# *274 Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government and others

Positive/Neutral Judicial Consideration

**Court**
Court of Appeal (Civil Division)

**Judgment Date**
24 October 2014

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[2014] EWCA Civ 1386
[2015] P.T.S.R. 274

ICLR

Court of Appeal

Sullivan , Tomlinson , Lewison LJJ

2014 Oct 9; 24

*Planning—Development—Green Belt land—Planning inspector dismissing appeal against refusal of planning permission for development on Green Belt land—Inspector taking non-Green Belt harm into account when assessing whether very special circumstances existing justifying inappropriate development—Whether "any other harm" including non-Green Belt harm—National Planning Policy Framework (2012), paras 87, 88*

The local planning authorities refused the claimant's application for planning permission to construct a hard runway to replace existing grass runways, together with ancillary infrastructure, at its aerodrome on Green Belt land. An inspector appointed by the Secretary of State dismissed the claimant's appeal, holding that the proposal was inappropriate development for the purposes of para 87 of the National Planning Policy Framework [1] , and that very special circumstances to justify the development did not exist. Para 88 of the framework provided that very special circumstances within para 87 would not exist unless "the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations". In deciding that very special circumstances did not exist, the inspector took into account non-Green Belt harm, namely harm to landscape character, adverse visual impact, noise disturbance and adverse traffic impact. The judge upheld the claimant's challenge to the inspector's decision under section 288 of the Town and Country Planning Act 1990 and quashed the decision, holding that "any other harm" in para 88 meant "any other harm to the Green Belt" and that, therefore, the inspector had erred in taking non-Green Belt harm into account. The judge had reached the opposite conclusion in a different case concerning the meaning of the phrase "any other harm" in para 3.2 of Planning Policy Guidance Note 2 ("PPG2"), which was materially the same as para 88 of the framework, although she found that that case had not been wrongly decided.

On appeal by the Secretary of State and the local planning authorities—

*Held* , allowing the appeal, that the National Planning Policy Framework had not intended to change the underlying purpose of Green Belt policy as contained in PPG2, namely to protect the openness of the Green Belt; that since "other considerations" in favour of granting planning permission which would, by definition, be non-Green Belt factors, would go into the weighing exercise under para 88 of the framework, there was no sensible reason why "any other harm" which happened to be non-Green

 

Belt harm should not also go into the weighing exercise; that, therefore, "any other harm" in para 88 of the framework included non-Green Belt harm and such harm could be taken into account when determining whether very special circumstances existed to justify the approval of inappropriate development; and that, accordingly, the inspector's approach to "any other harm" in para 88 had been correct and the claimant's application under section 288 of the 1990 Act would be dismissed (post, paras 17, 31–33, 35, 36, 37).

*R (River Club) v Secretary of State for Communities and Local Government [2010] JPL 584 applied* .

Decision of Patterson J [2014] EWHC 2476 (Admin) reversed.

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The following cases are referred to in the judgment of Sullivan LJ:

Doncaster Metropolitan Borough Council v Secretary of State for the Environment, Transport and the Regions [2002] EWHC 808 (Admin); [2002] JPL 1509
*Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government [2014] EWCA Civ 825; [2014] PTSR 1471, CA*
R (Basildon District Council) v First Secretary of State [2004] EWHC 2759 (Admin); [2005] JPL 942
R (River Club) v Secretary of State for Communities and Local Government [2009] EWHC 2674 (Admin); [2010] JPL 584

The following additional cases were cited in argument:

