Neutral Citation Number: [2016] EWCA Civ 74

Case No: C1/2014/4049

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE SINGH
[2014] EWHC 4555 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 February 2016

Before:

Lord Justice Lindblom
and
Lord Justice David Richards

Between:

Secretary of State for Communities and Local Government

Appellant

- and -

(1) South Gloucestershire Council
(2) AZ

Respondents

Mr Stephen Whale (instructed by **the Government Legal Department**) for the **Appellant**

Hearing date: 21 January 2016

Judgment Approved by the court for handing down

Lord Justice Lindblom:

Introduction

1. The only issue in this appeal is whether this court should set aside the exercise of discretion by the judge in the court below in favour of granting relief by way of a quashing order in a challenge to an inspector's decision to grant planning permission in an appeal under section 78 of the Town and Country Planning Act 1990. As is acknowledged on behalf of the appellant, the Secretary of State for Communities and Local Government, this court will rarely do that. We must consider whether, exceptionally, we should do so in the particular circumstances of this case.

2. The appeal is against the order of Singh J., dated 25 November 2014, granting the application of the first respondent, South Gloucestershire Council, under section 288 of the 1990 Act, for an order to quash the decision of the Secretary of State's inspector, Mr Clive Hughes, allowing the appeal of the second respondent, AZ, upon the failure of the council to determine AZ's application for planning permission for the use of land at Sloes Well Paddock, Westerleigh Road, Pucklechurch for the stationing of a mobile home for residential purposes, the formation of hardstanding and the construction of a utility building ancillary to that proposed use. The appeal is brought with the permission of Sales L.J..

3. The council opposed the appeal in submissions made on its behalf in a skeleton argument, dated 26 May 2015, prepared by Ms Suzanne Ornsby Q.C.. However, on 8 December 2015, the Secretary of State and the council produced a statement describing their "agreed position". In that statement, in paragraph 3, it is explained that the council challenged the inspector's decision because the question of whether it has a five-year supply of housing land, and in particular whether any accrued shortfall in supply "should be front loaded or annualised" is an issue with "significant implications for its development control decisions relating to residential development across its administrative area". In paragraph 5 the parties acknowledge that the Secretary of State is not seeking to dispute the "serious errors of law" discerned by Singh J. in the inspector's decision and, in paragraph 6, they state that the only live issue before this court is whether "even if the serious errors of law had not occurred", the inspector's "decision to grant planning permission would necessarily have been the same". Paragraph 7a of the "agreed position" statement explains that as the Secretary of State is not seeking to revisit the errors of law identified by Singh J., and merely seeks to challenge his exercise of discretion, the council "agrees to take a neutral position on discretion and will not be represented or appear at the hearing of the appeal". Ms Ornsby therefore did not attend the hearing, but, as I shall explain, she did make short written submissions after the hearing on the court's jurisdiction under section 288.

4. In these and previous proceedings AZ has been granted anonymity by order of the court. We extend the anonymity order for the purposes of this appeal, since the reasons for its being made, namely AZ's serious and continuing mental illness and the need to protect the interests of his son, who is aged under 18, remain valid. Neither of the two parties active in the appeal, the Secretary of State and the council, has sought to persuade us otherwise. AZ himself has taken no part in the proceedings.

Facts

5. The full facts are set out in Singh J.'s judgment, in paragraphs 2 to 17 and 20 to 32. A brief summary will suffice here. The land in question, about a tenth of a hectare in area is in the Bristol/Bath Green Belt, in a swathe of countryside between Pucklechurch and the M4 motorway, surrounded on all sides by agricultural land. It is part of a larger landholding of about one hectare. It has a long planning and enforcement history. The development with which these proceedings are concerned would involve the removal of unauthorized development. The proposed mobile home would be occupied by AZ, his wife and son. AZ has been living in a mobile home on the site since 2005 or 2006. The application for planning permission was made in October 2009. An appeal for non-determination failed in November 2010, but that decision was quashed by H.H.J. Thornton Q.C. in December 2012. The appeal therefore came back before the Secretary of State for redetermination by a different inspector. The inquiry into the remitted appeal was opened by the inspector on 17 September 2013, sat for three days (17 and 18 September and 16 October 2013), but was re-opened on 1 April 2014 after the adoption by the council of its core strategy on 11 December 2013 and the publication by the Government of its Planning Practice Guidance on 6 March 2014.

