

Talk 8 - Asylum Accommodation and the Planning Issues Arising

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Overview

- Background
- Planning Issues Arising
- Hotel Cases: *Ipswich, Fenland, Gt Yarmouth*
- Larger Sites: *Napier Barracks, Yarl's Wood, Penally, Barton Stacey*
- Class Q, Pt 19 of Sched 2 TCP (GPD) (Eng) Order 2015 (“**Class Q**”) re emergency development on Crown land
- Statements in Parliament
- Further Sites: *RAF Scampton, RAF Wethersfield, Bexhill, Portland Port*
- Conclusions and Further Thoughts

Background

- Nov 2022 – Home Secretary Suella Braverman described asylum system as “broken”. Channel crossings on the rise but processing of applications on the decline with ever increasing backlogs (c.130k in June 2022, with 70% waiting 6+ months for a decision; c166k in Dec 2022; 2nd biggest backlog in Europe after Germany)
- Resulting growth in need for accommodation (*Ipswich* [21-29])
- SSHD has obligations to provide support for asylum seekers and dependants likely to become destitute under s95 of Immigration and Asylum Act 1999 & Reg 5 of Asylum Seekers (Reception Conditions) Regs 2005 (*Ipswich* [1-2])
- Led to widespread use of short-stay accommodation such as hotels (c.40k asylum seekers, costing c.£6m/day) arranged through contractors (such as Serco Ltd)

Planning Issues Arising

- The SSHD has sought to avoid applications for planning permission for asylum accommodation wherever possible (e.g. through PD rights under Pt 19 GDPO 2015 or unauthorized development, Special Development Order, etc).
- Many LPAs have responded by resorting to JRs and planning enforcement tools available to them (PCNs, ENs, SNs, TSNs, Injunctions)
- The use of hotels for the accommodation of asylum seekers may constitute a material change of use (“**MCoU**”) for which planning permission is required (hostel became *sui generis* rather than Class C in Use Classes Order 1994/724).

Planning Issues Arising (Continued)

- Likewise the use of larger sites (e.g. army barracks and disused airfields) for these purposes will usually involve a MCoU
- The only LPA enforcement which is preventative is s187B TCPA 1990:
“(1)Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part”
- Several LPAs (e.g. Ipswich, E Riding of Yorkshire, Fenland DC, Gt Yarmouth BC) sought urgent *ex parte* injunctions at the end of last year. Most were granted on an interim basis but then discontinued by Holgate J.

Hotel Cases

- *Ipswich BC v Fairview Hotels and others (2) East Riding of Yorkshire Council v LGH Hotels and others* [2022] EWHC 2868
- *Fenland District Council v CBPRP Ltd, Serco Ltd and H&H North Ltd* [2022] EWHC 3132 (KB)
- *Great Yarmouth Borough Council v Al-Abdin & Others* [2022] EWHC 3476 (KB)

Ipswich BC v Fairview Hotels and others (2) East Riding of Yorkshire Council v LGH Hotels and others [2022]EWHC 2868

- Both LPA's sought to renew ex p s187B TCPA 1990 injunctions to restrain MCOU from hotel to hostel both re individual hotels and within wider areas
- Both hotels had entered into contracts with SSHD's contractors providing sole and exclusive use of each hotel for an agreed period
- SSHD denied any MCOU
- Jacobs J granted IBC and ERY interim injunctions on 27 10 22 and 28 10 22 respectively

*Ipswich BC v Fairview Hotels and others (2) East Riding of Yorkshire Council v LGH Hotels and others [2022]EWHC 2868
(Continued)*

- Holgate J held that both cases involved triable issues but the balance of convenience favoured allowing the use to continue until trial, particularly due to SSHD's duty to accommodate large numbers of recently arrived asylum seekers [21-29] and no flagrancy [118]. IBC had not shown substantial planning harm as the use was temporary and other enforcement tools could be used. ERY likewise failed to show factors in favour of the injunction outweighed those against it.
- NB Judicial criticism of ex p injunctions without notice "difficult to see how secrecy was justified in either case" [66]; useful review of hotel v hostel uses [72-83] and of the range of enforcement tools available to LPAs [84-90].

