SOUTH STAFFORDSHIRE DISTRICT COUNCIL COMMENTS ON APPELLANT'S ADDENDUM STATEMENT

INSPECTORATE REFERENCE: APP/C3430/C/22/3303424

SECTION 174 TOWN & COUNTRY PLANNING ACT 1990

APPEAL BY: Mr. Billy Rogers

SITE AT: Land Southwest of Saredon Road Hospital Lane Cheslyn Hay Staffordshire.
(14th May 2024).

1. The latest 2024 GTAA fully considered the judgement in Lisa Smith v. Secretary of State for Levelling Up, Housing & Communities [2022] EWCA Civ 1391.

2. At Appellant paragraph 5, 'Five pitches granted planning permission since the 2018 SAD allocations' is incorrect and outdated with 13 pitches (provision increasing from 8 since the drafting of the LPA's SOC at para. 7.5.8) being granted to date. Also, many of the pitches allocated in the 2018 SAD are existing but technically unauthorised, where the site owners have not made applications to regularise the pitches.

3. Appellant paragraph 18 outlines that a number of children at the site attend local schools. The LPA has not had sight of any documents to confirm attendance of children at local schools. Likewise, it has not had sight of documentary evidence of medical conditions of occupants of the site and medical care required.

4. At Appellent paragraph 12 it states the existing site in Hospital Lane has permission for 16 pitches. This is incorrect as planning application 12/00679/COU granted permission for 16 caravans (not pitches) of which no more than 5 shall be statics or mobile homes. The red line plan for this application included the original site and the site extension.

Neutral Citation Number: [2024] EWHC 676 (Admin)

Case No: CO/466/2022
AC-2022-LON-001196

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 March 2024

Before :

MRS JUSTICE LANG DBE

- -

Between :

WINIFRED HELEN WARD	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendants**
(2) BASILDON DISTRICT COUNCIL	

- -
- -

Stephen Cottle (instructed by the **Public Interest Law Centre**) for the **Claimant**
Killian Garvey (instructed by the **Government Legal Department**) for the **First Defendant**
The **Second Defendant** did not appear and was not represented

Hearing date: 7 March 2024

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Approved Judgment

This judgment was handed down remotely at 10 am on 25 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Lang :

1. The Claimant applies, under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990"), for a statutory review of the decision, made on 30 December 2021, by an Inspector, appointed by the First Defendant, which dismissed Mr Mark Cooper's appeal against the refusal of planning permission by the Second Defendant ("the Council") for a material change of use of land in the Green Belt for the stationing of caravans for residential occupation, on the south side of Carlton Road, Bowers Gifford, Basildon ("the Site").

2. The Claimant resides at the Site with Mr Cooper and their three children in one mobile home and one touring caravan. The Claimant is an Irish Traveller and Mr Cooper is a Romani Gypsy. Mr Cooper was the applicant for planning permission and the appellant in the appeal under section 78 TCPA 1990. He has not been joined as a claimant in this application because he has not been able to obtain legal aid. The Claimant has been granted legal aid and she is a person aggrieved by the decision, within the meaning of section 288(1)(a) TCPA 1990 as she is at risk of losing her home.

3. The Council is the local planning authority.

Grounds of challenge

4. There is a dispute between the parties over the extent of the grant of permission to apply for statutory review.

5. The grounds of challenge as originally pleaded, when the claim was filed on 8 February 2022, were as follows:

   i) **Ground 1**. The Inspector erred in law when she concluded in paragraph 24 of the Decision Letter ("DL/24") that 'substantial weight' should be attributed to *both* the harm in the Green Belt by reason of inappropriateness and the harm to the openness of the Green Belt.

   ii) **Ground 2**. The Inspector's decision not to grant a temporary planning permission which would be personal to the First Claimant and her family was disproportionate and irrational.

6. Permission to apply for statutory review was refused on the papers by Johnson J. on 24 June 2022. The Claimant renewed her application for permission on Ground 2 only. Ground 1 was not pursued.

7. The oral renewal hearing took place on 8 November 2022. HH Judge Walden-Smith, sitting as a Judge of the High Court, refused permission on all grounds. During the hearing, she allowed Counsel for the Claimant to rely upon new grounds which were only made orally and not recorded in writing, either before or immediately after the renewal hearing. They were summarised in paragraph 12 of her judgment, as follows:

> "Mr Cottle significantly expanded the extent of his challenge … that ground to contend that there was a failure to apply the public sector equality duty; that there was a failure to consider

> an absence of policy for the provision of sites; that some of the inspector's decisions were not supported by evidence; and there was a failure to have regard to the best interests of the children."

8. Upon an appeal to the Court of Appeal, Lewison LJ granted permission to apply for statutory review, on 25 January 2023, for the following reasons:

> "I do not underestimate the difficult of challenging what, on its face, appears to be a carefully reasoned balance of the various factors for and against the grant of planning permission. I do, however, consider that it is at least arguable that in para [25] of the DL the inspector in making the transition from "primary consideration" to "significant weight" (as opposed to "substantial weight" used elsewhere in the DL made an error of law. There is also some force in the Appellant's contention that the inspector, in addition to balancing the various factors, ought to have given greater consideration to the question of proportionality (dealt with simply as a conclusion in one sentence of para [31] of the DL)."

9. Mr Garvey, Counsel for the First Defendant, contends that the grant of permission was limited to the two issues specified in the 'Reasons' section of Lewison LJ's order.

10. Mr Cottle, Counsel for the Claimant, submits that, in the Court of Appeal, permission was sought and granted on the basis of the Grounds of Appeal submitted by him, in particular:

> "3. Having regard to all the circumstances (and particularly the small scale of the proposed development, the consequential degree of harm to the Green Belt and the matters which the Inspector identified should be attributed 'significant weight' in favour of the appeal) the Inspector's decision not to grant temporary planning permission made personal to the Claimant and her family was disproportionate and perverse.
>
> 4. Such is the combined weight of the matters relied upon in support of the appeal, such was the very limited extent of harm that the Inspector found was caused by the proposal given it is situated in a settlement, said to be a degree of harm, it was not a fair reflection of the factors to then go on to conclude that that harm was so substantial that it was not clearly outweighed. The substantial weight that must be given to protection of the green belt was so obviously outweighed it was perverse to decide otherwise and it was relevant to know what the profound health need was, that the Inspector was referring to."

11. In the 'Permission to appeal skeleton argument', Mr Cottle stated, at paragraph 17, that there was only one ground of appeal, namely, the ground set out in paragraph 3 of the Grounds of Appeal, taken from paragraph 21 of the Statement of Facts and Ground (in its original form).

12. In the light of the skeleton argument and the grounds of appeal, I consider that Lewison LJ must have treated the sole ground of challenge as being the text set out in paragraph 3 of the Grounds of Appeal. He did not grant permission on some grounds and not others because there was only one ground before him. The further grounds raised orally before HH Judge Walden-Smith were not before him.

13. Ground 2 was widely drafted. Mr Cottle submits that Lewison LJ gave permission for Ground 2 to be pursued in its entirety. Mr Garvey submits that Lewison LJ did not accept that the entirety of Ground 2 was arguable. He found that the Inspector's decision "on its face, appears to be a carefully reasoned balance of the various factors for and against the grant of planning permission". Lewison LJ only identified two arguable errors of law within Ground 2, which were as follows:

    i) In DL/25, the Inspector in making the transition from "primary consideration" to "significant weight" (as opposed to "substantial weight" used elsewhere in the DL) made an error of law.

    ii) The Inspector, in addition to balancing the various factors, ought to have given greater consideration to the question of proportionality, dealt with simply as a conclusion in one sentence of DL/31.

