Neutral Citation Number: [2004] EWCA Civ 1763

C3/2004/1454

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT
(SIR RICHARD TUCKER)

Royal Courts of Justice
The Strand
London, WC2A 2LL

Friday, 12 November 2004

BEFORE:

LORD JUSTICE PILL

LORD JUSTICE MUMMERY

LORD JUSTICE LAWS

T-MOBILE UK LTD
HUTCHINSON 3G UK LTD
ORANGE PERSONAL COMMUNICATIONS SERVICES LTD

Claimants/Respondents

-v-

THE FIRST SECRETARY OF STATE
HARROGATE BOROUGH COUNCIL

Defendant/Appellants

(Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
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Official Shorthand Writers to the Court)

MR PHILIP COPPEL (instructed by Treasury Solicitors, London SW1H 9JS) appeared on behalf of the Appellant

MR CHRISTOPHER KATKOWSKI QC AND MS GALINA WARD (instructed by Freshfields Bruckhaus Deringer, London EC4Y 1HS) appeared on behalf of the Respondents

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JUDGMENT
(Approved by the Court)

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1. LORD JUSTICE PILL: Lord Justice Laws will give the first judgment.

2. LORD JUSTICE LAWS: This is an appeal with permission granted by the judge below against the decision of Sir Richard Tucker sitting as a Deputy Judge in the Administrative Court on 23 June 2004, when he allowed the respondents' appeal brought under section 288 of the Town and Country Planning Act 1990 against the decision of an inspector appointed by the appellant, the First Secretary of State.

3. By his decision letter of 30 December 2003 the Inspector had dismissed the first respondent's appeal against the refusal on 3 June 2003 by the Harrogate Borough Council of their application for planning permission. The application was for a mobile phone development; that is to say the respondent proposed to install and extend certain telecommunications equipment at Harrogate. There had been an existing telecommunications mast in place on the site since July or August 2001, but that accommodated the antennae of the first respondent only.

4. The stated purpose of the development was to enable the second and third respondents to share a single mast with the first respondent, placing their own nine antennae and six dishes upon it. These additional antennae and dishes required a more substantial mast than the existing one.

5. The reasons given by the local planning authority for refusing permission were cited by the learned judge at the beginning of his judgment:

> "The proposed mast and headframes due to their bulk and massing notwithstanding the existing installation would unreasonably detract from the residential amenity of nearby dwelling houses and the amenity of the local facilities such as to conflict with Policies of the Harrogate District Local Plan."

6. The first respondent's appeal to the Secretary of State's Inspector was conducted by the written representations procedure. The first and second respondents both put in full appeal statements, as did the local planning authority. As the judge was to point out, the Inspector did not uphold the local planning authority's original reasons for refusing permission; rather, he dismissed the appeal upon consideration of matters relating to health risks. Health matters were raised in the local planning authority statement. They noted, as was the fact, that there was a school building 170 metres from the site, another school 250 metres from the site and a third school 420 metres from the site. The schools had expressed concerns about the proposal on health grounds, and I will return to that shortly.

7. In order to elucidate the issues arising for our determination, it is convenient at this stage to give a little background concerning the apprehension of health risks in relation to the use of mobile phones and their associated telecommunications equipment. I can do no better than cite this passage from the judgment of the learned deputy judge:

> "10. Concerns have arisen in recent years about the possible dangers to

health arising from the use of mobile phones and the emission of radio frequency from them and from the transmission stations of the kind to which this application refers. Particular concern was expressed about the siting of base stations on or near school premises. Therefore, the Government decided to establish an independent expert group to examine possible effects of mobile phones, base stations and transmissions on health. The group's Chairman was Sir William Stewart. It made a comprehensive enquiry into the problem and published a detailed report in April 2000.

11. The Report recommended that a precautionary approach to the use of mobile phone technologies should be adopted until much more detailed scientifically robust information on any health risks becomes available. They recommended that the ICNIRP [International Commission on Non-Ionising Radiation Protection] (International) guidelines for public exposure be adopted for use in the United Kingdom, rather than the national guidelines.

