Case No: CO/439/2009

Neutral Citation Number: [2009] EWHC 3808 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Datwe: Thursday, 8th December 2009

B e f o r e:

MR JUSTICE KING

- -

Between:
RAYMOND KNIGHT

Claimant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
First Defendant

and

TANDRIDGE DISTRICT COUNCIL
Second Defendant

- -

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Felicity Williams appeared on behalf of the **Claimant**
Charles Banner (instructed by the Treasury Solicitor) appeared on behalf of the **First Defendant**

- -

J U D G M E N T

1. MR JUSTICE KING:

Introduction

2. This is an application pursuant to section 288 of the Town and Country Planning Act

1990 against the decision of the Inspector appointed by the Secretary of State of the 12th November 2008, dismissing this claimant's appeal under section 78 of the 1990 Act against the refusal, on 28th September 2008, of the second defendant, the local planning authority, to grant the applicant outline planning permission in respect of a site known as Yew Tree Cottage at Miles Lane, Tandridge.

3. The effect of section 38(6) of the Planning and Compulsory Purchase Act 2004 is that the determination of the application for planning permission must be made, to use the words of the subsection, "in accordance with the development plan unless material considerations indicate otherwise". The development plan in this case includes the saved policies of the Tandridge District Local Plan, although I accept that the Core Strategy has to be read alongside that local plan. I also accept that the national planning guidance, for present purposes Planning Policy Guidance 2: Green belts ("PPG2"), and Planning Policy Statement 3: Housing ("PPS3"), although not part of the development plan itself, amount to material considerations.

4. The Local Plan itself says at paragraph 1.27:

> "The Local Plan has been prepared in the context of the Department of the Environment's Policy Planning Notes..."

5. Tandridge District Council's own website states as follows:

> "In December 2001 the Council adopted the Tandridge District Local Plan as the statutory local plan for the area.
>
> In October 2008 the Council adopted the Core Strategy which sets out new, key policies for the District. Therefore the Core Strategy must be read in conjunction with those parts of the Local Plan that are still in operation."

6. In my judgment the Core Strategy and the Local Plan are to be read in harmony together, and they are not to be read as if one might trump the other. Equally, the planning guidance at national level is a material consideration because the Local Plan policies are designed patently to reflect that guidance.

7. The site itself, it is now accepted, is within the green belt designated in Policy RE1 of the Local Plan. It is described by the Inspector, who visited the site on 25th November 2008, in paragraph 3 of his reasons:

> "The appeal site is about 0.1 ha in area, located in open countryside within the green belt and remote from any settlement. The site is enclosed by trees and hedging on its boundaries."

8. At the heart of this application is the question whether the planning authority and the Inspector applied that part of the Local Plan which was properly applicable to the site. Both the Council and the Inspector dealt with the proposal as one which involved a new

development within the green belt and which engaged Policy RE2 of the Local Plan. They did so in preference to the application of Policy RE9, which in principle allows for planning permission for the replacement of dwellings in the green belt outside the settlements.

The court's approach to a section 288 application

9. I record what I understand are the basic principles of law relating to the approach this court should take to any application under section 288.

10. The starting point is that this is not a re-hearing on the merits; it is classic law that an application under section 288 may only be brought on grounds upon which a claim for judicial review may be brought — error of law, irrationality, Wednesbury unreasonableness, or procedural unfairness (Seddon Properties v Secretary of State for the Environment [1978] JPL 835) — although I accept that, insofar as any of the Convention rights, introduced into domestic law by the Human Rights Act 1998, are engaged, the court does have to apply a perhaps broader principle relating to proportionality. The difference in this context between the application of classic judicial review principles and that of the human rights' concept of proportionality may in fact be more in appearance than in substance.

11. Next, it is established law that the court has to accord substantial deference to the expert planning judgment of the Inspector.

12. I was referred to Tesco Stores Ltd v Secretary of State [1995] 1 WLR 759 and the passage in the judgment of Lord Hoffmann at page 780:

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.
>
> This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the

exclusive province of the local planning authority or the Secretary of State."

13. In R (Newsmith Stainless Limited) v Secretary of State for the Environment, Transport and the Regions [2001] EWHC (Admin) 74, Sullivan J (as he then was) summarised the approach as follows:

> "6. An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision. An allegation that an Inspector's conclusion on the planning merits is Wednesbury perverse is, in principle, within the scope of a challenge under section 288, but the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a rerun of the arguments on the planning merits.
>
> 7. In any case, where an expert tribunal is the fact-finding body the threshold of Wednesbury unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most planning cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? et cetera. Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable.
>
> 8. Moreover, the Inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection. Against this background an applicant alleging an Inspector has reached a Wednesbury unreasonable conclusion on matters of planning judgment, faces a particularly daunting task. It might be thought that the basic principles set out above are so well known that they do not need restating. But the Claimant's challenge in the present case, although couched in terms of Wednesbury unreasonableness, is, in truth, a frontal assault upon the Inspector's conclusions on the planning merits of this green belt case."