14. In my view, the decision is ambiguous and could be read either way. Therefore, I have decided to give the Claimant the benefit of the doubt and proceed on the basis that permission was granted for Ground 2 as then pleaded.

15. A further complication is that the parties subsequently submitted to the Court directions which they had agreed between themselves, which permitted the Claimant to file an Amended Statement of Facts and Grounds ("SFG"). An Administrative Court Office Lawyer made an order accordingly on 14 April 2023.

16. In the Amended SFG, Mr Cottle recast his case with a substantial amount of new text. He re-numbered the Grounds, so that what was Ground 2 has become Ground 1. The Amended Grounds may be summarised as follows:

    i) **Ground 1: irrationality**. The Inspector's decision not to grant a temporary planning permission was disproportionate and perverse.

    ii) **Ground 2: children's best interests**. The Inspector misdirected herself by regarding the primary consideration of achieving the outcome that was in the best interests of the children as attracting less weight than the public interest in protecting the Green Belt.

    iii) **Ground 3: proportionality**. In carrying out the balancing exercise required by Article 8 ECHR, the Inspector failed to give sufficient consideration to the issue of proportionality. Further or alternatively, she failed to give sufficient reasons for her conclusion.

    iv) **Ground 4: flawed balancing exercise**. The Inspector's balancing exercise was flawed because she failed to factor in the right ingredients.

17. Ground 4 was not pleaded in the original SFG, and so Lewison LJ did not grant permission to pursue it. However, I have considered the specific points made under Ground 4 when determining Grounds 1 and 3.

Factual background

The Site and planning policies

18. The Site, which is about 527 sq. ft in size, is located on the south side of Carlton Road, Bowers Gifford, Basildon within the North Benfleet former Plotlands Estate. The Site is within the Metropolitan Green Belt. 63% of the Council's District is designated Green Belt; the rest is urban development. It lies between the built up areas of Basildon and Benfleet. The area is characterised by sporadic, low density, low rise residential development, interspersed with open, undeveloped plots of land. The Claimant submitted that the proposal was essentially infill development but the Council disagreed, as development on the land bordering the east and south was unauthorised, and affected the character of the area.

19. The development plan is the Basildon District Local Plan Saved Policies 2007. The Saved Policies are part of the Basildon District Local Plan, adopted in 1998, so the Local Plan is very out-of-date. There are no policies for meeting the accommodation needs of travellers. In 2018 a Basildon Borough Site Potential Study was published which assessed existing sites and found a significant shortfall.

20. The Green Belt is defined under Policy BAS GB1 of the saved Local Plan. It states: "The boundaries of the Green Belt are drawn with reference to the foreseen long term expansion of the built up areas acceptable in the context of the stated purposes of the Green Belt and to the provisions specified in this Plan". It does not set out criteria for development within the Green Belt.

21. The Statement of Common Ground set out evidence about the inadequate supply of traveller sites, and the need for development on the Green Belt, some of which was agreed and some of which was disputed by the parties. The Inspector determined the issues at DL/14-17, finding that the Council did not have a 5 year supply of deliverable sites to meet the current and historic need for pitches. There was a clear and immediate need for sites in Basildon.

Use of the Site

22. Mr Cooper has owned the Site since 2014. The Site was previously used for grazing horses. After hardstanding was laid, Mr Cooper stationed two caravans on the Site, in December 2017.

23. Mr Cooper, the Claimant and three children live in two caravans (a tourer and a static caravan) on the Site. There is a grassed amenity area for play and grazing for a pony/donkey. Living on a permanent site enables the children to attend school and other local activities, and to access medical and other services as may be required.

24. Mr Cooper was born and brought up in Basildon, and his parents and brothers live nearby. Two of his children live with his ex-partner in the Basildon area. Therefore it is important to him to live near Basildon.

25. The Claimant was born and brought up in West London. She suffers from severe anxiety and depression, and she is vulnerable by reason of her learning disability. Stability and familiarity are important to her.

26. The Council served two enforcement notices (which were later withdrawn). The Council also obtained an injunction, the terms of which were not available to me.

27. On 22 October 2018 Mr Cooper applied for part-retrospective planning permission (permanent or temporary) for a material change of use of land for stationing of caravans for residential occupation with associated development (hard standing and a day room constructed of either brick or wood).

28. The Council refused planning permission on 19 February 2019 for the following reasons:

> "The proposal represents inappropriate development in the Green Belt, contrary to its aims and objectives. The absence of suitable pitches in the borough in tandem with unmet need weighs in favour of the proposal, as does a demonstrable lack of a 5-year land supply and the weight attached to these factors is significant. However, these factors, in conjunction with the applicant's personal circumstances, are not sufficiently compelling to amount to very special circumstances and clearly outweigh the substantial harm cause to the openness of the Green Belt caused by the proposal and therefore overcome the attributable policy objections. The proposal does not accord with the aims of the Basildon's Local Plan Policies BAS GB1 & BAS BE12; policies contained in Chapter 13 of the National Planning Policy Framework 2019; The Planning Policy for Traveller Sites 2015 and policies contained in Basildon's Emerging Local Plan."

29. The Claimant appealed against the refusal of planning permission. The Inspector (Nicola Davies BA DipTP MRTPI) held a hearing and made a site visit in November 2021. At DL/7, she identified the main issues as follows:

    i) The effect of the proposal on the openness of the Green Belt; and

    ii) Would the harm by reason of inappropriateness, and any other harm, be clearly outweighed by other considerations so as to amount to the very special circumstances required to justify the proposal?

30. After a thorough review of the issues, the Inspector concluded, at DL/34:

> "**Conclusion**
>
> 34. The proposed development would, by definition, be harmful to the Green Belt, and I attach substantial weight to the

> harm to the Green Belt having regard to the policy in the Framework. The proposal would also result in harm to the openness of the Green Belt. The benefits of the other considerations, including those personal circumstances of the appellant and his family, do not clearly outweigh this harm. Consequently, there are not the very special circumstances necessary to justify inappropriate development in the Green Belt whether on a permanent or temporary basis. There would be no violation of the human rights on this occasion."