Fenland District Council v CBPRP Ltd, Serco Ltd and H&H North Ltd [2022] EWHC 3132 (KB)

- Less than 6 weeks after the *Ipswich* case, Holgate J considered whether to continue the out-of-hours interim injunction granted by Jay J on 07 11 23 preventing the use of the Rose & Crown, Wisbech for accommodating asylum seekers.
- Holgate J heard the inter parties application on 23 11 23 and on 25 11 22 handed down a relatively short judgment discontinuing the interim injunction
- FDC relied on safeguarding / trafficking issues experienced over 15 years [25] but Holgate J held that the balance of convenience lay in discontinuing the injunction due to temporary nature of use, limited harm and no flagrancy
- Following *Fenland* a number of LPA's discontinued their applications for injunctions

Great Yarmouth Borough Council v Al-Abdin & Others [2022] EWHC 3476 (KB)

- GYBC sought injunction under s187B TCPA 1990 to restrain Ds from using/facilitating the use of the Villa Rose Hotel and any others within Policy GY6 area. NB no injunction pursued vs 2 other hotels (Victoria and Embassy)
- Knowles J granted *ex p* interim injunction on 23 11 23
- Holgate J heard *inter partes* application for interim injunction on 21 12 22 and granted it due to the special protections in policy GY6 aimed at preventing loss of GYBC's important tourist income and the fact that the hotel was already the subject of a 2006 EN.
- Holgate J held that there was a serious issue to be tried (i.e. whether unauthorized MCOU from hotel to hostel) [46] and that because of the importance of GY6 and the longer period of anticipated use of the hotel and harm to tourist economy the injunction should be continued [79]
- Unlike in previous applications Holgate J held that the apprehended breach had a “flagrant character” due to 2006 EN [67].

Larger Sites

- *R (NB) v SSHD* [2021] EWHC 1489 (Admin) – Linden J: SSHD’s use of Napier Barracks to house destitute asylum seekers was perverse since conditions posed significant risks to physical and mental health and breached PHE advice. (Not a planning case)
- *R (Hough) v SSHD* [2022] EWHC 1635 (Admin) – Lieven J: SSHD’s NB’s 5 yr s59(3)(b) TCPA 1990 Special Development Order of 27 08 21 was in breach of s149 EA 2010 and s31(2A) SCA 1981 did not apply (*Tameside* and Class Q grounds dismissed).
- *Yarl’s Wood, Beds.* - SSHD backed down from using already constructed accommodation due to PAPL re Class Q, Pt 19, Sched 2 GPDO 2015 (said to be disapplied by Reg 3(4) and conditions prohibiting development, lack of EIA and in any event not an emergency)
- *Penally, Pembrokeshire* – SSHD relied on Class Q to use army camp for a year but then returned it to MoD on 21 03 21 rather than apply for PP
- *Barton Stacey, Wilts.* – SSHD scrapped plans to accommodate up to 500 asylum seekers after threats of challenge based on contaminated land and interference with a large housing scheme.
- *Comment:* SSHD avoids public scrutiny by using Crown land, PD rights, SDOs etc. or capitulating. Larger sites - LPAs forced to take on HMG (cf hotels)

Class Q of Sched 2 of Pt 19 of GPDO 2015

Class Q – development by the Crown relating to an emergency

Permitted development

Q. *Development by or on behalf of the Crown on Crown land for the purposes of—*

- (a) *preventing an emergency;*
- (b) *reducing, controlling or mitigating the effects of an emergency; or*
- (c) *taking other action in connection with an emergency.*

Conditions

Q.1 Development is permitted by Class Q subject to the following conditions—

- (a) the developer must, as soon as practicable after commencing development, notify the local planning authority of that development; and
- (b) on or before the expiry of the period of **12 months** beginning with the date on which the development began—
 - (i) any use of that land for a purpose of Class Q ceases and any buildings, plant, machinery, structures and erections permitted by Class Q is removed; and
 - (ii) the land is restored to its condition before the development took place, or to such other state as may be agreed in writing between the local planning authority and the developer.

