IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

No. CO/1577/2023

[2023] EWHC 1400 (Admin)

Royal Courts of Justice

Thursday, 11 May 2023

Before:

MR JUSTICE KERR

B E T W E E N :

THE KING
on the application of
WEST LINDSEY DISTRICT COUNCIL — Claimant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT — Defendant

- and -

(1) SCAMPTON HOLDINGS LIMITED
(2) SECRETARY OF STATE FOR DEFENCE — Interested Parties

MR RICHARD WALD KC and MR JAKE THOROLD (instructed by Legal Service Lincolnshire) appeared on behalf of the Claimant.

MR PAUL BROWN KC, MR NICK GRANT and MS ISABELLE BUONO (instructed by Government Legal Department) appeared on behalf of the Defendant.

THE INTERESTED PARTIES did not appear and were not represented.

J U D G M E N T

MR JUSTICE KERR:

Introduction

1 The claimant ("the council") issued a judicial review claim last week on 2 May 2023, seeking permission to challenge the decision of the defendant Secretary of State ("the Secretary of State"), taken on or about 28 March 2023, to deploy RAF Scampton ("the Site") in Lincolnshire for the purpose of housing asylum seekers. The Minister for Immigration announced in Parliament on 29 March 2023 that the Government intended to use military sites in Essex and Lincolnshire for that purpose. An accompanying document made clear that the site in Lincolnshire was RAF Scampton.

2 In the claim, the council seeks an order of this court quashing that decision. The council now seeks an interim injunction preventing the movement of materials, equipment and people by the Secretary of State onto the Site at RAF Scampton until the claim has been determined by the court. The interim injunction sought also seeks to restrain acquisition of the site by the Secretary of State from the current owner thereof, the first interested party, the Ministry of Defence ("the MoD").

3 If the interim relief sought is not granted, the council seeks directions for an expedited determination of the claim with a final hearing, if permission to proceed is granted, by the end of this month. Swift J ordered last week that the application for an interim injunction or directions for an expedited determination of the claim be heard today. The Secretary of State opposes those applications.

4 The council is the local planning authority for the area that includes the Site. The council wishes to develop the Site in a manner inconsistent with housing asylum seekers there. The

MoD is the current owner of the Site. The second interested party, ("SHL"), is the proposed developer, according to the council's plan for development of the Site.

5 There are various other claims arising from a similar plan relating to the other airport site at RAF Wethersfield in Essex. These claims are at different stages of development from this one and from each other. One has already reached Court of Appeal level. There is some overlap between the issues raised, but also differences in the issues.

6 After considering written comments from some of the parties in those cases, I have concluded that for the time being they should not at this stage be formally linked, though it is possible some of them may be in future. I am, therefore, considering today only the council's present application in this claim.

Background and facual position

7 The backdrop to this claim is the increasing number of asylum seekers and their dependents requiring accommodation. The Secretary of State has a statutory responsibility to provide accommodation if they would otherwise be destitute. The manner in which that has been and is being done is described in the recently published judgment of Waksman J in *Braintree District council v Secretary of State for the Home Department* [2023] EWHC 1076 (KB).

8 For an account of the numbers, how they have risen in recent months and years and how the Secretary of State has responded to the logistical challenge thereby created, I refer to paragraphs 11-28 of that judgment and need not repeat here what the judge there said. His account is, in turn, derived from the witness statement of Mr Oliver Banner, a senior civil servant, which is also in evidence before this court today.

9 The Site is located close to the village of Scampton in Lincolnshire. It is 800 acres in size with over 280 buildings and 10,000 feet of serviceable runway. It has one of the largest

blocks of restricted airspace in the UK, which affords opportunities for activities such as aeronautical training and testing. It has an illustrious history going back to 1916 and is particularly famed for its use during the Second World War as the base of the Dambusters. In recognition of its historic importance, a number of the structures there are listed buildings. It was decommissioned recently by the RAF.

10 Since its closure was announced back in 2018, the council has worked to exploit the opportunities it presents for development. The council wishes to retain an operational airfield there as that is useful to attract aviation businesses and with associated use of airspace above the site. These redevelopment proposals are reflected in the Local Plan for Central Lincolnshire, which was formally adopted by the Central Lincolnshire Joint Strategic Planning Committee on 13 April 2023; see in particular in Policy S75, to which I have been taken.

