Neutral Citation Number: [2015] EWHC 3494 (Admin)

Case Numbers: CO/1061/2015 CO/3939/2014, CO/1705/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2015

Before:

THE HONOURABLE MR JUSTICE CRANSTON

- -

Between:

Mulvenna and Smith	**Claimants**
- and -	
Secretary of State for Communities and Local Government	**Defendant**
- and -	
Equality and Human Rights Commission	**Intervener**

- -
- -

Marc Willers QC and Tessa Buchanan (instructed by **Lester Morrill Solicitors**) for the **Claimants**
Paul Brown QC and Stephen Whale (instructed by the **Government Legal Department**) for the **Defendant**
Chris Buttler (instructed by **Rosemary Lloyd)** for the **Intervener**

Hearing date: 20/10/2015

- -

Approved Judgment

Mr Justice Cranston:

Introduction

1. These cases raise, as a central issue, a matter which extends well beyond the realm of planning law: what are the consequences for a decision which has been made on the back of an unlawful decision? In the case of these claimants from the Traveller and Gypsy community, the Secretary of State for Communities and Local Government ("the Secretary of State") made directions to recover (or call in) their planning appeals so that he could determine them himself. Their local planning authorities had refused to grant them planning permission to live on green belt land. The Secretary of State then made determinations in the case of both claimants, Ms Bernadette Mulvenna and Mr Elias Smith, dismissing their appeals.

2. However, the Secretary of State's recovery decisions are accepted as being unlawful in light of a decision of this court, *Moore and Coates* v. *Secretary of State for Communities and Local Government* [2015] EWHC 44 (Admin) ("*Moore and Coates*"), which held that comparable recovery directions were discriminatory and also in breach of the public sector equality duty in the Equality Act 2010. Both Ms Mulvenna and Mr Smith contend that given that the Secretary of State's recovery decisions were unlawful, he had no jurisdiction to issue the planning appeal decisions in either case and they should be treated as nullities. The Equality and Human Rights Commission ("the EHRC") supports this argument.

3. Ms Mulvenna and Mr Smith also seek to quash the recovery directions themselves against the background of the decision in *Moore and Coates*. Their applications for permission to apply for judicial review in this regard are well out of time but they seek to extend time and also argue that a time bar would be in breach of the EU doctrine of effectiveness, which is said to confer on them an effective remedy for the right recognised in EU law not to be discriminated against. Moreover, they challenge the refusal of the Secretary of State to review and revoke his decisions on the appeals in light of *Moore and Coates*. Mr Smith has a separate claim to be considered brought under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") that the Secretary of State's decision to dismiss his appeal is, for various reasons, flawed.

The recovery decisions and *Moore and Coates*

4. On 30 June 2008 the Secretary of State set out his policy for the recovery of planning appeals so he could determine them himself in the form of a Written Ministerial Statement to the House of Commons. Under it the Secretary of State would consider the recovery of a number of types of appeal. These included proposals for significant development in the green belt. The policy added that there might on occasion be other cases which merited recovery because of the particular circumstances.

5. There was a further Written Ministerial Statement regarding the policy for recovering planning appeals on 1 July 2013 ("WMS1"). It stated:

> "Protecting the green belt
>
> The Secretary of State wishes to make clear that… he considers that the single issue of unmet demand, whether for traveller sites or for conventional housing, is unlikely to outweigh harm to the green belt and other harm to constitute the 'very special circumstances' justifying inappropriate development in the green belt.
>
> The Secretary of State wishes to give particular scrutiny to traveller site appeals in the green belt, so that he can consider the extent to which Planning policy for traveller sites is meeting this government's clear policy intentions. To this end he is hereby revising the appeals recovery criteria issued on 30 June 2008 and will consider for recovery appeals involving traveller sites in the green belt.
>
> For the avoidance of doubt, this does not mean that all such appeals will be recovered, but that the Secretary of State will likely recover a number of appeals in order to test the relevant policies at national level. The Secretary of State will apply this criteria for a period of 6 months, after which it will be reviewed."

6. WMS1 was published against the background of the National Planning Policy Framework ("NPPF") of March 2012, which sets out the government's planning policies for England and how these are expected to be applied. Green belt policy is contained in particular at paragraphs [87]-[88] of the NPPF:

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

"Inappropriate development" includes the construction of new buildings: [89].

7. The "Planning Policy for Traveller Sites" ("PPTS") was also published in March 2012, and sets out the government's planning policy for Traveller sites. Policy E, Traveller sites in green belt, states that inappropriate development is, by definition, harmful to the green belt and should not be approved except in very special circumstances. "Traveller sites (temporary or permanent) in the

green belt are inappropriate development": [14] Policy H of PPTS, Determining applications for Traveller sites, states:

> "[24] Local planning authorities should consider the following issues amongst other relevant matters when considering planning applications for traveller sites:
>
> a) the existing level of local provision and need for sites
>
> b) the availability (or lack) of alternative accommodation for the applicants
>
> c) other personal circumstances of the applicant
>
> d) that the locally specific criteria used to guide the allocation of sites in plans or which form the policy where there is no identified need for pitches/plots should be used to assess applications that may come forward on unallocated sites
>
> e) that they should determine applications for sites from any travellers and not just those with local connections."

The policy framework governing the grant of planning permission for Traveller sites in the green belt is dealt with at greater length by Lewis J in *Connors* v. *Secretary of State for Communities and Local Government* [2014] EWHC 2358 (Admin), [15]-[24].

8. In January 2014 there was a further Written Ministerial Statement of the Secretary of State's policy on recovering planning appeals ("WMS2"). In part it said:

> "That statement [of July 2013] revised the appeals recovery criteria by stating that, for a period of 6 months, the Secretary of State would consider for recovery appeals involving traveller sites in the green belt, after which the position would be reviewed… [H]e intends to continue to consider for recovery appeals involving traveller sites in the green belt."

9. In *Moore and Coates*, the claimants were Romany Gypsies. Their claims challenged by way of judicial review in June 2014 the decisions of the Secretary of State to recover their planning appeals. His decisions to do this were on the basis that they were appeals involving Traveller sites in the green belt. As at the date of the judgment in January 2015 the Secretary of State had not made decisions on the appeals themselves.

10. Richard Watson, head of planning casework in the Department of Communities and Local Government, prepared a witness statement for the purposes of the litigation dated 9 September 2014. His evidence was that from September 2013, the Secretary of State had recovered all appeals for Traveller sites in the green belt, despite the stated policy in the Written Ministerial Statement of 1 July 2013 that not all such appeals would be recovered. After the judicial review in *Moore and Coates* had been launched, the planning inspectorate was instructed not to recover 100 per cent of appeals, but instead to recover 75 per cent. The evidence was that the policy of considering all appeals for recovery, including those for single pitches, had not been applied in the case of other kinds of residential development in the green belt.

