

ENGLAND AND WALES / JUDGMENT

Smith & Anor v Secretary of State for Levelling
Up, Housing and Communities & Anor [2025]
EWHC 888 (Admin) (10 April 2025)
[2025] EWHC 888 (Admin)

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Case No: AC-2024-LON-001050

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

10 April 2025

B e f o r e :

KAREN RIDGE SITTING AS A DEPUTY HIGH COURT JUDGE

Between:

(1) STACEY JANE MARIE SMITH

(2) THERESA CASEY

Claimants

- and -

(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

(2) CRAWLEY BOROUGH COUNCIL

Defendants

Stephen Cottle (instructed by the Public Interest Law Centre) for the Claimants

Matthew Henderson (instructed by Government Legal Department) for the First Defendant

Scott Stemp (instructed by Crawley Borough Council Legal Services) for the Second Defendant

Hearing date: 28 November 2024

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Deputy High Court Judge Karen Ridge:

This is a renewed application for permission to bring a claim for statutory review of the decision of the First Defendant's Planning Inspector. The Inspector's decision dated 14 February 2024 dismissed an appeal against the Second Defendant's refusal of an application for planning permission for a Gypsy Traveller site at Greenacres, Radford Road, Tinsley Green, Crawley RH10 3NW. The development has already taken place, and the site provides accommodation for 17 occupiers.

The application for planning permission was refused on 1 December 2021. The Claimants appealed that decision and the subsequent appeal before the first Inspector was unsuccessful. The first Inspector's appeal decision dated 9 December 2022 was subsequently quashed by Order of this Court on 30 May 2023 and the appeal was remitted for redetermination. Following the re-hearing the second Inspector dismissed the appeal, and it is this decision which is subject to challenge.

The Claimants were granted permission to proceed on grounds 2(b) and 3 of the claim by Order of Mr Justice Eyre dated 9 August 2024. Permission for the remaining grounds was refused. The Claimants were further granted permission to rely on the Amended Statement of Facts and Grounds dated 23 April 2024 and to file and serve an amended witness statement from Mrs Alison Heine dealing with the change in the proposed positioning of the touring caravans.

The Claimants' renewal notice sought permission on grounds 1(c) and 2 initially but the Claimants have since withdrawn the application in relation to ground 1(c). At the oral hearing, Mr Cottle confirmed that the Claimants seek permission in relation to grounds 2(a), 2(c) and 4.

A preliminary issue therefore arose in relation to the Claimants' ability to seek to renew their argument that ground 4 should be granted permission because they had not sought renewal of this ground. Mr Cottle argued that ground 4 is inextricably linked to the grounds which have already been given permission and it would create an artificial dichotomy for ground 4 not to be considered. He further relies on paragraph 4.40 of Practice Direction 54D which provides that

where the claimant intends to apply to rely on additional grounds at the hearing of the planning statutory review, the claimant must give notice to the court and to any other person served with the claim form no later than 7 clear days before the hearing.

At the renewal hearing Counsel for both Defendants indicated that they were able to deal with arguments in relation to ground 4. They were already on notice of that ground since it has formed part of the claim and each of the grounds of resistance. Having regard to the overriding objective I am satisfied that it is appropriate to consider renewal on ground 4. There would be no prejudice to the other parties, and it would be expedient to deal with such arguments at this hearing as opposed to any further and separate hearing.

The Decision Letter (DL)

The Inspector identified several main issues at DL7. The first main issue was the use of the site in relation to the potential future expansion of Gatwick Airport. The DL records that the site lies within safeguarded land and that the main parties had agreed that the need to safeguard land for the possible future expansion of the airport prevented a permanent planning permission being granted. It was accepted by both the local planning authority and the Claimants that a temporary planning permission could be considered having regard to the remaining main issues. (DL11)

The fourth main issue dealt with the question of flood risk. The Inspector acknowledged at DL36 that part of the site falls within Flood Zone 1 but also recognised that other parts of the site were in Flood Zone 2. In particular, the access to the site is located in Flood Zone 2. The planning application was supported by a Flood Risk Assessment (FRA) which indicated that, wherever possible, the site layout would adopt the sequential approach to flood risk (DL39). At the appeal the Claimants submitted that there was a case to justify not applying the sequential test.

At DL41 to D43 the Inspector applies the advice in the Government's Planning Practice Guidance (PPG) to the scheme and concludes that the development does not fall within any of the exemptions so as to justify not applying the sequential test. At DL44 the Inspector considers the Claimants' proposition that provision for sites cannot be made elsewhere because there are no allocated, deliverable Gypsy and Traveller sites in Flood Zone 1 and 2. This is a matter which had been confirmed at the Hearing.

At DL45 the Inspector points to the advice within the PPG to the effect that local planning authorities should set an area over which the search for sites should be undertaken to enable applicants to then identify whether there are any other reasonably available alternatives within that area of search. Within that same paragraph the Inspector has recorded that there appears to be no agreement between the parties as to an appropriate area of search for sites. She goes on, in DL46, to say that there is no evidence to indicate that the Claimants had undertaken an assessment of reasonably available sites. Her conclusion at DL47 is that a sequential test has not been undertaken. Whilst the Inspector notes that the Claimants assert that the exceptions test has been passed, she says that she has not applied that test because it had not been demonstrated that the sequential test was first satisfied.