11 The MoD has an infrastructure management organisation called the Departmental Infrastructure Organisation ("DIO") which is based at the Site. The DIO and the council have been working closely on the redevelopment proposals. The arrangement under discussion has been that the council will purchase the Site from the MoD and thereafter transfer ownership of it to its development partner.

12 In April 2022, the council filed an expression of interest following the DIO's advertisement on the government's electronic portal. The council's plan was received with favour by government. There were no other expressions of interest and the council became preferred bidder.

13 In July 2022, the council commenced a competitive dialogue process to procure a partner for the future regeneration of the Site and, during the course of 2022, worked through a procurement process in that regard.

14 In September 2022, the council, the DIO and the Central Lincolnshire Joint Strategic Planning Committee entered into a statement of common ground to "confirm and clarify the level of agreement on the local plan and particularly S75 of the submitted plan which relates to RAF Scampton". The document confirmed that the parties supported the inclusion of a site-specific planning policy, to provide a framework for the development of the Site as provided in the Draft Local Plan on the grounds that it is soon to become available and "has significant potential and strategic importance in Central Lincolnshire going forward".

15 However, also in September 2022, the Home Office began a sifting exercise to identify Crown and private sector land that could be suitable for short-term residential use. In November 2022, the Home Office revisited SHL's proposed development and considered the potential of the Site for asylum accommodation. It did so also in relation to the other RAF base at Wethersfield in Essex. Both RAF sites were identified as potential residential asylum seeker sites through that process.

16 It is common ground that the Site is Crown land and currently owned by the MoD. It has also previously been used by the RAF for the training of the Red Arrows until that ceased at the end of March this year. The Secretary of State now intends to use about 50 hectares of the Site for its proposed development to accommodate asylum seekers. That development would comprise an area of hardstanding, barracks buildings and some grassed space. The area includes certain heritage sites which are being fenced off and are not intended to be accessible to asylum seekers as and when they are housed there.

17 I was told at the hearing today that initially about 200 asylum seekers were to go into residence on the Site, a number that could increase to about 2,000, which in terms of geographical area would amount to about 15 per cent of the Site. The proposed development will involve erection of modular accommodation units on existing areas of

hardstanding and refurbishment of existing barrack-style accommodation alongside ancillary works, including utilities connections and medical facilities.

18 There is no dispute that there are these two separate plans for the use of the Site and that they are in conflict with each other. No application for planning permission for the council's proposed development has, as far as I am aware, yet been made; nor, on the evidence before me, has any planning permission application been made by the Secretary of State to use the Site for residential use, which would be required in some form if the Site is to be used for that purpose beyond an initial 12 month period of occupancy.

19 The council says that during the period between November 2022 and March 2023 it engaged with the Secretary of State and her agent, SERCO, representing to her strongly that the Site would not be suitable for dispersed asylum accommodation and emphasising the effect that use would have on its own development proposals. The council provides in its statement of facts and grounds a detailed account of various meetings and written communications between it and government officials and others debating the proposal to use the Site for the housing of asylum seekers which the council opposed, and continues to oppose.

20 On 29 March 2023 Mr Robert Jenrick MP, the Minister for Immigration, announced in Parliament the use of military sites in Essex and Lincolnshire to provide basic accommodation for asylum seekers at scale. On the same day, it was confirmed that this included the Site, namely, RAF Scampton. That announcement followed a decision that had been taken the previous day, documents pertaining to which I have been shown.

21 The statement of Mr Jenrick in Parliament was followed by a press release and fact sheet stating, among other things, that:

a) the Site will be used for adult, single male asylum seekers;

b) the Home Office is assessing how long asylum seekers will be accommodated there;

c) the Home Office only intends to use Scampton on a temporary basis;

d) the Home Office plans to use a phased approach to moving people on site, starting with about 200 and increasing to about 2,000 people over time; and

e) the Home Office is committed to working with the council to develop their long term vision for the Site.

22 After that announcement and accompanying explanatory material, correspondence ensued in April 2023 in accordance with the pre-action protocol for claims of this kind, leading eventually to the filing of the present claim last week and the initial order of Swift J that this hearing should take place today.

