Neutral Citation Number: [2018] EWCA Civ 1089

Case No: C1/2017/1340

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION (PLANNING COURT)
C M G OCKELTON (VICE PRESIDENT OF THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER))
SITTING AS A DEPUTY HIGH COURT JUDGE
[2017] EWHC 874 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/18

Before :

LORD JUSTICE LINDBLOM
and
LORD JUSTICE HICKINBOTTOM

- -

Between :

FLINTSHIRE COUNTY COUNCIL

Appellant

- and -

THE QUEEN ON THE APPLICATION OF ANTHONY JAYES

Respondent

- and -

LEONARD HAMILTON

Interested Party

- -
- -

John Hunter (instructed by **Flintshire County Council Legal Services**) for the **Appellant**
Richard Langham (instructed by **Jayes Collier LLP**) for the **Respondent**
The Interested Party did not appear and was not represented

Hearing date: 2 May 2018

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Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. This is an appeal against the order of C M G Ockelton (Vice President of the Immigration and Asylum Chamber of the Upper Tribunal) sitting as a Deputy High Court Judge dated 21 April 2017 allowing the claim for judicial review brought by the Respondent ("Mr Jayes"), and quashing the decision of the Appellant local planning authority ("the Council") to grant planning permission to the Interested Party ("Mr Hamilton") for the continued use of a site known as Dollar Park, Bagillt Road, Holywell, Flintshire ("the Site") as a residential Gypsy caravan site for a temporary period of five years.

2. Mr Hamilton, his family and members of the other extended families who occupy the Site are all Gypsies, for whom living in caravans is an integral part of their ethnic identity, recognised by European law (Commission for Racial Equality v Dutton [1989] QB 783), domestic law (for example, as a protected characteristic under the Equality Act 2010) and the policy of the Welsh Minsters (see, for example, Welsh Assembly Government Circular 30/2007, "Planning for Gypsy and Traveller Caravan Sites" ("WAGC 30/2007")).

3. In 2011, Mr Hamilton obtained temporary planning permission for five years to use the Site as a residential caravan site.

4. In granting the further application in 2016, the Council accepted that the proposal would result in harm to the character of the area and the setting of a nearby Listed Building, Glyn Abbot, which is owned by Mr Jayes; and would thus be contrary to various policies in the development plan. However, as there was an unmet need for Gypsy sites in Flintshire, to refuse permission would make the families (including a number of children) currently occupying the Site homeless, in the sense that they would be itinerant and would have to pitch their caravans on the roadside without any base to access healthcare and education. In the circumstances, bearing in mind that the best interests of children are a primary consideration, despite the identified harm the Council concluded that planning permission should be granted for a further period of five years.

5. On the judicial review by Mr Jayes, the Deputy Judge found that the Council had erred in law by granting planning permission without having ascertained and evaluated the best interests of the children who lived on the Site (see [31]-[37] of his judgment). On that ground, he allowed the judicial review, and quashed the Council's decision. Although not making formal findings, it is clear that the judge was unimpressed by the other grounds of challenge (see [38]-[39]). None of the other grounds remains in play.

6. The Council appealed against the Deputy Judge's order; and, on 19 June 2017, Sales LJ granted permission to appeal on essentially one, narrow ground: the judge erred in concluding that the grant of planning permission was unlawful because the Council had insufficient information to justify its conclusion that refusing permission would be disproportionate to rights of the occupants of the Site, particularly the children, under article 8 of the European Convention on Human Rights ("the ECHR"). As a fall back, it is submitted that, even if the information was insufficient, the Deputy

Judge nevertheless erred in concluding that he could not be satisfied that the decision would likely have been the same had more information been available.

7. Before us, John Hunter of Counsel appeared for the Council, and Richard Langham of Counsel for Mr Jayes; and we thank them both for their helpful submissions. Mr Hamilton played no part in the appeal.

The Relevant Law and Policy: Gypsies and Travellers

8. The Site is, of course, in Wales; and planning is a function devolved to the Welsh Ministers.

9. Sections 101-102 of the Housing (Wales) Act 2014 (and their predecessors, sections 225-226 of the Housing Act 2004) oblige each Welsh local authority to make a regular assessment of the level of Gypsy and Traveller accommodation provision that is required by those who reside in or resort to its area.

