Case Name: *Green v Secretary of State for Levelling Up, Housing and Communities & Ors* [2024] EWHC 2723 (Admin)

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Commentary:

Background

This was an unsuccessful application for the statutory review of the decision of the Secretary of State for Levelling Up, Housing and Local Communities in which he accepted the recommendations of his Inspector and allowed two conjoined appeals against the decisions of the St. Albans City and District Council to refuse planning permission for two residential developments on adjacent sites within the Metropolitan Green Belt, in Chiswell Green, Near St. Albans. The Council had rejected both applications on the basis that they were inappropriate development in the Green Belt and, applying paragraph 148 of the National Planning Policy Framework, there were no "very special circumstances" justifying their approval. However, although in both appeals the Inspector attached substantial weight to the harm to the Green Belt, he concluded that the substantial benefits in terms of housing provision and other matters amounted to the very special circumstances necessary to justify the developments.

The claimant was a local community group, 'Keep Chiswell Green', and sought to challenge the Secretary of State's decisions on the basis that he unlawfully failed to have regard to a material consideration, the Arup Green Belt Review ("the Arup review"), which was published after the Inquiry closed but before the Secretary of State's decision, and where none of the parties (including the Claimant) sought to rely on the review or provide the Secretary of State with a copy. In determining the issue, Lang J considered the application of the Kides test and the Tameside duty of sufficient inquiry.

Grounds and judgment

Ground 1 – the preliminary issue

The claimant submitted that the Arup Review was an "obviously material" consideration as it superseded Part 2 of an earlier review, the SKM Green Belt Review, which had been treated as a material consideration by the Inspector and Secretary of State. In response, the defendants submitted that, as a preliminary issue, the claimant was not entitled to advance a submission based on new material and argument that was never put before the Secretary of State, and that there were no exceptional circumstances to justify a departure from this standard approach.

Lang J found that the claimant had failed, without good reason, to "comply with the fundamental obligation on parties to a planning material to place before the decision maker the material on which they rely." Although the Claimant could have asked the Inspector to consider the Arup Review and to seek representations on it from the parties, it failed to do so. In writing his report, the Inspector proceeded on the basis that none of the parties had sought to rely upon or refer to the Arup Review as relevant to the issues in the appeals. He simply noted in his summary of the Council's submissions that "…a new Green Belt Review is due to be published shortly", under the heading "Emerging Policy". Lang J found that the Inspector was entitled to take this approach: indeed the Claimant did not submit otherwise. Mindful of the finite nature of planning and court resources and the strong public interest in the finality of proceedings, Lang J held that the claimant had failed to demonstrate the exceptional circumstances required for the court to exercise its discretion to consider new evidence and grounds which were not raised or relied upon in the appeal.

Although the claimant's ground of challenge failed at this preliminary procedural hurdle, Lang J went on to consider the claimant's further or alternative submissions, namely:

- whether the Secretary of State and Inspector had breached the duty on a local planning authority to have regard to all material considerations, including under certain circumstances where such a consideration arose after a Planning Committee had resolved to grant permission, but before a decision notice was issued (The Kides test); and
- whether, in failing to properly consider the Arup Review, the Secretary of State had failed to discharge the Tameside duty of sufficient inquiry.

Ground 1 – material considerations arising following a Planning Committee resolution

In respect of the Kides test, it was common ground that the requirements were that the material consideration is so "obviously material" that it must be taken into account, and that the existence of the material consideration was either known or could have been reasonably easily discovered or anticipated by the decision maker. Lang J found that the Inspector and Secretary of State had acted rationally in not taking the Arup review into account for the following reasons:

- it had not been relied upon by the Claimant or Council, or even supplied to the Inspector;
- it was at an early stage of the emerging local plan process and consultation was ongoing. Unlike the earlier SMK Review, which it materially differed from in places, the Arup Review had not been tested by independent examination;
- it did not address the main issue identified by the Inspector and the First Defendant, namely, whether the harm by reason of inappropriateness,

and any other harm, was clearly outweighed by other considerations, in particular housing, so as to amount to very special circumstances; and

- the Secretary of State had the benefit of a detailed report from the Inspector who had considered the Green Belt issues and come to his own judgment following a site inspection, oral evidence, written evidence and submissions. This case-specific consideration removed any need to consider the higher-level and more generalised analysis in the Arup Review.

For these reasons, Lang J concluded that the Arup review was not a mandatory material consideration which the Inspector and Secretary of State were required by law to take into account, as required by the Kides test.

Turning to the putative breach of the Tameside duty of sufficient inquiry, Lang J found that the Secretary of State's decision to decide the appeals without making further inquiries into the Arup review was a rational one. As stated elsewhere under the first ground of challenge, neither the Council nor the Claimant relied upon the Arup review in resisting the appeal, and they, along with one of the Developers, asked the Secretary of State to disregard references to it in the post-inquiry correspondence. The Inspector's report considered the Green Belt issues in depth, including the SKM Review. The Arup Review was part of the evidence base for the emerging local plan, not a report in the appeals, and it did not address the main issue identified by the Inspector and the Secretary of State.

For these reasons, Ground 1 failed.

Ground 2 – the duty to give reasons

The Claimant submitted that, in the alternative, that if the Secretary of State did not take the Arup Review into account, no reasons were provided as to why he preferred the superseded SMK review, which the Arup Review materially contradicted. Lane J accepted the submissions of the Secretary of State that, as he did not treat the Arup Review as a material consideration when determining the appeals, any question of preferring one review over another did not arise and was not a principal controversial issue requiring a decision-maker to offer reasons. In addition, the Secretary of State dealt with the Arup Review and post-Inquiry representations on its import in his decision letter and concluded that it neither affected his decision nor warranted further investigation.

For these reasons, Ground 2 also failed and so the application for statutory review was dismissed.

Case summary prepared by Gregor Donaldson