Neutral Citation Number: [2012] EWHC 3660 (Admin)

Case No: CO/55/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2012

Before:

HIS HONOUR JUDGE ANTHONY THORNTON QC
Sitting as a judge of the High Court

Between:

AZ	**Applicant**
- and –	
(1) Secretary of State for Communities and Local Government	
(2) South Gloucestershire District Council	**Respondents**

Michael Rudd (instructed by **Bramwell Browne Odedra**) for the **Applicant**
Miss Lisa Busch (instructed by **The Treasury Solicitor**) for the **First Respondent**
The Second Respondent did not appear and was not represented

Approved Judgment

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HIS HONOUR JUDGE THORNTON QC

His Honour Judge Anthony Thornton QC:

A. Anonymity order

1. Although this judgment is concerned with an application under section 288 of the Town and Country Planning Act 1990 ("TCPA") that is made in relation to a planning appeal made under section 78 of the TCPA, it involves a detailed discussion of the personal details of the personal circumstances of three adults and a child now aged 13 and of their family, private and home lives. These family members are the applicant, his wife, his son who is his wife's step-son, and his sister-in-law, being his wife's sister. Any court has the power in cases involving children, in whatever sphere the case is concerned, to anonymise the names of a child party or a child who is directly involved in the case that that court is concerned with so that he or she cannot be identified and to similarly anonymise the names of any other party or witness who, by being named in the case, will enable that child to be identified. There is no reason for not adopting the same practice in this application and, although anonymity has not been requested, I am exercising my power to direct anonymity. Since the child will be readily identifiable if his father, the applicant, is named, I am also directing anonymity of the applicant, his wife and his wife's sister. The applicant will be known for all purposes connected with these proceedings as "AZ".

2. I am making this order because it is not in the best interests of this child to have him publicly named or to be identifiable by anyone reading this judgment or any report of it as can be seen from a reading of the factual background to the issues that arise for decision. This anonymity is necessary in order to pay due respect to his rights to a private and family life. It is for this reason that AZ, his wife, his son and his sister-in-law referred to throughout the judgment as the applicant, the applicant's wife and the applicant's son and the applicant's sister-in-law.

3. I am making this order in the exercise of my powers under CPR 39.2(4) and Section 39 of the Children and Young Persons Act 1933 and in the exercise of my duty to pay due respect to the private life of the applicant's son provided for by section 6 of the Human Rights Act 1998 ("HRA") and article 8(1) of European Convention of Human Rights ("HCRA"). In adopting this course, I have relied on the decision of the House of Lords in *In re S (A Child) (Identification: Restrictions on Publication)*[1] and of the Supreme Court in *Guardian News and Media & Ors, Re HM Treasury v Ahmed & Ors*[2].

4. I am, therefore, in conformity with normal practice when an anonymity order is made in respect of a child, making the following direction:

> (1) The applicant is to be named and known as AZ for all purposes in connection with this judgment and these proceedings.
>
> (2) No newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of the child concerned in this application or in the planning appeal from which this application is brought, either as being one of the persons by or in respect of whom the planning appeal was brought or this application is made or as being a witness or providing evidence to the planning appeal or that is referred to in this application.
>
> (3) No picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid; except in so far (if at all) as may be permitted by the direction of the court.
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> (4) This order extends to any subsequent hearing or inquiry held in connection with the planning appeal which this order relates to and which results from the quashing of the decision previously made that has been ordered as a result of the judgment in this application.

B. Introduction

5. This is an application brought under section 288 of TCPA. The applicant seeks to question the decision of an inspector appointed by the first respondent, the Secretary of State for Communities and Local Government ("the Secretary of State"), dismissing the applicant's appeal under section 78 of the TCPA. This decision was dated 19 November 2010. The appeal had been brought by the applicant against the failure of the second respondent, South Gloucestershire District Council ("SGDC"), to give notice within the prescribed period of a decision on his application for planning permission for the stationing for residential purposes of a mobile home in an open field in the green belt located approximately one mile north of Pucklechurch in South Gloucestershire. In

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1 [2005] 1 AC 593, HL(E).
2 [2010] UKSC 1, SC.

other words, the applicant seeks to question the inspector's refusal to grant him planning permission to place his mobile home on his field in the green belt and to use it to live in as his home with his young son

6. The decision was made following a hearing at which the applicant was represented by a non-legally qualified planning consultant and SGDC by one of its planning officers. The applicant questions the appeal decision on the grounds that amount to complaints that the inspector did not comply with relevant requirements of the Town and Country Planning (Hearings Procedure) (England) Rules 2002[3] ("the Hearings Rules"), the Human Rights Act ("HRA") and the law and policy relating to the granting of permission subject to conditions[4]. In short, the applicant questions the inspector's refusal to grant either planning permission or a temporary planning permission for his mobile home on a green belt site as resulting from a failure to comply with various relevant requirements that it was required to comply with.

C. **The background facts**

7. **Source of the background facts.** The inspector's decision does not summarise the relevant factual background to the applicant's human rights claim in any detail. Moreover, neither the applicant's hearing statement nor the list of major issues that were or should have been identified by the inspector[5] were included in the application bundle. However, three detailed consultant forensic psychiatric reports that were concerned with the applicant's psychiatric and psychological conditions were supplied to the inspector for the appeal hearing and copies were provided in the application bundle. I have obtained my summary of the factual background from the contents of these reports in addition to the inspector's decision since the inspector accepted the conclusions reached by the report writers in these reports which were based on the factual background recorded in detail in them[6].

8. The first of these reports was dated 9 March 2004. It had been prepared by Dr Mason on the instructions of the applicant's then solicitor to assess the applicant in connection with the claim that he had started against the operators of the care home in Penarth where he had resided for about 9 months many years previously when he was 12 years old. This report contained considerable detail about his life up to 2004. The other two reports, dated 3 February 2009 and 21 October 2010 respectively, were prepared by a different psychiatrist, Dr Reeves. The first was for use in connection with the applicant's plea in mitigation following his conviction in a criminal case in 2009 and the second, which was to be read with the first, was for use in the appeal hearing in 2010 that I am now concerned with. These two reports complimented Dr Mason's report and provided further details of the factual background up to the date of the second report.

9. All three reports are consistent with each other and they collectively provide considerable detail of the applicant's life and that of his wife and son as well as full assessments of his psychiatric and psychological conditions, none of which the inspector queried in her decision. That is why I have taken my summary of the factual background to both the appeal and this application from these reports. I have also relied, for the planning history of the appeal site, on the hearing statement of the applicant's representative that was used at the hearing and which was also contained in the application bundle.

10. **The applicant.** The applicant was born on 4 March 1957 and, at the date of the inspector's hearing, he was 53. His early years appear to have been uneventful with no unhappy memories. However, others appear to have taken a different view since he was subsequently assessed at the age of 12 as being emotionally inadequate and insecure, possibly it was suggested as a maladjusted response to a combination of familial rejection, overindulgence and frequent changes of home which included periods when the family were living in a mobile home. It would also seem that he witnessed, and was himself subjected to, frequent bouts of domestic strife and violence.

11. When he was 11, he fractured his skull and was in hospital for a lengthy period and the resulting injury left him with typical symptoms of post-concussional syndrome with headaches, memory loss, irritability and dizziness. He was bullied when he started secondary school to such an extent that he refused to attend school and as a result was sent to an approved school for a short period when he was 12. On his release, he spent time in two care homes. At the second, in Penarth where he resided for nearly 8 months, he was very badly treated physically and emotionally and was frequently excessively beaten. He remained and still remains subject to flashbacks and other severe symptoms so that, years later, he made the claim for this treatment that I have already referred to which was settled in 2004 by his receiving a payment of £10,000.

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3 SI 2002/2684.

4 Section 72(1)(b) of the TCPA and DOE Circular 11/95: *Advice upon the imposition of conditions granting temporary permission*.

5 See paragraphs 101 - 105 below.

6 See paragraphs 12 and 15 of the decision.

12. The applicant returned home when he was 13 and left school when he was 15 without any qualifications and, at about that time, was assessed as being illiterate with an IQ of 91. He left home soon afterwards, lived with his grandparents for a time and went to work in the mines for about 7 years as a blacksmith striker. Whilst working underground, he developed white finger and other damage to his hands from the pneumatic tools which he worked with. This has resulted in his permanent disability which remains extremely painful for which he is still in receipt of disability living allowance which is his only source of income. He met the woman who became his first wife when he was 18 and they married when they both were 21. This short marriage only lasted 10 months.

13. Soon after his first marriage ended, the applicant decided that he could no longer stand working underground with the constant fear of another of the occasional occurrences of the roof collapsing. He ceased working in the mines and moved to Bristol and lived with an extended itinerant family in their mobile homes for about 3 years before moving into his own mobile home and becoming a nightclub doorman. He had two short and, on his account, tempestuous marriages in this period whilst still in his 20s. The first of these occurred when he married his second wife when he was in his mid-20s in the early 1980s. After a particularly stormy marriage which lasted for about 4 years, he moved another woman into his mobile home and, having divorced his second wife, he married that woman as his third wife when he was 28 in 1985. The marriage did not last long and his third wife then left him.

14. By his own account, the applicant led an unstable and promiscuous lifestyle throughout his 20s and had been extremely violent to each of his first three wives during his three marriages. Moreover, he was convicted on four separate occasions between 1982 and 1986 for violent behaviour and had had to be operated on for a fractured jaw that he had sustained in a fight. He met his fourth and current wife in 1988 when he was 31 and has been married to her ever since. In 2004, he told his psychiatrist that this was a happy marriage which was not punctuated with any domestic violence and that he still loved his wife to bits.

15. Before her marriage, his wife had lived in a rented house in Bristol which became their matrimonial home. Following their marriage, the couple initially lived a nomadic life for a short time in a mobile home. On their return to Bristol, he worked as a nightclub bouncer and although he controlled his violence, he continued with his promiscuous lifestyle and was unfaithful on numerous occasions. After a number of years, he took a job in a nightclub in South Wales, partly because of his wife's dissatisfaction with his behaviour, and for the next 4 years he lived in a mobile home working as a bouncer. His wife continued to live in Bristol in the matrimonial home during the week and with him in his mobile home at the weekend.

16. The applicant's son was born in 2000 to one of the women that he had had a relationship with whilst working in South Wales. The applicant helped to care for him from a very young age and the infant lived with his biological mother during the week and with his father and step-mother in his father's mobile home at the weekends. His wife worked in Bristol and stayed in the matrimonial home during the week and visited the applicant and her step-son at the weekend. For a relatively short period when his son was aged 2, the son's biological mother insisted that he lived exclusively with her. This arrangement soon changed because his mother dropped out of his life even though a court and previously awarded both of them joint custody. The applicant's son has been cared for by him ever since and he subsequently stated that his son's biological mother took the decision to stop looking after their son because she didn't want any further part in his upbringing.

17. In 2002, the applicant left South Wales with his son and returned with him to live in the matrimonial house in Bristol. He took this step when the nightclub that he was working in was sold as well as for other unspecified reasons. His wife had remained throughout her marriage in full-time employment with the NHS and living in the matrimonial home when, in 2004, she moved to South Gloucestershire to live with her sister in her sister's house. She is a chronically disabled multiple sclerosis sufferer and the applicant's wife moved in with her in order to care for her on a full-time basis. Her house is located in the vicinity of Pucklechurch.

18. At about the same time that the applicant's wife moved in with her sister, he found that he could no longer bear to live in a house or an enclosed environment. The applicant and his wife learned soon afterwards that the appeal site had come up for auction. It is an open field located reasonably close to the applicant's wife's sister's house. They decided that it was an ideal location for the applicant to pitch his mobile home to enable him and his son to live close to the applicant in a location which would provide a solution to his fear of enclosure, his need for an open-air lifestyle and the impossible task his wife had to care for him and his son on a daily basis as well as caring for her sister. By then, both the applicant and his son had become very dependent on his wife's care. They bought this field at auction with the help of the abuse damages he had recently received and his wife's personal resources.

19. This site was bought in his wife's name but the applicant would have acquired both an equitable and a matrimonial interest in the site as well as owning the mobile home parked on the site. Both the applicant and his

wife were unaware that the site was located in the green belt and that the mobile home could only be lived in with planning permission which it was very unlikely that they would obtain.

20. **The applicant's psychiatric and psychological conditions and lifestyle.** The psychiatric assessments of the applicant were provided by Dr Mason's 2004 report and Dr Reeves's 2009 and 2010 reports. Dr Reeves attended the hearing but the decision does not suggest that he added to his reports during the hearing. The inspector was also provided with a letter from the applicant's General Practitioner whose contents were not discussed in the decision and a copy was not provided in the application bundle.

21. The applicant continues to suffer from an apparently untreatable chronic anxiety state or condition which overcomes him when he is in any enclosed space. This fear or phobia had been induced by a combination of his personality problems and the consequences of both his childhood ill-treatment and the mine working conditions that he had experienced in his youth. Its enduring pattern has led to his being clinically depressed and impaired in social, occupational and other areas of functioning. This phobic condition started his childhood and as a result, from the early 20s onwards, he has lived mostly in a mobile home. He lived with his wife in Bristol after they had married in her house until he moved to a mobile home in South Wales because of his growing difficulty in living in an enclosed environment. He lived there until his return to his matrimonial home in Bristol with his son but soon afterwards he found that his phobia had intensified and that living in an enclosed environment had become unbearable for him.

22. The applicant therefore now needs to live permanently in a mobile home located in a rural environment where he can eat in the open air or on an adjoining covered deck. If the applicant is confined in a building or an enclosed space for more than a short period, he becomes stressed and starts to sweat profusely, palpitate and suffer from flashbacks of his traumatic childhood ill-treatment and his years working underground. He also becomes severely depressed during these palpitating and depressive bouts. These symptoms are characteristic of Post-Traumatic Stress Disorder, although there is uncertainty whether he is a full PTSD sufferer, and they are related both to his childhood ill-treatment and his underground working experiences as well as his personality disorder which now manifests itself by his difficulties with cognition, interpersonal functioning and impulse control.

