

Case Name: *Kpogho v London Borough of Brent* [2020] EWHC 1905 (Admin) (17 July 2020)

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Commentary: The claimant challenged Brent Council's decision to refuse to extend the time period for compliance with an enforcement notice (the "Notice"), which the Council served on him on 28 November 2018. The court dismissed the claim. This case serves as a reminder to appeal an enforcement notice and time for compliance early and before the date specified on the notice.

The Notice required the claimant to demolish unauthorised extensions to his property. The Notice came into effect on 7 January 2019 and the date for compliance given on the notice was 6 months from that date. The claimant had the right to appeal the Notice, including the time for compliance, providing the appeal was received by 7 January 2019, as was made clear on the Notice. The claimant did not exercise this right.

The claimant applied for retrospective planning permission for the extensions to the property. This was refused by the Council on 1 March 2019 (the "First Refusal") and again on 21 June 2019 (the "Second Refusal").

On 25 June 2019, with 12 days to comply remaining, the claimant sent an email to the Council requesting that it grant an extension of time to facilitate the lodging of an appeal against the Second Refusal. The Council's planning officer refused this request by email on 26 June 2019, stating that the time for compliance set out on the Notice still stood. The claimant subsequently appealed the Second Refusal and the appeal was allowed.

The claimant challenged the Council's refusal to extend the time period for compliance with the Notice. The grounds of challenge were as follows:

1. the Council erred in law by failing to have regard to a relevant consideration, namely the relevance of exercising its discretion under section 70C of the Town and Country Planning Act 1990 (the "Act") to entertain two retrospective planning applications; and/or
2. the Council came to an irrational conclusion on the facts when refusing to extend the time period for compliance with the Notice.

There is no express statutory requirement of the decision-maker to take particular matters into account when deciding whether or not to refuse to give an extension of time. This case follows *R (Client Earth) v Secretary of State for Business, Energy & Industrial Strategy* [2020] EWHC 1303 (Admin) in which Holgate J held (at paragraph 99) that: "It is insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is not irrelevant or immaterial, and therefore something which the decision-maker is empowered or entitled to take into account. But a decision-maker does not fail to take a relevant consideration into account unless he was under an obligation to do so.

Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account."

The claimant submitted that the relevant consideration, which the Council failed to take account of when refusing to extend time under section 173A of the Act, was its decision not to exercise its powers under section 70C. The Council submitted that it was under no statutory obligation to take this consideration into account and it was not so "obviously material" to its decision whether or not

to extend the time period for compliance with the Notice, but in any event that this consideration was as a matter of fact that it had taken into account.

His Honour Justice Jarman QC highlighted in his judgment that this was a challenge not to the exercise by a local planning authority of the power under section 70C (to decline to determine a planning application if it is for development on land to which a pre-existing enforcement relates), but to the decision of the Council not to extend the time for compliance with the Notice in circumstances where its power under section 70C had not been exercised and the applications for retrospective planning permission had been determined and refused.

In that context, the court was satisfied that the Council considered the relevance of exercising its discretion under section 70C and ground 1 failed.

Irrationality (the second ground) poses a high threshold. His Honour Judge Jarman QC acknowledged force in the claimant's submission that for him to incur the cost and inconvenience of demolishing the extensions, only to incur further cost and inconvenience in rebuilding them if in the event the appeal was successful, appears to be non-sensical. However, His Honour Judge Jarman QC concluded that: "the lawfulness of the refusal to extend time for compliance with the notice must be judged in the circumstances which were or should have been known at the time, and the outcome of the appeal could not then be certain." Therefore, the Council was entitled to take a view on the planning merits of any appeal and to take into account that there had been no appeal against the notice and the Council had refused both applications for retrospective planning permission – the fact that an inspector took a different view on the planning merits does not detract from these matters.

Accordingly, the court held that the Council's refusal of the extension was reasoned and reasonable and the irrationality ground also failed. The claim was therefore dismissed.

Case summary prepared by Nikita Sellers