PLANNING CONTROLS and their ENFORCEMENT

EIGHTH EDITION

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In (c) above, "energy efficiency standards" means standards for the purpose of furthering energy efficiency that are:

(i) set out or referred to in regulations made by the appropriate national authority under or by virtue of any other enactment (including an enactment passed after the date of the passing of the 2008 Act (13 November 2008); or

(ii) set out or endorsed in national policies or guidance issued by the Secretary of State, in the case of a local planning authority in England or the Welsh Ministers, in the case of a local planning authority in Wales.

"Energy requirements", in relation to building regulations, mean requirements of building regulations in respect of energy performance or conservation of fuel and power (s.1(2)).

The powers described above are subject to the following:

(1) The provisions of s.19 of the Planning and Compulsory Purchase Act 2004 in the case of a local planning authority in England (which sets out the requirements for preparation of local development documents) and to s.62 of that Act in the case of a local planning authority in Wales (which sets out the requirements for preparation of a local development plan).

(2) Policies included in development plan documents in England, or in a strategic development plan[1] in Wales, by virtue of the above provisions, must not be inconsistent with relevant national policies.

These policies are defined in s.1(7).

3–092 Every development plan document has to be submitted to the Secretary of State for independent examination by a person appointed by the Secretary of State (s.20(1)). For this purpose, "development plan document" was originally defined to mean a document which is a development plan document and forms part of the development plan, but this definition is amended by s.180 of the Planning Act 2008 with effect from 6 April 2009,[2] to mean "a local development document which is specified as a development plan document in the local development scheme".

There is a right for any person seeking a change in a document to be heard by the person examining it. The effect of s.23 of the Act is to make the recommendation of the person examining the document

[1] See the Planning (Wales) Act 2015.
[2] SI 2009/400.

binding upon the local planning authority, who cannot adopt the document except in accordance with such recommendation.

With effect from 15 January 2012, ss.20 to 23 of the 2004 Act are amended by section 112 of the Localism Act 2011, so that if an Inspector, having carried out his examination, considers that, in all the circumstances, it would be reasonable to conclude that the document meets the statutory requirements and is sound, and that the local planning authority complied with any duty imposed on them by s.33A in relation to the preparation of the document, he must recommend adoption, giving reasons for his recommendation.

During the examination of the plan the local planning authority may request the inspector to make modifications to the plan which would make it suitable for adoption, but apart from this the Inspector will not be able to recommend any modifications.

Section 23 is amended so that a local planning authority will still only be able to adopt the development plan documents if the Inspector has recommended adoption, but they can adopt a plan incorporating modifications recommended by the Inspector or make modifications of their own and re-submit the plan for examination. They can also make non-material modifications.

Section 22 prevented a local planning authority from withdrawing a development plan document after submission to an Inspector, unless the Inspector had recommended withdrawal or the Secretary of State had directed withdrawal. These restrictions will no longer apply, but the Secretary of State will still be able to direct withdrawal (See s.21).

The Secretary of State has wide powers of control over these processes.

3–093 Section 39 of the Act applies to any person or body exercising any function under Part 2 in relation to a local development scheme. This section requires the person or body to exercise the stated functions with the objective of contributing to the objective of sustainable development, and subs.(3) requires that, for this purpose, regard must be had to national policies and advice contained in guidance issued by (in England) the Secretary of State and (in Wales) the Welsh Ministers.

Section 38, brought into force from 28 September 2004 by SI 2004/2202, provides that a reference to the *development plan* in (inter alia) the 2004 Act, the planning acts and any other enactment relating to town and country planning, is to be construed in accordance with subss.(2) to (5). The effect of this provision is that the development plan comprises the regional spatial strategy for the region in which

This decision was challenged by way of an application for judicial review by two development companies who succeeded in getting the decision quashed by the High Court. However, leave to appeal was given and the First Secretary of State was given leave to intervene in the appeal on the ground that the decision of the High Court raised a point of general importance affecting the power of local planning authorities to withdraw local plans, in particular during a period covered by the transitional provisions noted above. The application for judicial review was dismissed by the Court of Appeal.

3–098 Matters arising out of the transitional provisions were again at issue in the case of *R. (Stamford Chamber of Trade and Commerce and F.H. Gilman & Co) v Secretary of State for Communities and Local Government and South Kesteven District Council*.[1]

The practicalities concerned the possibilities of providing for the implementation of major roadworks to solve significant traffic problems and, at the same time, opening up the possibility of development on land east of the town without impacting on its historic town centre.

This was a claim for judicial review, the first claimant having obvious interests in these matters and the second claimant being a company operating in the Stamford area and occupying premises on the eastern side of the town being long concerned about traffic problems and their effects for local businesses and other groups.

3–099 On 11 August 2006 the Secretary of State wrote to all local planning authorities in England enclosing a protocol for procedures to govern applications by such authorities for a direction, under the above noted provisions, to save policies in a development plan beyond 27 September 2007 (the end of the basic three-year transitional period). In this document were the criteria the Secretary of State intended to apply. Requests were to be made by submitting a list to the relevant government office by 1 April, 2007. This list was to be in two distinct parts – those saved policies the local planning authority wished to extend beyond the three years and those which it did not wish to see saved beyond the three-year period, in each case with reasons for the view taken. It was made clear that the Secretary of State might extend a policy which was not among the list of those policies the local planning authority wished to save when it was considered that a policy was compliant with the criteria in Planning Policy Statement 12 (as to such statements see para.3–118 below), and the extension

[1] [2009] EWHC 719 (Admin).

was necessary in order to deliver national planning policy. This has since been superseded by the National Policy Planning Framework.

In response South Kesteven District Council (SKDC) submitted its list. In this it was indicated that the authority wished to have two transport policies extended (T2 and T3), and it did not wish to see policies T1 and T4 extended beyond the three years.

The list submitted was not the subject of any prior consultation, in particular with the highway authority (Lincolnshire County Council). In the event the Secretary of State made a direction. The policies saved did not include Policy T1.

3–100 The list submitted by SKDC to the Secretary of State had not been the subject of any external consultation prior to its submission, in particular not with the highway authority, Lincolnshire County Council, who had later indicated that had they been consulted, they would have requested that policy T1 should be saved at least pending the outcome of a pending feasibility study.

The court identified three main issues raised by the claim for judicial review:

(a) whether SKDC had breached the claimants' legitimate expectation that there would be public consultation by SKDC prior to a decision not to request the saving of Policy T1;

(b) whether if the claimants succeeded on that issue, the Secretary of State had erred in law in failing to take into account the claimants' legitimate expectation; and

(c) whether, independent of the first issue, the Secretary of State erred in law by accepting the decision of SKDC that there was no need to retain Policy T1.

It was common ground that the law on legitimate expectation was evolving and was to be determined on a case-by-case basis.

After a review of the cases and the facts, the claimants failed on all issues and the claim for judicial review was dismissed.

MATERIAL CONSIDERATIONS

3–101 Section 70(2) of the Town and Country Planning Act 1990 provides that a local authority dealing with a planning application "shall have regard to the provisions of the development plan insofar as material to the application and to any other material considerations".

See also s.38(6) of the Planning and Compulsory Purchase Act 2004 which provides: "regard is to be had to the development plan for the

2. The reference to "robust" evidence in the PPG was intended to be an echo of para.49 of the former NPPF which required local planning authorities to demonstrate the existence of the requisite housing supply (at [53]). In this case, the inspector had clear evidence that particular sites with planning permission were not in fact deliverable within five years. The submission amounted to excessive legalism which was to be deprecated (see *St Modwen* para.7) (at [52]). When the relevant paragraphs were read as a whole, it was apparent that the inspector had identified clear evidence that the schemes would not be implemented in five years, as required by fn.11.

3. Ground 3 fell away in light of the conclusions on grounds 1 and 2.

It is to be noted that the courts have stressed in a number of cases that inspectors are not policy makers and for this reason their decisions are not to be regarded as precedents. See, e.g. *Chelmsford BC v Secretary of State for the Environment and Alexander*.[1]

A *prospective change* in Ministerial policies as expressed in Circulars is capable of being a material consideration, the weight to be attached to it being a matter for the decision maker, subject to review by the courts only on the grounds of irrationality. See *Smith v Secretary of State for Communities and Local Government*,[2] followed in *Murphy v Secretary of State for Communities and Local Government*.[3] See also *Searle v Secretary of State for Communities and Local Government*.[4]

The courts have also considered the legality of consultations on core governmental policy document, the NPPF. In *Stephenson v Secretary of State for Housing, Communities and Local Government*,[5] following the adoption of a revised framework in 2018, the High Court ruled that a consultation on the policy was unfair and unlawful and the government had failed to take into account of relevant scientific evidence. The case concerned a challenge by a member of Talk Fracking to the Secretary of State adoption of para.209(a) of the National Planning Policy Framework (NPPF) in July 2018.

A report commissioned by the Department for Energy and Climate Change (DECC) in 2013 had confirmed that the use of shale gas would be consistent with the government's targets for climate

1 [1985] J.P.L. 316.
2 [2012] EWHC 963 (Admin).
3 [2012] EWHC 1198 (Admin).
4 [2012] EWHC 2269 (Admin).
5 [2019] EWHC 519 (Admin).

change and greenhouse gas emissions, performing better than alternatives like coal or liquified natural gas.

In 2015, a written ministerial statement (WMS) was published referring to the 2013 report, claiming that "shale gas can create a bridge while we develop renewable energy, improve energy efficiency and build new nuclear generating capacity. Studies have shown that the carbon footprint of electricity from UK shale gas would be likely to be significantly less than coal and also lower than imported liquefied natural gas. The Government therefore considers that there is a clear need to seize the opportunity now to explore and test our shale potential".

In 2017, a report by Talk Fracking criticised the science behind these claims. It called for the withdrawal of the DECC report and a moratorium on fracking operations until the implications for fracking and climate change were better understood.

In 2018, a consultation began on amendments to the NPPF. Talk Fracking responded pointing to its own scientific evidence on the consequences of fracking which it said had been underestimated. The new NPPF was published in July 2018 and para.209(a) set out the following provision: "Minerals planning authorities should: (a) recognise the benefits of on-shore oil and gas development, including unconventional hydrocarbons, for the security of energy supplies and supporting the transition to a low-carbon economy; and put in place policies to facilitate their exploration and extraction".

The grounds of claim were that:

1. the Secretary of State had failed to take into account material considerations, namely scientific and technical evidence produced after the WMS;
2. the Secretary of State had failed to give effect to the government's obligation to reduce green-house gas emissions under the Climate Change Act 2008;
3. the Secretary of State had unlawfully failed to carry out a Strategic Environmental Assessment. However, the issues raised were virtually identical to those in *Friends of the Earth Ltd v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 518 (Admin), and in view of this, there was no evidence to disturb the "principle conclusion of the Friends of the Earth case that Strategic Environmental Assessment (SEA) is not required on the basis that the Framework is not 'required by law'" (at [74]); and

(2) a procedural defect in that, it was said, some technical documents, in particular a Transport Impacts Study, a strategic flood risk and water cycle study and an affordable housing viability study were produced after the period allowed for consultations, thus depriving people who might be concerned of an opportunity of commenting on them, and, consequentially, of the right to appear and call evidence before the Inspector examining the Plan.

This latter ground was rejected but the first succeeded.

NEIGHBOURHOOD PLANNING

3–114.1 The Localism Act 2011, introduces into the planning system a new concept of "Neighbourhood Planning."

This is effected by amendments of the Town and Country Planning Act 1990 and the Planning and Compulsory Purchase Act 2004.

Sch.11 (Community right to build Orders; (except the provisions relating to the holding of a referendum), and s.121 and Sch.12 (consequential amendments).

A new category of development plans is known as ***neighbourhood development plans***. They are prepared by local planning authorities after requests for action by **parish councils** or by **neighbourhood forums**.

Neighbourhood Development Orders grant planning permission for development specified in the Order, or of the class specified in the Order, following a referendum. The process for making neighbourhood development orders is set out in Sch.4B to the Town and Country Planning Act 1990. Detailed procedural requirements are set down in the Neighbourhood Planning (General) Regulations 2012 Pt 6 (regs 21–27).

On 1 October 2016, the Neighbourhood Planning (General) and Development Management Procedure (Amendment) Regulations 2016 (SI 2016/873) came into force. Regulation 25A of the Neighbourhood Planning (General) Regulations 2012 provides that the date for the purposes of 61E(4) (b) is "the date which is the last day of the period of 8 weeks beginning with the day immediately following that on which the last applicable referendum is held". However, this does not apply where a challenge has been brought relating to an applicable referendum.

These plans will be part of the development plan and decisions on planning applications and appeals will therefore have to be made in

accordance with such plans unless material considerations indicate otherwise (s.38 of the Planning and Compulsory Purchase Act 2004 as amended by s.116 and para.6 of and Sch .9 to the Localism Act)

Briefly, the new system is as follows—

Neighbourhood areas

3–114.2 Section 61G of the Town and Country Planning Act 1990 deals with what areas can be covered by a neighbourhood development order.

Areas within the area of a local planning authority in England may be designated as neighbourhood areas by such authorities, at the request either of a parish council or a body that could potentially become a neighbourhood forum (see below). In the case of an application by a parish council the specified area must be one that consists of or includes the whole or any part of the area of that council. In the case of an application by an organisation or body the specified area must *not* be one that consists of or includes the whole or any part of the area of a parish council (For other detailed requirements see s.61G(5)–(10) of the 1990 Act). It is to be noted also that s.61G gives the Secretary of State extensive powers to make regulations about these matters.

The designation of a neighbourhood area was the subject of a judicial review in *R. (Daws Hill Neighbourhood Forum) v Wycombe DC.*[1]

The Forum had requested designation of a large area which included existing residential development in the Daw Hill locality and two substantial sites contiguous to that development. These comprised a site known as RAF Daws Hill (a former RAF station), and another known as the Handy Cross Sports Centre Site.

The Council had excluded both sites from the designated neighbourhood development area. Both were strategic sites in the Council's Adopted Core Strategy and both were the subject of site specific policies in the Council's Position Statement on Housing and Land for Business.

The essence of the case for the claimants was that the 2011 Act had been enacted in order that, when development proposals were made which had a significant impact on a community, the provisions for neighbourhood planning would come into play, enabling the community to influence the type, design, location and mix of new development in respect of such proposals. The intention that this

[1] [2013] EWHC 513 (Admin).

