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Case No: CO/2050/2020 &
CO/2051/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 7th May 2021

Before:

HH JUDGE EYRE QC

- -

Between:

SEFTON METROPOLITAN BOROUGH COUNCIL	**Claimant**
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES, AND LOCAL GOVERNMENT	**Defendant**
-and-	
JERRY DOHERTY	**Interested Party**

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- -

Piers Riley-Smith (instructed by **Sefton MBC**) for the **Claimant**
Sarah Reid (instructed by **Government Legal Department**) for the **Defendant**
Michael Rudd (instructed by **Claas Solicitors**) for the **Interested Party**

Hearing date: 23rd March 2021

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JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time of hand-down was 10.00am 7th May 2021.

HH Judge Eyre QC:

1.

Introduction.

2. By his decision of 27th April 2020 ("the Decision") Thomas Shields ("the Inspector") allowed the Interested Party's conjoined appeals against the Claimant's refusal of planning permission for a proposed change of use of land south of Spurriers Lane in Melling ("the Site") and against two enforcement notices issued by the Claimant in respect of the Interested Party's use of the Site.

3. The Claimant appeals pursuant to section 288 of the Town and Country Planning Act 1990 against the grant of planning permission and pursuant to section 289 against the quashing of the enforcement notices. The appeals were brought on two grounds. First, that the Inspector had erred in law in failing properly to interpret the National Planning Policy Framework ("the NPPF") and had, as a consequence, failed to apply that policy correctly. Second, that the Inspector had failed to give adequate reasons for the Decision.

4. On 24th June 2020 Holgate J ordered that the applications for permission be heard together. On 12th August 2020 Julian Knowles J gave permission for the Claimant's challenge to the lawfulness of the Decision but refused permission for the Claimant's challenge to the adequacy of the Inspector's reasons.

5. The Site is in the Green Belt and it is common ground that the development which the Interested Party had undertaken and for which he sought permission was inappropriate development. In the light of that the issues on all three appeals are the same namely the correct interpretation of paragraphs 143 and 144 of the NPPF and the lawfulness of the Decision in the light of that interpretation.

The Factual Background.

6. The Interested Party and his family are Travellers. Before the actions of the Interested Party the Site, which is enclosed by fences and hedgerows, was vacant and overgrown. The Interested Party applied to the Claimant for planning permission to change the use of the Site from a pony paddock to a site for six Gipsy/Traveller pitches for himself and the members of his family.

7. On 18th December 2018 the Claimant refused that application on the grounds that the proposed development was inappropriate development in the Green Belt; that there was further harm by reason of a loss of openness and by way of encroachment in the countryside; and that there were no very special circumstances clearly outweighing that harm. Nonetheless the Interested Party created an area of hardstanding on the Site and positioned a number of

caravans thereon. This led to enforcement notices from the Claimant dated 25th January 2019 and the matter came before the Inspector as a result of the Interested Party's appeals against those notices and against the refusal of planning permission.

The Relevant Provisions of the NPPF.

8. Section 13 of the NPPF sets out the approach to be taken to development in the Green Belt.

9. The importance of the Green Belt and the purposes it serves are set out thus at paragraphs 133 and 134:

> "133. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.
>
> 134. Green Belt serves five purposes:
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> a) to check the unrestricted sprawl of large built-up areas;
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> b) to prevent neighbouring towns merging into one another;
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> c) to assist in safeguarding the countryside from encroachment;
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> d) to preserve the setting and special character of historic towns; and
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> e) to assist in urban regeneration, by encouraging the recycling of derelict and other urban land."

10. The approach to be taken to applications for development in the Green Belt is set out at paragraph 143 and following of which paragraphs 143 and 144 are of note for current purposes and which provide that:

> "143. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 144. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations."

11. Paragraphs 143 and 144 of the NPPF are the latest enunciation of policy in respect of the Green Belt. As will become apparent it is necessary to consider the wording of their predecessors.

12. The position was formerly set out in these terms in paragraphs 3.1 and 3.2 of PPG2 Green Belts:

> "3.1 The general policies controlling development in the countryside apply with equal force in Green Belts but there is, in addition, a general presumption against inappropriate development within them. Such development should not be approved, except in very special circumstances.
>
> ...

> 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."