Bayliss v Secretary of State for Communities and Local Government [2013] EWHC 1612 (Admin)
*East Northamptonshire District Council v Secretary of State for Communities and Local Government [2014] EWCA Civ 137; [2015] 1 WLR 45, CA*
Fordent Holdings Ltd v Secretary of State for Communities and Local Government [2013] EWHC 2844 (Admin); [2014] 2 P & CR 204
*Hunston Properties Ltd v Secretary of State for Communities and Local Government [2013] EWCA Civ 1610; [2014] JPL 599, CA*
*Lloyd v Secretary of State for Communities and Local Government [2014] EWCA Civ 839; [2014] JPL 1247, CA*
*R (Holder) v Gedling Borough Council [2014] EWCA Civ 599; [2014] JPL 1087, CA*
*R (Siraj) v Kirklees Metropolitan Council [2010] EWCA Civ 1286; [2011] JPL 571, CA*
R (Timmins) v Gedling Borough Council [2014] EWHC 654 (Admin)
R (Wildie) v Wakefield Metropolitan District Council [2013] EWHC 2769 (Admin)
*Simplex GE (Holdings) Ltd v Secretary of State for the Environment (1988) 57 P & CR 306, CA*
*South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953; [2004] 4 All ER 775, HL(E)*
*Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening) [2012] UKSC 13; [2012] PTSR 983, SC(Sc)*
*Wychavon District Council v Secretary of State for Communities and Local Government [2008] EWCA Civ 692; [2009] PTSR 19, CA*

**APPEAL** from Patterson J

By a CPR Pt 8 claim form issued on 27 March 2014 the claimant, Redhill Aerodrome Ltd, applied pursuant to section 288 of the Town and Country Planning Act 1990 to challenge the validity of the decision dated 18 February 2014 of Diane Lewis sitting as an inspector appointed on behalf of the first defendant, the Secretary of State for Communities and Local Government, refusing an appeal under section 78 of the 1990 Act against the decision of the second and third defendants, Tandridge District Council and Reigate and Banstead Borough Council, the relevant local planning authorities, refusing the claimant planning permission for the construction of a hard runway to replace existing grass runways at the claimant's aerodrome and associated works. By a judgment [2014] EWHC 2476 (Admin) handed down on 18 July 2018 Patterson J allowed the appeal and quashed the decision of the inspector.

 

By an appellant's notice filed on 19 August 2014 and pursuant to permission granted by the judge the defendants appealed on the ground that the inspector had been correct to note that the Secretary of State had continued to make Green Belt decisions on the same basis after March 2012 as before but the court had erred in that it did not give any or any sufficient effect to the plain meaning of the words of paras 87–88 of the National Planning Policy Framework (2012).

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At the conclusion of the hearing on 9 October 2014 the court allowed the appeal for reasons to be given later.

The facts are stated in the judgment of Sullivan LJ.

*James Maurici QC* and *Richard Kimblin* (instructed by *Treasury Solicitor* ) for the Secretary of State.

*Stephen Whale* (instructed by *Assistant Chief Executive (Legal), Tandridge District Council* and *Legal Services, Reigate and Banstead Borough Council* ) for the local planning authorities.

*Christopher Katkowski QC* and *Alistair Mills* (instructed by *Wragge Lawrence Graham & Co LLP* ) for the claimant.

The court took time for consideration.

24 October 2014. The following reasons were handed down.

SULLIVAN LJ

Introduction

1. On 9 October 2014 we allowed this appeal, set aside the judge's order quashing the inspector's decision, and dismissed the claimant's application under section 288 of the Town and Country Planning Act 1990 (“the Act”). We said that we would give our reasons in due course. These are my reasons for allowing the appeal.

Green Belt policy

2. The protection of the Green Belt around our main urban areas is one of the 12 “Core planning principles” in the National Planning Policy Framework (“the Framework”) (para 17). Paras 87–88 of the Framework say:

> “87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> “88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. ‘Very special circumstances’ will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and *any other harm* , is clearly outweighed by other considerations.” (Emphasis added.)

The issue

3. Do the words “any other harm” in the second sentence of para 88 of the Framework mean “any other harm to the Green Belt” as submitted by the claimant, and found by the judge, or do they include any other harm that is relevant for planning purposes, such as harm to landscape character, adverse visual impact, noise disturbance or adverse traffic impact, as submitted by the defendants?

The inspector's decision

4. In a decision dated 18 February 2014 a planning inspector dismissed the claimant's appeal against the refusals of planning permission by the ***277** second and third defendants for the construction of a hard runway to replace the existing grass runways,

together with ancillary infrastructure, at Redhill Aerodrome. The aerodrome, which straddles the boundary between the two local planning authorities, is located in the Metropolitan Green Belt.