14. Finally, on the question of the court's approach, there is a "reasons" attack in this case. That is to say challenge is made not only to the express reasons of the Inspector, which were shortly stated in nine paragraphs, but also on the basis of what are said to be material omissions from the reasoning which, it is said, fatally undermines the decision. This is in particular with regard to the application of the "special circumstances" exception for the purposes of Policy RE2, and the alleged failure of the Inspector to have regard to the Convention rights of the applicant.

15. In this context I have in mind Lord Brown's guidance in South Buckinghamshire

District Council and Another v Porter (No 2) [2004] UKHL 33, on the issue of "reasons", at paragraph 36:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

The grounds

16. Three grounds are put forward in this application as a basis of challenge under Section 288:

1. the Inspector erred in his application of green belt policies to the site in question;

2. the Inspector's decision was unreasonable, taking into account the history of the site and the claimant's circumstances; and

3. the Inspector erred in failing to correctly consider the claimant's rights under the Human Rights Act 1998.

The background facts

17. Let me turn to the background facts. The applicant is now some 70 years of age. He is the current owner of the site. There is evidence — and this is what he put before the Inspector — that following a divorce in 1992 he had become homeless and had

purchased a camper van trailer as his sole residence. He acquired the appeal site from the local authority in 1997. It appears that at that time it was being used as a dump or a rubbish tip. However, I accept that there was evidence before the Inspector, as there is before me, that, certainly up until about 1960, there had been a cottage on this site. This was subsequently demolished, following a fire. When, specifically, is not clear.

18. According to the evidence of the applicant before me today, by reference to historic maps and records he has obtained, up until the demolition to which I have referred, there had been a history of a cottage being on site going back some 250 years. There is evidence that the last known resident was a gentleman who bought the premises from the estate of the Marquess of Northampton as a retirement home; that the cottage had then burnt down in or about 1959; and a proposal to rebuild it with a 50 per cent increase in size had been turned down. It appears the gentleman who owned the site had died before the matter could be resolved.

19. It appears that the site was purchased by the Tandridge District Council in about 1962 or 1963 and it became a rubbish tip. The applicant, in his witness statement before me, describes how he cleared the site of rubbish, took many tons of waste to the local tip, cleared fallen trees and installed gates and fences. He says to me that he used it as a place upon which to reside his camper van when not on the road, and that up to the point of the present application he had so used it 50 per cent of the time. That particular detail was, however, not before the Inspector.

20. He further says, in his application to this court, that he is not getting any younger and, in the words of his children, he should have a proper home, which is what he wants. His wish, as he would say, is to rebuild the cottage and live in it during his retirement. However, as I have already stated, the local planning authority and the Inspector did not regard this proposal as the replacement of a dwelling; rather as a proposal for a new dwelling within the green belt.

21. The thrust, therefore, of the applicant's evidence before me is that his wish has been to live in this proposed cottage during his retirement. The proposed development in respect of which permission was sought but was refused was for the construction of a single-storey dwelling, otherwise described as one with a floor area of some 195 square metres. The proposed development was put in these terms in a Design and Access Statement:

> "Cottage would be traditional oak framed structure useing reclaimed and new oak timber, outer walls clad with oak planks, inner walls filled with dense Rockwool insulation covered with high grade plaster board.
>
> Windows to match Cottage style treble glazed, roof red tiled.
>
> All doors extra wide front door would have access ramp in place of step.

A wood-burning Argga would be used for cooking/hot water central heating.

Power supply from 12 volt storage batterys, computor controled rectification batterys charged by Wind turbine and roof mounted Solar panels.

There is a mains cable running under ground at the rear of the site and would connect if economical. I could then sell any spare power.

Water supply from existing well, filtered/sterilized then pumped upto tank in roof space for drinking, cooking and washing."

22. Before I turn to the decision itself, it is important to note how the claimant put the matters he wanted to draw to the attention of the Inspector, in his appeal documents to the Inspector. This is set out in my bundle at pages 67-69. The flavour of it can be obtained from this extract from page 67:

"The circumstances leading to this appeal are on being made homeless in 1992 thanks to the divorce court. I then bought a campervan/trailer/Harley motor bike and became what you could call a new age traveler.

On seeing Surrey County Council selling off land I made a successful offer for Yewtree Cottage site, the idea being when I was in the area I would have a place to pull off the road to stay a few days or weeks, work on my transport and tidy the site whitch was being used as a rubbish tip. I spent two summers clearing the rubbish to the council tip and clearing the fallen trees from the 1989 storm.

I have made several half hearted applacations over the years in responce to nagging from my children who think I should have a 'proper home'.

However time moves on and I feel maybe I should make plans to settle down."

23. The rest of the representations on that page pursue, in part, not only the history of the site, to which I have already referred, but the contention of the applicant, not now pursued before me, that the site was not within a green belt.

24. I also quote from page 69 of his appeal to the Inspector:

"First I would like to explain the circumstances behind my appeal. After the brake up of my marrage in 1992 I found myself homeless.

I bought a Motorhome and went on the road, staying for short periods out

side friends and family with room and doing odd jobs for keep.

I picked up an old news paper one day and saw Surrey Council was selling off sites in the area one being Yewtree Cottage for whitch I made an offer. The idea was I would always have a place to pull off the road that was mine at any time, stay a few days, do a bit of work then move on.

I spent a summer clearing the fly tippings and rubish away and cutting up the fallen trees from the big storm.