11. Against that factual background, Gilbart J in *Moore and Coates* held that the recoveries constituted indirect discrimination under section 19 of the Equality Act 2010 and a breach of the public sector equality duty in section 149 of that Act. He said:

> "179. I think it important to identify what was unlawful. I have determined that what was unlawful was the practice of recovering all appeals, and the unreasonable delay caused to Mrs Moore's and Ms Coates' appeals. I have not determined that WMS 1 as drafted and published was unlawful, but I have found that its application was. In the case of WMS 2, its terms do not reflect the reasons for its being made nor its application.
>
> 180. What was unlawful was the application of the policies in WMS 1 and WMS 2 in such a way as to recover all traveller's pitch appeals, which, due to the way the practice was approached, amounts to a breach of sections 19 and 149 of the 2010 Act. I have also found that the practice of recovering all appeals, or an arbitrary percentage thereof, was and is unlawful. The effect of the approach of the Secretary of State was also to breach Article 6 [ECHR] so far as Mrs Moore and Ms Coates are concerned."

12. Gilbart J added that the issues raised in the judicial review by Mrs Moore and Ms Coates were not limited to their appeals. There were many other Gypsies and Travellers whose appeals had been recovered and who must be experiencing delays. Gilbart J commented that if appeals were recovered not because of their merits, but because they were cases of Travellers' pitches in the green belt, the effect of his judgment would be to call into question the legality of many other recoveries. However, it might be that when addressed properly some of those appeals would have merited recovery anyway: [182].

13. In *Connors* v. *Secretary of State for Communities and Local Government* [2015] EWHC 334 (Admin), Mr Ockleton, sitting as a Deputy High Court Judge, reiterated Gilbart J's findings in *Moore and Coates* and remarked *obiter* that the Secretary of State should review all the recovery decisions made between 1 July 2013 and 21 January 2015 in relation to Gypsy and

Traveller sites in the green belt, in order to determine whether they were tainted with the same illegality identified in Gilbart J's case: [18], [21].

14. In late March 2015, Lord Ahmad of Wimbledon provided an answer to a written parliamentary question in which he said that the Secretary of State would introduce a new planning and recovery policy for the green belt early in the new parliament. In the meantime the Secretary of State would de-recover those cases of appeals for Traveller development in the green belt on which a substantive decision had not been reached, and these would be remitted back to the planning inspectorate.

15. On 30 March 2015 Mr Watson wrote to all who were a party to recovered decisions where an appeal decision had already been issued by the Secretary of State. That included the claimants in this judicial review. He explained that the Secretary of State had no further power to deal with their cases.

Facts of the claimants' cases

(a) Bernadette Mulvenna

16. Bernadette Mulvenna is an Irish Traveller and a single parent and owns and lives on the land known as Shannon Moor Stables, land west of Mosslands, Aveling Drive, Banks, Southport. She is in her mobile home and touring caravan there with her four children. The land lies within the green belt. She applied on 22 August 2010 to West Lancashire Borough Council for planning permission for a change of use of the land for stationing caravans for residential occupation for a Gypsy-Traveller family, with associated works. On 17 April 2012, the Council refused the application. She appealed to the Secretary of State under section 78 of the 1990 Act.

17. The Council issued an enforcement notice on 9 July 2012, which alleged that Ms Mulvenna's land had been used for the siting of residential caravans, with associated works, including fencing and paving, in breach of planning control. The claimant appealed against the enforcement notice under section 174(2)(a) of the 1990 Act.

18. On 16 September 2012, the Secretary of State appointed a planning inspector, Bridget Campbell, to determine Ms Mulvenna's appeals. She conducted a hearing on 28 November 2012.

19. On 4 July 2013, the Secretary of State acted under section 79 and Schedule 6, paragraph 3, of the 1990 Act to recover Ms Mulvenna's appeal so that he could determine it himself.

20. The same day, 4 July 2013, the parties were invited to comment on whether the 1 July 2013 WMS1, or any other change in the circumstances since the hearing before the planning inspector the previous November, would have implications for the appeals.

21. Ms Mulvenna's agent, Alison Heine, responded in a letter dated 10 July 2013. She said that planning policy had not changed nor had the policy for recovering appeals when involving matters of strategic importance, with significant implications or raising novel issues. The land in Ms Mulvenna's case was a single pitch and she struggled to understand what was strategic, potentially significant or novel about

green belt issues concerning it. As to the Written Ministerial Statement of 1 July 2013, Ms Heine said that it did not seem to be supported by any evidence. She was not aware of any analysis of Gypsy-Traveller appeals. Ms Heine added:

> "No explanation has been given as to why this appeal was recovered. No explanation has been given for this unprecedented interference in the role of Planning Inspectors. No explanation has ever been provided why the Inspector's decision for a hearing heard last November has not been issued. It is not the fair play we were promised in PPTS [the Planning Policy for Traveller sites].
>
> I have been working on Gypsy-Traveller appeal case work for nearly 10 years. I do not recognise the term 'unmet demand' as usual in the Ministerial statement. Indeed I am unclear what this means…
>
> In the interests of fair play I am most surprised that appeals such as this are being recovered so that the Secretary of State can scrutinise the recommendation of Inspectors without any evidence even being provided of cases where it is considered the Planning Inspectors are failing to give sufficient protection to the Green Belt. This would suggest Ministers have no confidence in their Planning Inspectors ability to understand, interpret and apply policy. This is most troubling…
>
> No justification has been provided for the interference of the Secretary of State in the decision making process and there is no evidence to support the claims of [the Minister] that insufficient protection is being afforded the Green Belt by experienced Planning Inspectors."

22. The planning inspector, Bridget Campbell, provided the Secretary of State with her report on 16 September 2013. She recommended that conditional planning permission be granted and that the enforcement notice be corrected and quashed. As regards planning permission, she examined whether there was harm to the green belt, the visual impact and the flood risk to the land, before turning to other considerations, namely, the need for Gypsy and Traveller pitches and the claimant's personal circumstances, including the needs of the children. Although the land was not suitable for permanent residential occupation, she concluded that, for a temporary period of 5 years, other considerations clearly outweighed the identified harm and any development plan conflict so as to amount to the very special circumstances justifying inappropriate development harm in the green belt. Permission would need to be subject to appropriate conditions, and she set these out.

23. The Secretary of State wrote to the parties on 20 March 2014 offering them the opportunity to make representations on whether revised planning practice guidance published 6 March 2014 affected their cases on the appeal. Alison Heine responded on 22 March 2014, pointing out in particular the unsatisfactory position because of the delays in the Secretary of State making decisions on recovered appeals.

