The Queen on the Application of Albert Jordan v Secretary of State for Communities and Local Government

CO/290/2008

High Court of Justice Queen's Bench Division The Administrative Court

2 December 2008

[2008] EWHC 3307 (Admin)

2008 WL 5508442

Before: His Honour Judge Gilbart QC (Sitting as a Deputy High Court Judge)

Tuesday, 2nd December 2008

Representation

Mr M Willers (instructed by Davies Lore Lomax) appeared on behalf of the Claimant.

Mr A Sharland (instructed by Treasury Solicitors) appeared on behalf of the Defendant.

Judgment

Judge Gilbart QC:

1 This is an application under section 288 of the Town and County Planning Act 1990 by Mr Jordan, whereby he asks the Court to quash a decision letter of 30th November 2007 issued by an Inspector of the First Defendant Secretary of State. In that decision the Inspector dismissed his appeal against the refusal of Thurrock Borough Council to grant planning permission for what was described as a “mobile home park dwelling” after conducting a hearing on 14th November 2007.

2 The site lies in the statutory Green Belt close to the A 13 dual carriageway road. It has a significant planning history. The dwelling in question was the subject of successful enforcement action by the local planning authority in July 2004. The authority served two notices under section 172 of the Act. The first notice required an end to residential use (and cessation of related activities, including parking) within two months, and removal of the dwelling within three months. The second notice required removal of associated operational development in the form of hard standing, driveway, accesses, cesspool and the boundary fence, all within four months. An Inspector heard an appeal under section 174,subsection 2, sub paragraphs (a) and (g) of the Act. Apart from extending the time for compliance to eight months in each case on the first notice, and nine months on the second notice and making other amendments which are not relevant here, he dismissed the appeal by decision letter of 29th September 2005.

3 It is necessary to refer to that decision letter. Paragraphs 1 to 23 read:

“Background.

“1. My site inspection was made unaccompanied. I viewed the site and its surroundings from public places only. I am fully satisfied that I saw everything necessary to make a sound and proper decision.

“2. Both notices relate to the same site. The site is rectangular in shape and about 600 sq metres in extent. It is located at the junction of the local road Bells Hill Road and the A13 major road to the south of Basildon. It lies within a scattering of generally loose-knit

development that is situated on the north side of the much improved A13, with similar sporadic development on the south side.

"3. On the site is a sizeable mobile home of 'park home' style, a number of small outbuildings, a driveway and areas of hard standing.

"The Appeals Against Notices 1 and 2 on Ground (a)

"Main Issues.

"4. The appeal site lies within the Metropolitan Green Belt, where national and local planning policies make a general presumption against inappropriate development. If a proposed development is inappropriate the onus is on an Applicant to show that very special circumstances exist to justify it in the face of the very strong green belt objection. From what I saw at my inspection and having regard to the representations made I find that there are two main issues of planning merit that apply to the appeals against both notices. These concern: first, whether the change of use to residential use and the operational developments that are the subject of Notice 2 are appropriate development in the green belt; and second, if they are not, whether a situation of very special circumstances exists to justify the developments nonetheless.

"Planning Policy.

"5. The development plan for the area is the adopted Thurrock Borough Local Plan of 1997(the BLP). The review of the local plan has reached an advanced stage and so the Emerging Unitary Development Plan Deposit Copy of March 2003 (the EUDP) is also relevant.

"6. As I have mentioned the site and adjoining land lie within the green belt. They also lie outside the built confines of any settlement as shown in the BLP and the EUDP. Relevant policies of the BLP are GB1, GB2, GB4 and GB7; relevant policies of the EUDP are GRB1,GRB2, GRB4,GB7 and USP12.

"7. Policy GB1 of the BLP sets out the categories of development regarded as appropriate within the green belt. These include development for agriculture and forestry and other uses of land which preserve the openness of the green belt and do not conflict with the purposes of including land within it. Policy USP12 of the EUDP is to similar effect. Policy GB4 of the BLP sets out guidance on where 'infilling' may be appropriate in the green belt. GRB4 of the EUDP is to similar effect. Policy GB2 of the BLP sets out the design considerations involved in green belt development, where the development is acceptable in principle. It indicates, for example, that structures should be properly designed and constructed of appropriate materials and that a development should take full account of its impact on the existing landscape. Policy GRB1 of the EUDP is to similar effect. Policy GB7 of the BLP sets out policy for temporary dwellings in the green belt. They will only be permitted in connection with uses that are appropriate in the green belt and permissions will be of a temporary nature. Policy GRB7 of the EUDP is to similar effect.

"8. National policy on development in green belts is set out in PPG2 .

"Reasons.

Whether The Developments Are Appropriate In The Green Belt.

"9. Very clear guidance, relevant to this case, as to what categories of development are appropriate in the green belt is given in development plan policies GB1, USP12 and GB7 and in the Government's PPG2 . The stationing of a mobile home for residential purposes, the subject of Notice 1, not connected with agriculture or other appropriate rural uses, is clearly not an appropriate development in the green belt in terms of this policy guidance. Likewise the construction of hard standings, a driveway and the like, the subject of Notice 2, for purposes not appropriate to a green belt, is also not an appropriate development in the green belt in terms of the policy guidance.

“10. The Appellant contends that the appeal site is an ‘infill’ site and that the residential use of the land is ‘infilling’ in a gap in Bells Hill Road between the built frontage and the A13 slip road. Therefore, he submits, this is an appropriate development in the green belt. In some circumstances ‘infilling’ may be appropriate development. But in my view that is not the case here and indeed the Appellant acknowledges that that the appeal site is not within an area regarded as suitable for ‘infilling’ under policy GB4 of the BLP. Even setting aside the policy I disagree strongly with the Appellant's view that the appeal site is an ‘infill’ site. From my inspection I consider, as a matter of fact and degree, that the appeal land should be regarded as being sited on the edge of, and outside, the isolated pocket of housing development on Vange Park Road/Bells Hill Road, not within it. In my view the use of the site for residential purposes represents an extension of built-up development onto the expanse of green belt land associated with the wide A13 road feature, not infilling within a residential development.

“11. I find, therefore, that the appeal developments are not appropriate ones in the green belt. Inappropriate developments are, by definition, harmful to the green belt.

Very Special Circumstances.

“12. I turn therefore, to the second issue. PPG2 explains what is meant by ‘very special circumstances’. It says that very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness and any other harm is clearly outweighed by other considerations.

“13. The Appellant has advanced a number of matters which he says add up to justifying the development, including a number which he says amount to very special circumstances. I have already dealt with the matter of ‘infilling’ above. I deal with the others below.

“14. Mr Jordan contends that the appeal site makes no contribution to its green belt designation. I deal first with his comments on openness. PPG2 makes clear that the openness of green belts is their most important characteristic. The Appellant alleges that the openness of the green belt is not compromised here as the park home is similar in size to the former buildings on the site. In my view there is little merit in this line of argument. As a result of the unauthorised development the site has a very built-up appearance at present. The former activities on the site were unauthorised and the land has no lawful use other than that provided for in the Act of 1990. From the representations made little now remains of the buildings that were formerly on the land - and indeed no claim is made that any buildings on the land now are immune from enforcement action under the four year rule. Accordingly, on the balance of probability, the present development has a much more damaging impact on the openness of the site and of the green belt than any existing or lawful development does have or might have.