It was not my intention to live there full time in the Motorhome or a house. I like the free life style.

How ever Time moves on and being 65 its time to find a home.

So what I would like is to build a two bedroom cottage not just for me but also for my son who is serving in the Army, for some where to stay when on leave and in due course he would inherit a home."

25. I should also record that on page 67 he says this as regards human rights:

"I would like to point out that the TDC Policys L04-2004, RE2-2001, RE18-2001 whitch TDC are useing to refuse my application came into efect after Human Rights Act 1998 Specifically Protocol 1 Artical 1 Re Property Par-3.111 to 3.115 whitch states I have the right to Peaceful Enjoyment and Use of my Possessions.

I feel Tandridge Dist Council are in breach of my Human Rights.

To recap I want a home, I have the land, I don't want a Council house/flat I don't want any hand-outs and if I do get to build a Cottage Tandridge Dist Council will be there with the hand out for the Council TAX."

I observe *en passant* that there is no reference specifically to Article 8 in those grounds.

The decision

26. Let me then turn to the decision. Paragraphs 3 and 4 of the decision identify the policy in the Local Plan, which the Inspector determined was the appropriate policy to be applied, that is Green Belt Policy RE2, rather than Policy RE9 relating to the replacement of dwellings:

"3. The appeal site is about 0.1 ha in area, located in open countryside within the green belt and remote from any settlement. The site is enclosed by trees and hedging on its boundaries. The Council understands that the site was once occupied by a single detached dwelling, which was

demolished following a fire, possibly in 1960. According to the appellant the site was subsequently used as a rubbish tip which he subsequently cleared at a date that is not specified. There is now no visible evidence of any former dwelling on the site. The proposal is to erect a single-storey dwelling on the site with a floor area of some 195 square metres.

4. The Council's view is that, because the site has not had a dwelling on it for so many years, any residential use of the site has effectively been abandoned. Accordingly, it takes the view that Policy RE9 of the Tandridge District Local Plan 2001, which deals with the replacement of dwellings outside of green belt settlements does not apply. Bearing in mind the period of time that has elapsed since any dwelling occupied the site, the absence of physical evidence of its previous existence, as well as the intervening use of the site as a tip and the absence of any intention to resurrect a residential use of the site for some 40 years after the building was removed, that view is difficult to refute. It seems appropriate therefore to deal with this proposal as one which involves the erection of a new dwelling in the green belt."

27. If the applicability of Policy RE2 was a decision to which the Inspector was entitled to come, then the applicant has a difficult hurdle to overcome if his application is to succeed. I say this for the following reasons. Policy RE2: Development in the green belt outside settlements, part of the Local Plan, has in effect a presumption against the construction of new dwellings within the green belt, to be displaced only in very special circumstances. It reads as follows:

"Outside the settlements there will be a presumption against inappropriate development that would be harmful to the green belt. Proposals for inappropriate development may be justified if very special circumstances that outweigh the harm by reason of inappropriateness or any other harm can be shown to exist.

The construction of new buildings inside the green belt is inappropriate and will not be permitted unless they are reasonably necessary for agriculture and forestry, or comprise essential facilities for outdoor sport and outdoor recreation, or for cemeteries or other uses that preserve the openness of the green belt, and do not conflict with the purposes of including land in it.

Engineering and other operations and the making of a material change in the use of land are inappropriate development unless they maintain openness and do not conflict with the purposes of including land in the green belt.

Development involving the limited extension, alteration or replacement of dwellings, limited infilling or redevelopment of major developed sites

identified in the Plan, and the reuse of buildings is not inappropriate in the green belt provided the requirements of other relevant policies are satisfied."

28. The effect of this policy reflects that which is set out in the national green belt guidance, Planning Policy Guidance 2: Green belts, in particular at section 3, headed "Presumption against inappropriate development". The guidance which is there set out is helpful in informing the intention behind RE2. Paragraphs 3.1 and 3.2 read:

> "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 development should not be approved, except in very special circumstances. See paragraphs 3.4, 3.8, 3.11 and 3.12 below as to development which is inappropriate.
>
> 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."

29. This guidance makes clear under the head of "New buildings" at 3.4 that "the construction of new buildings inside a green belt is inappropriate unless it is for the following purposes..." There are there set out the criteria which are reflected in RE2. It expressly says in relation to the replacement of dwellings (to which policy in RE9 relates) that this refers to existing dwellings. Thus:

> "3.4 The construction of new buildings inside a green belt is inappropriate unless it is for the following purposes:
>
> ...
>
> • limited extension, alteration or replacement of existing dwellings (subject to paragraph 3.6 below)..."

Paragraph 3.6 states further in this context that the proposal should not result in disproportionate additions over and above the size of the original building.

30. In my judgment, assuming the Local Plan was the applicable plan to apply, it is difficult to see how the judgment of the Inspector can be faulted, that on the evidence before him, including his site visit, this site did not amount to a proposal involving the replacement of

a dwelling, and that, therefore, the presumptions in RE2 against this proposal applied. He was patently entitled to regard the concept of the replacement of a dwelling as involving the replacement of an existing dwelling in line with the national guidance as distinct from the replacement of a building which had previously been there.