Legal and policy framework

The development plan and material considerations

31. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

Gypsies and travellers

32. I have been assisted by the judgment of Coulson LJ in *Bromley LBC v Persons Unknown & Ors* [2020] EWCA Civ 12, [2020] PTSR 1043, in which he described the position of Gypsies and Travellers as follows:

> "4. Romany Gypsies have been in Britain since at least the 16th century, and Irish travellers since at least the 19th century. They are a particularly vulnerable minority. They constitute separate ethnic groups protected as minorities under the Equality Act 2010 (see *R (Moore) v Secretary of State for Communities and Local Government (Equality and Human Rights Commission intervening)* [2015] EWHC 44 (Admin); [2015] PTSR D14), and are noted as experiencing some of the worst outcomes of any minority across a broad range of social indicators (see, for example, Department for Communities and Local Government, *Progress report by the ministerial working group on tackling inequalities experienced by Gypsies and Travellers* (2012) and Equality and Human Rights Commission, *England's most disadvantaged groups: Gypsies, Travellers and Roma* (2016)).
>
> 5. A nomadic lifestyle is an integral part of Gypsy and Traveller tradition and culture. While the majority of gipsies and travellers now reside in conventional housing, a significant number (perhaps around 25%, according to the 2011 United

> Kingdom census) live in caravans in accordance with their traditional way of life. The centrality of the nomadic lifestyle to the gipsy and traveller identity has been recognised by the European Court of Human Rights. In *Chapman v United Kingdom* (2001) 33 EHRR 18, the court held at para 73:
>
> > "The court considers that the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or from their own volition, many gipsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures which affect the applicant's stationing of her caravans therefore have a wider impact on the right to respect for home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition."
>
> 6. In the UK, there is a long-standing and serious shortage of sites for gypsies and travellers. A briefing by the Race Equality Foundation found that gipsies and travellers were 7·5 times more likely than white British households to suffer from housing deprivation (Race Equality Foundation, *Ethnic Disadvantage in the Housing Market: Evidence from the 2011 census,* April 2015). The lack of suitable and secure accommodation includes not just permanent sites but also transit sites. This lack of housing inevitably forces many Gypsies and Travellers onto unauthorised encampments."

Planning policy for traveller sites

33. The Government's 'Planning policy for traveller sites' ("PPTS") was updated in December 2023). It is intended to be read in conjunction with the National Planning Policy Framework ("the Framework").

34. The policy's aims are set out, so far as is material, in paragraphs 3 and 4 ("PPTS/3-4")

> "3. The government's overarching aim is to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life of travellers while respecting the interests of the settled community.
>
> 4. To help achieve this, government's aims in respect of traveller sites are:

…..

(d) that plan-making and decision-taking should protect Green Belt from inappropriate development

……

(f) that plan-making and decision-taking should aim to reduce the number of unauthorised developments and encampments and make enforcement more effective

…..”

35. Development in the Green Belt is considered in Policy E:

“**Policy E: Traveller sites in Green Belt**

16. Inappropriate development is harmful to the Green Belt and should not be approved, except in very special circumstances. Traveller sites (temporary or permanent) in the Green Belt are inappropriate development. Subject to the best interests of the child, personal circumstances and unmet need are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances.

…….”

36. The determination of planning applications is addressed in Policy H:

“**Policy H: Determining planning applications for traveller sites**

…

24. Local planning authorities should consider the following issues amongst other relevant matters when considering planning applications for traveller sites:

a) the existing level of local provision and need for sites

b) the availability (or lack) of alternative accommodation for the applicants

c) other personal circumstances of the applicant

d) that the locally specific criteria used to guide the allocation of sites in plans or which form the policy where there is no identified need for pitches/plots should be used to assess applications that may come forward on unallocated sites

e) that they should determine applications for sites from any travellers and not just those with local connections

> However, as paragraph 16 makes clear, subject to the best interests of the child, personal circumstances and unmet need are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances.
>
> 25. Local planning authorities should very strictly limit new traveller site development in open countryside that is away from existing settlements or outside areas allocated in the development plan. Local planning authorities should ensure that sites in rural areas respect the scale of, and do not dominate, the nearest settled community, and avoid placing an undue pressure on the local infrastructure.
>
> ……
>
> 27. If a local planning authority cannot demonstrate an up-to-date 5 year supply of deliverable sites, this should be a significant material consideration in any subsequent planning decision when considering applications for the grant of temporary planning permission. The exception is where the proposal is on land designated as Green Belt; sites protected under the Birds and Habitats Directives and / or sites designated as Sites of Special Scientific Interest; Local Green Space, an Area of Outstanding Natural Beauty, or within a National Park (or the Broads)."

37. I agree with Mr Garvey that Mr Cottle was mistaken in relying upon the policy for plan-making in PPTS/13, as the PPTS clearly distinguishes between the local planning authority's functions of making plans, and its function of determining individual planning applications.

The Framework: Green Belt policy

38. The Framework is a material consideration when planning decisions are made under section 70 TCPA 1990 and section 38(6) PCPA 2004.

39. Section 13 of the Framework, under the heading "Protecting Green Belt land" describes the objectives of Green Belt policy, as follows:

> "142. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.
>
> 143. Green Belt serves five purposes:
>
> a) to check the unrestricted sprawl of large built-up areas;
>
> b) to prevent neighbouring towns merging into one another;

> c) to assist in safeguarding the countryside from encroachment;
>
> d) to preserve the setting and special character of historic towns; and
>
> e) to assist in urban regeneration, by encouraging the recycling of derelict and other urban land."

40. Guidance on determining planning applications in the Green Belt provides, so far as is material:

> "152. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 153. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations."

Statutory review applications under section 288 TCPA 1990

41. In *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), Lindblom LJ set out principles applicable to a claim under section 288 TCPA 1990, at [19], which include the following:

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to rehearse every argument relating to each matter in every paragraph: see the judgment of Forbes J in *Seddon Properties Ltd v Secretary of State for the Environment* (1978) 42 P & CR 26, 28.
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the principal important controversial issues. An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every

> material consideration: see the speech of Lord Brown of *Eaton-under-Heywood in South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953, 1964B—G.
>
> (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, provided that it does not lapse into Wednesbury irrationality (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) to give material considerations whatever weight [it] thinks fit or no weight at all: see the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780F—H. And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision: see the judgment of Sullivan J in *Newsmith Stainless Ltd v Secretary of State for the Environment, Transport and the Regions (Practice Note)* [2001] EWHC Admin 74 at [6]; [2017] PTSR 1126, para 5 (renumbered).
>
> ……."

42. An Inspector's decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

43. Two citations from the authorities listed are relevant in this case.

i) *South Somerset District Council*, per Hoffmann LJ at 84:

> "The inspector is not writing an examination paper on current and draft development plans. The letter must be read in good faith and references to policies must be taken in the context of the general thrust of the inspector's reasoning ... Sometimes his statement of the policy may be elliptical but this does not necessarily show misunderstanding. One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood a relevant policy or proposed alteration to policy."

ii) *Clarke Homes*, per Sir Thomas Bingham MR at 271-2:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

44. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. An Inspector is subject to the general public law duty to make a rational decision, taking into relevant matters and disregarding irrelevant matters, and to give proper and adequate reasons for his decision: *Seddon Properties v Secretary of State for the Environment* (1978) 42 P & CR 26, per Forbes J..

45. However, a Claimant cannot use a rationality challenge as a vehicle for challenging the merits of legitimate planning judgments. In *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, Sullivan J. said at [6] – [8]:

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

Irrationality and proportionality

46. In *R(Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) the Divisional Court provided a comprehensive description of irrationality as a ground of challenge, per Carr J. at [98]:

> "98. The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of "irrationality" or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is "so unreasonable that no reasonable authority could ever have come to it": see *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 233-4. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. *Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143, 175 (Lord Steyn). The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it - for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error….."

47. The Claimant submitted that the nature of a review on rationality grounds depends upon the significance of the right interfered with; the degree of interference involved, and the extent to which the court is competent to re-assess the balance which the decision maker was required to make.

