harm identified will be less than substantial."*

20. In paragraphs 28 and 29 he refers to other historic assets, concluding at paragraph 29:

> *"In these and other cases the harm would be quite small but may have cumulative influence in the balance. In all cases, it would be less than substantial."*

21. In paragraphs 30 to 54 he dealt with his third issue relating to other matters. On the effect on living conditions he concluded at paragraph 34:

> *"However I agree with the Council that overall the proposal would not result in overbearing effects. In this respect it would therefore accord with the criteria of CS policy EN7."*

22. In respect of noise, he concluded at paragraph 38:

> *"Overall therefore the proposal complies with, inter alia, policy EN7."*

23. In respect of ecology at paragraph 45 he concluded that the relevant policies will be satisfied "*as well as relevant criteria of CS policy EN7*". He reached similar conclusions on the other matters considered.

24. At paragraphs 55 to 62 he came to his final issue "the balance". At paragraphs 55 to 56 he considered the evidence on predicted output of the turbine, concluding:

> *"However the site would still provide a very good output of usable electricity compared to most other possible sites in North Norfolk."*

25. He continued:

> *"57. This would represent a valuable contribution towards national targets for the reduction of carbon emissions, and accord with the sustainability aims of the NPPF. It would also meet the aims of local policy and CS policy EN7, which is consistent with Section 10 of the NPPF. Policy EN7 supports renewable energy proposals in the context of sustainable development and climate change, and its contribution to overcoming energy supply problems in parts of the district.*
>
> *58. The harm identified includes that to the settings of heritage assets. Paragraph 134 of the NPPF tells us that where a proposal will lead to less than substantial harm to the significance of the designated heritage asset, as is the case here, it should be weighed against the public benefits of the proposal. The combined effect of the proposal on all of the heritage assets would remain less than substantial in my view. The public benefit of the renewable energy arising from the proposal is large, there are few sites in North Norfolk which could make an equivalent contribution.*
>
> *59. The combined effect on the significance of the heritage assets identified through the proposal's intrusion into their settings, is an important consideration. However, the turbine will be seen with the assets in limited views, and would not be a constant presence associated with any of them. Moreover, its proximity to heritage assets would be no less than some 1.5 kilometres. In these circumstances, having regard to the analysis made in this decision, I find that the public benefits of the proposal would outweigh the harm to their significance, subject to conditions described below."*

26. In paragraphs 60 and 61 he considered the planning obligations put forward and concluded that the provision of a fund of £25,000 for additional planting met the relevant tests for materiality and could be taken into account. He continued at paragraph 62:

> *"The harm to the landscape is certainly material, albeit the effect of the turbine on the skyline, an important consideration, would not be extensive. However, with the mitigation in place, subject to the conditions described, I*

> *find that the renewable energy benefits arising through CS policy EN7 would also outweigh the harm to the character and appearance of the countryside."*

27. The inspector then dealt with conditions in paragraphs 63 to 66 before concluding at paragraph 67:

> *"The proposal accords with the aims of the development plan and national policy overall. Subject to the conditions attached the second schedule of the unilateral undertaking, the proposal is acceptable. "*

He allowed the appeal.

The Development Plan ground

Legal principles

28. The relevant principles are well established and need not be rehearsed at length in this judgment. They include:

i) While the meaning of a Development Plan policy is a question of law to be determined by the court, its application is a matter for planning judgment for the decision maker, subject to review on normal administrative law principles: *Tesco Stores v. Dundee CC* 2012 UK SC paragraph 21;

ii) In applying section 38(6) of the 2004 Act, while the section creates a presumption in favour of the development plan, the weight to be attached to it and to other material considerations is for the decision maker to determine, subject only to the review on normal principles in this court: *City of Edinburgh Council v. Secretary of State for Scotland* 1997 1 WLR 1447 per Lord Hope at pages 149H-1450H.

iii) Where different parts of the development plan point in different directions, it is for the decision maker to decide which policy should be given greater weight in relation to a particular decision and overall in the conclusion whether the decision would be in accordance with the development plan: *R oao TW Logistics v. Tendring DC* 2013 EWCA Civ 9 per Lewison LJ at paragraph 18 confirming the approach of Ouseley J in *R oao Cummins v. Camden LBC* 2001 EWHC 1116 Admin at paragraph 164.

29. So far as reasons for the decision are concerned:

> *"The reasons must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to*

> *whether the decision-maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inferences will not readily be drawn. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced."*

South Bucks BC v. Porter (No. 2) 2004 1 WLR 1953 per Lord Brown at paragraph 36.