12. The group specifically considered the question of the siting of base stations near schools, and made a number of detailed suggestions, relating to the siting of such stations and to the areas within which the beam of greatest radiofrequency intensity should or should not be allowed to fall.

13. There was a prompt response from the Government, published in May 2000. In broad terms the recommendations made by the Stewart Group were accepted. It was agreed that the emissions from mobile phones and base stations should meet the international guidelines.

14. Dealing with base stations near schools, the Government agreed 'schools and parents should be reassured that the base stations near schools ... operate within the guidelines'. The Government did not expressly accept the Group's recommendations concerning the area of the beam of greatest intensity, but stated that it would be working with the Group on the further issues relating to this.

15. There then followed, on 22nd August 2001, Planning Policy Guideline 8 (PPG8) dealing with planning aspects of telecommunications."

8. Since, as I shall show, it is a principal contention of the appellant Secretary of State that the judge misunderstood relevant provisions contained within the policy document, PPG8, I should set out that document's material paragraphs at this stage. PPG8 has been effective from 22 August 2001 when it replaced its predecessor of December 1992. It gives planning policy guidance in the field of telecommunications developments. The critical passages are paragraphs 29 and 30, which are replicated in the same words in paragraphs 97 and 98 of the appendix. This is what they say:

"97. Health considerations and public concern can in principle be material

considerations in determining applications for planning permission and prior approval. Whether such matters are material in a particular case is ultimately a matter for the courts. It is for the decision-maker (usually the local planning authority) to determine what weight to attach to such considerations in any particular case.

98. However, it is the Government's firm view that the planning system is not the place for determining health safeguards. It remains Central Government's responsibility to decide what measures are necessary to protect public health. In the Government's view, if a proposed mobile phone base station meets the ICNIRP guidelines for public exposure it should not be necessary for a local planning authority, in processing an application for planning permission or prior approval, to consider further the health aspects and concerns about them."

Those are the critical paragraphs, but I should also read paragraph 99 of the appendix (replicating paragraph 31 of the policy):

"All new mobile phone base stations are expected to meet the ICNIRP guidelines. However, all applicants should include with their applications, a statement that self-certifies to the effect that the mobile phone base station when operational will meet the guidelines. In line with the Group's recommendations the mobile phone network operator should also provide to the local authority a statement for each site indicating its location, the height of the antenna, the frequency and modulation characteristics, and details of power output. Where a mobile phone base station is added to an existing mast or site, the operator should confirm that the cumulative exposure will not exceed the ICNIRP guidelines."

9. In his decision letter the Inspector noted at paragraph 9 that:

"There is local concern about the proximity of 3 schools to the proposed mast, and the effect of the increased output from the proposal compared to the existing mast."

In paragraph 10 he acknowledged that the proposed installation would comply with ICNIRP guidelines, and that indeed is common ground. He then proceeded thus:

"11. However, evidence (including material considered by Stewart) suggests that young children may be more vulnerable to the effects of electromagnetic radiation through increased thermosensitivity compared with that of the population at large. Stewart acknowledges that there is no evidence that, even under the 'beam of greatest intensity', exposure to levels of electromagnetic radiation within the ICNIRP guidelines would have any harmful effect upon health. However Stewart recommends as a precautionary measure that the 'beam of greatest intensity' from an installation should not fall upon schools. PPG8 states that *the Government's acceptance of the precautionary approach recommended*

by the Stewart Group's report 'Mobile Phones and Health' is limited to the specific recommendations in the Group's report and the Government's response to them:

