***R*(*Lakenheath Parish Council*) *v Suffolk CC* [2019] EWHC 978**

Background and decision

Lakenheath was a United States Air Force base, which operated from premises which belonged to the RAF. Local government for the area was provided by both Lakenheath Parish Council (L) and Suffolk County Council (S). S was the relevant planning authority for the area.

S granted planning permission for about 220 new homes to be built in the vicinity of Lakenheath. S applied to itself for planning permission to build a new school, in order to accommodate around 480 pupils. Both L and S agreed that during the school day, the areas around the school would be subjected to excessive noise. However, the extent of the noise, and its capacity to harm human health, was contentious.

L challenged the grant of planning permission, essentially on four grounds. The first was that S failed to have proper regard to the interests of the child, in terms of Art. 3 of the UN Convention on the Rights of the Child (UNCRC), or to treat that as a primary consideration.

The second ground of challenge was that either S had failed to have regard to, or interfered disproportionately with, Art 8 of the European Convention on Human Rights ('ECHR').

The third ground of challenge was that S had failed to have regard to the public sector equality duty under s149 of the Equality Act 2010.

The fourth ground of challenge was that S had breached Reg. 3 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ('EIA') by virtue of failing to properly assess the environmental impacts of alternatives for the site of the school.

In advancing their challenge to the decision, L claimed that there was not a single reference in the planning officer's report to the UNCRC Art 3, the ECHR Art 8, the Equality Act, or any EIA. L claimed that the report formed the evidential basis on which the planning committee came to its decision, and that the failure to mention, or evaluate, the potential harm from excessive noise to the physical or psychological well-being of children generally or to

their education and educational attainment, constituted actionable interference with their ECHR Art 8 and UNCR Art 3 rights generally. Furthermore, L argued that failure to mention in the report, the negative impact of noise on the children constituted a breach of the public sector equality duty.

Judge Gore QC stated that the main issue which the court was required to decide was whether the absence of reference in the planning officer's report, to the four issues which had been identified by L, fatally undermined the legality of S's decision, or, alternatively whether, despite the specific reference to these four issues, the substance of these issues was dealt with in the officer's report, and thereby, by S, so as to justify its decision being sustained.

His Lordship, citing *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1317 emphasised the principle that a planning decision could only be successfully challenged on the grounds that a planning officer's report was defective, if the planning officer had materially mislead the members on a matter bearing upon their decision, and that the error has not gone uncorrected before the decision was made. It was only if the advice in the officer's report misdirected the members in a material way, that the court could conclude that the decision, which was made by the planning authority, was rendered unlawful by that advice.

Judge Gore went on to hold that deciding the needs of children to have access to an education in a new school, when the facts were that the provision of new homes would increase the demand for places significantly, and that the existing school was nearly full and had no space or resources to meet this demand, amounted to treating the interests of the child as a primary consideration under Art 3 of the UNCRC. Therefore, the failure to mention this important requirement did not constitute misleading S on a matter bearing on its decision, either materially, or otherwise.

As far as the relevance of Art 8 was concerned, his Lordship was prepared to accept the proposition that the decision as to whether or not to grant of planning permission did engage Art 8(1) of the ECHR. The next question which fell to be resolved was whether the silence of the officers report on Art 8 materially misled S or whether, given the evidence, facts and matters which

were identified in the report, the officer had advised S and the latter had decided in accordance with the proportionate needs in a democratic society, thereby producing a balanced judgement, in terms of Art 8(2). His Lordship held that whereas Art 8(1) was engaged by S deciding the planning application, both the planning officer and S had kept at the forefront of their minds, the best interests of children. His Lordship accepted the proposition that Art 8 did not simply protect the physical integrity of the child, but also extended to protecting their physical and psychological space, which was necessary for personal development etc. However, Judge Gore held that to constitute a breach of Art 8(1) the interference required to be sufficiently adverse, and not based on hypothetical factors, which were not substantiated. There was no evidence before the court to conclude that the children would suffer from physical or psychological harm from excessive noise in the location. In the last analysis, S had not been unreasonably misled by the planning officer omitting to mention Art 8(2). S had carried out the balancing exercise which was required to consider whether potential infringement of Art 8(1) was proportionate when S decided to grant planning permission for the new school.

Judge Gore then addressed the third ground of challenge. Under s149(1) of the Equality Act 2010 (the 'Act') a public authority is required *inter alia* to have due regard to the need to eliminate discrimination. The question which fell to be addressed in the instant case was whether the provisions of the Act had been satisfied, notwithstanding the fact that the officer's report made no mention of this duty, and furthermore, that there was no extraneous evidence to the effect that S had this in mind when it made its decision. His Lordship emphasised the point that the relevant public authority was simply required by s149(1) to 'have regard' to the need to eliminate discrimination. The section did not require the authority to achieve a specific result. Judge Gore held that despite explicit reference to the Act in the planning officer's report, that report identified, and also reflected on the excessive levels of noise that would exist in the outdoor areas, which surrounded the school. S, by attaching appropriate conditions to the grant of planning permission, had either removed or minimised potential disadvantages to children with protected characteristics. Due regard had, indeed, been paid to meeting the needs of these children who

were to be placed in mainstream education and who would live in the new housing.

As far as the fourth ground of challenge was concerned, Judge Gore stated that seven alternative sites for the school were identified. However, environmental effects were considered at only three. His Lordship emphasised the point that it was well established by case law, which he cited, that the courts accorded wide discretion to planning authorities as to the content of an environmental statement. S's decision proceeded on the basis that the effects of outdoor noise, balanced against the needs and benefits which were identified, justified the grant of planning permission. That was a matter of planning judgement for the planning officer and the planning authority, S. In the last analysis, the planning officer's report had not misled S.

Comment

This case re-emphasises the point which is now well-established by case law, to the effect that it is only if a planning officer's report is such as to misdirect the members in a material way, that the court will conclude that the relevant decision was rendered unlawful by that advice. *Lakenheath* also illustrates the general point, which was made by Lindblom LJ in *Mansell* (above), that the courts should be vigilant against 'excessive legalism' infecting the planning system.

Although the point was not argued before the court, *Lakenhurst* also illustrates the application of the principle, to the effect that the courts accord a public authority a wide margin of appreciation, in determining whether it had taken sufficient measures to secure compliance with Art 8 of the ECHR see eg *Hatton v UK* (2003) 37 EHRR 28.

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