



Case No: AC-2024-LON-002214

Neutral Citation Number: [2025] EWHC 887 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 April 2025

Before :

KAREN RIDGE SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

**The King (on the application of
Teresa Casey (1)
And
Stacey Jane Marie Smith (2))**

Claimants

- and -

Crawley Borough Council

Defendant

Stephen Cottle (instructed by **Public Interest Law Centre**) for the **Claimants**
Scott Stemp (instructed by **Crawley Borough Council Legal Services**) for the **Defendant**

Hearing date: 28 November 2024

APPROVED JUDGMENT

Deputy High Court Judge Karen Ridge :

1. The Claimants are Irish Travellers residing on a site in Crawley which has been the subject of enforcement proceedings and separate applications for planning permission. The Defendant is the local planning authority for the administrative area in which the Claimant's land is situated. The planning application was made in respect of land to the north of Brookside and the east of Radfords Farm, Radfords Road, Crawley, West Sussex (the Land). This is the Claimant's renewed application for permission to judicially review the decision of the Defendant dated 16 May 2024 to decline to determine an application for planning permission (reference CR/2024/0103/FUL).

Background

2. By an enforcement notice (EN) dated 29 April 2021, the local authority alleged an unauthorised change of use of the Land to a residential caravan site with associated unauthorised operational development. That EN was subsequently appealed on grounds (e) and (g) of section 174(2) of the Town and Country Planning Act 1990 (the Act). Ground (e) alleged improper service of the EN and ground (g) requested additional time to comply with the requirements of the EN. The Claimants were professionally represented during the course of that appeal. Ground (e) was withdrawn before final determination and by decision letter dated 28 February 2022 the ground (g) appeal was dismissed. As a result of the appeal outcome the EN took effect on 28 August 2022 and the time for compliance expired on 28 August 2022.
3. Running alongside the EN procedures was a separate application for planning permission¹. That application was made on 6 August 2021 and it sought planning permission for the material change of use of land to a Gypsy and Traveller site with associated operational development. It was refused and it went to appeal and, by decision letter dated 9 December 2022, the appeal was allowed to the extent that a temporary planning permission (personal to the applicants) was granted for a period of 3 years. That decision was subsequently quashed by consent as a result of an error in the Inspector's approach to local planning policies in relation to noise.
4. The planning appeal was then re-heard on the 23 January 2024 and was dismissed by letter dated 14 February 2024 for reasons to do with flood risk. That appeal decision was then subject to judicial review proceedings which are ongoing and that claim has been granted permission on some grounds (the s288 proceedings).
5. In the meantime, on the 26 January 2024, a further application² for planning permission was submitted for a Gypsy and Traveller site with associated development. The local planning authority then exercised its discretionary powers, under section 70C(1) of the Act, to decline to determine the application. It is the challenge to that decision which is the subject of this claim.
6. Section 70C(1) provides as follows:

“70C Power to decline to determine retrospective application

¹ Reference CR/2021/0243/FUL

² CR/2024/0103/FUL.

- (1) A local planning authority may decline to determine an application for planning permission or permission in principle for the development of any land if granting planning permission for the development would involve granting, whether in relation to the whole or any part of the land to which a pre-existing enforcement notice relates, planning permission in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control.
 - (2) For the purposes of the operation of this section in relation to any particular application for planning permission or permission in principle, a “pre-existing enforcement notice” is an enforcement notice issued before the application was received by the local planning authority.”
7. In declining to determine the application the local authority had regard to whether there were good and proper reasons to determine the new planning application, notwithstanding the extant EN. It decided that there were no such good reasons, observing:

“In coming to this conclusion, the matters the Council took into account included:

 - There was an unsuccessful appeal against the Enforcement Notice during which a ground (A) appeal under s174(2)(a) of the Act was not progressed.
 - You subsequently filed an application for retrospective planning permission (application CR/2021/0243/FUL), which was refused. Your appeal before the Inspector was refused on 14.02.2024 (although I note there is an extant s.288 appeal before the Planning Court against this decision).
 - You were professionally represented in your appeal before the Inspector, and were able to submit whatever information you thought appropriate and proper to overcome the objections to permission.
 - The New Application would only serve to further delay effective enforcement at the Site through the Enforcement Notice”
8. By pre-action protocol letter the Claimants asked the Defendant to review its decision. That request was refused and a judicial review claim was duly issued. The application for permission to apply for judicial review was refused on the papers by the Honourable Mr Justice Eyre on 9 August 2024.
9. The Claimants contend that the discretion under section 70C has been unfairly exercised on three grounds and they seek to renew their application for permission on all grounds. I have been helpfully referred to the case of *R (on the application of*

Chesterton Commercial (Bucks) Ltd v. Wokingham Borough Council [2018] EWHC 1795 (Admin); [2019] PTSR 220 which draws together previous decisions on the exercise of a local authority's discretion (at §32 – 47).