24. In a decision letter dated 5 August 2014 the Secretary of State disagreed with the planning inspector's recommendations and dismissed Ms Mulvenna's appeals. He agreed with the planning inspector as to the main issues in the case and with her conclusion that the land was clearly not suited to permanent residential occupation as a caravan site by Gypsies when the need was weighed against the substantial harm to the green belt and the danger arising from flood risk. He further agreed that when the personal needs and circumstances of the claimant and her family were added into the equation, the benefits still did not outweigh the substantial harms identified, and that therefore there were no very special circumstances to justify this inappropriate green belt development. As to temporary permission, the Secretary of State rejected the idea:

> "[21] [He]… considers that 5 years represents a considerable length of time for a temporary permission. He disagrees with the Inspector's conclusion that the overall harm caused by granting a temporary consent for such a prolonged period of time would be clearly outweighed by the other considerations advanced in favour of the development. In particular, he considers that the harm to the green belt remains substantial and he also attaches substantial weight to the exposure of the site occupants, including the 4 children, to the danger from flood risks… The Secretary of State has taken account of the consequences of the decision to refuse planning permission and uphold the enforcement notice… but he does not consider that this tips the balance in favour of a temporary planning permission."

25. In light of this decision, the Secretary of State considered in relation to the enforcement appeal whether the period for compliance with the enforcement notice should be twelve months, not six months. For the same reasons he gave for rejecting temporary permission, he decided that it should remain at six months.

26. On 28 August 2014, Ms Mulvenna applied under section 288 of the 1990 Act seeking an order quashing the 5 August 2014 decision. Six months later, following the decision in *Secretary of State for Communities and Local Government* v. *Redhill Aerodrome* [2014] EWCA Civ 1386, counsel advised Ms Mulvenna to withdraw her application; that was done by a court order dated 29 January 2015.

27. Following the decision in *Moore and Coates*, handed down on 21 January 2015, Ms Mulvenna's solicitors asked the Secretary of State to revoke his decision letter on her appeal. These present judicial review proceedings were issued on 10 March 2015. On 30 March 2015, Mr Watson wrote on behalf of the Secretary of State the letter referred to earlier: he had no power to deal further with the case (in other words, he was *functus officio*). On 29 April 2015, Stewart J directed that there be a "rolled-up" hearing of the case.

28. Thus the key dates for Ms Mulvenna's appeal are as follows:

    (i) 4 July 2013: Secretary of State recovers appeal.

    (ii) 5 August 2014: Secretary of State dismisses the appeal.

(iii) 28 August 2014: Ms Mulvenna issues her section 288 application regarding the appeal decision and her section 289 appeal regarding the enforcement notice.

(iv) 9 September 2014: Mr Watson's witness statement in *Moore and Coates.*

(v) 11 December 2014: Ms Mulvenna withdraws her section 288 application and section 289 appeal.

(vi) 21 January 2015: Judgment in *Moore and Coates.*

(vii) 4 March 2015: Judicial review proceedings issued. Ms Mulvenna challenges both the recovery decision and the failure to revoke the decision on the appeal.

(b) Elias Smith

29. Elias Smith and his family are ethnic Romany Gypsies. On 5 April 2013 Mr Smith applied for planning permission for the change of use of land in the green belt known as land at Moss Lane, Knuzden, Blackburn, Lancashire to "a mixed use for the keeping of horses and as a residential caravan site for one Gypsy family, including part retention of an earth mound". On 23 July 2013, Hyndburn Borough Council refused his planning application.

30. Mr Smith appealed under section 78 of the 1990 Act and a planning inspector, Richard McCoy, was appointed to determine the appeal. He held a hearing into the appeal on 14 January 2014.

31. On 23 January 2014 Mr Smith's planning appeal was recovered by the Secretary of State under section 79, and paragraph 3 of Schedule 6, of the 1990 Act.

32. In his report dated 16 April 2014 the planning inspector, Mr McCoy, recommended that a temporary planning permission of three years' duration be granted, subject to conditions restricting residential use of the site to Mr Smith and identified members of his immediate family. After describing the site, outlining relevant planning policy and planning history, and setting out the respective cases of Mr Smith and the Council, the planning inspector spelt out his conclusions regarding the main considerations in the appeal: the proposal would, he said, constitute substantial harm to the green belt by reason of inappropriateness, with additional harm arising from a reduction in openness, encroachment, and the harm, albeit limited, to the character and appearance of the area. The proposal therefore conflicted with planning policies and, overall, those considerations weighed substantially against the appeal.

33. The planning inspector considered the general need for Gypsy accommodation. He said that additional pitches being made available might suggest that there would be a sufficient number to 2016, although the Council could not demonstrate a deliverable 5 year supply. As to the personal needs of Mr Smith and his family, the planning inspector said that he had heard evidence leading him to conclude that due to a dispute with the owner, it was unlikely that Mr Smith would be offered a place at Sankey House Farm. In addition, Mr Smith had submitted letters from the warden of

Sunnydale Caravan Park and the owner of the Green Caravan site stating that space was not likely to be available until 2018 and space was not available for horses. The planning inspector then said:

> "[59] In my judgement, a refusal of planning permission would be likely to result in the appellant's family having to leave the site with no alternative accommodation available to them. This may result in the family resorting to roadside camping and this could have a detrimental effect on the health of the appellant and his son. Accordingly, these personal needs are of significant weight in the consideration of this proposal.
>
> …
>
> [61] I consider that a refusal of planning permission would be likely to have a detrimental effect on the continuity of health care provision for Mr Smith and his son. These personal circumstances also carry significant weight in the consideration of this proposal."

In terms of the planning balance, the planning inspector concluded that very special circumstances existed which justified a three year temporary planning permission, subject to conditions.

34. In a decision letter dated 15 July 2014, the Secretary of State rejected the planning inspector's recommendation and dismissed Mr Smith's planning appeal. He agreed with the planning inspector's identification of the main issues and with the reasons the planning inspector had given that the proposal represented inappropriate development in the green belt. The NPPF provided that substantial weight should be given to any harm to the green belt, and inappropriate development proposals also conflicted with local policies. That weighed substantially against the appeal.

35. After referring to the general need for Gypsy accommodation, the Secretary of State turned to the personal circumstances of Mr Smith and his family. He had regard to the evidence on the availability of a site to meet the appellant's needs and in particular to the planning inspector's conclusion that, due to a dispute with the owner, it was unlikely that they would be offered a place at one site, or that there would be pitches or that they would be accepted on two other sites. The Secretary of State added that he:

> "[18] … does not share the Inspector's view on this matter. He is not satisfied that refusal of planning permission would necessarily result in the appellant's family having to leave the site with no alternative accommodation available to them which may result in the family resorting to roadside camping and this could have a detrimental effect on the health of the appellant and his son. He therefore gives this matter less than significant weight…
>
> [19] The Secretary of State has had regard to the personal circumstances of the appellant and his family. However, he

> does not consider the personal circumstances to be so compelling that it is necessary for them to remain on this site and consequently he gives less than significant weight in favour of this matter and the proposal."