Submissions

30. Ms Estelle Dehon submits that:

i) The inspector made clear findings as to the breach of polices EN2 and EN8 in his decision letter; both policies should clearly have been given full weight as restraint policies.

ii) He also concluded that the proposed development was in breach of policy EN7 so far as its effect on the landscape and heritage assets were concerned.

iii) In concluding at paragraph 57 of the decision letter as part of the balance that the energy output of the proposed turbine would meet the aims of policy EN7 the inspector misapplied the policy; read as a whole, it is plain that the support expressed in general terms in the first paragraph is subject to the conditions set out in the second paragraph and only applies where individually or cumulatively there are no significant adverse effects on landscape and historical features or otherwise. Thus the inspector misdirected himself in concluding, as he did, that permission for the proposal would accord with policy EN7.

iv) It is plain that policies EN2, EN7 and EN8 are mutually consistent and provide a coherent approach that seeks to support renewable energy proposals except where there is significant adverse effect on landscape and historical features, among other considerations.

v) In the circumstances, while it is a matter for the inspector's judgment what weight to attach to individual policies, it was not open to him rationally to conclude that the proposal accorded with the aims of the development plans in circumstances where it was plainly in conflict with the policies to which he referred.

vi) Given the particular importance of Section 38(6) of the 2004 Act, the inspector had to determine the application in accordance with the development plan unless he concluded that material considerations indicated otherwise; there was no indication that he addressed that fundamental issue in that his conclusion was that the proposal in fact accorded with the aims of the Development Plan and therefore was to be determined in accordance with its provisions.

vii) Alternatively, if he carried out that exercise, the reasons which he gave were wholly inadequate in failing to describe reasoning in this respect so as to leave substantial doubt whether the decision he reached was lawful.

viii) In any event, his consideration was flawed in that in considering the harm to the landscape as part of the planning balance he did not ascribe any weight to the breach of the development plan policy CS2 which should have been expressly addressed as part of the weighting in the balance in respect of landscape. His treatment of cumulative effects on the heritage assets was also unreasonable and inadequate.

31. Mr Daniel Kolinsky, who appears for the Secretary of State, takes issue with Ms Dehon as to her construction of policy EN7, which he submits is fundamental to this ground of challenge. In his submission, effect should be given to the whole of the policy, including the first paragraph. That paragraph makes clear that there will be support and proposals will be considered in the context of sustainable development and climate change, taking account of the benefits of renewable energy gain and their contribution to overcoming energy supply problems. He submits that that is a general policy approach, both in terms of consideration and active support, but is supplemented by a commitment to the grant of planning permission for renewable energy proposals where there would be no significant adverse effects as identified, including on landscape and historical features. However, the fact that in a particular case there is not the commitment to planning permission being granted does not detract from the fact that under the policy regard will be had to the context set out in the first paragraph, as well as support in that respect.

32. He submits that that is consistent with the justification which refers generally to the benefits of renewable energy, albeit to be balanced against the need for protection of landscape and environmental matters.

33. Moreover the fact that there is no commitment to grant planning permission does not mean that there would not remain a balance to be struck between the policy for support in the context in the first paragraph and the effect on other aspects such as landscape and heritage assets, which are protected under other policies in the plan.

34. He submits that that was precisely the approach taken by the inspector. The references to policy EN7 in the earlier parts of the decision letter relating to landscape and historic assets were plainly references to the criteria as to whether or not the commitment to permission would be engaged, which itself is consistent with its consideration as part of the third issue relating to other matters.

35. In dealing with the balance in the final issue the inspector was plainly referring to the policy for support and contextual consideration in the first paragraph of the policy which he summarised in the last sentence of paragraph 57. He then balanced the considerations of heritage assets in the context of paragraph 134 of the NPPF and the harm to landscape and concluded that the renewable energy benefits identified in policy EN7 would outweigh the harm to both.

36. It was open to the inspector to determine to which policies to attach greater weight in the Development Plan and his overall conclusion in the light of that balance, that the proposal accorded with the aims of the Development Plan in paragraph 67 was

rational and open to him on his conclusions. It was a decision accordingly made in accordance with Section 38(6) of the 2004 Act.

37. There was nothing in the other points made by Ms Dehon. The inspector dealt with combined effects at various points in the decision letter, but in particular specifically as part of the balance, in paragraphs 58 and 59.

38. He had dealt previously with Policy EN2 in considering the landscape effects and concluded that there was a breach of that policy. Taking the decision letter as a whole, it is plain that when he referred to harm to the landscape in paragraphs 61 and 62, that was harm in the context of the breach of the landscape policy and the criteria under policy EN7. It is not reasonably open to real rather than forensic doubt that he had properly taken policy EN2 into account as part of his overall conclusion. In the circumstances the ground should be rejected.

39. Mr Jeremy Pike, who appears for the Second Defendant, makes submissions in support of the Secretary of State as set out above.

Consideration

40. The construction of the development plan policy is a matter of law for the court. In my judgment it is clear that the policy should be construed as providing for support and consideration in the context of sustainable development and climate change, taking account of the wide environmental, social and economic benefits of renewable energy gain and their contribution to overcoming energy supply problems as a general policy to be applied when renewable energy proposals are put forward. However, that is supplemented by a policy dealing specifically with the grant of planning permission in the second paragraph of policy EN7. It is not expressed as a restraint policy. Rather it is a commitment to permission but a commitment that is conditional on there not being, either individually or cumulatively, significant adverse effects in the specified respects, including landscape and historical features or areas.

