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*Harris v First Secretary of State and others

[2007] EWHC 1847 (Admin)

Queen's Bench Division (Administrative Court)

Lloyd Jones J

31 July 2007

Town and country planning - Permission for development - Planning policy guidance - Mobile phone mast - Health concerns - Claimant reliant on machine for nutrition - Claimant asserting proposed mast would affect her health and interfere with machine - Inspector granting planning permission - Whether inspector properly applying planning policy guidance - Whether planning policy guidance compatible with Convention - Town and Country Planning Act 1990, s 288 - European Convention on Human Rights, art 2.

The claimant had to be fed intravenously through a machine. The third defendant sought to erect a radio base station for its mobile phone service some 600m from her home. The second defendant local planning authority refused permission, and the third defendant appealed to one of the Secretary of State's planning inspectors. The claimant's concerns that the electromagnetic interference from the mast might affect her health directly, and indirectly through interference with her medical equipment, were before the inspector. The inspector granted permission. He was of the opinion that para 98 of PPG8 was determinative of the claimant's concerns. Paragraph 98 provided, inter alia, that 'the planning system is not the place for determining health safeguards ... 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 ... to consider further health aspects and concerns about them.' The claimant applied to quash that decision under s 288 of the Town and Country Planning Act 1990.

The claimant submitted, inter alia, that the policy in para 98 of PPG8 was not directed to someone in her position, namely someone of particular vulnerability to electromagnetic radiation living in close proximity to proposed masts, that the inspector had failed to have regard to the indirect impact of the emissions on her health as a result of the effect they might have on her medical equipment and her fears of such indirect effect, and that PPG8 potentially contravened the obligation on public authorities in art 2 of the European Convention on Human Rights to take positive action to protect life if it required a decision-maker to leave out of consideration the particular vulnerability of an individual to director indirect effects on her health. The Secretary of State replied, inter alia, that the ICNIRP guidelines had been set not only by reference to the general population, but also to those who might be particularly vulnerable to electromagnetic radiation. He also submitted that since para 102 of the Appendix to PPG8 provided that there would 'generally' only be any justification for taking interference with 'other electrical equipment of any kind' into account where there was 'clear evidence that significant electromagnetic interference will arise', and there was no practicable remedy available, there was a threshold of relevance that the claimant had failed to cross in relation to interference with her medical equipment such that the inspector had not been required to consider the matter. The claimant responded, inter alia, that para 102 of the Appendix did not apply to medical equipment having regard to para 96, which provided that 'specific advice on interference with medical devices can be obtained from the Medical Devices Agency'.

The application would be dismissed.

(1) Applying settled principles, where PPG8 applied, public concerns about the health implications of the creation of a radio base station could be a material consideration only if there were exceptional circumstances that justified a departure from the policy, which had been formulated after taking account not only of the effect of electromagnetic radiation on the general population, but also of its effect on those who were particularly vulnerable.

In all the circumstances, there was no evidence to support the view that the claimant's case was exceptional so as to fall outside those of persons with a particular susceptibility to electromagnetic radiation of which full

account had already been taken in the setting of the policy.

Accordingly, the inspector had been entitled to conclude that the policy in para 98 of PPG8 had not been displaced on the facts.

Phillips v First Secretary of State [2003] All ER (D) 362 (Oct) not followed; *T-Mobile* (*UK*) *Ltd v First Secretary of State* [2004] All ER (D) 208 (Nov) applied.

(2) Paragraph 102 of the Appendix to PPG8 was of general application, and created a threshold of relevance. There was nothing to suggest that fears of an effect on electrical equipment, which lacked such an objective justification, were nevertheless relevant planning considerations.

The language of para 102 was extremely and deliberately wide. The provision was clear on its face, and the words 'of any kind' made it clear that that it was intended to include all types of electrical equipment. Paragraph 96 of PPG8 was not left without a purpose; it identified a source of expert advice.

The threshold of relevance had not been crossed. The evidence presented to the inspector amounted to no more than a statement of concern and an assertion that there was a risk. There were no exceptional circumstances that required the inspector to address the matter outside of the policy.

Vicarage Gate Ltd v First Secretary of State [2007] EWHC 768 (Admin) applied.

(3) The scheme of PPG8 was compatible with art 2 of the Convention.

So far as possible direct impact on health was concerned, para 98 of PPG8 required compliance with the ICNIRP guidelines, which were set not only by reference to the general population, but also to those who might be particularly vulnerable to electromagnetic radiation. Further, there was the possibility of departing from that policy in an exceptional case. So far as the possible indirect effect of electromagnetic radiation on health through interference with electrical equipment was concerned, the policy in para 102 of the Appendix to PPG8 was also not an immutable rule.

Having regard to the way in which the guidelines had been set, full and appropriate account had been taken of the position of individuals in a comparable situation to that of the claimant. Moreover, in the absence of evidence of a real risk of indirect interference with her health, the inspector's approach, in conformity with the policy, did not give rise to any violation of art 2 of the Convent ion.

Oneryildaz v Turkey [2004] ECHR 8939/99 considered.

Daniel Kolinski (instructed by Richard Buxton Solicitors) for the claimant.

James Maurici (instructed by the Treasury Solicitor) for the Secretary of State.

Martyn Gurr Barrister.

Judgment

[2007] EWHC 1847 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

31 JULY 2007

MR JUSTICE LLOYD JONES

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

MR. JUSTICE LLOYD JONES:

1. By this application pursuant to section 288, Town and Country Planning Act 1990 the Claimant, Mrs. Pam Jean Harris, seeks to quash the decision dated 12th December 2005 of Mr. Anthony J. Davison, an inspector appointed by the First Secretary of State, the First Defendant, allowing an appeal brought by Hutchison 3G UK Limited ("Hutchison"), the Third Defendant, and granting planning permission for the installation of a radio

base station at Mumby's Yard, Sutton's Lane, Deeping Gate, Peterborough. The local planning authority, Peterborough City Council, is the Second Defendant to the application.

2. Mrs. Harris, lives at 3, Ashfields, Deeping Gate. In 1983 she had the misfortune to contract toxoplasmosis while working on the medical staff at a hospital. Her condition is incurable and has worsened over time. As a result Mrs. Harris has to be fed intravenously through a machine three or four times a week. Each feed takes 17 hours to complete. The equipment used includes an Ivak-type infusion pump. Mrs. Harris is totally dependent on this machine for nutrition and therefore for her survival. Mrs. Harris has objected to the grant of planning permission for the construction of the radio base station at Mumby's Yard which is situated some 600 metres from her home. Her objections have focused, in particular, on her concerns about possible adverse effects of the proposed radio base station on her health directly due to the possible impact of electromagnetic radiation on her medical condition and indirectly due to possible interference of electromagnetic radiation with the equipment required to feed her intravenously.