“15. The Appellant says that the site performs none of the purposes of the green belt described in PPG2 . I disagree. I consider, for example, that if it continued to have undeveloped status its continued existence would assist in safeguarding the countryside from encroachment. The Appellant also says that it serves none of the objectives of green belt designation. I attach no weight to that point. First, as land with no authorised development it would help to retain an attractive landscape and to enhance the landscape. Second and in any event, as PPG2 makes clear, the extent to which land fulfils green belt objectives is not a material factor in its continued protection as green belt.

“16. The Appellant also says that the development brings amenity benefits by improving the appearance and character of the area. I disagree strongly. The argument that the character and appearance has been improved by the unauthorised development is based on two lines of reasoning. First it is argued that the character and appearance of the area is that of a residential area. I disagree. The area around the site has a very mixed appearance and character, not just a residential form. Around the site are patches of housing, fields, business uses of open character, and the great open sweep of the A13 roadway. Predominantly this is an area of open character. The creation of a new residential plot represents an extension of a knot of dense urban development into

an area of open character, damaging to the character and appearance of the area. This is clearly at odds with development plan policy. Second the Appellant is suggesting that he has improved the area by cleaning up what had been a derelict site and one that had had a long history of unauthorised use, tipping and the like. The tidying up of the site is, in itself to be welcomed. But the residential development that the Appellant has undertaken is not to be welcomed. That is not tidying up: that is development that is damaging to the appearance and character of the area and to the green belt. PPG2 makes clear that the quality of the landscape in the green belt is not relevant to its continued protection. That is an important point - if planning permission for the appeal development were to be given on the basis that the development was tidying up a derelict site that would be an invitation to other people to make green belt land derelict so that they could obtain planning permission for residential use. The Appellant also indicates that if the notices are upheld and the site is cleared it will revert to dereliction and become an eyesore. That again is no reason for granting planning permission now. To grant planning permission for that reason would simply invite people to neglect green belt land.

“17. The Appellant says that the site is previously developed land and that PPG3 gives strong encouragement to the development of such land for housing. That argument is misconceived in this case. PPG3 makes clear that its guidance does not override that in PPG2 . The ‘previous development’ of this land was unauthorised. In my view attaching weight to the PPG3 guidance in this case would provide encouragement to people to undertake unauthorised developments on green belt land in the hope of securing planning permissions thereby.

“18. I have considered whether the weighty objections to the grant of planning permission set out above could be overcome by attaching conditions to planning permissions. In my view they could not. For example there is no room for screening mobile home with tree planting. In any event the provision of screening is not a good basis for permitting development in a green belt - the argument could be repeated too often. The granting of a temporary permission would just perpetuate the harm associated with the development.

“19. The Council say that access to the site is poor, with poor visibility. From my inspection I agree with that and I cannot see how the problem could be improved significantly. This is a further significant consideration weighing against the development.

“20. I note that the Appellant has lodged an objection to the emerging UDP, seeking inclusion of the site and surroundings within policy GRB4. Evidently that objection has not yet been dealt with. I am firmly of the view that the appeal development is not an appropriate one in green belt policy terns and that there are other weighty objections to the grant of planning permission. I attach only limited weight to the existence of the objection to the EUDP and I note that no claim is made that it justifies allowing the appeals or postponing a decision on them.

“21. A sizeable number of local residents have supported the development by responding to a short questionnaire prepared by the Appellant. However the Appellant's document does not set out all of the Council's reasons for issuing the notices. There is no evidence that the respondents are aware of all of the policy and other planning issues involved in the case. Accordingly I attach only limited weight to their representations.

“22. Having weighed all of the evidence of merit I find that the harm due to the inappropriateness of the development in green belt, and the other harm that I have identified associated with the development, outweighs very substantially the considerations supporting the grant of planning permission. Accordingly no situation of very special circumstances exists to justify the grant of planning permissions on the deemed applications.

“Conclusions.

“23. For these reasons and having considered all of the other matters raised I conclude

that the appeals on ground (a) against Notices 1 and 2 should fail. Planning permissions will not be granted on the deemed applications.

4 I turn now to paragraph 31 to 37:

“The Appeals Against Notice 1 And 2 On Ground (g)

“Reasons.

“31. The Appellant says that the periods for compliance specified in Notice 1 are far too short and that the period for compliance with Notice 2 is also too short and should be at least as long as what should be specified for Notice 1 - that is 12 months.

“32. I agree that the periods for compliance with Notice 1 are too short. Mr Jordan needs a reasonable time in which to seek, secure and move to a new home and, if appropriate, to sell the mobile home too. No specific evidence has been put to support the view that the period should be 12 months. In my view that is unreasonably long. I consider a period of 8 months to be a reasonable one in this case. I shall vary Notice 1 accordingly. I shall vary Notice 2 to give a total of 9 months for compliance with the notice, to allow time for the works to be removed after the residential use has ceased. The appeals on ground (g) succeed to that extent.

“Conclusions.

“33. For the reasons given I conclude that the appeals on ground (g) should succeed to the extents specified above.

“Other Matters.

“34. The Appellant submits that the removal of the mobile home, his only home, and the cessation of the residential use, would interfere with his human rights as protected by Articles 1 and 8 of the European Convention on Human Rights (the ECHR). He submits that his right to respect for his private and family life and to own and use his property would be violated by the proposed enforcement action. He says that the enforcement actions against him are not in the public interest and that the development itself best preserves the public interest.

“35. As regards the submissions made relating to Article 1 of the First Protocol to the ECHR , I recognise that dismissal of the appeals would result in an interference with Mr Jordan's peaceful enjoyment of his property. However that interference must be balanced against the general interest. The objections to the development that is the subject of Notices 1 and 2, set out above, are serious ones and cannot be overcome by granting a temporary permission or one subject to other conditions. The general interest can only be safeguarded by the cessation of the residential use and by the removal of the operational development as set out in the notices. In all the circumstances I consider that the enforcement actions taken are necessary in the general interest. They do not place a disproportionate burden on Mr Jordan. I consider, therefore, that the dismissal of his appeals would not result in a violation of his rights under Article 1 of the First Protocol .

“36. As regards the submissions made relating to Article 8 of the ECHR I also recognise that dismissal of the appeals would result in an interference with Jordan's home and private and family life. However that interference must be balanced against the public interest in pursuing the legitimate aims stated in Article 8 , particularly the economic well-being of the country, which includes the preservation of the environment, and the protection of the rights and freedoms of others. The objections to the development are serious ones, as I have said, and they cannot be overcome by the imposition of conditions on planning permissions. The public interest can only be safeguarded by the cessation of the residential use and the removal of the operational development. I am

varying the periods for compliance with the enforcement notices to give adequate time for the Appellant to seek, secure and move to new accommodation elsewhere and, if appropriate, to sell his mobile home, and to comply with all of the requirements of the notices. In all the circumstances I consider that the enforcement actions taken are necessary in a democratic society in furtherance of the legitimate aims stated. They do not place a disproportionate burden on Mr Jordan. I consider, therefore, that dismissal of the appeals would not result in a violation of his rights under Article 8 of the Convention.

"37. In reaching my Decision I have had regard to all of the other representations made.

5 There was no appeal against that decision to the High Court. Notwithstanding that, the claimant has not complied with the Enforcement Notice, but has remained living in the dwelling, which was unlawfully erected, and then has unlawfully retained it in residential use, and has unlawfully retained it in situ.