6. During the first three days of the inquiry in September and October 2013 evidence was given on behalf of AZ to the effect that there was not a five-year supply of land for housing in the council's area, as is required by national planning policy in the National Planning Policy Framework ("the NPPF") issued by the Government in March 2012 (see in particular paragraphs 47 and 49 of the NPPF). Evidence was given on behalf of the council that there was a five-year supply of housing land.

The inspector's decision letter

7. In his decision letter, dated 1 July 2014, the inspector explained in paragraph 7 why he had re-opened the inquiry:

> "On 6 March 2014 the Government published the on-line *Planning Practice Guidance* (PPG). Of particular relevance to this appeal is the *Housing and economic land availability assessment* chapter. Both the adoption of the CS and the PPG are highly relevant to the determination of this appeal and so the inquiry was re-opened for a single day on 1 April 2014."

At the re-opened inquiry the inspector heard further evidence on housing land supply as well as other matters.

8. In paragraph 8 of his letter the inspector identified the main issues in the appeal as being, first, "the effect of the development on the Green Belt with particular regard to the effect on openness and the purposes of including land within it", secondly, the "effect of the development on the character and the appearance of the area", and thirdly, "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 necessary to justify the development".

9. On the first issue the inspector concluded, in paragraph 18 of his decision letter, that the development "would constitute inappropriate development; would encroach into the countryside in conflict with one of the purposes of including land within the Green Belt; and would result in a loss of openness". This, he said, "constitutes a significant amount of harm that, in accordance with advice in the Framework, carries substantial weight against the development", and "would also be contrary to Policy CS5(6) of the CS which refers back to the Green Belt provisions of the Framework".

10. On the second issue, the inspector concluded, in paragraph 24, that, "[overall], and provided all the existing unauthorised development is removed, there would be only very limited harm to the appearance of the area", and, in paragraph 25, "[this] identified harm needs to be balanced with the other material considerations advanced in support of the proposals".

11. The inspector turned then to "Other material considerations" in paragraph 26 of his letter. He identified four: first, "the personal circumstances of the appellant and his family"; second, "the lack of suitable alternative sites"; third, "the five-year housing land supply"; and fourth, "human rights issues".

12. His conclusions under the heading "Personal circumstances" included these: that the "personal circumstances of AZ are of great weight in the determination of this appeal", and that the evidence of Dr Reeves, a consultant psychiatrist, on AZ's serious personality disorder was not challenged (paragraph 27), one of Dr Reeves' conclusions being that "if AZ loses his home there is a probability that he will take his own life" (paragraph 28); that the council's statement that it would not immediately act to make AZ comply with the four extant enforcement notices relating to the site if the appeal failed "would not be a satisfactory situation and could lead to some deterioration in his mental health" (paragraph 30); that AZ's son, who was attending a local school, "suffers nightmares arising from the thought of having to leave the site, his school and his friends", and was "also fearful about the potential harmful effect on the health of his father" (paragraph 31); that the personal circumstances of AZ and his family carried "very significant weight" in his favour (paragraph 32).

13. In his discussion of "Alternative sites" in paragraph 33 of his letter the inspector observed that "[the] needs of AZ and his family are specific and out of the ordinary" and concluded that if the appeal should fail and if the council then made AZ comply with the enforcement notices, AZ "would become homeless", and that there were "no known alternative sites that would be suitable and affordable".

14. The inspector's conclusions on "Housing land supply" in paragraphs 34 and 35 of his letter were these:

> "34. The CS identifies that the Council has a five-year housing land supply. The CS is a very recent document that was adopted in December 2013. The Council, however, is in an unfortunate position in that the PPG was issued soon after the adoption of the CS. Advice in the PPG (paragraph 4 of section 3-035-20140306 in the *Housing and economic land availability assessment* chapter) is that authorities should aim to deal with any undersupply within the first five years of the plan period where possible; where it is not possible authorities will need to work with neighbouring authorities under the duty to cooperate.