41. In my judgment the fact that in this case the inspector concluded that there would be significant effects on landscape and historical assets so that the commitment to grant permission was not engaged did not mean that the policy ceased to support and to require consideration in the context of the benefits of renewable energy gain, including their contribution to overcoming energy supply problems, albeit to be balanced against other considerations, including other policies within the plan.

42. In the light of that conclusion, in my judgment Mr Kolinsky is correct in his submission that the inspector here applied the policy in accordance with Section 38(6) of the 2004 Act and was entitled to come to his conclusion that, given the balance between the benefits of the proposal under policy EN7 as against its adverse implications for landscape and historic assets, the proposal did accord with policy EN7 and overall with the aims of the Development Plan.

43. In my judgment there is nothing in the absence of specific reference to policy EN2 in paragraphs 61 and 62 of the decision letter. Read as a whole, it is clear that the inspector was applying the development plan policies and that he had concluded specifically that there would be breaches of policy EN2 in the landscape section of the decision letter. On that approach it is not open to reasonable as opposed to forensic

doubt that in referring to harm to the landscape in paragraphs 61 and 62, he was well aware that that harm itself constituted a breach of policy EN2 and the balance that he struck as against the benefits of the proposal took that into account.

44. It is also a matter which he plainly addressed in concluding that overall the proposal would accord with the aims of the development plan. In other words, he recognised that there were breaches of policies EN2 and EN8 but taken overall, including his judgement on the appropriate balance, it was a proposal that would accord with the aims of the Development Plan.

45. It is also right, as Mr Kolinsky submits, that the decision letter expressly dealt with the cumulative as well as the individual effects of the turbine on historic assets, as he sets out in paragraphs 58 and 59 of the decision letter.

46. In my judgment, accordingly, the decision letter reveals no error in the treatment of the Development Plan either in the application of the policy or in the approach under Section 38(6) of the 2004 Act. The reasons given for the decision were adequate and dealt with the relevant considerations in this respect. This ground of challenge accordingly fails.

The Listed Building Ground

Legal Framework

47. I have set out the relevant provision earlier in this judgment. As argued in this court, this ground essentially turns on the question whether or not the inspector did in substance comply with his statutory duty under Section 66(1) of the LBA 1990. There is no significant issue that arises on the relevant legal principles. It is however important to set that question in the context of the relevant authorities as to the correct approach.

48. In *Bath Society v. Secretary of State for the Environment* [1991] 1 WLR 1303 the Court of Appeal was considering the duty in respect of conservation areas under what was then Section 277(8) Town and Country Planning Act 1971. However, it is common ground that the principles that apply to the statutory duty in respect of conservation areas are not in any material way different in approach from those which apply to listed buildings.

49. At page 131H Lord Justice Glidewell set out the approach to be taken to the relevant duty:

> *"In my opinion in a conservation area the requirement under Section 277(8) to pay special attention should be the first consideration for the decision maker. It is true that desirability of preserving or enhancing the character or appearance of the conservation area is in formal terms a material consideration within Section 29(1). Since however it is a consideration to which special attention is to be paid is a matter of statutory duty, it must be regarded as having considerable importance and weight."*

50. In *South Lakeland District Council v. Secretary of State for the Environment* [1992] 2 AC 141 the House of Lords considered the meaning of preserve in the context of Section 277(8) of the 1971 Act. At page 146F Lord Bridge said:

> *"There is no dispute that the intention of Section 277(8) is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though no doubt in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest. But if a development would not conflict with that objective the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused on the application of ordinary planning criteria."*

51. In *Heatherington (UK) Limited v. Secretary of State for the Environment* (1995) 69 P&CR 374 the court was considering compliance with Section 66(1) of the LBA 1990. David Keene QC sitting as Deputy High Court Judge (as he then was) referred to the decisions in *South Lakeland* and *Bath Society* and at page 8 continued:

> *"Neither Respondent sought to argue that Section 54A in the development plan policy in some way overrode Section 66(1) of the Listed Buildings Act. Clearly that cannot be the case. They are separate statutory duties. Nor can Section 66(1) be ignored simply because the approach it embodies does not accord with the policy in the statutory development plan. Section 54A has given added emphasis to the development plan in development control decisions. It is of course not the end of the process of consideration. Any decision maker still has to consider whether material considerations indicate otherwise. At its lowest such material considerations must include the statutory obligation have special regard to the desirability of preserving a listed building, its setting or its relevant features. That objective thus remains one to which considerable weight should be attached as was noted in the Bath Society case. If it points to a different outcome from that indicated by the development plan, it will be for the decision maker to weigh these matters and to arrive at a judgment."*