6 On 26th May 2006, just under eight months after receiving that decision letter, the claimant then made a planning application to retain that dwelling, which was refused by Thurrock Borough Council and was the subject matter of the appeal whose decision is now under challenge.

7 In connection with this appeal, the claimant's case had been that full planning permission should be granted. In a section of the representations which he and his wife made to the planning authority when it considered his application, he stated:

"Special Circumstances.

"My wife and I own the site and the Park Home, and are resident on the site, and own no other property or dwelling. We are both of retirement age, and if we were forced to leave and remove our home, we would have no where else to go. We would be homeless. We have no savings, a mortgage is out of the question because of our ages.

"We do our best to upkeep the appearance of the site and surrounding landscape in accordance with the area.

"We are prepared to consider any variations, alterations etc, as the council see fit.

"We enjoy a wide local support for what we have brought to the site and the area and nobody wants to see it returned to its previous status. We just want to live there peacefully in our retirement and hopefully one day secure planning permission to build a proper bungalow.

"P.s. we have been paying council tax for approx the 2 ½ years we have resided there.

"Infringement of Human Rights?

"To have to remove our home may interfere with out human rights, as protected under Part 1, Article 8 and Article 1 of the first protocol of the Human Rights Act 1998 . Given that we own the site and Park Home, are resident on the site and own no other property or dwelling, our rights to respect for private family life and to property may be violated were we forced to vacate.

"Article 8 of the Act makes clear that a public authority should not interfere with this right except in accordance with the law and as necessary in protecting (inter alia) the rights and freedoms of others. Interference with such human rights is generally held to be permissible only where it is necessary for the preservation of the environment and is consequently in the public interest.

"Here it is the retention of the Park Home itself that best preserves the environment as opposed to reversion to a 'yard'. The wide local support for us clearly demonstrates how the public perceive their interests would be best preserved. In this instance if the application was rejected, it would achieve no more than to uphold policy, which in itself

is subject to review and objection.

"The Park Home development is not inappropriate development, being merely infilling in and otherwise residential area. The site is Brownfield and provides much needed housing in an area where pressure for new housing is high. In these circumstances our rights should prevail.

"If I can be of any further assistance please do not hesitate to contact me. I would welcome any opportunity to discuss this application further."

8 It is then appropriate to refer to the now challenged decision letter in full:

"Procedural Matters

"1. The mobile home is already in place. I have therefore considered this appeal as being an application for retrospective planning permission.

"Decision.

"2. For the following reasons, I dismiss the appeal.

"Main issues.

"3. I consider that the main issues in this case are:

"i) whether the proposal is inappropriate development in the Green Belt.

"ii) the effect of the development on the character and appearance of the area and the openness of the Green Belt.

"iii) the effect on highway safety and the free flow of traffic; and.

"iv) if inappropriate development, whether there are other considerations which clearly outweigh the harm to the Green Belt and any other harm thereby justifying the development on the basis of very special circumstances.

"Reasons.

"4. In 2005, 2 enforcement notices relating to this development were upheld on appeal (APP/M1595/C/04/1160778 & 1160779). Amongst other things, these appeals considered whether planning permission should be granted for the same development which is the subject of this current appeal, and the Inspector concluded that it should not. Those decisions, and whether there has been a significant change in circumstances since that time, are material considerations in my determination of this appeal.

"Development in the Green Belt.

"5. Government advice as set out in Planning Policy Guidance Note 2 : Green Belts contains a presumption against inappropriate development in the Green Belt and sets out a limited range of new buildings which are not considered inappropriate. This advice is reflected in policy GB of the Thurrock Borough Local Plan (1997). The appellant contends that the development amounts to limited infilling as provided for in PPG2 para 3.4 . I disagree that the development of this site can be viewed as 'infilling': it does not infill a gap between other buildings but rather extends the built-up area of this small enclave of development towards the A13. Furthermore, Local Plan policy GB4 clearly indicates where in the Borough such infilling would be accepted and the appeal site is not in one of the identified locations.

“6. I also note that under policy GB7 temporary dwellings are not permitted in the Green Belt except where mobile homes are proposed in connection with agriculture or other uses appropriate in the Green Belt, but that is not the case in this instance. I therefore conclude that the appeal development is inappropriate in the Green Belt and contrary to Local Plan policy GB1 and the advice in PPG2 . PPG2 states that inappropriate development is, by definition, harmful. Very special circumstances, which clearly outweigh the harm to the Green Belt and any other harm, must exist if such development is to be allowed.

“7. One of the purposes of including land within the Green Belt, as set out in PPG2 , is to assist in safeguarding the countryside from encroachment, and the guidance also states that the most important attribute of Green Belts is their openness. At the Hearing the Council explained that the previous uses of the site were unauthorised. Once the dual carriageway and slip road were built, the purpose of the site was to act as a buffer between the main road and the residential properties to the north. In the previous appeal the Inspector highlighted the mixed appearance and predominantly open character of the surrounding area and there is no evidence before me which shows that this has changed in the intervening period. I agree with his conclusion that development of the site with the mobile home (and the ancillary buildings which have also been erected) is detrimental to the character and openness of the Green Belt.

“Highway Safety.

“8. The site is at the junction of Bells Hill Road and the eastbound slip road leading off the A13. The access to the site is close to the junction and its associated pedestrian refuge. From what I observed at the site visit, traffic slows down on the slip road as drivers approach the roundabout to the east and when negotiating the turn into Bells Hill Road. Nevertheless, because of the banked verge and the high boundary fence on top of it, forward visibility from the slip road into Bells Hill Road is limited, as is right hand visibility from the appeal site, with considerable potential for conflicting movements, especially between vehicles entering Bells Hill Road and those turning right out of the appeal site. In my opinion, this would not be satisfactorily overcome by the provision of an ‘in-out’ driveway as the appellant suggested. As such, I conclude that the development is detrimental to highway safety and does not accord with Local Plan policy BE1 which requires, among other things, that designs should ensure that vehicular and pedestrian movements are made safe and convenient.

“Very Special Circumstances.

“9. The appellant has advanced various arguments centred around the historic use of the site and its appearance and role in the Green Belt (which were all addressed in the previous appeals) which, he contends, amount to very special circumstances as to why this development should be allowed contrary to Green Belt policy.

“10. I do not accept that the development has had the advantage of improving the character and appearance of the adjoining residential area and making use of a derelict site which has been, and could in the future be, subject to unauthorised use. Rather, as I have already found, it is development which is inappropriate in the Green Belt and which is harmful to its openness. The appeal development itself was carried out without planning permission and the Council has powers to deal with any future unauthorised uses should the need a rise.

“11. Besides, PPG2 indicates that it is not the quality of the landscape which is a material factor in the inclusion of land within the Green Belt or to its continued protection. It is the purposes of including land in the Green Belt which are of paramount importance and which should take precedence. To my mind the purpose of safeguarding the countryside from encroachment is not served by the appeal development. While the site may adjoin an enclave of residential and other development, it is fringe areas such as this which are particularly vulnerable to development pressures and which, cumulatively, can result in the gradual erosion of the

Green Belt. Although Planning Policy Statement 3: Housing (PPS3), which has superseded PPG3 referred to by the appellant, promotes the use of previously-developed land, this does not override the PPG2 policy of protection of the Green Belt from inappropriate development.