12. *Mobile Phones and Health - the Government's Response states that 'the Stewart Group recommended (1.42), in relation to macrocell base stations sited within school grounds, that the beam of greatest intensity should not fall on any part of the school grounds or buildings without agreement from the school and parents. Similar considerations should apply to macrocell base stations sited near to school grounds'.* The proposed installation would be sited some 200m from Woodfield Community Primary School building, and some 250m from St Roberts Catholic Primary School building; Harrogate Granby High School would be about 450m distant. Both Primary Schools would appear to have buildings and/or grounds that would be within the beam of greatest intensity. The Government Response further states: *Government agrees that schools and parents should be reassured that base stations near schools ... operate within guidelines. We will be working with the Stewart Group on the further issues regarding measurements of emissions from base stations on or near schools and how to take forward the recommendation on the 'beam of greatest intensity'.*

13. The Stewart Report, the Government Response, and PPG8 together appear to suggest that even under the 'beam of greatest intensity' there would be no risk to young children from emissions within ICNIRP guideline levels. However, on the question of the recommendation on the beam of greatest intensity, the Government response is open-ended rather than conclusive. This matter is of particular relevance to the current case.

14. I conclude that the appeal proposal in its present form provides insufficient reassurance that there would be no material harm to the living conditions (in terms of health concerns) specifically of the group identified by the Stewart Report as potentially vulnerable: that is, of young children, in this case at both Woodfield Community Primary School and St Roberts Catholic Primary School."

10. The respondents took two points upon their appeal under section 288: 1. The Inspector had misconstrued Government policy, that is to say PPG8. 2. The Inspector had failed to give adequate reasons for his decision. As for the first, the respondents' essential argument advanced by Mr Katkowski QC was that the effect in particular of PPG8 appendix paragraph 98 was that if international guidelines are met that is the end of the matter. Therefore, since in this case it was beyond contention that the ICNIRP standards were met (the emissions from the equipment would be lower than those standards by a factor of thousands) the Inspector should simply have been satisfied of that state of affairs.

11. There was of course a self-certificate within the terms of paragraph 99, and so the argument proceeded thus: the Inspector was not entitled to reject the appeal proposal on

health grounds or grounds to do with the perception of health. I suppose it might be added that if he was going to take such a course, that would be a departure from the policy guidance and there is no explanation in the decision letter of any such departure. In fact the Inspector plainly did not view his decision as departing from the Policy Guidance in PPG8. He considered it was consistent with the guidance; and that, submitted Mr Katkowski, was a misconstruction of the policy. On this first point the judge agreed with Mr Katkowski. He said this:

> "27. I prefer Mr Katkowski's submission. In my view the guidance contained in PPG8 is perfectly clear, and there was nothing open-ended about Government policy. I have no doubt that the present proposals meet the ICNIRP guidelines for public exposure, and that it was made clear to all concerned that there would be no material harm to the living conditions (in terms of health concerns) to young children. It is also clear that the applicants gave sufficient reassurances about this.
>
> 28. Regrettably the Inspector appears to have misunderstood Government Planning Policy on this topic as set out in PPG8 and failed to give adequate reasons for his decision."

12. The judge's statement at the end of paragraph 28 also expresses his acceptance of the respondents' second point relating to reasons. The particular argument under that head was that the Inspector failed to give adequate reasons for his conclusion that there had been insufficient reassurance that the proposal would involve no material harm in terms of health risks.

13. In this court the Secretary of State submits, first, that the judge himself misconstrued the planning policy contained in particular at paragraph 13/98 of PPG8. It is submitted by Mr Coppel that in accepting Mr Katkowski's argument that once compliance with ICNIRP was met - and no doubt there was a certificate to that effect - that was the end of the matter; the judge implicitly concluded that once it was shown by such compliance that there was no actual risk to health, the decision-maker could not within the policy distinctly refuse planning permission on grounds of a perceived health risk. It is said that that is not the effect of the relevant paragraph of the policy. It is said, and certainly in this court it is common ground, that actual health risk and perceived health risk or public concern about health, were both distinct matters treated as relevant considerations to the planning decision falling to be made and were so treated by PPG8.