48. The Claimant referred to *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, in which the claimant challenged a citizenship deprivation order, which had the effect of depriving him of EU citizenship, on the basis that it did not comply with the principle of proportionality in EU law. The Court held that the issue was not properly before it but in any event doubted whether applying EU law would produce a different outcome, given the flexible approach the courts adopted to standards of review. Lord Reed identified categories of cases in which a proportionality principle had been applied at [114] and [118]. Lord Mance went further and said that the tool of proportionality would be both valuable and available in that case. However, as the Supreme Court judgment in *R(Keyu) v Secretary of State for the Foreign and Commonwealth Affairs* [2016] AC 1335 made clear, reasonableness and not proportionality remains the generally applicable standard in cases without a Convention right or EU law dimension (per Lord Neuberger at [132] – [133]). Post-Brexit, cases are unlikely to have an EU law dimension.

49. In this case, Article 8 ECHR is engaged because the Claimant and her family are liable to lose their home, which is an interference with their rights under Article 8(1). Under Article 8(2), the interference can only be justified if it is "necessary in a democratic society" which means that it must be in pursuit of a pressing social need, justified by sufficient reasons, and it must be proportionate to the social need; that is to say, it must go no further than is necessary to secure that need.

50. In *Bank Mellat v HM Treasury* [2013] UKSC 39, Lord Sumption reviewed the authorities on proportionality, at [20], and set out the test to be applied, in the following terms:

> "Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

51. In this case, the Inspector recognised that Article 8 ECHR was engaged, and applied the proportionality test in making her decision. This Court is required to assess whether she did so lawfully, as part of the statutory review. However, as Hickinbottom J. explained in *Stevens v Secretary of State for Communities and Local Government* [2013] EWHC 792 (Admin), [2013] JPL 1383, at [85], in a statutory review this Court should not decide whether or not the interference was proportionate. Its role is confined to identifying any error of law and remitting the application for reconsideration, if necessary.

Green Belt land and travellers

52. The First Defendant relied upon the case of *Samuel Smith Old Brewery v North Yorkshire County Council* [2020] UKSC 3, in which Lord Carnwath JSC, giving the judgment of the Supreme Court, held that impacts on the Green Belt were all matters of planning judgment, not law, at [39]:

> "39. With respect to Lindblom LJ's great experience in this field, I am unable to accept his analysis. The issue which had to be addressed was whether the proposed mineral extraction would preserve the openness of the Green Belt or otherwise conflict with the purposes of including the land within the Green Belt. Those issues were specifically identified and addressed in the report. There was no error of law on the face of the report. Paragraph 90 does not expressly refer to visual impact as a necessary part of the analysis, nor in my view is it

> made so by implication. As explained in my discussion of the authorities, the matters relevant to openness in any particular case are a matter of planning judgement, not law."

53. In *R(Sefton MBC) v Secretary of State for Housing Communities and Local Government* [2021] EWHC 1082 (Admin), in which HH Judge Eyre QC, sitting as a Judge of the High Court, gave the following helpful guidance on the application of the Framework's Green Belt policies, at [32] – [34]:

> "32 The claimant's approach to the interpretation of paragraph 144 is vitiated by an excessively forensic analysis and by a failure to read that paragraph in the light of paragraph 143. It is paragraph 143 which sets out the proposition that inappropriate development is by definition harmful to the Green Belt and it is paragraph 143 which sets out the requirement that such development should not be approved unless there are very special circumstances. The second sentence of paragraph 144 is, in terms, setting out the only situation in which it will be appropriate to find that there are very special circumstances. It is clearly intended as an elucidation and development of paragraph 143. The first sentence of paragraph 144 is to be read in the light of the paragraph which precedes it and the sentence in the same paragraph which follows it. That first sentence is not setting out a new requirement separate from paragraph 143 but is part and parcel of the elucidation of paragraph 143 which paragraph 144 is intended to provide.
>
> 33 The claimant's argument is also flawed by taking metaphorical language unduly literally. The reference to "substantial weight" being given to harm is ultimately a metaphor as is the reference to the harm being "clearly outweighed" by other considerations. The exercise to be undertaken is not one of balancing weights on scales nor even one of saying that harm to the Green Belt is equivalent to a particular weight (say ten stone) while a different circumstance such as an applicant's family circumstances can never be rated as equivalent to more than a different weight (say five stone). Rather, the language of weight and weighing is being used to emphasise the importance of the Green Belt. It is used to make it clear to decision-makers that they cannot approve inappropriate development in the Green Belt unless the considerations in favour of the development are such as truly constitute very special circumstances so that the development can be permitted notwithstanding the importance given to the Green Belt. The realisation that the reference to weight is ultimately a metaphor highlights a practical difficulty in the approach for which Mr Riley-Smith presses. How is the decision-maker to decide what is equivalent to "substantial + substantial"? The claimant envisages the balancing exercise being quasi-mathematical but if that is the appropriate exercise

> then paragraph 144 fails to provide the decision-maker with guidance as to the values to be placed in the necessary mathematical calculations.
>
> 34 When paragraphs 143 and 144 are read together they can be seen as explaining that very special circumstances are needed before inappropriate development in the Green Belt can be permitted. In setting out that explanation they emphasise the seriousness of harm to the Green Belt in order to ensure that the decision-maker understands and has in mind the nature of the very special circumstances requirement. They require the decision-maker to have real regard to the importance of the Green Belt and the seriousness of any harm to it. They do not, however, require a particular mathematical exercise nor do they require substantial weight to be allocated to each element of harm as a mathematical exercise with each tranche of substantial weight then to be added to a balance. The exercise of planning judgement is not to be an artificially sequenced two-stage process but a single exercise of judgement to assess whether there are very special circumstances which justify the grant of permission, notwithstanding the particular importance of the Green Belt."

54. The Claimant submitted that this was a case analogous to *Moore v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1194 where the Court of Appeal was not persuaded that an inspector's refusal of temporary planning permission was a reasonable reflection of the factors he was required to take into account (per Richards LJ at [28]). Cox J., at first instance, held that the balancing exercises for temporary and permanent permissions were necessarily different, and that the serious difficulties that the family would face if evicted constituted 'very special circumstances' rendering it irrational for the inspector to refuse temporary planning permission.

55. The Claimant referred to *West Glamorgan CC v Rafferty* [1987] 1 WLR 457, a judicial review of a local authority's decision to evict gypsies from a site, in which Ralph Gibson LJ observed, at 477A-B, the "court is not …. precluded from finding a decision to be void for unreasonableness merely because there are admissible factors on both sides of the question".

56. In *Wychavon DC v Secretary of State for Communities and Local Government* [2008] EWCA Civ 692, [2009] PTSR 19, Carnwath LJ gave guidance on an earlier iteration of the 'very special circumstances' test, in the following terms:

> "(i) Interpretation of Green Belt guidance
>
> 21 I say at once that in my view the judge was wrong, with respect, to treat the words "very special" in para 3.2 of PPG2 as simply the converse of "commonplace". Rarity may of course contribute to the "special" quality of a particular factor, but it is not essential, as a matter of ordinary language or policy. The word "special" in PPG2 connotes not a quantitative test, but a