31. The reasoning which is set out paragraphs 3 and 4, relating to why the Inspector formed the view that Policy RE9 did not apply, shows that he took into account the following factors: the absence of any visible evidence of any form of dwelling on the site; the period of time that had elapsed since any dwelling occupied the site; the absence of physical evidence of its previous existence; the intervening use of the site as a tip; and, finally, the absence of any intention to resurrect a residential use of the site for some 40 years after the building was removed.

32. These are all factors which, in my judgment, he was entitled to take into account and nothing has been laid before me to suggest that he was in any way irrational in applying those factors to reach the decision he did. His finding that there was no visible evidence of any former dwelling on the site is attacked, but when pressed, counsel for the claimant had to concede that the only contrary visible signs which might have come to the Inspector's attention, contrary to what he says, were the existence of a well and, further, building materials by way of bricks which, it is said, were still on the site, being part of that which had been cleared away by the claimant and his friend.

33. There is evidence before me that when the claimant acquired the site in 1997 and proceeded to clear the site, he and his friend discovered old footings of the previous building and old drains. However, as regards the state of the site when visited by the Inspector on 25th November 2008, there is nothing before me to suggest that he was not entitled to form the view that there was then no visible evidence of any former dwelling.

34. His description of the area as being in open countryside, within the green belt, remote from any settlement, is attacked on the basis that it is more properly to be described as an enclosed residential site surrounded by high trees and hedgerow. It is said to be isolated from the surrounding fields and (I quote from the skeleton argument of the claimant) "in centuries of use as a residential site never has been, part of the open countryside. The site has retained its residential purpose. The only additional use for the site was as a rubbish tip during its period under the ownership of the Council, not as a protected green belt site."

35. However, this counter contention of how the site might be characterised is just that — a counter contention. There is nothing on the material before me to suggest that there was anything visible to the Inspector which meant that he was not entitled to form the counter view he did. I repeat: this application is not an opportunity to re-open the issues of fact or planning judgment material to the case. The contention that the site was a residential site, as of the date of the Inspector's visit, is in any event one which is difficult to understand. There is no suggestion that the Inspector should have formed the view from his site visit that this was the place where the claimant was actually living at the time.

There is reference, I accept, to the claimant saying in his appeal grounds that the idea of the site being acquired was for him to use it for his camper van when he was not on the road, but there is no evidence before me that on the day of the inspection the camper van was there, or that the site was in any sense being used as a residence.

36. So, as a matter of principle, in my judgment the Inspector was entitled, subject only to one matter to which I am about to turn, to form the view that Policy RE2 was the applicable policy, and that Policy RE9, which refers to the replacement of dwellings, was inapplicable since this was not a proposal for the replacement of an existing dwelling. I accept, however, that had it been such a proposal, then the Policy RE9 would have come into play, and it may well be that on the application of that policy the claimant might have been able to bring his proposal within it. I might add, however, that even RE9 is part and parcel of the overall green belt policy designed to protect the green belt. Hence its emphasis that the proposal should not be materially larger than the dwelling it replaces and its provisions reflecting the national guidance designed to ensure that the comparison is with the original dwelling and not any extension.

Previously-developed land

37. But it is said, on behalf of the claimant (and I quote from paragraph 20 of the skeleton argument) that:

> "...the Inspector erred in applying green belt policy to the site. It is not accepted by the claimant that the site is one to which green belt policy ought to apply. Rather, this is previously developed land, in residential use, to which a presumption of development exists under Planning Policy Statement 3..."

This contention introduces a matter which was never raised before the Inspector, namely the relevance of the concept of previously-developed land.

38. I accept that this concept is reflected in the Core Strategy, at various stages, in relation to the provision of housing and in relation to overall strategy. In particular, there is the following express objective under the heading "Issue 1":

> "To enable the green belt to be protected it is essential to make the best use of previously-developed land..."

39. I further accept that "making the best use of previously-developed land to limit green field loss" is an objective to be found within the Local Plan. For example, at paragraph 3.5 of the Local Plan, under the heading "Chapter 3: Built environment", this appears:

> "Since the publication of the deposit version of this plan the Government has issued a revised Planning Policy Guidance Note No3: Housing (PPG3) that provides advice on planning to meet the housing needs of the

> whole community. Its main objectives are to produce an improvement in the quality of housing development, to make the best use of previously-developed land and existing buildings and to limit green field land loss."

40. Within the Core Strategy of the District Council, under "Section 7: Housing provision", paragraph 7.3 reads:

> "The strategy for providing housing within the District is to ensure that the South East Plan figure is achieved as a minimum taking into account the delivery mechanisms contained in PPS3. In line with other parts of this Core Strategy the new housing will be delivered through the use of previously-developed land primarily within the built-areas, subject to the need to ensure that development has regard to and respects the character, setting and local context of those areas."

41. Then in paragraph 7.4 one reads:

> "The strategy for delivering housing should be seen within the context of the wider metropolitan area of London and the south-east... The relatively small allocation of housing to Tandridge reflects this and the strategy of making best use of previously-developed land in the built up areas is important not only for Tandridge but for the wider metropolitan area."

42. At paragraph 7.19 one sees a reference to matters that would undermine the overall strategy of the plan, which is said to be "about making best use of the previously-developed land within built up areas and protecting the green belt".