14. Mr Coppel's argument here may be no more than a different way of putting what I understood to be his substantive submission on paragraph 98, which was as follows. Mr Coppel says that the judge wrongly subordinated the statement of policy in paragraph 97, namely that it is for the decision-maker to determine what weight to attach to considerations of health and concerns about health, to the statement of view in paragraph 98, namely that once ICNIRP guidelines are met and certified it should not be necessary for the planning authority "to consider further the health aspects and concerns about them".

15. It is convenient to return to the language of paragraph 30/98. Mr Coppel submits distinctly that where the paragraph states it should not be necessary for an authority to consider further the health aspects and concerns, the expression simply means what it says and is to be distinguished from such phraseology as "it will not be necessary so to do". This is an expression of view or approach, not itself a distinct policy properly so-called. In addition to the language, it is submitted that the approach which Mr Coppel would advocate sits comfortably with other proposals in PPG8 such as paragraph 63 and 83 of the appendix. He adds that his approach accords with the general nature of planning policy guidance and makes what he calls policy sense.

16. This aspect of the case is at the heart of the appeal. If Mr Coppel is right then, on the face of it, the Inspector was entitled to conclude (as he did) that there had been insufficient reassurance regarding public concern about health without having to treat such an approach as being a departure from the policy. If he was wrong about it, the Inspector has departed from Government policy without explaining why.

17. The Secretary of State's next submission is that the Judge gave no reasons for his conclusion that the Inspector had failed to give adequate reasons for his. Then it is said that the Inspector's reasons were in any event sufficient and intelligible; and finally, there is a submission that the judge on an appeal on law only was not entitled to find (as he did here) that the respondent gave insufficient reassurances about health concerns for young children unless it had been perverse to find otherwise, which it was not. This clutch of arguments in truth adds nothing to the principal argument when the matter is examined, but I will return to them briefly.

18. I address, first, the substantive point of construction. I do not consider that a substantial distinction can be drawn between the expression of policy in paragraph 97 and the expression of a view or opinion in paragraph 98. Paragraph 97 in truth essentially states matters of background, the legal setting of the Secretary of State's policy, and in 98 the policy is expressed that if in any given case the ICNIRP guidelines are met the planning authority should not have to look further in relation either to an actual health risk or perceived health risks. The rationale of the policy is the first sentence which, to my mind, is important for an understanding of the whole. There, the Secretary of State says this:

> "... it is the Government's firm view that the planning system is not the place for determining health safeguards."

19. What follows is drawn in the light of that first statement. It seems to me plain that that is as much policy as anything else in the document. Certainly the text leaves open the possibility (and this is no more than a conventional aspect of administrative law) that there might be a case in which the planning authority would be justified in looking further and, to that extent, departing from the policy. But that would be an exceptional course which would have to be specifically justified, as the judgment of Woolf J (as he then was) in Gransden v Secretary of State for the Environment [1986] JPL 519, cited to the judge by Mr Katkowski, amply demonstrates.

20. Accordingly, as it seems to me, the judge was right to hold that the Inspector misunderstood PPG8. With deference to Mr Coppel, I was not assisted by his references to other paragraphs in the appendix. It seems to me that the suggestion that the approach advocated by the Secretary of State is more in accordance with the general nature of planning policy guidance and makes what Mr Coppel called "policy sense" is without any force. Once one recognises the thrust given to paragraph 98 by its first sentence, this is simply a classic piece of planning policy.

21. The Inspector appears to have considered that his conclusion that the appeal proposal provided insufficient reassurance on health was consistent with Government policy, notwithstanding the proposal's ample compliance with ICNIRP and an appropriate certificate having been given to that effect. That, in my judgment, was the error made by the Inspector which is central to this case. Such a conclusion in truth represented a departure from the policy. Although the Inspector, as I have said, might be entitled to take such a position, he would have to justify it as an exceptional course. I see no exceptional circumstances here, notwithstanding the fact - if it be one - that the beam of greatest intensity is directed to two of the schools. The planning policy indicated in paragraph 98 must, in my judgment, be ample to cover such a case. In any event the Inspector did not seek to justify his conclusion by reference to anything he thought to be an exceptional circumstance. Thus there is, as I have indicated, nothing in paragraphs 11-14 to show why, on the facts of this particular case, compliance with the ICNIRP guidelines was insufficient to allay perceived fears about health issues.