Chapter 9

APPEALS AND APPLICATIONS TO THE HIGH COURT

FURTHER APPEAL TO THE COURT

9–001 An enforcement notice which is not challenged, and which has not been complied with according to its terms, renders the owner of the land to which it relates and any other person who has control of, or an interest in, that land guilty of a criminal offence carrying liability to very heavy penalties on conviction. There are also other consequences (for details, see above).There are three possibilities for challenge.

(1) There is a right to appeal to the Secretary of State. This is the main, and in some respects the *only* route of challenge to an enforcement notice. It is exercisable only within time limits which no one (including the Secretary of State and the courts) has any power to extend. (The local planning authority does have certain powers under s.173A to withdraw an enforcement notice, or to waive or relax any requirement of it, but these are powers upon which, for obvious reasons, a recipient of a notice would be very unwise to rely.)

This right of appeal to the Secretary of State is especially important in that any matter which could have been raised in such an appeal can under no circumstances be raised in any other proceedings (s.285). Appeal to the Secretary of State is described in Ch.8.

(2) It is possible, on a point of law, to appeal from the Secretary of State to the High Court (see below).

(3) In very limited circumstances it may be possible to proceed direct to the High Court. In cases (2) and (3), also, there are strict time limits for action (see Ch.10).

Finally, if the Secretary of State exercises his power to grant planning permission for any of the matters comprised in the breach of planning control alleged in the enforcement notice, it may be possible for that grant to be challenged in the High Court. Here again, there are strict time limits. The exercise of this power by the Secretary of State raises entirely different considerations from those involved in the other grounds of appeal to him. (For a full description of the right of appeal to the Secretary of State see above.)

NULLITY AND INVALIDITY

9–002 The right of recourse to the court is explained below. There is a distinction between an enforcement notice which is a nullity and one which is invalid.

An enforcement notice which is a nullity is not, in law, a notice at all. As Widgery C.J. observed of such a notice in one case,[1] "there is no place for it but the waste paper basket". A notice which is a nullity cannot be appealed, since there is nothing to appeal against. It cannot be corrected. To ignore it carries no penal consequences and its existence is no bar to a defence in criminal proceedings or to any proceedings in the courts.

It will be very rare indeed that an enforcement notice is a nullity. It will be so if it is defective on its face, e.g. if it fails to state the date upon which it is to take effect, or to define a period during which required steps are to be taken, or to specify any such steps at all.

9–003 An invalid notice may appear on its face to be correct in that it states everything it is supposed by law to state, but it may be defective in that e.g. its allegations are, in fact, incorrect, it may have been issued out of time, or it may have been issued without jurisdiction. Most challenges to an invalid notice can, indeed *must*, be made by way of appeal to the Secretary of State and if not so made within the time limit applicable, cannot be made at all. As will be seen, it is the case that an invalid notice not appealed in this way can still be the basis for criminal proceedings.

If an enforcement notice clearly cross-refers to another document, that other document may legitimately be referred to as an aid to construction of the enforcement notice. See the judgment of Jacob J. in *Buckinghamshire County Council v North West Estates plc and John Brown and Matthews and Brown Engineering Ltd.*[2]

See also *City of Westminster v Davenport*.[3]

See *Koumis v Secretary of State for Communities and Local Government* (paras 13-30)[4], for a case in which an argument that a variation of the time for compliance with an enforcement notice had rendered the notice as a whole a nullity was unsuccessful (The power of a planning authority to vary the time for compliance with an enforcement notice

1 *Metallic Protectives v Secretary of State for the Environment* [1976] J.P.L. 166, DC.
2 [2002] EWHC 1088 (Ch); [2003] J.P.L. 414.
3 [2010] EWHC 2016 (QB).
4 [2012] EWHC (Admin).

is contained in s.173A of the Town and Country Planning Act 1990). See para.7.8 above.

OPPORTUNITY FOR APPEAL

9–004 In considering the opportunities for appeal to the High Court against decisions of the Secretary of State on an enforcement notice appeal, regard must be had to two sections of the 1990 Act – ss.288 and 289.

Anyone contemplating a s.288 appeal would do well to reflect carefully upon the following dicta of Sullivan J. in *Newsmith Stainless Ltd v Secretary of State*[1] at pp.6–8—

> "An application under s.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 s.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.
>
> 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 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.
>
> Moreover, the Inspector's conclusions will invariably be based not merely on the evidence heard at the 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."

Sections 288 and 289 are not as clear as they might be and advisers may be in some doubt as to which is the correct section to use in a particular set of circumstances. This was so in *Wandsworth Borough*

[1] [2001] EWHC Admin 74.

Council v Secretary of State for Transport, Local Government and the Regions.[1] The council were appealing against a decision of an inspector to quash an enforcement notice. The council brought its appeal under section 288 (instead of under section 289) and in the proceedings argued that it should be allowed to amend so that its appeal was under section 289 and if that amendment was allowed, that it should be granted an extension of time (of two weeks). The court allowed both the amendment and the extension of time. There had been no question of delay being deliberately used to lengthen the procedures and the error was understandable, given the lack of clarity in the statute. Decisions on enforcement notices require that in the public interest decisions of the Secretary of State which are erroneous in law should be corrected. The court suggested that where there was doubt about which of the two sections to use, both should be used.

9–005 On the question of what should be done by a local planning authority wishing to challenge adverse decisions of an inspector in an enforcement notice case but unclear as to whether to challenge under section 288 or 289 or both, Mr George Bartlett QC, sitting as a Deputy High Court Judge, in *Oxford City Council v (1) Secretary of State for Communities and Local Government (2) One Folly Bridge Limited*,[2] came to the same conclusion – that both sections should be used.

This case concerned use of a pontoon moored alongside a restaurant and used as an extension of the restaurant. The council had issued an enforcement notice requiring cessation of that use. The second defendant had appealed on ground (a) of section 174(2) of the Town and Country Planning Act 1990, i.e. that planning permission should be granted for the use. An inspector had allowed this appeal, quashed the enforcement notice and granted planning permission, subject to conditions.

The council made an application to the High Court under section 288 to quash this grant. They did not appeal under section 289 against the decision to quash the enforcement notice.

It was submitted on behalf of the second defendant that the section 288 application was invalid, or alternatively ought to be rejected by the court as an abuse of process, since there was no corresponding appeal against the quashing of the enforcement notice. For the

[1] [2003] EWHC 622 Admin.
[2] [2007] EWHC Admin 769.

council it was submitted that they should now be permitted to appeal under s.289.

9–006 The court held that the failure of the council to apply for permission to appeal under s.289 did *not* render its application under s.288 invalid or an abuse of process and, although noting that the application now to be permitted to appeal under s.289 was very much outside the specified 28-day period for such an application, decided that it would not be unfair to allow it.

In the event, the court dismissed the council's application under s.288, the deputy judge stating that, had he been minded to allow the application, he would have granted permission out of time to enable an appeal under s.289 to be determined as well.

Section 288 prescribes the means for challenging within a six-week period (inter alia) any action on the part of the Secretary of State mentioned in s.284(3) of the Act. This includes (in s.284(3)(e)) "any decision to grant planning permission under paragraph (a) of section 177(1) or to discharge a condition or limitation under paragraph (b) of that section". Section 177 deals with the determination by the Secretary of State of an appeal against an enforcement notice and paras (a) and (b) give him power to grant planning permission for the matters constituting the breach of planning control in question or as the case may be to discharge any condition or limitation alleged in the enforcement notice to have been breached. The six-week time limit for bringing a challenge to a decision on a planning appeal under s.288 of the Town and Country Planning Act 1990 is strict: *Croke v Secretary of State for Communities and Local Government.*[1]

In *Croke,* an application to challenge an inspector's decision was issued outside the six-week time limit. The applicant's last day for filing his claim was 23 March 2016 but, after missing his train, the applicant was unable to file in person so had instructed an agent. The agent agreed to file the papers before the court closed at 16.30 but the applicant mistyped the agent's email address causing delay and a failure to file on the day. The appellant attended the court office the next day but there were further problems (he had used the wrong form). He was instructed to return on the next working day which, because of the Easter break, was 29 March.

The High Court had refused to extend the principle in *Kaur v S Russell & Sons Ltd* [1973] Q.B. 336; [1972] 12 WLUK 74 to cover the applicant's circumstances. It was the litigant's responsibility,

[1] [2019] EWCA Civ 54.

where there were strict time limits, to ensure that they attended the court office in good time to avoid unexpected problems.

Linbdlom LJ, with whom Irwin and Baker LJJ agreed, dismissed the appeal, setting out the correct approach to the time limit for bringing statutory planning challenges, and the limited circumstances in which the limit may be extended.

There was a strict time limit of six weeks for the making of an application under s.288 and s.288(4B) did not admit any exception. The time limit was "precise, unambiguous and unqualified" (at [31]). The principle in *Kaur v Russell* was a narrow and simple one: a statutory limitation period would not be shortened if the final day of that period occurred on a "dies non". That "dies non" would always be clear in advance. "The principle was not subject to the vicissitudes that might prevent a claimant from filing a claim on a day when the court office was open" (at [32]) as this would stretch it beyond calendar events, which were fixed and certain, to circumstances that were unexpected and unpredictable, including the acts of third parties and of the litigant, over which the court had no control. The events in the instant case did not engage the principle in *Kaur* (at [33]–[37]).

The only basis upon which time could be extended would be if the court could exercise a discretion to do so, in exceptional circumstances, on human rights grounds but this was not such a case.

> "45. The six-week time limit for making an application, now provided in section 288(4B) , does not distinguish between one 'person … aggrieved' and another. It applies to them all. Parliament might have provided a longer time limit, but it did not. It imposed a relatively generous but finite period within which a challenge can be brought. The six-week period allows an intending applicant, even an applicant without the help of a professional lawyer, to prepare his application, in accordance with the requirements of the Civil Procedure Rules and the relevant Practice Directions (see paragraph 8 above). It has been held, rightly in my view, that the time limit is compatible with article 6 (see the judgment of Sullivan J., as he then was, in *Matthews v Secretary of State for the Environment, Transport and the Regions* [2002] J.P.L. 716 ; cf. *Perez de Rada Cavanilles v Spain* (2000) 29 E.H.R.R. 109). To adopt the words used by the European Court of Human Rights in *Tolstoy*

Miloslavsky, it does not 'restrict or reduce' the applicant's access to the court 'in such a way or to such an extent that the very essence of the right is impaired'. It respects and protects that right. The provisions of section 288 pursue the 'legitimate aim' of providing access to the court for those who are aggrieved by decisions on planning appeals and seek to test the lawfulness of such decisions. The scope they allow for such challenges, including the six-week time limit they impose, embodies a 'reasonable relationship of proportionality between the means employed and the aim sought to be achieved'. They do not offend 'the fundamental guarantees in Article 6'.

46. Nor can it be said that in the particular circumstances of this case there was any violation of Mr Croke's right to access to a court under article 6 that could justify an extension of the time limit in section 288(4B) . The circumstances in which he failed to file his application on 23 March 2016 may be unusual. But they are not, in my opinion, 'exceptional' in the sense referred to by Lord Mance in *Pomiechowski*.

47. At worst, and leaving aside for the moment his own share of responsibility for the events of 23 March 2016, Mr Croke might complain that he was denied, by an event beyond his own control, of the last five minutes of the six-week period for making an application to the court. But in my view this did not generate a conflict with his right of access to court under article 6(1) of the kind referred to by the Supreme Court in *Pomiechowski* – as Lord Mance put it, 'where [the] statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process …'. Taking the factors to which Maurice Kay L.J. referred in *Adesina*, one starts with the consequences of the decision itself. Here, the consequence is the possible loss of a landowner's ability to build two dwellings on his land, after planning permission had been refused by the local planning authority, and, on appeal, an inspector. I say 'possible loss' because it would be open to Mr Croke to make another application for planning permission, which might overcome the shortcomings of the proposal rejected by the inspector. This is a much less serious jeopardy than the possibility of the appellant's extradition – as in *Pomiechowski*, or his exclusion from a profession – as in *Adesina*. Another factor is the period within which proceedings may be begun,

which is not unduly short. Another is the availability of advice and relevant information. The relevant documents here would have not been hard to assemble; they should all have been in Mr Croke's possession. And the drafting of the grounds would not have been an onerous task, even for an applicant who had not instructed a lawyer to do it. This is in stark contrast to the situation of the appellant in *Pomiechowski* who was in custody, facing extradition, and had only seven days to make his appeal.

48. In *Pomiechowski* Lord Mance said (in paragraph 39 of his judgment) that for a court to exercise its 'discretion in exceptional circumstances to extend time for both filing and service', a litigant must 'personally [have] done all he can to bring and notify [his proceedings] timeously'. In this case, in my view, that was not so. It was not until the last day of the six-week period, and very late on that day, that Mr Croke attempted to file his application with the court, leaving himself no opportunity to deal with contingencies that might arise and in fact did. The Administrative Court Office was open, and operating normally, for the whole of that day. But Mr Croke failed to get to the court office himself, and so did his agent, Mr Miller. He may of course say – and did – that he was no less entitled to lodge his application on the last day of the six-week period than he was on the first. That is true. He also said that he was unable to prepare his application sooner than he did, to have it ready to be filed before the last day. This seems hard to accept. But in any event it cannot be said – and Mr Croke did not – that he would have been unable to lodge the application in time had he acted more expeditiously than he did on the last day. He was himself largely responsible for his failure to make an application within the time that section 288(4B) allows. It seems quite clear that if he had not missed his train, or even if, having missed the train, he had typed Mr Miller's email address correctly when he first tried to send him the Statement of Facts and Grounds, the application could and would have been lodged in the court office before it closed at 4.30 p.m. To isolate what the security officer did at or about 4.25 p.m. as if it were the sole or critical event is wrong. It was merely the last in a chain of events for which Mr Croke himself was at least partly responsible. The fact that it happened at the very end of the six-week period for challenge does not change that. It cannot be singled out as

the sole cause of Mr Croke's failure to lodge his application before the statutory time limit expired.

49. In this case therefore, the court is not faced with a question of the kind that arose in *Yadly Marketing*, where the appellant's failure to lodge its notice of appeal was the direct result of an event squarely within the responsibility of the court itself and for which the appellant bore no responsibility of its own – the refusal of the staff in the court office to receive a validly filed notice of appeal. As in *Adesina*, though the facts are different, the circumstances here cannot be seen as 'exceptional'. There is no good reason why Mr Croke's application could not have been lodged in time. So, in my view, the court cannot exercise a discretion on human rights grounds to extend the six-week time limit under section 288(4B)."

