Case Name: *ASDA Stores Ltd, R (on the application of) v Leeds City Council & Anor* [2019] EWHC 3578 (Admin) (20 December 2019)

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Commentary: The High Court dismissed the judicial review challenge by ASDA Stores Ltd (the "Claimant") of the decision of Leeds City Council (the "Council") to grant planning permission for the construction of a mixed-use retail-led development on a 5.9ha site at the former Beynon Centre, Middleton Ring Road, Leeds.

The grounds of challenge were as follows:

1. The Council misapplied paragraph 90 of the NPPF, which was the main issue in this case;
2. The Council failed to give adequate reasons for its decision, which is closely aligned to ground 1; and
3. The Council's decision was manifestly unreasonable.

The NPPF sets out clear policy in respect of out of centre retail development. Paragraph 89 states that "when assessing applications for retail and leisure development outside town centres, which are not in accordance with an up to date plan, local planning authorities should require an impact assessment if the development is over a proportionate locally set floorspace threshold… This should include an assessment of: ...the impact of the proposal on town centre vitality and viability, including local consumer choice and trade in the town centre and the wider retail catchment (as applicable to the scale and nature of the scheme." Paragraph 90 then states that "where an application fails to satisfy the sequential test or is likely to have significant adverse impact on one or more of the considerations in paragraph 89, it should be refused."

The Claimant relied heavily on the judgment of Hickinbottom J in Zurich Assurance Ltd v North Lincolnshire Council [2012] EWHC 3708 at paragraph 45, where the judgment refers to the equivalent policy in PPS4 creating a "national policy presumption of refusal", to assert that paragraph 90 of the NPPF creates a "presumption". The Claimant argued that by simply referring to "placing greater weight on the benefits of the scheme" the Committee carried out a simple balance, rather than what he argued to be a more appropriate tilted balance, because of the breach of paragraph 90 of the NPPF. Lieven J did not agree with the Claimant's interpretation of paragraph 90 of the NPPF.

In the judgment, Lieven J noted that the NPPF has to be read as a whole and that in paragraphs 11-14 of the NPPF the specific term "presumption" is used in relation to sustainable development, setting out a structure by which that presumption is to be applied, and in particular circumstances outweighed. By contrast, the word "presumption" is not used in paragraph 90 of the NPPF, nor is there any suggestion of a tilted balance or any attempt to tell decision makers that they should put more weight on one factor rather than another as in other paragraphs of the NPPF. The Secretary of State did not participate in the hearing and took a neutral stance on the application but Lieven J used his submissions in the judgment that the words "should be refused" are to be given their ordinary meaning and refusal is not mandatory in this context. Paragraph 90 of the NPPF does not create a presumption and does not legally change the normal approach to weight in decision making being a matter for the decision maker subject only to irrationality, as set out by Lord Hoffman in Tesco Stores v Secretary of State for the Environment [1995] 2 All ER 636. Accordingly, ground 1 was rejected.

It followed that ground 2 was rejected. There was no misinterpretation of the policy by the members so there can be no failure to give adequate reasons for departing from it.

Irrationality is a high test but the Claimant argued that it had been met in this case because the reasons refer to the potential to "boost" trade at the centre when the members had accepted that the development would have a significant adverse effect. Lieven J did not accept that the test had been met and also rejected ground 3. Lieven J noted that the members were fully aware of the significant adverse effect on the Middleton town centre and did not dispute that finding. Therefore, Lieven J concluded that when they referred to the application scheme having the potential to boost the centre, they can only have meant boost after the significant adverse effect.

Case summary prepared by Nikita Sellers