23. He has been prescribed with and has taken antidepressants continuously since 2005 and attends his GP surgery once a month. When particularly stressed and depressed, he experiences suicidal ideation and has been known to forego eating for 2 to 3 days at a time and to suffer from consequent weight loss. These symptoms have been recurrent throughout the long period of uncertainty about his future and he has explained that he would commit suicide if he was expelled from the site save for his great love for his son and the knowledge of how upset his son would be to lose his father. He is also in constant pain from his long-term hand and white finger disabilities caused by his time working underground with pneumatic tools.

24. He has suffered from these separate but inter-related conditions throughout his adult life but they appear to have intensified in the last ten years or so. He is able to look after himself but is heavily reliant on his wife's daily visits. He spends most of his waking hours out of doors and finds even short car journeys and any time spent in shops difficult to cope with. He is able to care for his son who has been brought up in a mobile home since he was about 5 and who appears to be thriving at school and in the natural environment that he is being brought up in. Father and son have a close relationship and the applicant is devoted to his son although both are clearly heavily dependent on the regular daily contact that they have with the applicant's wife who is, of course, his son's step-mother. The appeal site was acquired in order to provide both father and son with the outdoor home that he requires and which can be readily visited by his wife. The possibility of his being evicted from his mobile home or of his having to re-locate it from the appeal site to any other site regularly causes him acute and debilitating anxiety and suicidal ideation which is only controlled by his overriding love for his son.

25. Apart from his regular visits to his GP's surgery to collect his anti-depressant prescription, the applicant is not under any psychiatric, psychological or medical care. SGDC's social, children's, housing and planning services have never had any involvement with either the applicant or his son and it would appear that none of these departments have assessed the family's collective and individual needs or to have given any advice as to relocation or on planning, housing or social matters. The applicant's only apparent source of income is his disability living allowance and he and his wife share his son's child allowance which is spent on his son's needs. The applicant spends his days tending the appeal site, looking after his son and undertaking open air country pursuits. The inspector found that he had a good support system albeit that that finding was based solely on his answer to a question about how he would construct the structures associated with the proposed development after his mobile home has been resited. His answer was to the effect that he had many friends who would help him.

26. Dr Reeves, when interviewing the applicant on 31 January 2009, considered that he had little comprehension of the fact that he was living unlawfully on the appeal site and that he had acquired it without understanding that he would not get planning permission to live there. He has clearly been unable, given his

disabilities, personality disorder and illiteracy, to look for an alternative site to pitch his mobile home or to plan his future away from the appeal site and he and his wife do not appear to have given any thought to his and his son's possible need to move away from the area and, hence, away from her support and assistance. It would seem from the available evidence that no alternative site would be suitable for him and his son unless it could readily be visited on a daily basis by his wife and which was located in a secluded spot that enabled him to lead an open-air lifestyle and his son to attend secondary school nearby and to continue growing up.

27. The applicant is clearly also of the view that no other site was available to him that was suitable for his needs and that, if he was evicted from the appeal site, he would be homeless. SGDC provided no evidence to show that other suitable open air sites were available where the applicant could continue to live in the open air and he and his son could continue to receive daily support with overnight stays from his wife and his son's schooling and upbringing would not be interrupted or disrupted. The absence of any evidence from the applicant or SGDC of available alternative suitable sites for the applicant and son to relocate to would suggest that the applicant's view that he would have nowhere else to go to if he was evicted from the appeal site was and remains a realistic one.

28. There is independent evidence that corroborates the applicant's evidence that he cannot live or be relocated in a house and needs an open-air lifestyle. When the applicant was sentenced in 2008 for his part in cannabis cultivation activities that were discovered in the former matrimonial home in Bristol after it had been sub-let to tenants, he was given a suspended sentence after the sentencing judge had been provided with a copy of Dr Reeves's first report. This unusually light sentence for the type of offence he was sentenced for is explained by the sentencing judge stating that he would not go to prison on compassionate grounds due to his chronic claustrophobic condition. He appears similarly to have been given a very light sentence by the judge who sentenced him following his pleas of guilty for non-compliance with the enforcement notices he had been served with since he was given a conditional discharge. The sentencing remarks and the basis of this sentence were not summarised in the evidence before the inspector but it is reasonable to infer that that vey lenient sentence reflected the judge's acceptance of the applicant's psychiatric condition.

29. **The applicant's son.** The applicant's son has lived with his father until he was about 2 and then, after a short period of separation, permanently ever since. Although his biological mother still has joint custody of him, he has not lived with her since about 2002, has not seen her at all for some years and has only had very infrequent contact with her in other ways since he ceased to live with her. The applicant's son is reported to have done well at primary school and in September 2011 he moved to a local secondary school. The applicant drives his son to school on most days and he or his wife pick him up from there. There was little evidence as to what would happen to the applicant's son if he was required to move off the site. It is clear that he could not go to live with his step-mother given her circumstances as her sister's full-time carer and the applicant's only solution was that he would have to go to live with his biological mother notwithstanding the fact that his has not seen her for many years and nothing is currently known of her family circumstances or inclinations.

30. **The applicant's wife.** The applicant's wife comes from a gypsy family given that both her grandparents were gypsies. These grandparents lived at Hawkesbury Upton about 11 miles away from the appeal site. According to Dr Reeves's first report, the applicant's wife became estranged from her husband in or before 2000 but they have remained and still remain married and close friends and she cares for both her husband and her step-son as much as she is able to whilst acting as her sister's full-time live-in carer close at hand. This care is provided during her daily visits to the mobile home, her regular sleep-overs there and collecting her step-son from school. She left her employment in the National Health Service when she moved in with her sister. She has retained ownership of their former matrimonial home in Bristol when she moved to her sister's home and she has sub-let it and the rent that she is paid is her only source of income. The inspector's decision provided no further details of her, her lifestyle or her financial resources save that Dr Reeves, in his second report dated 21 October 2010, reported that she was building a house in Bristol which was then almost complete.

31. **The applicant's son's biological mother**. The applicant told Dr Mason that his son's biological mother handed care of their son over to him soon after he was born in order to tie him down and stop him being unfaithful to her. When his son was two, his mother demanded him back and, after court proceedings, the court ordered that the son's custody should be joint. For a time, the son lived part of the time with each of his parents but then his mother lost interest in him and he has remained with the applicant from then on. There is no other evidence of the biological mother's home and family situation or what she and the son respectively think about the possibility of him returning to live with her after so many years living apart with little indirect contact.

32. **The applicant's sister-in-law**. The inspector did not obtain any information about the applicant's sister during the discussion at the hearing save that she suffers from a chronic disabling condition necessitating her sister to act as her full-time live-in carer. Since her sister was also caring for the applicant and his son and sharing a family life with them in their home, a refusal decision could engage the article 8 rights of the applicant's sister-in-

law since she is wholly dependent on her sister and that dependency could be affected by any need for the applicant and his son to move away from the appeal site.

33. **The applicant's family.** The applicant's family consisted of the applicant, his wife and son and their family life also involved, albeit very indirectly through the applicant's son, his son's biological mother and, much more directly through the applicant's wife, her sister. Dr Reeves in his second report described how he had asked the applicant why he didn't live with his wife and he replied that she found him too volatile and furthermore he could not stand living in a house. He has remained heavily dependent on her and she spends nights in the mobile home on a regular basis.

34. The applicant's wife has had a significant role in looking after the applicant's son throughout their marriage. From infancy, she helped care for him because his son always stayed with his father at weekends when custody was shared and his wife always stayed with both of them at the weekends. Whilst the applicant lived in the matrimonial home, all three family members lived as a family and his wife claimed tax credit for her step-son since she was the only bread-winner and she also received the child allowance payments. This living arrangement was only broken up because his wife went to care for her sister and needed to sub-let the matrimonial home to support herself since she had no other income.

35. Since her step-son son has not seen his biological mother since he was about 4 years old and has only had occasional contact with her since, it is clear that his step-mother has always played a significant maternal role in his life and that the son's biological mother has not been involved in her son's life since she stopped seeing and caring for him and she has, in effect, dropped out of his life.

36. **Planning history of the appeal site.** The appeal site is jointly owned by the applicant and his wife[7] and was paid for by the wife in late 2005 for £21,000. These funds were provided by the applicant's wife who is also the registered proprietor of the site in the Land Registry. However the funds were provided, it is clear that the applicant and his wife have always treated their funds and resources as being jointly available to maintain both of them and the applicant's son so that both the applicant and his wife have occupational, equitable and matrimonial rights in both the site and the mobile home.

37. Following the acquisition of the appeal site, the applicant constructed a day room, sheds, fencing and associated paraphernalia around the mobile home he had parked there and he and his son moved into it. The site is bounded by agricultural land on its north, east and south sides and on its west side by a residential dwelling that is located on the road leading north out of Pucklechurch with agricultural land beyond. There is an access into the north western corner of the site from the side road that it fronts. The site of the mobile home and its associated buildings has an area of 0.25 of an acre within an appeal site area of 2.4 acres.

38. SGDC became aware of what was clearly and obviously unauthorised development in the green belt soon after the applicant had acquired the site and moved into the mobile home with his son. No doubt in consequence of SGDC's awareness, the applicant served a planning application on SGDC dated 7 April 2006 for the location of 2 mobile homes on the site for the use of a gypsy family. This was clearly a reference to himself, his wife and his son and to their wish to have permission for two mobile homes for their use. This application was refused on 26 September 2006. Meanwhile, SGDC served a stop order on the applicant dated 11 July 2006 which expired on 8 August 2006 and a second stop order dated 9 August 2006 which expired on 12 August 2006. SGDC also served two enforcement notices dated 9 August 2006 and two further enforcement notices dated 4 September 2006. The cumulative effect of these two stop orders and four enforcement notices was to require the applicant to remove his mobile home and the unauthorised development from the site. The applicant appealed against the refusal of his planning application and all four enforcement notices. These appeals were dismissed on 11 July 2007.

39. Following those dismissals, SGDC prosecuted the applicant for non-compliance with the enforcement notices. The only details of this prosecution are provided in Dr Reeves's second psychiatric report which suggests that the applicant pleaded guilty to the charge or charges in the Crown Court and was given a conditional discharge and ordered to pay the costs of the prosecution in the sum of £8,000. The report states that the applicant was told by the sentencing judge that he would have to vacate the site but there are no other details of the applicant's basis of plea or of sentence.

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[7] The joint ownership must have been an equitable interest in the proceeds of sale since legal title is vested in the applicant's wife's name. However, the circumstances of the purchase suggest that the applicant and his wife both have a joint interest in the appeal site pursuant to a resulting trust. The applicant also had a statutorily imposed matrimonial interest and both have an occupational, equitable and matrimonial interest in the mobile home.

40. The applicant was, in late 2008, convicted of offences concerned with the cultivation of cannabis in his wife's rented house in Bristol that his wife had sub-let when going to live with her sister. According to the applicant, he had been found by chance in the house when it had been raided by the police. He was there, according to his account, during one of his infrequent visits to the house to have a shower. He denied any knowledge or involvement in the cannabis cultivation that was taking place on the premises but the jury did not accept his defence and he was convicted. He was sentenced to two years imprisonment. However, the sentencing judge is reported to have suspended this sentence for two years having considered Dr Reeves's first psychiatric report prepared on the applicant and its assessment of his acute fear of living or remaining inside any building including, in particular, a prison.

41. The applicant, with the assistance of the planning consultant he had then recently engaged, served a further application for planning permission on SGDC dated 13 October 2009 seeking permission to stand a mobile home in a different and more secluded area of the appeal site from that which his mobile still occupies. Presumably the proposed re-siting of the mobile home was intended to reduce the planning harm that would be occasioned by the siting of a mobile home in its current position. For reasons that were not explained, SGDC never determined this application and a notice of appeal was served on the Secretary of State dated 8 June 2010 as a result. At the same time, the applicant served a second further planning application for a mobile home on SGDC which was refused on 12 August 2010. The appeal proceeded only in relation to the non-determination of the first of these two applications and it was dismissed in the decision dated 19 November 2010 that is the subject of this application.

42. **SGDC.** Although the applicant and his son have lived unlawfully in SGDC's area since 2006, there has been no reported contact between either of them and SGDC's housing, homelessness, social, children's or mental health services and its planning services do not appear to have given the applicant any advice about possible relocation sites. Similarly, neither the applicant nor the son have been visited or assessed by anyone from SGDC even though the son might become a child in need if he was evicted from the appeal site, particularly if that made him homeless. In the case of the applicant, no-one from or on behalf of SGDC appears to have assessed his psychiatric, psychological or medical conditions even though, as the inspector recognised, he has serious mental health problems.

D. **The appeal**

43. SGDC should have decided the planning application that was dated 13 October 2009 within 8 weeks starting with the day after it received it[8]. It did not explain to the inspector why this application had not been determined by 8 June 2009 which was the date on which the applicant exercised his right of appeal by serving a notice of appeal on the Secretary of State. The appeal was brought under section 78 of the TCPA and the Secretary of State had to deal with the appeal as if the application had been dismissed and had been made to him in the first instance[9]. The appeal process therefore considered and determined the application as one that had not previously been considered by anybody.

44. The Secretary of State directed a hearing and the applicant's planning consultant representative, Mr Matthew Green, submitted a hearing statement that identified the main issues that arose for determination. This contains the following extract:

> "95. Article 8 rights are engaged and are relevant as any dismissal of this appeal could result in the loss of [the applicant's] home, … the loss of a home wold also have a clear detrimental effect on [the applicant's] family life.
>
> 96. In order for an interference with human rights to be justified, it must be shown that the harm caused by the interference is proportionate and necessary.
>
> 97. It is difficult to see how the loss of [the applicant's] home, the potential harm to [the applicant's] mental health and the potential harm to the family relationships can be regarded as proportionate when set against the totality of harm caused.
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> 98. This is a case where Human Rights are intrinsic to the overall decision as to the test of whether the harm was proportionate given the peculiar circumstances of the case …."