9–007 Section 289 details the rights of appeal to the High Court on a point of law against decisions of the Secretary of State on an enforcement notice appeal (except a decision to grant planning permission or discharge a condition or limitation, which are provided for in s.288 as noted above). Here leave to appeal is required and the time limit (28 days from the date on which notice of the decision was given to the applicant) is prescribed by the Civil Procedure Rules. A detailed note of these provisions is given in the following paragraphs.

Section 289(1) of the Town and Country Planning Act 1990 provides that, where the Secretary of State *gives a decision in proceeding on an appeal* against an enforcement notice, the appellant or the local planning authority, or any person having an interest in the land to which the notice relates, may, as Rules of Court may provide, either appeal to the High Court against the decision on a point of law or require the Secretary of State to state and sign a case for the opinion of the High Court.

This provision was earlier contained in s.34 of the Caravan Sites and Control of Development Act 1960 and in *Hoser v Ministry of Housing and Local Government*,[1] a case under that section, the court decided that since Rules of Court provided for an appeal by motion, it was not open to an appellant to require the Minister to state a case. The selection of one of the alternatives referred to was for the Rules Committee and not an appellant.

[1] [1962] 3 W.L.R. 1337.

9–008 By an amendment made by the Planning and Compensation Act 1991, effective from 2 January 1992, the leave of the High Court is required to bring proceedings under this section (s.289(6)). Further appeal to the Court of Appeal requires leave either of that court or of the High Court. If should be noted that, if leave is refused by the High Court, the Court of Appeal has no jurisdiction to entertain an application for leave to appeal that refusal. It was so held in *Wendy Fair Markets v Secretary of State for the Environment; Huggett v Secretary of State for the Environment; Bello v Secretary of State for the Environment*.[1] For the procedure, see below.

Under the Civil Procedures Rules no appeal lies to the Court of Appeal from a refusal by the High Court to grant permission to appeal under s.289. See *Prashar v Secretary of State for the Environment, Transport and the Regions*.[2]

In *Kensington and Chelsea RLBC v Secretary of State for the Environment*[3] the court had to consider the standard to be applied in deciding whether leave should be granted. Without prejudice to future cases the standard applied in that case was that appropriate to judicial review.

9–009 The principles for the exercise by the court of its discretion to grant leave were reviewed in *PG Vallance Ltd v Secretary of State for the Environment*.[4]

Where the Secretary of State refuses the deemed application for planning permission under s.177(1), any further appeal to the High Court should be made under s.289 (see above). In *Jarmain v Secretary of State for the Environment, Transport and the Regions*,[5] proceedings had instead been brought under s.288, but the court held that, although it would be vigilant to prevent appeal procedures being used to prolong the appeal machinery, it had power to allow an amendment where the justice of the case required.

1 *The Times*, 1 March 1995, CA.
2 [2001] 3 P.L.R. 116.
3 [1992] 2 P.L.R. 116.
4 *The Independent*, 19 November 1992.
5 [2001] EWHC Admin 1140.

See *South Cambridgeshire District Council v Secretary of State for Communities and Local Government and Archie Brown and Julie Brown*[1] in the Court of Appeal, a note of which case is given in para.3.4.8 above, and in which Scott Baker L.J. made the following "general observations" about s.288:

(1) A decision may only be challenged on ordinary administrative law grounds, e.g. *Seddon Properties Ltd v Secretary of State*.[2]

(2) Interpretation of policy is the matter for the decision maker. Where the interpretation is one which the policy is reasonably capable of bearing, there is no basis for intervention by the court, e.g. *R. v Derbyshire Council Ex p. Woods*.[3]

(3) The weight to be attached to material considerations and matters of planning judgment are within the exclusive jurisdiction of the decision maker, e.g. *Tesco Stores Ltd v Secretary of State*.[4]

(4) A decision letter must be read in good faith, and references to policies must be taken in the context of the general thrust of the reasoning. The adequacy of reasoning is to be assessed by reference to whether the decision in question leaves room for general doubt as to what the decision maker has decided and why, e.g. *South Somerset District Council v Secretary of State*,[5] and *Clarke Homes Ltd v Secretary of State*.[6]

(5) There is no obligation on the decision maker to refer to every material consideration, only the main issues in dispute, e.g. *Bolton Metropolitan Borough Council v Secretary of State*.[7]

(6) Reasons can be briefly stated, the degree of particularity depending on the nature of the issues falling for decision. The reasoning must not give rise to substantial doubt as to whether there was any error of law, but such an inference will not readily be drawn, e.g. *South Bucks District Council v Porter (No. 2)*.[8]

9–010 For a further judicial exposition of the application of section 288 see the judgment of Nicola Davies J. (paras 5/16) in *Resource Recovery*

1 [2008] EWCA Civ 1010.
2 (1978) P. & C.R. 26.
3 [1997] J.P.L. 958.
4 [1995] 1 W.L.R. 759.
5 [1993] 1 P.L.R. 80.
6 (1993) 66 P. & C.R. 263.
7 (1995) 71 P. & C.R. 309.
8 [2004] UKHL 33.

Solutions (Derbyshire) Limited v Secretary of State for Communities and Local Government and Derby CC.[1]

See also *Amber Valley Borough Council v Secretary of State for Communities and Local Government.*[2]

See *Enertrag (UK) Limited v Secretary of State for Communities and Local Government and Broadlands District Council and Guestwick Parish Meeting*[3] for a challenge under s.288 of an inspector's decision in a case concerning the construction of six wind turbines. The claim was dismissed, the deputy judge characterising the case as in reality a challenge on the merits.

See also *Terence Charles Adams trading as Strategic Land Partnerships v The Secretary of State for Communities and Local Government and Cheltenham Borough Council*[4] where there was a challenge to the decision of an inspector in a case in which it was common ground that the appeal was essentially concerned with the resolution of two important, but in that case conflicting, policy considerations – (1) the need to provide more housing in an area where the council had failed to come even close to its target for housing provision and (2) the need to protect Areas of National Beauty from development.

9–011 The application was dismissed, the judge deciding that the application was "no more than a disagreement with the conclusion of the inspector's balancing exercise, which may well have been a fine one. But that is no basis for interference with it."

See *Wiltshire Council v Secretary of State for Communities and Local Government*[5] in which case the Council challenged under s.288 a decision of an inspector on appeal to grant planning permission for substantial residential development, which they themselves had refused to grant. The developers issued an application under CPR Pt 3(4)(2)(a) to dispose of the matter on the basis that the Statement of Case disclosed no reasonable grounds for bringing the claim. The basis of this assertion was that the claim was bound to fail and the continuance of the proceedings would cause unnecessary delay and serve no useful purpose, and secondly that delay would cause substantial prejudice to the public interest which required the building of the residential property. The Secretary of State took no part in this application, but had no objection to the claim being struck out.

1 [2011] EWHC 1726 (Admin).
2 [2009] EWHC 80.
3 [2009] EWHC 679 (Admin).
4 [2009] EWHC 771 (Admin).
5 [2010] EWHC 1009 (Admin).

Concluding that the basis of the claim was "in effect based on a disagreement with the views of the inspector dressed skilfully and persuasively... as an error of law", the learned judge, Simon J., decided that the claim should be disposed of summarily against the Council, and that, although the application had been made under CPR Pt 3(4)(2)(a), the better course would be to treat it as one under CPR Pt 24(2).

9–012 *Benacre Estates Company and Gisleham Parish Council v Secretary of State for Communities and Local Government and Waveney District Council and Sea and Land Power and Energy Limited*[1] concerned a challenge to a decision of an inspector on a written representations appeal, which was dismissed, the court commenting that the degree of particularity within the decision letter had to be seen in the context of a written representations appeal, the submissions that were laid before the inspector and the site visits that he carried out as part of the decision-making process. The decision letter was adequate for its purpose and gave sufficient reasons on the main issues in dispute.

In *Mid Beds Model Aircraft Club v Secretary of State for Communities and Local Government and Bedford Borough Council*[2] the court was considering a challenge to a decision of an inspector on an appeal by way of written representations. The inspector had defined as the main issue in the case the effect of the proposed use of land as a flying field on the living conditions of nearby residents in terms of noise and disturbance. The claimant had agreed that this indeed was the main issue.

One of the grounds of the claim was that the inspector had omitted a material consideration, namely consideration of conditions.

The council's case was that planning permission should be refused but, as is common, had included a draft set of planning conditions without prejudice to their case.

9–013 It was submitted on behalf of the claimant (inter alia), that the inspector had failed to consider (1) whether the test proposed by the council met the tests in Circular 11/95 or (2) whether the conditions put forward by the council addressed the problems of residential amenity.

On this point the court noted that in promoting an application for development, the claimant was proposing such conditions as would make the development proposed Code-compliant but, apart from

[1] [2009] EWHC 680 (Admin).
[2] [2009] EWHC 681 (Admin).

that, absolutely no reference had been made in any of the claimant's written representations to conditions. There were therefore from the claimant no alternative conditions for the inspector to consider. The claimant had argued that in those circumstances the inspector should have gone on to consider the without prejudice conditions proposed by the council which, it was said, cut down the application in a way that was acceptable to the claimant. The court considered there to be fundamental errors in that submission. There was no indication in the claimant's written representations that the conditions proposed by the council were acceptable to the claimant. It could indeed be argued that the converse was the case because in its written representations the claimant had been entirely silent on the conditions suggested by the council. They had, however, made observations on a part of the council's committee report which had noted that the problems of monitoring and enforcement were unlikely to be reasonable and enforceable.

This approach had meant that when the inspector found that compliance with the Code was insufficient to protect residential amenity in the circumstances of the proposal and hence a set of conditions that secured that was insufficient, the claimant left the inspector with no room to manoeuvre or to consider any of the other conditions. Secondly, on the claimant's submission a decision maker would then have to proceed to consider a without prejudice set of conditions in the event that the development was acceptable in principle even in cases where, as here, when the claimant expressed no view on those conditions. The implications of such an approach when the proposed development had already been found to be unacceptable were potentially enormous. Such a contention was, in the view of the court, misconceived.

9–014 It was particularly important in a written representations appeal that the parties were clear about both their own primary case and, secondly, what they would accept if they did not succeed in the entirety of their primary case.

It was unrealistic to expect an inspector, in the circumstances of the appeal, to proceed to consider conditions suggested by the council on the basis that they were agreed conditions in the event of the claimant not satisfying the inspector that the proposed use was acceptable through compliance with the Code. There was simply no evidence to enable the inspector to go down that route.

Further, the differences between the parties on the history of the use meant that there was no obvious solution to the noise from the model aircraft and no obvious set of conditions that the inspector

could be satisfied would deal with the noise. Absent that position, there was no further duty on the inspector.

The issue of other conditions was not a main controversial issue in the context of this appeal and there was therefore no deficiency on the part of the inspector.

9–015 See also *Cheesecake Shop Ltd v Secretary of State for Communities and Local Government*.[1] In this case the court had before it two sets of proceedings, in the first of which the claimant, under s.288 of the Town and Country Planning Act 1990 (as to which see para.9–030 below), sought a quashing order in respect of a decision of an inspector to dismiss an appeal against the refusal of the local planning authority to grant planning permission for redevelopment of premises used for the business of manufacturing and selling bakery products, on the ground that the proposed development did not accord with an approved masterplan for the area and would prejudice the implementation of a comprehensive redevelopment scheme for the area.

The claimant argued that the inspector had taken into account an immaterial consideration, and should have ignored the fact (assuming it to be the case) that the value of the claimant's property would be increased if planning consent was granted with a consequent cost to the comprehensive scheme in the event that the claimant's property was acquired for the purposes of that scheme either compulsorily or voluntarily; the *Alnwick* case (noted at para.5.6 above) being cited in support of this argument. The court decided that the inspector had been entitled to conclude that the additional costs were a material consideration and that challenge was rejected. The court stressed that the decision on that ground pre-supposed that evidence existed which justified the conclusion that an increase in cost to the comprehensive scheme was prejudicial to it and was consequent upon the grant of planning permission for the development for which the claimant sought permission.

However, in the second claim before the court, by way of judicial review, the claimant sought a quashing order in respect of a separate decision of the same inspector refusing an award of costs to the claimant, it being claimed (inter alia) that no evidence existed upon which the inspector could reasonably have concluded that the proposed development would cause prejudice to the comprehensive redevelopment of the area, by increasing the cost of that scheme. The court found that that claim was made out and accordingly the

[1] [2009] EWHC 1748 (Admin).

decision of the inspector on the first claim was in fact quashed, as was the decision of the inspector in relation to costs.

(Counsel for both parties had agreed that the order of the court in the judicial review proceedings should mirror the order made in the proceedings under s.288.)

9–016 *Britannia Assets (UK) Ltd v Secretary of State for Communities and Local Government and Medway Council*[1] concerned activities at a substantial site in Kent known as Thameside Terminal. The site had in the past been used as a chalk quarry and cement works, but during the Second World War, and for some time subsequently, it was derelict. Planning permission had been granted in 1962 for its use for the storage and distribution of petroleum products, involving fuel storage tanks buildings and hard standings. It was common ground that for many years after 1962 petrochemicals were received on the site from ships, via a specially constructed pipeline.

Following a change of ownership the fuel tanks were dismantled and removed and most of the buildings demolished. The site began to be used as a trading estate, with plots being created for individual occupation by small businesses.

The Council served a number of enforcement notices against which there were appeals to the Secretary of State. An Inspector appointed to determine those appeals quashed one notice, (A), but upheld 11 others, (B to L), subject to some corrections and variations.

9–017 Proceedings were issued in the High Court under s.289 of the Town and Country Planning Act 1990, under which the Appellant sought an order that the decision of the Inspector to uphold notices B to L should be quashed and remitted for further determination.

Directions had been given for a "rolled up" hearing, i.e. that the application for permission to appeal, required by s.289(6) of the 1990 Act, and the substantive appeal should be considered at the same hearing. The Appellant's Skeleton argument had identified 51 separate grounds of appeal, based upon approximately 60 individual alleged errors of law. The Learned Judge, Wyn Williams J., decided that an individual assessment of whether permission should be granted on each ground would be unduly onerous, extremely time consuming and ultimately would achieve no particular purpose and granted permission on all grounds.