23 The works required for the proposed development have not yet begun. The Secretary of State has commissioned surveys which have to be completed before works can commence and the results may lead to further preparatory works being required. The Secretary of State considers that the proposed use of the Site is permitted development under Class Q, Part 19 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO" and "Class Q"). I will return to this point.

24 Preparatory surveys have already begun. The Secretary of State wishes to continue with these and to commence preparatory works as soon as possible. However, based on current progress, she considers it unlikely that the Site will be ready to receive any asylum seekers before 3 July 2023 and, accordingly, offers an undertaking that no asylum seekers will occupy the Site before that date.

The parties' submissions

25 The council submits that the four grounds of challenge are strongly arguable and that the balance of convenience and justice favours the grant of interim relief to preserve the status quo pending resolution of the claim for judicial review.

26 The Secretary of State submits that the application for interim relief is incompatible with a statutory provision, section 296A of the Town and Country Planning Act 1990 ("the TCPA"); that the grounds of challenge are unarguable, i.e., they do not raise any serious issues to be tried; that damages would not be an adequate remedy for the Secretary of State; and that the public interest and the balance of convenience is against granting an injunction.

27 The Secretary of State also opposes directions for an expedited hearing, arguing that the fair way to proceed is to keep to the normal timetable for disposing a claim of this kind, particularly in view of the undertaking that there will be no occupancy of the Site by asylum seekers prior to 3 July 2023.

28 In only slightly more detail, the parties' contentions on the merits at this early stage may be summarised as follows. Dealing first with the Secretary of State's preliminary point arising from section 296A of the TCPA, it provides at subsection (2) that:

> "A local planning authority must not take any step for the purposes of enforcement in relation to Crown land unless it has the consent of the appropriate authority."

And by subsection (4):

> "A step taken for the purposes of enforcement is anything done in connection with the enforcement of anything required to be done or prohibited by or under this Act."

By subsection (5) of section 296A, a step includes applying to the court.

29 Second, the Secretary of State points out the Site is Crown land and the appropriate authority is (see section 293(2)(e)) the government department that owns the land, i.e., here, the MoD. Its consent to enforcement steps has not been sought.

30 Third, the Secretary of State says, in the *Braintree* case, Waksman J decided that section 296A barred Braintree's application for an injunction, made on the ground of breach of planning control under section 187B of the TCPA.

31 Fourth, Mr Brown KC for the Secretary of State submits that the present application is a thing "done in connection with the enforcement of anything required to be done or prohibited" by or under the TCPA and therefore prohibited by subsection (2) of section 296A.

32 Fifth, even if that is wrong, in the alternative the Secretary of State submits that if section 296A bars such an injunction for breach of planning control, the bar should not be circumvented by using the different procedural route of interim relief in judicial review proceedings. The substance of the council's complaint, it is submitted, is breach of planning control, even though the council does not call it that.

33 The council responds that the decision of Waksman J is not binding on this court and is subject to an appeal which is now pending; and that section 296A should not inhibit the grant of interim relief pending determination of this claim.

34 Further, the council says that this is not a claim brought under section 187B; it is only seeking an interim not a final injunction; and is doing so not by enforcement of planning controls but resting on ordinary public law grounds, notably disregard of mandatory material considerations, irrationality and excess of power. It has taken, Mr Richard Wald KC for the council points out, no decision to bring planning control enforcement proceedings. Such a decision would have to be made under s.171A of the TCPA, applying a test of expediency.

35 Turning to the grounds of challenge in briefest outline - the quotes are from respectively the council's statement of facts and grounds and the Secretary of State's skeleton argument - the first ground is failure to take account of material considerations. It is said by the council that the Secretary of State failed to take account of or inquire adequately into what must be said to mandatory relevant considerations, namely "local circumstances, including relevant development plan policies and the regeneration scheme proposed for the Site".

36 The council argues that the Secretary of State intends at first to use what are called Class Q emergency development powers to use the Site for 12 months as an interim measure and then, before expiry of that 12 month period, to apply for planning permission to use it beyond that period for two years or more. Mr Wald KC has taken me to documents envisaging use for two to three years in order for the project to be, in the government's view, cost effective.