10. Paragraph 10 of WAGC 30/2007 requires such an assessment to be done as part of the local housing market assessment performed when preparing the relevant Local Development Plan ("LDP"). Where a local housing market assessment has not been concluded, paragraph 12 requires local authorities to assess need for Gypsy and Traveller sites by reference to available data and information. The guidance continues:

> "13. Advice on the use of temporary permissions is contained in paragraphs 108-113 of Welsh Office Circular 35/95, "The Use of Conditions in Planning Permissions" ["WOC 35/95"]. Paragraph 110 advises that a temporary permission may be justified where it is expected that the planning circumstances will change in a particular way at the end of the period of the temporary permission. In cases where there is:
>
> - unmet need and;
> - no available alternative Gypsy and Traveller site provision in an area and;
> - a reasonable expectation that new sites are likely to become available at the end of that period in the area which will meet that need;
>
> local planning authorities should give consideration to granting a temporary permission where there are no overriding objections on other grounds.
>
> 14. Such circumstances may arise, for example, in a case where a local planning authority is preparing its site allocations as part of the LDP. In such circumstances, local planning authorities are expected to take into account the consequences of the unmet need in considering whether a temporary planning permission is justified. The fact that temporary permission has

> been granted on this basis should not be regarded as setting a precedent for the determination of any future applications for full permission for use of the land as a caravan site…".

11. Temporary planning permission is in practice only considered in circumstances in which the proposed development does not conform with the provisions of the development plan (see paragraph 5.23 of the Welsh Government Circular 16/2014, "The Use of Planning Conditions for Development Management" ("WGC 16/2014")).

The Relevant Law and Policy: Children

12. When a planning authority determines a planning application, section 70(2) of the Town and Country Planning Act 1990 requires it to exercise its planning judgment, taking into account all "material considerations", i.e. relevant factors. 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 to be made under the planning Acts (including a decision on a planning application), the determination must be made in accordance with the plan unless "material considerations" indicate otherwise.

13. The determination of what considerations are material is a matter of law; but it is for the relevant planning decision-maker to attribute such weight (if any) as he considers appropriate to each such consideration, and, of course taking into account relevant law and policy guidance, apply his planning judgment as to where the planning merits lie, to grant or to refuse the application.

14. Although any administrative decision-maker is under a duty to take all reasonable steps to acquaint himself with information relevant to the decision he is making in order to be able to make a properly informed decision (Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1997] AC 1014), the scope and content of that duty is context specific; and it is for the decision-maker (and not the court) to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor (R (Khatun) v London Borough of Newham [2004] EWCA Civ 55; [2005] QB 37 at [35]). That applies to planning decision-making as much as any other (see, e.g., R (Hayes) v Wychavon District Council) [2014] EWHC 1987 (Admin) at [31] per Lang J, and R (Plant) v Lambeth London Borough Council [2016] EWHC 3324 (Admin); [2017] PTSR 453 at [69]-[70] per Holgate J). Therefore, a decision by a local planning authority as to the extent to which it considers it necessary to investigate relevant matters is challengeable only on conventional public law grounds.

15. In determining a planning application, a local planning authority is exercising a public function, and is a "public authority" within the meaning of section 6 of the Human Rights Act 1998. It would therefore be unlawful for such an authority to make a decision which is incompatible with a right within the scope of the EHCR, including the article 8 right to respect for family life. Where article 8 rights are in play, they are a material consideration for the purposes of the determination of a planning application.

16. I will deal with the evidence in due course; but it is uncontroversial that there are several children resident on the Site. The interests of children likely to be affected by

a planning decision are not merely a material consideration, as the Supreme Court held in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4; [2011] 2 AC 166) ("ZH (Tanzania)"), they are a "primary" consideration. In coming to that conclusion, the Supreme Court relied upon general principles of international law, including obligations imposed on the state by international conventions (see, e.g. [21]-[23] per Baroness Hale). In this context, the most important obligations on the United Kingdom are those derived from the United National Convention on the Rights of the Child ("the UNCRC"), article 3(1) of which provides:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Thus, when a child's article 8 rights are engaged, they must be looked at in the context of the UNCRC or, as it has been put, "through the prism of article 3(1)" (HH v Deputy Prosecutor of the Italian Republic, Genoa; F-K v Polish Judicial Authority [2012] UKSC 25; [2012] 4 All ER 539 at [155] per Lord Wilson). Although not directly relevant to the issues in this case, it is perhaps noteworthy that the Rights of Children and Young Persons (Wales) Measure 2011 provides that, in Wales, when exercising any of their functions, including making or changing policies, the Welsh Ministers must have regard to the requirements of the UNCRC.