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[8] Article 7 of the Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2006.

[9] Ibid., section 79(1).

45. Although this summary only provided outline details of the article 8 issues that had to be determined, it can be seen from what it contained, when read with the psychiatric reports and the other documents that Mr Green submitted to the Secretary of State, that these issues would include both the hearing and the inspector considering of the following matters at the hearing and in her decision:

(1) Whether the applicant's mental and physical health had the effect that he had to remain living with his son on the appeal site, as opposed to living on any other site, in a mobile home;

(2) Whether it was correct that no clear alternative accommodation options were available to the applicant and his son;

(3) Whether the refusal of planning permission amounted to an unreasonable and disproportionate interference with his, his son's and his wife's article 8 rights relating to their family lives and their home so as to amount to very special circumstances justifying a permission on compassionate grounds or because a refusal would be a disproportionate interference with the various family members' article 8 rights;

(4) What the son's best interests were in relation to the possible decision to be reached by the inspector on the planning application; and

(5) Whether, on the assumption that permission was not granted with or without a personal condition, a temporary permission of appropriate length should be permitted, again whether with or without a personal condition.

(6) What considerations and possible future changes in the applicant's circumstances should be taken into account in considering whether he should be granted a temporary permission.

46. The hearing took place in the presence of the applicant and his representative, Dr Reeves and a planning officer representing SGDC and was conducted by the inspector as a discussion without cross-examination as required by the Hearing Rules.

E. **The appeal decision**

47. The appeal decision, dated 19 November 2010, refused planning permission and dismissed the appeal. It first considered the nature and form of the proposed development and decided that it would create a harmful effect on the character and appearance of the area and that it was in conflict with the green belt. This decision, on planning grounds was one that was both in conformity with applicable planning policy and unchallengeable.

48. The decision then dealt with the remaining issues as follows:

> "12. The appellant submits that there is a 'substantial material consideration that alone clearly outweighs the combined harm, so that very special circumstances exist'. I have read a Report from 2004 from Dr F Mason; letters from [applicant's] local doctor and 2 later Reports from Dr R Reeves who attend the hearing. These all concern the anxiety state of the appellant, possibly post traumatic stress and depression: I have read these carefully. [the applicant] has an aversion to live in a house. He becomes panicky, and cannot stand being confined. This is why living in a mobile home is so important to him; even on rainy days he lives and eats outside on his decking under a canopy. The Reports state that, if [the applicant] is forced to leave his site, he contemplates suicide but Dr Reeves continues 'he will not do it because of [the] son who would miss him so much'.
>
> 13. I do not underestimate the severity of the mental state described in the reports. Nevertheless, anyone troubled by such serious thoughts should, it seems to me, be receiving appropriate treatment. There is no evidence to indicate that this site, and this site alone, is the only place that the applicant could live the outdoor-life that he desires.
>
> 14. The applicant argued that, if he has to leave his site, his son would have to move back to live with his biological mother, but I have seen no evidence that this is inevitable. According to the first report of Dr Reeves, a judge awarded joint custody of the child. This history might well be taken into account *if*[10] any decision needs to be made at all about the child's home. I fully accept that the son is progressing well at a local school but, as I established at the hearing, he will be moving to secondary school in September 2011 (possibly in Yate) and so another place to live could be sought which would permit the appellant and his son to remain together and for his son to continue his education.

[10] The use of italics was the inspector's – see paragraph 139 below.

> 15. I note the outcome of the appeal decisions of July 2007 regarding the Enforcement Notices. It would appear that despite these and subsequent prosecution in the Courts, the appellant has done nothing to look for an alternative site, during this considerable period of time. In answer to my question at the hearing, he said that his wife helps him daily and is a friend to him; it appears she bought him this field. [the applicant's] life and that of his wife seem closely intertwined; [the applicant] goes to her house to have a shower; he "did the letting" of his wife's house in Bristol. Dr Reeves states that "she comes over every day and sometimes spends the night". In answer to my question at the hearing, the appellant also stated that he had many friends who would help him construct the appeal proposals; he therefore appears to have a good support system. I acknowledge that the appellant has severe mental health problems but these are of long standing; he has made no attempt to find another site despite knowing since 2007 that he would have to move. Accordingly, for all the reasons given above, I am only able to attach moderate weight to those factors; there is nothing to suggest that a less harmful site might not have been identified;
>
> **Conclusions**
>
> …
>
> 17. Overall, I conclude that the other considerations do not clearly outweigh the totality of harm to the green belt and the other harm I have identified; …
>
> 18. Submissions were made concerning a temporary permission, in the event that I did not consider a permanent permission justified and taking into account any reduced harm arising from a limited period of permission. Dr Reeves expressed the view that the appellant's condition was unlikely to change substantially in the short/medium term. If there is no realistic prospect of a change in circumstances, then a temporary permission would be inappropriate. …
>
> 19. Submissions were made relating to Article 8 of the ECHR and I recognise that dismissal of this appeal would interfere with [the applicant's] home and family life, particularly in the light of the history regarding the Enforcement Notices. However, this must be weighed against the wider public interest. For the reasons given above, I have found that this proposal would be harmful to the need to protect the openness of the green belt and I am satisfied that this legitimate aim can only be adequately safeguarded by the refusal of permission. On balance, I consider that the dismissal of the appeal would not have a disproportionate effect on [the applicant].
>
> 20. I have taken account of all other matters raised, including the use of any of the conditions suggested but find nothing that changes my decision on this appeal."

F. **The issues arising in this application**

49. On behalf of the applicant, it was contended that three issues arose for decision on this application. These were:

> (1) Whether the inspector failed properly to consider and assess the psychiatric evidence and thereby failed properly to assess the weight to be given to this evidence;
>
> (2) Whether the inspector failed to consider the applicant, his son's, his wife's, his sister-in-law's and his son's biological mother's article 8 rights; and
>
> (3) Whether the inspector failed properly to consider the imposition of a personal condition and the claim for temporary planning permission.

G. **The law**

(1) **Planning application in the green belt**

50. **The policy.** Green belt policy is set out in a Planning Policy Guidance document[11] which has always been considered to be a cornerstone of the Secretary of State's planning policies. The relevant purpose of preserving green belts is to assist in safeguarding the countryside from encroachment[12] and the relevant objectives

[11] PPG2 green belts (1995).
[12] Ibid., paragraph 1.5.

for the appeal site were to provide access to the countryside for the urban population, opportunities for outdoor recreation near urban areas, to retain attractive landscapes and enhance landscapes near urban areas, to secure nature conservation interest and to retain land in agricultural use[13]. The purposes of including land in green belts are of paramount importance so as to ensure their continued protection and should take precedence over other land use objectives[14].

51. There is a general presumption against inappropriate development within a green belt and such development is, by definition, harmful to the green belt. Inappropriate development is any development except that defined as not being inappropriate. Such development should not be approved save in very special circumstances. PPG2 defines how an application for inappropriate development should be approached as follows:

> "3.2 Inappropriate development is, by definition, harmful to the green belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the green belt when considering any planning application or appeal concerning such development."

The applicant's and the Secretary of State's[15] hearing statement referred to this policy and to the other relevant green belt and SGDC policies.

52. **Only possible site.** The applicant, when submitting an application, did not have to show that there was an absence of alternative sites in order to gain consent unless, amongst other factors, his proposal would otherwise cause harm or conflict with policy to a degree which would justify refusal and it was argued on his behalf that there were reasons why a site had to be found to accommodate the use he proposed. In such a case, the absence of an alternative site might be considered by the decision-maker to outweigh the harm done. This approach was clearly set out by Judge Gilbart QC in *McCarthy and another v Secretary of State for Communities and Local Government*[16]. As the judge pointed out:

> "16. Plainly the greater the harmful effects, or the more serious the breach of policy, the harder the applicant will have to work to show that there is no realistic alternative, … Thus it is, at the top end of the scale, in the case of proposed inappropriate development in green belt the evidential and persuasive burden on the applicant is very substantial."

53. **Very special circumstances.** It was always open to a decision-maker considering an application for green belt development to grant permission in an exceptional case on the grounds that there were very special compassionate circumstances to justify a departure from green belt development. Thus, in *South Bucks DC v Porter (No 2)*[17], an inspector granted a gypsy planning permission that was personal to her for the retention of her mobile home on a green belt site on the grounds of her chronic ill health, her status as a gypsy and a lack of alternative sites in the area notwithstanding her unlawful occupation of the site for many years and her persistent breaches of planning control. The inspector's conclusion that that applicant's personal hardship amounted to very special circumstances was upheld by the House of Lords without the need for any reference to article 8. This exceptional case was dealt with under the prevailing green belt policy.

54. **Inspector's decision as to very special circumstances.** In this case, the inspector's decision was to the effect that the applicant's application amounted to an attempted re-siting of his mobile home so that it was located deeper into the site in what was intended to be a less obtrusive location. Since the existing development was unlawful, the proposed development was accepted by the applicant's representative and the inspector as being a new development and not a replacement development in the green belt so that the existing development would have to be removed if the application succeeded. The inspector concluded that the scheme would reduce the openness of the green belt and that that reduction would be intensified by the likelihood that the applicant would erect a 2m high fence around the living quarters, the patio and the other associated paraphernalia. She also concluded that there was no realistic possibility of planting a small copse to mask the development.

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13 Ibid., paragraph 1.6.
14 Ibid., paragraph 1.7.
15 Presented in the form of SGDC's planning officer's report for the hearing.
16 [2006] EWHC 3287 (Admin) at paragraphs 15 – 16.
17 [2004] 1 WLR, 1953, [2004] UKHL 33, HL(E).

55. The decision then considered whether the applicant's circumstances amounted to very special circumstances given his ill-health and the need for his son to return to live with his biological mother if they were forced off the appeal site. The inspector found that there was no evidence to indicate that the appeal site was the only place that the applicant could lead the outdoor life and, taking that into consideration with the applicant's failure to take any steps to find another site and the support he received from his wife and others, she concluded that his hardship did not amount to very special circumstances.

(2) **Article 8**

56. **General.** Article 8 of the ECHR provides as follows:

> "8(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

57. These rights are directly enforceable against public authorities by section 6 of the HRA which provides that it is unlawful for a public authority to act in a way which is incompatible with a European Convention of Human Rights ("Convention") right. The term "public authority" is not defined by the HRA but, as an appointee of the Secretary of State to determine the appeal, the inspector was clearly acting in that capacity. She therefore had a statutory duty to consider all relevant article 8 rights of anybody directly affected by her decision on the appeal whether or not she was asked to do so.

58. Article 8 is intended to protect individuals from arbitrary interference by the state. This protection is given effect to by article 8(1) that imposes an obligation on a public authority to promote respect for family life and the home. A public authority must, therefore, equip itself or herself with sufficient information about the proposed interference and then carry out a decision-making process which balances the article 8 rights and interests of the applicant with those of the community if article 8 is engaged by the decision. The decision-maker is permitted a wide margin of appreciation, or discretion to use the more familiar common law concept, in deciding whether the proposed interference is justified by planning policy considerations. That is why great importance is placed on the quality of the assessment process that is required when article 8 is engaged to determine whether or not that interference is proportionate.

59. An article 8 proportionality assessment is not the same as a consideration of whether the personal circumstances of the applicant amount to very special circumstances. A proportionality assessment must consider a wider range of circumstances, the decision must balance all relevant circumstances in the round and the onus is placed on the decision-maker, taking reasonable steps, to identify the circumstances that should be considered. By way of comparison, consideration of very special circumstances in a PPG green belt context is more confined in scope. These may be considered piecemeal in a less structured decision-making process. Moreover, the onus of demonstrating the existence of the relevant very special circumstances, such as that there is no other site available, is placed on the applicant.

60. In practice, it will usually only be necessary to undertake an article 8 proportionality assessment in cases involving green belt development decisions where a person's article 8 rights are engaged, In such a case, a finding that the circumstances are such that the proposed refusal decision is disproportionate will almost inevitably be one that also amounts to a finding that the circumstances are very special.

61. **Home.** In the context of article 8, a home is a reference to anywhere that can reasonably be regarded as the relevant person's home and a person such as the applicant's wife can have more than one home that is protected, in the applicant's wife's case, for example, her relevant homes at the time of the hearing might well have been considered to be both her sister's home and the mobile home on the appeal site.

62. **Family life.** In the context of article 8, a family life is a reference to those matters that are essential in order to enjoy a family relationship. Thus, enforced separation from other family members, support and assistance provided by a family member to other family members, particularly to children of the family, and an ability to associate freely with other family members are protected by article 8 and any interference with them must not be disproportionate.

63. "Family life" is not confined to nuclear families but incorporates other forms of relationship including unmarried couples, step and adopted children and close relatives of a family member. The existence of "family life" depends on the nature of the relationship and not on its legal status. It is, therefore, a question of fact which

must be considered by the decision-maker as part of the consideration of whether a particular decision will interfere with family life. In this case, the applicant, his wife and son are clearly leading a family life together and it would be a question of fact, which was not investigated by the inspector, whether the applicant's sister-in-law also formed part of the family life being lived by these three family members.

64. **Unlawful use of home - general.** The applicant moved his mobile home onto the appeal site unlawfully, was served with enforcement notices requiring him to cease that use, had been prosecuted for non-compliance with those notices and, as the inspector found, had done nothing since being served with them to comply with them or look for an alternative site for his mobile home. The chronology was that the two stop orders and four enforcement notices had been served on various dates between 11 July 2006 and 4 September 2006, the decision dismissing the applicant's appeals against the enforcement notices was dated 11 July 2007 and the inspector's appeal decision relating to the applicant's planning application was dated 19 November 2010. Thus, the applicant and his son had been living unlawfully on land he had an interest in for 4½ years, had been living there for 4 years after being served with enforcement notices and for 3¼ years after the dismissal of the appeal against those notices.