> The figures in the CS are based upon dealing with past undersupply over the whole plan period. If the undersupply has to be provided within the first five years, and the Council did not argue that this is not possible, it currently has an undersupply of housing land. The first paragraph of section 3-030-20140306 of the PPG identifies that figures in up-to-date adopted plans, as in this case, should be the starting point for calculating the 5 year supply. It is therefore necessary to start from the CS figures and then apply the more recent advice in the PPG. In these circumstances, the Council is unable to demonstrate a five-year housing land supply.
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> 35. This issue would not be relevant in respect of a temporary planning permission on this site; in the case of a personal planning permission it is of only relatively limited significance as it would only provide a single unit of accommodation for as long as the appellant chooses to live on this site. It would not provide an additional permanent dwelling. Nonetheless, the absence of an up-to-date five-year housing land supply weighs in the appellant's favour."

15. The inspector went on to consider "Human rights" in paragraphs 36 to 45 of his letter. He found that "the dismissal of this appeal would be likely to result in the appellant and his wife and son having to vacate the land", and that the best interests of AZ's child living on the site "must be a primary consideration in the determination of this appeal" and "no other factor can inherently carry greater weight" (paragraph 36). He acknowledged that the dismissal of the appeal would amount to an interference with the rights of AZ, his wife and son under article 8 of the European Convention on Human Rights (paragraph 39), and that a proportionality assessment was necessary, including consideration of the best interests of the child (paragraph 40). And he concluded that "[the] best interest of the child in this case is undoubtedly to allow him to remain on the site" (paragraph 45).

16. The inspector then proceeded, in paragraphs 46 to 51, to consider the third of his main issues: "[whether] the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations". In paragraphs 47 and 48 he said:

> "47. The other material considerations advanced must therefore be balanced against the public and community interests. There is an in-principle presumption against inappropriate development in the Green Belt. Other objections to the development concern its impact on the openness of the Green Belt and on one of the purposes of including land in the Green Belt. These carry substantial weight against the development. Also weighing against the development, although to a much lesser degree, is its impact upon the character and the appearance of the area. The impact on the appearance of the area, in particular, is very limited and can be further reduced by additional planting. There would also be conflict with the Framework as the new dwelling would be in an isolated location. The Framework says that the Government attaches great weight to Green Belts and that one of their essential characteristics is their openness.
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> 48. The other material considerations largely arise from the personal circumstances of the appellant, his wife and his child. In accordance with the

> provisions of article 3(1) of the UNCRC I have had regard to its requirement that in all matters involving children the best interests of the child shall be a primary consideration. The best interests of AZ's son are clearly to remain living on the site where he feels secure and from where he can access his school. This coincides with the best interests of his father, who needs the space and secure surroundings to provide a safe sanctuary. The health needs of AZ are very significant and potentially life threatening; it is difficult to contemplate how they could be more serious. They carry substantial weight in favour of the development."

17. In paragraph 49 the inspector said that "[the] Human Rights considerations concerning AZ, his wife, his son and, albeit to a lesser extent, those of his parents-in-law, are also relevant", that "[their] Article 8 rights are clearly engaged and carry significant weight", and that "[the] lack of any suitable alternative accommodation carries significant weight in favour of the development". In paragraphs 50 and 51 he said:

> "50. The harm arising from the development, while substantial in weight, is nonetheless limited in scale and highly localised. However, there would be conflict with the interests of the community as set out in Government advice and in the development plan. Considering the best interests of the child and considering the Article 8 rights of the individuals involved, any refusal of planning permission resulting in the Council enforcing the ENs would not represent a proportional response. The harm that this development would cause is undoubtedly outweighed by the other material considerations.
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> 51. Paragraph 88 of the Framework says that very special circumstances will not exist unless the harm to the Green Belt by reason of inappropriateness and any other harm are clearly outweighed by other considerations. In this case I am satisfied that it has been shown that the harm is clearly outweighed."

18. Drawing his conclusions together in paragraph 53, the inspector said that "AZ's health needs and personal circumstances can reasonably be regarded as being truly exceptional", and that "[all] in all … the circumstances can be objectively regarded as very special".