5. There is no challenge to the inspector's conclusion that the proposal was inappropriate development in the Green Belt. In para 19 of her decision, the inspector said:

> "Submissions were made as to whether the Green Belt balancing exercise should follow the approach set out in the River Club judgment. Even though the judgment was made on the policy set out in Planning Policy Guidance 2, the wording in the Framework is very similar and I intend to follow the interpretation in the judgment. Furthermore this approach is reflected in decisions by the Secretary of State since the publication of the Framework."

6. The inspector duly followed the River Club approach: see below, paras 7–8. In her conclusions in para 123 she said:

> "The harm to the Green Belt by reason of the inappropriate development, the loss of openness and the encroachment into the countryside has substantial weight. The harm to landscape character has moderate weight and the slight adverse visual impact a small amount of weight. The limited harm to the quality of life and learning environment through noise disturbance and the failure to satisfactorily resolve the capacity and mode of travel issues provide additional weight against the proposal. The overall weight against the proposal is very strong. This conclusion takes account of the mitigation afforded by the use of planning conditions and planning obligations."

Having identified in para 124 the other considerations on the positive side—safeguarding employment, the prospect of additional jobs, the expansion of business aviation and support to business initiatives in the area—the inspector concluded, at para 125:

> "The other considerations, when taken together, do not clearly outweigh the potential harm to the Green Belt and the other identified harm. Very special circumstances to justify the development do not exist. The proposed hard runway development fails to comply with national policy to protect the Green Belt set out in the Framework …"

The River Club case

7. In *R (River Club) v Secretary of State for Communities and Local Government [2010] JPL 584, Frances Patterson QC, sitting as a deputy judge of the Queen's Bench Division, considered* the meaning of the words "any other harm" in para 3.2 of Planning Policy Guidance 2: Green Belts ("PPG2"). Paras 3.1 and 3.2 of PPG2 were in these terms:

> "3. Control over development
>
> *"Presumption against inappropriate development*
>
> "3.1 The general policies controlling development in the countryside apply with equal force in Green Belts but there is, in addition, a general presumption against inappropriate development within them. Such ****278*** development should not be approved, except in very special circumstances …
>
> "3.2 Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. 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. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt when considering any planning application or appeal concerning such development."

8. The claimant in the River Club case had submitted that the "other harm" referred to in the third sentence of para 3.2 meant harm to the purposes or objectives of the Green Belt, so that as a matter of law "any other harm" was constrained to Green

 

Belt harm: see para 21 of the judgment. The deputy judge rejected that submission for the reasons set out in paras 26–27 of her judgment:

> "26. Para 3.2 of PPG2 is within the section of the PPG entitled 'Control over development' and, within that part, sub-headed 'Presumption against inappropriate development'. In my judgment, para 3.2 is dealing with what is required to make inappropriate development acceptable in the Green Belt. That means considering the development as a whole to evaluate the harm that flows from it being inappropriate, together with any other harm that the development may cause, to enable a clear identification of harm against which the benefits of the development can be weighed so as to be able to conclude whether very special circumstances exist so as to warrant grant of planning permission.
>
> "27. It is of note that there are no qualifying words within para 3.2 in relation to the phrase 'and any other harm'. Inappropriate development, by definition, causes harm to the purposes of the Green Belt and may cause harm to the objectives of the Green Belt also. 'Any other harm' must therefore refer to some other harm than that which is caused through the development being inappropriate. It can refer to harm in the Green Belt context, therefore, but need not necessarily do so. Accordingly, I hold that 'any other harm' in para 3.2 is to be given its plain and ordinary meaning and refers to harm which is identified and which is additional to harm caused through the development being inappropriate. It follows that I reject the argument that the phrase is constrained and applied to harm to the Green Belt only."