“69 Secondly, the statutory objective of stopping applicants who have undertaken development in breach of planning control from gaming the system by tactical appeals and retrospective applications is not achieved by asking only whether the planning merits of a proposal have already been determined. The applicant cannot have multiple “bites at the cherry”, but nor can he decline the cherry when it is available to be bitten, and insist on biting it on a later occasion. As was recognised in *Banghard's case* [2018] PTSR 1050, para 30, the statutory purpose requires that the unexploited opportunity to have the planning merits considered should also count against the applicant, because “in such cases the developer had a full opportunity to a fair process and did not avail himself of it”. In *Smith's case* [2017] EWHC 2696 *Gilbart J* considered that it was sufficient that the opportunity to pursue an appeal against an enforcement notice had been available to the applicant's predecessor in title, even though it had not been taken and was no longer available to the applicant himself.”

Ground 1

10. The Claimants assert that the Defendant erred in deciding to rely on the April 2021 EN without having regard to the purported deficiencies in the evidence base which the new planning application sought to remedy. On behalf of the Claimants Mr Cottle says that the EN and its appeal were determined on the basis that some of the caravans would be located in Flood Zone 2, whereas the layout in the new planning application depicted them in Flood Zone 1.
11. Mr Stemp, on behalf of the Defendant, submits that the redetermined appeal decision had regard to the revised caravan layout; that the Claimants have had ample opportunities to present their case on the planning merits and that the exercise of the discretion was reasonable. The Claimants, he says, could have presented their evidence on flood risk at the EN appeal, the first planning application and the two subsequent planning appeals, as well as the second planning application.
12. The language of section 70C is discretionary. The purpose of section 70C is to prevent the forestalling of an EN taking effect by the submission of multiple applications and appeals in circumstances where the applicants have already had sufficient opportunity to address the planning merits at the centre of an EN. In this case, the EN was served to address breaches of planning control aimed at protecting landscape character; safeguarding protected land for the expansion of Gatwick airport; providing acceptable living conditions for occupiers (in terms of noise); protecting archaeological interests; addressing flood risk.
13. The Claimants fairly accept that, at the EN appeal, they did not take the opportunity to seek planning permission and address those planning objections. That was on the advice of a former professional advisor and I accept the Claimants' statement that this

was bad advice from a professional advisor on whom they had relied to serve their interests.

14. It is important thereafter to examine the chronology and the basis on which various decisions were made. Applicants and appellants will apply for planning permission after an initial adverse determination by a local planning authority or following an unsuccessful appeal and in doing so, will seek to address the issues on which the application/appeal was lost. In planning applications it is notable that following a refusal, subject to certain criteria, applicants have a 'free go' at a second application to enable them to address the reasons for refusal.
15. In this case, whilst the appeal against the EN did not seek planning permission for the reasons above, the first application for planning permission was submitted on 6 August 2021, only two months after the EN appeal was submitted and notably several months before the EN appeal was determined on the 28 February 2022. That does not point to applicants who were seeking to game the system, it is more indicative of applicants who were seeking to address the five planning reasons listed on the EN as being the reason for issuing the notice after having recognised that an opportunity had been missed in the EN appeal.
16. The EN appeal proceedings were ongoing between 2 June 2021 until determination on 28 February 2022. Alongside that, the planning appeal in relation to the first planning application was running between 6 August 2021 until determination on 9 December 2022. On the 9 December 2022 the appeal was allowed, the Inspector having determined that a temporary permission would overcome objections relating to noise issues and the safeguarding issues. The issues relating to landscape harm and archaeological issues were either not determinative or could be overcome by condition. The Inspector further concluded (DL59) that

“ In applying the Framework’s exceptions test concerning flood risk⁷ and Local Plan Policy ENV8, I am of the view that the reasons weighing in favour of granting permission amount to sustainability benefits that outweigh the flood risks in this case. To reiterate, the sustainability benefits are the immediate resolution, albeit temporarily, of an unmet need for two traveller pitches in the context of an absence of available alternatives, and the prioritisation of the best interests of a number of affected children. As this concludes the outstanding element of the test, and given that conditions can make the development safe for its temporary duration, the exceptions test is passed.”