[emphasis supplied – amended by TCP(GPD)(England)

(Amendment) Regs 2020]

Class Q of Sched 2 of Pt 19 of GPDO 2015 (Continued)

Interpretation of Class Q

Q.2—(1) For the purposes of Class Q, “emergency” means an event or situation which threatens serious damage to—

- (a) human welfare in a place in the United Kingdom;
- (b) the environment of a place in the United Kingdom; or
- (c) the security of the United Kingdom.

(2) For the purposes of sub-paragraph (1)(a), an event or situation threatens damage to human welfare only if it involves, causes or may cause—

- (a) loss of human life;
- (b) human illness or injury;
- (c) homelessness;
- (d) damage to property;
- (e) disruption of a supply of money, food, water, energy or fuel;
- (f) disruption of a system of communication;
- (g) disruption of facilities for transport; or
- (h) disruption of services relating to health.

(3) For the purposes of sub-paragraph (1)(b), an event or situation threatens damage to the environment only if it involves, causes or may cause—

- (a) contamination of land, water or air with biological, chemical or radioactive matter; or
- (b) disruption or destruction of plant life or animal life.

Statements in Parliament

- PM statement on illegal migration (13 12 22):

“it’s unfair and appalling that we are spending £5.5 million every day on using hotels to house asylum seekers. We must end this. So, we will shortly bring forward a range of alternative sites such as disused holiday parks, former student halls, and surplus military sites. ... Our aim is to add thousands of places through this type of accommodation in the coming months - at half the cost of hotels.”

- Minister for Immigration Robert Jenrick MP statement on illegal migration (29 03 23):

“The sheer number of small boat arrivals has overwhelmed our asylum system and forced the Government to place asylum seekers in hotels. These hotels take valuable assets away from communities and place pressures on local public services. Seaside towns have lost tourist trade, weddings have been cancelled and local councils have had their resources diverted to manage them. The hard-working British taxpayer has been left to foot the eye-watering £2.3 billion a year bill. We must not elevate the wellbeing of illegal migrants above that of the British people; ... Accommodation for migrants should meet their essential living needs and nothing more, because we cannot risk becoming a magnet for the millions of people who are displaced and seeking better economic prospects...So today the Government are announcing the first tranche of sites we will set up to provide basic accommodation at scale. The Government will use military sites being disposed of in Essex and Lincolnshire and a separate site in East Sussex.

Specific Sites

Home Office Spokesman (29 03 23):

To begin reforming the accommodation system, the government will:

- set up accommodation sites on surplus military sites in Wethersfield and Scampton for up to 3,700 asylum seekers across both sites, while preserving their heritage
- open a non-military site in Bexhill, East Sussex which will also be used for accommodation for up to 1,200 people
- explore the use of vessels to provide accommodation in line with the approach taken by the Netherlands and Scotland
- significantly increase dispersed accommodation across the country by providing a new local authority funding package with a generous additional per bed payment for asylum seekers, alongside continued funding for each new dispersal bed
- pilot an extra incentive payment for local authorities when properties for asylum seekers are made available faster
- introduce a temporary licensing exemption to houses of multiple occupancy regulations for asylum seekers which will help move people out of hotels more quickly

Braintree DC v SSHD KB/2023/001503

- Application for injunction made on 31 03 23 based on challenge to Class Q
- SSHD relies on Crown exemption from s187B TCPA 1990 under s296A (2) (Enforcement in relation to the Crown):
 - “(2)A local planning authority must not take any step for the purposes of enforcement in relation to Crown land unless it has the consent of the appropriate authority.”
- On 05 04 23 Holgate J ordered no use of site pending full injunction hearing on 19 04 23
- Waksman J heard arguments on scope of Crown immunity and Class Q yesterday and is due to hand down judgment imminently

Conclusions and Further Thoughts

- SSHD has sought to avoid planning applications and the associated public participation and scrutiny
- Planning enforcement / challenges have proved to be the principal but not only means by which LPAs / the public have been able to engage re the use of hotels / other sites for asylum accommodation
- SSHD attempts at using larger sites have proved largely unsuccessful
- SSHD use of hotels has proved unpopular and politically costly
- We are at the beginning of a new phase in deployment of other sites with some of the previous features (e.g. reliance on Class Q) but also some lessons learnt (e.g. front-loaded EIA scoping, EqIAs, etc.)
- The Courts have not seen the last of the legal challenges to HMG's asylum accommodation policy choices...