"12. The appellant argues that he and his wife own the site and the mobile home and that they have no other property or dwelling. Nonetheless, whether or not the appellant had contrary information from an adviser, the Council made it clear before the appellant moved to the site that its development for residential purposes would be contrary to both national and local Green Belt policy. This included informal officer advice in the late 1990s and the refusal of an outline planning application in 2002. In addition, the time for compliance with the enforcement notice was extended by the previous inspector in 2005.

"13. Having weighed these matters against the planning merits of the case, I consider that these arguments do not, either individually or cumulatively, outweigh the harm due to the inappropriateness of the development in the Green Belt and the other harm which I have identified in terms of character, openness and highway safety. Therefore, no very special circumstances exist to justify the grant of planning permission.

"Other Matters.

"14. The appellant asserts that having to remove his home would violate his human rights under Article 8 and Article 1 of the First Protocol of the European Convention on Human Rights . In respect of Article 8 , I recognise that refusal of this appeal would interfere with the appellant's home and family life. However, this must be weighed against the wider public interest. I have found that this development is inappropriate in the Green Belt and harmful to its openness, and is detrimental to highway safety. I am satisfied that these legitimate aims can only be adequately safeguarded by the refusal of permission. On balance, I consider that the dismissal of the appeal would not have a disproportionate effect on the appellant.

"15. Similarly, in balancing the appellant's rights against the public interest served by planning control in compliance with the requirements of Article 1 of the First Protocol, I consider that the interference with the appellant's peaceful enjoyment of is property is not disproportionate.

"16. I therefore conclude that dismissal of the appeal would not be a violation of the appellant's human rights.

"Conclusion.

"17. Overall, I find that there has been no material change in circumstances which would lead me to a different conclusion from that of the previous Inspector. For the reasons given above and having regard to all other matters raised, including local support for the development, I conclude that the appeal should be dismissed.

9 For the claimant, Mr Willers contends as follows:

(a) Because the decision to refuse permission would require the claimant to leave his home, Article 8 of the European Convention of Human Rights was therefore engaged. Although it is accepted that the Claimant never argued that he should receive a permission with a condition requiring removal after a number of years (a so called "temporary permission") the Inspector should have addressed whether such a permission should be granted, because it is a way in which the Article 8 rights of the claimant could have been protected. Given the fact that the claimant was unrepresented at the hearing, it was incumbent on her to do so.

(b) The effect of a decision on Article 8 rights should not be addressed as any other material consideration, or as part of the very special circumstances in the test under the

Planning Policy Guidance Note Two , but as a separate matter.

(c) If I accept that the question of whether a temporary permission should be granted was a material consideration which the Inspector had failed to have regard to, or was an issue which she had failed to address, then, unless I consider that the First Defendant has shown me that it could have made no difference to the outcome, I must quash the decision. (The approach in *Simplex GE Holdings Limited v Secretary of State for the Environment [1988] 3 PLR 25* .)

(d) Mr Willers relied on *Queen (ex party Daly) v Secretary of State for Home Affairs [2001] 2 WLR 1622* , Lee v First Secretary of State [2003] EWC 3235 (Admin), *Francis v First Secretary of State [2008] EWCA Civ 890 (CA)* , and South Oxfordshire District Council v Secretary of State for the Environment Transport and Regions [2002] 2 All ER 667 .

10 For the First Defendant Secretary of State, Mr Sharland contends that:

(a) As the matter of temporary permission was never raised before the Inspector, she was not required to address it.

(b) In fact, she did address it by inference, namely by her reference to the previous decision letter.

(c) That even if she had done so, it is most unlikely that permission would have been granted.

11 Mr Sharland relied on the Francis case and also *Chapman v UK [2001] 33 EHRR 18* , R (ex parte SB) v Governors of Denbigh School [2007] 1 AC 1000 and *Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19* .

12 I also asked counsel to address me on three other decisions: *O'Brien and others v South Cambridgeshire District Council [2008] EWCA Civ 1159* , Lough v First Secretary of State [2004] 1 WLR 2257 , and McCarthy and another v Secretary of State for Communities and Local Government [2006] EWHC 3287 . Their relevance will become apparent.

13 I start by identifying the statutory context for the determination of planning appeals. Like the planning authority, an Inspector on an appeal must comply with section 70 of the Town and Country Planning Act . I recite section 70 :

“70. Determination of applications: general considerations.

“(1) Where an application is made to a local planning authority for planning permission -

“(a) subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or.

“(b) they may refuse planning permission.

“(2) In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations.”

14 Are the Article 8 rights to be addressed under subsection (2) or otherwise? I do not accept Mr Willers' argument that they must be addressed discretely. In terms of the correct approach

generally, one may refer to the Denbigh School case at paragraphs 27–31 per Lord Bingham of Cornhill and to the Belfast case at paragraph 15 per Lord Hoffman. The law does not require that there is some formula to be applied to decision making, whereby one stands back after a decision has been formulated and asks whether the Article in question requires a different answer. The fundamental question is whether, looking at the decision as a whole, the Article 8 rights have been addressed appropriately. That approach is also the one adopted in the field of planning decisions. In *O'Brien and others v South Oxfordshire District Council [2008] EWCA Civ 1159* , Lord Justice Keene referred to my decision in McCarthy as follows at paragraph 6.

> "The applications were dismissed by His Honour Judge Gilbart QC, sitting as a Deputy High Court Judge, on 20 December 2006. He found that the Secretary of State had performed the kind of balancing exercise required by this court's decision in Lough so as to satisfy Article 8 of the European Convention on Human Rights and that the decision was not legally flawed. Permission to appeal against that High Court decision to this court was refused both on the papers and at an oral hearing."

15 In McCarthy I said the following about the correct approach:

> "47. I deal lastly with Mr Willers' arguments on Article 8 of ECHR . He contends that there is a 2 stage test in *Samaroo v Sec of State for Home Department [2001] EWCA Civ 1139* per Dyson LJ, and that the Secretary of State failed to apply it here. Mr Mould QC drew the court's attention to the subsequent *Court of Appeal decision in Lough v First Secretary of State [2004] EWCA Civ 905 [2004] 1 WLR 2557* in which Pill and Keene LJJ (Scott Baker LJ agreed with both of their judgements) considered Article 8 and Samaroo in the context of planning decisions.
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> "48. In Samaroo Dyson LJ propounded a 2 stage test, summarised succinctly in Lough at paragraphs 18 - 19 by Pill LJ:
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> "18. The applicant Samaroo was convicted of serious drug offences and made subject to a deportation order. He challenged the order on the ground that it would involve an interference with the right to family life under Article 8(1) of the Convention and that such interference was not justified under Article 8(2). Dyson LJ referred to the doctrine of proportionality, as explained by Lord Steyn in *R v Secretary of State for the Home Department ex parte Daly [2001] 2 AC 532* , (Daly involved an examination of the privileged correspondence of a prisoner.) Both Samaroo and Daly involved a direct issue between state powers and individual rights. In Samaroo , Dyson LJ stated, at paragraph 19, that:
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> "In deciding what proportionality requires in any particular case, the issue will usually have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights? … The essential purpose of this stage of the enquiry is to see whether the legitimate aim can be achieved by means that do not interfere, or interfere so much, with a person's right under the Convention".
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> "19. At paragraph 20, Dyson LJ stated:
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> "At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention Rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons?"
>
> "Dyson LJ concluded, at paragraph 25:
>
> "I would, therefore, hold that in a case such as the present, where the legitimate aim cannot be achieved by alternative means less interfering with a Convention Right, the task for the decision maker, when deciding whether to interfere with the Right, is to strike a fair balance between the legitimate aim on the one hand, and the affected person's Convention Rights on the other".