The judgment below

9. The claimant applied under section 288 of the Act to quash the inspector's decision on the ground that she had erred in taking non-Green Belt harm into account when deciding whether the "other considerations" clearly outweighed the potential harm to the Green Belt by reason of inappropriateness and any other harm. The claimant submitted before Patterson J: (i) that the River Club case was wrongly decided; (ii) alternatively, that the policy context now contained in the Framework was so different that it required a different approach to the meaning of the words "any other harm" in para 88: see para 30 of the judgment.
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10. Having referred in para 53 to her earlier decision in the River Club case, Patterson J accepted the claimant's submission (ii) for the reasons set out in paras 54–57 of her judgment:

> "54. Now, as Mr [Christopher] Katkowski QC submits, the policy matrix is different in that all of planning policy is contained within the NPPF which is to be read and interpreted as a whole. That includes when, for individual considerations in a planning application, it is appropriate to refuse planning permission. For each of the individual considerations a threshold is set which, when it is reached or exceeded, warrants refusal. It is for the decision-maker to determine whether the individual impact attains the threshold that warrants refusal as set out in the NPPF. That is a matter of planning judgment and will clearly vary on a case-by-case basis.
>
> "55. Here, the individual non-Green Belt harms did not reach the individual threshold for refusal as defined by the NPPF. Was it right then to take them into account either individually or as part of the cumulative Green Belt harm assessments?
>
> "56. On an individual basis given the clear guidance given in the NPPF I have no difficulty in concluding that, in this case, it was not right to take the identified non-Green Belt harms into account. The revised policy framework is considerably more directive to decision-makers than the previous advice in the PPGs and PPGs. There has, in that regard, been a considerable policy shift. Where an individual material consideration is harmful but the degree of harm has not reached the level prescribed in the NPPF as to warrant refusal, in my judgment, it would be wrong to include that consideration as 'any other harm'.
>
> "57. That leaves the question of whether individual considerations can be considered together as part of a cumulative consideration of harm even though individually the evaluation of harm is set at a lower level than prescribed for refusal in the NPPF. In my judgment it would not be right to do so. That is because the Framework is precisely as it says: a framework for clear decision-making. It is a rewriting of planning policy to enable that objective to be delivered. It has no words that permit of a residual cumulative approach in the Green Belt when each of the harms identified against a proposal is at a lesser level than would be required for refusal on an individual basis. Without such wording, to permit a combination of cumulative adverse impacts at a lesser level than prescribed for individual impacts to go into the evaluation of harm of a

 

> Green Belt proposal seems to me to be the antithesis of the current policy. It would re-introduce a possibility of cumulative harm which the NPPF does not provide for. It is clear that the NPPF does contemplate findings of residual cumulative harm in certain circumstances, as is evident in para 32, where it deals with the residual cumulative impact of transport considerations. Such phraseology does not appear in the Green Belt part of the NPPF."

11. Patterson J did not accept the claimant's submission (i) (above). In para 60 of her judgment, she said:

> "In those circumstances I do not need to hold that my previous decision in the River Club case was wrong. It was taken in a different policy context where there was greater scope for flexible interpretation. That is ***280** not to say that I am ignoring or disregarding the jurisprudence in [ R v Manchester Coroner, Ex p Taj [1985] 1 QB 67 ]. The fact is that the instant decision had to be determined in a NPPF policy context. If the consequence of that means that non-Green Belt harms of a lesser effect than those which would warrant refusal on an individual basis cannot be considered as part of a cumulative impact of a development proposal, as set out, that is due to the effect of the wording of the NPPF."

The claimant's case

12. There was no respondent's notice, and the claimant's skeleton argument did not suggest that the River Club case was wrongly decided in the policy context of PPG2. At the outset of the hearing we asked Mr Christopher Katkowski QC to confirm that the claimant was not submitting that the River Club case was wrongly decided. Although he was reluctant to concede that the River Club case was rightly decided in the context of PPG2, he did not pursue a submission that it was wrongly decided, and confirmed that he was content to base the claimant's case on its submission (ii) (above).