19. In paragraph 54 of his decision letter the inspector dealt with conditions, saying that the planning permission would be "personal to AZ, his wife and resident dependants as their personal circumstances were a material consideration of very great weight in the determination of this appeal". In paragraph 55 he rejected the possibility of a temporary planning permission. The inspector concluded (in paragraph 56) that "material considerations clearly outweigh the harm such that very special circumstances exist" and that therefore he was granting "personal planning permission".

The decision in the court below

20. It is not necessary to set out at length the conclusions reached by Singh J. on the three grounds of challenge in the council's application under section 288. A succinct summary of his main conclusions is to be found in paragraph 2 of the parties' "agreed position" statement. The judge's essential conclusions were that the inspector, in his

analysis in paragraphs 34 and 35 of his decision letter, where he concluded that the council was not able to demonstrate a five-year supply of housing land, had erred in law in three particular respects: first, by failing to take into account the conclusions of the core strategy inspector that the accrued shortfall should be annualized over the remainder of the core strategy period, rather than "front loaded" into the first five years of that period (paragraphs 39 to 58 of the judgment); secondly, that if he did take those conclusions of the core strategy inspector into account, he had failed adequately to explain why he had departed from them (paragraphs 59 to 63 of the judgment); and thirdly, that he had misunderstood and misapplied the relevant guidance in the Government's Planning Practice Guidance (paragraphs 64 to 68 of the judgment).

21. Before the judge Mr Stephen Whale, who appeared for the Secretary of State, as he has in this appeal, invited him to exercise his discretion not to quash the inspector's decision, on two main bases: first, that the decision would necessarily have been the same irrespective of the errors of law identified by the judge, and secondly, that if that proposition was not accepted, the court should in any event exercise its residual discretion under section 288 not to quash the decision. The judge dealt with those submissions in paragraphs 69 to 73 of his judgment:

> "69. The first defendant submits to this court that even if there was any error of law in the Appeal Inspector's reasoning, the court should decline to quash the decision in its discretion in section 288 of the 1990 Act. Two grounds were advanced on which this submission is based. First, that the decision would necessarily be the same in any event, given the strong indication set out elsewhere in the Inspector's reasoning. As I have already indicated, those other material considerations, to which the Appeal Inspector referred, related very substantially to the personal circumstances of AZ and his family, including his medical circumstances. They also relied in large part on human rights considerations. Secondly, Mr Whale submits that the court has a residual discretion in all cases under section 288 and should exercise it in this case, even if I were to form the view that the decision would not necessarily have been the same in the absence of the errors of law I have found to have been made. He submits that I should exercise that discretion, although it will be unusual to do so, he accepts, in view of the very special considerations applicable to this particular case.
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> 70. One bears in mind, for example, not just the human rights considerations and personal circumstances, to which I have already made reference, but also the background procedural context. An earlier decision has already been quashed by this court and the matter had to be remitted; some 5 years have elapsed since the initial application for planning permission was made in this case and 4 years since the deemed refusal of planning permission in 2010. AZ and his family, Mr Whale submits, have been kept waiting to know the outcome in the very difficult circumstances identified by the Inspector in this case.
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> 71. I have some sympathy with those submissions, in particular the second of those bases for exercising the court's residual discretion, however, in the result I have been unable to accept those submissions. In my judgment, the normal course should follow. There were, in my judgment, serious errors of law committed in this case. They have potentially profound consequences, not only

for this particular case, but for the local planning authority more generally. It is right, in my judgment, to be concerned that this decision, if it is allowed to stand, will be cited as a precedent in order to cast doubt in substance on the efficacy of its Core Strategy, in particular Policy CS15 in the coming years.

72. Furthermore, I bear in mind that the Appeal Inspector himself clearly did not regard the personal circumstances of AZ and his family as being dispositive in this case. He himself regarded the adoption of the Core Strategy as being one of the "highly relevant" matters which necessitated the reopening of the inquiry. Furthermore, reading his decision as a whole, as I must do, I do not accept that Mr Whale's submission, that the third of the four material considerations he identified at paragraph 26 simply had no weight placed upon it at all. It clearly did; it featured in the Inspector's reasoning.

