

Case Name: *The Open Spaces Society v Secretary of State for Environment, Food And Rural Affairs* [2020] EWHC 1085 (Admin) (05 May 2020)

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Commentary: The High Court has dismissed a legal challenge brought by the Open Spaces Society against the Secretary of State concerning an Inspector's decision of 31 October 2019 to confirm a public path diversion order ('Order') made by Oxfordshire County Council. In giving judgment, the High Court has given important interpretive guidance on the legal test for footpath diversions in section 119 of the Highways Act 1980 ('1980 Act').

The legal challenge was brought on the ground that the Inspector had misinterpreted section 119(6) of the 1980 Act which provides for the confirmation of Orders, among other things, where it is "expedient ... having regard to the effect which" the Order will have on (a) public enjoyment of the path as a whole, (b) land served by the existing public right of way and (c) other land.

In giving judgment, the High Court considered previous case law, and held that factors (a) to (c) above in section 119(6) of the 1980 Act are not exclusive. The High Court considered that the statutory language of "expedient" in section 119 of the 1980 Act suggested "a broad balance or judgement" approach was appropriate on confirmation of the Order and that any other approach "would involve ... obviously relevant factors being made legally irrelevant".

Applying this broad balancing approach to the section 119 test, in dismissing the legal challenge, the High Court held that it was legally open to the Inspector to have had regard in confirming the Order to the landowner's interests when considering the expedience test in s119(6) of the 1980 Act, notwithstanding that those interests would already have been taken into account as the trigger for the Order under s119(1) of the 1980 Act.

Comment- This is a helpful judgment clarifying that decision-makers can lawfully take into account factors such as a landowner's interests, agriculture and forestry, biodiversity and public convenience matters when carrying out the overall balancing exercise in s119(6) of the 1980 Act.

Case summary prepared by Paul Arnett