52. In *Garner v. Elmbridge Borough Council* [2011] EWCA civ 891 Lord Justice Sullivan said at paragraph 7:

> *"It is common ground that the same approach should be adopted to the desirability of preserving a listed building or its setting when applying Section 66(1) of the 1990 Act. The*

> *development which leaves the setting of a listed building unharmed will preserve that setting. Having cited an earlier passage ... from the speech of Lord Bridge, Ouseley J summarised the position as follows in paragraph 8 of the judgment. "Section 66 does not permit a local planning authority to treat the desirability of preserving the setting of a listed building as a mere material consideration to which it can simply attach the weight it sees fit in its judgment. The statutory language goes beyond that and treats the preservation of the setting of a listed building as presumptively desirable. So if a development would harm the setting of a listed building there has to be something of sufficient strength in the merits of the development to outweigh that harm. The language of presumption against permission or strong countervailing reasons for its grant is appropriate. It is an obvious consequence of the statutory language rather than an illegitimate substitute for it."*

Lord Justice Sullivan went on at paragraph 38 to add:

> *"I do not accept that in order to show that it had complied with the duty under Section 66(1) the respondent had to pass through a particular series of legal hoops first to decide A and then, if not A, to decide B etc. The need to comply with Section 66(1) did not place the respondent in such a legal straightjacket when it comes to giving a summary of the reasons for its decision. "*

53. In *East Northamptonshire District Council v. Secretary of State for Communities and Local Government* [2013] EWHC 473 Admin (a wind turbine case) Mrs Justice Lang was considering compliance with Section 66(1) and, having referred to *South Lakeland* and *Bath Society*, said at paragraph 39:

> *"In my judgment in order to give effect to the statutory duty under Section 66(1) a decision maker should accord considerable importance and weight to the desirability preserving the setting of a listed building when weighing this factor in the balance with other material considerations which have not been given this special statutory status. Thus where the Section 66(1) duty is in play it is necessary to qualify Lord Hoffmann's statement in Tesco Stores v. Secretary of State for the Environment ... that the weight to be given to a material consideration was a question of planning judgment for the planning authority."*

She continued at paragraph 45:

> *"Although harm is not the test in Section 66(1), one of the meanings of preservation is to keep safe from harm and so the concepts are closely linked (see South Lakeland District Council v. SSE 1992 2 AC 141 per Lord Bridge at 150.)*

> *However in my view the addition of the word "desirability" in Section 66(1) signals that "preservation" of setting is to be treated as a desired or sought after objective to which an inspector ought to accord "special regard". This goes beyond mere assessment of harm.*
>
> *46. In my judgment the inspector did not at any stage in the balancing exercise accord "special weight" or considerable importance to "the desirability of preserving the setting". He treated the "harm" to the setting and the wider benefit of the wind farm proposal as if those two factors were of equal importance. Instead he downplayed "the desirability preserving the setting" by adopting key principle (i) of PPS 22 as a "clear indication that the threshold of acceptability for a proposal like the one at issue in this appeal is not such that all harm must be avoided". In so doing he applied the policy without giving effect to the Section 66(1) duty which applies to all listed buildings whether the harm has been assessed as substantial or less than substantial."*

I should note that that decision is under appeal to the Court of Appeal.

54. In *Forest of Dean District Council v. Secretary of State for Communities and Local Government* [2013] EWHC 4052 Admin Mr Justice Lindblom in considering Section 66(1) of the LBA referred to *South Lakeland* and the other authorities referred to above. He continued at paragraph 49:

> *"Can it be said that the inspector failed to do what Section 66(1) required? In my view it cannot. I do not think the scope and intensity of the inspector's assessment can conceivably be said to fall below what was required of him by the special regard duty. On the contrary it was in my view exemplary. It shows that he attached great importance to the desirability of preserving the setting of the listed buildings. He described the statutory test as "a high hurdle" ... and when one reads the relevant parts of the letter one is left in no doubt that he gave the requirements of Section 66(1) a "high priority" – Lord Bridge's expression in South Lakeland – and "considerable importance and weight" – Glidewell LJ's in Bath Society."*

He continued at paragraph 51:

> *"51. Of course, in assessing the effects the development would have on the setting of the listed buildings the inspector could not avoid making a visual and aesthetic judgment on each of the two proposals before him having regard to the history and change of physical state of the buildings and their surroundings. This is the kind of exercise a decision maker will normally need to undertake when having special regard to the desirability of preserving*

> *the setting of a listed building. Where visual or aesthetic considerations are involved in the planning decision, the range of reasonable judgment is wide. The court will not interfere with a reasonable planning judgment exercised in accordance with the relevant statutory scheme (see Tesco Stores Limited v. Secretary of State). That general principle is not excluded in the case where a Section 66(1) duty applies. I do not believe Lang J was seeking to suggest otherwise in paragraph 39 of her judgment in East Northamptonshire District Council.*
>
> *52. In this case it cannot be said that the inspector failed to give "special weight" – as Lang J described it – to any of the considerations relevant to the duty in Section 66(1). He came to a reasonable conclusion on the issue that Section 66(1) required him to face, in the light of all the factors bearing on the judgment he had to make."*