43. In Planning Policy Statement PPS3 one finds reference at paragraph 36, in the context of providing housing in suitable locations, that the priority for development should be previously-developed land, in particular vacant and derelict sites and buildings.

44. I have no doubt whatsoever however that the matters to which I have had my attention drawn, do not in any way contradict the policy set out in the Local Plan for the determination of planning applications involving green belt sites. I accept that in principle the planning policy statements in the national Planning Policy Statement on Housing ("PPS3") about the use of previously-developed land in the context of the provision of housing, are to be read in the context of an overall spatial strategy. I note at paragraph 1 of PPS3 this expression:

> "Planning Policy Statements (PPS) set out the Government's national policies on aspects of planning in England. PPS3 sets out the national planning policy framework for delivering the Government's housing objectives. This complements, and should be read together with, other relevant statements of national planning and housing policy (in particular

> PPS1: Delivering Sustainable Development and the forthcoming PPS on Climate Change)."

45. The Core Strategy Guidance and this National Planning Policy Statement on the provision of housing in relation to previously-developed land cannot, in my judgment, be read as overriding the Local Plan policy requirements relating to proposed green belt developments. The notion that that which is in the Core Strategy and the National Planning Statement relating to the use of previously-developed land, could render as an acceptable development that which is an inappropriate development contrary to RE2 is, in my judgment, unsustainable. I accept the submission made by the defendant that, both at a national level and at a local level, the previously-developed land policy in relation to the provision of housing, and green belt policy in relation to planning applications, are on the same side. I accept that it could not be that the Core Strategy was in any way, on being introduced in 2008, designed to overturn the import of the green belt policy in Policy RE2, which was retained. Indeed, I note that in the Core Strategy at paragraph 6, under the heading "Policy CSP 1", this appears:

> "There will be no change in the green belt boundaries, unless it is not possible to find sufficient land within the existing built up areas and other settlements to deliver current and future housing allocations. Such changes will only take place at sustainable locations as set out in Policy CSP2 whilst having regard to the need to prevent built up areas from coalescing. Any changes will be made through a Site Allocations Development Plan Document and the accompanying Proposals Map."

46. I accept that that makes clear that the thrust of the objective of the use of previous-developed land for housing is in the context, primarily, of built-up areas, and that although housing provision might have to extend into green belt land, if it were to do so, it would not be on a case-by-case basis in relation to a particular planning application, but would be by reference to a considered and produced development plan, which is not this case.

47. I should also record that in line with the above, in PPS 3, as regards determining planning applications, there is general guidance at paragraphs 68 and 69 that "local planning authorities should take into consideration the policies set out in the Regional Spatial Strategy and Development Plan documents, as well as other material considerations. When making planning decisions for housing developments after 1st April 2007 local planning authorities should have regard to the policies in this statement as material considerations which may supersede the policies in existing development plans".

48. I move to a separate point, which is that it is highly dubious in any event whether this particular site qualified as previously-developed land, as contended for on behalf of the claimant.

49. The definition of previously-developed land is set out in Annex B to PPS3. It states:

> "Previously-developed land is that which is or was occupied by a permanent structure including the curtilage of the developed land and any associated fixed surface infrastructure."

50. So far so good. It could be said that the present site falls within that definition since it undoubtedly was once occupied by the cottage to which I have already referred. The definition, however, goes on to exclude, among other things:

> "Land that was previously-developed but where the remains of the permanent structure or fixed surface structure have blended into the landscape in the process of time (to the extent that it can reasonably be considered as part of the natural surroundings)."

51. It must be highly arguable in this case that such that such remains of the cottage which may have existed at the time of the Inspector's site inspection, had by then blended into the landscape in the above sense in the process of time. In my judgment, it is difficult to see how, even if the Inspector should have applied his mind to concepts of previously-developed land, he would not have concluded (for similar reasons as those set out in paragraphs 3 and 4 of his Decision), that such remains had blended into the landscape.

52. However, I do not need to determine this particular issue as a matter of certainty, because I am quite satisfied that those policies which have been brought to my attention as to previously-developed land cannot sustain the contention in paragraph 20 of the claimant's skeleton argument that there is an existing presumption of development in relation to such land for the purposes of the planning appeal before the Inspector.

53. As a further indicator of the fallacy of this contention, I should also add that Annex B of PPS3 states:

> "There is no presumption that land that is previously-developed is necessarily suitable for housing development nor that the whole of the curtilage should be developed."

54. So I find no substance in the first ground of challenge in this case, namely that the Inspector erred in applying green belt policies to the site in question.

<u>The Inspector's Application of RE2: the need to show "very special circumstances"</u>

55. Let me then turn to what his findings were when applying the applicable policy, RE2. I have already set out what RE2 states and how it reflects the national guidance, and the additional help which the national guidance can give. The Inspector said that the main issue arising out of the application of Policy RE2 was whether the proposal would constitute inappropriate development within the green belt and, if so, whether there were

other material considerations sufficient to outweigh the harm, thereby justifying it on the basis of very special circumstances.