As to the planning balance, the Secretary of State concluded:

> "[23] The Secretary of State agrees that the Council is unable to demonstrate a 5 year supply of sites and that there is an unmet need for additional gypsy and traveller pitches beyond 2016 within the Borough… However, unlike the Inspector he gives less than significant weight to the appellants (sic) need for the appeal site and to their personal circumstances…
>
> [24] The Secretary of State disagrees with the Inspector's overall conclusion… He considers that overall the lack of a five year supply of sites the (sic) personal needs of the appellant and his family are not so compelling that taken with other factors in favour of the appeal justify a case for very special circumstances to outweigh the harm by reasons of inappropriate development and other harms identified to grant a 3 year temporary planning permission on this Green Belt site."

The Secretary of State added that he had considered the Article 8 and Article 1 Protocol 1 ECHR rights of Mr Smith and his family, and the import of the Equality Act 2010.

36. On 21 August 2014, Mr Smith applied under section 288 of the 1990 Act for the Secretary of State's decision to dismiss his section 78 appeal to be quashed, in particular, his decision to reject the planning inspector's recommendation that he be granted temporary planning permission.

37. Following *Moore and Coates*, Mr Smith's solicitors sent a pre-action protocol letter on 27 March 2015. There was then Mr Watson's letter on 31 March 2015. On 13 April 2015 Mr Smith issued his claim for judicial review. It was acknowledged that Mr Smith's applications for judicial review of the recovery and appeal decisions were out of time and an application for an extension of time for bringing the claim was made under CPR 3.1(2)(a). Stewart J ordered a rolled-up hearing and that the claim be heard along with Ms Mulvenna's case.

38. Thus the key dates and what Mr Smith claims is as follows:

(i) 23 January 2014: Secretary of State recovers planning appeal.

(ii) 15 July 2014: Secretary of State dismisses the appeal.

(iii) 21 August 2014: Mr Smith issues section 288 application regarding the appeal decision.

(iv) 19 September 2014: Mr Watson's witness statement in *Moore and Coates.*

(v) 22 January 2015: Judgment in *Moore and Coates.*

(vi) 13 April 2015: Judicial review proceedings issued. Like Ms Mulvenna, Mr Smith challenges the Secretary of State's recovery direction and his failure to revoke the substantive appeal.

Secretary of State's decisions: legislative framework

39. Part III of the 1990 Act deals with "control over development". A number of sections in Part III address the Secretary of State's powers as regards planning applications and decisions. Under section 78(1) of the 1990 Act, a person whose application to the local planning authority for planning permission has been refused may appeal to the Secretary of State. Section 79 provides for the determination of such appeals.

> "(1) On an appeal under section 78 the Secretary of State may –
>
> (a) allow or dismiss the appeal, or
>
> (b) reverse or vary any part of the decision of the local planning authority (whether the appeal relates to that part of it or not), and may deal with the application as if it had been made to him in the first instance."

40. Section 79(5) states that the decision of the Secretary of State on such an appeal "shall be final". Later in the 1990 Act, in Part XII ("Validity"), except in so far as may be provided by that Part, any decision by the Secretary of State on a section 78 appeal "shall not be questioned in any legal proceedings whatsoever": ss.284(1)(f) and (3)(b). By way of exception in Part XII, section 288 permits an application to the High Court in the following terms:

> "288 Proceedings for questioning the validity of other orders, decisions and directions.
>
> …
>
> (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds—
>
> (i) that the action is not within the powers of this Act, or
>
> (ii) that any of the relevant requirements have not been complied with in relation to that action,
>
> he may make an application to the High Court under this section."

The section applies to actions on the part of the Secretary of State as mentioned in section 284(3). Under the section, applications must be made within six weeks from the date of the action.

41. Section 79 authorises the appointment of planning inspectors ("appointed persons") to determine appeals to the Secretary of State under sub-section (1). It does so in the following way. First, section 79(2) provides:

> "(2) Before determining an appeal under section 78 the Secretary of State shall, if either the appellant or the local planning authority so wish, give each of them an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose."

Secondly, section 79(7) provides that Schedule 6 of the 1990 Act applies to such appeals.

42. Schedule 6 ("Determination of Certain Appeals by Person Appointed by Secretary of State") opens ("Determination of appeals by appointed person") in paragraph 1, as follows:

> "(1) The Secretary of State may by regulations prescribe classes of appeals under sections 78… 174… which are to be determined by a person appointed by the Secretary of State for the purpose instead of by the Secretary of State.
>
> (2) Those classes of appeals shall be so determined except in such classes of case—
>
> > (a) as may for the time being be prescribed, or
> >
> > (b) as may be specified in directions given by the Secretary of State"

The relevant regulations referred to are the Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) Regulations 1997, SI 1997: No. 420 ("the 1997 Regulations"). Regulation 3 provides that appeals under section 78 (and section 174 – see below) are prescribed as appeals to be determined by an appointed person.

43. Paragraph 2 of Schedule 6 is headed "Powers and duties of appointed person". An appointed person shall have the same powers and duties in relation to an appeal under section 78 as the Secretary of State: (1)(a). Where an appeal has been determined by an appointed person his decision shall be treated as that of the Secretary of State: (6). Except as provided by Part XII the validity of that decision shall not be questioned in any proceedings whatsoever: (7). Paragraph 1(8) then states:

> "(8) It shall not be a ground of application to the High Court under section 288, or of appeal to the High Court under section 289… that an appeal ought to have been determined by the Secretary of State and not by an appointed person, unless the

> appellant or the local planning authority challenge the appointed person's power to determine the appeal before his decision on the appeal is given."

44. The Secretary of State's power to recover appeals being determined by a planning inspector is in paragraph 3 of Schedule 6, and his power to de-recover such appeals is in paragraph 4 (both under the sub-heading "Determination of appeals by Secretary of State").

> "3. (1) The Secretary of State may, if he thinks fit, direct that an appeal which would otherwise fall to be determined by an appointed person shall instead be determined by the Secretary of State.
>
> (2) Such a direction shall state the reasons for which it is given…
>
> (3) Where in consequence of such a direction an appeal falls to be determined by the Secretary of State, the provisions of this Act which are relevant to the appeal shall, subject to the following provisions of this paragraph, apply to the appeal as if this Schedule had never applied to it.
>
> …
>
> 4. (1) The Secretary of State may by a further direction revoke a direction under paragraph 3 at any time before the determination of the appeal."