37 Therefore, the council submits, the Secretary of State must "make decisions on this basis", i.e., must take account of the possibility that planning permission will be refused and the Secretary of State will only have the site for up to one year. The Secretary of State should therefore, Mr Wald submits, have considered in a cost benefit analysis whether use for only 12 months is justifiable. The Secretary of State, the council says, has acted unlawfully by presuming more than 12 months' use of the Site and failing to consider whether only 12 months' use would "outweigh the harm that will be caused by such use".

38 The Secretary of State counters those arguments as follows. Local development plan policies, Mr Brown submits, were not a mandatory material consideration at all. The Secretary of State, in making the challenged decision, was not exercising a planning function; she was performing her duty to provide accommodation to asylum seekers who otherwise would face homelessness and destitution.

39 The land belongs to the Crown, which is not obliged to sell it to anyone. The Secretary of State has the right to use the land in accordance with the Class Q permitted development right. Local Plan policies, the Secretary of State submits, are trumped by that development right.

40 The Secretary of State and government were entitled, she submits, to find the Site suitable for housing asylum seekers and have done so. Any negative impact on the area is a matter

for political accountability through the ballot box. It creates no legal obligation and no mandatory relevant consideration.

41 Next, the Secretary of State submits that the dialogue thus far shows that she and her Immigration Minister are acutely aware of the 12 month temporal limit on Class Q development of the Site and the need for planning permission thereafter, which may or may not be granted. The risk that it may not be is one she is entitled to take and has chosen to take, she submits.

42 The next ground is irrationality. The council says selection of the Site as a place to house asylum seekers is irrational and, therefore, unlawful. This submission, put another way, is that no reasonable Secretary of State could select the Site as a place to house asylum seekers. The threshold is high, because it means the court is asked to interfere in a decision taken in the political arena.

43 The council's case on irrationality is based on similar reasoning to that advanced under the first ground. The council relies, again, on the 12 month time limit on Class Q development; prevention of the council's scheme from going ahead; the stated intention to use the Site for more than 12 months; the need for planning permission for that to happen; and the fact that a planning permission has not, it appears, been made.

44 The Secretary of State opposes those arguments, saying that the second ground does no more than restate and add nothing to the first ground; and that the second ground should fail by the same reasoning. It is up to the Secretary of State and government, submits Mr Brown, what to do with Crown land and, to the extent that planning permission will be required, as it will be by the end of the 12 month period, it is not irrational to take the risk that it will not be granted.

45 The third ground has been labelled "*ultra vires*" by the council in its statement of facts and grounds. It is founded on the proposition that the Class Q development right cannot be used in this case at all because, contrary to the recent decision of Waksman J, there is no "emergency". To understand this, I need to explain briefly what a Class Q development right is.

46 Normally, planning permission is required for development (section 57 of the TCPA). An application made and the local planning authority must, in determining it, have regard to the local development plan (see section 70(2)).

47 By sections 58 and.59, the Secretary of State may grant planning permission for specific categories of development. Using this power, the Secretary of State has issued the GPDO, to which I have already referred.

48 Article 3(1) of the GPDO grants permission for the classes of development set out in Schedule 2. That is subject to article 3(10), requiring an "EIA", i.e., environmental impact assessment, in some cases, but in this case a "screening opinion" has determined that no EIA is necessary.

49 One of the classes of permitted development within Schedule 2 to the GPDO is "Class Q". For Class Q development there must be an "emergency". Class Q is defined as development by or on behalf of Crown land for the purposes of preventing, reducing, controlling, mitigating the effects of or taking other action in connection with the emergency.

50 Class Q development is permitted subject to the developer ceasing the use and removing buildings, plant, machinery, etc within 12 months, unless otherwise agreed in writing with the local planning authority or unless the local planning authority has granted planning permission for the development.

51 An “emergency” is defined widely in Q2. I will not set out the definition here. It can be found in the judgment in the *Braintree* case. On similar facts, Waksman J decided in that case that the asylum seeker accommodation issue was an emergency. Anyone wanting to know about his reasoning in more detail will be enlightened by reading his published judgment. His decision is subject to appeal by permission of the judge and an appeal has been brought in the last couple of days. The council, in the present case, has applied to intervene in that appeal.

52 The council’s starting point in this case is that the decision of Waksman J is “plainly wrong” and I should therefore depart from it. The council’s statement of facts and grounds includes paragraphs submitting that there is no emergency here; there is only a potential future emergency. It has to be, the council says, “something sudden and unexpected”. The accommodation issue has been around for some time. The Secretary of State can avoid breaching her statutory obligations by booking hotel rooms, as she has done in the past.