13. PPG2 was replaced with an earlier version of the NPPF which provided thus at paragraphs 87 and 88:

> "87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

14. It will be seen that the wording of paragraphs 87 and 88 is similar to that of PPG2 paragraphs 3.1 and 3.2 but is not identical to it. It is to be noted that while paragraph 3.2 says "substantial weight" will be attached to "the harm to the Green Belt" paragraph 88 refers to "substantial weight" being given to "any harm to the Green Belt". However, the only difference between the current paragraph 143 and the former paragraph 87 is that the latter begins with the words "as with previous Green Belt policy". Similarly, the wording of the current paragraph 144 and of the former paragraph 88 is identical save that in the former the words "resulting from the proposal" have been added after "any other harm". Thus the reference in paragraph 144 to "substantial weight" being given to "any harm to the Green Belt" reproduces the language of the former paragraph 88.

The Decision.

15. The Inspector started from the agreed position that the proposed development and the development which the Interested Party had already undertaken were inappropriate development within the Green Belt. He identified the three main issues in these terms at [6]:

> "(a) the effect on the openness and purposes of the Green Belt;
>
> (b) the effect on the character and appearance of the area; and
>
> (c) whether the harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations so as to amount to the very special circumstances required to justify the development."

16. Having set out uncontentious policy considerations the Inspector considered the effect of the development on openness and the purposes of the Green Belt. In doing so he identified, at [13], the prevention of urban sprawl by keeping land permanently open as being "the fundamental aim of Green Belt policy"

and noted that their openness and permanence are "essential characteristics" of Green Belts. The Inspector then considered the particular location and context of the Site. He reached the conclusion that both "the loss of openness in purely visual terms" and the "degree of encroachment into the countryside" would be limited. It was in the light of that assessment that he concluded, at [15], that "there would be a significant loss of openness" together with a "limited adverse impact" on the Green Belt purpose of safeguarding the countryside from encroachment.

17. The Inspector then turned to address the effect of the development on the character and appearance of the area. He explained, at [18], that the partially developed site had caused "some limited harm" to the character and appearance of the area. However, he then took note of the scale of the development and layout proposed for the Site together with the potential for the effects of the development being mitigated by landscaping. In the light of that his "overall" finding in this regard was that there would be "no significant harm to the character and appearance of the area".

18. The Inspector then identified the other considerations to which he had had regard including the need for and provision of Traveller sites; the availability of alternative sites; the personal circumstances of the members of the Interested Party's family; and a miscellany of "other matters" concluding in respect of those other matters that none of them added any material weight to the arguments against allowing the appeal.

19. The core of the Decision was the Inspector's analysis of the planning balance and it was here that the Claimant says he erred in law. The Inspector began that analysis by setting out at [38] a paraphrase of the terms of NPPF paragraph 144 in these terms:

> "The Framework, reflected in LP Policy MN7, requires that substantial weight is given to any harm to the Green Belt, and that very special circumstances will not exist unless any harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

20. The Claimant accepts that this was an accurate rehearsal of the terms of paragraph 144 but says that the error of law was articulated in the next paragraph of the Decision where the Inspector explained the weight which he was attaching to the harm caused by the development saying:

> "The proposed development is inappropriate development and is therefore harmful by definition. I attach substantial weight to that harm. I have also previously identified some loss of openness and a limited adverse impact on one of the Green Belt purposes which seeks to safeguard the countryside from encroachment. The additional harm arising from these matters, together with the status of the development as intentional unauthorised development, attract collectively a further degree of weight."

21. At [40] and [41] the Inspector identified the factors which weighed against that harm and in favour of allowing the appeals noting that he attached "substantial weight" to the personal circumstances of the Interested Party's family. The outcome of the balancing exercise appeared at [42] where the Inspector explained why he concluded that the factors in favour of the

development clearly outweighed the harm resulting from the development such as to constitute very special circumstances. Thus:

> "The PPTS and WMS set out that personal circumstances are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances. However, in this case I find on balance that the totality of the harm to the Green Belt and any other harm is clearly outweighed by the combined weight I attribute to the best interests of the children on site; the wider family's personal circumstances; the site being sustainably located in compliance with LP Policy HC5; the lack of alternative suitable sites which would meet the particular needs of this family; and the very high likelihood that any other suitable sites would also be in the Green Belt. Together these considerations amount to the very special circumstances necessary to justify the development."