56. He first decided that the proposed development was an inappropriate development within the meaning of Policy RE2. He did so in paragraphs 5 and 6 of his Decision as follows:

> "5. Policy RE2 of the Local Plan follows national guidance as laid down in Planning Policy Guidance 2: Green belts in stating that, outside defined settlements, there is a presumption against inappropriate development. The construction of new buildings in the green belt is inappropriate and will not be permitted unless necessary for agriculture and forestry or comprise essential facilities for uses that preserve the openness green belt.
>
> 6. The proposed new dwelling would be located outside a defined settlement and does not meet any of the outline criteria. Accordingly, it would be inappropriate development in... terms of local and national policies."

57. I can find no fault with that reasoning. It patently follows the terms of Policy RE2. What is inappropriate development is defined in the policy, as guided by the national guidance. The construction of a new building inside the green belt is deemed inappropriate for the purposes of the policy unless it falls within the criteria set out by way of exclusion in Policy RE2 and at section 3 of the national guidance. It cannot be said other than this proposal did not fall within those criteria. Therefore, the Inspector correctly reached the conclusion that this was an inappropriate development, in terms of local and national policies. It followed that he was bound, then, to dismiss the appeal unless — and it would be for the claimant to make this out — the otherwise inappropriate development could be justified because (in the terms of RE2) "very special circumstances that outweigh the harm by reason of inappropriateness or any other harm can be shown to exist".

58. This is the balancing exercise which the Inspector was bound to undertake within the terms of the policy. I remind myself how the balancing exercise is explained in the national guidance in paragraph 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."

59. "Other considerations", I agree with the defendant, must be a reference to benefits which would otherwise be produced by the proposal, although I accept that those benefits should be viewed not only from a planning standpoint but also from the standpoint of the

applicant as a human being (described before me by the claimant as the human factor).

60. The Inspector found that no very special circumstances had been made out. He did so in paragraphs 7 and 8 of his decision, which read as follows:

> "7. The material considerations put forward by the appellant in support of the proposal are based on personal circumstances of his being made homeless as a result of a divorce that occurred in 1992. There is no evidence that housing for the appellant could not be better and more effectively provided for him within a defined settlement where access to day-to-day services and facilities would be readily available without reliance on a private car. Quite apart from the green belt objections to the proposal, the appeal site is not a sustainable location for new housing. Although the appellant maintains that the appeal site has never been in the green belt, in terms of the statutory development plan the site is located with the Metropolitan Green Belt. The ownership of land within the green belt is not sufficient reason to justify the erection of a new dwelling on that land.
>
> 8. According to PPG2 inappropriate development is, by definition, harmful to the green belt. In addition, the most important attribute of green belts is their openness. The proposed dwelling would occupy an area that is currently undeveloped and would significantly reduce that openness. This would cause further harm to the green belt and would also undermine the policies that seek to protect it.
>
> 9. The appellant has not put forward any material considerations sufficient to clearly outweigh the harm identified and no very special circumstances therefore exist. The proposal would consequently be contrary to Policy RE2 of the Local Plan. I conclude therefore that the appeal should not succeed."

Unreasonableness

61. The challenge to this particular part of the decision and these findings that no very special circumstances had been made out, is put in two ways, although they overlap. One is by reference to a contention of unreasonableness. It is said that the Inspector failed properly to take into account and weigh the matters put forward by the applicant as to why the proposal should be accepted. Particular points are taken. First it is said that the Inspector failed to take account of the human factor. It is said that the claimant is 70 years of age and was seeking to use his own land, which he says he has carefully restored, to provide a location for his home in his retirement. It is said he has no alternative place of residence and this was the human factor which the Inspector ignored.

62. Emphasis is put on the long history "of residential use" to which I have already

referred. Then it is said that the Inspector generally failed to acknowledge the improvement to "current residential use" of the site by the claimant himself since he acquired it in 1997. The Inspector, it is said, failed to take on board the lack of objections from local residents to the claimant's application. Particular complaint is made about the finding that the proposal would have additional harm by a reference to the fact that it would occupy an area that was currently undeveloped and would significantly reduce that openness. It is said that this conclusion is unfounded because the site should be regarded as one which is enclosed, and a building on the site would not be visible beyond its boundaries. It is said that the enclosed nature of the site arises precisely from the fact of its residential use "for generations" and that to decide that one stray cottage on the site would reduce openness is unreasonable.

63. The complaint is further made that generally the Inspector failed to acknowledge the history to which I have referred and, in particular, the existence on the site of the well.

64. It is further said that it was not appropriate for the Inspector to have regard to the factor that more appropriate accommodation might be available to the claimant elsewhere. This is said to ignore the claimant's wish to live independently.

65. I have to say that I listened carefully to all these contentions, but I cannot see the basis for the submission that in paragraphs 7 and 8 the Inspector did not take into account, and weigh as he found appropriate, all these matters, in particular those relating to the personal circumstances of the appellant. I have already set out how the applicant put his case in his appeal grounds to the Inspector. When the Inspector said that the material considerations put forward by the appellant in support of the proposal were based on personal circumstances of his being made homeless as a result of a divorce that occurred in 1992, he must have had in mind all the personal circumstances which were laid out in the appeal notice to him. When he said, at the end of paragraph 7, that the ownership of land within the green belt is not in itself sufficient reason to justify the erection of a new dwelling on that land, he must be right, in my judgment.