65. **Initial use unlawful.** On behalf of SGDC, it was submitted that the applicant's use of his mobile home was not protected by article 8 because its use was unlawful when it started and it remained unlawful until the present day. However, the test for deciding whether article 8 was engaged in this case was not whether the applicant's use of the mobile home as a home was lawful but whether he had, as a matter of fact, been using it as a home. He had to show that the nature, length of time and degree of permanence of his and his son's occupation was sufficient for the mobile home to have become their home. Since they had been living in the mobile home on the appeal site for 4½ years, had nowhere else to live and regarded the mobile home as their home, it was clearly their home throughout the time that they have been living on the site.

66. The applicant's situation was similar to that of the applicant in *Buckley v UK*[18]. In that case, the ECHR held that, although the applicant had sited her mobile home without planning permission on her own land, it was nonetheless her home since she had lived there for a number of years and had no residence or intended residence elsewhere. In this case, the inspector did not address the question of whether the mobile home was also one of the wife's homes but since she visited it every day to lead a family life with her husband and step-son, stayed over on a regular basis, owned the site and had a matrimonial interest in the mobile home, it would appear that it was one of her homes and therefore her interest in it was also protected by article 8.

67. **Unlawful continuation of use.** The next question is whether the applicant can still rely on article 8 even though his unlawful use had been enforced against and he had ignored the relevant notices such that he had been convicted for his non-compliance. This question can only be answered by recourse to the protection provided by article 8(1) which was that the inspector to show "respect for the applicant's family life and his home"[19]. This meant that SGDC could not remove the applicant and his son from their home or refuse a planning application to site their mobile home on the appeal site without first considering whether that decision would cause them disproportionate interference with their family life and their home. A decision which failed to consider that question where it was clear that article 8 rights might be affected it could not reasonably be relied on subsequently to enable SGDC and the inspector to take action which would undermine the applicant's family and home rights.

68. It follows that earlier adverse decisions could only undermine the applicant's reliance on article 8 if SGDC could satisfy the inspector that it had paid due respect to his home and family life in taking those decisions, that those decisions were proportionate and that any delay in enforcing them or any change in his and his son's circumstances had not undermined his article 8 rights.

69. This approach is in accord with the speech of Lord Brown in *South Bucks DC v Porter (No 2)*[20] where he stated that the unlawful use that was without planning permission was capable of being a material consideration in circumstances where the occupier sought to rely on the fact of continuing use and the long period of residence[21]. That particular occupier's unlawful occupation had persisted for many years despite enforcement proceedings and non-compliance that could properly be described as criminal. However, she did not rely on the fact or length of her residence as an element of her hardship claim so that her unlawful occupation of the site was of little or any materiality to the grant or refusal of her application for planning permission based on her hardship of a kind which

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18 (1996) 23 EHRR 101 at paragraph 54, ECHR.

19 The appropriate words of article 8(1).

20 [2004] 1 WLR 1953, HL(E).

21 The applicant's application for planning permission was considered on the basis that the claimant's compassionate circumstances, being his chronic ill-health and other personal circumstances, amounted to a very special reason so as to justify planning permission.

the inspector found as amounting to very special circumstances. There was no reference in the speech to article 8 but the principle explained by Lord Brown would be equally applicable to an article 8 proportionality assessment.

70. **Failure to look for alternative sites.** Had the only consideration been whether or not the applicant's situation amounted to very special circumstances, the applicant's failure to look for other sites might well have resulted in a finding that no very special circumstances existed albeit that the applicant was maintaining that there were no alternative sites suitable for the combined needs of him and his wife and son and there were no suitable alternative sites anywhere in SGDC's planning area. However, it is not necessarily fatal that an alternative site had not been looked for in a PPG green belt development case albeit that it would be very unlikely that a decision-maker would find that there were very special circumstances present.

71. However, in this case, the inspector had to undertake a proportionality assessment which involved an inclusive assessment of all relevant circumstances and required her to identify those circumstances and then be satisfied, following an inquisitorial hearing, that the proposed decision was proportionate. Furthermore, SGDC did not provide any evidence to show that alternative sites were available or attempt to advise the applicant of where he might find one. Moreover, the applicant gave evidence that there were no suitable sites available anywhere and the inspector merely found that "there is no evidence to indicate that this site and this site alone is the only place that the applicant could lead the outdoor-life that he desires".

72. There was, however, evidence which the inspector did not make findings about, that no other suitable site was available for the applicant and his family's wide range of requirements. These needs included his need for an outdoor-life and a home located in a secluded spot, his fear of enclosure, his and his son's need for the care and support provided by his wife, his need for a family life with his wife, the needs of his son including a family life with his step-mother, the needs of his sister-in-law which required the presence of the applicant's wife at the sister-in-law's home on a permanent basis to care for her, the applicant's illiteracy, mental health, personality and physical problems and his inability to afford to buy or to rent somewhere else to pitch his mobile home.

73. **Conclusion.** The unlawful use of the site, the enforcement measures that had been taken and ignored, the lack of evidence that the applicant had looked for alternative sites and the suggestion that this was not the only site which he could live on were not reasons why article 8 was not engaged, a proportionality assessment was not needed or a disproportionality finding could not be made. All of the matters relating to historical unlawfulness or lack of attempts to relocate matters referred to by the inspector and the submissions made on behalf of the Secretary of State could, of course be weighed up in the proportionality assessment as considerations telling against the grant of permission but, on the facts of this case, these considerations did not weigh heavily or at all against the grant of permission or a finding of disproportionality.

(3) **The son's article 8 rights**

74. The applicant is claiming article 8 protection for his son to live a family life with him and his step-mother and for his wife to live a family life with him and his son in his home on the appeal site. This claim gives rise to two questions: (a) whether he is entitled to rely on his son's and his wife's article 8 claims on their behalf as part of his appeal to the inspector and (b) the nature of their claims.

75. **The applicant's entitlement to rely on the son's article 8 claim.** The question of how a family member's article 8 rights that are potentially affected by a decision or other action of a public authority can be protected when that family member is not a party to the relevant application or appeal was resolved by the decision of the House of Lords in *Beoku-Betts v Secretary of State for the Home Department*[22]. Lord Brown delivered the principle speech in which he concluded that the decision-maker, in this case the inspector, had to take account of the article 8 rights of any family member whose article 8 rights might be interfered with by the proposed decision. The relevant passages of Lord Brown's speech are as follows[23]:

> "*The rival arguments*
>
> 20. (a) The appellant's case

[22] [2008] UKHL 39, HL(E).

[23] The words in bracketed italics have been added as alternatives for the words in the original speech so that references to the immigration appeal process in Lord Brown's speech which are underlined and which related to an immigration appeal can be seen to be of general application and are clearly referable to the planning appeal process even though they refer to and are given in the context of an immigration decision.

The appellant submits that the legislation allows, indeed requires, the appellate authorities, in determining whether the appellant's article 8 rights have been breached, to take into account the effect of his proposed removal upon all the members of his family unit. Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims.

21. In making her initial decision on removal *[planning permission]* the Secretary of State *[and the inspector appointed by him and, if the decision is being taken by the planning authority, that planning authority]* must necessarily have regard to the article 8 rights of each and all of the family members. So too the European Court of Human Rights on a complaint by the family of an article 8 violation by the United Kingdom's removal of a family member would look at the overall impact on family life. So too, therefore, should the immigration appeal authorities *[the Secretary of State and the Administrative Court]* consider the matter on appeal *[on an application relating to an appeal]*. Otherwise, other family members would have no alternative but to bring separate proceedings under section 7 of the Human Rights Act 1998, parallel or sequential to the section 65 appeal *[original application, the section 78 appeal and the section 288 application]*.

…

The Strasbourg case law

37. Plainly the present issue could not arise on a Strasbourg application: as Sedley LJ pointed out in *AB (Jamaica)*[24], from Strasbourg's point of view the husband's Convention rights were as fully engaged as the wife's. Time and again the Strasbourg case law emphasises the crucial importance of family life.

38. *Sezen v Netherlands*[25] is a case in point. Noting that the case concerned "a functioning family unit where the parents and children are living together", paragraph 49 of the judgment continued:

> "The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by article 8 of the Convention and that to split up a family is an interference of a very serious order. Having regard to its finding . . . that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same [as when a 10 year exclusion order remained in force] as long as the first applicant continues to be denied the right to reside in the Netherlands."

39. True, unlike *Sezen*, the present case is not concerned with young children. But the dependency between the appellant and his mother here clearly engages article 8. As the Court stated in *Mokrani v France*[26]:

> "[R]elationships between adults do not necessarily benefit from protection under article 8 of the Convention unless the existence of additional elements of dependence, other than normal emotional ties, can be proven."

On the adjudicator's findings of fact, such additional elements of dependence can properly be said to exist in the present case.

40. All of this, moreover, is entirely consistent with the approach taken by the House in *Huang v Secretary of State for the Home Department*[27]:

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24 [2007] EWCA Civ 1302, CA.
25 (2006) 43 EHRR 30, ECHR.
26 (2003) 40 EHRR 123, ECHR at paragraph 33.
27 [2007] 2 AC 167, HL (E), at page 186.

> "[T]he main importance of the [Strasbourg] case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant."

Conclusions

41. Whilst it is no doubt true that only infrequently will the present issue affect the outcome of an appeal, clearly on occasion it will and in any event that could provide no reason for maintaining the present narrow approach if it is wrong—indeed, quite the contrary.

42. Ouseley J in ***AC*'s** case[28] envisaged as a disadvantage of the wider construction that the appellant might make claims relating to other family members which they might not agree with. To my mind the risk of this is small: generally the appellant would be advised to adduce signed statements from other affected family members if not indeed to call them. The greater risk surely arises upon the narrower construction: if the impact of removal on other family members is relevant only in so far as it causes the appellant distress and anxiety, that puts a premium on the appellant exaggerating his feelings.

43. The disadvantages of the narrow approach are manifest. What could be less convenient than to have the appellant's article 8 rights taken into account in one proceeding (the section 65 *[78 appeal or the section 288 application]*), other family members' rights in another (a separate claim under section 7 of the Human Rights Act)? Is it not somewhat unlikely that the very legislation which introduced "One-stop" appeals—the shoulder note to section 77 of the 1999 Act—should have intended the narrow approach to section 65?[29] Surely Parliament was attempting to streamline and simplify proceedings. And would it not be strange too that the Secretary of State (and the Strasbourg Court) should have to approach the appellant's article 8 claim to remain on one basis, the appellate authorities on another? Unless driven by the clearest statutory language to that conclusion, I would not adopt it. And here the language seems to be far from decisive. Once it is recognised that, as recorded in the eventual consent order in *AC's* case, "there is only one family life", and that, assuming the appellant's proposed removal would be disproportionate looking at the family unit as a whole, then each affected family member is to be regarded as a victim, section 65 *[sections 78 and 288]* seem comfortably to accommodate the wider construction.

44. I would accordingly adopt the wider construction to section 65 *[sections 78 and 288]* contended for by the appellant, and, in the result allow the appeal …."

76. Baroness Hale added this pithy summary of this decision in her short speech of assent:

> "4. I am in full agreement with the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood and for the reasons he gives I too would allow this appeal and reinstate the adjudicator's decision in the appellant's favour. To insist that an appeal to the Asylum and Immigration Tribunal *[Secretary of State]* considers only the effect upon other family members as it affects the appellant, and that a judicial review brought by other family members considers only the effect upon the appellant as it affects them, is not only artificial and impracticable. It also risks missing the central point about family life, which is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed."

77. I have added to the extracts from both Lord Brown and Baroness Hale's speeches so that they refer directly to the planning appeal process in addition to the immigration appeal process[30] that the case was concerned with. I

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28 [2004] Imm. AR 573.

29 This passage is only applicable for immigration appeals.

30 See footnote 23 above.

have done so to show that the decision and its reasoning is directly applicable to section 78 TCPA appeals. As Lord Brown's speech makes clear, a public authority taking a decision that affects a person's home or family life is required to give effect to that applicant's article 8 rights. Thus, a public authority making a planning decision of that kind must take account of affected individual's article 8 rights in exactly the same way and for exactly the same reasons as an appeal tribunal is required to give effect to an applicant's rights in the immigration field.

78. Miss Busch, who appeared for the Secretary of State, submitted that article 8 rights were not the concern of an inspector when deciding a planning appeal or, at best, were not matters which undue regard had to be paid to. She submitted that the extent to which such rights had to be taken account of depended on the type of decision that was being taken and that an immigration decision was one which had to pay due regard to the article 8 rights of affected parties whereas a planning decision was different and either did not engage article 8 or only did so in some unspecified lesser manner.

79. I do not accept Miss Busch's submission. Article 8 is capable of being engaged by a planning appeal or an enforcement notice decision or appeal or by any other decision or action of a public authority if and to the extent that any of these decisions or actions could result in the interference with a person's home or family life. Miss Busch's submission is correct in suggesting that each case must be decided on its own facts and that the application of article 8 involves a consideration that is fact sensitive and which must be decided on a case by case basis. However, she is not correct in suggesting that the nature or intensity of its application varies depending on the subject-matter of the decision. Every public authority is required to give effect to the Convention rights of anyone affected by that public authority's decisions or actions regardless of the sphere of activity affected. Each case that involves the potential for interfering with a person's Convention rights requires an appropriate proportionality assessment to be undertaken so that the intensity of scrutiny will vary from case to case but not from subject-matter to subject-matter. The only gloss that I would put on that general principle is that since planning decisions are usually dependent on the application of planning policies to decisions that do not engage Convention rights, a planning case only very infrequently requires a proportionality assessment and even more infrequently a finding that the proposed decision would amount to disproportionate interference with article 8 rights..

80. **The nature of the son's article 8 claim.** The article 8 rights of children inevitably require greater consideration and protection than those of most adults given their vulnerability and dependency and their many and varied social, health, education and welfare needs. The jurisprudence of the European Court of Human Rights has always recognised that the Convention provides greater and more intense protection for children than for adults and that the needs of children vary and alter as they are growing up and maturing.