> qualitative judgment as to the weight to be given to the particular factor for planning purposes. Thus, for example, respect for the home is in one sense a "commonplace", in that it reflects an aspiration shared by most of humanity. But it is at the same time sufficiently "special" for it to be given protection as a fundamental right under the Convention. Furthermore, case law of the European Court of Human Rights … places particular emphasis on the special position of gipsies as a minority group, notwithstanding the wide margin of discretion left to member states in relation to planning policy: see *Chapman v United Kingdom* (2001) 33 EHRR 399 and the comments of Lord Brown of Eaton-under-Heywood in *Kay v Lambeth London Borough Council* [2006] 2 AC 465, para 200. Thus, in the *Chapman* case, at para 96, the Strasbourg court recognised that the gipsy status did not confer "immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment" but added:
>
> > "96. . . . the vulnerable position of gipsies as a minority means that *some special consideration should be given to their needs and their different lifestyle* both in the relevant regulatory planning framework and in arriving at the decisions in particular cases … . To this extent, there is thus a positive obligation imposed on the contracting states by virtue of article 8 to facilitate the Gypsy way of life …." (Emphasis added.)
>
> The special position of gipsies in this respect is reflected in the 2006 circular.
>
> 22 Against this background, it would be impossible in my view to hold that the loss of a Gypsy family's home, with no immediate prospect of replacement, is incapable in law of being regarded as a "very special" factor for the purpose of the guidance. That, however, is far from saying that planning authorities are bound to regard this factor as sufficient in itself to justify the grant of permission in any case. The balance is one for member states and involves issues of "complexity and sensitivity": see *Chapman v United Kingdom* 33 EHRR 399, para 94. That is a judgment of policy not law, and it needs to be addressed at two levels: one of general principle, the other particular to the individual case."

Best interests of the child

57. Article 3(1) of the United Nations Convention on the Rights of the Child 1989 ("UNCRC") provides:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law,

> administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

58. In *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, the Supreme Court concluded that the best interests of the child should be taken into consideration when considering the proportionality of interference with rights under Article 8 ECHR in an immigration context. Subsequently the Secretary of State for Levelling Up, Housing and Communities accepted that the "best interests" principle should also be applied in the context of planning.

59. In *Stevens v Secretary of State for Communities and Local Government* [2013] EWHC 792 (Admin), [2013] JPL 1383 Hickinbottom J. set out the general principles for assessing the best interests of the child in the context of a planning decision at [69]:

> "(i) Given the scope of planning decisions and the nature of the right to respect for family and private life, planning decision making will often engage art.8. In those circumstances, relevant art.8 rights will be a material consideration which the decision maker must take into account.
>
> (ii) Where the art.8 rights are those of children, they must be seen in the context of art.3 of the UNCRC, which requires a child's best interests to be a primary consideration.
>
> (iii) This requires the decision maker, first, to identify what the child's best interests are. In a planning context, they are likely to be consistent with those of his parent or other carer who is involved in the planning decision-making process; and, unless circumstances indicate to the contrary, the decision maker can assume that that carer will properly represent the child's best interests, and can properly represent and evidence the potential adverse impact of any decision upon that child's best interests.
>
> (iv) Once identified, although a primary consideration, the best interests of the child are not determinative of the planning issue. Nor does respect for the best interests of a relevant child mean that the planning exercise necessarily involves merely assessing whether the public interest in ensuring planning controls are maintained outweighs the best interests of the child. Most planning cases will have too many competing rights and interests, and will be too factually complex, to allow such an exercise.
>
> (v) However, no other consideration must be regarded as more important or given greater weight than the best interests of any child, merely by virtue of its inherent nature apart from the context of the individual case. Further, the best interests of any child must be kept at the forefront of the decision maker's mind as he examines all material considerations and performs the exercise of planning judgment on the basis of them; and, when

> considering any judgment he might make (and, of course, the eventual decision he does make), he needs to assess whether the adverse impact of such a decision on the interests of a child is proportionate.
>
> (vi) Whether the decision maker has properly performed this exercise is a question of substance, not form. However, if an inspector on an appeal sets out this reasoning with regard to any child's interests in play, even briefly, that will be helpful not only to those involved in the application but also to the court in any later challenge, in understanding how the decision maker reached the decision that the adverse impact to the interests of the child to which the decision gives rise is proportionate. It will be particularly helpful if the reasoning shows that the inspector has brought his mind to bear upon the adverse impact of the decision he has reached on the best interests of the child, and has concluded that impact is in all the circumstances proportionate. …"

60. Hickinbottom J. then went on to consider the Court's role in reviewing a proportionality issue in the course of an application under section 288 TCPA 1990, and gave guidance in the following terms:

> "85. ….
>
> (i) It was common ground before me that, for the purposes of section 70 of the 1990 Act, any article 8 rights that are in play are a material consideration that a planning decision-maker is bound to take into account. I have no doubt that that is so. It is well-established that, in a field such as planning, the interests of any relevant children cannot properly be regarded as something distinct and apart from the necessary section 70 balancing exercise: they are an inherent, integral, and important, part of that exercise……
>
> (ii) If the inspector fails to take a material consideration into account, as a matter of general public law principles, he errs in law. Section 70 requires him to take all material considerations into account; and, if he fails to do so, his decision is not "within the powers of [the 1990] Act" for the purposes of section 288(5)(b)…...
>
> (iii) By section 288(5)(b), this court is restricted by way of remedy to quashing a decision of an inspector that is not within the powers of the 1990 Act. It is therefore necessarily the case that, even if this court considers an inspector's decision unlawful on the ground that he failed properly to take into account as a material consideration article 8 rights in play, then it can only quash that decision. It would not be open to this court to make a new decision in its place.

> (iv) In this application, neither party suggested that, if I were to find the inspector had failed properly to take into account the relevant article 8 rights, then this court should begin performing the section 70 balancing exercise giving the weight I considered appropriate to all of the material considerations, including all planning policy factors as well as article 8 rights. Indeed, all parties appeared to view that prospect with some alarm. They submitted that I should treat the case as any other case of a failure of an inspector to take into account a material consideration. All submitted that, if that error is material (in the sense that, without it, the decision would or may have been different) then I should quash the decision."

61. The Court of Appeal in *Collins v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1193, [2013] PTSR 1594 approved Hickinbottom J.'s list of principles at [69].

62. In the immigration case of *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2013] 1 WLR 3690, Lord Hodge JSC, giving the judgment of the Supreme Court, set out the following principles which had been agreed between the parties, at [10]:

> "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 of the Convention;
>
> (2) in making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
>
> (3) although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
>
> (4) while different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
>
> (5) it is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
>
> (6) to that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
>
> (7) a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

The Inspector's witness statement

63. When the First Defendant filed his Detailed Grounds of Resistance, he also filed a witness statement from the Inspector, dated 20 July 2023, which stated:

> "Ground 2 of the claim alleges that by affording substantial weight to harm to the Green Belt (for example at paragraph 24), that was a greater degree of weight than the significant weight I afforded to the best interests of the children (at paragraph 25).
>
> However, I did not treat substantial as being a greater (or different) amount of weight than significant.
>
> 3. I tend to use the terms 'significant', 'moderate' or 'limited' when referring to different degrees of weight in my decision letters. However, paragraph 148 of the NPPF says, *"When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt"*. I reiterate this terminology in paragraphs 7, 20, 23 and 27 of my decision letter where I refer to harm to the Green Belt. This terminology is, therefore, consistent with the NPPF.
>
> 4. The Collins Online dictionary and thesaurus defines substantial to mean: ..…
>
> 5. The Collins Online dictionary and thesaurus defines significant to mean: …..
>
> 6. I know that inspectors often use the words 'substantial' and 'significant' in an interchangeable way. This is even reflected in national policy, for example in paragraph 49(a) of the NPPF. Thus, I do not regard a substantial weight as being greater than a significant weight. So whilst I tend to use the word 'significant' when describing weight, given the NPPF uses the word substantial when referring to the Green Belt, I adopted that term. But, in doing so, I did not afford this any greater weight than when I used the word significant elsewhere in my decision.
>
> 7. I am aware that the best interests of the children must be a primary consideration. I note this point specifically at paragraph 33 of the decision. In treating this as a primary consideration, there was no other matter that I afforded greater weight. The distinction between my use of 'substantial' and 'significant' simply reflected the NPPF's use of the word substantial in respect to Green Belt. For the purposes of my planning balance, the two words constituted the same degree of weight.