The Parties' Contentions in Outline.

22. For the Claimant Mr. Riley-Smith submitted that paragraph 144 required the decision maker to undertake a two-stage process. First, weight was to be allocated to the relevant harms and benefits. Second, the weights which had been so allocated were then to be balanced. There could be multiple separate Green Belt harms. Thus inappropriate development in the Green Belt is by definition harmful but there could be further and separate harm arising from loss of openness or the impact of a proposed development on the function of the Green Belt (see for example per Sullivan J in *Doncaster MBC v SSETR* [2002] EWHC 808 (Admin) at [68]). Mr. Riley-Smith contended that paragraph 144 required that where multiple harms were present then substantial weight was to be given to each separately at the stage of allocating weight to harms and benefits and that those separate substantial weights were then to be brought into the second stage, the balancing exercise. The Claimant characterises this as the "individual approach" with substantial weight being given to the Green Belt harms individually. Mr. Riley-Smith based that argument in very large part on the language of paragraph 144 saying that it was the proper reading of the direction that substantial weight was to be given to "any" harm to the Green Belt.

23. In the light of that interpretation of paragraph 144 Mr. Riley-Smith said that the Inspector had erred in failing to apply substantial weight to each of the Green Belt harms which the latter had identified. He said that the Decision at [39] showed the Inspector attaching substantial weight to the definitional harm arising from the fact that the development was inappropriate development but failing to attach, as the Claimant says he should have done, further and separate substantial weight to each of the additional Green Belt harms which he identified and instead saying that they attracted "collectively a further degree of weight".

24. The Claimant's subsidiary argument was that even if its interpretation of paragraph 144 was incorrect the Inspector nonetheless failed to attach sufficient and proper weight to the harm posed by the development to the Green Belt.

25. Miss. Reid for the Defendant and Mr. Rudd for the Interested Party disputed the Claimant's interpretation of paragraph 144. They said that the NPPF and

that paragraph in particular required substantial weight to be given to the totality of the harm to the Green Belt. That was what the Inspector did and having done that his conclusion as a matter of planning judgement as to the balance between the harm caused and the factors supporting permission was not susceptible tochallenge. Miss. Reid placed particular stress on characterising the Claimant's interpretation of paragraph 144 as being one which was overly forensic and which would result in an unduly mechanical or quasi-mathematical approach to what was to be an exercise of judgement on the part of the decision maker. Mr. Rudd pointed out that the exercise of applying weight to the harm to the Green Belt and balancing that against other factors was one which was very familiar to decision makers in the planning process and where a consistent approach had been adopted over a number of years and through changing enunciations of policy. He said that the current wording of the NPPF is not be regarded as having changed the approach which was previously applicable and that approach, as shown by the authorities, did not involve the mechanistic calculation for which the Claimant contends.

26. It follows that the central question between the parties is the proper interpretation of paragraph 144.

The Approach to be taken to the NPPF and to the Decision.

27. There was no dispute as to the approach I am to take to the interpretation and effect of the NPPF and to interpretation of the Decision and the applicable principles can be summarised very shortly.

28. It is an error of law for a decision maker to fail to apply the NPPF correctly (see *Bloor Homes Ltd v SSCLG* [2014] EWHC 754 (Admin), [2017] PTSR 319 at [19(4)]). The NPPF is to be interpreted objectively with its proper construction being a matter of law for the court but the NPPF and other policy statements are to be read as such and not as statutes and their construction by the court is to have regard to their nature as policy statements (see again *Bloor Homes Ltd* at [19(4)], *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [2012] PTSR 303 at [19], and *Hopkins Homes Ltd v SSCLG* [2017] UKSC 37, [2017] 1 WLR 1865 at [22] – [26] and [72] – [75]). The decisions of the Secretary of State and of inspectors appointed by him must set out the reasons for the conclusion reached and must do so adequately and intelligibly but they are to be construed "in a reasonably flexible way" having regard to their nature and audience (*Bloor Homes Ltd* at [19(1) and (2)]). The court must remember always that matters of planning judgement are matters for the decision maker and not the court (*Bloor Homes Ltd* at [19(3)]).