45. Part VII of the 1990 Act deals with enforcement. Section 174(1) enables a person having an interest in the land to which an enforcement notice relates or a relevant occupier to appeal to the Secretary of State against the notice. Section 174(2) sets out the grounds on which an appeal may be brought. These appeals may be heard by a planning inspector pursuant to Schedule 6. It is an offence where an enforcement notice is not complied with: s.179. The validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings on any of the grounds on which such an appeal may be brought: s.285(1). Under section 289 there can be an appeal to the High Court against the decision of the Secretary of State on an enforcement notice appeal on a point of law or by way of case stated. Decision includes a direction or order: s.289 (7).

Secretary of State's recovery decisions: lateness

46. Unsurprisingly in the light of *Moore and Coates*, Ms Mulvenna and Mr Smith challenged the Secretary of State's recovery of the planning appeals in their cases. For the purposes of the hearing, the Secretary of State accepted (subject to the delay issue) that his recovery of their appeals was unlawful. However, the difficulty Ms Mulvenna and Mr Smith face is that their challenges are well out of time. Planning

judicial reviews must be filed not later than six weeks after the grounds to make the claim arise: CPR 54.5(5). Here, the Secretary of State's recovery of Ms Mulvenna's appeal occurred on 4 July 2013, yet it was twenty months later, 4 March 2015, that her judicial review was issued. Mr Smith was almost fifteen months late, with the recovery occurring on 23 January 2014 and his judicial review being issued on 13 April 2015. So Ms Mulvenna's and Mr Smith's applications are well and truly out of time.

47. Both claimants seek to avoid the consequences of the late filing of their judicial review challenges to the recovery decisions. First, they submit that these are appropriate cases for an extension of time to file their claims for judicial review under CPR 3.1(2)(a); secondly, they contend that to deny their claims for judicial review on the basis of lateness would deny them an effective remedy for a right recognised in EU law, the right not to be subject to discrimination contained in the Race Directive 2000/43/EC and section 19 of the Equality Act 2010.

48. The applications for an extension of time under CPR 3.1(2)(a) are based largely on the fact, Mr Willers QC submitted, that until the decision in *Moore and Coates* was handed down on 21 January 2015 they did not know of the Secretary of State's discriminatory actions and that they had viable grounds for a challenge. Thereafter, Ms Mulvenna issued her judicial review within the requisite six weeks. Mr Smith took almost twelve weeks to do so, but that was excusable because he was waiting for the Secretary of State to consider an administrative review of the recovery decision and the validity of the appeal decision itself. Mr Willers then submitted that this is not a case in which it could properly be said that the Secretary of State would be caused any substantial hardship or prejudice were permission to follow an extension of time, or that the grant of permission to apply for judicial review would be detrimental to good administration. Instead, an extension of time would be a just and proportionate response having regard to the need to promote the rule of law and the importance of the claimants' rights at stake: *R* v. *Secretary of State for the Home Office ex p Ruddock* [1987] 1 W.L.R. 1482, 1485G.

49. This simply will not do. Anyone objecting to a decision of a public authority by way of judicial review must challenge it without delay; they cannot wait until others show that the way is clear. The time limits in planning judicial reviews are especially tight. Once launched, however, a claim can be stayed until a test case is decided. It may be as well that claimants can amend their claim in the light of another's case. But for reasons of good administration our system of public law cannot work on the basis of persons holding back from legal challenges until another claimant in a similar position has a success in court. Those unhappy with a public authority's decision must take the initiative and promptly challenge it.

50. In Ms Mulvenna's case her agent, Ms Heine, raised objections to the recovery decision within a week of it being made: as we have seen, she objected that it was inconsistent with policy, a decision on Ms Mulvenna's appeal was already much delayed, and there was an unfairness in the process of recovery of Gypsy and Traveller green belt appeals. Yet no legal challenge was made to the recovery decision in Ms Mulvenna's case. By contrast, the claimants in *Moore and Coates* did not hold back. (Their claims were slightly late owing to delays with legal aid funding problems but no objection was taken on timing: see [46], [49], [51] and [55] of the judgment.) Like Ms Heine, their advisors no doubt saw the pattern of recovery

decisions with Gypsy and Traveller appeals and decided to advance an Equality Act 2010 claim. Once the Secretary of State's evidence in their cases was in, notably Mr Watson's witness statement of 9 September 2014, it lent support to their claims that there were flaws under the Equality Act 2010 in the Secretary of State's approach to recovering appeals by Gypsies and Travellers denied planning permission for green belt sites. Ultimately, of course, they were successful.

51. The comparison with *Moore and Coates* brings out another point: by contrast with the present claims the Secretary of State had made no decision on the Moore and Coates' appeals. He had recovered those appeals but was still sitting on them when Gilbart J handed down his judgment in January 2015. In the present claims, however, the Secretary of State made decisions on both appeals, in Ms Mulvenna's case in the decision letter of 5 August 2014, in Mr Smith's case, in the decision letter of 15 July 2014. If an extension of time were to be granted, it could hardly be said that no detriment to good administration would be involved when, at the very least, public resources have gone into the preparation of these decision letters. Certainly in these cases good administration is not some empty rhetorical device.

52. The second argument Mr Willers advanced is that the lateness barrier must be surmounted by the need to accord the claimants an effective remedy for breach of the right not to be discriminated against derived from EU law. He invokes a passage in the *White Book* (Civil Procedure, 2015, vol. 1, 54.5.1, p. 2032), which cites two cases where, to provide an effective remedy under Article 1(1) of the Procurement Directive 89/665/EEC, the time limit was held to run from the date when the claimant knew or ought to have known of the breach: *Uniplex (UK) Ltd* v. *NHS Business Services Authority* [2010] 2 CMLR 47, *SITA UK Ltd.* v. *Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156; [2011] LGR 419. The editors of the *White Book* opine:

> "Although these cases dealt with the procurement regulations, the likelihood must be that the time-limits for judicial review will similarly be found to contravene the general EU principle requiring that an effective remedy be granted for a breach of a right derived from EU law. The likelihood is that, in such cases, the courts will permit such claims to be brought within three months of the date when the claimant knew, or ought to have known, of the alleged breach of EU law."