[1] [2011] EWHC 1908 (Admin).

A number of crucial issues were identified, including the question of whether the Council had acted unlawfully in determining whether to issue the notices.

9–018 As earlier noted, the power given to a local planning authority to issue such a notice is given by s.172(1) of the 1990 Act, which requires that it must appear to the authority (a) that there has been a breach of planning control and (b) *that it is expedient to issue the notice* having regard to the provisions of the development plan and to any other material considerations.

It was submitted on behalf of the appellant that in issuing the enforcement notices in the instant case the authority had failed to have regard to a number of material considerations when deeming that it was "expedient" that notices should be issued, and further that it was open for this point to be taken in proceedings under s.289 of the 1990 Act.

As noted above there are seven specified and separate grounds for appealing to the Secretary of State against an enforcement notice, set out in s.174(2) of the 1990 Act, and s.285 of the Act provides that the validity of an enforcement notice shall not be questioned in any proceedings on any of the grounds on which an appeal may be made to the Secretary of State except by way of an appeal under s.174.

9–019 It was argued for the two Defendants that it was not open to the Inspector to consider whether or not the authority which had issued the notices considered it expedient to do so. The statutory language constrained him or her simply to consider whether any of the grounds of appeal specified in s.174 were made out. It was further submitted that the court was in an identical position. Any person aggrieved by the issue of an enforcement notice wishing to challenge the notice on the ground that the local planning authority had failed to act in accordance with s.172 should do so by judicial review proceedings.

For the appellant it was argued that the statutory language was not interpreted this way in practice. It was commonly the case that points about the validity of an enforcement notice were taken before an Inspector on an appeal under s.174. In the instant case, for example, a point had been taken on behalf of the appellant that notice A was a nullity and the Inspector had determined the point. The court should be slow to decide the point at issue in the instant case in a way which would undermine a settled practice that could be justified by reference to sound practical considerations.

Giving judgment, the Learned Judge (paras 30-33) determined that the term "enforcement notice" must bear the same meaning wherever it appeared in Part VII of the 1990 Act, so that in s.174 (1) the "enforcement notice" against which an appeal could be made must be interpreted to mean a notice issued by a planning authority which on its face complied with the requirements of the act and had not been quashed by way of judicial review. In the light of the analysis in *Wicks* an enforcement notice which was a nullity on the grounds that its terms were uncertain or that it failed to comply with the requirements of the Act was not an enforcement notice at all. Inevitably, from time to time, an Inspector had to grapple with the issue of whether a notice was a nullity since, if it was, it had no legal existence and an Inspector had no jurisdiction to consider the merits of the appeal against the notice. Section 176 was also important in this context. There might be circumstances in which an Inspector had to consider the use of the power to vary or correct the terms of an enforcement notice under appeal and inevitably cases would arise in which an appellant would argue that a notice could not be corrected or varied because, in reality it was a nullity. There were good reasons why there should be cases from time to time in which an Inspector was bound to consider whether an enforcement notice was a nullity as a means of determining the extent of his jurisdiction.

9–020 Once an Inspector determined that a notice was not a nullity, (if that point was raised), his jurisdiction was governed by the terms of s.174 read in conjunction with s.176 of the act.

The Inspector in the instant case had no jurisdiction to determine whether or not the Council had complied with its obligations under s.172 of the Act.

The appeal was dismissed.

Cubitt-Smith v Secretary of State for Communities and Local Government[1] is a reminder, yet again, that an application to the Court under s.288 of the 1990 Act does not provide an opportunity to have the planning merits of an Inspector's decision reviewed by the Court. Questions of planning judgment and of weight are within the exclusive province of the decision maker; it is not for the court to substitute its own judgment. *Tesco Stores v Secretary of State for the Environment*[2] (per Lord Hoffmann at 780).

9–021 An Inspector had dismissed an appeal against a decision of the Council to refuse planning permission for the construction of a new dormer

1 [2012] EWHC 68 (Admin).
2 [1995] 1 W.L.R. 759.

window in the front of the main roof of a late Victorian terraced house in Putney, and for other extensions to the main roof with another roof extension to an existing rear kitchen. The Inspector had stated that he considered the main issues in the case to be the impact of the development proposed upon the character and appearance of the original dwelling and street scene and upon the living conditions of occupiers of neighbouring properties. Detailing his reasons for dismissing the appeal, the Inspector had found that the proposal as a whole would lead to unacceptable harm to the character and appearance of the original dwelling and street scene and to the living conditions of occupiers of another property, conflicting with the policies of the Development Plan.

This decision was attacked, inter alia, on the ground that it was irrational "to override sustainable, ecological, energy saving grounds, fire safety, creating more habitable space in a small house, providing light to a roofspace in a more traditional manner for a Victorian house than velux windows, on the sole ground of the local roofscape in a non-conservation area".

The Court held that the Inspector's conclusion on the unsuitability of the front dormer window was an exercise of planning judgment with which the Court could not interfere. The application to quash the decision was dismissed.

9–022 *Searle v Secretary of State for Communities and Local Government*[1] concerned an appeal under s.289 of the Town and Country Planning Act 1990. against a decision by the Secretary of State to dismiss an appeal against an enforcement notice served by Chichester District Council in respect of land within South Downs National Park on which, without planning permission, two mobile homes and a caravan had been placed and used for human habitation. The appellants, who were travelling horse dealers, were Romany gypsies.

There had been a hearing before an Inspector, who had not upheld a claim for a permanent planning permission, but who had recommended that a temporary permission should be granted until alternative sites were available, which she had decided would be likely to be at the end of 2013. The Secretary of State, who had recovered the appeal for his own determination, did not accept this recommendation, deciding that the harm which would be caused by the development would be too great, even for a temporary period.

[1] [2012] EWHC 2269 (Admin).

There had originally been four grounds of appeal. But one had been abandoned and those remaining claimed—

(a) that the Secretary of State had regard to an immaterial consideration, namely his intention to revoke and replace Circular 01/2006 (issued by the Office of the Deputy Prime Minister), and that, as a result, gave less weight to that Circular, notwithstanding the fact that it was not known which parts of the Circular would be replaced with advice that was materially the same as existing advice thereunder. Such an approach was palpably irrational. Further, the Secretary of State failed to give intelligible, proper and adequate reasons for the decision to give less weight to the Circular;

(b) that the Secretary of State had departed from the Inspector's assessment of harm to the natural beauty of the area without a site visit, which, on uncontradicted evidence, was necessary. The Claimants relied upon the doctrine of natural justice and, if necessary in the case of the First Claimant, the Human Rights Act 1998. The Secretary of State should not have departed from the view of an Inspector's quasi-judicial determination on such an issue of fact and the positive obligation of States to facilitate the traditional Gypsy lifestyle;

(c) The Secretary of State was wrong to rely upon a different reason for rejecting the grant of a temporary planning permission from that advanced by the Council without giving the Claimant a chance to answer it.

All these arguments failed and the appeal was dismissed.

It should be noted that where the High Court refuses leave to appeal under s.289(6) of the Town and Country Planning Act 1990 against an appeal against an enforcement notice under s.174 TCPA 1990, that refusal of leave cannot be the subject of an appeal to the Court of Appeal: see *Walsall MBC v Secretary of State for Communities and Local Government*.[1] This was recently confirmed in *Binning Property Corp Ltd v Secretary of State for Housing, Communities and Local Government*.[2]

In *Binning*, the applicant appealed a High Court judge's refusal of permission to appeal against a decision involving an enforcement notice. The Court of Appeal had previously confirmed it had no jurisdiction under s.289(6) to entertain an appeal against the

[1] [2013] EWCA Civ 370.
[2] [2019] EWCA Civ 250.

High Court's refusal of leave to appeal. However, the applicant contended that *Walsall MBC v Secretary of State for Communities and Local Government* [2013] EWCA Civ 370; [2013] J.P.L. 1183; [2013] 2 WLUK 128; *Wendy Fair Markets Ltd v Secretary of State for the Environment Times*, 1 March 1995; [1995] 2 WLUK 359; and *Prashar v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 1231; [2001] 3 P.L.R. 116; [2001] 7 WLUK 473 were no longer good law in light of subsequent legislative and procedural changes The applicant also argued that, as the Court of Appeal had jurisdiction to entertain appeals under s.288 of the 1990 Act, there was no longer justification for a disparity between s.288 and s.289(6) and that a refusal of leave could be a "judgment or order of the High Court" under the Senior Courts Act 1981 s.16.

Sharp and Lindblom LJJ refused permission.

The previous decisions remained good law and none "of the recent amendments to the legislative and procedural regime for challenging planning decisions – under the 2015 Act – or the adjustments made to the costs capping provisions in section VII of CPR Pt 45 call for a different conclusion now" (at [30]). Parliament had deliberately enacted an inconsistency between the positions under s.288 and s.289 by imposing an extra filter requirement in the latter provision (at [22]).

> "31. There has been no significant change to the self-contained statutory scheme for the enforcement of planning control or, in particular, the provisions for appeals under section 289 since this court decided as it did in *Walsall Metropolitan Borough Council* in 2013. The procedure for an 'appeal' under section 289 was left unchanged by the 2015 Act. It is true that the requirement for leave that has been introduced into the procedure for making an 'application' under section 288 – in section 288(4A) – is in similar terms to the corresponding provision in section 289(6). But this amendment to section 288 did not affect the arrangements under which local planning authorities are empowered to take enforcement action, landowners are given the right to appeal against enforcement notices on specified grounds under section 174, and appeals may be made under section 289 by 'the appellant or the local planning authority or any other person having an interest in the land to which the notice relates'. The addition of a statutory leave stage to enable the High Court to filter applications under section

288 did not, and could not, generate a new right of appeal to the Court of Appeal against the refusal by the High Court of leave to pursue an appeal to itself under section 289. For such a right of appeal to come into being there would have had to be an appropriate amendment to the arrangements for appeals under section 289. There has been no such amendment – either in the statute itself or in the relevant provisions of the Civil Procedure Rules.

32. Emphasis has been given in the previous cases to the absence of a leave filter in section 288. But the decisions in those cases have not turned on the fact that there was, then, no requirement for the High Court to permit an application to be made under that section. Crucial in all of them has been the application of the principle in *Lane v Esdaile*, and the absence of an express right of appeal to this court against the High Court's refusal of leave to appeal to itself under section 289(6).

33. Ms Hutton also submitted, in my view correctly, that the 'policy reasons' referred to by the Master of the Rolls in *Wendy Fair Markets* and Sullivan L.J. in *Walsall Metropolitan Borough Council* have not gone away. She mentioned the problem of 'abusive appeals', as Sullivan L.J. described them in Walsall Metropolitan Borough Council, which bring needless uncertainty and delay to the enforcement of planning control. That this problem is mitigated by the finality of a High Court judge's refusal of leave to appeal against an inspector's decision on a section 174 appeal may be seen as some justification for the difference between the arrangements for appeals under section 289 and those for applications under section 288. Another difference to which Ms Hutton referred was that, under section 288(4B), a section 288 application must be made within six weeks of the decision under challenge, whereas, under paragraph 26.1(1) of Practice Direction 52D, a section 289 appeal must be made within 28 days.

34. But as Ms Colquhoun acknowledged, whatever may be said about those 'policy reasons', there is also an important distinction in status between the two sections. An application under section 288 is a 'planning statutory review', whereas an appeal under section 289 is not. CPR r.8.1(6) states that a rule or practice direction may, in respect of a specified type of proceedings '(a) require or

permit the use of the Part 8 procedure'. Practice Direction 8C was made under that rule. In the 'General provisions applicable to planning statutory review', paragraph 1.1 of the practice direction says that it relates to 'claims for statutory review' under various provisions, which include section 288 but not section 289. Paragraph 1.2 states that '[in] this Practice Direction "claim for planning statutory review" means a claim under any of the statutory provisions set out in paragraph 1.1'. After the coming into force of the relevant provisions of the 2015 Act on 26 October 2015, and with effect from 3 October 2016, CPR r.52.10 provides, under the heading 'Planning statutory review appeals':

> '… (1) Where permission to apply for a planning statutory review has been refused at a hearing in the High Court, an application for permission to appeal may be made to the Court of Appeal.
>
> (See Part 8 and Practice Direction 8C.)
>
> … .'

Under section 54 of the 1999 Act, rules of court may make such provision for a right of appeal. CPR r.52.10 has effectively done so for proceedings under section 288, but not for proceedings under section 289. This could have been done, but was not.

35. Ms Colquhoun pointed out that CPR r.52.10 was introduced to deal with amendments made by the 2015 Act to section 288 and other forms of statutory challenge for which leave was not previously required. She submitted that it should not be seen as reinforcing the disparity between sections 288 and 289, and also inimical to access to environmental justice under the Aarhus Convention – which the provisions for costs protection in section VII of CPR Part 45 seek to promote. But that argument cannot undo the principle in *Lane v Esdaile* and its continuing relevance to appeals under section 289 – which are still not subject to any provision allowing an application for permission to appeal to be made to the Court of Appeal against the High Court's refusal of leave to appeal to itself. The fact that the amended provisions for costs limits in Aarhus Convention claims now include in CPR r.45.41(2)(a)(i) claims for 'review under statute' as well as claims for judicial review, and that it was considered

necessary to provide, as CPR r.45.41(3) does, that appeals under section 289(1) are 'for the purposes of this Section to be treated as reviews under statute' – with a corresponding provision in paragraph 26(17) of Practice Direction 52D – does not bear on the principle with which we are concerned. The consistent regime for costs protection does not yield a right of appeal to the Court of Appeal against the High Court's refusal of leave to appeal to itself under section 289(6). It does, however, confirm the deliberate distinction in the Civil Procedure Rules between a 'planning statutory review' under section 288 and a section 289 appeal."

Meaning of "a decision in proceedings on an appeal"

9–023 It was held in *Horsham DC v Fisher*[1] that a decision of the Secretary of State to refuse to accept a notice of appeal was "proceedings on an appeal" so that an appeal to the High Court lay under the then s.246 (now s.289), and an appellant who had failed to exercise that right of appeal to the High Court could not thereafter raise the relevant point in other proceedings. In that case the Secretary of State had (wrongly) decided that a notice of appeal against an enforcement notice was defective. The defendant did not appeal under s.246, was convicted by magistrates for non-compliance with the enforcement notice and appealed to the Crown Court. It was held on the above basis that the validity of the enforcement

[1] [1977] J.P.L. 178.

notice could not be challenged in the Crown Court and that the conviction must stand.