55. I should also refer to the decision by Mr Justice Kenneth Parker in *Colman v. Secretary of State for Communities and Local Government* [2013] EWHC 1138 (Admin), where in refusing an application to add a new ground in respect of section 66(1) he said at paragraph 68:

> "That conclusion has of course to be read against the detailed findings that, apart from All Angels, insofar as there was any harm at all, it was "minimal" or "minor". It is also notable that the inspector concluded that the overall harm that would arise from the development was "limited" ... In my view, the inspector did give in this case "special regard" to the consideration referred to in Section 66(1) of the (LBA 1990). He did so by carrying out a careful and detailed assessment of the impact on the setting of the listed buildings in question. In all instances but one there was no such impact or the impact was such that it could in effect be discounted in the decision making. The inspector did have real concern about one listed building and found the impact was significant. However he was then required first to evaluate the extent of that impact and to weigh the negative impact against the substantial benefits of the development in accordance with the NPPF. The impact on the one building was less than substantial and, even if special weight were attached to that impact, the overall negative effects were limited and could not outweigh the benefits of the development. "

56. In *Bedford Borough Council v. Secretary of State for Communities and Local Government* [2012] EWHC 4344 (a turbine case) the Secretary of State did not oppose the statutory challenge and Mr Justice Jay in summarising the claimant's submission at paragraph 32 said:

> *"Mr Cosgrove accepted that "special" in this context did not mean that special or heightened weight needed to be given to setting etc but there had to be evidence that the inspector's regard to it was special."*

57. He continued at paragraph 36:

> *"Mr Newcombe's forceful submission was that special regard and special weight are incongruent concepts and I agree. The focus is on the regard, not on the according weight pursuant to that regard. Special regard may lead to the giving of special weight but it does not necessarily do so. The treating of factors as being of equal importance may be evidence that an inspector has not had special regard but this does not inevitably follow.*
>
> *37. Mr Newcombe submits that the correct formulation of the law is to be found in the judgment of Mr David Keene QC as he then was in Heatherington ... and Kenneth Parker J in Colman ... ".*

58. He then quotes the judgment in *Heatherington* where the Deputy Judge concluded on the words of the decision letter that the inspector probably had not had regard to the statutory duty. He continued at paragraph 39:

> *"It is true that the decision of Kenneth Parker J which post dated the decision given by Lang J did not comment adversely on the latter. In my judgment his approach and that of Mr David Keene as he then was in Heatherington is slightly different and to be preferred."*

Submissions

59. Ms Dehon submits that:

(i) The authorities are clear that to have special regard to the desirability of preserving the setting requires more than simply having regard to it; it requires the decision maker to apply the statutory presumption against development which does not respect that statutory desirability unless it is overridden by other factors; she submits that that approach is consistent with the summary of Mr Justice Ouseley which was confirmed in *Garner* and with the approach taken in *Heatherington***,** *Bath Society***,** *South Lakeland* and *East Northamptonshire*. It is also consonant with the tests applied by Mr Justice Lindblom at paragraph 49 of the *Forest of Dean* case. In *Bedford Borough Council* it is not clear that the particular application of the presumption was in fact in issue before Mr Justice Jay. In any event, as can be seen from the

extracts of the decision letter at paragraph 41 of the judgment, that inspector specifically referred to the Section 66(1) duty on at least two occasions in his decision letter.

(ii) Ms Dehon further submits that paragraph 134 of the NPPF is not a substitute for the discharge of the Section 66(1) duty; the paragraph invites a straight balancing of public benefit against harm which does not have regard to the statutory duty to have special regard to the desirability of preservation in carrying out that balancing exercise; she accepts that those aspects are addressed to an extent in paragraph 132 of the NPPF, which advises that great weight should be given to the heritage asset's conservation and that any harm should require clear and convincing justification but that again is not a substitute to the application of the statutory duty as part of the assessment;

(iii) Ms Dehon accepts that the decision letter is not required specifically to mention Section 66(1) and submits that the question is one of substance rather than form as to whether on the face of the reasons it is clear that the inspector did in fact have special regard to the desirability of preserving the setting in accordance with Section 66(1) of the LBA 1990;

(iv) In that respect she submits that in this decision letter not only is there no reference to Section 66(1) but it is plain that what the inspector actually did was carry out a straight balance under paragraph 134 of the NPPF without any regard to the statutory presumption under section 66(1); his conclusion that the proposals would be contrary to Core Strategy policy EN8 was consistent with that approach, particularly given his finding that there would be less than substantial harm "engaging paragraph 134 of the NPPF", see paragraph 17 of the decision letter;

(v) Moreover the issue stated by the inspector is itself simply stated as the balance of public benefit and harm;

(vi) She notes that at paragraph 58, having identified the benefits of energy generation, the Inspector turns to harm, which includes harm to the settings of heritage assets but then only refers to the balance in paragraph 134 of the NPPF; moreover, the language used in paragraphs 58 and 59 is entirely consistent with a straight balancing exercise under that paragraph; and

(vii) She submits that there is no hint of the application of the statutory presumption in favour of the desirability of preserving the setting and nothing to indicate that the approach has been in accordance with Section 66(1) of the LBA 1990.