66. Moreover, the emphasis put by the applicant, in the challenge before me, upon "the residential use of the site" is an emphasis which is not sustainable, in my judgment, on the evidence which was before the Inspector. The evidence that it was being used as a residence at the time of his Inspection is very vague indeed. There is no evidence that before the Inspector there was material which would have lead him to conclude that it was actually being used there and then, on a regular basis, by the applicant as his home as a site for his camper van.

67. Bearing in mind the approach which I should take to an Inspector's decision and his reasoning, in my judgment the attack based on unreasonableness and a failure properly to weigh the material factors in relation to paragraphs 7 and 8 of the Decision cannot succeed.

68. I have to approach the Inspector's decision with a degree of flexibility; and I accept on

the authorities already cited, particularly that of Lord Brown in the Porter case, that it should not be treated as if it were a legally drafted contract or statute.

Human Rights

69. I turn now to the final ground of challenge, which overlaps with this complaint about unreasonableness, namely the alleged failure of the Inspector to have proper regard to the Convention rights of the applicant under Article 8 and under Article 1 of Protocol 1 of the European Convention.

70. It must be questionable whether Article 8 was engaged at all in this case. I say this because, as I have already indicated, the evidence that the site was being used as the home of the applicant at the date of the proposal is very vague indeed. The decision of the European Court in Buckley v United Kingdom [1996] 23 EHRR 101 was cited to me with its reference to the earlier decision of the European Court, or rather the Commission, in Gillow v United Kingdom (1986) 11 EHRR 335. Paragraph 54 of Buckley reads as follows:

> "The court, in its Gillow v United Kingdom judgment of 24th November 1986, noted that the applicants had established the property in question as their home, had retained ownership of it intending to return there, had lived in it with a view to taking up permanent residence, had relinquished their other home and had not established any other in the United Kingdom. That property was therefore to be considered their 'home' for the purposes of Article 8.
>
> Although in the Gillow case the applicants' home had initially been established legally, similar considerations apply in the present case. The court is satisfied that the applicant bought the land to establish her residence there. She has lived there almost continuously since 1988 — save for an absence of 2 weeks, for family reasons, in 1993 — and it has not been suggested that she has established, or intends to establish, another residence elsewhere. The case therefore concerns the applicant's right to respect for her 'home'."

71. In my judgment, however, there was very little evidence before the Inspector to establish that, as of the date of the site visit and his determination of the appeal, the applicant had established a home on the site. I am not at all persuaded that the mere intention to use a site which you own as your home engages, per se, Article 8.

72. As regards Article 1 of Protocol 1, that, in its material part, states:

> "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the

general principles of international law.

(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

73. Again, in my judgment, it must be questionable whether Article 1 of Protocol 1 was itself engaged here. As the respondent says, there was no consequence flowing from the decision refusing planning permission, which amounts to the applicant being deprived of his possessions, or deprived of his land, or the use of his land as it currently was being exercised, although I accept that in the case of Lough v First Secretary of State [2004] 1 WLR 2557 Pill LJ did observe at paragraph 45:

> "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 R (Malster) v Ipswich Borough Council & Ipswich Town Football Club [2001] EWHC Admin 711, at paragraph 89, in relation to Article 1, the prospective developer 'is equally entitled to the enjoyment of its possessions.'"

74. But even if Article 8 and Article 1 of Protocol 1 were here engaged, I cannot find that the Inspector, in reaching the conclusions he did in his Decision at paragraphs 7, 8 and 9, in any way came to conclusions which amount to a breach of those articles. There is good authority for the proposition that the balancing exercise undertaken by the Planning Inspector in this case, in deciding whether or not very special circumstances existed, reflects the proportionality test which would have to be applied if, in principle, there were an interference with the right under Article 8 to respect for one's private and family life and home, or, on the face of it, an interference with the claimant's right under Article 1 of Protocol 1 to peaceful enjoyment of his possessions.

75. I was referred in some detail to the decision of the Court of Appeal in Lough. The headnote reads that:

> "... the provisions of the Convention should inform the decision-maker's approach to material considerations in a planning matter, and the concept of proportionality and the need to strike a balance was inherent in that approach; that, in the circumstances, notwithstanding the proposed development departed from the local authority's development plan, the inspector had struck a balance in accordance with the requirements of Article 8 and there was nothing arbitrary in the procedure he had

adopted..."

76. At paragraphs 45-50 Pill LJ said this:

"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 judgment 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 R v Secretary of State for the Home Department ex parte Daly [2001] 2 AC 5322 at paragraph 23:

'Domestic courts must themselves form a judgment as to whether a Convention right has been breached (conducting such inquiry as is necessary to form that judgment)...'

47. I find no breach of Article 8(1). Resort to Article 8(2) is not in my judgment 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 judgment 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 R (Samaroo) v Secretary of State for the Home Department [2001] UKHRR 1622, 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 judgments of Sullivan J in Egan and Elias J in R (Gosbee) v The First Secretary of State [2003] EWHC 770 Admin 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."

