



Case No: AC-2024-LON-002635

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
(PLANNING COURT)
[2024] EWHC 3271 (Admin)

The Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 13 November 2024

BEFORE:
MRS JUSTICE LANG DBE

BETWEEN:

THE KING
(on the application of MICHAEL WALLIS)

Claimant

-and-

SECRETARY STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS
NATURAL ENGLAND

Defendant

Interested Party

MISS K BARNES (instructed by Irwin Mitchell LLP) appeared on behalf of the Claimant.

MR H FLANAGAN(instructed by Government Legal Department) appeared on behalf of the Defendant.

The Interested Party did not appear and was not represented

JUDGMENT
(Approved)

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1. MRS JUSTICE LANG: This is a renewed application for permission to apply for judicial review of the defendant's notice of determination ("the Determination") pursuant to section 52 of the National Parks and Access to the Countryside Act 1949 ("the 1949 Act"), approving the coastal access proposals of Natural England ("NE") for a section of the Aust to Brean Down Route, which will cross the claimant's farmland. The notice was published on 7 May 2024.
2. The claimant also seeks to challenge the Planning Inspectorate's ("PINS") guidance for Inspectors in relation to the mode of determination for coastal access objections (Appendix B of Guidance: Coastal Access - Marine and Coastal Access Act 2009 - Part 9: Advice for Inspectors published 1 March 2013 ("the PINS guidance")).
3. Permission was refused on the papers by Sir Peter Lane, sitting as a judge of the High Court, on 25 September 2024.
4. Under ground one, the claimant contends that the determination was procedurally unfair at common law and under article 6 ECHR, because the claimant was not given the opportunity to reply to NE's comments on his objection to their proposals for coastal access across his land. It is contended there were important new matters in their comments which the claimant could not reasonably have addressed in his initial objection.
5. It is convenient to consider ground one, together with the challenge to the PINS guidance, as they are linked. The claimant contends that the PINS guidance sanctions the procedural unfairness referred to in ground one, because it encourages the use of the written representations procedure when it would be unfair to do so. A hearing or inquiry must be held where a landowner has made a valid objection and wishes to reply to NE's comments.
6. Schedule 1A to the 1949 Act, supplemented by the Coastal Access Reports (Consideration and Modification Procedure) (England) Regulations 2010 ("the 2010 regulations"), sets out a detailed step-by-step procedure to be followed when a coastal access report is submitted under section 51 of the 1949 Act. In summary, it provides:

(1) NE advertises its coastal access proposals (schedule 1A, paragraph 2).

(2) Affected landowners have the right to make a formal objection to the proposals on specified grounds (schedule 1A, paragraph 3). These must be made to NE within eight weeks of the publication of the report containing the coastal access proposals (regulation 4 of the 2010 regulations).

(3) Any such objection is referred by the defendant to an "appointed person", who, in practice, is a rights of way/planning inspector. The inspector determines if the objection is admissible (schedule 1A, paragraphs 4 and 5).

(4) NE is then required to comment on the objection (schedule 1A, paragraph 6).

(5) The objection, along with the relevant documents, including NE's comments, are provided to the inspector to make a recommendation to the defendant as to whether the proposals fail to strike a fair balance (schedule 1A, paragraphs 9 and 10). To assist with this, the inspector may elect to hold a hearing or an inquiry (schedule 1A, paragraph 13). Regardless of whether an inquiry is held, the inspector may carry out a site visit (regulation 8 of the 2010 regulations).

(6) The defendant then makes a final determination as to whether the proposal should be approved with notice of the determination given to affected landowners (section 52 of the 1949 Act and schedule 1A, paragraphs 16 and 17).

(7) Where a valid objection has been made, the notice must include the reasons for the determination insofar as these are relevant to the objection (schedule 1A, paragraph 17).

7. Thus, Parliament has provided for a procedure which adopts a sequential approach whereby NE presents a reasoned proposal, a landowner can object to it and NE can respond to the objection. The inspector and the defendant then consider all the submissions made when making a determination. In my view, there is nothing inherently unfair at common law or under article 6 ECHR in this procedure. Fairness

does not require a formal statutory right for the landowner to respond to NE's comments on a landowner's objection.

