IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
[2023] EWHC 2580 (Admin)

AC-2023-LON-002660

Royal Courts of Justice

Wednesday, 11 October 2023

Before:

MR JUSTICE HOLGATE

B E T W E E N :

THE KING
ON THE APPLICATION OF
CARALLYN PARKES — Claimant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT — Defendant

- and -

(1) DORSET COUNCIL
(2) PORTLAND PORT LIMITED — Interested Parties

MR A GOODMAN KC, MS P NEVILL, MS F PETERSON and MR A SHATTOCK (instructed by Deighton Pierce Glynn) appeared on behalf of the Claimant.

MR G WILLIAMS KC and MS N PINDHAM (instructed by Government Legal Department) appeared on behalf of the Defendant.

MR J THOROLD (instructed by the Legal Department of the local authority) appeared on behalf of the First Interested Party. The Second Interested Pary did not appear and was not represented.

J U D G M E N T

MR JUSTICE HOLGATE:

1 The claimant, Carralyn Parkes, is the Mayor of Portland and a local resident. She brings this claim on her own behalf to review the lawfulness of the "actions and anticipated actions" of the defendant, the Secretary of State for the Home Department, in performing her statutory duty under s.95 of the Immigration and Asylum Act 1999 to provide accommodation for destitute asylum seekers. She intends to do so by accommodating them on a barge, the Bibby Stockholm, moored in Portland Harbour.

2 On 5 April 2023 the Government made an announcement about its intention to use the barge stating:

> "Today ... the Home Office has announced that an accommodation barge in Portland Port, Dorset, will be used to reduce the unsustainable pressure on the UK's asylum system and cut the cost to the taxpayer caused by the significant increase in channel crossings. Currently hotel accommodation for asylum seekers is costing £6 a day. ...
>
> "The Barge, called "the Bibby Stockholm", will be berthed in Portland Port and will accommodate about 500 single adult males whilst their asylum claims are processed. It will provide basic and functional accommodation, and healthcare provision, catering facilities and 24/7 security will be in place on board, to minimise the disruption to local communities. People whose claims are refused and have exhausted their appeal rights will be removed from the UK.
>
> "The use of vessels for accommodation brings the UK in line with other countries around Europe, for example in the Netherlands where migrants have successfully been accommodated on vessels. The Scottish government have also used vessels for Ukrainian refugees.
>
> "Migrants are due to be moved on to the Bibby Stockholm in the coming months. The Home Office is in discussion with other ports and further vessels will be announced in due course...
>
> "Bibby Stockholm will be operational for at least 18 months and stay berthed in the port during that time."

3 On 3 April 2023 the defendant had completed an equality impact assessment for the purposes of s.149 of the Equality Act 2010. This was updated in a further review, dated 4 August 2023.

4 Ms Parkes has provided a witness statement in which she describes the considerable concern amongst local residents about the decision to accommodate asylum seekers in "the Bibby Stockholm". Those issues are not matters for this court in proceedings for judicial review. In such a case the court may only consider whether the defendant has acted unlawfully. At this stage the issue is whether it is arguable that the defendant has acted unlawfully.

5 In May 2023 Dorset Council issued a statement that it was opposed to the use of the harbour to accommodate asylum seekers in the barge. Ms Parkes and others raised the issue of whether the mooring of the barge in the harbour to provide such accommodation required planning permission.

6 Dorset Council took the advice of a silk specialising in planning law, Mr Richard Wald KC. At a meeting of the Council on 13 July 2023 its leader responded to questions raised by a member of the public. He said that the legal advice received by the Council had been that the barge would not be subject to planning control because its position would be below the mean low water mark. Consequently, there was no requirement for planning permission to be obtained.

7 On 18 July 2023 the Bibby Stockholm was towed into Portland Harbour and moored in the position it now occupies. On 7 August 2023 the claimant's solicitors sent a pre-action protocol letter to the Home Office. In its response the Government Legal Department said on behalf of the Secretary of State that any challenge of the kind proposed ought to be directed to the District Council. In response to the question:

> "Please confirm that the Home Office is proceeding on the same basis as the Dorset Council regarding planning jurisdiction over the barge."

the letter stated:

> "As noted above, it was not legally necessary for the SSHD herself to determine whether planning permission would be needed: the question whether permission is required (and if so, whether it would be expedient to take enforcement action against any failure to obtain it) is primarily a matter for the local planning authority. Nevertheless, SSHD agrees with the Council that the barge is not within its jurisdiction, for the reasons set out above."