77. Particular statements of principle emerging from these passages are these: first, Article 8 does not achieve a radical change in planning law; secondly, that although recognition does have to be given to the fact that Article 8 and Article 1 of the First Protocol are part of the law of England and Wales and, that being so, Article 8 should normally be considered as an integral part of the decision-maker's approach to material considerations, the concept of proportionality is inherent in the approach to decision-making in planning law; finally, the absence of the word 'proportionality' in a decision letter does not in itself render the decision unsatisfactory or liable to be quashed.

78. In my judgment, even if Article 8 were properly engaged before the Inspector, and Article 1 of Protocol 1 also, the balancing exercise, which he patently carried out and which is reflected in paragraphs 7, 8 and 9 of his decision, did amount to a proper balancing exercise for the purposes of applying the principle of proportionality within the meaning of Article 8, and indeed the First Protocol.

79. I ask myself how the result would have been any different than what is laid out in paragraphs 7, 8 and 9, had the Inspector spelt out the Convention considerations in express terms. The protection of the green belt, subject to very special circumstances being made out, which, in summary, is the import of the Policy RE2, must, in my judgment, be a legitimate and proportionate interference with rights under Article 8 or Article 1, subject only to any particular considerations unique to the applicant. But here I repeat, it could not be shown that this site was the existing home of the applicant in any meaningful sense. The considerations of his intentions, his need for independence, his desire to build a home there and the history of his having carried out restoration of the site are hardly factors which could outweigh the obvious need to protect the green belt from the harm which, in principle, was going to arise from the proposed development, including the further harm identified in paragraph 8.

80. In my judgment, the contention that paragraphs 7, 8 and 9 of the Decision ran roughshod over the Article 8 and Article 1 of Protocol 1 rights of the applicant is just not

made out. Nor is the argument sustainable that Policy RE2 is incompatible with these Convention rights. I repeat, Policy RE2, understandably, given its purpose of protecting the green belt from new buildings, demands, if planning permission is to be granted, that very special circumstances be shown to exist that outweigh the harm by reason of inappropriateness of the development or any other harm that can be shown to exist. That test is identical, in my judgment, to the exercise which would be carried out if one expressly applied, in terms, the proportionality approach under Article 8 or Article 1 of the Protocol.

81. For all these reasons, I cannot find that the Inspector in any way came to conclusions on the issue of very special circumstances which were unlawful, irrational or unreasonable; nor can I find that he erred in failing correctly to consider the claimant's rights under the Human Rights Act 1998. Overall, it has not been shown that the Inspector erred in law or in any other way acted perversely or irrationally, as contended for by the applicant. For all these reasons, this application must be dismissed.

82. MR BANNER: My Lord, I am very grateful indeed for that. I do have an application for costs. Before I make that application, my Lord, I wonder if I may respectfully make one minor suggestion for correction, which is simply that there were a couple of points where you referred to the PPS3 as PPG3, and your Lordship may, in the transcript, wish to look at that.

83. MR JUSTICE KING: Just remind me what it should be.

84. MR BANNER: It should be PPS3. Planning Policies PPG2 but PPS3.

85. MR JUSTICE KING: I will make sure, when I see the transcript, that that is corrected.

86. MR BANNER: Thank you, my Lord. As for my application for costs, I do not know, did your Lordship receive this?

87. MR JUSTICE KING: I have, but what I have done with I do not know.

88. MR BANNER: I have a spare one. It is easier for somebody to hand that up. **(Handed)**.

89. As to the principle, my Lord, I simply rely on costs following the event. As to the quantum, at this stage all I say is, in my submission Treasury rates are reasonable and the hours claimed are both reasonable and proportionate to a High Court hearing of a day of this nature. Just one slight correction, my Lord, is given on the second page. My fee is slightly different because the Treasury counsel rates, as you may be aware, are by the hour, and this hearing ran a little bit longer than I had anticipated, so my fee is £700, not £440.

90. MR JUSTICE KING: Where is that to be found?

91. MR BANNER: That is the very last box on page 2, before the end. So that makes the total £5,792.

92. MR JUSTICE KING: What was the amount of the fee now?

93. MR BANNER: Mine would be £700 full stop.

94. MR JUSTICE KING: Very good.

95. Yes?

96. MS WILLIAMS: My Lord, yes, I had the opportunity to look at the statement of costs with the claimant in this case. The summary assessment seems fair, my Lord. The issue is that obviously the claimant in this case was represented pro bono. He has very limited funds, being in retirement, and money is a matter of concern to him this case.

97. MR JUSTICE KING: I sympathise, but that is hardly a relevant factor, is it? I do not think I have the discretion to look into means at this stage; I just have to look to whether or not, as a matter of principle, costs should be awarded. Do you have any view on that?

98. MS WILLIAMS: My Lord, no.

99. MR JUSTICE KING: Costs should follow the event, should they not? The next question is whether you have any submissions to make on the reasonableness and proportionality of the items of cost.

100. MS WILLIAMS: My Lord, no. In relation to that they do seem reasonable.

101. MR JUSTICE KING: In the light of that, my order is, having dismissed this application, that the first defendant is entitled to his costs from the claimant and I assess them summarily in the sum of £5,752, as set out in the statement of costs.

102. MR BANNER: Thank you very much, my Lord.

103. MR JUSTICE KING: Can I thank everybody for their assistance.