

Case Name: *Open Spaces Society v Secretary of State for Environment, Food and Rural Affairs* [2021] EWCA Civ 241 (25 February 2021)

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Commentary: The Court of Appeal has upheld the High Court's judgment and rejected a legal challenge by the Open Spaces Society to an Inspector's decision dated October 2019 to confirm a public path diversion order diverting a public footpath in Little Rollright, Oxfordshire, away from a Grade II listed private manor house on the grounds of privacy. The case is significant as it the first time that the Court of Appeal has considered the criteria for the confirmation of public path diversion orders.

The question at issue in the appeal concerned the correct statutory interpretation of section 119 of the Highways Act 1980 which deals with the process for confirmation of public path diversion orders.

The appellant submitted that section 119 required a separate and distinct 3 stage process for the confirmation of public path diversion orders. Stage 1 requires the decision-maker to be satisfied that the proposed diversion was expedient in the interests of the landowner, or the interests of the public. Stage 2 requires the decision-maker to be satisfied that the path would not be substantially less convenient to the public as a consequence of the proposed diversion. Stage 3 requires the decision-maker to determine whether it is expedient to confirm the public path diversion order considering only the matters specified in section 119(6) which are whether "it is expedient to confirm the order having regard to the effect which (a) the diversion would have on public enjoyment of the path or way as a whole; (b) the coming into operation of the order would have as respects other land served by the existing public right of way, and (c) any new public right of way created by the order would have as respects the land over which the right is so created and any land held with it".

In response, the Secretary of State submitted that the use of the word "expedient" in the statutory scheme indicated that the decision-maker was exercising a broad discretion on confirmation. Under the statutory scheme, the decision-maker had to have regard to the specific considerations mentioned in paragraphs (a) to (c) of section 119(6) as they were mandatory considerations but that did not mean that they were the only considerations to which a decision-maker could have regard to in deciding whether it was expedient to confirm a public path diversion order in the exercise of this broad statutory discretion.

The Court of Appeal held that while subparagraphs (a)-(c) of section 119(6) were mandatory factors the decision maker may have regard to any other relevant matter, including if appropriate the interests of the owner or occupier of the land over which the path currently passes, or the wider public interest. The Court of Appeal concluded that the broad nature of the application of the expedience test on confirmation was consistent with the law on public path extinguishment orders (under section 118 Highways Act 1980) and public path creation orders (under section 26 Highways Act 1980).

This case is an important clarification of the application of the relevant tests on confirmation of public path diversion orders

Case summary prepared by Paul Arnett