“49. In Lough nearby residents opposed a new development at Bankside near the south bank of the Thames in London, and claimed in objections at a public inquiry that it would interfere with their residential amenities, which they contended would amount to an interference with their rights under Article 8. They argued that the Inspector had failed to consider whether the interference with their Article 8 rights was necessary and proportionate. At paragraph 23 Pill LJ addressed the scope and relevance of Article 8 in the context in which planning issues fall.

““The scope of Article 8 in context.

“23. It is necessary to consider the scope of Article 8 and its relevance and application in a situation where there are competing private interests between landowners and also a public interest in beneficial land use.

“50. Pill LJ then went on to consider the authorities (both domestic and in the European Court of Human Rights). At paragraphs 43 to 54 he stated:

““43. It emerges from the authorities:

“(a) Article 8 is concerned to prevent intrusions into a person's private life and home and, in particular, arbitrary intrusions and that is the background against which alleged breaches are to be considered.

“(b) Respect for the home has an environmental dimension in that the law must offer protection to the environment of the home.

“(c) Not every loss of amenity involves a breach of Article 8 (1). The degree of seriousness required to trigger lack of respect for the home will depend on the circumstances but it must be substantial.

“(d) The contents of Article 8(2) throw light on the extent of the right in Article 8(1) but infringement of Article 8(1) does not necessarily arise upon a loss of amenity and the reasonableness and appropriateness of measures taken by the public authority are relevant in considering whether the respect required by Article 8(1) has been accorded.

“(e) It is also open to the public authority to justify an interference in accordance with Article 8(2) but the principles to be applied are broadly similar in the context of the two parts of the Article.

“(f) When balances are struck, the competing interests of the individual, other individuals, and the community as a whole must be considered.

“(g) The public authority concerned is granted a certain margin of appreciation in determining the steps to be taken to ensure compliance with Article 8.

“(h) The margin of appreciation may be wide when the implementation of planning policies is to be considered.

“44. I add that the present alleged breach of Article 8 is based on a departure from the development plan but, following the reasoning in Hatton , where a government scheme regulating movement of aircraft was under consideration, the Court would adopt the same approach whether it is in a departure from the development plan or an application of the development plan itself which is alleged to be in breach of Article 8. Of course, the contents of the development plan, and the procedure by which it is adopted, should be Convention compliant.

“Conclusions.

“45. In the light of the authorities, and the Inspector's findings of fact, Article 8 made no significant impact upon the task to be performed by the Inspector. Article 8 does not achieve the radical change in planning law inherent, although not acknowledged as such by the Appellants, in the submission summarised at paragraph 22 of this judgement that consideration should have been given to the possibility that the benefits achieved by the grant of permission could have been achieved in some other way or on

some other site. Article 8, with its reference to the protection of the rights and freedoms of others, and Article 1 of the First Protocol with its reference to a person's entitlement to the peaceful enjoyment of his possessions, acknowledge the right of a landowner to make beneficial use of his land subject, amongst other things, to appropriate planning control. As Sullivan J stated in Malster , at paragraph 89, in relation to Article 1, the prospective developer "is equally entitled to the enjoyment of its possessions."

"46. I am far from persuaded that, in circumstances such as the present, domestic law in general, and the planning process followed in this case in particular, fail to have regard to the Article 8 rights of people in the vicinity of the appeal site, including the Appellants. Departure from a development plan, even if it is from a provision entitled 'Protection of Amenity' does not of itself involve a breach of Article 8. In his approach to his task, the Inspector struck a balance which was entirely in accord with the requirements of Article 8 and the jurisprudence under it. There has been nothing arbitrary about the procedure followed and the striking of the balance provided that reasonable and appropriate measures were taken to secure the Appellants' rights in accordance with Article 8(1). The approach the Court should adopt was stated by Lord Bingham of Cornhill in Daly at paragraph 23:

"Domestic courts must themselves form a judgement as to whether a Convention right has been breached (conducting such inquiry as is necessary to form that judgement)…"

"47. I find no breach of Article 8(1). Resort to Article 8(2) is not in my judgement necessary to uphold the decision, for the reasons I have given, but, if I am wrong about that, it provides, on the Inspector's findings, justification for the permitted development. I refer to the findings at paragraph 56 of the Inspector's decision together with an acknowledgement of the right of a landowner to make use of his land, as a factor to be considered.

"48. Recognition must be given to the fact that Article 8 and Article 1 of the First Protocol are part of the law of England and Wales. That being so, Article 8 should in my view normally be considered as an integral part of the decision maker's approach to material considerations and not, as happened in this case, in effect as a footnote. The different approaches will often, as in my judgement in the present case, produce the same answer but if true integration is to be achieved, the provisions of the Convention should inform the decision maker's approach to the entire issue. There will be cases where the jurisprudence under Article 8, and the standards it sets, will be an important factor in considering the legality of a planning decision or process. Since the exercise conducted by the Inspector, and his conclusion, were comfortably within the margin of appreciation provided by Article 8 in circumstances such as the present, however, the decision is not invalidated by the process followed by the Inspector in reaching his conclusion. Moreover, any criticism by the Appellants of the Inspector on this ground would be ill-founded because he dealt with the Appellants' submissions in the order in which they had been made to him.

"49. The concept of proportionality is inherent in the approach to decision making in planning law. The procedure stated by Dyson LJ in Samaroo , as stated, is not wholly appropriate to decision making in the present context in that it does not take account of the right, recognised in the Convention, of a landowner to make use of his land, a right which is, however, to be weighed against the rights of others affected by the use of land and of the community in general. The first stage of the procedure stated by Dyson LJ does not require, nor was it intended to require, that, before any development of land is permitted, it must be established that the objectives of the development cannot be achieved in some other way or on some other site. The effect of the proposal on adjoining owners and occupants must however be considered in the context of Article 8, and a balancing of interests is necessary. The question whether the permission has "an excessive or disproportionate effect on the interests of affected persons" (Dyson LJ at paragraph 20) is, in the present context, no different from the question posed by the Inspector, a question which has routinely been posed by decision makers both before and after the enactment of the 1998 Act. Dyson LJ stated, at paragraph 18, that "it is important to emphasise that the striking of a fair balance lies at the heart of proportionality".

"50. I am entirely unpersuaded that the absence of the word "proportionality" in the decision letter renders the decision unsatisfactory or liable to be quashed. I acknowledge that the word proportionality is present in the post- Samaroo decisions and the judgements of Sullivan J in Egan and Elias J in Gosbee but I do not read the conclusion reached by either judge as depending on the presence of that word or on the existence of a new concept or approach in planning law. The need to strike a balance is central to the conclusion in each case. There may be cases where the two-stage approach to decision making necessary in other fields is also appropriate to a decision as to land use, and the concept of proportionality undoubtedly is, and always has been, a useful tool in striking a balance, but the decision in Samaroo does not have the effect of imposing on planning procedures the straight-jacket advocated by Mr Clayton. There was no flaw in the approach of the Inspector in the present case.

