INTRODUCTION

Jonathan Darby

Welcome to the first edition of our Planning, Environment and Property newsletter of 2021. We hope that you all had a restful Christmas and New Year. This edition features an article on the implications of the Supreme Court's decision on Heathrow NPS from Celina Colquhoun, alongside two short articles from Stephen Tromans QC, with the first considering this week's announcement in relation to further delay to the Environment Bill, and the second on the issue of the presence of old hazardous waste landfills in England and Wales.

There are also a number of other items that we would like to bring to your attention.

Contents

Richard Harwood QC's new short series on lobbying councillors has launched this week. In the first episode, which you can listen to here, Richard Harwood QC looks at the Holborn Studios (No2) judgment and asks the fundamental question: is there a right to communicate directly with elected politicians?

Stephen Tromans QC's popular series of short videos on current issues in environmental and planning law. In his first episode for 2021, Stephen awaits Storm Christoph, reflects on the wreck of the tanker Erika, and on the UK/EU Trade and Cooperation Agreement. You can watch here.

We have also recently launched our Art and Cultural Property Group, which is bringing together our art expertise in contract, tort, property, historic environment and regulatory work. More information on the group's expertise can be found on the sector page here. It is worth noting that the first webinar of our Art and Cultural Property Series will be taking place in a few weeks, in which Richard Harwood QC, David Sawtell, Catherine Dobson and Professor Antonia Layard will be discussing contested heritage: whether statues or other memorials should be removed because of the conduct of those depicted. Further details to follow shortly.

Finally, and in light with the overwhelmingly positive feedback received in 2020, we are pleased to confirm that the Pilot Briefings service is still open for all of our clients to use. To utilise the service, we will require a short email detailing the issues at hand and the questions you would need addressing. On receipt, a 15 minute time slot will be arranged with a member of our established team of silks, senior juniors and juniors, who will be able to discuss the legal query you have. If you would like to book a Pilot Briefing with one of our Planning, Environment and Property experts, then please contact Andrew Poyser or Elliott Hurrell.

IDENTIFYING POLICY: THE IMPLICATIONS OF THE SUPREME COURT'S DECISION ON HEATHROW NPS

Celina Colquhoun

***R(oao FOE et ors) v HAL* [2020] UKSC 52**

Whilst the dust is still settling on the Supreme Court's ('SC')decision last month (16 December 2020) to overturn the Court of Appeal's ruling that the designation (pursuant to section 5 of the Planning Act 2008 (PA08) of the *"Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England"* ('the Airports NPS') was not lawful and the DCO application for a northern runway at Heathrow now awaits, there is much else to be noted from the SC's judgment. This is beyond the more specific aspects on Climate Change Act 2008 ('the CCA') and the Paris Agreement but upon the wider aspects of their lordships conclusions as to what does and what does not amount to 'Government policy'.

Under the TCPA 1990 regime as we know and as we were reminded time and again with the debates which flowed following the adoption of the NPPF e.g. Hopkins Homes Ltd[1] it is to policies laid out in an adopted local plan that we all must look to first in approaching the question of whether a development can go ahead and thereafter relevant Government policy is 'only' a material consideration.

However as confirmed by the Lord Justice Treacy (with whom the Master of the Rolls Lord Justice Laws agreed) in *SSCLG v West Berkshire DC*[2] ('the WMS case')the role of government policy in planning is not in any way to be treated as secondary:

> *"First while the development plan is under s.38(6) [of the Planning and Compulsory Purchase Act 2004] the starting-point for the*

1 *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 W.L.R. 1865
2 [2016] EWCA Civ 441

decision-maker (and in that sense there is a "presumption" that it is to be followed), it is not the law that greater weight is to be attached to it than to other considerations: see in particular Glidewell LJ's dictum in Loup cited by Lord Clyde. Secondly, policy[3] may overtake a development plan ("… outdated and superseded by more recent guidance"). Both considerations tend to show that no systematic primacy is to be accorded to the development plan."

As Lord Hope in City of Edinburgh[4] put it *"The development plan does not, even with the benefit of section [38(6)] have absolute authority…"*.

In the WMS case, Treacy LJ reminded us [12] that *"that the Secretary of State's power to formulate and adopt national planning policy is not given by statute. It is an exercise of the Crown's common law powers conferred by the Royal Prerogative."*

The issue of course raised in the WMS case was whether the policy, promulgated through a Written Ministerial Statement in November 2014 relating to changes to levels of affordable housing levies and the tariff-based contribution required of developers, was lawful. In Holgate J's judgment the policy was not as based upon reasons on inconsistency with the statutory scheme; a failure to take relevant matters into account; failure properly to consult and failure to accord with the Equality Act 2010.