13. Before Patterson J the claimant had relied on *Doncaster Metropolitan Borough Council v Secretary of State for the Environment, Transport and the Regions [2002] JPL 1509* in support of its submission that the River Club case was wrongly decided: see para 31 of Patterson J's judgment. That reliance was misplaced. In his oral submissions before us Mr Katkowski accepted that the only "other" harm that had been found by the inspector in the Doncaster case in addition to the harm by reason of inappropriateness was harm to the openness and purpose (preventing urban encroachment into the countryside) of the Green Belt: see para 19 of the judgment in that case. Thus the issue raised in the River Club case—whether "any other harm" was confined to harm to the Green Belt other than harm by reason of inappropriateness—did not arise in the Doncaster case.

14. The River Club case was decided on 7 October 2009 . I have referred to it at some length because the River Club approach to the meaning of "any other harm" in para 3.2 of PPG2 was well established as the existing Green Belt policy background against which the policies in the Framework were prepared, and published in March 2012. An earlier example of the same approach to the meaning of "any other harm" in para 3.2 of PPG2 can be seen in *R (Basildon) District Council v First Secretary of State [2005] JPL 942* : see para 18 of that judgment. Mr Katkowski accepted that there was no authority which supported a different approach to the meaning of "any other harm" in the context of PPG2.

The Framework

15. It is common ground that excluding non-Green Belt harm from "any other harm" in the second sentence of para 88 of the Framework would make it less difficult for applicants and appellants to obtain planning permission for inappropriate development in the Green Belt because the task of establishing "very special circumstances", while never easy, would be made less difficult. All of the considerations in favour of granting permission would now be weighed against only some, rather than all of the planning harm that would be caused by an inappropriate development.
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16. If it had been the Government's intention to make such a significant change to Green Belt policy in the Framework one would have expected that there would have been a clear statement to that effect. Mr Katkowski accepts that there is no such statement. In my judgment, all of the indications are to the contrary:

(1) While there have been some detailed changes to Green Belt policy in the Framework, protecting the Green Belt remains one of the core planning principles, the fundamental aim of Green Belt policy to prevent urban sprawl by keeping land

> open, the essential characteristics of Green Belts, and the five purposes that they serve, all remain unchanged. By contrast with para 86 of the Framework, which does change the policy approach to the inclusion of villages within the Green Belt, para 87 emphasises the continuation of previous Green Belt policy (in PPG2) in respect of inappropriate development: "As with previous Green Belt policy …"
> (2) The impact assessment in respect of the Framework published by the Department for Communities and Local Government in July 2012 said that "The Government strongly supports the Green Belt and does not intend to change the central policy that inappropriate development in the Green Belt should not be allowed". Under the sub-heading "Policy changes" the impact assessment said that "Core Green Belt protection will remain in place." It then identified four proposed "minor changes to the detail of current policy" which would resolve technical issues, but not harm the key purpose of the Green Belt, "as in all cases the test to preserve the openness and purposes of including land in the Green Belt will be maintained." On the face of it, paras 87 and 88 of the Framework would appear to constitute the "central policy" which the Government did not intend to change.
> (3) That there was no intention to change this aspect of Green Belt policy is confirmed by the inspector's statement in para 19 of her decision: that the River Club approach to "any other harm" in the balancing exercise is reflected in decisions by the Secretary of State since the publication of the Framework. We were not referred to any decision in which a different approach has been taken to "any other harm" since the publication of the Framework.

17. I readily accept that these indications are not conclusive. The Framework means what it says, and not what the Secretary of State would like it to mean: see the authorities cited by the judge in paras 18 and 19 of her judgment. However, if the Framework has effected this change in Green Belt policy it is clear that it has done so unintentionally. Mr Katkowski did not submit that there was any material difference between paras 3.1–3.2 of PPG2 and paras 87–88 of the Framework. He was right not to do so. The text of the policy has been reorganised (see paras 2 and 7 above), but all of its essential characteristics —"inappropriate development is, by definition, harmful to the Green Belt", so that it "should not be approved except in very special circumstances", which "will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations", and the "substantial weight" which must be given to "harm to the Green Belt"—remain the same. Mr Katkowski submitted that the change in policy was to be inferred, not from the wording of paras 87–88, but from the other policies in the Framework which "wrapped around" Green Belt policy, and which were, he submitted, very different in some respects from previous policies in the ****282*** earlier policy documents which were replaced by the Framework. At an early stage in his submissions he said that at the heart of his case was "Context, context, context".