17. I considered the implications of these principles for decision-making in a planning context in R (Stevens) v Secretary of State for Communities and Local Government [2013] EWHC 792 (Admin); [2013] JPL 1383. It is common ground between the parties that the propositions set out in [69] of that judgment (approved by this court in Collins v Secretary of State for Communities and Local Government [2013] EWCA Civ 1193; [2013] PTSR 1594 at [10]-[11]) adequately summarise the law:

> "(i) Given the scope of planning decisions and the nature of the right to respect for family and private life, planning decision-making will often engage article 8. In those circumstances, relevant article 8 rights will be a material consideration which the decision-maker must take into account.
>
> (ii) Where the article 8 rights are those of children, they must be seen in the context of article 3 of the UNCRC, which requires a child's best interests to be a primary consideration.
>
> (iii) This requires the decision-maker, first, to identify what the child's best interests are. In a planning context, they are likely to be consistent with those of his parent or other carer who is involved in the planning decision-making process; and, unless circumstances indicate to the contrary, the decision-maker can assume that that carer will properly represent the child's best interests, and properly represent and evidence the potential adverse impact of any decision upon that child's best interests.
>
> (iv) Once identified, although a primary consideration, the best interests of the child are not determinative of the planning issue. Nor

> does respect for the best interests of a relevant child mean that the planning exercise necessarily involves merely assessing whether the public interest in ensuring planning controls is maintained outweighs the best interests of the child. Most planning cases will have too many competing rights and interests, and will be too factually complex, to allow such an exercise.
>
> (v) However, no other consideration must be regarded as more important or given greater weight than the best interests of any child, merely by virtue of its inherent nature apart from the context of the individual case. Further, the best interests of any child must be kept at the forefront of the decision-maker's mind as he examines all material considerations and performs the exercise of planning judgment on the basis of them; and, when considering any decision he might make (and, of course, the eventual decision he does make), he needs to assess whether the adverse impact of such a decision on the interests of the child is proportionate.
>
> (vi) Whether the decision-maker has properly performed this exercise is a question of substance, not form. However, if an inspector on an appeal sets out his reasoning with regard to any child's interests in play, even briefly, that will be helpful not only to those involved in the application but also to the court in any later challenge, in understanding how the decision-maker reached the decision that the adverse impact to the interests of the child to which the decision gives rise is proportionate. It will be particularly helpful if the reasoning shows that the inspector has brought his mind to bear upon the adverse impact of the decision he has reached on the best interests of the child, and has concluded that that impact is in all the circumstances proportionate. I deal with this further in considering article 8 in the context of court challenges to planning decisions, below."

18. I gave further consideration to proposition (iii), which is particularly relevant in this appeal, in [58]:

> "… [I]t seems to me, as the cases repeatedly confirm, that article 3 of the UNCRC self-evidently requires the identification of what the best interests of any child are. In some cases, perhaps where the interests of a child and his primary carer are not necessarily the same, that may itself be a testing question; but in most contexts there is unlikely to be any antagonism between the wishes of that carer and a child's best interests, and the question of what the best interests of the children are may not be difficult. In a planning context, in which the child lives with a parent or other primary carer who has an interest in the relevant planning proceedings, a stable home is almost always going to be in that child's best interests, together with all that that brings including educational opportunities. Where that home is put in jeopardy in a planning application (and particularly where the result may be homelessness, or camping by the roadside), the interests of a

> carer who has an interest in the application and the best interests of the child are most likely to coincide, as they do in this case. In cases in which those interests do coincide, the carer will usually be in the best position to put forward evidence as to the potential adverse impact a decision may have upon any child; and the planning decision-maker (or, in any challenge, the court) will be entitled to assume that any and all relevant evidence of the child's best interests is put before it by that carer. Although of course there may be cases in which circumstances are such that carers cannot be relied upon to ensure that a child's best interests are brought fully to the attention of the court, it will not usually be necessary for the decision-maker or court to make its own enquiries as to evidence that might support those obvious best interests. To that extent, I respectfully disagree with the comments of His Honour Judge Thornton QC sitting as Deputy High Court Judge in the context of planning enforcement proceedings in Sedgemoor District Council v Hughes [2012] EWHC 1997 (QB) at [32], that a planning decision-maker or the court will routinely be required to produce social enquiry or welfare reports on all children whose interests are or may be adversely impacted by any planning decision or even any planning enforcement decision."

19. In Collins at [16], Richards LJ (with whom Floyd LJ and Sir David Keene agreed), specifically approved the proposition that "it will not usually be necessary for the decision-maker to make his own enquiries as to evidence that might support the child's best interests" (see also Coates v Secretary of state for Communities and Local Government [2017] EWCA Civ 940 (Civ) at [34] per Sales LJ).

The Factual Background

20. The Site is in a wooded roadside setting within the belt of open countryside between Holywell and Bagillt, lying to the south of the A5026 Bagillt Road. Glyn Abbot, a Grade II listed building owned by Mr Jayes, lies to the north of the Site, set back 70m from the road in an elevated position.

21. Since March 2007, the Site has been occupied by caravans owned and occupied by Mr Hamilton, his family and members of two other families, all of whom are Romany Gypsies who live together with ties as an extended family group providing mutual security and support. An application for planning permission for ten caravan pitches on the Site was refused by the Council in 2008; and an enforcement notice served which, on appeal, was varied to allow the occupants until February 2010 to vacate the Site.