Wain v Secretary of State for the Environment[1] was a case in which notice of appeal against an enforcement notice had been given without grounds or facts. The Department replied that the appeal could not be entertained without these, and when later the appellant supplied grounds and facts, the Department said that the appeal was then out of time. (This decision was in fact erroneous as shown by the subsequent decision of the Court of Appeal in *Howard* (see above, para.8.1.4).) However, when the plaintiffs sought to re-open their appeal, the court held that the Department's letter saying that the appeal was out of time was a decision in proceedings on appeal for the purpose of s.246 and, as the plaintiff had not appealed against that decision in accordance with s.246, the decision stood and could not be questioned.

However, see the later case of *Lenlyn Ltd v Secretary of State for the Environment*[2] where it was held that a decision of the Secretary of State not to entertain an appeal was not a decision in proceedings on appeal and could not therefore be challenged under this section. The proper procedure in such a case was an application for judicial review.

Young v Secretary of State for the Environment[3] was a case in which the Court of Appeal had to consider whether a landowner in whose favour an enforcement notice had been quashed on appeal to an inspector was entitled to have the matter remitted for re-hearing on the ground that a finding not necessary for the decision had been made which might cause the landowner future prejudice. It held that he was not so entitled. Mr Young had been served with an enforcement notice and appealed against it inter alia on the ground "that the matters alleged in the notice do not constitute a breach of planning control". The inspector's decision letter stated that in 1981 the Secretary of State had on appeal granted conditional planning permission. He held that there had been a breach of planning control and the appeal on that ground must therefore fail. He, however, quashed the notice on the basis that it was defective in form (it had referred to a change of use without permission whereas it should have alleged failure to comply with a condition). Mr Young's appeal against that decision had been dismissed by the High Court.

9–024 In the Court of Appeal Dillon L.J. held that the appeal should be dismissed on the ground that the inspector was entitled to say

1 [1978] 39 P. & C.R. 82.
2 *The Times*, December 5, 1984.
3 *The Times*, February 26, 1990.

what he did in his decision letter and that in the circumstances of that case Mr Young could not appeal from a decision in his appeal. Concurring, McCowan L.J. said that Mr Young was appealing not against the inspector's decision but his reasons and the Act gave no power to appeal against reasons. Even if the part complained of was part of the decision there was no error of law in it. Woolf L.J., concurring in the result, expressed concern that the decision might be interpreted more widely than His Lordship would intend. It was important that the court's decision on facts (where there had been no error of law) should not be taken as unduly restricting the right of appeal in section 246. There seemed to him to be force in the argument that there could be more than one ground of decision and so more than one "decision" for the purposes of section 246.

The High Court decided in *Gill v Secretary of State for the Environment*[1] that there may be proceedings under section 246 (now section 289) to challenge a decision of the Secretary of State in an enforcement appeal, to grant planning permission, although section 245 (now section 288 – see below) might be a more appropriate route of challenge.

Who may appeal

9–025 The right of appeal under section 289 is confined to the appellant, the local planning authority and any other person having an interest in the land to which the notice applies. This will be so whether or not a copy of the enforcement notice was served on them. Conversely, a person who *has* been served with a copy of the notice but who is not the owner and who has no interest in the land will not have a right of appeal under this section.

Method of appealing

9–026 Rule 52.20 of the Civil Procedure Rules (and the accompanying Pt 52 Practice Direction) governs appeals under s.289. Paragraph 22.6C(1) of the Practice Direction provides that an application for permission to appeal must be made within 28 days after notice of the decision is given to the applicant. Time runs from the date the notice of the decision was given to the appellant. CPR r.2.8 further provides:

"(2) A period of time expressed as a number of days shall be computed as clear days.

[1] [1985] J.P.L. 710.

(3) In this rule 'clear days' means that in computing the number of days –

(a) the day on which the period begins; and

(b) if the end of the period is defined by reference to an event, the day on which that event occurs are not included."

For a case concerning exercise of the discretion of the court to extend time, see *Mayflower Glass Ltd v Secretary of State for the Environment and South Tyneside Metropolitan Borough Council*.[1] Prior to the "Woolf" reforms which produced the Civil Procedure Rules 1998, the procedure was governed by the Rules of the Supreme Court.

In *Wenman v Secretary of State for the Environment and Guildford Borough Council*[2] the court took the view that an application under the section is not "made" until all the required procedural steps have been followed and that it was not sufficient merely to file an application for leave and a draft notice of motion. The deputy judge referred to Order 12, rule 2(c) of the Rules of the Supreme Court which provided that an application shall "be made by filing it in the Crown Office [now the Administrative Court Office] together with the decision, the draft originating notice of motion and an affidavit verifying any facts relied on" and took the view that the whole of these matters constituted "making an application". He further took the view that rule 12(2)(d) required that other steps be taken as a pre-condition for a properly constituted application, namely service of the application and the draft notice of motion and affidavit on the proposed respondents. In that case, neither the decision nor an affidavit was filed. Accordingly the court decided that the application was not made in time. The intended appellants had also, against the possibility that the court might rule that an application had not been made in time, made an application (under rule 12) for extension of time. Dealing with that application, the court refused to exercise its discretion, finding no good reason for the delays both in service and in preparing affidavits.

It was held in *Ringroad Investments v Secretary of State for the Environment*[3] that time runs from the date of sending of the letter of decision. In that case the decision of the Secretary of State dismissing an appeal against an enforcement notice had been conveyed in a letter dated 6th March 1979 and received by the appellant on 7th March 1979. He purported to appeal by notice of motion on 4th

1 [1992] J.P.L. 751.
2 [1995] J.P.L. 1040.
3 (1980) 40 P. & C.R. 99, DC.

April 1979. The Secretary of State moved to strike out the appeal as being out of time and was successful on the basis set out above, but the court in *Ynys Mon Borough Council v Secretary of State for the Environment*[1] took a different view, namely that the date of receipt by the appellant was the relevant date.

Scope of appeal

9–027 On appeal to the High Court from the Minister an appellant is confined to the grounds of appeal actually taken before the Minister.[2]

In *Green v Minister of Housing and Local Government*[3] the Divisional Court in an appeal decided that the extended power of the court to receive further evidence under RSC Order 55, rule 7(2) and (3), did not allow the court to hold a re-hearing of the primary facts and refused to allow the appellant to adduce evidence which was not before the Minister's inspector. The appeal was confined to a point of law.

A contention that an inspector has failed to give adequate weight to particular evidence does not raise a question of law on which to base an appeal under the section (*E.L.S. Wholesale (Wolverhampton) v Secretary of State for the Environment*).[4]

Powers of the court

9–028 The powers of the court under section 246 (now section 289) were considered by the Court of Appeal in *London Parachuting and Rectory Farm (Pampisford) v Secretary of State for the Environment*.[5] South Cambridgeshire District Council had served enforcement notices requiring cessation of parachuting activities by LP on land belonging to RF. Both appealed to the Secretary of State and lost. The time for compliance was then 31st July 1985. On 24th May 1985 they appealed to the High Court under section 246. The unauthorised parachuting activities continued beyond the date for compliance with the enforcement notices. In August 1985 the council instituted proceedings in the Chancery Division for an injunction. Scott J. accepted undertakings which gave two days in which to appeal. LP and RF did not appeal but issued a notice of motion before the Divisional Court of the Queen's Bench Division for an order that the enforcement notices be of no effect pending the final determination

1 [1992] 3 P.L.R. 1.
2 *Miller-Mead v Minister of Housing and Local Government* [1963] 2 QB 196.
3 [1967] 2 Q.B. 606.
4 (1988) 56 P. & C.R. 69, DC.
5 (1986) 552 P. & C.R. 376, CA.

of the appeal under section 246. An order was made that the enforcement notices should be of no effect until 1st October 1985. Accordingly, the undertakings given were discharged by Scott J. On the council's appeal the Court of Appeal held that the court had power at an interlocutory stage to make an order under the then RSC Order 55, rule 3(3) that an appeal under section 246 (now section 289) should operate as a stay of any proceedings on an enforcement notice. It did not have power to order that the enforcement notices should be of no effect.

Subsection (4A) provides that in proceedings brought under section 289 in respect of an enforcement notice, the High Court or, as the case may be, the Court of Appeal may order that the notice shall have effect, or have effect to such an extent as may be specified in the order, pending the final determination of the proceedings and any re-hearing and determination by the Secretary of State. The court has power under the section to impose such terms (if any) as it thinks fit which may include terms requiring the local planning authority to give an undertaking as to damages or any other matter.

For a case in which the court exercised the power under subsection (4A) and ordered that an enforcement notice should take interim effect, see *Bown (Roger) and R B Transport Ltd v Secretary of State for the Environment*.[1]

9–029 If the High Court considers that the Minister's decision was wrong in law, it will remit the matter to him with the opinion or direction of the court for re-hearing and determination. The court will not set aside or vary his decision. It has no power to do so.

The Divisional Court decided in *Bendles Motors v Bristol Corporation*[2] that the court will only interfere with a decision of the Minister if it is satisfied that, the Minister having properly directed himself as to the law, the decision was perverse in the sense that the evidence could not support it.

Perhaps not surprisingly in *Donovan v Secretary of State for the Environment*[3] the court held that in an appeal under this section it was not relevant that the local planning authority, while proceeding against an appellant, had not taken action against others in a similar position (unauthorised traders).

1 [1996] J.P.L. B130.
2 [1963] 1 W.L.R. 247.
3 *The Times*, 4 July 1987, DC.

As to the question of costs on a refusal of leave to appeal under section 289, see *R. v Secretary of State for Wales and Dyfed County Council ex parte Rozhon*.[1] An applicant under Order 94, rule 12 is at risk of having to pay the respondent's costs if he fails to get leave and costs will normally follow the event. It makes no difference that the respondent is the Secretary of State.

CHALLENGE OF PLANNING PERMISSION BY APPLICATION TO COURT

9–030 When, on any appeal against a notice, the Secretary of State decides, under the provisions noted above, to grant planning permission for the development to which an enforcement notice relates, his action may be challenged under section 288 of the 1990 Act, re-enacting section 245 of the 1971 Act.

Under this section the challenge is to be made by application to the High Court. There may be a subsequent appeal to the Court of Appeal and thereafter to the Supreme Court. An appeal to the Court of Appeal requires leave to appeal, which may be given by the court below or by the Court of Appeal. (Civil Procedures Rules.) An appeal to the Supreme Court is by leave of the Court of Appeal or by an application to the Supreme Court. (The Supreme Court Rules 2009 (SI 2009/1603).)

Apart from challenge as described above, the validity of a decision of the Secretary of State on an enforcement appeal, to grant planning permission for the development to which the enforcement notice relates, cannot be questioned in any legal proceedings whatsoever (s.284(1) and (3)).

As was judicially noted in *Residents Against Waste Site Ltd v Lancashire County Council*[2] the test in s.288 is designed to afford rights of challenge to individuals whose private interests are affected and which often do not turn on any suggested illegality or "public wrong" by a public body. For a note of that case, see paras 10.3 and 10.4 below.

Who may challenge a decision

9–031 Section 288 provides that applications may be made to the court by *any person who is aggrieved* by the action of the Secretary of State and who wishes to question the validity of his action on the grounds that the action is not within the powers of the Act or that any of

[1] [1994] J.P.L. 801, CA.
[2] [2007] EWHC Admin 2558.

the relevant requirements has not been complied with in relation to that action (s.288(1)(b)). The local planning authority has a similar right (s.288(2)).

The "relevant requirements" mean any requirements of the 1990 Act or of the Tribunals and Inquiries Act 1992 (consolidating earlier statutes), or any enactments replaced thereby, or of any order, regulations or rules made under these Acts which are applicable to the action in question (s.288(9)).

Who is "a person aggrieved"? There was a time when this phrase was interpreted narrowly by the courts, but that is not the position today. The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624) and the Town and Country Planning (Inquiries Procedure) (Wales) Rules 2003 (SI 2003/1266) give rights to third parties in appeal proceedings, and this has been the basis for a wider interpretation to be given to the meaning of "a person aggrieved". In *Turner v Secretary of State for the Environment*[1] it was held that a local preservation society might be such a person. The *Turner* approach was taken by the Court of Appeal in *Times Investment Ltd v Secretary of State for the Environment*.[2]

9–032 In *Eco-Energy (GB) Ltd v (1) First Secretary of State (2) Durham County Council*[3] a consortium named the Eco-Energy Group had been established for the purpose of carrying out development of an area of land. The Group had made a planning application which had been refused on appeal to an inspector. The Group had orally purported to assign its interest in the planning application to C who, in turn, had assigned his interest to E. E had a sole shareholder (C). E had made an application under s.288, challenging the decision of the inspector. That application had been struck out on the basis that E was not "a person aggrieved" for the purpose of s.288 of the Town and Country Planning Act 1990. E now appealed to the Court of Appeal, arguing that the Group had orally assigned its interest to C and, as there was no requirement that such an assignment be in writing, it had acquired the Group's interest and was accordingly within the terms of s.288. The appeal was dismissed. The court held that the Group, by virtue of its rights as an applicant for planning permission, was a potential applicant under s.288, but it had not been able to assign to any other person its right to apply to the High Court to challenge the planning decision.

1 [1976] J.P.L. 306.
2 [1991] J.P.L. 67.
3 [2004] EWCA Civ 1566.

This case was followed in *Bowen v Bristol City Council*,[1] in which a claim under s.288 for an order to quash a Woodland Tree Preservation Order was dismissed, the claimant being held, on the facts, not to be a "person aggrieved", since he was not the appellant in the planning process, nor someone who took a sufficiently active role in that process and had no relevant interest in the woodland.

In *Historic Buildings and Monuments Commission for England, and Others v Secretary of State for Communities and Local Government and Others*[2] noted at para.3.3 above, it was held that William Ashton, one of several applicants under s.288 to quash a decision regarding major development in the London Borough of Lambeth, "did not play a sufficiently active role in the planning process properly to be described as 'aggrieved' within the meaning of section 288".

9–033 As noted in para.3, the application to quash failed. The other unsuccessful applicants, the Historic Buildings Commission for England and Westminster City Council, did not appeal, but William Ashton decided to take the matter to the Court of Appeal and obtained permission to do so.[3]

His challenge was based on a narrower ground than that which had earlier been canvassed and related to the reference in the decision of the Secretary of State to the funding of a proposed sports centre and swimming pool complex, it being claimed on his behalf that the decision contained a material error of fact or, alternatively, that the reasoning of the Secretary of State on that issue was unlawful because it left substantial doubt as to whether that material error of fact had been made. This appeal was dismissed.