53 The council goes on to submit that, even if there is an emergency, the development proposed, i.e., housing asylum seekers, would not be undertaken for the purpose of addressing the emergency. The purpose of using RAF sites is, the council says, referring to the reasons given in Parliament, to save costs, cease using hotels and deter potential asylum seekers from travelling here by offering only subsistence standard accommodation.

54 The Secretary of State’s response is that this ground is unarguable. It is contrary to the reasoning of Waksman J which is clearly, submits Mr Brown, not plainly wrong and should be followed. It is self-evident, says the Secretary of State, that there is an emergency where, unless sites such as this one are used, record levels of asylum seekers will become homeless for want of accommodation required by statute to be provided. An emergency need not be sudden and unexpected; it can acquire the quality of an emergency over time.

55 The Secretary of State relies on the reasoning in the judgment of Waksman J, which I need not repeat here. It is not the law, she submits, that Class Q can only be used where non-Class Q measures could address the emergency in a different way. The fact that other options may exist does not mean there is no emergency, nor that the use to be made of this Site is not a measure for the purpose of addressing that emergency.

56 The fourth ground is a failure to provide adequate reasons, also labelled "perversity". The council submits here that the Secretary of State has "failed in her duty to provide adequate reasons". She has breached this duty, it is said, "by providing differing and mutually inconsistent justifications for its use of RAF Scampton".

57 The council referred me to Lord Brown's well-known statement in *South Buckinghamshire District council v Porter (No. 2)* [2004] 1 WLR 1953 at [36] that 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.

58 The council reproaches the Secretary of State for not having done that and asserts that it has suffered substantial prejudice in consequence, for its proposed £300 million redevelopment scheme "hangs in the balance".

59 The Secretary of State submits that there is no duty to give reasons for the decision at all. It is not a decision of a local planning authority or an inspector under the statutory scheme. It is a communication from the Minister for Immigration in the political arena outlining proposed government action.

60 There does not have to be only one reason, the Secretary of State submits; there may any number. In any case, even if the duty existed, the reasons are adequate. The council and the public know why the government proposes to use the Site to house asylum seekers. It

proposes to do so in the performance of the statutory duty to accommodate them as well as for the other reasons given in Parliament.

61 The difficulties in continuing to use hotels to house asylum seekers are well documented, the Secretary of State submits. Hoteliers may or may not be reluctant to have them, but hotels are expensive. Injunctions have sometimes stopped the use of hotel accommodation where that involves a change of use from hotel to hostel which can, in some cases, be a flagrant breach of planning control. Use of hotels, she submits, is clearly not the answer and was never intended to be more than a stop gap measure

Reasoning and conclusions

62 As this is an application for interim relief made early in the proceedings, I will be relatively brief in my consideration of the opposing arguments. It is common ground that the question of interim relief is governed by the test set out in the *American Cyanamid* decision of the House of Lords in 1975, although it is not always applied in quite the same way where the decision engages public as well as purely private interests.

63 The first question I have to address is whether the grounds of challenge raise any serious issue to be tried. I do not propose to engage too closely with the merits of the arguments at this stage. The issue of permission has yet to be determined and the test to be applied when determining whether to grant permission is not dissimilar to the question of whether the grounds raise a serious issue to be tried. A judge of this court will shortly have to determine the issue of permission and I do not wish to pre-empt or prejudice that exercise.

64 Having said that, I cannot avoid altogether engaging with the strength of the arguments on either side. In a public law context, where the public interest is relevant to the balance of convenience and justice, to which I am coming shortly, the strength of the public interest in

granting or withholding relief cannot easily be disentangled from some preliminary evaluation of the likely merits of the challenge.

65 At present, there appears to me to be force in the Secretary of State's preliminary point that section 296A of the TCPA, if not a jurisdictional bar, as in a section 187B case such as *Braintree*, should either operate as a discretionary bar to the relief sought or at least heavily influence the balance of convenience to avoid (if the decision of Waksman J is right) the statutory bar being circumvented.