73. In my judgment, it is not for this court normally to pre-empt what the outcome would be if the errors of law I have identified have not been made. That is for an Inspector to determine on the merits. The normal course will follow and the matter will be remitted to another Inspector for consideration on the merits."

Should this court interfere with the judge's exercise of his discretion?

22. Mr Whale recognizes that it was for the Secretary of State to satisfy the judge that the inspector necessarily would have made the same decision even if he had not committed the errors of law identified by the judge (see the Court of Appeal's decision in *Simplex GE (Holdings) v Secretary of State for the Environment* (1989) 57 P. & C.R. 306, in particular the judgment of Purchas L.J. at p.327 and the judgment of Staughton L.J. at p.329). He submits that in the light of the cogent and unchallenged conclusions of the inspector as to the considerations amounting in this case to "very special circumstances" justifying planning permission being granted for inappropriate development in the Green Belt, and in particular his conclusions about AZ's mental health and his and his family's personal circumstances, it is unthinkable that the inspector might have reached a different conclusion had he approached the housing land supply issue correctly and concluded, as he should have done, that the council was able to demonstrate a sufficient supply. AZ was seeking planning permission only for the stationing of a single mobile home. Whether or not the council was able to demonstrate a five-year supply of housing land, a single dwelling would make no more than a negligible contribution to the meeting of any shortfall. In paragraph 35 of his decision letter the inspector said that the five-year housing land supply issue would be "of only relatively limited significance" if a personal planning permission were to be granted, because it would provide only a single unit of accommodation, and would do so only for as long as AZ chose to live on the site. The development permitted by the inspector would not provide an additional permanent dwelling. Nowhere in his decision letter did the inspector attribute any specific degree of weight to the absence of a five-year supply of housing land. It did not feature at all in his discussion of the third main issue – "whether the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations". The judge should therefore have accepted that, on a fair reading of the decision letter as a whole, the inspector's conclusions on the issue of housing land supply made no difference at all to his decision to allow AZ's appeal. The judge could only reasonably exercise his discretion against quashing the inspector's decision.

23. I see force in those submissions.

24. There is no suggestion that the judge approached the exercise of his discretion on the basis of a misunderstanding of the relevant legal principles. Section 288(5)(b) provides that the court "if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action" (my emphasis). The judge was, of course, well aware of the approach indicated in the authorities to which Mr Whale refers, in particular *Simplex*. He will have been conscious too of other relevant jurisprudence, including the judgment of Glidewell L.J. in *Bolton Metropolitan Borough Council v Secretary of State for the Environment* (1991) 61 P. & C.R. 343 (in particular at p.353), the observations of Lord Bingham of Cornhill and Lord Hoffmann in *Berkeley v Secretary of State for the Environment* [2001] 2 A.C. 603 (respectively at p.608 and p.616), to the effect that the court's discretion not to quash an ultra vires decision is very narrow, and Lord Carnwath's discussion of remedies and discretion in *Walton v Scottish Ministers* [2012] UKSC 44 (at paragraphs 102 to 133).

25. The judge rightly observed that it is not for the court "normally to pre-empt" what the outcome of a section 78 appeal would be if identified errors of law had not been made (paragraph 73 of the judgment). If the court is to exercise its discretion not to grant relief where unlawfulness has been found, it must be satisfied that the decision-maker would necessarily have reached the same decision but for the legal error. That is, of course, a stringent test. It is not enough for the court to be persuaded that the decision probably would have been the same but for the decision-maker's error, or very likely would have been the same, or almost certainly would have been the same. It must be persuaded that the decision necessarily would have been the same. The authorities are clear on that proposition. It is consistent, as I see it, with perhaps the most elementary principle of planning law, that the exercise of planning judgment is a matter for the decision-maker and not for the court (see the classic statement to this effect in the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780E-H).