Mr Ashton had, however, now sought also to challenge the finding of the judge below that his interests had not in any event "been substantially prejudiced" by the decision of the Secretary of State and that he was not a person "aggrieved" within the meaning of that word in s.288, and therefore had no standing to make the statutory challenge to the Secretary of State's decision.

As Pill L.J. observed in delivering the leading judgment, that was an issue which needed to be determined only if Mr Ashton would otherwise succeed on his substantive challenge.

9–034 As noted, the substantive challenge did not in fact succeed and it was not necessary for the Court of Appeal to rule on the issue of standing.

1 [2009] EWHC 1747 (Admin).
2 [2009] EWHC 2287 (Admin).
3 [2010] EWCA Civ 600.

However, Pill L.J. (at para.28) decided that comment might be appropriate "because the facts highlight the issue in a stark form and because the judge has made a finding which may in any event be cited in future cases".

The following principles were drawn from the authorities as those to be applied when considering whether a person is aggrieved within the meaning of s.288 of the 1990 Act (para.53):–

1. Wide access to the courts is required under the section (*Attorney General of the Gambia v N'Jie*)[1]
2. Normally, participation in the planning process which led to the decision sought to be challenged is required. What is sufficient participation will depend on the opportunities available and the steps taken (*Eco-Energy GB Ltd v (1) First Secretary of State (2) Durham County Council*[2] and *Lardner v Renfrewshire DC*[3]).
3. There may be situations in which failure to participate is not a bar (*Cumming v Secretary of State for Scotland*[4] , cited in *Lardner*).
4. A further factor to be considered is the nature and weight of the person's substantive interest and the extent to which it is prejudiced. The sufficiency of the interest must be considered (*N'Jie* and *Lardner*).
5. This factor is to be assessed objectively. There is a difference between feeling aggrieved and being aggrieved (*Lardner*).
6. What might otherwise be a sufficient interest may not be sufficient if acquired for the purpose of establishing a status under s.288 (*Morbaine Ltd v Secretary of State*[5]).
7. The participation factor and the interest factor may be interrelated in that it may not be possible to assess the extent of the person's interest if he has not participated in the planning process (*Lardner*).
8. While recognising the need for wide access to the courts, weight may be given, when assessing the prior participation required on, to the public interest in the implementation of projects and

1 *Attorney General of the Gambia v N'Jie* [1961] A.C. 617.
2 *Eco-Energy (GB) Ltd v (1) First Secretary of State (2) Durham County Council* [2004] EWCA Civ 1566.
3 *Lardner v Renfrewshire DC* [1997] SC 104; S.L.T 1027.
4 *Cumming v Secretary of State for Scotland* [1922] SC 463.
5 *Morbaine Ltd v First Secretary of State* [2004] EWHC 1708 (Admin).

the delay involved in judicial proceedings (*Commission of the European Communities v Ireland*)[1].

The appeal was dismissed on both grounds.

9–035 Existing authorities in relation to the term "persons aggrieved" were reviewed by the Supreme Court in *Walton v Scottish Ministers*.[2] It is important to consider the entire judgment to assess its impact on existing authorities but the key paragraphs, from Lord Reed, are below:

"87 The authorities also demonstrate that there are circumstances in which a person who has not participated in the process may nonetheless be "aggrieved": where for example an inadequate description of the development in the application and advertisement could have misled him so that he did not object or take part in the inquiry, as in Cumming v Secretary of State for Scotland and the analogous English case of Wilson v Secretary of State for the Environment [1973] 1 W.L.R. 1083. Ordinarily, however, it will be relevant to consider whether the applicant stated his objection at the appropriate stage of the statutory procedure, since that procedure is designed to allow objections to be made and a decision then to be reached within a reasonable time, as intended by Parliament.

88 In the present case, Mr Walton made representations to the Ministers in accordance with the procedures laid down in the 1984 Act. He took part in the local inquiry held under the Act. He is entitled as a participant in the procedure to be concerned that, as he contends, the Ministers have failed to consult the public as required by law and have failed to follow a fair procedure. He is not a mere busybody interfering in things which do not concern him. He resides in the vicinity of the western leg of the WPR. Although that is some distance from the Fastlink, the traffic on that part of the WPR is estimated to be greater with the Fastlink than without it. He is an active member of local organisations concerned with the environment, and is the chairman of the local organisation formed specifically to oppose the WPR on environmental grounds. He has demonstrated a genuine concern about what he contends is an illegality in the grant of consent for a development which is bound to have a significant impact on the natural environment. In these circumstances, he is indubitably a person aggrieved within the meaning of the legislation."

Further:

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1 *Commission of the European Communities v Ireland* (C -427/07).

2 [2013] P.T.S.R. 51.

"92 … a distinction must be drawn between the mere busybody and the person affected by or having a reasonable concern in the matter to which the application relates. The words "directly affected", upon which the Extra Division focused, were intended to enable the court to draw that distinction. A busybody is someone who interferes in something with which he has no legitimate concern. The circumstances which justify the conclusion that a person is affected by the matter to which an application relates, or has a reasonable concern in it, or is on the other hand interfering in a matter with which he has no legitimate concern, will plainly differ from one case to another, depending upon the particular context and the grounds of the application. As Lord Hope made plain in the final sentence, there are circumstances in which a personal interest need not be shown."

"94 In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it.

95 At the same time, the interest of the particular applicant is not merely a threshold issue, which ceases to be material once the requirement of standing has been satisfied: it may also bear upon the court's exercise of its discretion as to the remedy, if any, which it should grant in the event that the challenge is well-founded. In that regard, I respectfully agree with the observations made by Lord Carnwath at para 104."

Time and procedure for challenge

9–036 The application to the court must be made within six weeks of the date on which the action of the Secretary of State was taken (s.288(3)).

In *Okolo v Secretary of State for the Environment and Kingston upon Hull City Council*, a case concerning the compulsory purchase of land under the Acquisition of Land Act 1981, the court decided that the sort of strict time limit (six weeks) there applying for a person aggrieved to apply to the High Court to determine the validity of an

order should not be narrowly construed and an application by the Secretary of State to strike out the originating motions on the ground that they were out of time was dismissed. In that case the statute (s.23) required a challenge to be made within six weeks from the date on which the confirmation or making of the compulsory purchase order was first published in accordance with the Act. That date was Monday June 17, 1996. The originating motions had been issued on Tuesday July 30, 1996. It was held that the applications were in time, on the basis that the day of publication had to be left out of account (this was indeed common ground between the parties at all stages), and therefore that the six weeks ran from Tuesday June 18. It was further held that the period ended six Tuesdays later and that an act done on the final Tuesday was an act done within six weeks.

The case went to the Court of Appeal, and the appeal was allowed, *sub nom Omoregei v Secretary of State for the Environment*,[1] the court holding that "six weeks" means six times seven days and, where a notice is published on a Monday and there are six weeks to challenge it, those six weeks end by midnight on the Monday in six weeks' time. In this case the challenge was out of time.

9–037 The six-week period under the section is absolute and the court has no power to convert an application for judicial review (even if within the time limit) into an application under s.288. See *R. v Secretary of State for the Environment Ex p. Johnson and Benn*.[2]

In *Matthews v Secretary of State for the Environment, Transport and the Regions*,[3] the court held that the time limit in s.288(3) pursued a legitimate aim in ensuring legal certainty and finality in planning matters and was proportionate, given the nature of those matters. M had sought to challenge dismissal by an inspector of his appeal against a planning refusal in respect of a mobile home, on the basis that the inspector had failed to give sufficient weight to his Convention rights under the Human Rights Act 1998. His application was outside the six-week time limit. M was illiterate and had lived in a caravan on the land for many years, subject to several temporary planning permissions and enforcement action. His application failed, the court holding that even if his challenge had been made within the six-week period, it would have failed. The inspector had been under a duty to consider the effects of art.8 of the Convention, although it had not, in fact, been raised before him, but his duty had been

1 [1997] 4 All E.R. 242.
2 June 18, 1997, unreported.
3 [2001] EWHC Admin 815, October 10, 2001.

sufficiently discharged in considering M's personal circumstances as well as policy considerations.

For the procedural requirements, see Part 8 of the Civil Procedure Rules. These provisions replace similar requirements of the Rules of the Supreme Court (to which the cases cited relate).

9–038 It is the entering of notice at the Administrative Court Office (formerly the Crown Office) which constitutes the making of the application to the court (which must be within six weeks of the decision). It was held that service upon the respondents could be effected later by extension of time under what was then Order 3, r.5 and was not automatically caught by the time limit of six weeks. See *Mendip District Council v Secretary of State for the Environment and Castle Housing Society Ltd.*[1] The power to extend time for service is now available under the case management powers of Part 3 of the Civil Procedure Rules.

For a case in the Court of Appeal which concerned an apparent administrative error at the Central Office of the High Court resulting in arrival of the notice of motion at the Crown Office (now the Administrative Court Office) five days late, see *Low v Secretary of State for Wales and Glyndwyr District Council.*[2]

Time runs from the date the decision letter of the Secretary of State is signed on his behalf and date stamped, and not from the date the applicant receives the letter (*Griffiths v Secretary of State for the Environment*).[3]

9–039 However, in *Daws v Secretary of State for the Environment*[4] the court allowed an exception where decision letters sent to the appellant by an error bore a different date from copies sent to third parties and it was held that an aggrieved person was entitled to rely on the date on his copy of the decision letter, unless it was corrected in time.

Time will run against an applicant even though he may be unaware that an appeal has been made and a decision given. See *R. v Secretary of State for the Environment Ex p. Kent.*[5]

1 November 29, 1992 on a preliminary issue.
2 *The Times*, March 18, 1993, CA.
3 [1983] 2 A.C. 51.
4 [1987] N.P.C. 115.
5 [1988] 3 P.L.R. 17.

See also *Stainer v Secretary of State for the Environment*,[1] where the High Court decided that the period for challenge includes bank holidays and that the court had no discretion to extend the period.

The absolute nature of the six-week time limit was illustrated again in *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Locker*.[2] In that case an applicant for a decision to be quashed under s.288 had his application dismissed because the Crown Office stamp showed that his application had been received two days outside the time limit. He was a litigant in person who had had difficulties in obtaining legal aid.

9–040 See *San Vicente v Secretary of State for Communities and Local Government*[3] for a case in which the High Court, in considering a claim under s.288, had to decide whether to allow an application by the claimants for permission to amend their claim by substituting new grounds.

The claimants were residents of Great Dunmow and sought to challenge a decision of the Secretary of State for Communities and Local Government to grant outline planning permission for the development of some four hectares of land, by the erection of up to 100 houses on the edge of the developed area of that town. Application for this permission had been made to the local planning authority, Uttlesford District Council, which had, contrary to the advice of its officers, refused permission. The developers had appealed and their appeal had been allowed by an Inspector.

The claim form in the proceedings had been issued by the claimants in person.

Before the Court the claimants accepted that their original grounds of claim could not be sustained because they went to the merits of the decision. Their proposed substituted claim was that (inter alia) the decision of the Secretary of State was unlawful by reason of procedural unfairness, namely the failure to ensure that all parties were notified of the hearing in accordance with the Town and Country Planning (Hearings Procedure) (England) Rules 2000 and, having discovered a complete absence of notification of concerned residents, the failure to restart the inquiry with a new Inspector.

1 [1993] E.G.C.S. 130.
2 November 16, 1999, unreported.
3 [2012] EWHC 3585 (Admin).

9–041 The Court granted permission for the substitution of the amended ground set out above, detailing the reasons for so doing. They may be summarised as follows:

(1) The application to amend was to be decided under CPR 17.1(2)(b) and the Court had a wide discretion.

(2) Rule 17.4 was not applicable. The six week period imposed for bringing a claim under s.288 was not a period of limitation under the Limitation Act 1980, nor was it "any other enactment which allows such an amendment or under which such an amendment is allowed". The decision of the Court of Appeal in *Eco-Energy (GB) Ltd v First Secretary of State*[1] was binding on the Court.

(3) There was a threshold of merits, though not a high one.

This threshold was effectively the same as that on an application for summary judgment i.e. has the claimant no real prospect of succeeding on the claim or issue?

(4) Was there prejudice to the defendants?

It was not right to compare the position of the defendants if permission were granted with what it would be if permission were refused. The proper comparison was with its position if the amended claim had been made at the start of the proceedings. Looked at in this way the additional delay in this case was comparatively small and not sufficient to prevent an otherwise proper claim being put forward.

(5) The public interest.

(6) Parliament had decreed a short time of only six weeks for challenges under s.288 and this was a period which could not be extended by the courts. The reason for this was to ensure certainty in the planning process, and this was a very important public interest consideration. The process must both be fair and be seen to be fair the first time around. Objectors to a planning application have no right of appeal on the merits as a developer does. For them s.288 is the only form of challenge and there is a vital public interest in ensuring public confidence in the fairness of the initial planning process.

In the instant case the claimants had real prospects of success in challenging the decision on the ground of procedural unfairness. It was not considered that any delay or further expense outweighed the need for public confidence in the planning process. There was

[1] [2005] 2 P. & C.R. 5.

no, or no sufficient, prejudice to the defendants to justify the refusal of permission to amend.

An appeal by the Secretary of State was dismissed.[1]

Scope of challenge

9–042 The court can interfere with a decision if the Secretary of State has acted on no evidence, or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa (per Lord Denning, MR, in *Ashridge Investments Ltd v Minister of Housing and Local Government*.[2] See also *Seddon Properties v Secretary of State for the Environment*.[3]

For the extent of the duty on an inspector or the Secretary of State to take into account provisions of a development plan which were not drawn to attention by either of the parties at a local inquiry see *R. (on the application of St James Homes Ltd) v Secretary of State for the Environment, Transport and the Regions*.[4]

There is no such thing as a "technical" breach of the rules of natural justice. An applicant raising such a contention must have been substantially prejudiced. See *Swinbank v Secretary of State for the Environment and Darlington Borough Council*.[5]

Powers of the court

9–043 On an application under s.288 the High Court:

(1) may by interim order suspend the operation of the action in question until the final determination of the proceedings;

(2) if satisfied that the action in question is not within the powers of the Act or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that action.