81. Four milestones along this route of the development of Convention protection for children should be briefly mentioned:

(1) In 1989, the *United Nations Convention on the Rights of the Child*, which the United Kingdom is a signatory to, came into force. This international Convention built on earlier work in both the United Nations and the European Union and it contains Article 3 which provides that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

(2) In 2004, the *Children Act 2004* was enacted and section 11 gives effect in England and Wales to the United Kingdom's obligations provided for in Article 3 of the UNCRC. This provides, in what is for this case its most material of its provision, that:

> "**Arrangements to safeguard and promote welfare**
>
> 11(1) This section applies to each of the following—
>
> (a) a local authority in England;
> (b) a district council which is not such an authority; ...
>
> (2) Each person and body to whom this section applies must make arrangements for ensuring that—
>
> (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; … ."

In principle, this duty extends to all sections and departments of SGDC including its planning department when undertaking planning functions such as granting planning permissions and issuing stop orders and enforcement notices.

(3) In 2010, in *Neulinger v Switzerland*[31], the ECHR observed that:

> "…the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken … of 'any relevant rules of international law applicable in the relations between the parties' and in particular the rules concerning the international protection of human rights."

(4) In 2011, in *ZH (Tanzania) v Secretary of State for the Home Department*[32], the Supreme Court, applied the principles extracted from the earlier developments that I have listed as well as from other developments in international, domestic and Commonwealth jurisprudence and from general principles now applicable to the application of article 8. In doing so, it held that when a public authority in England and Wales is undertaking a proportionality assessment under article 8 in relation to a child, that child's best interests must be a primary consideration and that, in discovering what those interests are, the public authority must ask the right questions of the right people and must additionally give the views of the child due weight in accordance with the age and maturity of that child having, where possible, given consideration to hearing directly from him or her. It is clear from this decision, if it had not been clear previously, that the duty to give the best interests of the child a primary consideration and to consult the child as appropriate extends to every function undertaken by a public authority which engages a child's article 8 rights and which involves a proportionality assessment in relation to that child.

82. These inter-related duties are confirmed by the judgment of Baroness Hale. These extracts from her judgment confirm this with great clarity:

> "25. Further, it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as "a primary consideration". Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration". …
>
> …This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first. That seems, with respect, to be the correct approach to these decisions in this country as well as in Australia."
>
> "34. Acknowledging that the best interests of the child must be a primary consideration in these cases immediately raises the question of how these are to be discovered. An important part of this is discovering the child's own views. Article 12 of UNCRC provides:
>
> > "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> >
> > 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."
>
> … In most cases, however, it will be possible to obtain the necessary information about the child's welfare and views in other ways [than by separate representation]. …
>
> 36. The important thing is that those conducting and deciding these cases should be alive to the point and prepared to ask the right questions. …

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31 (2010) 28 BHRC 706, ECHR, paragraph 131.
32 [2011] UKSC 4, SC.

> 37. In this case, the mother's representatives did obtain a letter from the children's school and a report from a youth worker in the Refugee and Migrant Forum of East London (Ramfel), which runs a Children's Participation Forum and other activities in which the children had taken part. But the … authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so. While their interests may be the same as their parents' this should not be taken for granted in every case.
> …
> Children can sometimes surprise one."

(4) **The applicant's wife's article 8 rights**

83. The applicant's wife also has article 8 rights that were engaged by the inspector's decision and the applicant has the right to make her claim part of his own article 8 claim. The wife is the owner of the site and she was enjoying a family life with her husband and step-son in the mobile home during her daily visits and periodic sleep-overs there. The applicant can rely on his family life with his wife as part of his article 8 claim, particularly given the considerable support and care that she has given him and her step-son since she married the applicant and her step-son was born. Equally, he can rely on her right to her family life with him and his son and to her home in the mobile home in similar way to his reliance on his son's article 8 rights.

(5) **The applicant's sister-in-law's article 8 rights**

84. The applicant's sister-in-law, given her chronic disabilities and her almost complete reliance on her sister for care and support, has rights of both a family and private nature that are potentially engaged by the inspector's decision. The applicant was entitled to rely on the interference or potential interference with these rights as well as the other interferences that he was entitled to rely on.

(6) **The son's biological mother's article 8 rights**

85. The son's biological mother's rights to share a family life with her son were not, on the available facts of this case, engaged.

(7) **The article 8 structured proportionality decision**

86. It was always clear that the planning application to SGDC and the subsequent appeal would engage article 8 for the applicant and his three family members. When the inspector conducted the hearing and then considered her decision, she should have first considered it as if it was a decision arising out of a green belt planning application that involved the unlawful use of a mobile home. She should then have decided whether her potential decision engaged article 8 and if it did, she should then have conducted a proportionality assessment. Finally, she should have fitted her assessment decision into her provisional decision as a very special reason for allowing the appeal and granting permission if, but only if, she considered that the applicant and his family's article 8 rights should prevail over the public interest in upholding green belt planning controls.

87. This approach to the inspector's decision in this case accords with *R (Samoo) v Secretary of State for the Home Department*[33] and *Lough v First Secretary of State*[34]. In *Lough*, Pill LJ stated that, in conducting the balancing or proportionality exercise, the competing interests of the individual, other individuals and the community as a whole had to be considered and that a planning authority, or in this case the inspector on behalf of the Secretary of State, was granted a certain margin of appreciation, which might be a wide margin when implementing planning policies were concerned, in determining the steps to be taken to ensure compliance with article 8[35].

88. Lord Bingham in his speech in the House of Lords in *Razgar v Secretary of State for the Home Department*[36] set out the approach that should be adopted by a public authority decision-maker when reaching a decision that potentially engaged a person's article 8 rights. The case involved an immigration appeal decision in an immigration case but the case is applicable generally to all public authority decisions as can be seen by this

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33 (2001) UKHRR 1150, CA.
34 [2004] 1 WLR 2557, CA.
35 At paragraph 43.
36 [2004] UKHL 27, HL(E).
16 (1993) 19 EHRR 112, ECHR.

extract from Lord Bingham's speech which I have interpolated to show how his references to the immigration process are equally applicable to the planning appeal process[37]:

> "17. In considering whether a challenge to the Secretary of State's decision to remove a person *[refuse planning permission]* must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator *[inspector]*, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator *[inspector]*. In a case where removal is resisted *[refusal of permission and consequent removal from the appeal site]* is resisted in reliance on article 8, these questions are likely to be:
>
> (1) Will the proposed removal *[refusal of permission]* be interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life *[or home]*?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (2) If so, is such interference proportionate to the legitimate public end sought to be achieved?
>
> 18. If the reviewing court is satisfied in any case, on consideration of all the materials which are before it and would be before an adjudicator *[inspector]* that the answer to question (1) clearly would or should be negative, there can be no ground at all for challenging the certificate of the Secretary of State *[decision to refuse permission]* of the adjudicator *[inspector by way of an application to the Administrative Court]*. Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention: see, for example, *Costello-Roberts v United Kingdom*[38]. If the reviewing court is satisfied that the answer to this question clearly would or should be negative, there can again be no ground for challenging the certificate *[refusal]*. If question (3) is reached, it is likely to permit of an affirmative answer only.
>
> 19. Where removal *[refusal of permission]* is proposed in pursuance of a lawful immigration *[planning]* policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens *[such matters as the control of development in the green belt]* is recognised in the Strasbourg jurisprudence … and implementation of a firm and orderly immigration *[planning]* policy is an important function of government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator *[inspector]* answering this question other than affirmatively.
>
> 20. The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. *[The inspector must make her own assessment at the first section 78 appeal stage ... The Administrative Court dealing with an application under section 288 of the TCPA]* must assess the judgment *[decision]* which would or might be made by an adjudicator *[inspector on appeal]*. …

[37] I have underlined the passages that are particularly linked to the immigration appeal process and have then added in italicised brackets the corresponding equivalent reference to the planning appeal process. See, further, footnote 23 above.

[38] (1993) 19 ECHH 112 (ECHR).

> 21. … Decisions taken pursuant to the lawful operation of immigration *[planning]* control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."

89. In the present application, there was no dispute, and it is in any event clear, that the first, second and fourth stages in Lord Bingham's check list should be answered in the affirmative. This application is concerned the fifth stage which has meant that it has not additionally been concerned with the third stage[39]. I will set out the relevance of each stage to the inspector's decision.

90. **Stage (1).** The inspector's dismissal of the applicant's appeal against the non-determination of his planning application amounted to an interference with his family life and home by a public authority. This can readily be seen from the previous planning history of the appeal site. The inspector's decision was the second refusal of planning permission for the use of a mobile home on the appeal site. The second application for permission had been made on the basis that the presently unlawfully sited mobile home and associated paraphernalia would be removed and the proposed development located on a different and, it was claimed, more suitable pitch on the appeal site.

91. There had previously been two stop orders and four enforcement notices which cumulatively required the applicant's existing unlawful residential use to cease and the mobile home and associated paraphernalia to be removed from the site. The four enforcement notices had been the subject of a consolidated appeal[40] and those appeals had been dismissed. There had also been a successful criminal prosecution in relation to the applicant's non-compliance with the enforcement notices and he had pleaded guilty and had been sentenced to a conditionally discharge.

92. It followed that SGDC would take removal action to enforce the enforcement notices that had taken effect 3 years previously as soon as the applicant's planning application was refused and both he and his son and their mobile home would be removed from the appeal site. In those circumstances, the inspector's refusal decision would inevitably interfere with the exercise of the applicant's and his wife's and son's enjoyment of their family life and their mobile home and would possibly interfere with the applicant's sister-in-law's exercise of her family and private life.

93. **Stage (2).** It is obvious that the applicant's and his son's removal from the site would have grave consequences for both of them that would involve a grave interference with their article 8 rights. This would involve the loss of their home on the site, the unlikelihood of finding another suitable site for their mobile home, the possible need for them move to an unsuitable site, their possible homelessness and the possible splitting up of the applicant from his son and the consequent loss of his son's family life with both his father and step-mother. In short, article 8 would undoubtedly be engaged in this case.

94. **Stage (3).** The interference with the applicant's and his son's article 8 rights would possibly have been in accordance with the law since the refusal decision would be seen to have resulted from a valid exercise by the inspector of her discretion to decide that the application for the proposed development should be refused. This decision would have been based on an apparently unchallengeable decision that the development was harmful green belt development and there were no very special circumstances that would enable it to proceed notwithstanding its green belt location. This would have been a decision that conformed to the Secretary of State's well-publicised policy relating to green belt development which was clearly lawful and in the public interest.

95. However, the inspector's discretionary decision that the applicant's hardship resulting from his mental health and other problems did not amount to a very special reason so as to result in his planning application succeeding on compassionate grounds could well have been one which was not in accordance with the law because the inspector's consideration of the applicant's mental, psychological and physical health problems was inadequate and possibly *Wednesbury* unreasonable[41]. These errors might well have been challengeable under the second limb of section 288 but, given the limitations of such a challenge[42], it was not inevitable that such a challenge would succeed. However, I have not had to consider that difficult issue since the applicant's principal challenge has been brought against the inspector's article 8 proportionality assessment.

96. Logically, I should only embark on a consideration of whether the inspector's proportionality assessment was correctly carried out if I had first decided that the inspector's very special circumstances decision was in

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39 See paragraphs 99 - 100 below.
40 Presumably under section 174 of the TCPA.
41 See paragraph 41 below.
42 See paragraphs 116 - 120 below.

accordance with the law. If that decision was *Wednesbury* unreasonable, her decision would be set aside without there being any need to consider whether the decision was proportionate. However, since it is unlikely that her decision was irrational despite its misuse of the psychiatric evidence, and since the applicant's challenge was concentrated on challenging the inspector's article 8 decision, I will adopt the same course and move straight to a consideration of her proportionality assessment.

97. **Stage (4).** The interference created by the refusal of planning permission is necessary since it is of the kind referred to by Lord Bingham as amounting to: (1) the regulation of land use that is recognised as falling within the ambit of permissible restrictive activities that may be performed by Sovereign States and (2) development control measures that are recognised as an important function of Government. Moreover, the inspector did not decide to apply green belt policies for any reason of bad faith, ulterior motive or deliberate abuse of power.

98. **Stage (5)**. Since the applicant's article 8 rights were engaged, the inspector's proposed decision had to be subjected to a proportionality assessment. There is no express reference in the Convention to the principle of proportionality. However, the ECHR has consistently held that this principle is inherent in the application of Convention rights so that the right to respect for a family life and a home are inherently rights which are subject to considerations of proportionality. It follows that the inspector was required to undertake the balancing or proportionality exercise required by article 8(2) that is referred to as stage (5) in the Bingham checklist.

99. **The proportionality assessment.** The structured proportionality assessment or balancing exercise required by stage (5) involved:

> (1) The identification of all relevant considerations relating to the applicant's, his wife's, his son's and his sister-in-law's exercise of their respective rights of enjoyment of a family life and a home. This would involve an appropriate factual inquiry into those considerations where the factual background was not clear and obvious;
>
> (2) The identification of what the best interests of the applicant's son were by an appropriate process of identification which included, where possible, the ascertainment and consideration of the son's own wishes and views as to his best interests;
>
> (3) The identification of the particular public or community interests that had to be balanced against the applicant's and his family's various interests; and
>
> (4) A structured weighing up and balancing of all these interests. This balancing exercise should involve a consideration of the son's best interests first and it should strike a fair balance between the rights of the four individuals concerned and the interests of the community.

100. The decision-making process would only identify disproportionate consequences resulting from a refusal decision if this fact sensitive case was one of a small minority of exceptional cases that required the inspector to give effect to section 6 of the HRA by a careful examination and weighing up of all relevant facts.