26. I accept that the inspector regarded the housing land supply issue as a matter he had to consider, notwithstanding that the proposal before him was only for a single dwelling, and that the context for the consideration of this issue was one in which inappropriate development in the Green Belt was proposed. He said that "the absence of an up-to-date five-year housing land supply weighs in the appellant's favour" (paragraph 35). But having done that, he did not return to this matter in determining the third and crucial main issue, namely "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 necessary to justify the development" (paragraph 8 of the decision letter). In the six paragraphs of the decision letter devoted to that issue – paragraphs 46 to 51 – there is no mention of the lack of a five-year supply of housing land as a specific consideration weighing in favour of planning permission being granted. It seems to me impossible to think that if the inspector had seen this as a consideration of any significance in the balance he had to strike in the particular and highly unusual circumstances of this case he would not have said so. What is absolutely clear, however, is that AZ's and his family's personal circumstances carried "substantial weight in favour of the development", as the inspector put it in paragraph 48 of his

letter; that the harm the development would cause was "undoubtedly outweighed by the other material considerations", as he said in paragraph 50; and that, in the application of government policy for the Green Belt in paragraph 88 of the NPPF, the harm was "clearly outweighed", as he said in paragraph 51. And in paragraph 53 of his letter the inspector concluded that AZ's health needs "can reasonably be regarded as being truly exceptional".

27. In the light of those conclusions, which are the core of the inspector's analysis, and reading his decision letter as a whole, I cannot see any real possibility that the presence of a five-year supply of housing land, properly identified on the evidence at the inquiry, could have affected the outcome of the appeal. As Mr Whale on behalf of the Secretary of State urges us to accept, whether the requisite five-year supply existed or not, the addition of a single dwelling, subject to a personal condition limiting its occupation to AZ and his wife, could not have made any material difference to it. In paragraph 35 of his decision letter the inspector said that this issue would not even be relevant if a temporary planning permission were to be granted, and that in the case of a personal permission it was "of only relatively limited significance". Given the extraordinary strength of the considerations weighing in favour of planning permission – "truly exceptional" as the inspector found some of them to be – it is in my view inconceivable that his decision might have been different if he had dealt with the housing land supply issue correctly.

28. I acknowledge that the judge described the errors of law in the inspector's handling of that issue as "serious" (paragraph 71 of the judgment). And I can see why he did so. The errors went to an important theme of national planning policy in England, namely the requirement for a local planning authority being able to show, at all times, a five-year supply of housing land. This requirement has its own distinct significance in the specific policies set out in paragraphs 47, 49 and 14 of the NPPF. Those policies are amplified in the Planning Practice Guidance, which, in this case, the inspector failed to understand and apply as he should. At the local level the adequacy of the supply of housing land is clearly a matter of considerable importance to the council, as paragraph 3 of the "agreed position statement" makes plain (see paragraph 3 above). The judge clearly recognized this point, and it weighed significantly with him. It led him to conclude, in paragraph 71 of his judgment, that, if the inspector's decision were allowed to stand, it could be relied upon "as a precedent in order to cast doubt in substance on the efficacy of its Core Strategy, in particular Policy CS15 in the coming years". This was clearly seen by the judge as a powerful factor in the exercise of his discretion.

29. I can understand the judge's concern. But I think the answer to it, and in my view, the complete answer, is to be found in the judgment itself. In my opinion, the judge's own very careful discussion of the grounds of challenge to the inspector's analysis of the five-year housing land supply issue, his cogent – indeed indisputably correct – conclusions on those grounds, and his identification of the inspector's "serious errors of law" in the analysis he undertook were such as to prevent any future reliance on that analysis in support of an application for planning permission. This conclusion is only reinforced by the fact that the inspector's errors in his approach to the five-year housing land supply issue are no longer a matter of dispute between the parties in these proceedings and the Secretary of State has not sought in this appeal to defend the inspector's analysis. But in any event I do not think the "precedent" factor should have been a consideration in the judge's exercise of his discretion in this case.

30. I should add, of course, that the issue of housing land supply will always have to be approached correctly on the facts as they are at the time of the decision. Whether today the council is or is not able to demonstrate a five-year supply has no bearing at all on our decision on this appeal.