Para 88

18. There is no dispute that the words in para 88 should not be construed in isolation, and must be construed in the context of the Framework as a whole, but Mr James Maurici QC and Mr Stephen Whale for the defendants rightly submit that the starting point must be the words of the policy in para 88. Not only are the words "any other harm" in the second sentence of that paragraph unqualified, they are contained within a paragraph that expressly refers, twice, to "harm to the Green Belt." When the policy wishes to restrict the type of harm to harm to the Green Belt it is careful to say so in terms.

19. The defendants also submit that the judge's approach to "any other harm" would lead to an imbalance in the weighing exercise that is at the heart of para 88. In para 51 of her judgment, having rejected the second and third defendants' submission that the effect on landscape character and the visual impact of the proposed development were harms to the Green Belt, Patterson J continued, at para 51:

> "The effect on the landscape character and the visual impact of a development proposal are clearly material considerations but are different from a consideration of harm to a Green Belt. If a development proposal contributed to the enhancement of the landscape, visual amenity and biodiversity within the Green Belt those could well be factors in its favour as part of a very special circumstances balancing exercise."

20. It is common ground that all "other considerations", which will by definition be non-Green Belt factors, such as the employment and economic advantages referred to by the inspector in her decision in this case, must be included in the weighing exercise. On the judge's approach, if an inappropriate development in the Green Belt is *beneficial* in terms of the appearance of the landscape, visual amenity, biodiversity or, presumably any other matter relevant for planning purposes such as the setting of a listed building, or transportation arrangements, it must be weighed in the balance when deciding whether "very special circumstances" exist; but if the inappropriate development is *harmful* to any of those non-Green Belt considerations, that

 

harm must not be weighed in the balance when deciding whether "very special circumstances" exist. I accept the defendants' submission that this imbalance is illogical. If all of the "other considerations" in favour of granting permission, which will, by definition, be non-Green Belt factors, must go into the weighing exercise, there is no sensible reason why "any other harm", whether it is Green Belt or non-Green Belt harm, should not also go into the weighing exercise.

21. Mr Katkowski submitted that it was not illogical to exclude non-Green Belt harm from the weighing exercise because the underlying purpose of the policy was to protect the openness of the Green Belt so that it could continue to serve one or more of the five purposes identified in para 80 of the Framework. Since there is no suggestion that the underlying policy purpose has changed as between PPG2 and the Framework—the essential characteristics and the five purposes of the Green Belt all remain the ***283** same—this argument is, in reality, a return to the submission that the *River Club case [2010] JPL 584* was wrongly decided. There is no dispute that the underlying purpose of the policy was, and still is, to protect the essential characteristic of the Green Belt—its openness—but there is nothing illogical in requiring all non-Green Belt factors, and not simply those non-Green Belt factors in favour of granting permission, to be taken into account when deciding whether planning permission should be granted on what will be non-Green Belt grounds ("very special circumstances") for development that is, by definition, harmful to the Green Belt.

The wider policy context

22. It is true that the "policy matrix" (see para 54 of the judgment) has changed in that the Framework has, in the words of the ministerial foreword, replaced "over 1,000 pages with around 50, written simply and clearly". Views may differ as to whether simplicity and clarity have always been achieved, but the policies are certainly shorter. There have been changes to some of the non-Green Belt policies, and there have also been changes to detailed aspects of Green Belt policy, not all of which were identified in the impact assessment: see eg *Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government [2014] PTSR 1471* .

23. However, I do not accept the premise which underlies the claimant's case, which was accepted by the judge, that the other policies "wrapping around" the Green Belt policy in paras 87–88 of the Framework are "very different" from previous national policy (see para 24 of the judgment), or that, as the judge put it, there has been "a considerable policy shift": see para 56 of the judgment.