3. Hutchison applied for planning permission on the 31st March 2005. The development proposed is the installation of a radio base station comprising a 25m high telecommunications tower, three antennae, one 600 mm and two 30 mm diameter dish antennae, radio equipment housing and development ancillary thereto. In support of its application Hutchison provided a declaration that the proposed development conformed with the Public Exposure Guidelines published by the International Commission on Non-Ionizing Radiation Protection (ICNIRP).

4. A number of objections to the planning permission were received by Peterborough City Council. The objectors included Deeping Gate Parish Council ("the Parish Council") and a number of local residents. At that stage Mrs. Harris did not send a letter of objection to the planning authority.

5. The application for planning permission was refused by Peterborough City Council by notice dated 18th May 2005. On the 21st June 2005 Hutchison appealed against the refusal for planning permission pursuant to section 78, Town and Country Planning Act 1990.

6. Following the lodging of the appeal a number of people sent letters of objection to the Planning Inspectorate on grounds which included visual amenity and health concerns. At this time Mrs. Harris was in correspondence with Mr. Shanesh Vara, the local Member of Parliament. In this correspondence Mrs. Harris raised her concerns as to the effect of electromagnetic radiation from the base station on her medical condition and on her medical equipment. This correspondence was, in due course, forwarded by Mr. Vara to the Planning Inspectorate and was before the inspector. The MP's letter to the Planning Inspectorate dated 2nd August 2005 referred to the enclosed correspondence and stated:

> "You will see from this that Mrs. Harris suffers from a very rare condition and the machine through which she is intravenously fed is very sensitive and Mrs. Harris is concerned about the effect that this proposed mast will have on it, and therefore the risk to her health."

The supporting statement by Mrs. Harris explained her medical condition in more detail and described her dependence on medical equipment to feed her intravenously. She explained that she contracted toxoplasmosis in 1983 and that despite repeated surgery her condition had worsened and was incurable. The onset of her illness had caused her to develop coeliac disease and to develop allergies to many foods and chemicals including drugs and everyday items such as fumes from fuel and cleaning products. She stated:

> "It was impossible for me to obtain sufficient nutrition from my limited diet, so after developing osteoporosis and my weight plummeting to 6 stone I was put on trans-parentral nutrition.
>
> I have Hickman lines into the main vein of my heart. I have to sterilise my lines and carry out an aseptic procedure to connect other catheter lines then a machine which connects to electric power points. Intravenous food solution is connected to this to give me nutrition to live and bypasses my digestive system. Each feed takes 17 hours to run through, 3-4 times per week.
>
> I cannot have food that is near a microwave or tinned food as I suffer severe reactions to any item that I am allergic to, even clinical preparation has induced shock, to the point that I have to go into a teaching hospital to have antihistamine / adrenaline / steroid cortisone intravenously before even simple straightforward treatments. I am denied some treatments and scans because of the risk and my surgeon has refused to operate again unless it is to save my life due to the many risks involved. I do not have to have contact with some items as I am seriously affected by airborne allergens. My machine used in the feeding process is very sensitive and reacts to the slightest interference.

> ...
>
> The proposed radio telecommunication buildings etc. are in a direct line from every window and the garden at the back of my home. A field is the only area between us and it is a completely flat area.
>
> If this goes ahead, I am unsure of what problems I may encounter with my machine, but very fearful of what it would do to my health. I am affected by mobile phones and digital phones."

The papers placed before the inspector on behalf of Mrs. Harris included a letter from Dr. A. W. Norman, her general practitioner, which stated:

> "I confirm that I have treated Mrs. Harris for a number of years and she has a significant number of serious medical problems. Primarily amongst these is an abdominal disorder which prevents normal nutrition and she is therefore permanently obliged to receive her nutrition through complex intravenous feeding. This requires an Ivak type infusion pump which notoriously can be interfered with by other electronic machinery. She also has significant allergies to food, chemical, drugs and the effect of extraneous exposure to chemicals and to electromagnetic radiation may have unpredictable serious consequences."

7. The appeal was conducted by written representations. The inspector carried out a site inspection on the 23rd November 2005.

8. The inspector delivered his decision by letter dated the 12th December 2005. He allowed the appeal and granted planning permission subject to conditions set out in the formal decision. He considered that the main issue was the effect of the proposed radio base station on the character and appearance of the area. He carried out an evaluation of matters relevant to visual impact and concluded that the proposed development would not have an unacceptable impact on the character and appearance of the area and would not conflict with the material development plan policies. These conclusions are no longer challenged by the Claimant in these proceedings.

9. The inspector's decision included the following passage at paragraph 13:

> "I have taken account of the concern expressed by local residents about the health implications of the proposed installation. One resident in particular is concerned about the effect that it may have on her disability. Paragraph 98 of PPG 8 says that the planning system is not the place for determining the health safeguards. It adds that, if a proposed installation meets the guidelines for public exposure set by the International Committee on Non-Ionising Radiation (ICNIRP) it should not be necessary to consider the health aspects and concerns about them any further. The Appellants have confirmed that the installation would comply with ICNIRP guidelines. Accordingly I consider that the residents' concerns about what they perceive to be the health risks associated with the appeal proposals do not justify withholding planning permission."

It is common ground between the parties before me that the second sentence of paragraph 13 refers to Mrs. Harris.

10. At paragraph 7 the decision makes reference to alternative sites. This will be referred to in detail later in this judgment.

11. The Claimant seeks to challenge the decision on a number of grounds. It is convenient to address these grounds in a slightly different order from that in which they were presented at the hearing before me and I have accordingly renumbered the grounds formulated by Mr. Kolinsky, on behalf of the Claimant, as follows:

> (1) The inspector erred in equating the Claimant's particular vulnerability with the situation at which the advice in paragraph 98 of the Appendix to PPG 8 is directed.
>
> (2) The inspector erred in his approach to the possibility of interference with the Claimant's essential medical requirements.
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> (3) The inspector's approach produces a potential conflict with the obligations of the United Kingdom under Article 2, European Convention on Human Rights.

(4) The inspector erred in law in his approach to the question of alternative sites.

Legal and Policy Framework.

12. Section 70 of the Town and Country Planning Act 1990 provides that in determining applications for planning permission the decision maker "shall have regard to the provisions of the development plan, so far as material to the application and to any other material considerations".

13. Section 38 (6) of the Planning and Compulsory Purchase Act 2004 provides that:

> "If regard is to be had to the development plan for the purpose of any determination made under the planning Acts the determination must be made in accordance with the plan unless the material considerations indicate otherwise".

14. The applicable national planning policy on telecommunication masts is contained in "Planning Policy Guidance 8: Telecommunications" (PPG 8"). It is clear that the national planning policy contained in PPG 8 was a material consideration in the determination of this planning application and that in order to have lawful regard to a national planning policy it was necessary for the decision maker to understand it correctly. (See *EC Gransden v Secretary of State for the Environment* (1987) 54 P&CR 86 at pp. 93-4.)