(8) **The Hearings Rules**

101. **The Hearings Rules.** The Secretary of State, since 2000, has had the option to direct that a section 78 appeal should be conducted by way of a hearing which is a procedure that is a half-way house between the written representations procedure and a full inquiry. Criteria have been published which identify when it appropriate to direct a hearing[43]. The relevant criteria are that: there is no need for evidence to be tested by formal cross-examination, the issues are straightforward and do not require legal or other submissions to be made and the applicant should be able to present his or her own case although he or she may choose to be represented. Furthermore, the case should be one that is unlikely to take more than one day to be heard. A hearing would, if it was appropriate, be of particular benefit for this applicant since he had limited means and could not afford legal representation and was therefore relying on a non-lawyer planning consultant to act for him at the hearing

102. There is no challenge to the decision to hold a hearing although, as it has turned out, the appeal might be thought to have needed both cross-examination and legal and other submissions.

103. **Applicable procedural rules.** The hearing procedure required the applicant to submit a hearing statement and the second respondent to submit comments on that hearing statement. Either of the parties could have informed the Secretary of State before the hearing or the inspector at the hearing that a hearings procedure

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[43] Annexe C of procedural guidance published by the Planning Inspectorate entitled "*Planning appeals and called-in applications"*(PINS01/2009) with further information about the application of the criteria in PINS Good Practice Advice Note 01/2009.

was inappropriate and the Secretary of State or the inspector could then have decided in consultation with the parties whether an inquiry should be held instead. Similarly, the inspector could herself have decided at the hearing, in consultation with the parties, that an inquiry should be held instead of a hearing and have adjourned the hearing to be restarted as an inquiry.

104. At the hearing, the following relevant provisions applied to this appeal:

(1) The hearing should take the form of a discussion led by the inspector at which cross-examination would not be permitted unless the inspector thought that it was necessary to ensure a thorough examination of the main issues;

(2) At the start of the hearing, the inspector should identify the main issues, that in her opinion arose;

(3) The calling of evidence was at the inspector's discretion; and

(4) The inspector could refuse to hear (but not receive in written form) what she considered to be relevant or repetitious evidence[44].

105. **Inquisitorial nature of the hearing.** These Hearing Rules gave the inspector a significant role in deciding what was raised for discussion and how the necessary facts, issues and law arising for consideration should be dealt with. She had to identify the main issues which needed to be decided and had to identify for discussion any issues of that kind even if they had not been identified or raised in the hearing statement. She then had to lead the discussion which had to explore all the issues that she had identified without the benefit of cross-examination of any witness unless she considered this was necessary to enable there to be a thorough examination of these issues. In other words, the inspector had to act inquisitorially and had to make sure that all the main issues were discussed and, by exercising her discretion about the evidence that was called, also had to make sure that all the evidence that was needed to discuss the main issues was also identified and then obtained if the parties had not produced it already.

106. In summary, therefore the inspector during the discussion that she has to conduct at the hearing has the responsibility to bring out such evidence as is required in order for her to decide the main issues that she has identified. That requires her, if necessary, to give the parties an opportunity to introduce evidence or documents or other information into the hearing which had not previously been referred to, to obtain and adduce any relevant or significant evidence, to permit cross-examination of all those present or of a particular witness or witnesses or, in an extreme case, to abandon the hearing so as to allow the appeal to be determined as an inquiry. The inspector's overriding objective is to conduct the hearing fairly, expeditiously and economically so as to determine the appeal in a single hearing lasting no more than about one day having addressed the main issues and given the applicant and the planning authority a reasonable opportunity of explaining their respective points of view in a non-technical environment.

107. It follows from this that the inspector was required to take an active part in the formulation of the agenda or list of the main issues she had to decide and in the decision of what material should be brought out, discussed and considered to enable her to decide them. Her role required her to lead the discussion, decide in her discretion what evidence should be called and take the initiative in deciding during the hearing whether, after all, cross-examination or the inquiry procedure were necessary. This inquisitorial role is one which planning inspectors and many statutory tribunals have traditionally played and it has now been given structure and coherence in the Hearings Rules which were introduced in 1990. The inquisitorial approach therefore requires the inspector to take a pro-active role and she cannot sit back and leave these procedural issues to the parties. In an extreme case in which the inspector has been unable to identify some of the main issues, bring out the relevant features of those issues or identify and call for relevant evidence, her decision will be quashed since she would not have complied with the mandatory requirements of the Hearings Rules and, as contended in this case, her mandatory duty not to interfere with the appellant's and his family's right for respect for their family life and their home.

108. **Secretary of State's submissions.** It was submitted on behalf of the Secretary of State that the highly relevant decisions of *Beoku-Betts* and *ZH (Tanzania)*45 and the need for the inspector to consider the article 8 rights of the applicant's wife, son and sister-in-law was not drawn to her attention and the lack of evidence about

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44 Rule 11 of the Town and Country Planning (Hearings Procedure)(England) Rules 2002, SI 2002/2684.

45 *Beoku-Betts v Secretary of State for the Home Department* and *ZH (Tanzania) v Secretary of State for the Home Department* see paragraphs 66 -68 above. Reference could, in this context also have been made to a third decision, *Razgar v Secretary of State for the Home Department* which was also an immigration case of general application to any consideration of article 8, see paragraphs 88 - 99 above and a fourth decision, *South Bucks DC v Porter (No 2)*, see paragraphs 69 above and 112 - 115 and 147 below.

significant matters was the sole responsibility of the applicant's representative. Indeed, Miss Busch submitted that the inspector could not have been expected to have searched out the various relevant decisions, issues and evidence and was not required to do so. However, given the inquisitorial and statutory duties imposed on the inspector, she was required to do so.

109. **Discussion.** The applicant had previously been unrepresented in relation to his initial planning application and the enforcement notice appeals and he was not legally represented at the hearing. He was also illiterate and without resources. In consequence, he and his lay representative were heavily dependent on the inspector to conduct the hearing in a way that enabled his appeal to be fully and fairly determined in accordance with the statutory requirements of the HRA.

110. In fairness to the applicant's lay representative and the hearing statement that he had prepared, sufficient notice of the applicant's article 8 case was provided to place SGDC and the inspector on notice that a difficult proportionality exercise involving a detailed factual investigation and a consideration of difficult psychiatric and psychological issues arose for consideration and decision. These were issues that could be brought out fully at the hearing discussion since the applicant was present with Dr Reeves and a lay representative who specialised in appearing for lay applicants in similar appeals and the Secretary of State was represented by the planning officer of SGDC who had knowledge of the application under appeal. The inspector therefore was on notice of the importance of her exercising her powers under the Hearings Rules and of her need to take the lead in identifying what had to be decided, what evidence and other materials were needed to enable the necessary proportionality assessment to take place, what should be brought out in the discussion with the applicant, his psychiatrist who had prepared two of the three psychiatric reports and the two appropriately qualified professional representatives who were present.

111. It follows that, if the inspector failed to identify and consider some of the main issues or did not identify significant gaps in the evidence needed to decide those issues, she had not properly applied the Hearing Rules to this appeal or complied with her duty to the applicant in relation to his article 8 rights. In short, she would not have complied with her duty to act in proactive manner that had arisen in this case as a result of the inter-relationship between the Hearings Rules and the mandatory requirements of the HRA that she was required to show respect for.

(9) **Duty to give reasons**.

112. The inspector's decision had to contain sufficient reasons to explain the conclusions that it reached and the evidence on which those conclusions were based. Given the informal and inquisitorial procedure that was involved and the unminuted and unrecorded discussion that the inspector had conducted during the hearing, the decision should have included a reference to the major issues that had been discussed and have summarised the salient points that had emerged during the discussion.

113. This duty and how it should be fulfilled is helpfully explained and set out in the speech of Lord Brown in *South Bucks DC v Porter (No 2)*[46] *as follows:*

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

[46] See paragraph 69 and footnote 21 above.

114. When the reasons for the decision are given following a hearing conducted by reference to the Hearing Rules or similar rules of procedure, they should, therefore, identify the main issues that the inspector had herself identified at the outset of the hearing and summarise the salient parts of the discussion that bear upon the main issues. This is because an inspector's duty to provide adequate reasons extends beyond her duty to inform the parties of how her decision was arrived at.

115. There are two further purposes for the obligation to give sufficient reasons, both of which are highly important to the parties. Firstly, the obligation is intended to provide the parties with the means of satisfying themselves that every material consideration has been taken into account in the decision-making process and that nothing that is immaterial that has nonetheless been taken into account might have led to significant error in that process. Secondly, it is a means of ensuring that the decision-maker identifies and then decides all the issues in dispute in a structured and coherent manner. The most effective way for a decision to achieve these objectives is for the decision-maker to set out her decision in writing with short but adequate reasons to explain it.

(10) Section 288 of the TCPA

116. **Relevant requirements**. The Administrative Court, when sitting as a first-tier reviewing court of a planning inspector's appeal decision pursuant to a section 288 application, may only consider the applicant's application to question the inspector's decision on either of these two grounds:

(1) That it was not within the powers of the TCPA; and

(2) That any of the relevant requirements have not been complied with in relation to that decision.

117. The basis of the application in this case is that the inspector did not comply with the requirements of the Hearings Rules, the HRA and the Secretary of State's policy with regard to temporary permissions in reaching her decision. In particular, she did not conduct an inquisitorial discussion and hearing in relation to the HRA issues as required by the relevant hearings rules and did not undertake a structured proportionality assessment as required by article 8(1). Furthermore, in relation to her consideration of a temporary permission, she did not properly consider or apply the Secretary of State's policy on *The Use of Conditions in Planning Permissions*[47].

118. **Weight to be attached to the evidence.** It was submitted by Miss Busch that the applicant's challenge to the inspector's decision amounted to a challenge that she had given inappropriate weight to particular features of the evidence, in particular to the medical evidence. That challenge was impermissible since it was clear from the well-known decision of the House of Lords in *Tesco Stores Ltd v Secretary of State*[48] that the inspector was entitled to attach such weight as she saw fit to the evidence or any part of it and, unless she rendered a perverse decision, her findings were not open to challenge.

119. It is important to consider the context in which the House of Lords concluded in *Tesco* that the weight that was to be given to a particular planning or policy consideration was a matter exclusively for the decision-maker. In the *Tesco* case, the issue concerned the decision-maker's need to have regard to a proposed planning obligation if, but only if, it was a material consideration that was relevant to the development. The challenge to the refusal of permission was that the relevant proposal that had been made was not considered by the decision-maker. The House of Lords decided that the proposed planning obligation was taken into account but it had then been decided that little weight should be placed on it. That decision as to the weight to be placed on the proposed obligation related to the application of planning policy which was a matter exclusively for the decision-maker.

120. In this case, the challenge does not, on analysis, involve planning policy but is a challenge to the manner in which the inspector undertook the proportionality assessment. It is contended on behalf of the applicant that the inspector failed to take into account material considerations which she should have taken into account and vice versa. If that challenge can be made good, the relevant decision would not be in accordance with the HRA since it would not have weighed up and balanced the considerations that the applicant contended should allow his article 8 rights to prevail over the legitimate interest of the community in the strict observance of green belt policies. This required the inspector to arrive at a reasonable decision having concluded a reasonable decision-making process and the challenge in this case is, on analysis, a challenge based on the contention that the requirement to undertake a reasonable and thorough proportionality assessment was not complied with. It is, therefore, a challenge that falls squarely within the permitted range of challenges provided for by the second limb of section 288.

G. Summary of the relevant law

121. I will now draw together these diverse strands into a summary of the relevant applicable law that the inspector should have applied and given effect to:

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47 Circular 11/95.

48 [1995] 1 WLR 759, HL(E).

(1) The applicant's appeal was to be dealt with by the inspector as if the application had been dismissed and had been made to her in the first instance[49].

(2) The proposed development, being for a change of use and the siting of a mobile home in the green belt, was one where there was a general presumption against inappropriate development so that the application should not be approved unless the applicant could show that there were very special circumstances why permission should be granted. Such circumstances would not be shown to exist unless the harm by reason of the inappropriateness and any other harm was clearly outweighed by other circumstances. It was for the applicant to show whey permission should be granted[50].

(3) The applicant was contending that the development site was the only site on which he could pitch his mobile home as his home. In order to establish that there were very special circumstances so as to justify his being granted permission, he had to show that there was an absence of alternative sites or that there were compassionate reasons amounting to very special circumstances since his proposed development would otherwise cause harm or conflict with a policy to a degree which would justify refusal. The applicant had to overcome a substantial burden to show this given that the proposed development was otherwise inappropriate development in the green belt[51].

(4) However, if planning permission was not granted on the basis of there being very special reasons for its grant, it was open to the applicant to seek to satisfy the inspector that, exceptionally, the refusal decision would constitute an unfair and disproportionate interference with the applicant's, his son's, his wife's and his sister-in-law's right to respect for a family life and a home notwithstanding the interests of the community in pursuing the green belt policy. In such a case, the finding of disproportionality would amount to a very special circumstance for permitting the proposed development[52].

(5) The applicant, his son, his wife and his sister-in-law had joint and several rights to respect for their family life and their home. These rights were, in this case, rights involving the enjoyment of a family life together and the enjoyment of the mobile home on the appeal site as their home. The applicant was entitled to rely on his son's and his wife's and his sister-in-law's individual rights protected by article 8(2) in addition to, and as a support for, his reliance on his own entitlement in that regard[53].

(6) The fact that the site had already been unlawfully used for 4½ years already, had already been the subject of enforcement action for that unlawful use which had been continued despite it having been found to be criminal and the applicant had disregarded the unlawful use, enforcement action and his criminal conviction and had not attempted to find alternative accommodation or sites for his mobile home did not prevent his article 8 rights from being engaged and these facts were of little material relevance to the grant or refusal of his application based on either hardship or article 8 grounds[54].

(7) The applicant's wife appeared on the facts taken into account by the inspector to enjoy use of the mobile home as her home for the purposes of article 8 protection in addition to the enjoyment of such use by the applicant and his son and all three applicants enjoyed a family life together in the mobile home on the appeal site. The applicant's, his son's and his wife's article 8 rights to a family life and a home were, therefore engaged by the appeal decision[55].