29. In *Bloor Homes Ltd* Lindblom J said, at [19(3)], that the weight to be attached to any material consideration is a matter for the decision maker and not the court. In context Lindblom J was making two points. The first was that matters of planning judgement are for the decision maker and not for the court. The second was that provided relevant matters are considered the weight to be given to any particular relevant matter is, subject to *Wednesbury* irrationality, a question for the decision maker. It was, rightly, not suggested that this principle precluded Mr. Riley-Smith's argument as to the proper application of

paragraph 144 of the NPPF. That argument was that as a matter of law the proper application of the NPPF required a particular degree of weight to be given and for the balancing exercise to be performed in a particular way.

The Meaning of Paragraph 144.

30. Mr. Riley-Smith contends that the individual approach follows from the wording and context of paragraph 144 and that it is supported by authority.

31. The context and wording of paragraph 144 are conveniently considered together. Mr. Riley-Smith argues that it is significant that there can be different kinds of harm to the Green Belt. Thus inappropriate development is by definition harmful regardless of the physical effect of the proposed development but there can be separate harm to openness or by way of encroachment in the countryside. It accordingly is appropriate for the NPPF to specify the weight to be given to the different kinds of harm. Paragraph 144 is to be seen as providing that substantial weight is to be given separately to each such element of Green Belt harm. In that regard Mr. Riley-Smith placed considerable emphasis on paragraph 144's requirement that "substantial weight is given to any harm to the Green Belt" contrasting that with the language of paragraph 3.2 of PPG2 with its provision that "the Secretary of State will attach substantial weight to the harm to the Green Belt" (emphasis added in both instances). Mr. Riley-Smith contends that the two-stage process of, first, allocating weight to the harm and, second, calculating the balance between the competing considerations follows from the two sentences of paragraph 144 where the first sentence provides for the giving of substantial weight and the second sentence says that very special circumstances are not present unless the potential harm to the Green Belt is clearly outweighed by other considerations.

32. In my judgement the Claimant's interpretation of paragraph 144 fails to take proper account of the nature and purpose of the NPPF and of paragraph 144 in particular. The NPPF is not a statute and is not to be construed as such, rather it is guidance to decision makers and paragraph 144 is giving guidance as to how a particular exercise of planning judgement should be approached. Those making planning decisions must apply the NPPF and must interpret it correctly but the nature of the decision-making process is in turn relevant as to how the policy is to be interpreted. That is because the interpretation is to have regard to the persons by whom and in what setting the policy is to be applied. In that regard it is important to remember the way in which Lindblom LJ in *East Staffordshire BC v SSCLG* [2017] EWCA Civ 893, [2018] PTSR 88 at [50] characterised the decision making and his consequent warning to the court saying:

> "I would, however, stress the need for the court to adopt, if it can, a simple approach in cases such as this. Excessive legalism has no place in the planning system, or in proceedings before the Planning Court, or in subsequent appeals to this court. The court should always resist over complication of concepts that are basically simple. Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process, not rigid or formulaic. It involves, largely, an exercise of planning judgment, in which the decision-maker must understand relevant national and local policy correctly and

> apply it lawfully to the particular facts and circumstances of the case in hand, in accordance with the requirements of the statutory scheme. The duties imposed by section 70(2) of the 1990 Act and section 38(6) of the 2004 Act leave with the decision-maker a wide discretion. The making of a planning decision is, therefore, quite different from the adjudication by a court on an issue of law…"

33. The Claimant's approach to the interpretation of paragraph 144 is vitiated by an excessively forensic analysis and by a failure to read that paragraph in the light of paragraph 143. It is paragraph 143 which sets out the proposition that inappropriate development is by definition harmful to the Green Belt and it is paragraph 143 which sets out the requirement that such development should not be approved unless there are very special circumstances. The second sentence of paragraph 144 is in terms setting out the only situation in which it will be appropriate to find that there are very special circumstances. It is clearly intended as an elucidation and development of paragraph 143. The first sentence of paragraph 144 is to be read in the light of the paragraph which precedes it and the sentence in the same paragraph which follows it. That first sentence is not setting out a new requirement separate from paragraph 143 but is part and parcel of the elucidation of paragraph 143 which paragraph 144 is intended to provide.