15. In *South Bucks District Council v. Porter (No. 2)* [2004] 1 WLR 1953 Lord Brown summarised the authorities on the correct approach to a reasons challenge to a planning decision as follows:

> "35. It may perhaps help at this point to attempt some broad summary of the authorities governing the proper approach to a reasons challenge in the planning context. Clearly what follows cannot be regarded as definitive or exhaustive nor, I fear, will it avoid all need for future citation of authority. It should, however, serve to focus the reader's attention on the main considerations to have in mind when contemplating a reasons challenge and if generally its tendency is to discourage such challenges I for one would count that a benefit.
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> 36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. 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. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

Ground 1.

16. Under this ground the claimant criticises the inspector's reliance on paragraph 98 of the Appendix to PPG 8 at paragraph 13 of his decision and his failure to have regard to the particular and unusual circumstances of Mrs. Harris's case. In particular, it is said that the inspector erred in equating the Claimant's particular vulnerability with the situation at which the advice in PPG 8 is directed.

17. The health effects of exposure to electromagnetic fields are addressed at paragraphs 85-101 of the Appendix to PPG 8. It states that the public has become increasingly aware of the presence of electromagnetic fields and that this has been accompanied by concern that such exposure may have possible adverse effects on health. It refers to the fact that both the National Radiological Protection Board (NRPB) and the International Commission on Non-Ionising Radiation Protection (ICNIRP) have published guidelines on limiting exposure to radio waves (paragraphs 85, 86.)

18. PPG 8 also refers to the Independent Expert Group on Mobile Phones (IEGMP) set up by the NRPB at the request of the Government in 1999. This Group, under the chairmanship of Sir William Stewart, considered concerns about health effects from the use of mobile phones, base stations and transmitters. It published its report on the 11th May 2000. The Appendix to PPG 8 states:

> "89. In respect of base stations, the report concludes that "the balance of evidence indicates that there is no general risk to the health of people living near to base stations on the basis that exposures are expected to be small fractions of the guidelines. However, there can be indirect adverse effects on their well-being in some cases". They also say that the possibility of harm cannot be ruled out of confidence and that the gaps in knowledge are sufficient to justify a precautionary approach.
>
> 90. The Independent Expert Group recommended a precautionary approach, comprising a series of specific measures, to the use of mobile phone technologies until we have more detailed and scientifically robust information on any health effects."

PPG 8 then records that in its response to the report the Government indicated that it accepted the precautionary approach. In particular, it accepted the recommendation that emissions from mobile phone base stations should meet the ICNIRP guidelines for public exposure (at paragraphs 90, 91). At paragraph 95 PPG 8 states, with regard to compliance with health and safety legislation, that the Health and Safety Executive refers to the guidelines for restriction produced by the NRPB. It continues:

> "However,... the Government has accepted the Stewart Group's recommendation that mobile phone base stations should, as a precautionary measure, meet the ICNIRP guidelines for limiting exposure. The ICNIRP guidelines for public exposure are 5 times more restrictive than those of the NRPB. It follows that, in complying with the ICNIRP guidelines, operators will also be complying with those of the NRPB."

Paragraph 96 of PPG 8 states:

> "96 Specific advice on interference with medical devices can be obtained from the Medical Devices Agency."

Paragraphs 97 and 98 provide:

> **"Taking Account of Health and Public Concern about Mobile Phone Base Stations.**
>
> 97 Health considerations and public concern can in principle be material considerations in determining applications for planning permission and prior approval. [A footnote here refers to *Newport B.C. v Secretary of State for Wales* [1998] Env. LR 174; [1998] JPL 377.] 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 nor prior approval, to consider further health aspects and concerns about them."

19. Accordingly, the guidance states that all new mobile phone base stations are expected to meet the ICNIRP guidelines (at paragraph 99). PPG 8 also states that the Stewart Report does not provide any basis for precautionary actions beyond those already proposed and that it is the Government's view that local planning authorities should not implement their own precautionary policies (at paragraph 101).

20. It can be seen from paragraph 13 of the inspector's decision in the present case, quoted at paragraph 9 above, that so far as the issue of the direct impact of the proposed station on health is concerned, the approach of the inspector was simply to apply the statement in paragraph 98 of the Appendix to PPG 8 that the planning system was not the place for determining health safeguards. The inspector considered that since there was evidence that the installation would meet the guidelines set by the ICNIRP it was not necessary to

consider the health issues any further. On this basis he concluded that the residents' concerns about what they perceive to be the health risks associated with the appeal proposals did not justify withholding planning permission.

21. Mr. Kolinsky, on behalf of the Claimant, accepts that the direct effect of radio signals on health is a matter which is addressed in the passages from PPG 8 referred to above. However he submits that this is not a conclusive answer in the case of the concerns expressed by Mrs. Harris in relation to the direct effect on health in her case. He points to paragraph 97 of PPG 8 which states that it is for the decision maker to determine what weight to attach to health considerations and public concern in any particular case. This case, he submits, is an extreme case because there was evidence before the inspector of the particular vulnerability of Mrs. Harris to electromagnetic radiation. He criticises the inspector's failure to address her particular circumstances. He submits that paragraph 98 of PPG 8 does not contemplate persons of particular vulnerability living in close proximity to proposed masts. In his submission the inspector should not have treated the guidance, which is applicable to the generality of cases, as providing a conclusive answer as to how effects on health and health concerns should be approached in this unusual case.

22. In support of this submission Mr. Kolinsky relies on the statement by Richards J., as he then was, in *Phillips v First Secretary of State* [2003] EWHC 2415; [2003] 4 PLR 75, at para 41 that:

> "...[A]lthough the guidance states that it should not be necessary to consider the health aspects of a development that complies with specified standards of public exposure, it recognises that public concerns about the health implications of a development can still be a material consideration: see paras. 97 ff. of the appendix. No doubt the existence of such concerns is one of the reasons why the location of telecommunications structures is such a sensitive issue."

23. However, there are a number of difficulties in the path of Mr. Kolinsky's submission. First, it fails to take account of the subsequent decision of the Court of Appeal in *T-Mobile (UK) Limited v First Secretary of State* [2004] EWCA (Civ.) 1763; [2005] Env.L.R. 364. T-Mobile had applied for planning permission for a new mobile phone mast which was refused by the local planning authority on visual amenity grounds. On appeal, the inspector refused the application relying on the perception of health risks and holding that there was insufficient assurance that there would be no harm to children in three schools situated nearby. On appeal to the High Court it was held that the inspector had misinterpreted paragraphs 97 and 98 of the Appendix to PPG 8. The Court of Appeal upheld the decision of the High Court. Laws L.J. at paragraphs 18-21 expressed the matter as follows:

> "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 paragraph 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:
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> "...it is the Government's firm view that the planning system is not the place for determining health safeguards."
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> 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] J.P.L. 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."