"51. There remains the discrete question on the Inspector's finding "that matters of property valuation" do not amount to material planning considerations, and its bearing on Convention rights. I readily accept that a diminution in value may be a reflection of loss of amenity and may be taken into account as demonstrating such loss and its extent but, in his reply, Mr Clayton, as I understand it, sought to create diminution of value as a separate and distinct breach of Article 8 and Article 1 of First Protocol. Having regard to the background and purpose of each Article, I do not accept that submission. A loss of value in itself does not involve a loss of privacy or amenity and it does not affect the peaceful enjoyment of possessions. Diminution of value in itself is not a loss contemplated by the Articles in this context.

"52. I do not underestimate the importance to landowners of a loss of value caused by neighbouring developments but it does not in my view constitute a separate or independent basis for alleging a breach of the Convention rights involved. The weighing of interests should not be converted into an exercise in financial accounting to determine the loss to the respective landowners and to the community.

"53. I would uphold the conclusion and reasoning of the judge and dismiss the appeal."

"51. At paragraph 55 Keene LJ said this:

"I agree with Pill LJ that the process outlined in Samaroo , while appropriate where there is direct interference with Article 8 rights by a public body, cannot be applied without adaptation in a situation where the essential conflict is between two or more groups of private interests. In such a situation, a balancing exercise of the kind conducted in the present case by the inspector is sufficient to meet any requirement of proportionality."

"52. It is clear from the passages above in the judgements of Pill and Keene LJJ that.

"(a) One cannot simply read the two stage test across into the planning context;

"(b) Provided that the decision maker carries out a proper balancing exercise, the test of proportionality is met.

"53. Here the Secretary of State at paragraph 36 of the Decision Letter balanced the public interest (which lay in protecting the environment from the effects of the proposed development) against the interference with their home and family life which would result in the McCarthys and the other appellants having to use unauthorised sites or live by the roadside. He concluded that it was necessary in the public interest to refuse planning permission, and that that would not place a disproportionate burden on the Appellants. I can find no flaw in that reasoning, nor any failure to apply the precepts of the ECHR . It is precisely the kind of balancing exercise endorsed in Lough ."

16 That approach that I had adopted was expressly approved by the *Court of Appeal when dismissing an application for permission to appeal at [2007] EWCA Civ 510* . Sir Paul Kennedy said:

"As Mr Willers rightly submitted, the facts of Lough were such that the focus was on a balancing between two or more groups of private interests, but the observations made by the court in that case and, in particular, in the passages from Pill LJ which I have

> cited are clearly more widely applicable in a planning context and, as it seems to me, are of considerable assistance to any judge in the position that HHJ Gilbart was in, in the present case. Thus he was able to say at paragraph 52 of his judgement:
>
> "It is clear from the passages above in the judgements of Pill LJ and Keene LJ that:
>
> "a) One cannot simply read the two-stage test across into the planning context;
>
> "b) Provided that the decision maker carries out a proper balancing exercise the test of proportionality is met."
>
> "It seems to me that in the present case that was an entirely appropriate observation for the judge to make and I can find nothing to indicate that he was in any way misled as to the proper approach to the question of proportionality in this case. Indeed, as Richards LJ said when dealing with this matter on paper:
>
> "The judge was right to reject the contention that a rigid two-stage test of proportionality, as referred to in Samaroo, has to be applied in the context of a planning decision of this kind. The attempt to distinguish Lough is unsustainable: the present case is equally one where a balance has to be struck between the interests of the land owner seeking to develop his land, the interests of neighbouring land owners and the wider interests of the community and the protection of the environment."

17 It follows that the discrete approach favoured by Mr Willers is not one which should be followed. That being so, the issue of the effect on the claimant's Article 8 rights cannot and must not be addressed outwith the consideration of the planning merits generally.

18 With that in mind I address the nature of the task which the Inspector had to perform, given that this is a site in the statutory Green Belt. As this was not a class of developments falling within one of the excepted purposes (see Planning Policy Guidance note 2, paragraph 3.4) and was therefore by definition inappropriate, the policy burden lay on the Claimant to show that there were very special circumstances why the development should be permitted, which will encompass a judgement whether the harm is outweighed by "other considerations" (that is the paragraphs 3.1 and 3.2 of PPG2). In that process she had to consider the effect on the family life of the Claimant. I am prepared to hold that the effect of Article 8 is to add strength to arguments about personal circumstances.

19 To expect an Inspector to do so outside that process would lead to a very odd result, for in a case where she reached the conclusion that special circumstances did not exist, she would then have to consider granting permission for a reason which figured neither in the development plan, nor in the "other considerations" of PPG2 or the "material considerations" of section 70 . Such complexity is unnecessary for decision makers to give effect to Article 8 and I reject it, as I did in McCarthy .

20 I reject Mr Sharland's submission that the Inspector actually addressed whether a temporary permission should be granted. I consider that the decision letter does not admit of such an interpretation. That therefore leaves one central question about this decision letter: was she under a duty to address an argument which not been put before her?

21 In *Francis v Secretary of State [2008] EWCA Civ 890 the Court of Appeal* had to consider the often difficult point of a potentially significant issue which had not been ventilated before the Inspector - in that case literally, as it is a case about how to deal with the effect of cooking odours on neighbours. Mr Sharland relies on paragraphs 23 to 36 of Lord Justice Pill's judgement and paragraph 38 in Lord Justice Keene's judgement. It is helpful to refer to both judgements (with both of which Lord Justice Toulson agreed). I start at paragraph 21 of Lord Justice Pill's judgement.

> "21. I agree with the judge's finding that there is no basis on which the appellant and her advisers are entitled to say they were unaware of the council's position in relation to the appeal generally and to the need, in particular, as the authority perceived it, for a duct to be at a high level. There was, in my judgement, no reasonable basis for a belief that the council had changed its position.

“22. The issue which needs to be addressed is whether, in that situation, the inspector failed in his duties. It is necessary to consider the consequences of the above finding. The judge's use, in paragraph 41 of the words “relieve the inspector of any burden” was perhaps not the most appropriate. It might suggest that the principles expressed in other cases as to the inspector's duties did not arise. The issue is whether and to what extent duties arose in the light of the state of knowledge which must be imputed to the appellant and her representative.

“23. Reliance is placed on the decision of this court, in which I gave the leading judgement, in *Dyason v The Secretary of State for the Environment & Another [1998] JPL 778* , and the statement at page 784:

“There is a danger upon the procedure now followed by the Secretary of State of observing the right to be heard by holding a ‘hearing’, that can lead for such consideration is forgotten. The danger is that the “more relaxed” atmosphere could lead not to a “full and fair” hearing but to a less than thorough examination of the issues. A relaxed hearing is not necessarily a fair hearing. The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden upon an inspector.”

“I added:

“I add that each case must be determined on its own merits and plainly there are limits to the inspector's duty to ask questions… the court will need to enquire, by reference to the decision letter, whether there has been a sufficient consideration to the various cases put forward by a party and of any challenge to it.”

“24. Laws LJ agreed with that approach.

“25. In LB Croydon v Secretary of State for the Environment [1999] EWHC Admin 748 , Keene J, as he then was, stated in relation to an informal hearing, at paragraph 43:

“I return to the submission about the need for the Inspector to have adopted an inquisitorial role. No one suggests that an Inspector is required to engage in a search for material not put before him. What the Dyason case establishes is that, when there is an informal hearing which, as a matter of procedure, normally excludes cross-examination, the Inspector has to play an enhanced role in order to resolve conflicts of evidence. In addition, such an Inspector must not arrive at a finding adverse to a party without having put the point to the party in question or his witness, and that is what happened in the Dyason case.”