8. The PINS guidance sets out criteria to assist inspectors in deciding what type of procedure would be appropriate: written representations, a hearing or an inquiry. It advises that the written representations procedure will be the most appropriate procedure, where (1) the grounds of objection and issues raised can be clearly understood from the objections; and (2) the inspector should not need to test the evidence by questioning or to clarify any other matter face by face. It then sets out criteria for more complex cases to be considered at a hearing or at an inquiry,
9. The PINS guidance says nothing at all about whether, in a written representations procedure, a landowner may be permitted to reply to NE's response to his objection. It certainly does not indicate that it would be impermissible to do so. The submission that fairness requires a hearing or an inquiry whenever a landowner wishes to reply to NE's on his objection, regardless of the complexity of the issue, is unarguable and has no realistic prospect of success.
10. In reaching these conclusions, I have had regard to the authorities referred to by both parties: the claimant's counsel at paragraphs 10 to 13 of her skeleton argument, and the defendant's counsel at paragraphs 7 to 10 and paragraphs 29 to 32 of his skeleton argument.
11. I now turn to consider whether there was any arguable procedural unfairness to the claimant on the particular facts of this case. As long ago as 25 July 2019, NE published its coastal access report alongside a shadow Habitats Regulations Assessment ("HRA") and Nature Conservation Assessment. This provided a full explanation of the proposals and the reasoning behind them. Prior to the publication of the coastal access report, there had been significant engagement and discussion between NE and the claimant.
12. On 12 September 2019, the claimant exercised his right to object to the proposals under paragraph 3 of schedule 1A to the 1949 Act. The claimant submitted a detailed and informed objection to the proposal, as well as representations, which included the following issues:

(1) Omissions and inaccuracies in the shadow HRA provided by NE: these include concerns that key mitigation measures relied on were not realistic, particularly walkers complying with signs to keep dogs on leads in sensitive areas.

(2) Required changes to farming practices and increased cost for the claimant's farming businesses: these included the potential need to relocate bulls being grazed on the affected land and the risk posed to the public by live stock.

(3) Biosecurity concerns (risk of disease to cattle caused by dogs).

(4) A proposed alternative route relying on part of the recently approved cycleway between Clevedon and Weston-super Mare for the part of the route between Channel View and Tutshill. The claimant also submitted maps and the local authority's highway report on the cycleway,

13. On 28 January 2020, the claimant was informed by PINS that his objection was admissible. PINS directed NE to comment on the claimant's objection. NE made comments on the claimant's objection, in accordance with the statutory procedure, which were sent to the claimant in April 2021 under cover of a letter which also invited him to a site inspection with the Inspector on 24 May 2021. The letter stated, "Please find enclosed Natural England's comments on your objection. These are for information, no comments are invited". I agree with the defendant and Sir Peter Lane that this is not a statement that no comments would be accepted, and it was open to the claimant to reply to the comments.
14. I wish to return to the question of the eight-week time limit for exercising the right to object to NE's proposals. In my view, that length of time was not inherently unreasonable or unfair. If the claimant needed more time -- for example, to obtain an ecologist's report on the HRA -- he could have asked for an extension, but he did not do so.
15. The site inspection took place and the claimant attended with Ms Slade, a rights of way consultant whom he employed. PINS, on behalf of the Inspector, asked NE for its comments on various further matters by email on 15 June 2021. NE responded by

email on 1 July 2021. By letter dated 6 July 2021, PINS sent NE's response to the claimant stating that "I would appreciate any further comments you wish to make are sent to me by 21 July 2021". This letter expressly invited further comments from the claimant, although it did so in the context of NE's response to the Inspector's request for information. The invitation did not say or indicate that wider comments would not be accepted. Indeed, the claimant did take the opportunity to provide more general comments. His detailed reply dated 12 July 2021 dealt with matters relating to his objection, including his arguments for an alternative route along the proposed cycleway, risk of injury due to members of the public passing through fields containing cattle, limited views of the sea from the proposed path and a complaint that the authors of the HRA were insufficiently independent.

16. On 6 October 2021, the claimant wrote to the Inspector asking for a response to his letter of 12 July 2021. PINS sent the claimant a letter on 1 November 2021 confirming that his letters had been passed to the Inspector. The letter ended as follows:

"The Inspector will now consider whether she has all the information she needs to make her recommendations to the Secretary of State. If not, I will write again".

17. I agree with the defendant and Sir Peter Lane that that letter clearly raised the prospect of the Inspector proceeding to make a recommendation without a further opportunity being provided to the claimant to make submissions, whether by a hearing, an inquiry or further written representations. The claimant was on notice that, if he considered it necessary to submit any further information, he needed to do so forthwith,
18. On 3 November 2021, NE emailed Ms Slade to request a meeting to discuss some further questions posed by the Inspector, primarily concerned with the possibility of straightening the route through the claimant's land. Further correspondence was exchanged in this regard between Ms Slade and NE on 8 November 2021, 8 December 2021, 10 December 2021, 23 December 2021 and 17 January 2022. NE suggested a further site visit, but the claimant declined. Ms Slade responded on his behalf on 17 January 2022 saying, "Mr Wallis is not unwilling to discuss modifications but he feels that discussion falls naturally once the principal issues have been determined".
19. In the same email, Ms Slade raised his concerns about the process:

"He has raised a number of issues, including in correspondence with the Inspector, and he has neither had a response to these nor any indication as to when such matters will be considered. He feels the process is unbalanced, that from the site visit it is going straight to decision without open consideration of the issues raised. Even if the process was not to be determined by hearing, he would have expected there to be formal opportunity for written representations. He notes that some issues have not been discussed at all: for example, his proposal for an alternative route".