31. For those reasons I am satisfied that, in the extremely unusual circumstances of this case, the judge did err in the exercise of his discretion in such a way as to justify our setting his decision aside. And I think this is a case in which, rather than remitting the case to the judge, it would be right for us to exercise our own discretion to uphold the inspector's decision to grant planning permission. In my view this is one of those exceptional cases in which the court, in its discretion under section 288(5)(b), should refrain from quashing an inspector's decision flawed by legal error.

Remedy

32. At the end of the hearing we invited Mr Whale to make submissions to us on the question of whether the court has jurisdiction in proceedings under section 288 of the 1990 Act to grant a declaration, and, if it does, whether such relief should be granted here and in what form. Mr Whale asked us to allow him and Ms Ornsby to make submissions in writing on this question after the hearing. We did that. Mr Whale duly presented us with helpful written submissions, with which Ms Ornsby agreed.

33. Mr Whale recognizes that the jurisdictional question is not entirely an easy one, and asks us to resolve it. He submits that both the High Court and the Court of Appeal "probably" do have the power to grant a declaration in proceedings under section 288. If the High Court has jurisdiction to grant a declaration the Court of Appeal must also have such jurisdiction, under CPR 52.10(1). Mr Whale argues that the provision in section 288 that the court "may quash" the decision under challenge may indicate that other remedies, including a declaration, are not excluded. He seeks to draw support for this submission from the principle that statutory provisions such as these should generally not be construed so as to oust the court's jurisdiction (see, for example, the speech of Viscount Simomds in *Pyx Granite Co. Ltd. v Ministry of Housing and Local Government* [1960] A.C. 260, at p.286, and, generally, the decision of the House of Lords in *Anisminic v Foreign Compensation Committee* [1969] 2 A.C. 147). Mr Whale points out that the Part 8 procedure used in proceedings under section 288 does not exclude the operation of the court's power under CPR 40.20 to "make binding declarations whether or not any other remedy is claimed".

34. As Mr Whale acknowledges, relevant decisions at first instance have not been consistent (see, for example, *Wiltshire Council v Secretary of State for Communities and Local Government* [2015] EWHC 1459 (Admin), in which Patterson J. granted a declaration in section 288 proceedings, and *R. (on the application of Samuel Smith Old Brewery (Tadcaster)) v Secretary of State for Communities and Local Government* [2009] EWHC 3238 (Admin), where Robert Jay Q.C. (as he then was), sitting as a deputy High Court judge, accepted the submission made on behalf of the Secretary of State that the High Court has no power to grant declaratory relief in such proceedings). In this court there is at least one recent decision in which the court has contemplated resort to its inherent jurisdiction in a section 288 case, though not in the context of

remedies (see paragraph 59 of the judgment of Beatson L.J. and paragraph 71 of the judgment of Lloyd L.J. in *San Vicente v Secretary of State for Communities and Local Government* [2014] 1 W.L.R. 966). Consensus on the question is also elusive in the text books (see "De Smith's Judicial Review", seventh edition, at paragraph 17-027, and Zamir and Woolf's "The Declaratory Judgment", fourth edition, at paragraphs 3-34 to 3-36).

35. Mr Whale accepts, however, that a declaration is not a "coercive remedy", and that in the circumstances of this case a "narrative judgment" of the kind given by Singh J. is no less effective than any declaratory relief could be. The Secretary of State therefore takes a "neutral stance" on the appropriateness of the court granting such relief. Ms Ornsby's submission on behalf of the council is that the order made by this court "should reflect and be consistent with the narrative judgment", and that a declaration should therefore be granted.

36. I agree with Mr Whale that even if the court does have jurisdiction to grant a declaration in proceedings under section 288 – which I am not prepared to hold on the submissions made to us in this case – there is no need for such relief here. The errors in the inspector's decision are as clearly identified as one could wish in Singh J.'s characteristically lucid judgment. In truth, a declaration would add nothing of value to the judgment itself. It follows that we do not need to resolve the question of jurisdiction. It is better, in my view, to leave that question to be tackled on full argument in another case if an answer to it is ever required.

Conclusion

37. For the reasons I have given I would allow the appeal, and order that the inspector's decision be restored.

Lord Justice David Richards

38. I agree.