22. It is important to have in mind that this is a case in which the developers did not merely issue the self-certificate referred to in paragraph 99 that there is detailed correspondence between the developers and all three schools, as well as the local planning authority. We have been shown some of the letters this morning. I do not propose to read them out, by I will indicate that I have had particular regard to the developers' letter to the Catholic Primary School of 29 January 2003, which sets out technical information. Reading the letter I do not consider that to be a vice. The letter was written to the head teacher of the Catholic Primary School. If the head teacher did not understand the letter - and I make no such suggestion - it was of course open to him or her to take advice about it. Moreover, the letter ends with an invitation for the school to submit representations or views which would be considered by the developers and submitted to the Council. As I understand it that was done, I think in relation to all three schools, for there was a second round of correspondence and we have also been shown that. If one were looking to see whether the Inspector was entitled to hold that there was insufficient consultation or reassurance here, it is very difficult to my mind to see how such a conclusion could be arrived at.

23. As far as reasons are concerned, as I have already indicated, the judge simply stated that the Inspector failed to give adequate reasons for his decision. It is said that that itself is an unreasonable conclusion. However the reality is that the Inspector gave no reasons as to why he concluded as he did. He certainly referred to such important matters as "the beam of greatest intensity" and so forth, but there is no discussion of the communications that had actually passed between the parties. In any event, we must be primarily concerned with the legal integrity of the Inspector's decision letter and, in my

judgment, for reasons I have given, that is fatally undermined by the Inspector's misconstruction of the policy.

24. Finally, there is the criticism of the judge's own statement that sufficient reassurances had been given. Given the view I have taken of the construction of PPG8 that was necessarily correct. The assurance consisted in certification of the compliance with ICNIRP, at least in the context of the letters earlier written. The judge's comment is accordingly unobjectionable.

25. For all these reasons, in my view, the learned deputy judge was right to quash the Inspector's decision, and for my part I would dismiss this appeal.

26. LORD JUSTICE MUMMERY: I agree.

27. LORD JUSTICE PILL: I also agree. Laws LJ has referred to PPG8 and, in my judgment and in agreement with him, clear guidance is given there on the matters which arise in this appeal. If that guidance is to be departed from sound reasons are to be expected. The Inspector was not, as he appeared to think, making a decision in accordance with the guidance.

28. What the Inspector has sought to rely on, notwithstanding the PPG, is a paragraph in the Government's response to the report of an expert committee chaired by Sir William Stewart. . The Inspector has cited the Government response at paragraph 12 of his report:

> "[The] Government agrees that schools and parents should be reassured that the base stations near schools... operate within guidelines. We will be working with the Stewart Group on the further issues regarding measurements of emissions from base stations on or near schools and how to take forward the recommendation on the "beam of greatest intensity'."

29. In paragraph 13 the Inspector stated that the Government response is "open-ended". Reassurance was given as to the operation being within guidelines, both in the certificate supplied and in detailed explanations in correspondence, to which Laws LJ has referred. These assurances were accurate, as acknowledged by the Inspector in another part of paragraph 13 of his report. That part of the Government's response which deals with reassurances is not open-ended. All that is open-ended in that response is the second sentence quoted by the Inspector in relation to further work upon the measurements of emissions. In my judgment, the assurances required by the Government response were given in this case. I agree with Laws LJ that the Inspector was not following, though he thought he was, policy, and he has not sought to justify any departure from policy.

30. For those reasons and the reasons given by Laws LJ I agree that this appeal should be dismissed.

(Appeal dismissed; Appellant do pay Respondents' costs, such costs to be the subject of detailed assessment).