34. The Claimant's argument is also flawed by taking metaphorical language unduly literally. The reference to "substantial weight" being given to harm is ultimately a metaphor as is the reference to the harm being "clearly outweighed" by other considerations. The exercise to be undertaken is not one of balancing weights on scales nor even one of saying that harm to the Green Belt is equivalent to a particular weight (say 10 stone) while a different circumstance such as an applicant's family circumstances can never be rated as equivalent to more than a different weight (say 5 stone). Rather the language of weight and weighing is being used to emphasise the importance of the Green Belt. It is used to make it clear to decision makers that they cannot approve inappropriate development in the Green Belt unless the considerations in favour of the development are such as truly constitute very special circumstances so that the development can be permitted notwithstanding the importance given to the Green Belt. The realisation that the reference to weight is ultimately a metaphor highlights a practical difficulty in the approach for which Mr. Riley-Smith presses. How is the decision maker to decide what is equivalent to "substantial + substantial"? The Claimant envisages the balancing exercise being quasi-mathematical but if that is the appropriate exercise then paragraph 144 fails to provide the decision maker with guidance as to the values to be placed in the necessary mathematical calculations.

35. When paragraphs 143 and 144 are read together they can be seen as explaining that very special circumstances are needed before inappropriate development in the Green Belt can be permitted. In setting out that explanation they emphasise the seriousness of harm to the Green Belt in order to ensure that the decision maker understands and has in mind the nature of the very special circumstances requirement. They require the decision maker to have real regard to the importance of the Green Belt and the seriousness of any harm to it. They do not, however, require a particular mathematical exercise nor do

they require substantial weight to be allocated to each element of harm as a mathematical exercise with each tranche of substantial weight then to be added to a balance. The exercise of planning judgement is not to be an artificially sequenced two-stage process but a single exercise of judgement to assess whether there are very special circumstances which justify the grant of permission notwithstanding the particular importance of the Green Belt.

36. That was the approach that was taken to the relevant parts of PPG2 and to the previous iteration of the NPPF.

37. In *Doncaster MBC v SSETR* Sullivan J was concerned with a challenge to an inspector's decision which had allowed appeals against the council's refusal of planning permission and the issuing of enforcement notices in relation to the development of land in the Green Belt as a site for the members of a Gipsy Traveller family. The applicable policy guidance was that set out in paragraphs 3.1 and 3.2 of PPG2. Sullivan J concluded that there was real doubt as to whether the inspector had applied the policy correctly in that he had failed to take proper account of the need for very special circumstances and of the harm potentially posed by inappropriate development.

38. Sullivan J explained the importance of applying full weight to the proposition that inappropriate development is of itself harmful to the Green Belt and the need for the harm caused to be clearly outweighed by the benefits of the development for there to be very special circumstances at [67] and [68] and [70] thus:

> "67. Thus applying the policy set out in paragraph 3.2 of PPG2, the proper question for the Inspector in the present case was whether the harm, by reason of inappropriateness, and the further (albeit limited) harm caused to the openness and purpose of the Green Belt were clearly outweighed by other considerations. Those other considerations were confined to "the benefit to the appellant's family, and particularly the children, of allowing the appeals." But it was only if those benefits not merely outweighed "the limited harm caused to the openness and purpose of the green belt", but if they clearly outweighed the harm by reason of inappropriateness and, the further, albeit limited, harm caused to the openness and purpose of the Green Belt, that very special circumstances could be found in terms of paragraph 3.2 of PPG2. …
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> 68. … it is very important that full weight is given to the proposition that inappropriate development is by definition harmful to the Green Belt. That policy is a reflection of the fact that there may be many applications in the Green Belt where the proposal would be relatively inconspicuous or have a limited effect on the openness of the Green Belt, but if such arguments were to be repeated the cumulative effect of many permissions would destroy the very qualities which underlie Green Belt designation. Hence the importance of recognising at all times that inappropriate development is by definition harmful, and then going on to consider whether there will be additional harm by reason of such matters as loss of openness and impact on the function of the Green Belt.
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> …
>
> 70 … Given that inappropriate development is by definition harmful, the proper approach was whether the harm by reason of inappropriateness and the further

> harm, albeit limited, caused to the openness and purpose of the Green Belt, was clearly outweighed by the benefit to the appellant's family and particularly to the children so as to amount to very special circumstances justifying an exception to Green Belt policy" (Sullivan J's emphasis)

39. At [71] Sullivan J cautioned against regarding his description of the proper approach as an attempt to require a particular form of words pointing out that decision letters are to be read as a whole and in a common sense way and on the basis that questions of planning judgement are for the decision maker and not the court.