24. In the light of the reasoning of Laws L.J. it seems to me that the statement of Richards J. at paragraph 41 of *Phillips*, cited above, can no longer be regarded as a correct statement of the general approach. The effect of *T-Mobile* is to recognise that, where the policy guidance applies, public concerns about the health implications of the creation of a radio base station can be a material consideration only if there exist exceptional circumstances which justify departure from the policy.

25. The second difficulty in the path of the Claimant's argument is that the policy contained in PPG 8 was formulated after taking account not only of the effect of electromagnetic radiation on the general population but also of its effect on those who are particularly vulnerable. As we have seen, the relevant policy in PPG 8 is founded on the conclusions and recommendations of the Stewart Report. In particular, Government policy adopts the ICNIRP standards as the appropriate precautionary measures in respect of exposure of public to electromagnetic fields. The Stewart Report explains that under the ICNIRP guidelines the maximum levels of exposure of the public are about five times less than those used by NRPB in the case of workers. The Stewart Report explains (at paragraph 1.13) that the reason for this approach was the possibility that some members of the general public might be particularly sensitive to electromagnetic radiation. In contrast to the NRPB guidelines, the ICNIRP guidelines constitute a two tier system with limits for exposure of the general public five times lower than those for occupational exposure. The Stewart Report explains (at paragraph 6.29) that this difference was intended to allow for certain circumstances including:

> "Potentially higher thermal sensitivity in certain population groups such as those who are frail or elderly, infants, young children, and people with diseases or taking medications that compromise thermal tolerance."

26. This matter was expressly addressed by Hutchison in the material before the inspector. In a response dated the 9th May 2005 Hutchison explained that the worst case operation of the proposed installation would result in levels of energy at ground level which were 16,345 times below the ICNIRP guidelines. It also stated that the ICNIRP guidelines took into account the potentially higher thermal sensitivity in certain population groups such as the frail or elderly, infants, young children, and people with diseases or taking medications that compromise thermal tolerance.

27. It appears from paragraph 13 of the inspector's decision that he did take account of the particular situation of Mrs. Harris. He states that "[o]ne resident in particular is concerned about the effect that it [the base station] may have on her disability". I accept the submission of Mr. Maurici on behalf of the Secretary of State that this was a fair and adequate summary of her case having regard to the limited evidence on these matters which had been presented to the inspector. To my mind, the inspector clearly considered that her case fell within the policy in paragraph 98 of PPG 8 as opposed to being an exceptional case that justified a departure from the policy. On that basis he was not required to give any fuller reasons than he did for actually applying the relevant policy in PPG 8 in a way consistent with the construction given to that document by the Court of Appeal in *T-Mobile*. Had he departed from the policy he would have been required to give clear reasons for doing so.

28. In these circumstances, it becomes necessary to consider whether the particular features of Mrs. Harris's case were exceptional so as to require the inspector to depart from the policy in PPG 8 and to address in his decision the likely effect of the proposed development on public health and public concern on health grounds. I consider that the inspector was clearly entitled to conclude that there were present in this case no exceptional circumstances requiring him to depart from the policy. First, the evidence before the inspector as to the ill health suffered by the Claimant was extremely limited. In the statement she provided to the inspector Mrs. Harris said she was "very fearful of what [the development] would do to my health" and that she was affected by mobile phones and digital phones. Similarly, her general practitioner's letter dealt with the possible consequences of electromagnetic radiation on her health only in the most general terms. He stated that she

has "significant allergies, food, chemical drugs and the effect of extraneous exposure to chemicals and to electromagnetic radiation may have unpredictable serious consequences." Secondly, as we have seen, the precautionary measure adopted by PPG 8 is one which has already taken into account the particular vulnerability of the frail, the elderly and those suffering from particular conditions or taking medications that compromise thermal tolerance. Accordingly, there was no evidence before the inspector to support the view that Mrs. Harris's was a case which was exceptional so as to fall outside those of persons with a particular susceptibility to electromagnetic radiation of which full account had already been taken in the setting of the policy.

29. Accordingly, I consider that the inspector was entitled to conclude that the policy stated in paragraph 98 of PPG 8 was not displaced on the facts of the case and that compliance with the ICNIRP guidelines was sufficient to deal with the position of the Claimant. It was not necessary for him to undertake any further assessment of possible risks to health or perceived risks to health.

Ground 2.

30. Under this ground it is contended on behalf of Mrs. Harris that the inspector failed to have regard to the indirect impact of electromagnetic radiation emitted from the base station on the health of Mrs. Harris as a result of the effect it may have on her medical equipment.

31. There was no dispute before me that interference with medical equipment caused by a telecommunications mast can be a relevant planning consideration. This follows from paragraphs 96, 102 and 103 of the Appendix to PPG 8. Furthermore, it was common ground between the parties that interference with medical equipment is a discrete issue from that of the direct impact of electromagnetic radiation on health. This follows from the scheme of PPG 8 which treats them as separate issues.

32. Under this ground Mr. Kolinsky advances alternative arguments. His primary case is that the inspector made the mistake of considering that paragraphs 97 and 98 of PPG 8 address both the direct impact of emissions on health and the indirect impact of emissions on health as a result of a possible effect on medical equipment, and that it was, therefore, not necessary to take further account of the possible effect of emissions on medical equipment. Mr. Kolinsky submits that paragraph 13 of the decision letter is intended to address both aspects of Mrs. Harris's objection. Accordingly, he submits, the inspector proceeded on a mistaken basis. In the alternative, he submits that if paragraph 13 was not intended to address the effect of emissions on medical equipment, the inspector has simply failed to deal with the matter at all. In either case, he submits, the decision should be quashed.

33. On behalf of the Secretary of State, Mr. Maurici accepts that paragraphs 97 and 98 of PPG 8 do not deal with the issue of the effect of emissions on medical equipment. Furthermore, he submits that paragraph 13 of the inspector's decision does not deal with and was not intended to deal with this issue. However, he submits that in all the circumstances, and in particular having regard to the other provisions of PPG 8, the inspector was not required to deal with this issue in his decision.