60. In respect of the reference in paragraph 59 to the combined effect on the significance of the identified heritance assets through the proposal's intrusion into their settings as "an important consideration" she submits that that is in the context of assessing the extent of that harm, including the factors set out as to limited view and distance. That is a normal part of any balancing exercise and is not a substitute for giving effect in substance to the statutory presumption.

61. Moreover, there is nothing in the final concluding paragraph 67 of the decision letter that indicates that special regard had been paid to the presumptive desirability in accordance with the statutory obligation.

62. In these circumstances, the court should conclude from the reasons given where there is no express acknowledgment of Section 66(1) which was a statutory requirement and to which his attention had been drawn by the Second Defendants in their evidence that the inspector failed in substance to give effect to the statutory presumption in accordance with the requirements of Section 66(1).

63. Mr Kolinsky submits that it is clear that this inspector had Section 66(1) well in mind and in any event that there is nothing on the face of the decision letter to demonstrate that he did not have regard to his statutory duty, bearing in mind that the burden of persuasion is on the Claimant. He makes the following further points in support of that submission:

(i) The evidence on behalf of the Second Defendant referred to Section 66(1) in two places where it was set out; therefore the inspector had his statutory duty expressly put before him;

(ii) The main issue formulated in respect of historic assets used language reflecting Section 66(1) in referring to the effect of the proposal on the setting of historic assets;

(iii) The careful analysis of each of the historic heritage assets in respect of their settings and the evaluation of harm was effectively the discharge of the duty to have special regard to the desirability of preservation for the purposes of Section 66(1);

(iv) Paragraph 58 of the decision letter starts the application of the relevant NPPF guidance; it is clear, he submits, that the NPPF is consistent with section 66(1) in setting out the general approach in paragraphs 131 and 132, which included giving great weight to the conservation of heritage assets and requiring clear and convincing justification for any harm or loss. It is inconceivable that this inspector applied the balance under paragraph 134 without at the same time, taking into account the totality of the relevant advice in the same section of the NPPF;

(v) The consistency between that advice and the statutory duty is self-evident as accepted by Mr Justice Lindblom in the *Forest of Dean* case, where at paragraph 48 he supported the inspector's conclusion that there was no intentional conflict between the statutory duty in Section 66(1) and the relevant policy in the NPPF;

(vi) Moreover, he submits, it is entirely clear that in considering the relationship between harm to the setting of the heritage assets and the public benefit within the context of paragraph 134 of the NPPF, the inspector expressly recognised that the effect on the heritage assets was an important consideration, thus giving that consideration special regard and high priority;

(vii) Having then established the particular importance of the preservation of

the heritage assets, the inspector went on to assess whether, having regard to his assessment of the actual degree of harm, that important consideration was outweighed by the public benefit; that was an approach which was entirely in accord with the approach endorsed in the *Bath Society* and *South Lakeland* cases;

(viii) Thus, while the inspector does not specifically refer to Section 66(1), it is clear that he in fact had special regard to the effect on the preservation of the setting of the heritage assets and specifically attached to that consideration weight as an important consideration; beyond that, the actual degree of harm and the weight to be attached to it was a matter for the inspector; and

(ix) Accordingly it is plain that he complied with his statutory duty in giving special regard to the desirability of preserving the setting of the heritage assets and that his decision is not to be faulted on that account.

64. Mr Jeremy Pike made submissions in line with and in support of the submissions by Mr Kolinksy.

Consideration

65. I start with the nature of the duty imposed on the decision maker by LBA Section 66(1). Mr Kolinsky accepted that the correct approach was as set out in *Bath Society* and *South Lakeland*. In my judgment that is correct and accordingly the effect of the statutory requirement to have special regard to the desirability of preserving in this case the setting of the relevant heritage assets would impose a duty to give "considerable importance and weight" or "high priority" to that consideration. Where there is conflict with that statutory objective, the question for the decision maker is whether the presumption is overridden by other considerations of public interest. Thus the exercise of planning judgement is engaged against a presumptive desirability which is to be distinguished from the application of a straight planning balance. That seems to me to be consistent with the approach endorsed in the subsequent decisions in *Heatherington, Garner***,** *East Northamptonshire* and *Forest of Dean*.