40. The approach set out by Sullivan J in *Doncaster* at [70] was approved by the Court of Appeal in *Wychavon DC v SSCLG* [2008] EWCA Civ 692, [2009] PTSR 19 where the court reversed Mitting J's decision and upheld an inspector's decision giving permission for the use of land in the Green Belt as a site for a Gipsy Traveller family.

41. Sir Anthony Clarke MR and Wilson LJ agreed with the judgment of Carnwath LJ. In that he had noted, at [21] that "the word `special` in PPG 2 connotes not a quantitative test but a qualitative judgment as to the weight to be given to the particular factor for planning purposes". In my judgement the use of the word "substantial" in paragraph 144 of the NPPF can be characterised in the same way.

42. At [23] Carnwath LJ noted that it would have been open to the Secretary of State to set out in PPG2 potentially relevant factors and to say whether particular matters were or were not sufficiently important to outweigh the benefit of preserving the Green Belt. He went on to explain that a different approach had been adopted with the emphasis being on an assessment by the decision maker saying:

> "23 … As it is, the guidance neither excludes nor restricts the consideration of any potentially relevant factors, including personal circumstances. PPG2 limits itself to indicating that the balance of such factors must be such as "clearly" to outweigh Green Belt considerations. It is thus left to each inspector to make his own judgment as to how to strike that balance in a particular case.
>
> 24 At the particular level there has to be a judgment how if at all the balance is affected by factors in the individual case: for example, on the one hand, public or private need, or personal circumstances, such as compelling health or education requirements; on the other, particular factors increasing or diminishing the environmental impact of the proposals in the locality, or (as in this case) limiting its effect in time. This judgment must necessarily be one to be made by the planning inspector, on the basis of the evidence before him and his view of the site."

43. The decision of Sullivan J in *R (Chelmsford BC) First Secretary of State* [2003] EWHC 2978 (Admin), [2004] 2 P & C R 677 had been read as drawing a rigid division between the two parts of the question posed by paragraph 3.2 of PPG2 (namely whether very special circumstances are present and whether the harm to the Green Belt is clearly outweighed). At [25] Carnwath LJ said that such approach was inappropriate and, at [26], explained that the factors

meaning that very special circumstances were present could be the same as or overlap with those which justified the conclusion that Green Belt considerations were clearly outweighed. It was in that context that Carnwath LJ approved the test set out in the *Doncaster* case at [70] saying that the passage rightly "treats the two questions as linked but starts from the premise the inappropriate development is `by definition harmful' to the purposes of the Green Belt".

44. One of the issues before Dove J in *Atkins v Tandridge City Council* [2015] EWHC 1947 (Admin) was a challenge to the grant of planning permission for a motocross circuit in the Green Belt. The applicable guidance at that time was that set out at paragraphs 87 and 88 of the earlier version of the NPPF. At [35] Dove J identified the correct approach as being that enunciated by Sullivan J in the *Doncaster* case at [70] noting, at [36], that:

> "No submission was made in the course of argument, in my view entirely correctly, that any different approach was justified by the replacement of PPG2 with paragraph 88 of the Framework in respect of this cardinal test of how to apply Green Belt policy in a development control context. In particular the approach that there is a need for harm to be clearly outweighed is still reflected in the Framework."

45. At the time of the decision of the Court of Appeal in *Redhill Aerodrome Ltd v SSCLG* [2014] EWCA Civ 1386 the applicable guidance was also that contained in paragraphs 87 and 88. The Court had to consider whether the words "any other harm" in the second sentence of paragraph 88 meant only any other harm to the Green Belt or included any other harm which was relevant for planning purposes (see at [3]). The argument which had been successful at first instance and which the respondent maintained on the appeal was that the change from PPG2 to the NPPF required a different meaning to be given to the words "any other harm" from that which had been given to the same words in PPG2 paragraph 3.2 (see at [9]). It follows that the Court of Appeal had to address directly the question whether there had been a change from the approach applicable under the PPG2 regime.