> 8. As regards the Claimant's third ground of challenge, as regards proportionality, I did have regard for the impact of the proposal on the best interests of the child and whether a personal or temporary permission was proportionate. My conclusion that dismissing the appeal would be proportionate and necessary expanded upon my earlier conclusions.
>
> Further, I expanded upon the impacts on the children at paragraph 33. I equally had this at the forefront of my mind, as I referred to it in the final sentence of paragraph 34. I also referred to the impacts upon the children at paragraphs 19 and 27. I had regard for the impacts on the children and this was a primary consideration in my decision. However, in my planning judgement, it was proportionate and necessary that these interests were overcome by the adverse impacts associated with the development (including in respect to a personal or temporary permission)."

64. Witness statements of this nature, which respond to a legal challenge, are generally considered inappropriate because they "create all the dangers of rationalisation after the event, fitting answers to omissions into the already set framework of the decision letter, risking demands for the Inspector to be cross-examined on his statement, and creating suspicion about what had actually been the reasons …. " per Ouseley J. in *Ioannou v Secretary of State for Communities and Local Government* [2013] EWHC 3945 (Admin).

65. In this case, the First Defendant had permission to file evidence with its Detailed Grounds of Resistance, and the Claimant made no objection to the filing of the statement or its content. Therefore I was not aware of it until I read the papers on the day before the hearing. By that stage, both parties had prepared their skeleton arguments and submissions on the basis of the statement, and both wanted to rely upon it, for different reasons. In these circumstances, I concluded that it was contrary to the overriding objective to exclude the witness statement and so adjourn a long overdue hearing so that the parties could re-cast their cases, and it was also artificial and possibly unfair to the parties for the Court to ignore the Inspector's evidence in determining the claim.

The Inspector's assessment

66. The Inspector structured her decision in four main sections: (1) Green Belt; (2) Other Considerations; (3) Planning Balance and Human Rights; and (4) Conclusion. On a fair reading of the decision letter, I consider that Inspector applied her findings in sections 1 and 2 when reaching her conclusions on the planning balance and Article 8 ECHR in section 3.

(1) Green Belt

67. The Inspector made the following findings.

68. Policy BAS GB1 of the Local Plan, which set out the Green Belt boundaries, supported the Framework's aim to prevent urban sprawl and keep the land within Green Belts permanently open (DL/9). However, as it did not include management criteria for development within the Green Belt, the Inspector considered the objectives of the Framework and the PPTS to be more applicable (DL/13).

69. The parties agreed that the proposal would represent inappropriate development in the Green Belt (DL/10). Therefore by definition it was harmful (paragraph 152 of the Framework).

70. Although the scale of the development was small, it would reduce the openness of the Green Belt by placing a caravan and dayroom on a location which had previously been free from development. The negative effect on the openness of the Green Belt was an additional degree of harm, in addition to the harm arising from the inappropriate nature of the development (DL/11).

71. The proposed material change of use was also inappropriate development because, by reference to paragraph 138 of the Framework, it would not preserve openness and it would conflict with purposes to check urban sprawl and to safeguard the countryside from encroachment (DL/12).

72. In my view, the Inspector directed herself correctly on the Green Belt policies, and applied them appropriately to the evidence. Paragraph 153 of the Framework advised that she should give "substantial weight to any harm to the Green Belt", and accordingly she gave "substantial weight" to the inappropriate development and the harm to the openness of the area (DL/24). Policy E of the PPTS, advises that traveller sites are inappropriate development in the Green Belt, and subject to the best interests of the child, personal circumstances and unmet need are unlikely to outweigh harm to the Green Belt. The Inspector's findings on the Green Belt were weighed in the planning balance and taken into account in the assessment of proportionality in section 3.

(2) Other Considerations

Supply of traveller sites

73. The Inspector made the following findings on the supply of traveller sites in the area.

74. The Council did not have a 5 year supply of land to address the current and historic need for pitches within the Borough. There was a clear and immediate need for sites in Basildon. The Inspector gave the lack of sites significant weight in favour of the proposal when considering the planning balance and proportionality (DL/14).

75. Although the Council submitted that it was currently seeking to address the lack of sites through the emerging Local Plan, any potential traveller sites would not come forward until sometime after its adoption, and would then be allocated through the relevant plan process (DL/15).

76. The Inspector found that Bowers Gifford Parish was earmarked for residential development, but any allocations for traveller sites would have to be considered

through the relevant plan adoption process (DL/15).

77. At DL/17, the Inspector considered the requirements in the PPTS for local planning authorities to set targets for pitches, and to assess need. She considered the Claimant's criticisms of the 2018 survey, which was being used to inform the emerging Local Plan. She concluded that this would be a matter for the Local Plan examination and did not alter the fact that the Council did not currently have a 5 year supply of pitches.

78. The Claimant argued that development on the Green Belt was likely to occur in future, or had already occurred, in any event. The undisputed evidence before the Inspector, in the Statement of Common Ground, was that 63% of the Council's District was designated Green Belt and the rest was in urban areas. The Claimant contended (at paragraph 9 of the Statement) that the Council relied on land in the Green Belt to meet the need for more dwellings and traveller sites. The Council's position was that they were "relying on a mix or *[of?]* infill sites and a substantial redevelopment of the town centre to provide many new residential units, as well as Green Belt sites to full *[?fulfil]* the Borough's future housing needs" (my suggested typographical corrections are included in brackets).

79. The Inspector made the following findings on this issue, at DL/16:

> "16. Basildon Borough is constrained by its Green Belt designation with limited undeveloped land available outside of it. I acknowledge that there are other lawful sites or tolerated sites in the Green Belt plotland areas. However, I have not been directed to any within the vicinity of the appeal site, other than that of a long-standing planning application for a traveller plot on Grange Road that remains undetermined. It is not clear at this point in time how the emerging Local Plan would overcome the policy presumption against sites in the Green Belt or address the historic shortfall of pitch provision. Whilst it has been suggested that the emerging Local Plan may seek to facilitate development in the Green Belt, given the early stage of that plan very little weight can be attributed to this possibility."

80. In my view, the Inspector was entitled to make these findings on the use of Green Belt land, on the basis of the evidence and submissions before her. She was also entitled to conclude that little weight could be placed on the emerging Local Plan, applying the guidance in Framework/48. This conclusion was a point in the Claimant's favour, as the Council was seeking to rely on the emerging Local Plan in support of its case. Contrary to the Claimant's submissions, the Inspector was not required in law to give these factors separate weight in the balancing exercise.

81. The Claimant argued at the hearing before me that the Inspector should have acknowledged that, if the Claimant was forced to live "a roadside existence", it would be in the Green Belt, and thus cause harm. The First Defendant submitted that this point was not raised before the Inspector, nor in the grounds for statutory review. If it had been raised, my view is that the Inspector would have recognised that this was a possibility, in line with her findings in DL/16 that so much of the District was Green Belt, though there was insufficient evidence to assess how likely that was to be the

case. Moreover, there was no evidence before her as to the likelihood that the authorities would enforce against unauthorised roadside camping in the Green Belt, to avoid harm to the Green Belt.