(8) The applicant's sister-in-law appeared on the limited facts taken into account by the inspector to enjoy a family and private life with the applicant's wife which was engaged by the appeal decision and she was entitled to have those rights taken into account by the inspector[56]

(9) The son's article 8 protected rights included, additionally, the right to have his best interests and his own views as to those best interests taken into account as a primary consideration by the inspector and weighed in the balancing exercise involved when deciding whether the application should, exceptionally be allowed[57].

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49 See paragraph 43 above.
50 See paragraphs 50 – 51 above.
51 See paragraph 52 above.
52 See paragraphs 98 - 100 above.
53 See paragraphs 80 - 85 above.
54 See paragraphs 64 - 73 above.
55 See paragraphs 61, 80 – 81 and 83 - 85 above.
56 See paragraph 84 above.
57 See paragraph 82 above.

(10) The inspector was required to undertake a structured proportionality assessment involving the weighing up and balancing of all relevant factors[58]. The purpose of this assessment was to determine whether the protected rights of the applicant and his family members were disproportionately interfered with by the inspector's decision upholding the rights of the community to the maintenance of green belt policies and, if they were, what the decision should be in order for there to be a proportionate interference with those rights[59]

(11) Since the Secretary of State had directed that a hearing should be held by the inspector pursuant to the Hearings Rules, the inspector was obliged to undertake an inquisitorial exercise involving the identification of the major issues that arose, a discussion which would inevitably involve identifying any gaps in the evidence and other materials presented to her and her drawing out that material from the parties during the discussion and, if this proved to be necessary, permitting cross-examination, the obtaining of further evidence or even the abandonment of the hearing so that the appeal could restart as an inquiry[60].

(12) The inspector was also required to provide adequate reasons for her decision[61].

(13) This challenge to the inspector's decision is made under section 288(2) of the TCPA and is based on alleged failures to comply with requirements of the Hearings Rules, article 8 of the ECHR, section 6 of the HRA and the relevant principles to be found in the relevant case-law; and the policy set out in the *Use of Conditions in planning permissions* circular.[62].

(14) This challenge is a permissible use of section 288(2). It is not an impermissible challenge that is based on the applicant's disagreement with the inspector's factual findings, the weight that her decision placed on matters that it took into consideration or on her discretionary application of planning policy[63].

H. Issue 1 - Whether the inspector failed properly to consider and assess the psychiatric evidence and thereby failed properly to assess the weight to be given to this evidence

122. **The parties' respective cases.** On behalf of the applicant, it was submitted that the inspector accepted the psychiatric, psychological and medical evidence that she was provided with by the applicant's representative but she failed to take essential elements of it into account. Mr Rudd submitted that the only part of this evidence that was considered and on which any weight was placed was the applicant's wish to "live the outdoor lifestyle". This inadequate consideration of the professional evidence was demonstrated by the inspector's conclusion that there was no evidence that the only site that could accommodate that lifestyle was the appeal site and that another site could be sought (as opposed to, it was to be noted, "could be found") which would enable the applicant and his son to stay together and for his son to continue with his education.

123. On behalf of the Secretary of State, it was contended that the complaints made by Mr Rudd about the inspector's treatment of the professional evidence amounted to an impermissible challenge about matters that were left exclusively to the inspector since they amounted to no more than a challenge to the weight that the decision had placed on the medical evidence and to the way in which it had applied relevant planning policy in dismissing the appeal.

124. Ms Busch also submitted that the inspector's decision demonstrated that she had understood and fully taken into account all expert professional evidence and that the applicant's challenge amounted to no more than a disagreement with the weight that the inspector placed on it. The inspector's decision demonstrated that she had a good understanding of the psychiatric reports and that she had concluded that there was no evidence to show that the appeal site was the only site on which the applicant could lead an open air lifestyle. Moreover, the inspector had reasonably concluded that the applicant had not availed himself of the opportunity to look for another site. In consequence, she had decided, again reasonably, that his personal circumstances did not amount to very special reasons or an unwarranted interference with his article 8 rights was not open to challenge.

125. **Discussion.** Mr Rudd's submissions have considerable force. The decision neither mentions nor takes into account much of the professional evidence. In particular, there is no reference to the fact that the applicant suffers from a serious personality disorder which affects his cognitive ability, affectivity, interpersonal functioning and impulse control. It takes no account of the applicant's illiteracy and relatively low IQ; his potentially enduring

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58 See paragraph 99 above.
59 See paragraphs 88 & 98 above.
60 See paragraph 101 - 111 above.
61 See paragraph 112 - 125 above.
62 See paragraphs 116 - 117 above.
63 See paragraphs 118 - 120 above.

brain damage originally suffered when he was a child; his propensity to both depressive bouts and suicidal ideation; his recurrent pain from the permanent white finger and other hand damage suffered when working with pneumatic tools in his late teens and his marked inability, without the daily care and assistance of his wife, to cope with the pressures and exigencies of daily living and to care for his son. The applicant's chronic and apparently untreatable PTSD-type symptoms, his phobia of being situated in an enclosed space and his need for an open-air lifestyle need to be considered in conjunction with all his other psychiatric, psychological and medical complaints since they are obviously affected and enhanced by the other complaints which are not referred to in the decision from which he also suffers.

126. This failing led the inspector to conclude that there was no evidence to show that the appeal site was the only site on which the applicant could live. The evidence that was available to her included the very significant evidence adduced on behalf of the applicant that his claustrophobic-type condition, taken in conjunction with his personality disorder, the constant pain he lived with from his hand injuries, his recurrent flashbacks, his depressive and suicidal tendencies, his low IQ and illiteracy and his difficulties coping with life all coalesced into the need to live in a secluded and open-air environment close to his wife who, from necessity, was living with her sister nearby in order to provide her with the full-time care that she needed but could not otherwise obtain. It is not for me to express any view as to whether this case was made out. What I am asked to do, however, is to consider whether it was a case which was taken into account by the inspector in reaching her decision.

127. **Conclusion.** The inspector erroneously confined her consideration of the psychiatric, psychological and medical evidence to the applicant's fear of enclosed spaces. As a result, her conclusion that there was no evidence that the only site that the applicant could live on was the appeal site was based on an incomplete evaluation of the available evidence and her proportionality assessment was both incomplete and inadequate

I. Issue 2 - Whether the inspector failed to consider the applicant and his son's and wife's and sister-in-law's article 8 rights

(1) Parties' cases

128. On behalf of the applicant it was contended that the proportionality assessment was fundamentally flawed whereas, on behalf of the Secretary of State it was contended that there was no obligation to consider the applicant's son's, wife's or sister-in-law's article 8 rights but that, in any event, the article 8 rights of the applicant's son were taken into account. Moreover, all other relevant considerations were taken into account and the inspector's proportionality assessment was satisfactorily undertaken in a way that was not open to challenge.

(2) The decision's structure

129. **Structural error in the decision-making process.** The relevant paragraphs of the inspector's decision are set out above[64]. It is structured into two parts. The first part considered the applicant's belief that he could not leave the site because of his mental health problems and his evidence that if he was forced to leave it, his son would inevitably have to go and live with his biological mother. The inspector concluded that these factors and the support he received from his wife and friends did not constituted a "substantial material consideration" that outweighed the planning harm the development would provide. It followed that there were no "very special circumstances" that justified her granting permission. The second part of her decision re-considered the same considerations without elaboration and concluded that they were not sufficient to outweigh the public interest in protecting the green belt.

130. I have doubts as to the lawfulness of the inspector's "very special circumstances" conclusion given its failure fully to consider the applicant's mental and physical health but, as I have already decided, it is not necessary to reach a conclusion on that issue and I will say no more about it[65]. It was, however, unfortunate that the inspector split up her decision in the way that she did because it appears that the result of doing was that she carried out her proportionality assessment under article 8 in an erroneous manner by failing to take account of a range of relevant considerations[66]. This occurred because she had concluded that the required proportionality assessment amounted to no more than a repeat of her planning or compassionate circumstances decision which had been to the effect that there were no very special circumstances requiring her to give consent. This error may well have occurred because she had overlooked the fact that the considerations giving rise to a finding of disproportionality could also, but need not necessarily, amount to very special circumstances.

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64 See paragraph 48 above.
65 See paragraphs 94 - 96 above.
66 See paragraph 95 above.

131. **Applicant's son's best interests a primary consideration.** The two sections of the decision concerned with the family and home circumstances of the applicant and his wife and son briefly refer to his son's possible need to return to his biological mother if the planning application was refused. However, she concluded that these were not matters that carried any weight because she had not been shown any evidence that the appeal site was the only one on which the applicant could live.

132. However, before those findings could be reached, it was incumbent on the inspector to identify what were the best interests of the applicant's son and then give those interests a primary consideration. For example, it might not have been in his best interests to be moved off the site and if this was so, it had to be taken into account as a primary consideration even if other suitable sites were available. In ascertaining these best interests, it was also incumbent on the inspector to ensure that she had been provided with a reliable summary of what the applicant's son considered to be in his best interests and, in consequence, to ascertain what alternative sites were available to enable him to express his views about his best interests in the light of those alternatives.

133. **Structured assessment - general.** In undertaking an assessment of what was in the son's best interests and a proportionality assessment, the various contributing considerations that had to be taken into account should have been assessed together in a structured and balance assessment once the necessary circumstances relating to each consideration had been ascertained and it had been decided what relative weight should be given to each circumstance. The inspector's proportionality assessment was not structured, largely because she had decided that the incomplete considerations that she took into account should carry little if any weight.

(3) **Matters that should have been taken into account – the applicant**

134. **The applicant's case.** The decision failed to account of many features of the applicant's case for contending that the inspector's decision was a disproportionate interference with his family life and home. His case was, in summary, that:

(1) The appeal site was the only site where the applicant could enjoy a family life and his home with his son and share that life with his wife in a way that did not result in an interference with his sister-in-law's family and private life.

(2) The applicant suffered from an incurable claustrophobic-type complaint and other disabilities which required an unusual, if not unique, open-air lifestyle which needed to be lived in seclusion and close to his sister-in-law's house in a location where both he and his son could be cared for and supported by his wife.

(3) There was no realistic likelihood of the applicant's disabling conditions being treated or being cured or reduced in severity.

(4) The applicant and his wife owned the appeal site and the mobile home and there was no good reason for their being moved off site notwithstanding that the use of the mobile home on the site had been unlawful from the start and had been enforced against and was now criminal in nature.

(5) Furthermore there were no other alternative comparable sites so the applicant had not looked for any and, besides, his illiteracy and personality problems precluded him taking any meaningful steps to investigate or search for alternative sites.

(6) The applicant had no resources of his own to put towards an alternative home and his wife's resources were limited to the value of the house she was building for herself in Bristol and the rental income from the matrimonial home that they have now both vacated.

(7) SGDC, as the relevant planning, housing, homelessness, social and children's authority and pursuant to its duties to him and his child under the HRA and the children, housing and social services and welfare legislation, had never undertaken assessments of his and his son's planning, housing, welfare and social needs as they were required to do and they had not provided any information to the inspector to enable her to undertake her statutory duties that she was required to undertake by virtue of the HRA.

(8) The applicant's son's best interests pointed to his being able to live with his father on the appeal site at least until he ceased to be a child. His best interests involved his living near his present secondary school with his father on the appeal site. If he was moved away from the appeal site, he might have to move back to his biological mother despite his lack of contact with her for many years or change his school and lifestyle. However, no attempt had been made to ascertain what was in his best interests or his views as to what was in his best interests.

(9) His wife not only provided the applicant and her son-in-law with significant support, she shared their home which was a necessary part of the family life she enjoyed with them. However, she was committed to providing full-time care for her severely disabled sister who she lived with nearby. Her sister was also living in the SGDC area and that authority had social and care responsibilities for her sister which she was helping it to fulfil.

(10) If the applicant and his son moved away from the appeal site, if this was practicable, his wife would have to choose between her family and her sister with the possible interference with the family and private lives of all of them including her own.

135. **Psychiatric, psychological and medical factors.** The list of psychiatric, psychological and medical factors that were not taken into account has already been identified[67]. The list is both lengthy and significant. The inspector considered that someone with the psychiatric difficulties of the applicant should be seeking professional help. That view was not supported by the experts' reports she was provided with which indicated that there was no long-term help that he could receive which would minimise or eradicate his phobia and his other disabling propensities.

136. **Dependency.** The applicant was very significantly dependent on his wife's daily visits to the site and her overnight stays and on the contribution she made to looking after her step-son and to his life and welfare. These matters were not taken account of at all.

137. **Applicant's interest in the appeal site.** Although it was stated and accepted that the site was acquired exclusively by his wife using only her own funds, nonetheless the applicant appeared to have an equitable interest in the site and its proceeds of sale as well as an interest arising from the matrimonial homes legislation and as his wife's husband. He was, therefore, living on land that he had a significant interest in which had been acquired without any thought given to the planning consequences.

138. **Applicant's inability to search.** No account was taken of the applicant's case that he had not searched for alternative sites because there were no available alternative sites nor of the psychiatric evidence that his personality and other problems had impaired his ability to look for other sites or to manage his affairs in a way that enabled rational decision-making about his and his son's future to be undertaken.

(4) **The applicant's son**

139. **Son's best interests.** The applicant's son's best interests were not identified. In addition, there was no consideration of what alternative home for him would be in his best interests if he was required to leave the appeal site. As part of that consideration, no-one investigated whether it was feasible for him to go to live with his biological mother, or to find out whether she would accept him. It seemed highly unlikely that this was an option since he had not lived with her since he was an infant some years ago and she had apparently lost interest in him and his contact with her since he moved to Bristol at least eight years earlier had been indirect and intermittent. Of much greater significance was the fact that the inspector was not informed that any attempt had been made to ascertain his views about his future or as to what he considered to be his best interests and SGDC had apparently made no attempt to find these out or to investigate the feasibility of his going to live with his biological mother.