17. That temporary planning permission, which addressed the five reasons on the EN, was granted on 9 December 2022 and it remained in force until quashed on 30 May 2022. The decision was quashed³ on the basis that the Inspector had misunderstood policy H5a when coming to his conclusions about noise. The policy set out noise levels for various types of sites.
18. The appeal went to the a re-hearing. Whilst the Defendant maintained its objections in relation to flood risk at the rehearing, the Claimants would no doubt have been aware

³ Schedule of Reasons appended to Consent Order dated 14 February 2023 attached to SGD

that the previous Inspector's decision had found that those matters did not militate against the grant of a temporary permission. The revised site layout, moving the caravans into flood zone 1, was an attempt to reinforce the argument (and previous Inspector's view) that the site could be made **safe** during the operation of a temporary permission with the imposition of a condition requiring alerts. The Defendant accepted that the site could be made **safer** with the imposition of such a condition.

19. When one looks at the chronology of events and the five original reasons for serving the EN, it is apparent that the planning merits of the proposal have shifted as proceedings have progressed. It is against this background that the Defendant had to determine whether there were good and proper reasons not to entertain another application for planning permission. Local authorities of course must guard against abuses of the planning system by multiple applications in circumstances where the opportunity to address the planning merits have not been taken or have been taken and found wanting. In the unusual circumstances of this case there is an argument as to whether that discretion was fairly or rationally exercised given the chronology events and the changing landscape of the planning merits. Ground 1 is arguable.

Ground 2

20. Secondly it is alleged that the Defendant should have looked at the nature of the challenge to the EN appeal decision. The Defendant confirms that they had regard to the nature of the section 288 challenge but did not agree with the merits of that challenge and proceeded to exercise its discretion accordingly.
21. Whilst it was not for the Defendant to second guess the outcome of the section 288 challenge, it was important for the Defendant to examine the basis for that challenge and to see if there was any merit in it or change of circumstances to justify looking at the planning merits again. That was part and parcel of the exercise in looking at the chronology of events and all other factors. The challenge to the section 288 decision will be dealt with separately and this aspect of the present claim cannot be contingent on determination of that ground of challenge elsewhere.
22. For the above reasons I conclude that this ground is not arguable on its own merits.

Ground 3

23. Mr Stemp took a preliminary point in relation to the renewal of ground 3. The Claimants had not indicated that on their renewal form that they wished to pursue this ground. Paragraph 4.40 of Practice Direction 54D provides that where a claimant intends to apply to rely on additional grounds at the hearing of the planning statutory review, the claimant must give notice to the court and to any other person served with the claim form no later than 7 clear days before the hearing. The Claimants' skeleton argument dealt with ground 3, as did the Defendants.
24. Mr Stemp was on notice of ground 3, it was part of the claim already pleaded and he had already dealt with it previously. Having regard to the overriding objective I am

satisfied that it is proportionate and appropriate to deal with ground 3. There is no prejudice to the Defendant in doing so and it is expedient to deal with such arguments on this occasion.

25. The Claimants contend that the decision to decline to determine the planning application affected the article 8 rights of the site residents and their article 6 rights or alternatively, that the decision by the Defendant that the section 6 duty was not breached was unlawful.
26. The proportionality of any interference with the article 8 rights of the Claimants was at the heart of the planning merits within the EN and planning applications. The decision not to determine the application was not a direct interference with the Claimants' article 8 rights and I conclude that this part of ground 3 is not arguable.
27. The Defendant's decision to decline to determine the second planning application did directly affect the question of the rights of the Claimants to a fair hearing/determination. I have concluded that it is arguable that the discretion was unfairly/irrationally exercised and I therefore conclude that it is also arguable that the decision unlawfully affected the Claimants' article 8 rights. Ground 3 is arguable to this extent.
28. I would ask Counsel to draw up an appropriate order to reflect the terms of this judgment.