8 On 11 August 2023 AECOM Limited, consultants instructed by the Home Office provided a a "screening appraisal" on the use of the barge. They concluded that the project would not be likely to result in unacceptable adverse effects on the environment by virtue of factors such as its nature, size or location.

<u>The proposed claim for judicial review</u>

9 The claim for judicial review was issued on 8 September 2023. It was brought solely against the Secretary of State as defendant. Dorset Council was named as the first interested party. The claim form states that the decision challenged was taken on 7 August 2023, but the court has not been shown any decision by the defendant on that date.

10 According to para.2 of the Statement of Facts and Grounds the claimant seeks the following declarations:

> "(a) The accommodation of asylum seekers on the Bibby Stockholm in Portland Harbour is:
>
> (i) capable of constituting 'development' within the meaning of section 55 of the Town and Country Planning Act 1990;
>
> (ii) may amount to a breach of planning control; and

(iii) may be the subject of enforcement action by the Council (whether or not the Bibby Stockholm is fully within the Council's jurisdiction: although for the reasons given below, it is).

(b) There has not been compliance with environmental impact assessment duties in relation to the accommodation of asylum seekers on the Bibby Stockholm in Portland Harbour.

(c) The defendant has not complied with her duties under section 149 of the Equality Act 2010 in connection with the proposed accommodation of asylum seekers on the Bibby Stockholm in Portland Harbour."

11 In a footnote on p.2 of the Statement of Facts and Grounds, the claimant says in relation to the declarations sought under sub-para.(a) that "the court is not asked to make a factual judgment about whether the use 'is' development but rather merely to confirm that it is capable of being development (questions of fact and degree not being matters for the court)." Such matters are for planning authorities.

12 The proposed grounds of challenge are as follows:

"Ground 1: The Defendant, being obliged to comply with the law, has erred in law in acting on the basis that the stationing and use of the Bibby Stockholm is incapable of constituting 'development' within the meaning of Section 55 of the Town and Country Planning Act 1990 such that planning permission may be required, or enforcement action taken.

Ground 2: The Defendant has erred in law in acting on the premise that the proposed development is outside the jurisdiction of the Council and may not be the subject of enforcement action.

Ground 3: In purporting to carry out Environmental Impact Assessment (EIA) screening exercise, the defendant unlawfully failed to comply with the Town and Country Planning (Environment Impact Assessment) Regulations 2017 and/or retained EU law on EIA.

Ground 4: The Defendant has unlawfully failed to comply with the public sector equality duty in Section 149 of the Equality Act 2010 (notwithstanding an Equality Impact Assessment dated 4 August 2023)."

13 The claimant does not seek a quashing order in relation to any decision taken by the Secretary of State.

Grounds 1 and 2

14 Mr Alex Goodman KC for the claimant submits:

"An ordinary private developer is, in planning law, entitled to chance his arm and wait to see if a local planning authority seeks to enforce against a breach of planning control. The Crown, and the Secretary

> of State, are not like a private developer. They seek as a matter of constitutional convention, and in this case as a matter of express declaration, to comply with the law without the necessity of compulsion by local authority enforcement action...
>
> "The claimant asks the court to declare the true legal position, to enable the defendant to proceed (as it is presumed she intends to do) on a lawful footing in respect of her intended housing of asylum seekers on the Bibby Stockholm. Failing the defendant complying with planning controls, the court's judgment and declarations will also enable the local authority to consider enforcement action on a lawful footing, should that be necessary. The remedies sought are intended to be confined to that which is within the proper sphere of the court's jurisdiction. Declaratory relief allows, rather than compels, the defendant to act according to the law, it being a constitutional expectation that a minister of the Crown will do so..." (See paras. 3 and 4 of the Statement of Facts and Grounds)

15 Similarly, para.43 of the Statement of Facts and Grounds states:

> "It is against this background that the claimant seeks declaratory remedies in this case to allow the defendant to comply with her duties rather than any order directing the defendant to act in a certain way, or for that matter the local planning authority to take enforcement action (enforcement being rendered unnecessary if the Crown acts according to the judgment of the court."