53. The principle of effectiveness in EU law is that the rules governing domestic actions in EU Member States should not make it virtually impossible or excessively difficult to exercise the rights EU law confers: *Levez* v. *TH Jennings (Harlow Pools) Ltd*, Case C-326/96 [1999] 2 CMLR 363; *R (on the application of Unison)* v. *Lord Chancellor* [2014] EWHC 4198 (Admin), [2015] ICR 390, [25]. Article 19 of the Treaty on European Union now states that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by EU law, and Article 47 of the Charter of Fundamental Rights of the European Union provides for a right to an effective remedy and a fair trial. Directive 2000/43/EC, the Race Directive, requires Member States to ensure that judicial and administrative procedures for the enforcement of obligations under the Directive are available to persons who consider themselves wronged by the failure to apply the principle of equal treatment to them.

54. The principle of effectiveness was successfully invoked in *Levez* v. *TH Jennings (Harlow Pools) Ltd* Case C-326/96 [1999] 2 CMLR 363. There the legislation placed a two year limitation period on equal pay claims but the delay was attributable to the employer deliberately misrepresenting to the female claimant the remuneration paid to the man she replaced. In another equal pay case, *Alabaster* v. *Barclays Bank plc* [2005] EWCA 508, [2005] 2 CMLR 19, the Court of Appeal held that to give effect to the female claimant's EU rights in UK national law the part of the Equal Pay Act 1970 imposing a requirement for a male comparator had to be disapplied. *Johnston* v. *Chief Constable of the Royal Ulster Constabulary*, Case C-222/84 [1987] QB 129 held that Article 53 of the Sex Discrimination (Northern Ireland) Order 1976, which provided that a certificate signed by the Secretary of State was conclusive proof that the applicant had been refused employment on the grounds of national security, public safety, and public order, contravened Article 6 of the Council Directive (76/207/EEC) on the implementation of the principle of equal treatment for men and women and, specifically, its requirement that all persons be given a right to an effective remedy.

55. To my mind the EU principle of effectiveness does not have any purchase in this case. The editors of the *White Book* have extrapolated from two procurement cases a conclusion which has no basis in authority and whose far-reaching implications they fail to explore. Authorities such as *Levez*, *Alabaster* and *Johnston* involved situations when claimants would have been shut out from a remedy altogether. The EU principle of effectiveness does not mandate that domestic remedies cannot be subject to appropriate time and other procedural limits. In *R (on the application of Unison)* v. *Lord Chancellor* [2014] EWHC 218 (Admin), [2014] ICR 498 the claimant challenged the introduction of fees in the employment tribunal, inter alia, because it violated the principle of effectiveness. Although agreeing that the principle of effectiveness applied, Moses LJ and Irwin J were unpersuaded that there was a breach since:

> "The very use of the adverb "excessively" in the jurisprudence suggests that the principle of effectiveness is not violated even if the imposition of fees causes difficulty and renders the prospect of launching proceedings daunting, provided that they are not so high that the prospective litigant is clearly unable to pay them.": [40], per Moses LJ.

56. The time limit for planning judicial reviews is tight, but as illustrated by the successful claims in *Moore and Coates* not impossible to meet. For the reasons given by Moses LJ in the *Unison* case, there was no breach of the EU effectiveness principle. Here, even taking the date the judgment in *Moore and Coates* was handed down as the starting point, Mr Smith was out of time. I have already explained why time should toll from the date of the Secretary of State's decision to recover the appeals and not from when the claimants knew about the decision in *Moore and Coates*.

57. Accordingly, although the point was arguable I have concluded that Ms Mulvenna and Mr Smith should not have time extended. Thus they are unable to challenge, by way of judicial review, the Secretary of State's decisions to recover their appeals.

Secretary of State's decisions on appeals: failure to review/revoke

58. Mr Willers accepted that he could not, through judicial review, challenge the Secretary of State's substantive decisions on the appeals head on. Instead, he contended in his first line of attack that, in light of the decision in *Moore and Coates*, the Secretary of State should have reviewed and then revoked his refusal of the planning appeals in Ms Mulvenna and Mr Smith's cases. The Secretary of State was in error to state that he had no power to do this (was *functus officio*) in his 30 March 2015 letter. A party would only be *functus officio* where a lawful decision has been made, the Court of Appeal decision in *Davies* v. *Howe Bridge Spinning Co. Ltd* (1934) 27 BWCC 207 being authority to this effect. The Secretary of State had failed to reach a lawful decision in Ms Mulvenna and Mr Smith's cases and it must follow, submitted Mr Willers, that he could not claim to be *functus officio*. Since his recovery decisions in their cases were unlawful, he would have been bound to conclude that he should never have taken the decisions on the substantive appeals. As a consequence the appeal decisions should be revoked. Having done that, Mr Willers continued that the Secretary of State should adopt the recommendations made by his planning inspectors in each case subject, perhaps, to the consideration of any material change of circumstances that had subsequently occurred.

59. In my judgment it is not arguable that the Secretary of State has power to revoke his decision letters on these appeals. It is hornbook law that planning law is the creature of statute and that the legislation offers a comprehensive code on the subject: *Pioneer Aggregates Ltd* v. *Secretary of State for the Environment* [1985] 1 AC 132, 140H-141C, per Lord Scarman. The Secretary of State has no power to review a decision already taken on an appeal under section 78, or a prior recovery direction in the event of a decision on a section 78 appeal. Nor does the legislation afford him a power to revoke a decision to dismiss an appeal under section 78. This conclusion follows whether the Secretary of State's prior recovery direction is lawful or not. Under the legislation, his determination on these appeals remains lawful and valid unless set aside by the court.

Secretary of State's decisions on appeal: nullity

60. The second line of attack on the Secretary of State's decisions on Ms Mulvenna and Mr Smith's appeals was through the doctrine of nullity. It was in this respect that the Equality and Human Rights Commission lent its support to their substantive legal cases. In outline, the argument was that the Secretary of State only has jurisdiction to decide a planning appeal if he has lawfully recovered it. *Moore and Coates* decided that the Secretary of State's recovery decisions were unlawful. Given that the Secretary of State's planning appeal decisions were based on his unlawful recovery decisions, they were therefore themselves a nullity or, putting it another way, ultra vires.

(a) the court's jurisdiction

61. If the argument about nullity or ultra vires is correct, there is a preliminary issue as to whether the court has jurisdiction to address it. Mr Willers submitted that the claimants' applications for judicial review of the Secretary of State's appeal decisions in this regard should not be precluded by section 284 of the 1990 Act. The grounds of challenge could not have formed the basis for a statutory review under section 288

since they cannot argue that the appeal decisions were not within the powers of the Act – section 288(1)(b)(i) – since they were decisions that the Secretary of State had the power to reach as a matter of planning judgment. Nor could either of the claimants suggest that the Secretary of State failed to comply with any of the relevant requirements when reaching his appeal decisions: section 288(1)(b)(ii).