34. The starting point for a consideration of these submissions must be to ask whether, approaching the decision letter on the basis indicated by Lord Brown in *South Bucks*, paragraph 13 does address the effect of emissions of medical equipment. I have come to the conclusion that it does not for the following reasons. First, the first sentence of paragraph 13 states that the inspector has taken account of the concern expressed "by local residents about the health implications of the proposed installation". A number of local residents had objected on the basis of the direct effect of emissions on health. To my mind, this sentence must be read as referring to such objections and not to the indirect effect on health via its effect on medical equipment, which was a matter of concern only to Mrs. Harris. Secondly, the second sentence clearly does refer specifically to Mrs. Harris. It states that she "was concerned about the effect it may have on her disability". To my mind, the reference to "disability" makes clear that this relates to the direct impact of emissions on health and cannot be read as referring to their effect on medical equipment. Thirdly, paragraph 13 of the decision then proceeds by referring to paragraph 98 of PPG 8 and the guidelines for public exposure set by the ICNIRP. It would have obvious to the inspector and to anyone who had read these passages that they are concerned solely with the direct impact of emissions on health. On a fair reading of paragraph 13 I find it impossible to conclude that the inspector has misunderstood paragraph 98 of PPG 8 and the ICNIRP guidelines by considering that they meet objections based on the indirect effect of emissions. On the contrary, the reference to these documents and the fact that the inspector concludes that they provide an answer to the objections indicates that he is limiting his consideration to objections based on the direct effect of emissions on health.

35. It is therefore necessary to consider whether the decision letter fails to take account of a relevant consideration in that it fails to address the indirect effect of emissions. On behalf of the Secretary of State, Mr. Maurici submits that this was not a relevant consideration because the Claimant had failed to cross the

threshold of materiality set by PPG 8.

36. The Appendix to PPG 8 includes a section headed "Radio Interference from Proposed Development". Within that section paragraph 102 deals with interference with electrical equipment in the following terms:

> "102 In any development, significant and irremediable interference with other electrical equipment of any kind can be a material planning consideration. There are essentially two types of interference. The first type is electromagnetic interference, caused by a radio transmitter or by unwanted signals emitted by other electrical equipment. The Radiocommunications Agency has statutory powers for dealing with this type of interference under the Wireless Telegraphy Act 1949. Only if there is clear evidence that significant electromagnetic interference will arise, or will probably arise, and that no practicable remedy is available, will there generally be any justification for taking it into account in determining a planning application."

Paragraphs 103 and 104 then deal respectively with interference to telecommunications or broadcast signals and the second identified type of interference which is physical interference caused by structures.

37. Mr Maurici submits that in the present case the possible effect of emissions on Mrs. Harris's medical equipment was not a relevant issue before the inspector because Mrs. Harris had failed to produce clear evidence that significant interference would arise or would probably arise and that no practicable remedy was available. He submits that Mrs. Harris has failed to cross the threshold of relevance set by paragraph 102.

38. Mr. Kolinsky objects that paragraph 102 has no application to the effect of emissions on medical equipment. This, he says, follows from paragraph 96, which appears in the section on health and safety legislation and which states that specific advice on interference with medical devices can be obtained from the Medical Devices Agency. (Paragraph 96 is quoted at paragraph 17, above.) He submits that paragraph 102 must be read in conjunction with paragraph 96 and that their combined effect is to exclude medical equipment from the general provision in paragraph 102. He submits that it is inherently unlikely that PPG8 would treat the effect of emissions on life-preserving equipment in the same manner as toasters, hairdryers and other domestic appliances. Furthermore, he submits that if paragraph 102 is applicable in a case such as the present, paragraph 96 becomes otiose.

39. I am unable to accept these submissions. First, the language of paragraph 102 is extremely and, it seems to me, deliberately wide. The first sentence makes clear that it is addressing "significant and irremediable interference with other electrical equipment of any kind". I read the word "other" as meaning other than the transmitter, which is itself electrical equipment. The words are clear on their face and the words "of any kind" make clear that they are intended to include all types of electrical equipment. Secondly, PPG 8 does go further in the case of interference of medical devices in that paragraph 96 identifies a source of specific advice in relation to interference with such devices. However, I do not read this as withdrawing medical devices from the general provision in paragraph 102. Thirdly, to my mind paragraph 102 does not leave paragraph 96 without purpose. If, as Mr. Maurici submits, there is a burden on an objector to produce evidence sufficient to meet the threshold test in paragraph 102 before interference with medical equipment can become a material issue, paragraph 96 serves to identify a source of expert advice for objectors. Moreover, if the threshold test is satisfied, the applicant for planning permission will need to deal with the matter and may be assisted by the reference in paragraph 96.

40. Linked with this issue is the question of how paragraph 96 is intended to work and to whom it is addressed. On behalf of the Secretary of State, Mr. Maurici submitted that it cannot be read as imposing any obligation on the inspector to seek advice from the Medical Devices Agency in the light of the matters raised by the Claimant. He referred to *Pye (Oxford) Estates Limited v Secretary of State for the Environment* [1982] JPL 577 in support of the submission that an inspector is not under an obligation to undertake an investigatory role and he submitted that it was for the Claimant to produce clear evidence that interference with medical equipment will arise or will probably arise. On behalf of the Claimant, Mr. Kolinsky, in his oral submissions, accepted that there was no duty on the inspector to obtain information pursuant to paragraph 96. However, he submitted that various courses were open to the inspector. First, he could have imposed a condition on the planning permission, for example a condition that the development should not be implemented until the developer had shown to the satisfaction of the local planning authority that emissions would have no effect on Mrs. Harris's medical equipment. Secondly, he could have requested further information from the parties. In this regard Mr. Kolinsky relied upon *Phillips v. First Secretary of State* [2003] 4 P.L.R. 75, at paragraph 54, *Taylor v Secretary of State for Wales* [1985] J.P.L. 792 at pp. 794-5 and *Dyason v Secretary of State for the Environment* [1998] JPL 778 at pp. 784-5. Thirdly, he submitted that the inspector could have dealt with the issue in the decision letter on the basis of the information before him. It was his submission that the inspector was under a duty to follow one of those courses.

41. The inspector was, of course, empowered to impose conditions on the grant of planning permission. However, I am unable to see how the inspector can be criticised for not imposing a condition of the type indicated by Mr. Kolinsky in the circumstances of the present case where no party had suggested that he should do so. (See *Top Deck Holdings v Secretary of State for the Environment* [1991] JPL 961 at p 964; *R (Ayres) v Secretary of State for the Environment Transport and the Local Regions* [2002] EWHC 295 (Admin) at paragraphs 35-43 where Silber J. provides an overview of the cases on the imposition of conditions.) Moreover, while the inspector undoubtedly had the power to request further information from the parties, this does not assist in answering whether he was under a duty to do so. In this regard I should say that *Dyason v Taylor* is to my mind a case where such a duty arose because procedural unfairness would otherwise have resulted. Similarly, the observations in *Phillips v. First Secretary of State* at paragraph 54 and *Taylor v Secretary of State for Wales* at pp. 794-5, referred to above, are concerned with giving effect to basic principles of procedural fairness. It is not suggested that is the position here. The question for consideration here is whether the inspector acted unlawfully in failing to follow one of the three courses identified by the Claimant. That brings us back to the question whether the indirect impact of emissions on health on medical equipment was a relevant consideration which the inspector was required to address in his decision.