The National Planning Policy Framework sets out objectives in relation to seeking to direct development away from higher areas of flood risk. That principle is enshrined in the sequential test which aims to steer new development to areas of lowest risk of flooding (the sequential test). If that objective is not possible, then decision makers move on to consider the exception test which applies in circumstances where it is not possible to locate development in areas at lower risk. The exception test has regard to the vulnerability of the site and that of the development which is being proposed. The exception test is passed if it can be demonstrated that the development would provide wider sustainability benefits which outweigh the risk and that the development would be safe for its lifetime.

The Inspector correctly identified that, as part of the site was within Flood Zone 2, the sequential test had to be undertaken (DL38). The Inspector explains that the Claimants' FRA explains that a "the appellants will follow the sequential approach to site layout where practically possibly" and confirms that the four touring caravans will be partially located in Flood Zone 2

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. However, she goes on to conclude that the FRA makes little attempt to carry out a sequential test.

At DL40 the Inspector recognises that the Claimants were contending that, on the facts of their appeal, there was justification for not applying a sequential test. She then applies the advice in PPG as to when it is appropriate to give an exemption to the application of the sequential test. She properly concludes that the circumstances of this case do not fall within any of the exemptions. The requirement to carry out the sequential test remains.

Ground 2(a)

Ground 2(a) alleges that the Inspector was wrong to conclude that the development would be unacceptable for the duration of a temporary permission without first considering the duration of such a permission. It is contended that the evidence adduced in support of the exception test was aimed at showing that the site would be

safe

for the duration of a temporary permission. The following agreed position is recited at paragraph 6.7 of the Statement of Common Ground (SCG):

"The caravans are sited within Flood Zone 1 on hardstanding to the north of the site outside of the Flood Zone 2. The caravans are therefore outside the medium flood risk area and a condition could be applied to secure a flood warning and evacuation plan to make the occupation of the site

safer

for occupants from flood risk." (my emphasis)

The Claimants overstate the agreed position. The SCG is acknowledging that if the caravans are outside the medium flood risk area and there was a flood warning and evacuation plan secured, that would make the occupation safer. It is not an agreement that the occupation would be safe or that this would amount to satisfaction of the exception test.

The Inspector had begun her analysis by recording that the duration of any proposed temporary permission was not agreed at the hearing (DL11). Her conclusion at DL73 was in the following terms:

"Given that the site lies partly in Flood Zone 2 and is at risk of reservoir flooding, the scheme constitutes highly vulnerable development, and there are both children and older adults on site, I consider substantial weight should be given to the harm associated with flood risk. This would not be reduced by a temporary permission as a severe flooding event could occur at any time."

That conclusion is reinforced at DL74 when the Inspector says:

"...it would also not be suitable or proportionate to allow either a temporary or a personal permission, as either option would potentially place the lives, property and livelihoods of the extended family group at risk due to flood risk."

Applying a common sense reading to those two paragraphs, it is evident that the Inspector was concluding that a temporary permission would be unacceptable irrespective of the duration of such a permission. That was a conclusion she was reasonably able to come to having regard to the risks identified and the vulnerabilities of the users and all other information before her. The risk of flooding is expressed in terms of annual events but because events of flood risk cannot be predicted, the risks which arise from such an event are constant. In other words, the risk of flooding for one year is the same as the risk the next year and it does not reduce as time passes.

The Claimants contend that the relevance of the duration of a temporary permission to risk was overlooked. However, the Inspector clearly had the implications of a short duration permission in mind when she reached her conclusions at DL73 and DL74. Her firm conclusion at DL74 was that a limited duration permission would be unsuitable because it would potentially place the lives, property and livelihoods of the family group at risk.

The reasoning is sufficiently clear, and it is not arguable that the Inspector erred in not first identifying the duration of any temporary permission. In his oral submissions Mr Cottle contends that failure to pass the sequential test is not the end of the matter since the Inspector was bound to apply the overall planning balance required by section 38(6) of the Town and Country Planning Act 1990.

However, the Inspector's reasoning at DL70 onwards is concerned with the planning balance and the need to consider whether other material considerations warrant a decision other than in accordance with the development plan. In this case the failure to pass the sequential test was contrary to CBLP policy ENV8. The Inspector attributed substantial weight to the harm associated with flood risk (DL73) and went on at DL76 to conclude that the benefits associated with the proposal did not outweigh the harms she had identified. Ground 2a is not arguable.

Ground 2(c)

This ground alleges that the Inspector's risk assessment in relation to flooding was further flawed because she failed to take into account the Claimants' evidence that the exception test was met. In addition, it is alleged that the Inspector did not properly take into account that the previous Inspector had found the exception test to be satisfied and the previous finding that a condition could be applied to secure an effective flood warning and evacuation plan.