62. In any event, submitted Mr Willers, the claimants would not have known of the existence of the grounds of challenge advanced in their claims for judicial review within six weeks of the Secretary of State's planning appeal decisions so that the statutory review procedure would not have provided them with a remedy even if it were capable of being used. Given what he submitted were the exceptional circumstances arising in these cases, and the EU doctrine of effective remedy, Mr Willers contended that section 284 should not be interpreted in such a way as to prevent the claimants challenging the Secretary of State in this respect.

63. In my view, the Secretary of State's decision on the planning appeals, including the issue of nullity, can only be challenged by means of an application made under section 288 of the 1990 Act, not through judicial review. That is made clear by section 284 of the 1990 Act. Mr Buttler's analysis in this regard was correct. A person aggrieved by what is said to be an ultra vires appeal decision of the Secretary of State under section 78 can challenge it through the section 288 procedure. An error of law renders a decision ultra vires, and any ultra vires decision is "not within the powers of the Act": section 288(1)(b)(i). Under the statutory code this is the exclusive procedure for challenging a section 78 decision. Exceptional circumstances, if they be such, take the legal argument nowhere, and for the reasons already given the EU doctrine of effective remedy has no purchase. Consequently, only Mr Smith can raise the issue of nullity, and then only if his current section 288 application is amended to accommodate it.

(b) the law

64. The law has adopted the absolutist position that an unlawful decision, whether within jurisdiction or not, is void, not voidable. A decision made without a statutory base, a decision contrary to statute, a decision made in breach of a rule of public law – all are unlawful and a nullity: see *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 AC 147; *R (Lumba)* v. *Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245, [66], per Lord Dyson. Subsequent decisions on the back of unlawful decisions are, as a matter of logic, also a nullity. Mr Willers cited in support the judgment of John Howell QC in *Smith* v. *Secretary of State for Communities and Local Government* [2015] EWHC 784 (Admin), and the authorities considered there to support such an argument; *Ahmed* v. *HM Treasury, Justice Intervening Nos 1 and 2* [2010] UKSC 5, [2010] 2 AC 534, per Lord Phillips in his post-judgment judgment (with which five other members of the Supreme Court agreed) at [1] and [4]; *McLaughlin* v. *Governor of Cayman Islands* [2007] UKPC 50, [2007] 1 WLR 2839 at [14]-[15], per Lord Bingham; and *Secretary of State for the Home Department* v. *JJ* [2007] UKHL 45, [2008] 1 AC 385, at [27], per Lord Bingham, with whom Baroness Hale at [64] and Lord Brown at [109] agreed.

65. In *Boddington* v. *British Transport Police* [1999] 2 AC 143, the House of Lords accepted that if the railway by-laws had not empowered the train operator to ban smoking completely on its trains, the decision to post no smoking notices in all

carriages was ultra vires and the defendant had not committed an offence. Lord Irvine LC addressed the legal effect of an unlawful decision as follows (at 155):

> "Subordinate legislation, or an administrative act, is sometimes said to be presumed lawful until it has been pronounced to be unlawful. This does not, however, entail that such legislation or act is valid until quashed prospectively. That would be a conclusion inconsistent with the authorities to which I have referred. In my judgment, the true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced to be unlawful, but is then recognised as never having had any legal effect at all."

Lord Browne-Wilkinson and Lord Slynn preferred to express a view on the point of whether ultra vires acts were incapable of having any legal consequence during the period between the doing of the act and the recognition of its invalidity by the court. Lord Steyn said (at 172):

> "I accept the reality that an unlawful byelaw is a fact and that it may in certain circumstances have legal consequences. The best explanation that I have seen is by Dr. Forsyth who summarised the position as follows in "The Metaphysic of Nullity, Invalidity, Conceptual Reasoning and the Rule of Law," [in C. Forsyth & C. Hare, *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (1998)] at p. 159:
>
> > "It has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. *The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act*. And it is determined by a analysis of the law against the background of the familiar proposition that an unlawful act is void." (Emphasis supplied.)

Lord Hoffmann agreed with Lord Irvine and Lord Steyn.

66. In *Boddington*, the earlier House of Lords case of *R* v. *Wicks* [1998] AC 92 was considered. That involved a criminal prosecution, and an enforcement notice, for breach of planning control issued under the 1990 Act. The defendant raised, by way of defence, that the enforcement notice had been served in bad faith and was motivated by immaterial considerations. Ultimately, he pleaded guilty to breach of the notice but then sought to appeal. The House of Lords held that, since the 1990 Act contained detailed provisions regarding appeals, whether the enforcement notice had been motivated by bad faith, bias or other procedural impropriety had not been regarded by Parliament as suitable for decision by a criminal court. The notice had

not been set aside on appeal or quashed on judicial review and accordingly the defendant had been guilty of the offence charged.

67. The result was a product of statutory construction. Lord Hoffmann traced the history of the statutory provisions. In the Town and Country Planning Act 1947 there was no counterpart to section 285 of the 1990 Act, but over time there were statutory amendments restricting the issues a person with an enforcement notice could raise when prosecuted: 119C-F. The statutory context meant that enforcement notice in section 179 meant a notice which, on its face, complied with the 1990 Act whether or not it was actually void: 122F. That was the case here and since the defendant had failed to comply with the notice he was guilty of the offence.

68. In light of these authorities, the law appears to be this. Unlawful administrative acts are a nullity, but they are presumed to be valid until the court rules otherwise. Once the court declares them to be unlawful it is confirming that they have been unlawful from the outset, in other words, that they are void, not voidable. There is the practical problem, however, that parties may have taken subsequent action assuming these unlawful acts to be valid. If they are a nullity, subsequent acts taken on the strength of them are also a nullity. The result might be administrative chaos or even political crisis if a myriad of subsequent acts are void.

69. To avoid the domino effect that all subsequent acts are also a nullity, various solutions have been posited. One is that in some cases judicial rulings should be given prospective force only. That approach did not attract the support of the House of Lords in *R* v. *Governor of Brockhill Prison, ex p Evans (No. 2)* [2001] 2 AC 19. A second favoured by Professor Paul Craig (*Administrative Law 7th ed.*, 2011), para. 24-22, is that the court in its discretion may withhold a quashing remedy. Yet there is high authority that, generally speaking, a party succeeding in a judicial review will be entitled to relief.

70. Thirdly, there is Professor Forsyth's conceptual approach, the theory of the second actor, approved by Lord Steyn in *Boddington*. Under this, despite the original act being a nullity, the second actor may have the power to confer validity on a subsequent act. *R* v. *Wicks* is invoked as an example. The theory is summarised in a passage earlier in the article, and set out by Lang J in *AAM (A child)* v. *Secretary of State for the Home Department* [2012] EWHC 2567 (QB), [104].