140. **The applicant's son's future home.** The inspector concluded that there was no present need to consider whether or not the applicant's son could and would return to his biological mother. This was an error since it was necessary for the inspector, in assessing what was in the best interests of the applicant's son, to consider all possible alternatives in the event of a refusal decision. Clearly one such alternative would be for him to be rehoused with another family member since it was not inevitable that a suitable site could be found for the applicant and his son to live together in a mobile home.

141. **Homelessness and child in need.** One possible option facing both the applicant and his son was that they became homeless with the need for SGDC to consider whether it would treat father and son as a family unit in priority need and, if so, where they would be offered accommodation if the application for permission was refused. Equally, it had not considered how it would accommodate the applicant's son if it would not or could not accommodate the applicant since, in such circumstances, he would be a child in need who SGDC would have a statutory duty to support. SGDC should have provided the inspector with answers to these questions.

(5) **The applicant's wife**

142. **Wife's role as carer.** The applicant's wife was acting as the full-time carer of her sister. This necessitated her living with her sister save for her nights over at the family home and her daily visits there to look

[67] See paragraph 125 above.

after her husband and step-son. Her role as her sister's live-in full-time carer appeared to be the only way that her sister could continue to live in her home which the house in which her family had lived for many years. SGDC had not assessed her needs or the need for the applicant's wife to act as her full-time live-in carer or how the applicant and his son would be cared for in the event of their moving away from the area whilst the applicant's wife stayed with her sister. Furthermore, no-one appears to have given the inspector any information about the applicant's wife's views as to the future or the extent of her caring role for both her husband and step-son.

(6) **The applicant's sister-in-law**

143. **Applicant's disabilities.** No account was taken of the applicant's sister-in-law's disabilities which apparently required full-time care which could only be provided by her sister and only by her sister living with her on a full-time basis. It was possible that, if the applicant and his son were to move away from the site, the applicant's wife and sister-in-law would be unable to share their family life together, the sister-in-law's private life might be interfered with and the applicant's wife might have to take the very difficult decision of whether to support her sister at the expense of her husband and son-in-law or vice versa.

(7) **SGDC**

144. In addition to its role as an authority concerned with both homelessness and children in need, SGDC was the planning authority who was concerned to remove both the applicant and his son from the site to an alternative pitch. It would appear that it had not carried out any assessment of where father and son could be relocated in a way that would ensure that their dependence on the applicant's wife could be accommodated and that the applicant could continue to enjoy his secluded open-air lifestyle. SGDC should have provided the inspector with answers to these questions as the planning authority seeking the applicant's removal from the site and in conformity with its duties under section 11 of the Children Act[68] and section 6 of the HRA.

(8) **Previous planning history.**

145. No account was taken of the extent to which previous enforcement decisions taken by SGDC had taken account of the article 8 rights of the applicant or his son, wife or sister-in-law, of why no attempt had been made since their arrival on the appeal site to remove them from the site or of what alternative sites the applicant could have come up with had he sought them out. Furthermore, the inspector was not provided with copies of each planning decision made by SGDC, there having been two refusals of permission, two stop orders and four enforcement notices, nor was she provided with copies of the planning officer's reports to the planning committee that had led to each of these decisions being taken.

(9) **Inspector's inquisitorial role.**

146. The lack of evidence on the matters that I have summarised above should have been made good in the discussion conducted by the inspector and brought out in the list of major issues that she had formulated, or should have been formulated, at the outset of the hearing. For those matters where it was clear that the available evidence and information was inadequate or not available, for example appropriate assessments of the family's long-term health, welfare and housing needs, an adjournment should have been considered or a decision taken to abort the hearing so that the appeal could be restarted afresh as an inquiry.

(10) **Inspector's reasons.**

147. The inspector's reasons do not adequately explain her reasoning for dismissing the appeal in these respects:

(1) The reasons did not identify the issues that the inspector had identified as being the main issues that she considered had arisen for discussion and did not, save in an incomplete and oblique fashion, summarise the discussion on those main issues.

(2) The reasons showed that material issues were not discussed and material evidence and information was not obtained from or explored with the parties.

(3) The reasons also showed that the vital decisions concerned with the proportionality of the refusal decision and the rejection of a temporary and personal permission were not arrived at in a structured manner and in compliance with the HRA and relevant planning policies, did not take account of highly relevant considerations and were not reached after an appropriate balancing of the applicant's and his wife's, son's and sister-in-law's respective interests against the community interests involved.

(11) **Overall**

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[68] See paragraph 81(2) above.

148. The inspector did not consider the applicant's family life to any significant extent and certainly did not consider each of the four family members' enjoyment of family life with the other three. Furthermore, she did not pay any respect to the son's and the wife's home in the mobile home on the appeal site. Finally, there were significant gaps in the consideration of each of the family's entitlement to respect for their respective home lives on the appeal site and the applicant's wife and sister-in-law's family and private lives and home life at the applicant's sister-in-law's home.

J. Issue 3 - Whether the inspector failed properly to assess the claim for temporary planning permission

(1) The law.

149. This issue is concerned with the use of conditions to limit the grant of planning permission if a full permission was not granted. It involves a consideration of what is informally but inaccurately called a temporary permission which is a permission subject to a condition that the development or permitted change of use must be discontinued after a stated time limit. It is also concerned with the use of a personal condition which would limit the use of the development to a named individual, in this case the applicant. The Secretary of State's policy on these matters is set out in the Circular: *The Use of Conditions in Planning Permissions*[69], the salient parts of which are as follows:

> "Conditions Restricting the Occupancy of Buildings and Land
>
> ***Occupancy: general considerations***
>
> 92. Since planning controls are concerned with the use of land rather than the identity of the user, the question of who is to occupy premises for which permission is to be granted will normally be irrelevant. Conditions restricting occupancy to a particular occupier or class of occupier should only be used when special planning grounds can be demonstrated, and where the alternative would normally be refusal of permission.
>
> ***Personal permissions***
>
> 93. Unless the permission otherwise provides, planning permission runs with the land and it is seldom desirable to provide otherwise. There are exceptions, however, where it is proposed exceptionally to grant permission for the use of a building or land for some purpose which would not normally be allowed at the site, simply because there are strong compassionate or other personal grounds for doing so. In such a case, the permission should normally be made subject to a condition that it should endure only for the benefit of a named person – usually the applicant (model condition 35) … ."
>
> 108. Section 72(1)(b) of the TCPA gives power to impose conditions requiring that a use be discontinued or that buildings or works be removed at the end of a specified period …
>
> ***Short-term buildings or uses***
>
> 110. Where a proposal relates to a building or use which the applicant is expected to retain or continue only for a limited period, whether because they have specifically volunteered that intention, or because it is expected that the planning circumstances will change in a particular way at the end of that period, then a temporary permission may be justified. For example, permission might reasonably be granted on an application for the exercise of a temporary building to last seven years on land which will be required for road improvements eight or more years hence, although an application to erect a permanent building would normally be refused."

150. No mention was made during the hearing or during the hearing of this application of the possible use of a personal condition despite its obvious potential relevance to the applicant's position and personal circumstances. Such a condition would, nonetheless, be a possible option given the applicant's case and the evidence of his and his family's circumstances and article 8 claims. It was therefore an option that the inspector, pursuant to her obligation to conduct the hearing in the inquisitorial manner required by the Hearings Rules, should have raised for consideration and discussion at the hearing and dealt with in the decision.

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[69] Circular No. 11/95.

(2) **The inspector's decision**

151. It is helpful to set out again the inspector's brief reasoning on this issue:

> "18. Submissions were made concerning a temporary permission, in the event that I did not consider a permanent permission justified and taking into account any reduced harm arising from a limited period of permission. Dr Reeves expressed the view that the appellant's condition was unlikely to change substantially in the short/medium term. If there is no realistic prospect of a change in circumstances, then a temporary permission would be inappropriate."

152. The applicant's representative asked the inspector to consider a temporary permission condition if she did not grant a full permission. Having decided that a full permission was not justified, she should then have considered all the lesser alternatives including whether to impose a personal condition limiting any permission to the personal use of the applicant and his family and a time-limited condition. The imposition of a personal condition with or without a time-limited permission and the length of that time-limit if a time-limited condition was to be imposed would depend on her consideration of all the personal and compassionate factors that she concluded merited a condition or conditions.

153. The inspector dealt with the question of a temporary permission very briefly and did not deal with the possibility of a personal condition, whether linked to a permission or a temporary permission. She considered that a temporary permission should normally be considered only if there was likely to be a change of circumstance in the short to medium term and concluded that there was only one relevant circumstance of that kind, being the applicant's psychiatric condition. She decided that a temporary condition was not appropriate since she considered that the psychiatric evidence was to the effect that the applicant's psychiatric condition was unlikely to change.

(3) **The parties' respective cases**

154. On behalf of the applicant, it was contended that the inspector failed to apply the relevant policy that I have set out above[70] in only considering one of several major factors which would inevitably change with time. On behalf of the Secretary of State it was contended that the inspector had the relevant policy in mind and decided that the only factor which should bear any weight did not justify a temporary permission, particularly since the applicant had already had three years by the date of the hearing to sort out and move to an alternative site with his son.

(4) **Discussion**

155. **Personal condition.** The inspector should first have considered imposing a personal condition as an adjunct to a full permission if a full permission was not justified. Such a condition, although rare, is clearly envisaged by the relevant policy as being one that is available on compassionate grounds or, it could now be added, on proportionality grounds. Such a condition was imposed in *South Bucks DC v Porter (No 2)*[71] and upheld by the House of Lords in not dissimilar circumstances to those present in this case and its use in this manner was something that should have been considered. There were a number of inter-related circumstances that existed, or might have been considered to exist, which could have given rise to a personal permission on compassionate grounds. This could well have been considered to be a proportionate approach to the applicant's article 8 claims.

156. **Time limited condition.** If the inspector concluded that it was not appropriate or possible to grant a full permission with or without a personal condition, she should have then considered granting a temporary permission after a consideration of all relevant circumstances that would or might alter with time. However, she only considered one such circumstance, being the possibility of the applicant's psychiatric condition changing with time with professional intervention and she concluded that this would not happen. However, a number of highly relevant circumstances were likely to change over time, none of which were considered by the inspector in the context of either a time-limited condition or a personal condition coupled with a time limited one. In these circumstances, a personal condition would be used to fashion an appropriate time-limited condition on compassionate grounds.

157. The relevant circumstances that should have been considered in this context included the following:

> (1) The applicant's claustrophobic-like condition appeared to be linked to his personality, the PTSD-type symptoms he presented with, his stress and depression and the levels of extraneous support in practical

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70 See paragraph 149 above.

71 See paragraph 69 and footnote 21 above.

matters affecting his life. Each of these was variable and subject to change for the better or for the worse and, despite current prognosis, with future psychiatric intervention.

(2) The support that he and his son required that was provided by his wife might decrease with time.

(3) The applicant might accompany or follow his wife to a different location if she ceased to be the full-time carer of her sister or to reside at her sister's house.

(4) The applicant's son's dependency and his need to reside on the appeal site would cease when he reached 18 or possibly later.

(5) Alternative accommodation might be discovered in the SGDC planning area or elsewhere that would be suitable for the applicant's, his son's and his family's needs.

158. **Unlawfulness and other sites.** It was not material, as was submitted on behalf of the Secretary of State, that the was considering a time-limited condition some 4 years after the imposition of enforcement notices and some 3 years after the appeal against these notices was dismissed or that the applicant had not looked for alternative sites since these events. However, there were good reasons why the applicant had not looked elsewhere given his need for a site located close to his sister-in-law's house and his psychiatric, psychological, personality problems and illiteracy which made it difficult if not impossible to undertake such measures. Further, there were good reasons why the historic enforcement action did not diminish the applicant's article 8 claim and were matters that should not be held against him when the inspector considered the hardship elements of the applicant's appeal and the proportionality of a refusal decision[72].

159. Each of the circumstances that I have listed, whether individually or in combination, might well have suggested that if a full permission was not appropriate that a permission linked to an amended application which reduced the perceived harm or a personal or time-limited condition would be appropriate and in conformity with the published policy concerning personal or temporary permissions. They certainly point to an error of approach by the inspector in only focusing on the unlikelihood of the applicant's health improving, in concluding that that factor was unlikely to change and in failing to consider whether any other relevant factor would be likely to change or indeed, considering whether there were compassionate grounds for granting a permission linked to a personal condition. In other words, it was an error to exclude consideration of the possibility of a temporary permission without first considering whether and to what extent the applicant's and his family's circumstances might change with time.

(5) **Conclusion**

160. The inspector should have considered four linked possibilities having ruled out a full permission:

(1) Amending the terms of the permission so as to reduce the perceived harm caused by the proposal;

(2) A personal condition;

(3) A time-limited condition; and

(4) The appropriate length of a time-limited condition.

The inspector failed to consider three of these possibilities and erroneously limited her consideration of a time-limited condition to the possibility of a change in the applicant's psychiatric condition.

K. **Overall conclusions**

161. For all the reasons set out in section I above[73], the inspector's decision cannot stand since it did not take into account a series of requirements that it should have complied with. It must therefore be quashed and the Secretary of State must reconsider the applicant's in the light of this judgment.

L. **The order to be made on the application**

162. The proposed order that should be made is as follows[74]:

(1) The applicant is to be named and known as AZ for all purposes in connection with this judgment and these proceedings.

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72 See paragraphs 64 - 72 above.

73 See paragraphs 128 - 148 above.

74 Subject to the comments or agreement of the parties as to any changes in this proposed wording.

(2) No newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of the child concerned in this application or in the planning appeal from which this application is brought, either as being one of the persons by or in respect of whom the planning appeal was brought or this application is made or as being a witness or providing evidence to the planning appeal or that is referred to in this application.

(3) No picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid; except in so far (if at all) as may be permitted by the direction of the court.

(4) The application should be allowed, the inspector's decision should be quashed and the Secretary of State should reconsider the appeal in the light of the judgment.

(5) The first respondent should pay the claimant's costs on the standard basis to be subject to detailed assessment if not agreed.

(6) No order as to the costs of the second respondent.

HH Judge Anthony Thornton QC