66. I would respectfully agree with Mr Justice Lindblom that, taken as a whole, the advice in the NPPF is consistent with that approach, having regard in particular to paragraphs 131 and 132 where it advises that great weight should be given to the conservation of a designated heritage asset and that clear and convincing justification should be required for any harm or loss. It is correct that Section 66(1) applies the presumptive desirability directly to the setting of a listed building, while in the NPPF the advice is directed to the significance of the asset itself. For present purposes that distinction is not of any significance. However it remains essential that in applying the subsequent advice in paragraph 134, which is expressed in terms of a balance rather than expressly referring to issues of weight and significance, the approach of the decision maker is consistent with the statutory obligation under Section 66(1). Thus the question should not be addressed as a simple balancing exercise but whether there is justification for overriding the presumption in favour of preservation.

67. Ms Dehon has not pleaded or contended in her submissions in this court that the reasons given in this respect were inadequate. Thus, as in *Heatherington*, the question that I have to address is whether on the face of the decision letter read as a whole in a straightforward manner I am persuaded that on the balance of probabilities this inspector failed in substance to have special regard to the desirability of preserving the setting of the heritage assets in accordance with Section 66(1). In that respect the burden of persuasion is on the Claimant in the light of the accepted premise that the decision letter does not have to set out all material considerations or in particular to recite all the relevant statutory provisions or for that matter national or other policies.

68. In the absence of a challenge to the adequacy of the reasons it will normally be assumed that the decision was taken in accordance with the law unless there is evidence to the contrary. Moreover, in this case, given my conclusion that the advice in the NPPF taken as a whole is consistent with the statutory duty under Section 66(1), Ms Dehon would need to persuade me that in applying the balance under paragraph 134 this inspector failed to apply the advice in paragraphs 131 and 132 of the NPPF or, if he did, failed to apply that advice in a manner consistent with the statutory duty. In considering those questions it is accepted that the question is one of substance, not form.

69. At the outset it is right to note, as Ms Dehon submitted, that in this case the inspector did not specifically refer to Section 66(1), but the question remains whether the decision letter demonstrates that he did not comply with it taking his consideration of the issues as a whole and in particular his application of the balance at paragraphs 58 and 59.

70. It is convenient first to consider the decision letter as a whole. The inspector noted the relationship between the development plan policies and the NPPF in paragraph 2 and it is clear from his subsequent references that he considered that the landscape and heritage policies were consistent with the NPPF so as to be given weight. He set out his four issues, which included the effect on landscape and on the settings of historic assets, leading to the balance of public benefit and harm. He then considered those issues in turn.

71. In respect of the landscape effects he concluded that there would be harm contrary to the development plan policies, which would be balanced against the public benefits in the final issue. On the setting of the historic assets his conclusion at paragraph 17 was that there would be harm to the building's setting contrary to the development plan policies, which were consistent with the relevant section of the NPPF, and that overall the proposal would not preserve the setting of that listed building. However, that harm would be less than substantial, engaging paragraph 134 of the NPPF, and

again the harm would be weighed against the public benefit in the final issue. That in effect reflected his approach and conclusion on each of the heritage assets.

72. On the final issue the inspector dealt first with the benefits of the proposal and at paragraphs 58 and 59 addressed the balance of harm and benefit in the context of paragraph 134 of the NPPF. The language used is similar to the language in paragraphs 61 and 62, where the inspector balanced the harm to the landscape and the benefits. In each case he concluded that the benefits outweighed the harm. His final conclusion was that the proposal accorded with the Development Plan and national policy overall and was acceptable.

73. While it is a matter of impression, I do not find anything in this overall process of reasoning that reflected the application of the statutory requirement to have special regard to the desirability of preserving the setting of the historic buildings. Rather the inspector's approach seems to me at this level to have balanced the relative harm and benefit as a matter of straightforward planning judgment without that special regard required under the statute. Thus he treated the balance under paragraph 134 of the NPPF as the same exercise as that in respect of the landscape effects.

74. As in *Heatherington*, it is then appropriate to examine the reasoning in a little more detail to see whether in fact the inspector has applied that requirement in a way which is essentially built into the balancing exercise that he carried out in respect of the heritage issue at paragraph 59. I will deal the relevant points in the order of the decision letter.

75. I do not find the references to the Core Strategy policy and its consistency with the NPPF persuasive in this respect. As set out above, the Core Strategy policy provided a policy against development that would have an adverse impact on listed buildings but did not as such address directly the role of Section 66(1) as part of decision making. In that respect I consider that the consideration of the policy and its consistency with the NPPF is neutral as to his approach to Section 66(1). Similarly it does not seem to me that the statement of the issues is supportive of his application of the statutory requirement. If anything, it could be said that the relevant issues of effect and balance indicated the application of a straightforward balance of benefit and harm without regard to the statutory duty.

76. I then turn to paragraph 17 of the decision letter, where the inspector set out his conclusions on the effect of the proposal on All Saints Church, Bodham. He concluded that the harm he had identified would be in conflict with the Core Strategy policy which would be consistent with the aims of chapter 12 of the NPPF. While that chapter of the NPPF includes the advice on weight in paragraph 132 to which I

have referred, it does not seem to me that this statement goes anywhere in rebutting the overall impression that this inspector was simply engaged in a straightforward exercise of planning balance, free of the special regard to be had to the desirability of preservation under Section 66(1). The Core Strategy policy itself does not specifically mirror the Section 66(1) requirement.