Where an order is so quashed, it is not open to the court to substitute any other order. The appeal to the Secretary of State revives and is pending.[6]

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1 [2013] EWCA Civ 817.
2 [1965] 1 W.L.R. 1320.
3 [1978] J.P.L. 835.
4 [2001] Admin EWHC 30.
5 (1987) 55 P. & C.R. 371.
6 *Hartnell v Minister of Housing and Local Government* [1965] 2 W.L.R. 474, HL.

In *R. (on the application of Newsmith Stainless Ltd) v Secretary of State for the Environment, Transport and the Regions*[1] the court, while noting the decision in the *South Oxfordshire* case (as to which see para.3.5.7 above), observed that it was important not to regard this decision as a licence to introduce new material in applications under s.288. Whilst there was no general rule against raising new material, it would only be appropriate to do so in very rare cases. It would not normally be appropriate if this would require further findings of fact and/or planning judgment, which were for the inspector, not the court. See also the cases noted in para.8.2.1C above.

Position on re-hearing

9–044 In a re-hearing the Secretary of State should take full account of all matters relevant as at the date of re-hearing.[2]

The authorities relating to admission of evidence in an appeal under s.289 were reviewed in *Sharif v Secretary of State for the Environment, Transport and the Regions*,[3] in which it was held that the rule was that fresh evidence should not be admitted except in exceptional circumstances.

The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624), rule 19 and the Town and Country Planning (Inquiries Procedure) (Wales) Rules 2003 (SI 2003/1266), rule 19 and the corresponding rules where appeals are decided by inspectors (Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 (SI 2000/1625), rule 20 and the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (Wales) Rules 2003 (SI 2003/1267), rule 20)) provide that where a decision is quashed, the Secretary of State is required to send to the persons entitled to appear at the inquiry, who did so appear, a written statement of the matters with respect to which further representations are invited for the purposes of further consideration of the appeal. He must then provide an opportunity for them to make, within three weeks, written representations in respect of those matters or of asking for a re-opening of the inquiry. The Secretary of State may then, if he thinks fit, re-open the inquiry.

1 [2001] EWHC Admin 74, February 1, 2001.
2 See *Price Brothers (Rode Heath) Limited v Secretary of State for the Environment*, 38 P. & C.R. 579.
3 [1999] 80 P. & C.R. 362.

It is not for the court, but for the inspector, to decide what are the relevant facts on which a finding is required.[1]

Costs

9–045 As to costs, the Court of Appeal in *Wychavon District Council v Secretary of State for the Environment*[2] reviewed the rules where both the Secretary of State and the local planning authority are represented at a s.288 appeal, reaffirming the rule that only one set of costs would be ordered and rejecting the practice for two sets of costs to be awarded where a developer and the Secretary of State resisted a challenge made by a local planning authority. The Secretary of State was entitled to defend decisions made by him or on his behalf (unless he conceded that the appeal should succeed). There had to be special circumstances for not awarding his costs in the event of the appeal failing. The developer had a commercial interest in the outcome but it did not follow that the local planning authority should have to bear more than one set of costs.

The question of the award of costs where more than one party was involved in a s.288 appeal was also before the House of Lords in *Bolton Metropolitan Borough Council v Secretary of State for the Environment*.[3] The House ruled that the Secretary of State (if successful in defending his decision) would normally be entitled to the whole of his costs and was not required to share them with another party. A developer could demonstrate that there was likely to be a separate issue on which he was entitled to be heard and which was not covered by counsel for the Secretary of State or that he had an interest which required separate representation, but the fact that he was a developer would not of itself justify an award. However, in *Bolton* their Lordships stressed that costs were always in the discretion of the court.

For a later case in which a second respondent failed to recover costs although the participation of that party in the proceedings was held to be appropriate and necessary and the second respondent had in fact undertaken a substantial part of the presentation of arguments for both respondents, see *Randall v Secretary of State for the Environment and Buckinghamshire County Council*.[4]

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1 See *Continental Sprays v Minister of Housing and Local Government* 67 LGR 147; *William Boyer & Sons v Minister of Housing and Local Government* (1968) 20 P. & C.R. 176 and *Deasy v Minister of Housing and Local Government* (1970) 214 E.G. 415.

2 [1994] E.G.C.S. 151, CA.

3 [1995] 3 P.L.R. 37, HL.

4 [1995] 70 P. & C.R. 422, QBD.

9–046 For cases in which a second set of costs (those of developers) was ordered to be paid, see *R. v West Dorset District Council Ex p. Searle*[1] and *Hillingdon London Borough Council v Secretary of State for the Environment*,[2] in both of which developers were held to have a sufficient interest to justify their being separately represented. In the first case the applicant had made an allegation of fraud against the developers.

Landowners, who had been represented at the hearing, were awarded their costs in *Bromley London Borough Council v Secretary of State for the Environment, Transport and the Regions,*[3] in which case the High Court had dismissed a challenge by the council to the decision of the Secretary of State, under s.288, to grant planning permission. The court took the view that the landowners had been at risk of losing their homes if the council's challenge had succeeded and that it would be fundamentally unjust for someone in such circumstances not to be able to attend court to defend their homes.

For another case in which the rule in *Bolton* was departed from in exceptional circumstances, see *Younger Homes (Northern) Ltd v First Secretary of State*,[4] the High Court awarding two sets of costs. In that case, a decision of the Secretary of State was challenged on the basis of allegations involving serious imputations on the integrity and truthfulness of witnesses for the local authority, although such allegations were, in the event, not actually pursued. The court held that it was not open to a claimant to put forward such points without anticipating that the local planning authority would be bound to seek to attend the proceedings and defend.

9–047 Before the Court of Appeal in *Green v Secretary of State for Communities and Local Government*, *Canterbury City Council v Secretary of State for Communities and Local Government*[5] (noted at para.3.5.7 above), there was also an issue as to costs. In the court below the judge had awarded a second set of costs to the successful third and fifth respondents who lived on the appeal site. The fifth respondent was recorded as having being an appellant at the Inquiry before the inspector. The third appellant did not give evidence and was not recorded a having been present, although the Court was informed by counsel that she had been present.

1 February 21, 2000, unreported.
2 July 30, 1999, unreported.
3 [2001] EWHC Admin 561.
4 [2003] EWHC Admin 3058.
5 [2010] EWCA Civ 64.

The judge had accepted that these respondents did not deal with separate issues and that the basic principles were that the Secretary of State could be expected to defend his own appeal decisions. He had awarded those respondents no more than half their costs which he had assessed at £2,000. Of which half was to be paid by the appellant.

The Court of Appeal accepted that a judge had a broad discretion on costs, but decided that in the instant case there was no basis on which the judge could properly award a second set of costs to the third and fifth respondents. They had not shown a separate issue on which they were entitled to be heard or that they had an interest which required separate representation. The likelihood that if the appeal had been allowed the case would have been remitted to the Secretary of State for further consideration of the planning issues which might have put their homes at risk was not a sufficient basis.

The appeal on this issue was allowed.

the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

The issue before the court was whether, in those cases, interference was "necessary in a democratic society" and, in particular, whether the interference was proportionate.

12–057 The court allowed three of the appeals and dismissed the fourth, holding that, in considering whether to grant injunctive relief under section 187B, the court had a duty to act proportionately; it being necessary that an injunction should not only fulfil the public interest objective but also that the private interest of an individual affected should not be subject to an excessive burden. It was not the role of a judge to independently determine the planning merits of a case. Injunctive relief should not be granted unless a judge was prepared, if necessary, to consider committal to prison of a defendant for breach of the injunction. In reaching such a conclusion, it was necessary for the judge to have regard to the hardship caused to the defendant's family by requiring it to move and to the availability of alternative sites. Other relevant considerations were the consequences to the health and education of the family, the extent of the alleged breach and past planning decisions. *Hambleton v Bird*, above, was not applied, the approach in that case being held to be inconsistent with the court's duty to act in accordance with Convention rights.

This case went to the House of Lords.[1] See below.

An injunction was, however, granted in *Powys County Council v Hanson*,[2] which also concerned residential occupation of land by a gypsy. The circumstances were such that the court was persuaded that, although the injunction was an interference with family life within the terms of the Human Rights Act, the interference in that case was proportionate to the legitimate aims of planning controls.

12–058 Injunctions were granted to the local planning authority in *Buckinghamshire County Council v North West Estates Plc*[3] in respect of a number of enforcement notices despite arguments by the first defendant, the owner of the land, (inter alia) that to meet the requirements of article 8 of the European Convention on Human Rights (right to respect for private and family life), the court should have regard to the whole planning history of the case when deciding whether to exercise its discretion to grant an injunction to enforce compliance with the enforcement notices. The court held that to

1 [2003] UKHL 26.
2 5 October 2001.
3 Ch D 31 May 2002.

do so was not the function of the court and that planning matters which could have been raised at an earlier stage to challenge the enforcement notices would not be sufficient to meet the requirements of article 8.

12–059 For a case in which a permanent injunction was held to be warranted and proportionate, see *Epping Forest District Council v Mason*.[1]

It was unsuccessfully claimed in *South Buckinghamshire District Council v Flanagan*[2] that the local planning authority were estopped from seeking an injunction, because of a compromise reached in earlier proceedings for breach of an enforcement notice. There would need to be clear and compelling evidence of the authority holding out their prosecuting solicitor as having authority to withdraw an enforcement notice, and there was no such evidence. The prosecuting solicitor had no actual authority to bind the authority to withdraw the enforcement notices and ostensible authority would go beyond what could reasonably be regarded as normally incidental to the conduct of a prosecution for breach of an enforcement notice.

For a case in which the applicability of the *Mansi* doctrine was considered in the context of injunction applications by the local planning authority, see *Buckinghamshire County Council v North West Estates Plc*.[3] As to the *Mansi* doctrine see paragraph 7.5 above.

The High Court held in *Buckinghamshire County Council v North West Estates Plc* that the local planning authority were entitled to seek a composite injunction stemming from six separate enforcement notices. After reviewing the authorities, the court concluded that prima facie the court, when asked to exercise its discretion to grant an injunction to enforce compliance with an enforcement notice, should do so. The local planning authority was the democratically elected authority entrusted with planning control and it was for the respondent to demonstrate why an enforcement notice whose validity was beyond challenge should not be enforced by way of injunction. Mere planning considerations were unlikely to be enough for this purpose.

In *Wrexham County Borough Council v Berry; South Buckinghamshire District Council v Porter; Chichester District Council v Searle*[4] the House of Lords considered consolidated appeals concerning the position of gypsies under planning law and policy and in particular the criteria

1 [2002] EWHC 1532, QBD.
2 [2001] 4 P.L.R. 110.
3 [2002] EWHC 1088 (Ch).
4 [2003] UKHL 26.

CHAPTER 25

APPEAL PROCEDURES

INTRODUCTION

The Planning Act 2008 makes important changes to the procedures for dealing with appeals under the following Acts, to come into force on a day or days to be appointed. (See para.25–007 below). The changes are effected by the insertion of a new section into each of the following Acts: **25–001**

(1) The Town and Country Planning Act 1990 (section 319A inserted by s.196(1) of the 2008 Act).

(2) The Planning (Listed Buildings and Conservation Areas) Act 1990 (s.88D inserted by section 196(2) of the 2008 Act).

(3) The Planning (Hazardous Substances) Act 1990 (s.21A inserted by s.196(3) of the 2008 Act).

THE TOWN AND COUNTRY PLANNING ACT 1990 **25–002**

Application of new procedures

The new provisions noted infra apply to the following by virtue of s.319A(7), inserted by s.196(1) of the 2008 Act: **25–003**

(1) An application made to the Secretary of State under s.62A which deals with major development applications (see para.3–001);

(2) An application referred to the Secretary of State under s.77 instead of being dealt with by a local planning authority in England (as to which see para.3–178 above).

(3) An appeal under s.78 against a decision or failure to take a decision by a local planning authority in England (see para.3.5.7 above).

(4) An appeal under s.174 against an enforcement notice issued by a local planning authority in England (see para.8.1 above).

(5) An appeal under s.195 against a decision of a local planning authority in England (certificates of lawful development) (see para.1.10 above).

(6) An appeal under s.208 against a notice under s.207(1) (replacement of trees) issued by a local planning authority in England (see para.17.5.2 above).

None of the above provisions apply to any proceedings if they are referred to a Planning Inquiry Commission under s.101 of the 2008 Act (as to which see Chapter 23 above), and on any such proceedings being so referred any determination made in relation to those proceedings ceases to have effect (s.319A(8)).

Power of amendment by Secretary of State

25–004 The Secretary of State is given power, by order, to amend the above provisions, by adding proceedings to, or removing provisions from, the above lists, or otherwise modifying the description of such proceedings, and an order so made may contain incidental, supplementary, consequential, transitional and transitory provisions and savings and may amend, repeal or revoke any provisions made by or under the Act of 2008, or by or under any other Act (s.319A(9) and (10)). Such an order is to be made by statutory instrument, and is subject to annulment pursuant to a resolution of either House of Parliament (s.232(4)).

25–005 THE PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) ACT 1990

Application of new provisions

25–006 The new provisions apply to the following by s.88D inserted by s.196(2) of the 2008 Act:

(1) An application for listed building consent referred to the Secretary of State under s.12 instead of being dealt with by a local planning authority in England (see para.16.3 above).

(2) An appeal under s.20 against a decision of a local planning authority in England (see paragraph 16.3 above).

(3) An appeal under s.19 against a listed building enforcement notice issued by a local planning authority in England (see para.16.8 above).

Power of amendment by Secretary of State

25–007 The amending powers of the Secretary of State in this case are the same as those noted in para.25–004 above (s.88D(8) and (9)).

THE PLANNING (HAZARDOUS SUBSTANCES) ACT 1990 25–008

Application of new provisions

The new provisions apply to the following by s.21A, inserted by s.196(3) of the 2008 Act: **25–009**

(1) An application referred to the Secretary of State under s.20 for decision instead of being dealt with by a hazardous substances authority (see para.20.8 above).

(2) An appeal under s.21 against a decision of a hazardous substances authority in England (see para.20.9 above).