National and development plan policy requirements set out a staged approach to flood risk assessment which requires the sequential test to be applied and passed before proceeding to the exception test. The Inspector's approach here was to first conclude that a sequential test had not been undertaken, and it had not been demonstrated that such a test could be satisfied and in those circumstances she has not gone on to consider the exception test. That is a proper application of local and national policy. (DL47)

The Inspector then went on to have regard to the previous appeal Inspector's decision (DL48). She notes that her findings at DL47 contrasted with the quashed appeal decision but said that the local planning authority had maintained its concerns regarding the sequential test and that the Claimants had had the opportunity to address the sequential test. The Inspector has properly explained her reasons for departing from the conclusions of the previous Inspector. The question of the sequential test remained in issue at the appeal and the Inspector dealt with it appropriately.

As Mr Henderson pointed out, the PPG

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states the need for the sequential test to be satisfied even where a flood risk assessment shows that the development can be made safe during its lifetime without increasing risk elsewhere. I have already explained above that the Claimants overstate the nature of the agreement on the imposition of the condition referred to in the Statement of Common Ground. That condition was an attempt to make the site safer, it did not render the site safe in any event.

Mr Cottle contends that permission should be granted for ground 2 (c) because the human rights of the Claimants were engaged and safety considerations relating to flood risk lay at the heart of the refusal of planning permission so the agreed fact "that the site could be made safe for its lifetime" fell to be considered in the round.

The human rights contention is based on an erroneous premise that the site could be made 'safe' for its lifetime. Secondly, the Inspector clearly had regard to human rights considerations. There is a careful exposition of the family's personal circumstances, their needs and the consequences of dismissal of the appeal. All of those matters are considered at DL62-DL69 and they are afforded significant weight by the Inspector when carried forward into the final planning balance. Human rights considerations were clearly taken into account when the matter was considered in the round in that final planning balance.

The Claimant's Statement of Case before the Inspector explained the position in relation to flood risk at paragraph 2.22 which says:

"2.22 There is no need for an Exception/ Sequential test for land in FRZ1. This is only required in connection with the site access road and front of the yard area. It is considered that an exception can be made to the sequential test approach for this site and development for the following reasons."

The statement goes on to provide 6 reasons to justify this approach before setting out its conclusions in the final two paragraphs on flood risk:

"2.23 As it is not possible for the development to be located in a zone with a lower risk of flooding, the exception test needs to be applied. The development provides accommodation for a Traveller family who are homeless with nowhere else to live in their caravans. If permitted to live here they can sign up to the EA Warnings and Emergency services know where to find them if there is a need to evacuate. That is much safer than a roadside encampments. It is considered that the sustainability benefits of ensuring the family are settled and able to access essential services outweigh the flood risk on this site, at least until the Council has found and delivered enough sites to meet the need for more Traveller pitches in this district.

2.24 It is argued that the development can be made safe for its lifetime and without increasing flood risk elsewhere. The proposed development would not increase flood runoff. The caravans and vehicles all have a freeboard and there are gaps in the fencing. Any flood water which reaches the outer limits of the flood plain would be able to cross the site and would not be displaced. The mobile home could be tethered so that it is made secure. With the benefit of flood warnings all moveable objects (eg vehicles and the touring caravan) could be removed from the site to a safe place on higher ground to the east before it flooded and not returned until the flood risk had receded"

I have already concluded that the Inspector's determination that the site required a sequential test and exception test was correct. Paragraph 2.22 makes the case for an exemption to the application of these tests which the Inspector properly dealt with. Ground 2 (c) is not arguable.

Ground 4

This ground alleges that the reasons for the conclusion that the flooding risk to site occupants would be unacceptable on a temporary basis was unclear. Mr Cottle contends that this lack of clarity is due to the prior findings that the occupants would be living in Flood Zone 1 and that the site was not at high risk of flooding. The Claimants contend that the failure to demonstrate that the sequential test has been passed needed to be looked at in light of these findings.

The Inspector properly acknowledged that part of the site falls within Flood Zone 2 and that the Flood Map placed it at medium risk of flooding from fluvial sources (DL36). The site's access and egress was located Flood Zone 2. The Inspector acknowledged that the site was at very low risk of reservoir flooding (DL36) for the reasons set out. However it remains at medium risk of fluvial flooding. At DL36 she has recorded that there are 17 occupiers on the site and she goes on to confirm that the Scheme comprises highly vulnerable development, with both children and older adults on site. It is against this backdrop that the Inspector comes to her conclusions in terms of the failure to complete the sequential test at DL39 and DL73.

The reasoning is clear and logical and enables the reader to understand the basis on which the Inspector has concluded that the development would be unacceptable for a temporary period. For these reasons ground 4 is not arguable.

I have concluded that none of the renewed grounds are arguable. The matter should now proceed to a substantive hearing on the basis of the grounds permitted by Mr Justice Eyre. I would ask Counsel to draw up an appropriate Order reflecting this judgment.

Note 1 I note that the alleged error in the location of the touring caravans is the subject of grounds 2b and 3 but for the purposes of consideration of the remaining grounds it is not material

[\[Back\]](#)

Note 2 Paragraph: 023 Reference ID: 7-023-20220825

[\[Back\]](#)

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Prepared on 22 October 2026 · Esheria