82. The Claimant criticised the Inspector for not giving significant weight to the Council's lack of an up-to-date Local Plan. In my view, the Inspector made a reasonable exercise of judgment by giving significant weight, at DL/14, to the key issue which was the lack of sites, which she explained was a result of the Council's failure to identify a 5 year supply of land in the Local Plan (as required by PPTS/10). The Inspector then elaborated further at DL/26 where she acknowledged the national and regional need for pitches, to which she attached significant weight, and went on to say that the Council's failure to demonstrate an up to date 5 year supply of deliverable pitches did not address the housing needs of the appellant, contrary to the Government's objectives.

The housing needs of the Claimant and her family

83. The Claimant and Mr Cooper were of mixed heritage and so would not be accepted on many traveller sites. Site sharing was unlikely to be an option for them and so they could not benefit from future allocations for multi-pitch sites under the emerging Local Plan. This carried significant weight in favour of the proposal when considering the planning balance and proportionality (DL/18).

84. Mr Cooper had family ties with gypsies living within the Borough. The Claimant and Mr Cooper had five children between them, three of whom lived with them at the Site. The school age children were attending school locally. The family was registered with a local health provider. The Claimant had on-going serious health conditions and it was important for her to have stability and familiarity (DL/19).

85. Mr Cooper owned the Site and he advised the Inspector that he had no other site available to him and other family members could not accommodate them. The Council could not suggest suitable alternative sites. Mr Cooper considered that he and his family would be forced to live a roadside existence, without a fixed address (DL/20).

86. The Inspector found that the lack of an alternative site and the personal circumstances of the family carried significant weight in favour of the proposal when considering the planning balance and proportionality.

87. The Claimant criticised the Inspector for considering the lack of an alternative site and the personal circumstances of the family together in this way, arguing that significant weight should have been accorded to each factor. In my view, this was a matter for the Inspector's judgment. It was not unreasonable for her to consider the housing needs of the family as a single factor, at DL/20, particularly bearing in mind that she separately accorded significant weight to the problems arising from the family's mixed heritage, and to the best interests of the children (at DL/25).

88. At DL/22, the Inspector took into account that there was local support for the proposal. However, that had to be considered in terms of the wider public interest and the great importance attached to protecting the Green Belt. The Inspector was not

required, as a matter of law, to accord this consideration specific weight in the planning balance.

(3) Planning balance and Human Rights

89. At DL/23, the Inspector correctly directed herself in accordance with the statutory test, namely, that determinations must be made in accordance with the development plan unless material considerations indicate otherwise. In accordance with the guidance in *Stevens,* she identified and assessed the Article 8 rights of the family, and in particular the best interests of the children, as material considerations.

90. At DL/24, the Inspector found that the proposal would be inappropriate development in the Green Belt, which carried substantial weight, as required by Framework/152 and 153. The scheme would also result in harm to the openness of the area; such harm also carried substantial weight.

91. At DL/25, the Inspector found that it was in the best interests of the children involved to have a settled base which affords them access to education and other services. Applying the principles established in the case law I have set out above, she stated that this was "a primary consideration". She attached significant weight to the best interests of the children.

92. At DL/26, the Inspector acknowledged the national and regional need for pitches, to which she attached significant weight. She referred again to the Council's failure to demonstrate an up to date 5 year supply of deliverable pitches which did not address the housing needs of Mr Cooper and his family.

93. The Inspector considered and acknowledged the personal housing needs of the Mr Cooper, the Claimant and their children, and the benefit of having a settled base close to health care facilities and education, along with the lack of available sites in the Borough and elsewhere. These factors had significant weight. However, applying the test in Framework/153, the Inspector did not consider that these matters, would "clearly outweigh the substantial harm to the Green Belt" and justify inappropriate development in the Green Belt (DL/27).

94. The Inspector considered and applied the guidance in the PPTS on the grant of a temporary planning permission, namely, a local planning authority's failure to demonstrate an up to date 5 year supply of deliverable sites should be treated as a significant material consideration, but not where the proposal is on Green Belt land. The Inspector attached significant weight to this (DL/29).

95. The Inspector also found that the harm to the Green Belt would take place over any temporary period of occupation of the Site (DL/29).

96. In considering a time limited occupation, the Inspector recognised that the bar would be set at a lesser level than that of a permanent permission. Mr Cooper said he would accept a condition allowing a 5 year occupation of the Site. The Inspector found that the harm to the Green Belt would exist over that time (DL/30).

97. The Inspector's findings on Article 8 were at DL/31, as follows:

> "31. I have had regard to the Human Rights Act 1998 and rights under Article 8 in respect of the private and family life and the home and the rights of the children. The applicant and his family are in clear need of a pitch and would benefit from being settled where his family can access health care facilities and education. In dismissing the appeal this would result in the occupiers not having a settled home in which to locate. This would be an interference of the appellant's rights under Article 8 of the Convention incorporated into the Act. Nonetheless, I find that the issue of inappropriateness in relation to the Green Belt along with the resulting harm to the openness is so substantial and that, in the wider public interest, it cannot be clearly outweighed by the personal circumstances of the appellant and/or the other considerations. I have considered whether a lesser requirement or alternative would overcome the harm. For those reasons give above, I have ruled out the possibility of imposing a temporary or personal permission. Dismissing the appeal would be proportionate and necessary."

98. At DL/32 and 33, the Inspector discharged the public sector equality duty under the Equality Act 2010, by having regard to the family's traditional way of life, and their personal circumstances, including the Claimant's health. She expressly had regard to the best interests of the children as a primary consideration. These matters were clearly taken into account by the Inspector in making her decision. They were accorded specific weight: see DL/18-29; DL/25, DL/27, DL/31.

Ground 1 and 3

Claimant's submissions

99. **Under Ground 1**, the Claimant contended that the Inspector's decision not to grant a temporary planning permission was disproportionate and perverse.

100. The Claimant accepted that whether "very special circumstances" existed, for the purposes of Framework/153, was a matter for the Inspector's planning judgment. However, that was not determinative of the issue. The countervailing considerations relied upon by the Claimant clearly outweighed the harm to the Green Belt on any reasonable view. The Inspector explained in her witness statement that the term "significant" carried the same degree of weight as "substantial" when used in the DL. She only used the term "substantial" in respect of the Green Belt harm in order to comply with the guidance in Framework/153. This lent support to the claim, as the substantial weight accorded to Green Belt harm was outweighed by the much greater number of facts in favour of the proposal which also attracted substantial weight.

101. Following *Moore*, this was a case where the Court should find that the Inspector's refusal of temporary planning permission was not a reasonable reflection of the factors she was required to take into account. It was irrational in the sense that there was an error of reasoning which robbed the decision of logic.

102. **Under Ground 3**, the Claimant contended that in carrying out the proportionality exercise required by Article 8 ECHR, the Inspector failed to give sufficient consideration to the issue of proportionality and failed to give sufficient reasons.

103. The Inspector's conclusion did not properly take into account the different directions in which the public interest was pulling, and the balancing exercise was flawed.

104. The Inspector erred by failing to give greater consideration to the question of proportionality in the context of a temporary permission.