“26. For the appellant, Mr Marshall relied on the decision of Collins J in The Queen (on the application of Singh) v First Secretary of State [2004] EWHC 2366 Admin. That was a written representations case but, as one of the reasons for quashing the decision of the inspector, Collins J stated:

“The inspector ought to have been alerted to conclude that the appellant and those advising him had ‘taken their eyes off the ball’.”

“That, it is submitted, supports the claim that decisions may be quashed, even if, as on my finding, the appellant and Mr Stanway ought to have known of the position of the council.

“27. The task of this inspector was a difficult one. At the meeting he was faced by over 30 people. Mr Marshall agreed that it was more a public meeting than the type of “round table” discussion contemplated by the informal hearing procedure. A public local inquiry had not been requested by the appellant, notwithstanding the technical issues involved in relation to ventilation and the extent of local interest and opposition.

“28. There is, in my judgement, a requirement upon an appellant, whose appeal it is, to put his case fully before the inspector. The appellant's advisers should have been aware, from their long involvement with the scheme, of the issues, including whether the local authority were seeking to insist upon a high level duct. The appellant presented her case to the inspector on the basis that a low level duct was all that was necessary.

In the circumstances of this case the appellant could not expect the inspector to enquire of the appellant's representative why he was putting the case as he was, and why he was not putting it in a different way. Mr Stanway did not confront the position taken by the council; he did not seek to contrast the effect of a low level scheme with that of a high level scheme.

“29. Further complaint is made that the inspector relied on evidence about issues of noise and odours that had not been explored at the meeting. Similarly, on those detailed matters it should have been obvious to Mr Stanway that those issues were live issues which needed to be addressed. Further, the inspector was required to consider not only the position as between the appellant and the council's position as expressed, but also the more general public interest and the representations of other people present. Having regard to the guidance he had been given, clearly he would be concerned to ensure that all present who wanted to make a contribution, and to put their point of view, were permitted to do so.

“30. On behalf of the appellant the case on which he sought to rely on the issues present should have been put forward. With the benefit of hindsight, a succinct written statement of that case handed to the inspector at the beginning of the discussion would have been helpful. No question was raised with the council's representatives present, by Mr Stanway, as to whether they were persisting with their requirement for a high level scheme. That would have been the easiest and, with respect, most sensible action to take if Mr Stanway was in any doubt as to what case, by way of objection, he had to meet. An inspector has his duties, but he is entitled to rely on a properly represented appellant to put the case fully to him.

“31. The case is more akin to that of Ouseley J in *Castleford Homes Ltd v Secretary of State & RB Windsor & Maidenhead [2001] EWHC Admin 77* than it is to Dyason . That was a planning inquiry, where the judge found that the appellant may not have realised what the council's position was on a particular point. Ouseley J analysed the situation in this way, at paragraph 63:

“It can be said that an appellant at an Inquiry should be alert to the potential rejection of its arguments by an Inspector; but that is not so easy to say fairly when the Council has not made clear its opposition to that particular argument and an Inspector does not seek to clarify the position.”

“Ouseley J added:

“No question was put by the Inspector alerting the Claimant to the possible conclusion that the real answer to the debate between the Claimant and the Council was on-site provision for residents alone in the event that he rejected the Council's primary position.”

“Paragraph 65:

“Whilst an Inspector can reasonably expect parties at an Inquiry to explore and clarify the position of their opponents, if an Inspector is to take a line which has not been explored, perhaps because a party has been under a misapprehension as to the true position of its opponents, as in my view happened here, fairness means that an Inspector give the party an opportunity to deal with it. He need not do so where the party ought reasonably to have been aware on the material and arguments presented at the Inquiry that a particular point could not be ignored or that a particular aspect needed to be addressed.”

“32. Ouseley J went on to hold, on the facts of that case, that the appellant's attention should have been drawn to the relevant issue. In my judgement the present case is very much on the other side of the line. This was a case where the inspector was entitled to assume that the appellant knew of the issue in relation to the high level duct, and on noise and odours, and was entitled to conclude that, advisedly, the appellant was putting her case as it was put, namely to stake all on the adequacy of the low level system.

“33. I would add that, even on the case put forward, technical evidence, which one might have expected to be available in support, was not available. Before the court is a

long statement from Mr Stanway in which he attempts to deal with matters relied by the inspector, though in the context of the submission that the inspector was not entitled to have regard to them. He refers, at paragraphs 28 and following of his second statement, to further information obtained to the effect that Mr Love's expert opinion is that “to all intents and purposes clean air” comes out of his system, and to his further opinion, which was available only well after the hearing, that “noise generated by the fans would be insignificant”. Even had the inspector raised questions at the informal hearing on those points Mr Stanway would not have had an answer. It is submitted that telephone calls to Mr Love would have followed and the position might have been remedied. That illustrates the need for an appellant to put his case to the inspector. Regrettably in this case reliance appears to have been placed on the inspector exceeding what, in my judgement, was the function to be expected of him when conducting his own investigation.

“34. I would further hold, in agreement with the judge that, even on the low level scheme, the inspector was entitled to make the findings he did. Mr Marshall has addressed the court on the basis of the findings of the inspector at paragraph 19 but, though it is perhaps surprising that these are separately expressed, the inspector also reached conclusions in paragraphs 24 and 25 which require consideration. The inspector made findings, with which the judge agreed, that there were limitations in the low level system such as to make it unsatisfactory. In my view, the inspector was entitled to come to the conclusion he did on the low level scheme.

“35. I would not accept the judge's finding, at paragraph 45, that it had not been proposed by the appellant that the permeation of smells should be dealt with by way of a condition. Mr Marshall has pointed to a suggestion made in the appellant's written case that a condition might be appropriate. However, there was no evidence available to Mr Stanway, had the point been raised with him, as to whether it was technically feasible to seal the premises in the way it is now proposed they could be sealed. I have referred to the later evidence of Mr Love (not available to Mr Stanway at the hearing) in that respect. I am far from saying that in every case where a condition is to be imposed detailed technical evidence of feasibility has to be available. However, in the context of submissions made by objectors to this scheme, as well as by the council itself, if this point was to be pursued, evidence of feasibility should, in my judgement, have been available.

“36. There was, in the inspector's approach in Dyason , a failure which led to the decision of this court. There has been a failure in the present case but one, in my judgement, on the appellant's behalf. An inspector's duty to investigate does not extend to the length which it is submitted in this case it should. It does not relieve an appellant of the responsibility of preparing and setting out a case which can form the basis of the discussion at the meeting. It is not for an inspector always to root out a case which the appellant has singularly, with respect, failed to put; particularly where, as in this case, the appellant is represented by someone skilled in the field of planning.

“37. For those reasons I would dismiss this appeal.

22 Paragraph 38 of Lord Justice Keene's judgment reads:

“38. I agree. Had the appellant not been professionally represented at the hearing by a chartered town planner who was also a chartered architect, there would have been a stronger argument for a more interventionist role to have been played by the inspector at this informal hearing; but when an appellant is professionally represented, an inspector is normally entitled to expect that the appellant's case will be adequately put forward by that representative and will address at least those issues which have been identified beforehand by the pre-enquiry statements and such other documents as the planning authority's reasons for refusing permission. Such was the situation here. The planning authority's objection to a low level ventilation system had been clearly flagged up in advance of the hearing, and in those circumstances the inspector could properly proceed on the basis that if the appellant sought to establish that that objection was invalid, then evidence would be produced to that effect. That being so, I for my part am

> not persuaded that the procedure adopted here was unfair. I too would dismiss this appeal."