46. At [16] Sullivan LJ explained that it had not been the Government's intention in moving from PPG2 to the NPPF to make a significant change to Green Belt policy noting in that regard the opening words of paragraph 87 with their assertion of continuity. Sullivan LJ acknowledged that the ultimate test was the meaning of the NPPF and not the Secretary of State's intention but then explained that when regard was had to the wording of the two provisions there had been no material change. Thus at [17] he said:

> "The text of the policy has been reorganised … but all of its essential characteristics – `inappropriate development is, by definition, harmful to the Green Belt', so that it `should not be approved except in very special circumstances', which `will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations', and the `substantial weight' which must be given to `harm to the Green Belt' – remain the same."

47. In the light of that assessment of paragraphs 87 and 88 of the NPPF the Court of Appeal concluded that the approach applicable to the words "any other harm" in those paragraphs remained the same as that which had been applicable to those words in PPG2.

48. Thus both Dove J in *Atkins v Tandridge City Council* and the Court of Appeal in *Redhill Aerodrome Ltd v SSCLG* expressly stated that there had been no material change between the effect of paragraph 3.2 of PPG2 and paragraphs 87 and 88 of the NPPF.

49. Mr. Riley-Smith sought to escape from the effects of that assessment by contending that the change of approach which he said had been effected was not a significant one. However, his challenge to the Decision depends on the contention that the use of the term "any harm to the Green Belt" in paragraph 144 means that the exercise to be undertaken is different from that which appertained under paragraph 3.2 of PPG2 of attaching substantial weight to "the harm to the Green Belt". The reality is that this must be seen as a significant change.

50. In my judgement it is highly material to note that paragraphs 143 and 144 are in almost identical language to the former paragraphs 87 and 88. The opening words of paragraph 87 "as with previous Green Belt policy" have not been carried over. However, that is not surprising because there is no need in the current guidance to explain whether it was or was not consistent with previous guidance. However, those opening words of paragraph 87 are revealing as indicating that the new wording was seen as a continuation of the previous policy. The continuation into paragraphs 143 and 144 of the wording of paragraphs 87 and 88 is also noteworthy. In my judgement the "cardinal test" (to adopt Dove J's description) and the "essential characteristics" of the policy (adopting the words of Sullivan LJ) have remained the same through the changing iterations of PPG2, the former paragraphs 87 and 88, and the current paragraphs 143 and 144. The wording has been rearranged but the nature of the guidance and consequently the nature of the exercise to be undertaken by the decision maker have not altered.

51. Mr. Riley-Smith relied not just on the conclusions which he said should be drawn from the language of paragraph 144 but also on the authorities which he said supported his contention. He said that the decisions of HH Judge Sycamore in *Budhdeo v SSCLG* [2016] EWHC 21 (Admin) and *Thurrock BC v SSCLG* [2016] EWHC 200 (Admin) supported his submissions. Mr. Riley-Smith said that in the former Judge Sycamore held that the application of the individual approach (ie the application of separate tranches of substantial weight to each Green Belt harm) was consistent with paragraph 88 and that in the latter the learned judge upheld the inspector's decision because the inspector had applied the individual approach. Accordingly, Mr. Riley-Smith relies on these decisions as authorities endorsing the applicability of the individual approach.

52. In *Budhdeo* Judge Sycamore was concerned with an appeal against an inspector's dismissal of planning appeals seeking permission for inappropriate

development in the Green Belt. The applicable guidance was that contained in paragraphs 87 and 88 of the earlier version of the NPPF.

53. In that case the inspector had accepted that the loss of openness which would result from the proposed development would be limited. However, because openness was an essential feature of the Green Belt he said, at paragraph 19 of the decision letter, that he attached "significant weight" to even that limited loss of openness. At paragraph 39 the inspector had rehearsed paragraph 88 and at paragraph 40 he had set out the conclusion that the benefits of the proposed development did not outweigh the harm and that as a consequence very special circumstances such as would justify the grant of permission did not exist.

54. At [17(ii)] Judge Sycamore addressed the claimants' contention that the inspector's conclusion had been irrational in finding that although limited the loss of openness remained harmful. In rejecting this argument the learned judge took account of the terms of paragraph 88 and explained that the inspector had been engaged in an exercise of planning judgement in which the question of the degree of weight to be given to the loss of openness was a matter for the inspector.

55. In their amended grounds in *Budhdeo* the claimants had argued that the inspector had failed to consider both definitional and actual harm to the Green Belt. At [22] Judge Sycamore explained that on his interpretation of the decision letter the inspector had considered both definitional and actual harm.