16 On the basis of the declarations sought, compliance by the Secretary of State, according to the claimant, would involve the Secretary of State seeking planning permission, whether or not the local planning authority considers that the use of the barge does constitute a material change of use for which planning permission should be obtained. But, in my judgment, on a proper analysis of the claimant's legal argument if the court were to grant declarations (i) to (iii), the Secretary of State would only have to ask the local planning authority whether they consider that development is actually involved. The court will not have decided that. In effect, this amounts to no more than an expectation that the Secretary of State should make an application under s.191 of the 1990 Act for a certificate of lawful development, and not an application for planning permission.

17 But in reply Mr Goodman sought to maintain that the actions of the Secretary of State complained of are the stationing and use of the barge *without obtaining planning permission*.

18 In essence I accept the submissions of Mr Guy Williams KC for the Secretary of State on this aspect. I conclude as follows. First, the carrying out of "development" by the Crown, or any other entity amenable to judicial review, without obtaining any planning permission required under the 1990 Act, does not in itself amount to an error of public law in the exercise of a power to undertake that development. Second, that action constitutes a breach of planning control which is susceptible to enforcement action by the local planning authority. But that authority is not obliged to take enforcement action. It is a matter for the authority as to whether they consider it expedient to take such action under Part VII of the 1990 Act. Third, *in R (Hammerton) v London Underground Ltd* [2002] EWHC 2307 (Admin) Ouseley J explained, at [184] to [187] that judicial review cannot be used to usurp the discretionary powers of local planning authorities to decide whether it is appropriate to

take enforcement action. I note the nature of the relief sought in that case by the claimant, not against the local planning authority but against the developer (see [182]) They sought to quash a decision by LUL refusing to give an undertaking that they would not carry out certain works said to be in breach of planning control. In effect it was a form of enforcement action.

19 In *R (Prokopp) v London Underground Limited* [2004] Env.L.R. 8 at [48], Schiemann LJ said:

> "As a matter of general principle, where a develop is acting in breach of planning control it is in the first instance for LPAs not the court to consider whether to take enforcement proceedings. LPAs are only entitled to do so where they consider it expedient. For reasons which one can easily understand, they did not consider it expedient in the present case. In those circumstances the court will in general only act if there is reason to believe that the LPAs have acted unlawfully."

20 Likewise, if the location of the Bibby Stockholm within the port does fall within the scope of planning control so that the decision of Dorset Council on that particular point was incorrect, it does not mean that it is arguable that the Home Secretary has acted unlawfully by using or proposing to use a barge in that location in such a way as to require planning permission. The most that can be said is that, subject to the judgment of Dorset Council as to whether (a) that activity amounts to development requiring planning permission and, if so, (b) whether it would be expedient to take enforcement action unless a planning application were to be made, the Secretary of State faces the risk of enforcement action being taken. But it does not follow that a public law error has been committed by the Secretary of State, or that the actions or the proposed actions of the Secretary of State, about which the complainant complains, are arguably unlawful so as to be amenable to judicial review. Any such error as defined (if it be an error) would have been committed by the local planning authority as the body declining to exercise its planning control jurisdiction under the 1990 Act.

21 For these reasons, grounds 1 and 2 are not arguable in a claim against the Secretary of State for judicial review arguing that she has acted or is proposing to act unlawfully.

Ground 1

22 In addition ground 1 is not arguable because in truth there is no issue. The Secretary of State has accepted through Mr Williams that , subject to the jurisdiction issue raised by ground 2, that the mooring and the use of "the Bibby Stockholm" to accommodate asylum seekers is, as a matter of law *capable* of being treated as material change of use, and hence capable of being treated as development requiring planning permission, rather than incapable of being so treated. Whether it is to be treated as development is a matter for Dorset Council subject to the jurisdiction issue.

Ground 2

23 Because for the reasons already given there is no justification for the court to grant permission to bring this claim for judicial review against the Secretary of State for declaration (a), I do not consider that the court should address at length the merits of the legal arguments under ground 2 on whether the site occupied by the Bibby Stockholm is subject to planning control. But the court has received helpful and detailed submissions from all parties on the subject, and there are certain observations which at this stage the

court should make about difficulties faced by the claimant's case in order to assist the parties.