42. For the reasons given above, I consider that paragraph 102 is of general application and creates a threshold of relevance. It is only if that threshold is crossed that the inspector applying the policy would be required to address the issue of the impact of the emissions on Mrs. Harris's medical equipment.

43. Mr. Kolinsky objects that in planning appeals there is no formal burden of proof. However, this, to my mind, is not to the point. A number of decisions disapprove of the use in the context of planning appeals of the concept of "burden of proof" as it is used in civil litigation. (See, for example, *Pye (Oxford) Estates Ltd. v. Secretary of State for the Environment* [1982] J.P.L. 577, per Mr. David Widdicombe QC, sitting as a Deputy High Court Judge.) In *Chesterfield Properties plc v. Secretary of State for the Environment* (1988) 76 P. &C.R. 117 at pp. 125-6 Laws J., as he then was, disapproved the use of the burden of proof, being a concept designed for a lis inter partes, as a tool in the compulsory purchase inquiry context. He also disapproved of the use of the concept of standard of proof for the same reason. However, as Judge Gilbart QC, sitting as a Deputy High Court Judge, explained in *Vicarage Gate Limited v. First Secretary of State* [2007] EWHC 768 (Admin), in cases where planning policies require a developer or an objector to demonstrate the existence of some state of affairs:

> "Those policy requirements are not applying a burden of proof, or defining a standard of proof to be attained, or the type of evidence to be adduced, as a matter of law. They are applying a policy that those tests should be met, and as a policy, exceptions can be made if reasons are given, whereas in the case of a legally derived burden or standard of proof no such possibility exists on a case by case basis. But while there is a different provenance (policy rather than law) for the requirement to adduce evidence or of the imposition of a duty to persuade on one party or another, there can be no doubt that the effect in forensic terms at an inquiry is very similar to that in litigation of a legally derived burden or standard of proof. The decision maker will still be looking for the party identified by the policy to adduce evidence of the kind prescribed by the policy to the standard set by the policy."

In the present case, the question is whether, applying the policy, enough has been done to constitute a particular issue a relevant issue which must be addressed by the inspector.

44. Furthermore, I am unable to accept the submission that it would be unfair to impose such a burden on someone in the position of Mrs. Harris on the ground that it would be particularly difficult burden for her to discharge. There is nothing in the present case to suggest that the emissions from the proposed transmitter would be significantly different from those from any other transmitter. It would have been open to Mrs. Harris to seek advice from the manufacturer of the equipment. If there had been a history of emissions from radio transmitters interfering with such equipment, the manufacturer would, no doubt, be aware of this and would be able to provide relevant information. Moreover, the manufacturer would have been able to put Mrs. Harris in touch with the Medical Devices Agency.

45. I turn therefore to consider whether the material before the inspector did cross the threshold of relevance specified in paragraph 102. The material before the inspector on this issue was very limited. The letter of the 2nd August 2005 from Mr. Shanesh Vara MP stated that "the machine through which [Mrs. Harris] is intravenously fed is very sensitive and Mrs. Harris is concerned about the effect that this proposed mast will have on it". In her statement Mrs. Harris stated that the "machine used in the feeding process is very sensitive and reacts to the slightest interference". Mrs. Harris's general practitioner stated that the machine is one which "notoriously can be interfered with by other electrical equipment". To my mind, this material comes nowhere near constituting "clear evidence that significant electrical or magnetic interference will arise or will

probably arise" as a result of the proposed development, let alone that no practicable remedy was available. In these circumstances I consider that the inspector, in applying the policies of PPG 8, was not required to have regard to this matter or to deal with it in his decision letter.

46. Mr. Kolinsky then submits that the inspector was, nevertheless, bound to take account of Mrs. Harris's fears as to the effect of emissions on her medical equipment, and thereby indirectly on her health, and to address these in his decision, even if these fears lacked any objective justification. In this regard he relies on *Newport BC v Secretary of State for Wales* [1998] Env. L.R. 174; [1998] J.P.L. 377. There, the Court of Appeal considered that the public perception of risk to its safety inherent to a proposed development, even if objectively unfounded, can be a material consideration for planning purposes.

47. In the present case both parties accepted that the public perception of a direct risk to health resulting from a proposed development can be a relevant planning consideration whether or not it is objectively justified. This is made clear by paragraph 97 of the Appendix to PPG 8 which states that health considerations and public concern can in principle be material considerations and then refers in a footnote to the *Newport* case. Similarly, at paragraph 98 it states the Government's view that if the ICNIRP guidelines are met it should not be necessary to consider further the health aspects or the concerns about them. For the reasons set out above in considering the Claimant's Ground 1, I consider that this passage provides a complete answer to the Claimant's case on the direct impact of the proposed development on health and the public perception thereof.

48. However, contrary to Mr. Kolinsky's submission, it does not seem to me that a perceived threat to the operation of electrical equipment which lacks objective justification must be regarded as a relevant planning consideration. To my mind this is so even if the concern is that failure of the equipment may in turn have an effect on health. Unlike the paragraphs in PPG 8 which deal with health issues, which expressly accept that public concern can be a relevant issue, those paragraphs which deal with effects on electrical equipment set an objective threshold of relevance. Within the policy, it is only if there is clear evidence that significant electromagnetic interference will arise, or probably arise, and that no practicable remedy is available that there will be any justification for taking it into account in determining a planning application. There is nothing here to suggest that fears of an effect on electrical equipment which lack such an objective justification are nevertheless relevant planning considerations.

49. Nor can I see that the policy adopts a different approach in cases where a failure of machinery may have an effect on health. Nothing in PPG 8 supports such an approach. On the contrary its scheme strongly suggests that only where the objective threshold is crossed will there in general be any justification for taking such fears into account.

50. It therefore becomes necessary to consider whether there are in the present case exceptional circumstances which required the inspector to depart from the policy stated in PPG 8. While I would accept that there may be circumstances in which evidence of a real risk to life would require an inspector to depart from the policy and to address the likely effect of emissions on medical equipment, I am not persuaded that that is so in the present case. The evidence presented to the inspector amounted to no more than a statement of concern and an assertion that there is a risk. No attempt was made to identify the precise nature of the risk or to evaluate it. In these circumstances, I consider that the inspector was reasonably entitled to approach the issue within the context of the policy. There were here no exceptional circumstances which required him to address the matter outside the policy.

51. In the circumstances of the present case, where there was the merest assertion of an indirect risk to health resulting from interference with electrical equipment and no evidence capable of demonstrating any objective justification for such fears, there was no obligation on the inspector to deal with the matter in his decision letter.

Ground 3.