56. In my judgement it is artificial to see either the inspector or Judge Sycamore as having taken the view that the former had to apply the individual approach. The best reading of the decision letter as set out in Judge Sycamore's judgment is that the inspector was making a planning judgement in the light of the importance of the Green Belt purposes and of the seriousness of any harm to a Green Belt purpose even if, absent Green Belt considerations, the harm in question would not otherwise be significant. Judge Sycamore's conclusion was that the planning judgement was one which the inspector had been entitled to make. Judge Sycamore was not addressing the contrast between the individual approach and any other approach (unsurprisingly because that was not the argument before him). He was not holding that the appeals failed because the inspector had adopted the individual approach. Instead his judgment was to the effect that they failed because the assessment of whether very special circumstances existed was a matter of planning judgement where the inspector had taken account of material considerations and where the conclusion he had reached was one which he had been entitled to reach. At the highest even if the inspector is to be seen as having applied the individual approach (which is debateable at best) Judge Sycamore was saying that this was an approach which he was entitled to take and one which was consistent with paragraph 88. He was not, however, holding that it was an approach which the inspector had been obliged to take let alone that no other approach was consistent with paragraph 88. It is of note that at [24] Judge Sycamore quoted [35] of Dove J's judgment in *Atkins v Tandridge City Council* where Dove J applied the *Doncaster* approach to paragraph 88 and there is no

indication that Judge Sycamore regarded himself as applying a different approach.

57. Accordingly, the decision in *Budhdeo* is not authority supporting the Claimant's contention that the proper application of paragraph 144 requires a decision maker to adopt the individual approach.

58. In the *Thurrock* case the inspector had granted permission for the use of a site in the Green Belt by Irish Travellers. In its appeal the council contended that the inspector had erred in that having found both a loss of openness and an encroachment into the Green Belt she had, it was said, attached only "some weight" to these matters rather than substantial weight. However, the inspector's reference to "some weight" had been in the context of other passages where she had repeatedly referred to the need for substantial weight to be given to any harm to the Green Belt. Judge Sycamore rejected this ground of appeal in the light of the decision letter read as a whole.

59. Although it was not expressed as such the challenge to the inspector's decision in the *Thurrock* case was in part on the basis that the inspector had failed to apply the individual approach. It is not entirely clear whether the inspector did or did not apply that approach but what is significant for present purposes is that Judge Sycamore was not saying that was the only proper approach. Rather his emphasis was on the need to read the decision letter as a whole and on his conclusion that when that was done the inspector had had proper regard to paragraph 88. It was not a decision to the effect that the proper application of the paragraph 88 guidance required adoption of the individual approach let alone that the *Doncaster* approach was no longer good law.

60. It follows that I have concluded that the approach applicable under PPG2 paragraph 3.2 and paragraphs 87 and 88 of the former version of the NPPF remains applicable in respect of paragraphs 143 and 144 of the current version of the NPPF. It is not necessary for substantial weight to be allocated to each Green Belt harm at the first stage of a two-stage process with each allocated weight being applied at the second stage. Instead the approach enunciated by Sullivan J in the *Doncaster* case, my understanding of which I have explained at [34] above, remains good law.

The Lawfulness of the Decision.

61. In the light of that analysis of paragraphs 143 and 144 did the Inspector err in law?

62. The Inspector's analysis of the issues cannot be faulted and his articulation at [38] of the applicable test is unimpeachable. The starting point is, therefore, that the Inspector applied correctly the test which he had formulated correctly. In considering the Decision [39] – [42] are to be read together and as a whole to ascertain the process which the Inspector undertook. As I have already explained the Inspector was not in error in failing to apply the individual approach and in failing to attach separate substantial weight to each element of harm set out in [39]. The Inspector there identifies the need for substantial weight to be attached to the harm flowing from inappropriate development in

the Green Belt and then identifies that such harm does not stand alone but that there are other elements of harm which add further weight to the considerations against the grant of permission. The Inspector was clearly alert to the need to be satisfied that there were very special circumstances before upholding the appeals and granting permission. Having taken account of that need the Inspector nonetheless concluded that very special circumstances existed in the particular case. This was a classic exercise of planning judgement and did not display any error of law.

63. It follows that the appeals under section 288 and 289 all fail.