24 I should point out that the claimant has sought to add new arguments on the subject in oral submissions without any or any proper written notice in advance. This placed the defendant, the interested party and the court at a material disadvantage.

25 In general, planning permission is required for the development of "land" (s.57(1)). "Land" means any corporeal hereditament, including a building …." (s.336(1)).

26 The statutory scheme for exercising planning control in the present type of case depends upon the making of a planning application to a local planning authority (s.58 of the 1990 Act). The special procedure under s.62A of the 1990 Act for major development proposals in the areas of under-performing local authorities is not relevant for present purposes. Even a reference made to the Secretary of State for Levelling Up Housing and Communities under s.77 of the Act (a "call-in") assumes that an application has previously been made to the local planning authority in the first place. It may therefore be said that this aspect of development control depends upon an application being made to the local planning authority within the boundaries of which the development would take place.

27 This case is concerned with defining the geographical extent of a local planning authority's development control powers in the interface between land and sea. The claimant has not explained how the court is assisted on that issue by authorities on development in rivers where there is no such spatial issue. There is no doubt that the boundaries of a local authority generally include land over which a river flows and that planning control applies to such areas. But that provides no help in defining the geographical extent of a coastal planning authority's planning control in relation to the sea.

28 The parties referred to s.72 of the Local Government Act 1972, which appears in Part IV of that Act dealing with the boundaries of local authorities. Section 72 provides:

> "**72 Accretions from the sea, etc.**
>
> (1) Subject to subsection (3) below, every accretion from the sea, whether natural or artificial, and any part of the sea-shore to the low water-mark, which does not immediately before the passing of this Act form part of a parish shall be annexed to and incorporated with—
>
> (a) in England, the parish or parishes which the accretion or part of the sea-shore adjoins, and
>
> (b). . . . . .
>
> in proportion to the extent of the common boundary.
>
> (2) Every accretion from the sea or part of the sea-shore which is annexed to and incorporated with a parish . . . under this section shall be annexed to and incorporated with the district and county in which that parish . . . is situated.
>
> (2A). . . . . .
>
> (3) In England, in so far as the whole or part of any such accretion from the sea or part of the sea-shore as is mentioned in subsection (1) above does not adjoin a parish, it shall be annexed to and incorporated with the district which it adjoins or, if it adjoins more than one

> district, with those districts in proportion to the extent of the common boundary; and every such accretion or part of the sea-shore which is annexed to and incorporated with a district under this section shall be annexed to and incorporated with the county in which that district is situated."

Accordingly, it is relevant to consider whether the sea bed below the Bibby Stockholm forms part of the sea shore to the low water mark.

29 I deal firstly with "any part of the sea-shore to the low water mark". In *Anderson v Alnwick District Council* [1993] 1 WLR 1165 the Divisional Court said at p.1165 G-H:

> "In our judgment, there is no established rule of law that the low water mark is necessarily the line of median low water, and the principle which identifies the landwards boundary of the foreshore and the line of medium high water mark depends upon factors which have no application at the seaward lower water mark. Nor is there any general rule as to the meaning of 'low water line' or 'low water mark' which should apply as a matter of law, regardless of context, although we should be slow to accept that the common and natural meaning of 'foreshore' or 'seashore' recognised by Bridge LJ in *Loose v Castleton* (1978) 41 P & CR 19 and by the Crown Court in this case should not be applied, even in a statutory or statutory instrument, unless the context clearly demands otherwise."

30 In *Loose*, Bridge LJ state that the seaward extent of the foreshore extends to "the whole of the shore that is from time to time exposed by the receding tide" (see [1993] 1 WLR at 1163 G-H). Even on that broader basis, Mr Goodman rightly accepted that the site in question is never exposed by the receding tide. Therefore, the *Alnwick* case does not assist the claimant. On that basis ground 2 would be unarguable.

31 The next part of the argument turns on the application of the term "accretion" in s.72 of the Local Government Act of 1972. It is necessary to be clear about what the alleged accretion from the sea would be in this case. Various candidates have been put forward by the claimant: (1) the finger pier; (2) the outer breakwaters; (3) the water enclosed by the outer breakwaters; and (4) "the Bibby Stockholm" itself. On the submissions I have heard, it is unclear why (2) could be considered to be an accretion to the shore, nor has it been shown to be arguable that (3) or (4) are accretions, or why that should be so even if either (1) or (2) is.