52. Under this ground the Claimant contends that the inspector's approach conflicts with the obligations of the United Kingdom under Article 2 of the European Convention on Human Rights.

53. Mr. Kolinsky submits that the evidence before the inspector suggested that the Claimant's medical equipment may be particularly sensitive to emissions from the radio base station. He submits that there was no evidence before the inspector on which he could lawfully have concluded that there was no possibility of interference with the Claimant's medical equipment and the inspector did not so conclude. If, contrary to the Claimant's primary case, the inspector was entitled to treat paragraph 98 of PPG 8 as conclusive of the approach of health effects in the present case then, submits Mr. Kolinsky, PPG 8 potentially contravenes Article 2 of the European Convention on Human Rights. He submits that a regulatory system which requires

the decision maker to leave out of consideration the particular vulnerability of an individual to direct or indirect effects on her health conflicts with the positive requirements of Article 2. Furthermore, he submits that the application of the threshold requirement of paragraph 102, in circumstances where the failure of electrical equipment may have an effect on health, similarly constitutes an infringement of Article 2.

54. In this regard Mr. Kolinsky refers to the established principle that Article 2 enjoins States not only to refrain from the intentional taking of life but also to take appropriate steps to safeguard the lives of those in its jurisdiction. (See, for example *Calvelli v Italy*, Case 32967/96; Judgment of 17th January 2002, at paragraph 48.) Mr. Kolinsky placed at the forefront of his submissions *Oneryildiz v Turkey*, Case 8939/99; Judgment of the Grand Chamber, 30th November 2004. The complaint in that case was that the national authorities had not done all that they should have done to prevent the deaths of the Applicant's relatives in an accident at a municipal rubbish tip which was operated under the authorities' control. The Court considered that the obligation under Article 2 must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake and, a fortiori, in the case of industrial activities which, by their very nature, are dangerous, such as the operation of waste collection sites. The Court considered that the positive obligation to take all appropriate steps to safeguard life entailed a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrents against threats to the right to life. The Court continued:

> "This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of potential risk to human lives. They must cover the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practicable measures to ensure the effective protection of citizens whose lives may be in danger by the inherent risks.
>
> ...
>
> In any event, the relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels." (at paragraph 90.)

55. On behalf of the Defendant, Mr. Maurici submitted that that aspect of Article 2 which imposes an obligation on public authorities to take positive action to protect life, with which we are concerned, is engaged only if a real and immediate threat to life is demonstrated. In this regard he referred to *Osman v United Kingdom* 29 EHRR 245, where, at paragraph 116, the European Court of Human Rights employed the high test of "a real and immediate risk" before a duty could arise requiring the State to take positive action to protect an individual from the criminal acts of a third party. He also pointed to the fact that in *Oneryildiz* itself, at paragraphs 100 and 101, the Strasbourg Court applied the test of a real and immediate risk.

> "It follows that the Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near the Umraniye municipal rubbish tip. They consequently had a positive obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals ..., especially as they themselves had set up the site and authorised its operation which gave rise to the risk in question."

56. If, as Mr. Maurici submits, the test of a real and immediate risk is applicable in the present case, then it is clear that Article 2 is not engaged. However, I would question whether that test is necessarily applicable in the circumstances of the present case. In the passage from the judgment of the Strasbourg Court in *Oneryildiz* cited above the Court was addressing the question whether a positive obligation to take preventive operational measures had arisen. By contrast, in the present case we are concerned with a regulatory scheme instituted by the State and the questions which arise are whether that scheme and the manner in which it has been applied in this case conform with Article 2. I doubt whether the high threshold for engagement of Article 2 appropriate to create a duty to take preventive operational measures necessarily applies in these circumstances.

57. In any event, I am entirely satisfied that there has been no infringement of Article 2 in the present case. So far as the possible direct effect of electromagnetic radiation on health is concerned, the regulatory scheme clearly complies with Article 2. Paragraph 98 of PPG 8 requires compliance with the ICNIRP guidelines. It is agreed that there was such compliance in this case. Those guidelines were set by reference not only to the general population but also by reference to those who may be particularly vulnerable to electromagnetic

radiation, including individuals with diseases or taking medication that compromise thermal tolerance. As a result, full and appropriate account has been taken of the position of individuals in a position comparable to that of the Claimant. Furthermore, as the Court of Appeal explained in *T-Mobile*, paragraph 98 of PPG 8 leaves open the possibility that there might exceptionally be cases in which the planning authority would be justified in looking further than paragraph 98, departing from the policy and considering the particular health issues in play.

58. Similarly, so far as the possible indirect effect of electromagnetic radiation on health through interference with electrical equipment is concerned, the policy stated in paragraph 102 of PPG 8 is not an immutable rule. Exceptions can be made on a case by case basis where exceptional circumstances require a departure from the policy. This is sufficient to ensure that the policy laid down in PPG 8 complies with Article 2, ECHR. In the present case, the Claimant did not produce any evidence before the inspector to show that there was a real risk of such indirect interference with health occurring. In these circumstances, I consider that the inspector's approach in conformity with the policy guidance did not give rise to any violation of Article 2, ECHR.

59. Accordingly, I conclude that Article 2, ECHR does not assist the Claimant in the circumstances of the present case.

Ground 4.

60. Ground 4 relates to a wholly distinct subject matter, namely the consideration of alternative sites.

61. The possible availability of alternative sites was undoubtedly a relevant consideration before the inspector in the present case. This follows from the terms of PPG 8 which in paragraphs 19-20 and paragraphs 66-73 of the Appendix makes clear that these are relevant considerations. I gratefully adopt the conclusions of Richards J., as he then was, on this issue in *Phillips v First Secretary of State*, conclusions which I consider are not affected in any way by the decision of the Court of Appeal in *T-Mobile (UK) Limited*. Having stated the general proposition that consideration of alternative sites is relevant to a planning application only in exceptional circumstances, Richards J. went on to find that the Government policy guidance made it relevant in that case.

> "It is PPG 8 that I consider particularly important in this case. It makes consideration of alternatives an integral part of the assessment of an application for approval of the siting of telecommunications structures. It is true that the main thrust of the guidance with regard to alternatives concerns the sharing of masts and sites: applicants for new masts are expected to show that they have explored the possibility of sharing existing structures as an alternative to a new site. But, in my view, alternative new sites also fall within the scope of the guidance. The broad tenor of the guidance is to accept the principle of telecommunications structures where they are needed for coverage, but to acknowledge the sensitivity of the location of such structures and to emphasise the importance of searching, in each case, for the optimal location. The question, as it seems to me, is not just "is this an acceptable location?", but "is this the best location?", and, for the purpose of answering that question, one can, and should, look at whatever alternative possibilities there may be." (at paragraph 39).