Power of amendment by Secretary of State

The amending powers of the Secretary of State in this case are the same as those noted in para.25–009 above (s.21A(8) and (9)) but, in this case, an order can only be made if a draft of the instrument containing the order has been laid before and approved by resolution of each House of Parliament (s.21A(10) and (11)). **25–010**

ACTION REQUIRED TO BE TAKEN BY SECRETARY OF STATE 25–011

In each of the cases referred to in para.25–001 above the Secretary of State is required, before the end of a prescribed period (see below), to make a determination as to the procedure by which the relevant proceedings are to be considered. Such a determination must provide for the proceedings to be considered "in whichever of the following ways appears to the Secretary of State to be most appropriate:

(a) at a local inquiry;

(b) at a hearing;

(c) on the basis of representations in writing."

He may vary such a determination by a subsequent determination at any time before the proceedings in question are determined. Any determination made must be notified to the appellant or the applicant, as the case may be, and the criteria to be applied in a determination must be published.

(See s.319A of the Town and Country Planning Act 1990, s.88D (4),(5) and (6) of the Planning (Listed Buildings and Conservation Areas) Act 1990 and s.21A(4),(5) and (6) of the Planning (Hazardous Substances) Act 1990.)

PRESCRIBED PERIOD

25–012 The period of time within which the Secretary of State is required to determine the procedure by which proceedings under para.25.1 above are to be considered has now been fixed by the Town and Country Planning (Determination of Appeal Procedure) (Prescribed Period) (England) Regulations 2009 (SI 2009/454). That period is seven working days from the receipt of a valid appeal (reg.2(1)). A "working day" for this purpose means a day which is not a Saturday, Sunday, bank holiday, or other public holiday (reg.2(2)). "Receipt of a valid appeal" means, in relation to an appeal under s.78 of the Act (as to which see para.3–173 above), receipt by the Secretary of State of the completed form of appeal and accompanying documents and, in relation to an appeal under s.174(3) (as to which see para.8.1 above), receipt by the Secretary of State of a notice of appeal under s.174(3), together with the statement of appeal submitted in accordance with reg.6 of the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 (SI 2002/2682) (reg.2(2)).

APPEAL REQUIREMENTS

25–013 Section 197 of and Sch.11 to the Planning Act 2008 make the following additional provisions in relation to appeals:

(1) A notice of appeal under s.78 of the Planning Act 1990 (appeals against planning decisions or failure to take such decisions), must be accompanied by such information as is prescribed by a development order (s.78(4A) of that Act, inserted by s.197 of and Sch.11 para.2 to the 2008 Act).

(2) A notice of appeal under s.195 of the Planning Act 1990 (appeals against refusal of, or failure to give a decision on, an application for a certificate of lawful development) must be served within such time and in such manner as is prescribed by a development order and be accompanied by such information as is so prescribed. The time prescribed for service of such a notice cannot be less than 28 days from the date of notification of decision on the application or, in the case of failure to give a decision, as the case may be, 28 days from the end of a further period agreed between the parties (s.195(1B) and (1C) of the 1990 Act inserted by s.197 of and Sch.11 para.3 to the 2008 Act).

(3) A notice of appeal against a notice under section 207 of the Town and Country Planning Act 1990 (replacement of trees) must indicate the grounds of appeal and state the facts on which

it is based and be accompanied by such information as may be prescribed (s.208(4) substituted by s.197 of and Sch.11 para.4(2) to the 2008 Act).

(4) Regulations may provide for an appeal under s.20 of the Listed Buildings Act (appeal against a refusal of listed building consent, or conditions imposed on such a consent, or against a failure to determine an application, must be accompanied by such further information as may be prescribed (s.21(8) of the Listed Building Act 1990, inserted by s.197 of and Sch.11 para.5 to the 2008 Act).

(5) A notice of appeal under s.21 of the Hazardous Substances Act (appeal against decisions and failure to take decisions relating to hazardous substances) must be accompanied by such information as may be prescribed (s.21(3A) of the Hazardous Substances Act inserted by s.197 of and Sch.11 para.6 to the 2008 Act).

CESSATION OF RIGHT TO BE HEARD ORALLY ON APPEAL

25–014 In all of the cases noted above in para.25–003 (1) to (6), para.25–006 (1) to (3) and para.25–009 (1) and (2), existing law prior to the coming into force of relevant provisions of the Planning Act 2008 gave to an applicant or appellant, as the case may be, a legal right to be given an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.

These rights are all to be removed (s.196 of and Sch.10 to the 2008 Act).

WALES

25–015

As to Wales see Pt 10 of the 2008 Act.

PROVISIONS IN FORCE

25–016 The following provisions, noted above, are in force as indicated.

Section 196 and paras 1, 3 to 6 and 10 to 14 of Sch.10, so far as they relate to (i) any appeal under s.78 of the 1990 Act against a decision of a local planning authority or (ii) any appeal under s.174 of the 1990 Act against an enforcement notice are in force in both England and Wales on and from 6 April 2009, except in relation to any appeal of which notice was given to the Secretary of State before that date (the Planning Act 2008 (Commencement No. 1 and Savings) Order 2009 (SI 2009 No. 400).

Section 197 and Sch.11 are in force in England only from 6 April 2009 (SI 2009 No. 400).

CONDUCT OF APPEALS DETERMINED BY WRITTEN REPRESENTATIONS – DISCLOSURE OF INFORMATION

25–017 Circular 05/00 explained the then new procedures for handling planning appeals in England, with effect from 1 August 2000, the government's stated aim being "to streamline the appeal process and speed up planning decisions, whilst safeguarding public participation and the fairness, openness and quality of decision making".

This Circular has since been replaced by the *Planning Inspectorate's Procedural Guidance: Planning appeals and called-in planning applications (PINS 01/2009)*. The most up to date edition is 31 July 2015.

What in practice is required of the parties to meet the last mentioned objective was a major issue in a case in the administrative court in 2009, *Elizabeth Eley v (1) the Secretary of State for Communities and Local Government, (2) Watford Borough Council (3) Visao Limited*.[1]

The case concerned two applications for planning permission for residential development, objected to by local residents on a number of grounds, but including assertions that (a) the site included a badger sett and a run used by badgers, and (b) that the developer was deliberately phasing the development relative to land immediately to the east of the application site so as to avoid having to contribute to the objective of affordable housing, a scenario perhaps not unfamiliar to many developers.

The proceedings were brought by the claimant under section 288 of the 1990 Planning Act, who sought an order to quash planning permission granted by an inspector on appeal on 13 February 2008. The claimant asserted that the permission should be quashed because (a) the applicant (the third defendant) failed to disclose to the inspector matters which materially undermined its case and (b) the inspector had founded his decision upon a mistake as to an existing (and established) fact which was at least potentially material to his decision.

25–018 The appeal had been dealt with under the written representation procedure, a fact to be particularly noted, because in his judgment the learned judge, Wyn Williams J, said (at para.35), "I make it plain at the outset that I confine my determination of this issue to appeals which are conducted by the written representations procedure. This judgment does not deal, quite deliberately, with other forms

[1] [2009] EWHC 660 (Admin).

conclusion. It seemed most unlikely, looking at the facts of the case as a whole, that the inspector's mistaken belief (if that was what it was) that there was no conclusive evidence of the existence of badgers on site played a material part in his decision.

There were no grounds for quashing the decision of the inspector to allow the appeal and grant permission in relation to the "badgers issue". **25–027**

Even if that conclusion was wrong, the plain fact was that the outlier badger sett had been removed in accordance with proper procedures and as a matter of discretion there could be no purpose in quashing the decision. On any reconsideration of the planning appeal the issue of badgers on the site could not be material since badgers did not now exist on the site.

As to the second issue (the ownership or control of adjoining land), at the time of the application for planning permission on 8 May 2007 the applicant neither owned nor controlled any land in the vicinity of the application site. However, in June 2007, they had been granted an option to purchase some land adjoining the appeal site and on 31 July 2007 had purchased other land.

Having considered the facts and the arguments of the parties on the point, the learned judge stated that he was inclined to the view that the third defendant did own or control adjoining land and, on the basis of this tentative conclusion, the third defendant should have indicated on the plan submitted with the appeal that it owned and/or controlled adjoining land. However, as it happened he did not think it necessary to determine conclusively the meaning of the word "control" in its context within a notice of appeal or, for that matter what was meant by the word "control" in s.72 of the 1990 Act.

The existence of the option over part of the additional land and the ownership of the remainder of it should have been disclosed to the inspector by virtue of the sequence of events which had in fact occurred. **25–028**

On 19 June 2007 the third defendant's planning adviser had written to the council following the "phasing" issue raised by objectors, noted supra saying "... this is simply not the case as the applicant has no control over this neighbouring land and it would therefore be wholly unreasonable for it to be suggested that deliberate phasing is taking place. In any case the current threshold for affordable housing means 25 dwellings or more and it is not considered that an additional 14 plus units could be achieved on this neighbouring land".

After that letter had been written the third defendant acquired the ownership of part of the additional land and that ownership together with the option gave rise to the clear possibility that development of some kind might take place on the adjoining land.

Against this background fairness did demand that disclosure should be given in the changed circumstances.

25–029 The situation was very different from that described in the planning adviser's letter and at least potentially relevant to the decision of the inspector. It had been asserted previously that the third defendant would not develop the adjoining land because it did not control it. It was relevant to know that inability to carry out development through lack of control was no longer an issue.

This did not mean, however, that the failure to disclose the option and the ownership of part of the additional land that the decision of the inspector had necessarily to be quashed. A quashing order should not be granted if the defendants had demonstrated that the inspector's decision would have been the same had disclosure been made.

Having considered the facts and submissions made, the learned judge decided that the reality was that the failure of disclosure in the case had no effect on the decision reached by the inspector and his decision would have been the same even if disclosure had taken place.

Accordingly, the challenge failed.

PROCEDURAL CHANGES

25–030 The following changes, which relate only to England, are operative on and from 1 October 2013:

(1) The Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184) is amended by SI 2013/2136. The time limit for submitting an appeal is altered and appellants will have to supply with their appeal form a full statement of case and a statement of which procedure (written representations, a hearing or an inquiry) they consider should be used to determine the appeal. If the appellant considers that the appeal should be determined through a hearing or an inquiry he must also submit a draft statement of common ground. There are some exceptions to this latter requirement, concerning national security, urgent crown development, major infrastructure projects, and development that is substantially the same as development in respect of which an enforcement notice

has been served. The 2010 Order and amending orders have now been consolidated and replaced by the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595) with effect from 15 April 2015. See art.37 of the 2015 Order for current requirements for appeal. The DMPO 2010 was revoked and replaced by the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595) with effect from 15 April 2015 (subject to savings and transitional provisions). Provision on appeals is now found in art.37 of the DMPO 2015

(2) Consequentially, other procedural instruments are amended by the Town and Country Planning (Hearings and Inquiries Procedure) (England) (Amendment) Rules 2013 (SI 2013/2137) and the Town and Country Planning Appeal (Written Representations Procedure and Advertisements (England) (Amendment) Regulations (SI 2013/2114). Similar amendments are made by the Planning (Listed Buildings and Conservation Areas (Amendment No.2) (England) Regulations (SI 2013/2115).

(3) DEMOLITION OF UNLISTED BUILDINGS IN CONSERVATION AREAS

The Secretary of State is authorised to determine applications for planning permission made by an authorised local planning authority under s.1 of the Growth and Infrastructure Act 2013 for demolition of an unlisted building in a conservation area. For the procedure to be followed see The Town and Country Planning (General) Regulations (SI 1992/1492) as amended by the Town and Country General (Amendment) (England) Regulations 2013 (SI 2013/2145).

The Town and Country Planning (General Permitted Development) (Amendment) (England) No.3 Order 2013 (SI 2013/2147) made changes to the General Development Order 1955 (SI 1995/418) so that demolition of certain unlisted buildings in conservation areas is not permitted development for the purpose of that Order. Accordingly, planning permission will be required for such development. Order 2013/2147 was repealed by the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596) with effect from 15 April 2015. The relevant provision is now found in Part 11, Class B.1.

(4) MAJOR DEVELOPMENT APPLICATIONS

There is now provision in s.62A of the Town and Country Planning Act 1990 for the Secretary of State to designate a local planning authority, enabling certain applications for planning permission for major development in such an area to be made direct to the Secretary of State (at the option of the developer). See the Town and Country Planning (Section 62A Applications) (Procedure and Consequential Amendments) Order 2013 (SI 2013/2140). See also The Town and Country Planning (Section 62A Applications) (Written Representations and Miscellaneous Provisions) Order 2013 (SI 2013/2142) and the Town and Country Planning (Section 62 Applications) (Hearings) Rules 2013 (SI 2013/2141).

(5) BUILDINGS IN CONSERVATION AREAS

The Enterprise and Regulatory Reform Act 2013 has abolished the system of conservation area consent as it applied to buildings in conservation areas in England, replacing it with a requirement that planning permission be obtained. For consequential provisions see The Enterprise and Regulatory Reform Act (Abolition of Conservation Area Consent) (Consequential and Saving Provisions) (England) Order 2013 (SI 2013/2146).

(6) STOPPING UP OR DIVERSION OF HIGHWAYS

Section 12 of the Growth and Infrastructure Act 2013 brought into force s.257(1A) of the Town and Country Planning Act 1990, which permits competent authorities to stop up or divert a footpath, bridleway, or restricted byway, where they are satisfied that it would be necessary to do so in order to enable development to be carried out in accordance with a planning permission for which an application has been made under either Part 3 or s.293A of the 1990 Act, were that application to be granted. See also the Town and Country Planning (Public Path Orders) (Amendment) (England) Regulations (SI 2013/2201).

(7) NOTICE OF APPEAL AND DOCUMENTATION

The Town and Country Planning (Appeals) Written Representations Procedure and Advertisements (England) (Amendment) Regulations 2013 (SI 2013/2114) amend the Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009 in important respects, including provisions relating to the form of notice of appeal, and the documentation which must accompany it, and the

specification of requirements for subsequent steps, and reduction of the time in which such steps are to be taken.

(8) LONDON

The above Regulations make consequential changes to procedures, when the Mayor of London is involved.

(9) LISTED BUILDINGS

Changes similar to the above provision are made by the Town and Country Planning (Hearings and Inquiries Procedure) (England) (Amendment) Rules 2013 (SI 2013/2137) and the Town and Country Planning (Listed Buildings and Conservation Areas (Amendment No.2) (England) Regulations 2013 (SI 2013/2115).

(10) TIME FOR APPEAL

The starting point of the period within which an appeal must be made, formerly six months from receipt of a decision notice, is altered, and appeals must now be made within six months from the date of the decision notice.