66 It is difficult at this stage to see why the outcome should be different if the application is brought not under section 187B, but by invoking the court's general jurisdiction to grant interim relief in civil proceedings, including judicial review proceedings. At the very least, the point has some relevance in the context of the balance of convenience and justice, to which I will return shortly.

67 Turning to the four grounds of challenge which arise if the application survives that preliminary objection: the first is that the Secretary of State has failed to take account of mandatory relevant considerations. A possible difficulty with that argument is to show how the considerations relied on can be said to be mandatory.

68 They are, I remind myself, "local circumstances, including relevant development plan policies and the regeneration scheme proposed for the Site" and in particular the temporary nature of the proposed Class Q occupancy and the possibility that planning permission beyond that will not be granted.

69 As the Secretary of State points out, subject to any express provision, making a consideration mandatory and subject to the high hurdle of irrationality, it is for the decision maker to select the considerations that she considers material; it is not for the challenger to

find one that was not taken into account and then complain of that. It seems to me that this ground faces some difficulty for that reason.

70 I do not accept that it is necessarily irrational to approach the temporal question by taking an optimistic view about the future grant of planning permission, taking the risk that it may not be granted and deciding to "cross that bridge when we come to it".

71 The next ground is freestanding irrationality or perversity challenge. The hurdle is high. It used to be said that to show what is often called *Wednesbury* unreasonableness or irrationality it would have to be shown that the minister had taken leave of his senses.

72 While that is no longer how the test is formulated, there is obvious difficulty in saying that the Secretary of State cannot rationally treat as an option open to her the option of using Crown land to place people she has a duty to accommodate; who have to be housed somewhere; whose location will displease some people nearby wherever they are put; who will be able to stay longer than 12 months if planning permission is granted for that to happen – I interject in parentheses that government has it in its power to grant a special development order to that end under section 59 of the TCPA – and who may, at worst, have to be moved again after the initial 12 month period.

73 I also think there is force in the submission that the alternative development espoused by the council was extensively considered within government in the documents appended to the witness statement of Mr Liam Burns, the senior civil servant who gave written evidence for the Secretary of State. I refer in particular to what is, in effect, an options and assessment paper dated 27 February 2023; the Minister's response recorded in an email of 1 March 2023; and an assessment document dated 23 March 2023. These included consideration of different options, not just the presently favoured one, and value for money issues.

74 The third ground is the so-called *ultra vires* argument: that there is no emergency and, therefore, this is not a Class Q case. A possible difficulty with that ground for the council is that the contrary decision of Waksman J may be correct. We tend to treat decisions of brother and sister judges in our division and court as right unless there is some good reason why we should not.

75 That permission to appeal was granted is not, in itself, a good reason to treat the decision as wrong. There is, with great respect, no glaring or obvious flaw in the reasoning that I can see. So the third ground is looking difficult for the council. Mr Wald has pointed to the pending appellate proceedings and he has advanced arguments contrary to the reasoning of Waksman J. But he has not, at this stage, made out his bold claim to my satisfaction that the decision is obviously wrong and should be disregarded.

76 The fourth ground is inadequacy of reasoning. The premise appears to be that the decision is or is akin to a planning decision, such as one made by a local planning authority or, on appeal, an inspector. If that is right, the further question would arise whether what was said in Parliament and in the fact sheet was sufficiently intelligible so as to enable the council to know why it lost the argument.

77 A possible answer would be: so that asylum seekers, who must be housed somewhere, can be housed at Scampton, because they are many and need accommodation. At the moment I do not find that obvious reason is manifestly lacking from the government's explanation of what it is doing here, particularly when one adds to the publicly available documents the further documents created behind the scenes but shown to me, having been appended to Mr Burns' witness statement.

78 If you add to that the further reasoning which was given in public: that the government wishes to save costs by discontinuing hotel use and achieving economies of scale; and

wishes to deter travel here by providing spartan accommodation, the reasons seem to be both intelligible and adequate and I find no internal contradiction or manifest inconsistency between them.

79 So while I would not go so far as to say the grounds raise no serious issue to be tried, I have seen more compelling cases than this one and I think the council may well face the difficulties on the merits that I have mentioned.

80 Turning to the second stage of the *Cyanamid* exercise, damages would manifestly not be an adequate remedy for either side, with or without an undertaking in damages which is not given (and whether it should be is the subject of a subsidiary dispute which I need not address further). The issue of damages is of little relevance where this case is about the housing of persons at risk of destitution if not accommodated.