The Court of Appeal took a different view largely on the basis that the making of policy at common law was not proscribed in the way Holgate J had considered.

Debates more often rage in planning about the interpretation of planning policy as opposed to its identification as such. It is comparatively easy to identify a Local Plan and the policies therein, less so it would appear, to identify relevant Government policy.

The *Encyclopaedia of Planning Law & Practice* at P70.35 harks back to the time when there were available manifold circulars (as well as Planning Policy Guidance document) and describes Government policy in the following way:

"Although the Secretary of State for Communities and Local Government is no longer subject to the duty formerly imposed on his predecessors by s.1 of the Minister of Town and Country Planning Act 1943 to "secure consistency and continuity" in land use policy (the section was repealed by SI 1970/1681), the policies promulgated by him provide a framework for decision-making by him... His policies filter through to local planning authorities both through the forward planning system and through development control. Policy is communicated to local planning authorities principally by way of circulars but also by way of ministerial statements, White Papers, appeal decisions and other means. Unless issued under some specific statutory authority (such as a Direction issued under the Act or under the Town and Country Planning (Development Management and Procedure) Order, for example) a circular is not formally binding on a local planning authority. It will, however, be taken into account by the Secretary of State on appeal from their decision or on a called-in application, and the interpretation and application of the policy (although not its merits, nor the merits of the application) is liable to be reviewed in the courts." [emphasis added]

The authors go on to suggest a number of propositions including:

"(4)a policy need not be promulgated in any particular fashion for it to be taken into account. Policy may be made on an ad hoc basis, and an identifiable consistent trend of past decisions may demonstrate, or constitute, policy. But to this principle there are important exceptions. First, the courts have stressed

3 i.e. Government policy

4 *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447 Lord Hope at p. 1450B-D):

that inspectors are not themselves policy makers, and that their decisions should not therefore be regarded as precedents: see, e.g. Sears Blok & Co. v Secretary of State for the Environment [1980] J.P.L. 523; Chelmsford BC v Secretary of State for the Environment and E.R. Alexander Ltd [1985] J.P.L. 316. Second, although any statement of policy may be taken into account, the weight to be attached to it may vary in accordance with the formality of its expression. In Dinsdale Developments Ltd v Secretary of State for the Environment [1986] J.P.L. 276 an attempt was made to persuade the court to accept as "policy" an after dinner speech made by the then Secretary of State. The court reluctantly looked at the material, though doubtful whether it was admissible, but found that it did not assist the appellants' case. Thirdly, proposals for new policies which are still in the formative stage cannot yet constitute policy, as where a circular is issued in draft on a genuinely consultative basis: see, e.g. Pye (J.A.) (Oxford) Estates Ltd v Secretary of State for the Environment and West Oxfordshire DC [1982] J.P.L. 577. But that may not always be the case, and it may be relevant still to take a draft circular into account as reinforcing a policy point (see, e.g. Richmond upon Thames LBC v Secretary of State for the Environment [1984] J.P.L. 24), and to take into account advice on an issue which has been given independently to the Secretary of State, though is not yet government policy: see, e.g. Westminster City Council v Secretary of State for the Environment and City Commercial Real Estate Investments Ltd [1984] J.P.L. 27 (Property Advisory Group's report on planning gain)…"

The CA in the WMS case was not debating whether the policy set out in the WMS was Government policy but the lawfulness of the policy itself and its promulgation

By contrast in the Heathrow Airports NPS case, whilst the principal issue was whether the Airports NPS was lawfully designated under the PA 08, central to that question was whether, in so designating, the SofS had *"given reasons for the policy"* and that those reasons explained how the policy *"takes into account Government policy relating to the mitigation of, and adaptation to, climate change"* in accordance with Section 5(7) and (8) and also reflecting s10 of the PA 2008.

The Respondents had been successful in the CA in arguing that there had been a failure to accord with the above statutory provisions due to an open acknowledgment by the SofS that the terms and commitments set out in the Paris Agreement had not been taken into account.