24. The judge listed the policy differences relied on by the claimant in para 23 of the judgment. Mr Katkowski placed para 32 of the Framework at the forefront of his submissions, and it is the only policy expressly relied on by the judge in her conclusions: see para 57 of the judgment. I will deal with para 32 below (paras 26–33). I am not persuaded that any of the other policies relied on by Mr Katkowski is an example of a change of substance, as opposed to a shorter, and in the minister's view, a simpler and clearer, statement of well established policy. The policy in respect of heritage considerations is the best illustration of this point. In his oral submissions Mr Katkowski accepted that the policy contained in para 133 of the Framework was not substantially different from the policy guidance which was replaced by the Framework.

25. The judge did not refer to para 134 of the Framework which says that when a development would cause less than substantial harm to the significance of a designated heritage asset, that harm must be weighed against the public benefits of the proposed development. Mr Katkowski accepted that this approach did not represent any practical change from previous policy. If less than substantial harm to the significance of a designated heritage asset must be weighed against the public benefits of the proposed development in all cases, it is difficult to see why, in the case of an inappropriate development in the Green Belt which would cause harm that is less than substantial to the setting of a listed building, that harm should not be included as "any other harm" when the public benefits of the proposed development are being weighed in the balance as the "other ***284** considerations" in favour of granting permission for the inappropriate development.

Para 32

26. Para 32 of the Framework requires all developments that would generate significant amounts of traffic to be supported by a transport statement or transport Assessment. Account must be taken of a number of factors, including whether: "improvements can be undertaken within the transport network that cost effectively limit the significant impacts of the development". Para 32 continues: "Development should only be prevented or refused on transport grounds where the residual cumulative impacts of development are severe."

 

27. The "residual cumulative impacts" referred to in para 32 are impacts on the transport network. There is nothing new in the proposition that such residual cumulative impacts—ie those traffic impacts which would remain after any highway improvement to limit the significant impacts of the development have been carried out—are a material planning consideration which may, in appropriate cases, justify a refusal of planning permission. What is new is that part of the policy which, unusually, sets out the only basis on which planning permission should be refused on this ground: permission should only be refused on transport grounds "where the residual cumulative impacts of development are *severe* " (emphasis added).

28. While this is a change in transport policy, which is now more prescriptive in this respect, it does not provide any support for the claimant's submission that the Framework has implicitly effected a change in Green Belt policy. It does not follow from the (new) policy that permission should only be refused *on transport grounds* where the residual cumulative impacts of a development are severe, that when considering whether permission for inappropriate development in the Green Belt should be granted, an adverse residual cumulative transport impact of that development that is less than severe should be ignored when an inspector is deciding whether "the potential harm to the Green Belt by reason of inappropriateness, and *any other harm* ", is clearly outweighed by "other considerations", which would include any beneficial transport considerations, eg an offer to provide a bus service to the development, or to fund the construction of a new railway station.

29. Mr Katkowski repeated the submission that is referred to in para 25 of the judgment: that if the River Club approach to "any other harm" is followed an applicant for planning permission is "cheated" of the benefit of those policies in the Framework which prescribe the threshold at which particular harms will justify a refusal of planning permission. Para 37 of the claimant's skeleton argument explained the basis of that submission:

> "To take an easy example of the consequences of applying the River Club approach to the [Framework]: if a development is sited *outside* the Green Belt, it can 'only' be refused on transport grounds if the impact would be 'severe' (para 32) but if the site is in the Green Belt then either instead of or in addition to this very specific policy test, any adverse transport impact (even if far less than 'severe' and even if the impact was on roads outside the Green Belt) would lead to a refusal of permission unless 'clearly outweighed' by 'very special circumstances' under para 88."

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30. The judge accepted that submission, saying in para 56 of her judgment:

> "Where an individual material consideration is harmful but the degree of harm has not reached the level prescribed in the [Framework] as to warrant refusal … it would be wrong to include that consideration as 'any other harm'."

It is not clear whether the judge considered that where an individual non-Green Belt consideration did reach the impact level for refusal prescribed in the Framework, eg where there would be "significant harm" to biodiversity, such a consideration could then be taken into account in the weighing exercise as "any other harm". If that was the judge's approach, it was not supported by Mr Katkowski who submitted that non-Green Belt harm, whether or not it reached the impact level prescribed for refusal in the Framework on another ground, such as transport or biodiversity, was not "any other harm" for the purposes of para 88 of the Framework.