81 Turning, finally, to the balance of convenience and justice, which is the last and, in this case, decisive stage of the exercise, the council submits that the balance of convenience is in its favour and relies on the evidence of Ms Grindrod-Smith in her first witness statement at paragraph 120 and following.

82 She makes a number of points there which I have considered carefully. They are explained in detail at paragraph 122 through to paragraph 144. The points are grouped under the headings “loss of investment opportunities”, “loss of heritage significance/harm to heritage” and “loss of size, scale and form”.

83 Having considered those points, I have reached the clear conclusion that I should accept the arguments of the Secretary of State pointing the other way, against the grant of any interim relief. I do so with one exception, which is that I do not accept the argument that the council has brought these proceedings too late and delayed unduly. It has not delayed unduly. It is easy to criticise the timing of a judicial review application, whether it is brought late or

early. Here, the announcement was made only about six weeks ago. The Secretary of State's other arguments on the balance of convenience, which I do accept, are, in summary, the following.

84 First, addressing the council's concerns about deterring investment, I do not think it is possible to predict the future intentions of investors in the manner that the council seeks to do. I accept that the potential presence of asylum seekers, particularly if protracted, will not be good for the investment climate; but I do not think anyone, not even the council, can say with any degree of assurance what the intentions of investors will become in the future, particularly if the presence of the asylum seekers is relatively short lived.

85 There are, indeed, assertions from the council that the investment currently proposed will be lost, but there is no evidence before me from the council's proposed developer, the second interested party, SHL. That party, like the MoD, has not appeared at the hearing today.

86 If it turns out that residential use is limited to one year, as the council has urged may well be the case, then only a year will have been lost. It is difficult to see why the temporary presence of asylum seekers, as it will be if the council succeeds in this claim, will blight the Site irretrievably, as asserted. It is, as the council itself urges, a prestigious and valuable site with an illustrious history. That will not go away and will remain a positive feature of this heritage asset.

87 Nor do I accept that the harm to the Site from preparatory works will be irreversible. The Secretary of State has explained that the buildings to be erected will stand on tarmac and be as readily removable as installable.

88 I accept that the spot booking of hotels is an unsatisfactory strategy in many ways. The numbers are becoming too great and the difficulties considerable. I accept the council's evidence that it was only ever intended to be a short term solution. Furthermore, there is

clear evidence that demand is continuing to increase and accommodation of a large number of asylum seekers in one place is therefore increasingly an appropriate solution to address the problem.

89 The duty to address it is statutory; it is not a voluntary matter. While the accommodation is not intended to be luxurious, it must be provided as a matter also of ordinary humanitarian concern, as well as statutory duty. I reject the suggestion of the council that causation of a specific breach of the duty to accommodate specifically identifiable individual asylum seekers must be proved. That seems to me unreal. The safeguard against breach of the statutory duty is to build capacity, which is what this proposal seeks to do.

90 Next, the council's proposed development is not at an advanced stage. There is no planning permission in place. Moreover, there will be no asylum seeker in occupation until, at the earliest, 3 July 2023. That leaves enough time for at least the question of permission, if not the whole claim, to be determined.

91 Next, the works that are proposed are, as I have said, not irreversible and there is no convincing suggestion that they would permanently damage the environment. Assurances are given in relation to preservation of heritage buildings on the Site and some works, such as asbestos removal, will be beneficial whatever the ultimate fate of the Site.

92 Finally, the land is, at the end of the day, Crown land and it is difficult to say, applying common sense, that the Crown's representatives cannot use their own land to perform their duties and that a non-owner should be able to stop this.

93 Overall, for those reasons, it seems to me that the Secretary of State has by far the better of the arguments at this stage and I will refuse interim relief.

94 As for expedition, the claim is quite detailed, but the Secretary of State has already largely prepared her defence to it. The acknowledgement of service is due in about two weeks. I see no reason to bring that forward.

95 I propose to direct that the papers be put before a judge of the Planning Court within 48 hours of the acknowledgement of service being filed. That judge can then, if the case proceeds further, give appropriate directions in writing for any substantive hearing, including the question of expedition. And that judge will have in mind the undertaking that there will be no residential occupancy before 3 July 2023.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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