32 The claimant relies on passages from textbooks, for example *Halsbury's Laws of England* (the sea bed between "the jaws of the land" point, rejected in the Scots case *Argyle and Bute District Council v Secretary of State for Scotland* [1977] SLT 248) and harbours for which a local planning authority is the harbour authority. But the authors do not identify any legal basis for these assertions, nor has the claimant addressed that gap.

33 Next, the claimant argued in the alternative that if the territorial extent of planning control does not include something in the sea which could be described as "a project" for the purposes of the EIA directive, then the *Marleasing* principle should be applied to the construction of the definition of "land" in the 1990 Act. However, this point has not been pleaded or raised in the skeleton. The words which the court would be asked to read into the legislation have not yet been identified by the claimant. The submission is capable of having a much broader effect going beyond the issues in this case because the argument is simply based upon the use of the word "project" which has a broad compass.

34 The claimant also suggested that planning control may be taken to extend to 12 nautical miles from the coast, the territorial sea (see the Territorial See Act 1987). The basis for this assertion by the claimant is wholly unclear. Nor has it been shown how Parliament could have intended such a wide extension of territorial jurisdiction given, for example, explicit provisions in the planning legislation such as s.90 of the 1990 Act.

35 The claimant is seeking to raise arguments which could have wide implications going far beyond the circumstances of this, and even similar cases. In relation to such arguments permission should not be given without a clear identification in the pleadings of the points sought to be pursued with a sufficient statement of the basis for the case being advanced for the court to be able to consider arguability. It is also important that those requirements are satisfied so that other parties, including the Secretary of State for Levelling Up and Housing and Communities, may have a proper opportunity to respond.

Ground 3

36 Mr Goodman, rightly accepts that ground 3 is parasitic on ground 2 when the issues are properly analysed. Because, in my judgment, it is inappropriate to grant permission for ground 2 to proceed, the same must follow for ground 3.

Ground 4

37 However ground 4 is a free-standing complaint. The claimant relies, in particular, upon s.149(1)(c) linked to s.13(5) of the 2010 Act. Mr Goodman says that here there would be segregation between non-British asylum seekers and British non-asylum seekers living in the area. However, Mr Goodman made it clear that he is not alleging, and he says he does not need to allege, discrimination as such. But he says that under s.149 there was a requirement to assess the effects of segregation. He does accept that the Equality Impact Assessments in this case did assess impacts relating to this factor, but his submission is that they did not go far enough. An argument of that kind depends upon showing irrationality on the part of the defendant. Having read the assessments, I am not persuaded that this point is arguable.

Conclusions

38 Yesterday I adjourned the hearing for judgment to be given this morning. At 17:43 yesterday afternoon the claimant's representatives sent an email to my clerk, copied to the other parties, indicating an intention to submit this morning a draft application form, a draft order and draft amended grounds. In summary, the proposal was to reformulate the claim so that in the event of permission for the claim being granted, the claimant would apply to join Dorset Council as a second defendant, but only in that event. It was suggested that the claimant would rely upon the existing grounds 1 and 2 as against both defendants, both the Secretary of State and Dorset Council. Therefore, it was made clear that the claimant would wish to proceed if permission were to be granted against the Secretary of State on all the four grounds already pleaded.

39 For the reasons already given permission is being refused by the court in any event to bring the claim against the current defendant. Grounds 1 to 3 depend upon the jurisdiction issue. Put shortly, in my judgment the claimant has brought those challenges against the wrong defendant, as the Secretary of State sought to point out in the pre-application protocol stage. Consequently, it would be inappropriate to allow the amendment. The refusal of permission

to proceed against the Secretary of State means the claim is at an end. There is nothing to amend.

40 In addition, I consider that it is inappropriate for the court to allow arguments on ground 2 as pleaded to date to be advanced against the defendant for a number of reasons. They include the lack of clarity in the claimant's case. If, after careful consideration and research, the claimant wishes to pursue matters relating to the jurisdiction point further, it would need to be dealt with by a fresh, properly pleaded and argued claim.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.