31. In my judgment, there are two fallacies in this submission. There is no question of an applicant or appellant being "cheated" of the benefit of another policy in the Framework which prescribes a threshold for a refusal of permission on a particular ground, such as transport or biodiversity. First, the submission assumes that if the threshold for a refusal of planning permission on transport or biodiversity grounds is not met in the case of a proposed development *outside* the Green Belt any adverse impact on transport or biodiversity must simply be ignored when a decision is taken whether to grant or refuse planning permission. That assumption is incorrect. Take the example of a proposal for a large scale commercial development in the countryside outside the Green Belt. If, as is likely, the proposal is not in accordance with the policies in the development plan for the protection of the countryside, planning permission must be refused in accordance with the development plan "unless material considerations indicate otherwise": see section 70(2) of the Act and section 38(6) of the Planning and Compulsory Purchase Act 2004 , and paras 11–12 of the Framework.

32. The Framework does not purport to alter the statutory duty to have regard to "any other material consideration" when determining a planning application or appeal: see section 70(2) of the Act. When deciding whether "material considerations indicate otherwise" the local planning authority or the inspector on appeal will consider all of the material considerations, those

 

which point in favour of granting permission, and those considerations which, in addition to the conflict with the development plan, point against the grant of permission. In the former category there may well be employment and economic considerations of the kind referred to in the inspector's decision in the present case. If the proposed development would cause some, but not significant harm to biodiversity; some, but not substantial harm to the setting of a listed building; and some, but not severe harm in terms of its residual cumulative transport impact, those harmful impacts will fall within the "material considerations" which point against the grant of permission. The fact that a refusal of planning permission on biodiversity grounds, heritage grounds or transport grounds would not be justified does not mean that the harm to those interests would be ignored. The weight to be given to such harm would be a matter for the inspector to **286* decide in the light of the policies set out in the Framework, but it would not cease to be a "material consideration" merely because the threshold in the Framework for a refusal of planning permission on that particular ground was not crossed. The position is no different if development is proposed within the Green Belt, save that the "very special circumstances" test will be applied if the proposal is for inappropriate development in the Green Belt.

33. The second fallacy in the claimant's submission is the proposition that "any adverse transport impact, even if far less than severe … would lead to a refusal of planning permission unless 'clearly outweighed' by 'very special circumstances'". The harm that must be "clearly outweighed by other considerations" is not simply the less than severe transport harm, but the harm to the Green Belt by reason of inappropriateness and "any other harm", which would include, but would not be limited to the less than severe transport harm. If, having carried out this balancing exercise, the inspector concluded that "very special circumstances" did not exist, she would refuse planning permission, not on transport grounds, but on the ground that the proposed development did not "comply with national policy to protect the Green Belt set out in the Framework": see the inspector's decision in this case (para 6 above).

Sustainable development

34. There is one respect in which it can fairly be said that there has been a change in policy. The Framework now places a presumption in favour of sustainable development at the heart of national planning policy: see para 14 of the Framework. The judge mentioned this new presumption in para 47 of her judgment, but it does not assist the claimant. One of the circumstances in which the policy that permission should be granted where relevant policies in the development plan are out of date (which was conceded by the second and third defendants in respect of some of their development plan policies, see para 12 of the inspector's decision) does not apply is if "specific policies in this Framework indicate development should be restricted". Footnote 9 gives a number of examples of such policies. Those examples include policies relating to land designated as Green Belt. Thus, far from there being any indication that placing the presumption in favour of sustainable development at the heart of the Framework is intended to effect a change in Green Belt policy, there is a clear statement to the contrary.

Conclusion

35. The inspector's approach to "any other harm" was correct.

TOMLINSON LJ

36. I agree.

LEWISON LJ

37. I also agree.

*Appeal allowed.*

*Ken Mydeen, Barrister* **287*

 

## Footnotes

1 National Planning Policy Framework (2012), paras 87, 88: see post, para 2.