This in the CA's view meant that the designation was unlawful because [228] *"the Government's commitment to the Paris Agreement was clearly part of "Government policy" by the time of the designation of the ANPS. First, this followed from the solemn act of the United Kingdom's ratification of that international agreement in November 2016. Secondly, as we have explained, there were firm statements re-iterating Government policy of adherence to the Paris Agreement by relevant Ministers, for example the Rt. Hon. Andrea Leadsom MP and the Rt. Hon. Amber Rudd MP in March 2016."*

The SC disagreed with the above. In particular, the judgment of Lord Hodge and Lord Sales took issue with the CA's view that the words "Government policy" *"were words of the ordinary English language"*.
The SC specifically adopted a purposive approach to the obligation under s.5 [105] *"that an NPS give reasons for the policy set out in it and interpret the statutory words in their context"* which was *"to make sure that there is a degree of coherence between the policy set out in the NPS and established Government policies relating to the mitigation of and adaptation to climate change."*

In their Lordships view in speaking of *"Government policy"* s.5 of the PA 08 *"points toward a policy which has been cleared by the relevant departments on a government-wide basis. In our view the phrase is looking to carefully formulated written statements of policy such as one might find in an NPS, or in statements of national planning*

policy (such as the National Planning Policy Framework), or in government papers such as the Aviation Policy Framework".

Rather than taking the wider approach of the CA the SC concluded that in order for s.5(8) *"to operate sensibly the phrase* [Government policy] *needs to be given a relatively narrow meaning so that the relevant policies can readily be identified. Otherwise, civil servants would have to trawl through Hansard and press statements to see if anything had been said by a minister which might be characterised as "policy"".* In particular, their Lordships considered that *"Parliament cannot have intended to create a bear trap for ministers by requiring them to take into account any ministerial statement which could as a matter of ordinary language be described as a statement of policy relating to the relevant field."*

In terms of additional guidance their Lordships set what they considered was *"the epitome of "Government policy"* namely *"a formal written statement of established policy"* [106].

They did acknowledge that there *"might in some exceptional circumstances"* be exceptions the judgment emphasised that *"it is appropriate that there be clear limits on what statements count as "Government policy", in order to render them readily identifiable as such."*

These limits are provided by *"the criteria for a "policy" to which the doctrine of legitimate expectations could be applied"* and these criteria *"would be the absolute minimum required to be satisfied for a statement to constitute "policy" for the purposes of section 5(8)".*

Those criteria are that *"a statement qualifies as policy only if it is clear, unambiguous and devoid of relevant qualification".*[5]

It was in particular a matter of agreement before the SC not only that *"a ratified international treaty which had not been implemented in domestic law"* (i.e. the Paris Agreement at the relevant point or indeed once ratified) does not fall *"within the statutory phrase "Government policy""* as well as once it was ratified. This was in noted contrast to the position taken by the successful appellants before the CA and which the CA appeared to agree [108]. As explained at this was because [108]:

> *"The fact that the United Kingdom had ratified the Paris Agreement is not of itself a statement of Government policy in the requisite sense. Ratification is an act on the international plane. It gives rise to obligations of the United Kingdom in international law which continue whether or not a particular government remains in office and which, as treaty obligations, "are not part of UK law and give rise to no legal rights or obligations in domestic law" (R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5; [2018] AC 61, para 55).*

In addition and which specific attention and reliance had been placed upon in the CA and by the respondents in the SC to two statements made by ministers[6] in the House of Commons as to how the commitment within the Paris Agreement (before it was finally ratified) might be taken forward and where policy is still inchoate also do not satisfy the policy criteria.

This was because these statements *"were not clear and were not devoid of relevant qualification in this context. They did not refer to the temperature targets at all and they both left open the question of how the Paris Agreement goal of net zero emissions would be enshrined in UK law. Andrea Leadsom went out of her way to emphasise that "there is an important set of questions to be answered before we do." The statements made by these ministers were wholly consistent with and plainly reflected the fact that there was then*

5 E.g. *Inland Revenue Comrs v MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 , 1569 per *Bingham LJ; R (Gaines-Cooper) v Comrs for Her Majesty's Revenue and Customs* [2011] UKSC 47; [2011] 1 WLR 2625 , paras 28 and 29 per Lord Wilson of Culworth

6 by of Andrea Leadsom MP and Amber Rudd MP

an inchoate or developing policy being worked on within Government. This does not fall within the statutory phrase." [106]

The question that arises of course is does this lead to a change to the approach that planners should apply to what should or should not amount to Government planning policy?

The fact that this decision was in the context of s5 of the PA 08 should not sensibly lead to the conclusion that a different approach to the meaning of Government policy outside of that Act.

It is interesting to compare the criteria set out in the SC judgment with the propositions and extracts from the Encyclopaedia above which imply a looser approach but it is one thing to submit a draft policy or formal statement is relevant and quite another to suggest it is 'policy'.