23 I think one must be careful here. There are some issues that are only material if a point has been made about them; the way in which a heating duct or ventilation duct works being a good example. But there are other matters which are material, not because the parties have chosen to refer to them, but because of their intrinsic nature. A right under the European Convention of Human Rights is relevant not because one or other party refers to it, but because it is so by operation of law. There can also be no doubt that a temporary permission would have permitted the claimant and his wife to live for longer in the dwelling then they could do if permission were refused. I do not accept Mr Sharland's submission that had Lord Justices Pill and Keene thought that cases relating to temporary permissions were different, they would have said so. In my judgement Francis is an authority (and an important one) on the duty of an Inspector to deal with an issue raised, in other words the first category, and does not seek to set down a rule that a failure by a party to refer to an undoubtedly material consideration thereby renders it immaterial (i.e. the second category). Indeed the references in Francis to what should have been done had the appellant in that case been unrepresented shows that it is not to be taken as being prescriptive in all cases.

24 As the Inspector did accept that Article 8 rights were engaged, I consider that she did have to consider whether or not there was a means short of a full planning permission whereby they could be protected. As I pointed out in McCarthy in paragraphs 31 to paragraph 34, the approach in paragraph 109 of Circular 11/95 is legally flawed, and a temporary permission can cause less harm than a permanent permission.

25 However I turn now to Mr Sharland's third point, that is whether, had the Inspector considered the temporary permission issue, it would have made any difference to the decision.

26 The fact that the dwelling had been put there unlawfully, and the claimant had failed to comply with a lawful requirement to remove it, means that when considering whether the requirement that they leave their home is proportionate to the legitimate aim to be pursued, less weight attached to the argument that the claimant should not have to vacate his home; see *Chapman v United Kingdom [2001] 33 EHRR 18* at paragraph 102.

27 No argument has been addressed to me that the Green Belt policy conflicts with Article 8 , nor that it is not a legitimate way of protecting the environment. There can in my judgement be no doubt that the protection of the Green Belt is a legitimate aim pursued for reasons which are protective of the environment and of the interests of the community generally. The case for the claimant on Article 8 grounds is there a comparatively weak one.

28 His case had been considered in 2005, when his arguments for both a full and a temporary permission had been rejected, and he and his wife had been given eight months to leave. The development causes harm to the character and openness of the area, thus conflicting with the most important attribute of the Green Belt. It is also harmful to the safety of those using the highway. The fact that someone wishes to living in a house in the Green Belt, albeit temporarily, cannot realistically be regarded as "very special circumstances" least of all when the same case had been rejected just two years earlier. It is thus inconceivable that the Inspector would have granted a temporary planning permission had she considered it.

29 I am therefore abundantly satisfied that the Simplex test is passed.

30 The claim therefore fails. The time has come for the claimant to come to terms with the fact that he has no right to live on the site. It is for the local authority to consider what action it should take to enforce compliance with the Enforcement Notice.

31 MR SHARLAND: My Lord, I think I will let my learned friend start.

32 JUDGE GILBART QC: Yes, indeed.

33 MR WILLERS: My Lord, hesitantly I rise to my feet just in this respect: it seems clear that your Lordship has refused the application on the Simplex test and that being an exercise of discretion it might be very difficult to persuade anybody, let alone your Lordship, that permission should be granted to appeal that point. But can I formally ask for it at this stage and then go away and

consider it in the cold light of day whether or not, if your Lordship refuses it, permission should be sought elsewhere.

JUDGE GILBART QC: Thank you.

34 MR SHARLAND: My Lord, I do not think we need to say anything on this issue.

35 JUDGE GILBART QC: Mr Willers, it is an exercise of my discretion. I cannot think of a stronger case for the application of a Simplex test than this one. I think an appeal would be hopeless, that is my view and I am refusing you permission.

36 MR WILLERS: My Lord, those words will be at the forefront of my mind when I consider any further steps.

JUDGE GILBART QC: Your client must not throw good money after bad.

MR WILLERS: Exactly and that will be my advice.

37 MR SHARLAND: My Lord, that just leaves the issue of costs. Do you have the summary schedule?

JUDGE GILBART QC: No.

MR SHARLAND: My Lord, I can hand that up now. It does not appear to have reached you, I do not think my learned friend resists the principle of costs.

MR WILLERS: No.

JUDGE GILBART QC: Just one moment.

MR SHARLAND: Of course, my lord.

JUDGE GILBART QC: Yes, Mr Sharland.

38 MR SHARLAND: I do not think my learned friend resists the principle or the actual quantum. The claimant is legally aided but subject to a contribution, so I suggest the appropriate order in this case is that the claimant to pay defendant's cost.

JUDGE GILBART QC: What is the extent of the claimant's contribution?

MR SHARLAND: I do not know, my Lord.

JUDGE GILBART QC: That is the important question.

39 MR WILLERS: I can tell your Lordship that they pay £102.52 a month and they have been paying for nine months.

JUDGE GILBART QC: What is the assessed contribution, your instructing solicitor-

MR WILLERS: That is it as I understand it, my Lord, the amount to be paid at that rate until the end of the proceedings; so it amounts to, as I understand it, a figure of about £900.

40 JUDGE GILBART QC: Mr Willers, my understanding is that where there is a legally assisted claimant the normal order would be that the award of costs would be limited to the amount of the contribution.

MR WILLERS: That is my understanding as well, my Lord. I have taken that from an excerpt from the White Book.

JUDGE GILBART QC: That is what I wanted to know, what the contribution was.

MR WILLERS: That is the contribution, it is literally-

JUDGE GILBART QC: How much do you say it is?

MR WILLERS: I have not calculated it, my Lord, but it is £922.68.

JUDGE GILBART QC: Thank you.

41 Mr Sharland, do you want to say anything about that?

MR SHARLAND: Pardon, my Lord.

JUDGE GILBART QC: Do you want to say anything about that?

MR SHARLAND: My Lord, if our costs were limited to £900 payable by the claimant within 28 days.

JUDGE GILBART QC: I am going to allow a little longer than that.

MR SHARLAND: Of course, my Lord.

42 JUDGE GILBART QC: I am going to allow three months-

MR WILLERS: I am very grateful, my Lord, thank you.

JUDGE GILBART QC: - because I do realise they have to move house. I am going to award costs to the first defendant, the sum of £922.68 to be payable within three months of today's date; and I order legal aid taxation of the legal aid assisted claimant's cost.

MR WILLERS: I am very grateful, thank you very much, my Lord. Thank you for hearing the matter.

43 My Lord, can I trouble you just for one other point, your Lordship has ordered that the defendant's pay that sum within three months. It is just this point really, the Legal Services Commission have determined that they have the ability to pay £102.52 per month on their income. Clearly if your Lordship's order gives them three months they are going to have to pay that sum within three as opposed to nine months and therefore it is going to put them in grave difficulties. Can I ask for more time?

MR SHARLAND: My Lord, we are happy with the approach-

44 JUDGE GILBART QC: I do not like orders to drift around for months, I am prepared to go for six.

45 MR WILLERS: I am grateful, my Lord, thank you very much. Apologies for not having made the point earlier.