62. In the present case the inspector's decision letter includes the following statement at paragraph 7:

> "The Appellants have considered several other potential sites but discounted them for a variety of technical and other reasons. The Council does not dispute these reasons but nevertheless considers that the contentious nature of this site and the effect that the mast would have on the visual amenity of local residents and the appearance of the flat and open landscape of the area justify its refusal of planning permission."

63. On behalf of the Claimant Mr. Kolinsky criticises this passage as making "a passing reference to the discussion of alternatives". He submits that the inspector has failed to give proper consideration to the availability of alternative sites. In particular, he submits that the inspector did not make any findings that there are no satisfactory alternatives and did not find that this site is the optimal site. The inspector did not refer to the representations of third parties. He criticises the inspector for having failed to have regard to the relevant guidance in PPG 8 as explained by Richards J. in *Phillips*.

64. It is necessary to consider these criticisms against the background of the history of the planning application. In the Supporting Statement dated 31st March 2005 submitted by Hutchison as part of the planning application Hutchison set out details of the alternative sites considered and the reasons for their rejection. In a response dated 30th April 2005 the Parish Council maintained its position that there were suitable alternatives which provided the required coverage and which would have a reduced environmental

impact. However, the only sites which the Parish Council was now maintaining were viable were sites 2, 8 and 9. The response included a specific proposal involving a combination of the existing sites 8 and 9.

65. In a letter dated the 9th May 2005 to Mr. Simon Hoppee, another objector to the proposal, Hutchison stated that prior to identifying the site at Mumby's Yard Hutchison had carried out an extensive search of the area to identify all possible site options. Existing base stations in the area had been viewed and various options had been considered and discounted. The letter then set out in detail the reasons for the rejection of the alternatives. In particular, it stated that sites 2, 8 and 9 were discounted as they fell outside the search area and therefore would not be able to provide the necessary coverage from these locations. This letter did not expressly deal with the proposal for the use of a combination of sites 8 and 9. Nevertheless, it was a substantial response to the issues which had been raised by the Parish Council.

66. On the 18th May 2005 planning permission was refused by the local planning authority. The refusal letter refers to the policies applied. These include, within U1, the policy that in determining applications the planning authority will take into account whether there are any satisfactory alternative sites. However, the reasons for refusal were stated to be that the proposal would be out of keeping, visually intrusive and detrimental to the character of the area and the visual amenity of occupiers of nearby properties. It was not suggested by the Council that there was any satisfactory alternative site. It appears therefore that by this stage Peterborough City Council was satisfied that there were no suitable alternative sites.

67. In its appeal to the Secretary of State dated 21st June 2005 Hutchison set out in detail its reasons for rejecting alternative sites. It explained that following detailed assessment of all possible alternative sites none had been found which were either technically suitable for providing the required coverage or provided an optimal solution in terms of minimising visual impact given the technical constraints of the site.

68. The statement from Peterborough City Council in response to the appeal includes the following passage in the section containing comments on the Appellant's grounds of appeal.

> "Whilst it is recognised there is a demonstrable need for modern telecommunications systems and awareness of the technical constraints according to the location of various sites, there is also a need to keep the environmental impact of such equipment to a minimum. Whilst the Appellant has considered other locations, none of these alternatives have been considered suitable for reasons of viability, coverage and acquisition. Nevertheless given the contentious nature of this site, its proximity to residual properties and its potential distortion of views within the open countryside the height of the proposed mast will have an unacceptable effect on both visual amenity of the occupiers of nearby properties and the flat landscaped appearance of the open countryside."

The local planning authority is here not disputing that there are no satisfactory alternative sites. Rather it is maintaining its objection to the proposal on grounds of visual amenity.

69. The Parish Council did not make any submissions to the Planning Inspectorate. However, their original submissions were before the inspector. The only letter sent to the Planning Inspectorate, as opposed to the local planning authority, which dealt with alternative sites was a letter dated the 7th August 2005 from Mrs. Jan Morris which argued that there were two potentially relevant existing masts which had not been considered. These were, in fact, sites 8 and 9 which had already been considered. In a letter dated 18th August 2005 to the Planning Inspectorate Hutchison observed that while the suitability of alternative sites had been referred to in a number of letters no locations had been put forward for consideration beyond those already assessed in the application to Peterborough City Council. It stated that it had already set out its reasons for rejecting such alternative sites. It expressly referred to the fact that the assessment of alternative sites was not disputed by Peterborough City Council. It submitted that the proposed site had been selected as it was considered to provide the optimal environmental and technical solution to the defined coverage requirement.

70. In the light of the history of the planning application and the appeal, I consider that the issue of the availability of alternative sites had ceased to be a substantial issue in the planning proceedings. Hutchison had on a number of occasions set out in detail the reasons why it considered that there were no suitable alternative sites. The local planning authority in refusing permission had not done so on the basis that there were suitable alternative sites. In its response to the appeal the local planning authority had not disputed that the alternatives could not be considered suitable for reasons of viability, coverage and acquisition. While it is correct that the original objections made to the local planning authority, including the objections by the Parish Council referring to alternative sites, were before the inspector, the issue of alternative sites was, to my mind, no longer a real issue.

71. In *South Buckingham District Council v Porter (No. 2)* [2004] 1 WLR 1953 Lord Brown emphasised, at paragraph 36, that the reasons given by the inspector need refer only to the main issues in the dispute, not to every material consideration. The inspector is required to give reasons which enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues. As Lord Lloyd observed in *Bolton Metropolitan District Council v Secretary of State for the Environment* (1995) 71 P.&C.R. 309 at pp. 314-315, to require the inspector to refer to every material consideration, however insignificant, and to deal with every argument, however peripheral, would be to impose an unjustifiable burden. Having regard to the history set out above I consider that the issue of alternative sites was not a principal important controversial issue before the inspector.

72. Furthermore, a closer examination of the inspector's decision reveals further passages which have a bearing on the question now under consideration. In paragraph 3 the inspector refers to Local Plan Policy U1. He expressly refers to the fact that it lists various factors to be considered including the availability of alternative sites and opportunities for sharing sites or using existing buildings and structures. Similarly, in paragraph 6 of the decision letter the inspector refers to the fact that PPG 8 strongly encourages the sharing of masts and sites and the use of existing buildings and structures to site new antennae and that this requirement is reflected in Local Plan Policy U1. This is immediately followed by paragraph 7 which is quoted above. Then, at paragraph 12 of the decision, the inspector expresses his conclusion that the proposal would not conflict with any of the policies to which he has referred. I accept the submission of the Defendant that on a fair reading of the decision the inspector's conclusion that Local Plan Policy U1 has been complied with must involve the conclusion that the issue of alternative sites has been satisfactorily addressed.

73. For these reasons, I conclude that the Claimant's challenge to the inspector's decision based on his treatment of the issue of alternative sites is unfounded.

Conclusion.

74. The Claimant's application will be dismissed.