105. The Inspector erred in failing to count interference with human rights as a material consideration of substantial weight in its own right.

106. The last sentence of DL/31 was insufficiently reasoned. The proportionality exercise, as described in *Bank Mellat*, required more of the Inspector.

Conclusions

107. I have considered Grounds 1 and 3 together to avoid duplication, as both rely on proportionality.

108. I addressed the law on irrationality and proportionality at Judgment/47-51.

Irrationality

109. The Claimant rightly conceded that the "very special circumstances" test was a matter of judgment for the Inspector. In *Samuel Smith Old* Brewery, the Supreme Court confirmed that an inspector's assessment of the impact of a development on the openness of the Green Belt was a matter of planning judgment, not law.

110. The Claimant submitted that the number of factors in favour of the proposal outweighed the number of factors against, and since they were all accorded the same weight, the Inspector should have granted temporary planning permission. However, as HH Judge Eyre QC explained in *Sefton* (Judgment/53), this assessment is not a mathematical exercise; it is a matter of planning judgment. The Government attaches great importance to the Green Belt (Framework/142) and inappropriate development in the Green Belt is subject to a stringent test of "very special circumstances" which only exist where the potential harm to the Green Belt (and any other harm) is "clearly outweighed by other considerations" (Framework/153). It is therefore unsurprising that the test may not be met, even where the number of factors in favour of the proposal exceed the number of factors against it.

111. In this case, the Inspector carefully considered all the relevant factors, and made findings and reached rational conclusions which were clearly open to her, in the exercise of her judgment. In reality, the Claimant seeks to make an impermissible challenge to the merits of her decision-making.

112. The decision of the Court of Appeal in *Moore* was a conclusion reached on the particular facts and decision-making in that case. The facts and decision-making in this claim are clearly distinguishable.

Proportionality

113. In my judgment, on a fair reading of the decision letter, applying the principles set out in the case law at Judgment/42-43, the Inspector's assessment of proportionality under Article 8 ECHR did not merely comprise one sentence at the end of DL/31, when she concluded that "[d]ismissing the appeal would be proportionate and necessary". Her assessment was based upon all the findings made, and conclusions reached, earlier in the DL where she had thoroughly explored all the relevant factors. This reading accords with the guidance of Sir Thomas Bingham MR in *Clarke Homes* that the issue is whether "the decision …. leaves room for genuine as opposed to forensic doubt" as to what the decision-maker has decided and why. "This is an issue to be resolved ….. on a straightforward down-to-earth reading of his decision letter, without excessive legalism or exegetical sophistication".

114. At DL/31, the Inspector clearly identified the interference with the Article 8 right to a private and family life, the home, and the rights of the children. In summary, the family were in clear need of a pitch and would benefit from being settled where they can access health care facilities and education. Dismissing the appeal would result in the family not having a settled home.

115. The Inspector explained why the interference was necessary, stating that the issue of inappropriateness in relation to the Green Belt, along with the resulting harm to the openness of the Green Belt, was so substantial that, in the wider public interest, it was not outweighed by "the personal circumstances of the appellant and/or the other considerations". I have no doubt that the Inspector had well in mind the needs and best interests of the children, as she had just referred to them earlier in the same paragraph, as well as at DL/19, DL/25 and DL/27.

116. The Inspector considered whether there was an alternative measure which would be less intrusive, namely, a temporary or personal permission. The Inspector acknowledged, at DL/30, that in the case of time-limited planning permission, the bar would be set at a lesser level than that of a permanent permission. However the harm to the Green Belt would still exist for the duration of the occupation of the Site, which was contrary to the wider public interest in the protection of the Green Belt.

117. In *Stevens*, (at [69(vi)]), the Court acknowledged that the proportionality exercise can be briefly stated. In my view, a planning inspector should not be required to set out the legal test of proportionality in the way that a judge is expected to do. The Inspector is not writing an "examination paper" (*South Somerset District Council* at Judgment/43). It is sufficient to identify the key elements of the proportionality exercise, which the Inspector did here. When the Inspector's conclusions on Article 8 are read in the context of her findings and conclusions earlier in the DL, it is apparent that she did take into account the competing considerations. Her consideration of proportionality, in the context of a temporary permission, was sufficient.

118. The Claimant contended that the Inspector erred in failing to count interference with human rights as a material consideration of substantial weight in its own right. In my view, there was no requirement in law to do so. The Inspector gave significant weight (which she treated as substantial weight) to the conduct by the Council which gave

rise to the interference with the family's human rights, namely, the eviction from their home. She then correctly identified this as an interference with their Article 8 rights.

119. The standard of reasons required in a planning appeal was set out by Lord Brown in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, at [36]. The reasons given must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues. Reasons need refer only to the main issues in the dispute and not to every material consideration, and the reasons can be briefly stated, with the "degree of particularity required depending entirely on the nature of the issues falling for decision".

120. In my judgment, the Inspector's reasons met the required legal standard, for the reasons I set out in Judgment/113 – 117.

121. Therefore Grounds 1 and 3 do not succeed.

Ground 2

122. Under Ground 2, the Clamant submitted that the Inspector erred in law in DL/25 by regarding the primary consideration of achieving the outcome that was in the best interests of the children as attracting less than substantial weight. In *Zoumbas*, at [10], the Supreme Court confirmed that "although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant". The substantial weight to be attached to the Green Belt should have been equated with the substantial weight to be attached to achieving the best interests of the child.

123. In her witness statement, at paragraph 7, the Inspector stated:

> "I am aware that the best interests of the children must be a primary consideration. I note this point specifically at paragraph 33 of the decision. In treating this as a primary consideration, there was no other matter that I afforded greater weight. The distinction between my use of 'substantial' and 'significant' simply reflected the NPPF's use of the word substantial in respect to Green Belt. For the purposes of my planning balance, the two words constituted the same degree of weight."

The Claimant did not seek to challenge the veracity of this evidence.

124. I accept the First Defendant's submission that the word 'substantial' does not denote a greater quantum of weight than 'significant': see the dictionary definitions provided by the Inspector; *R v Golds* [2016] UKSC 61, at [27] and [40]; *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17, at [31]; and the authorities cited in 'Words and Phrases Legally Defined" (see the First Defendant's skeleton argument at paragraph 2.10).

125. At DL/25, the Inspector expressly treated the best interests of the children as a primary consideration. This was confirmed at DL/33. I am satisfied that she did not

treat any other consideration as inherently more significant.

126. Therefore Ground 3 does not succeed.

Ground 4

127. Under Ground 4, the Claimant submitted that the Inspector "failed to factor in the right ingredients for a lawful decision". This pleading was outside the scope of the grant of permission to apply for statutory review. Nonetheless, the First Defendant was content for me to consider it, to avoid further litigation. Dealing with the points made in turn, the Inspector was obviously aware that the Site was small (DL/11), but she did not find that the harm at the lowest end of the scale. At DL/16 she addressed the difficult matter of whether and to what extent the Council could or would make pitch provision on Green Belt land in future. The Inspector did not find any local harm in addition to the Green Belt harm. Finally, at Judgment/82, I found that the Inspector's findings and conclusions, in regard to the Council's failure to meet the accommodation needs of travellers under its Local Plan, were a reasonable exercise of judgment on her part.

128. Therefore Ground 4 does not succeed.

Final conclusion

129. The claim for statutory review is dismissed for the reasons set out above.