This email was copied to PINS.

20. On 9 March 2022, NE responded to the Inspector in respect of her outstanding questions. It indicated that it had been unable to consider further the possibility of straightening the route through the claimant's land in circumstances where he had declined a further site visit.
21. In my view, the claimant cannot legitimately claim he was not given sufficient opportunity to respond when he refused to participate further in a site visit and in ongoing discussions about the route.
22. The claimant contends that there were further new matters raised in NE's comments on which he which he wished to respond. However, he did raise these further matters with NE and in writing to the Inspector and there was nothing to prevent him from making further representations if he wished to do so.
23. The claimant gives two examples of new matters in NE's comments: first, the expert evidence of Mr Jenkinson regarding the effectiveness of keeping dogs on leads. This had already been raised in the shadow HRA. NE's comments were supplied to the claimant in April 2021 and he could have responded after that.
24. Secondly, NE's comments on why the claimant's proposed alternative cycle route was unsatisfactory. The claimant did make further representations on the alternative cycle route in his 12 July 2021 letter, but he did not respond to NE's points about safety.
25. On 3 July 2023, the Inspector completed her report into the sections of the route that passed over the claimant's land. The report was not made public at that stage.

26. On 17 April 2024, Minister Pow decided to approve the proposals. A letter dated 1 May 2024 was sent to the claimant with the notice of approval, but it was not received until 9 May 2024. The notice was published online on 7 May 2024, together with the Inspector's report.
27. In my judgment, on the evidence, it is unarguable that the claimant was not given a fair opportunity to make representations on NE's comments on his objection. I also consider that, given the leisurely pace of the procedure, the claimant had sufficient time to commission expert reports, if he wished to do so.

Ground two

28. On ground two, the claimant submits that the notice of approval did not provide a statement of reasons, in breach of the duty imposed by paragraph 17(4) of schedule 1A, and that the reasons are inadequate.
29. I agree with Sir Peter Lane that it is "unarguably apparent" what the defendant decided and why he did so. The decision notice has to be read in the context of the material that was before the defendant, in particular NE's proposal, its comments and the HRA. The notice addresses the objections received in annex A and the representations made in annex B. The claimant's objections and representations are referenced along with others (see reference ending in 1340 and the text at pages 505, 513, 514, 515 and 519).
30. On a fair reading, the defendant agreed with and adopted the reasoning of the appointed person, the Inspector. In my judgment, there can be no genuine as opposed to forensic doubt as to what the defendant decided on the principal important controversial issues and there is no realistic prospect of success in the claimant's submission that the standard of reasoning set out in *South Bucks DC v Porter (No.2)* [2004] 1 WLR 1953 has not been met. Furthermore, the claimant has not satisfied the requirement to show that he has been substantially prejudiced by any deficiency in the reasons.
31. Finally, even if the reasons challenge was arguable, which I have found it was not, section 31(3C) to (3D) of the Senior Courts Act 1981 applies, as it is highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred.

32. For these reasons, permission is refused.

COSTS

33. The claimant objects to the costs order of Sir Peter Lane, that the claimant do pay the defendant's costs in the sum of £9,310.90.

34. I deal with the objections in turn.

35. First, I consider it was entirely appropriate for the defendant Secretary of State to instruct the Government Legal Department to act in these proceedings instead of out-of-London private solicitors.

36. Secondly, the objection that there was substantial overlap between the work done between the grade A and grade C fee earners and too much time was spent by both of them on their tasks is not made out. This was a complex case. The defendant's solicitors have explained that the fee earner with primary conduct of the claims is a grade C fee earner. A grade A fee earner from the same team assisted when the primary fee earner was unavailable at the outset of the claim, and with instructions to counsel. I accept that the grade A fee earner had to fully review the documents and the costs incurred were reasonable and proportionate.

37. The grade C fee earner reviewed the summary grounds of resistance, and cross-checked these against the statement of facts and grounds, and documents produced. I accept that the costs incurred by the grade C fee earner were reasonable and proportionate.

38. Therefore, I confirm the costs order made by Sir Peter Lane on 25 September 2024.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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