In general terms it would seem that this decision should lead to little debate nevertheless practitioners ought to be alive to arguments about weight to be accorded to statements in parliament; letters to planning officers; White Papers or indeed the Planning Practice Guidance itself and other emanations of the Government that are not formally identified as planning policy but which may have hitherto been treated as Government policy as a consequence of expression.

DELAY TO ENVIRONMENT BILL

Stephen Tromans QC

On Tuesday 26 January the Environment Bill was due to begin its House of Commons Report Stage. Instead, the Minister of State Rebecca Pow MP announced it was being pulled from the current parliamentary Session and carried over to the next. The Government has given the cause as lack of Parliamentary time caused by pressure from the COVID-19 pandemic on the Parliamentary timetable. The risk was that lack of time might have meant the Bill failing to pass and having to start from scratch the Parliamentary process in the next Session. As it is, we are now looking at the Bill becoming law at best in late 2021.

Whilst the Government has stated its commitment to this "flagship" piece of legislation, the delay has caused dismay and has been criticised by many environmental interest groups.

Minister Pow is reported as having said that *"… carrying over the bill to the next session does not diminish our ambition for our environment in any way"* and that

> *"… key work on implementing the Bill's measures will continue at pace, including establishing the Office for Environmental Protection, setting long-term legally-binding targets for environmental protection and creating a new Deposit Return Scheme for drinks containers."*

Assuming that the delay does not represent a weakening of commitment by the Government, a key issue will be how far the extra time results in a strengthening of the Bill's provisions when it returns. One key area is that of air quality. Articles in The Times this week have highlighted further research on the serious health effects of urban air pollution: for example on populations in outer London suburbs which are not generally seen as pollution "hotspots", and as a possible cause of irreversible sight impairment by

macular degeneration. Giving legal effect to WHO standards on PM 2.5 remains a possible step.

Another possible area of improvement is a clearer legal commitment on the natural environment, in line with the Government's political aspirations to be the generation which leave the environment in a better state than it found it. The decline in habitats and species remains a serious cause for concern.

The delay to the Bill will of course also result in the OEP's functioning being set back from the indicated summer 2021 until possibly 2022. The designated Chair of the OEP has been reported as describing the decision as "extremely disappointing". Those scrutinising the Bill will wish to see greater assurance than it has hitherto given on the resourcing and independence of the OEP.

The 39 Essex Website offers a range of resources on the Bill, including a written guide and an archived webinar series. Readers may also be interested in the series of webinars being run on the UK/EU Trade and Cooperation Agreement, the first of which was on 27 January, with further webinars to follow on 15 March and 15 April. Again, details are on the website.

OLD LANDFILLS

Stephen Tromans QC

At the start of 2021 ENDS Report (15 and 18 January 2021) ran articles on the issue of the presence of old hazardous waste landfills in England and Wales, based on analysis of Environment Agency data. The results make for sobering reading. According to the data, there are over 21,000 old landfills across England and Wales, of which around 1,287 are thought to contain hazardous waste.The waste is in many cases not categorised adequately, or indeed at all: over 7,000 landfills contain unspecified "Industrial liquid sludge" and at over 400 the waste content is simply unknown. Of course, sites dating back to the 1950s or 1960s, prior to the Deposit of Poisonous Waste Act 1972, even if ostensibly comprising domestic or inert waste, may well also contain hazardous chemicals or substances. The data itself held by the Environment Agency is not entirely reliable, dating back to a Department of Environment project which has not been updated, or refined to address changing approaches to what is hazardous waste.

Mapping of the sites by ENDS shows that current land uses over the landfills varies widely, from green space and parkland, through sports pitches, race tracks and commercial premises, to schools, care homes and housing. About 750 are within 500m of water bodies. About 2,100 are located on the coast or in flood risk zones, making them potentially vulnerable to flooding and coastal erosion. The older sites will of course not be lined to modern standards, or at all. They are likely in some cases to contain substances which are now banned such as PCBs, PFOS and PFOA.

Absent any funding to investigate, let alone clean-up sites, they remain a serious possible risk to public health and the environment, and a contingent liability for the landowner.

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Stephen is recognised as a leading practitioner in environmental, energy and planning law. His clients include major utilities and industrial companies in the UK and elsewhere, banks, insurers, Government departments and agencies, local authorities, NGOs and individuals. He has been involved in some of the leading cases in matters such as environmental impact assessment, habitats, nuisance, and waste, in key projects such as proposals for new nuclear powerstations, and in high-profile incidents such as the Buncefield explosion and the Trafigura case. To view full CV click here.

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