77. That to my mind is reinforced by the following passages which refer to paragraph 134 of the NPPF and that the harm is to be weighed against the benefits as part of the final issue. It seems to me that that formulation again reflects a simple planning balance, particularly when it uses similar language to that used in paragraph 11 in respect of the landscape issue. I take the same view of the specific conclusions in respect of the other heritage assets, which in effect identify harm contrary to the Core Strategy policy which will be balanced against the benefit under paragraph 134 of the NPPF in the final issue.

78. I come then to the final issue, which is considered at paragraph 55 and following. As I have indicated earlier in this judgment, the inspector reached his conclusions on the benefits of the proposal in the context of the Core Strategy policy and the NPPF in paragraphs 55-57. He then balanced that against the harm to the settings of the heritage assets in paragraphs 58-60 and to the landscape in paragraphs 61 and 62. He concluded that the public benefits would outweigh the harm in the former case to the significance of the heritage assets and in the latter to the character and appearance of the countryside. In the former case he stated that the combined effect on the significance of the heritage assets was an important consideration, but the turbine would be seen in limited views and would not be a constant presence or proximate. In the latter case the effect of the turbine on the skyline was an important consideration but the harm would not be extensive.

79. In each case it seems to me that the approach comprised a weighting of the considerations which were then weighed against each other as part of the planning balance. In the case of the heritage assets that was introduced in paragraph 58 by reference to the balance under paragraph 134 of the NPPF and the inspector's conclusion that the combined effect on all the heritage assets would remain less than substantial, while the public benefit from the proposal was large. But this is consistent with the general approach that I have described.

80. I also have in mind that this inspector appears to have set out with some precision his process of reasoning so that the absence of any direct or indirect reflection of the duty to have special regard to the desirability of preservation as part of that reasoning may have more significance than might otherwise be the case. While Section 66(1) was certainly referred to in the representations of the Second Defendant, the appeal was conducted by a hearing where the course of any discussion or debate was to be led by the inspector and in any event there is no note or evidence as to what form that took.

Hence it does not seem to me that that throws much light on the actual basis for the inspector's decision in this respect.

81. I have come to the conclusion that the inspector did not as a fact address his mind to Section 66(1) as such in considering his final issue. Whatever account he took of the earlier advice in section 12 of the NPPF, including that in paragraphs 131 and 132, it does not seem to me that he engaged with that advice in any way so as to reflect the requirement to have special regard to the desirability of preservation in accordance with Section 66(1).

82. But the question remains whether in substance he did have that special regard to the desirability of preserving the settings of the heritage assets as part of the consideration that led to his decision, notwithstanding that, as I find, in approaching that question he did not expressly have regard to the statutory requirement as such. In approaching that question I remind myself of the helpful guidance in *Garner* that it is not necessary for the decision maker to pass through a particular series of legal hoops to comply with Section 66(1) nor, I would add, does he have to recite any particular mantra or form of words to demonstrate that he has done so. However, adopting the formulation of Mr Justice Ouseley approved by the Court of Appeal in *Garner*, that does not mean that the decision maker can "treat the desirability of preserving the setting of a listed building as a mere material consideration to which (he) can simply attach the weight (he) sees fit in (his) judgement. The statutory language goes beyond that and treats the preservation of the setting of a listed building as presumptively desirable. So, if a development would harm the setting of a listed building, there has to be something of sufficient strength in the merits of the development to outweigh that harm. The language of presumption against permission or strong countervailing reasons for its grant is appropriate. It is an obvious consequence of the statutory language rather than an illegitimate substitute for it."

83. Mr Kolinsky relied on the fact that in the decision letter the inspector did consider with care the effect on the setting of the heritage assets. Moreover in the balancing exercise that he undertook he accepted that the combined effect on their significance was an important consideration but that it was outweighed by the public benefits of the proposed development. I recognise the force of that submission. However, the problem that it faces is that, on the conclusion to which I have come, the inspector did not in fact have regard to the statutory duty but applied a simple balancing exercise under paragraph 134 of the NPPF. In the particular circumstances of this decision it is not possible to know how the balance would or might have been affected if he had had special regard to the desirability of the preservation of the settings in accordance with the approach helpfully summarised in *Garner* and set out in the other authorities to which I have referred.

84. I accept that on the conclusions which he set out he could still have come to the same overall decision, but I do not consider that it is possible for this Court to say that he would inevitably have done so if he had in fact taken the statutory requirement into account.

85. In these circumstances I conclude that this inspector did not comply with section 66(1) of the LBA 1990. In my judgment it is not possible to say that he would inevitably have come to the same conclusion, had he directed his mind to that requirement and approached his decision on that basis. . For the same reason I do not consider that it would be appropriate to exercise my discretion to refuse relief. For these reasons in my judgment this ground succeeds and the decision will be quashed.