> "[At p.149] In such cases the invalidity of the first act does involve the unravelling of later acts which rely on the first act's validity. However, the voidness of the first act does not determine whether the second act is valid. That depends upon the legal powers of the later actor. If the validity of the first act is a jurisdictional requirement for the valid exercise of the second actor's powers, then, if the first act is invalid, so is the second. Sometimes it will not be – the tax demand did not need to be valid for the money to be validly paid – and sometimes it will be – a valid tax demand could not be made unless the regulations had been properly made."

71. In practice it seems to me that the courts will adopt a combination of techniques, as Professor Mark Elliott suggests in Beatson, Matthews and Elliott's *Administrative*

Law, 4th ed., (2005), 101: the courts will be guided by the language of the statutory scheme, its history and policy, but in the exercise of their discretion will also take account of the consequences which would ensue if they concluded that a power could only be exercised on the basis of a valid first act. Discretion in the granting of a public law remedy may enter the picture.

(c) Analysis

72. For the EHRC, Mr Buttler contended that the statutory scheme in the 1990 Act vests the power to decide section 78 and section 174 appeals in planning inspectors, subject to any direction by the Secretary of State to recover an appeal. Consequently, if a recovery decision is void the Secretary of State lacks jurisdiction to determine the appeal and any decision he makes on the appeal is ultra vires. In his submission, clear statutory language would be required to empower the Secretary of State to act on the basis of a void recovery decision. Nothing in the statutory scheme does that. By contrast to *R* v. *Wicks*, the vires of an appeal determination can be challenged by reference to the underlying recovery decision.

73. Mr Buttler found support for his submission in paragraph 2(8) of Schedule 6 of the 1990 Act which, on his reading, restricts challenges to the Secretary of State's decision not to recover an appeal. But for that provision, he submitted, a planning appeal determination by an inspector could be challenged on the basis of an unlawful refusal to recover by the Secretary of State. There is no equivalent provision in relation to the Secretary of State's decision to recover appeals. Applying the maxim *expressio unius est exclusio alterius*, Mr Buttler submitted that Parliament intended that decisions to recover appeals could be challenged on section 288 and 289 appeals.

74. All this is arguable. To my mind however, it does not follow, assuming that the Secretary of State's recovery direction under Schedule 6, paragraph 3(1) in Ms Mulvenna and Mr Smith's appeals were unlawful, that his subsequent decisions to dismiss their section 78 appeals under section 79(1)(a) were ultra vires and a nullity. That turns in large part on the design of the statutory scheme. Contrary to Mr Buttler's submission, that the statutory scheme vests the power to decide section 78 and section 174 appeals in planning inspectors, subject to any recovery decision, the legislation makes clear that section 78 and section 174 appeals are appeals to the Secretary of State. That is qualified by the 1997 Regulations and is subject to Schedule 6 and the determination of appeals by planning inspectors. But appeals are to the Secretary of State, and determinations by him following a recovery direction are thus a return to primary statutory locus for the determination of such appeals.

75. That is underlined by Schedule 6, paragraph 4(1), whereby the Secretary of State may, by further direction, revoke a recovery direction under paragraph 3 at any time before the determination of the appeal. Paragraph 2(8), cited by Mr Buttler, must be seen in this context. The primary statutory locus for appeals is with the Secretary of State, they will be determined by planning inspectors as a result of the 1997 Regulations and Schedule 6, and if they are paragraph 2(8) is there to ensure that it is not possible to challenge that course with the argument they should have been determined by the Secretary of State. I accept Mr Brown's submission that the utility of paragraph 2(8) is limited to precluding a challenge to a determination by a planning inspector per se, if there is no timeous challenge to his or her power to determine the appeal prior to its determination.

76. Thus even if the Secretary of State's recovery decisions were a nullity because of *Moore and Coates*, it does not follow that his determination of the appeals are also a nullity. That is because the statutory framework conferred jurisdiction on him to determine the appeals, whatever the lawfulness of his decisions, to recover them for his own determination. Given that conclusion there is no need for me to consider whether, as a matter of discretion, to withhold a remedy from Ms Mulvenna and Mr Smith.

Mr Smith's section 288 application

77. Mr Smith's application under section 288 of the 1990 Act is set out in his Part 8 claim form. The ground pursued is that the Secretary of State's decision to dismiss his planning appeal and refuse him temporary planning permission was unlawful because the Secretary of State failed to explain his reasons for concluding that he should attribute less than significant weight to the need for the claimant's family to live on the site and to their personal circumstances. Mr Willers sought to amend Mr Smith's section 288 application to incorporate the challenges advanced in his judicial review but, not least because of the view I have taken of them, I refuse to do so.

78. In Mr Willers's submission, this followed because the planning inspector concluded that the refusal of planning permission would be likely to result in the claimant's family having to leave the land with no alternative accommodation available to them and that they may have to resort to roadside camping, with its detrimental effect on the claimant's health and that of his son. In other words the planning inspector was giving this significant weight. The Secretary of State's decision letter rejecting the planning inspector's recommendation resulted from his conclusion that he should attribute less than significant weight to the need of the claimant's family to live on the land and to their personal circumstances. At least in part that was based upon his view that the family would not necessarily have to resort to roadside camping if the appeal were dismissed. In Mr Willers's submission, the Secretary of State failed to explain what evidence led him to reach that view and that failure amounts to an error of law which ought to vitiate his decision. There must be a substantial doubt, Mr Willers concluded, as to whether the decision was based on all relevant considerations.

79. Mr Willers readily acknowledged that decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced: *South Bucks District Council* v. *Porter (No.2)* [2004] UKHL 33, [2004] 1 WLR 1953, [36], per Lord Brown. Effectively what Mr Smith was seeking to do was to challenge attributions of weight in the Secretary of State's decision letter. Weight is, of course, a matter for the Secretary of State's planning judgment on aspects such as the availability of alternative sites, the possibility of roadside camping and the link with health effects. In fact the planning inspector recorded that there might be a sufficient number of pitches in 2016 and that the problem with sites may, not would, result in roadside camping. Thus one can see why the Secretary of State attributed less than significant weight to certain matters and why he regarded the personal circumstances of Mr Smith and his family not as compelling as did the planning inspector. In short, the Secretary of State's reasons were adequate and intelligible and his decision to dismiss Mr Smith's application cannot be said to be in error.

Conclusion

80. My conclusions, in short, are as follows: (1) the judicial review applications of the Secretary of State's decisions to recover Ms Mulvenna and Mr Smith's appeals fail because they are late and there is no basis to extend time; (2) the Secretary of State does not have power to revoke the decisions he has made on these appeals; (3) those decisions on the appeals are not a nullity; and (4) Mr Smith's section 288 reasons challenge to the Secretary of State's decisions on his appeal fails.