22. In December 2009, Mr Hamilton made a further application for use of the Site as a residential caravan site for six Gypsy families, each with two caravans, and ancillary works. In April 2010, the Council refused the application, and Mr Hamilton appealed. In February 2011, the appeal was allowed by an Inspector on behalf of the Welsh Ministers, and planning permission for a temporary period of five years was granted.

23. The Inspector found that, because of its physical scale and resulting visual impact, the development would significantly harm the rural character of the area, and the setting of Glyn Abbot as a Listed Building; and would thus be contrary to a number of policies in the development plan. However, there was a substantial shortfall of accommodation for Gypsies in Flintshire and the wider area, and, if permission were to be refused and the extant enforcement notice complied with, the result would be that the families who occupied the Site would have to return to an itinerant roadside existence or the occupation of other land in breach of planning control, an outcome which (the Inspector found) would interfere with their rights to respect for family life under article 8. He gave substantial weight to the benefits to the Site occupants of granting temporary permission, in terms of continuity of use of health services and attendance at the local school for some children and home tutoring arrangements for others, in respect of which he had evidence. Applying paragraph 13 of WOC 35/95 and paragraph 110 of WAGC 30/2007 (see paragraph 10 above), the Inspector found that (i) there was an unmet need for Gypsy accommodation, (ii) there was no alternative Gypsy site provision in the area, and (iii) within five years, there was a reasonable expectation that new sites would become available in the area that would meet the unmet need. In respect of (iii), he took into account that the LDP (with Gypsy and Site allocations) was due to be adopted in 2015, and then a period would be needed for allocated sites to be made available. Applying paragraph 110 of WOC 35/95, the Inspector concluded that, although the proposal was unacceptable as permanent development due to the harm to the character of the area and the impact of the setting of the Listed Building, temporary permission should be granted for five years (i.e. to 2016).

24. Unfortunately, the LDP did not progress as quickly as expected. The Council engaged with other North Wales local authorities in a collaborative Gypsy and Traveller Accommodation Assessment for the period to 2016, published in 2012 and endorsed by the Council in 2013. However, by the end of 2015, the LDP had still not been adopted. Work was underway on a new assessment of need for such accommodation for the LDP, which was by then not due to be adopted until 2019.

25. Consequently, on 2 November 2015, Mr Hamilton applied to the Council to continue the use of the Site as a residential Gypsy site. By this time, the use of the Site had intensified – a seventh pitch on the Site had been created – and the application was for use of the Site accommodating nine families on seven pitches with no more than seven static caravans in a total of thirteen caravans and ancillary development. The Design and Access Statement accompanying the application named the adults who then occupied the site, and the changes in occupants and plots there had been since 2011. The "nine families" comprised the three extended families which had occupied the Site since 2007, although the members of those families who by then occupied the Site had changed. It did not name the children, or even give the numbers of children on the Site. However, it did refer to the Inspector's view in 2011 that it would be a benefit to the children to have "continuity of existing attendance at the local school for some children and home tutoring for others", and it expressed a need for the households to continue to live together as an extended family group, "and where they can obtain adequate health care, and regular schooling for the children".

26. In the usual way, a Senior Planner with the Council's Planning & Environment Service (Ms Emma Hancock) prepared a report to assist the Council in considering

the application ("the Officer's Report"). Ms Hancock had dealt with the 2007 and 2009 applications for the Site, and had visited the Site on numerous occasions since 2007. She was therefore familiar with the Site, and with the Site occupants.

27. The Officer's Report referred to the 2011 decision; and, at paragraph 7.30, it described the main issues in the instant application in similar terms to those in which the issues before the Inspector were earlier described, as follows:

> "… the impact on the rural character and appearance of the area and the impact on the setting of the listed building and whether these site specific issues still outweigh other material considerations such as the best interests of the children on the site, the need for gypsy and traveller sites, the provision of alternative sites and the personal circumstances of the site occupants".

28. The Officer's Report recognised that the planning harm had increased since 2011, because of the intensification of use (paragraphs 7.37 and 7.46).

29. On the other side of the balance, at paragraphs 7.49-7.57, it noted that work was underway to try and establish the future level of need for Gypsy and Traveller sites in the area, and carefully went through each site in the current provision and the sites for which a planning application had been made. Having done so, the officer observed (at paragraph 7.57) that "there is no obvious alternative to direct these families to…"; and, in paragraph 8.01 (repeated in the summary at paragraph 1.02), she concluded:

> "… [T]here is still a need for sites and to refuse to grant permission on a temporary basis would make the families and their children homeless and put them on the road side with no base to access healthcare and education."

30. Of the children on the Site, paragraph 7.58 of the Officer's Report said simply:

> "No details of the applicants or the site's residents' specific personal circumstances have been put forward other than that they have a need for lawful accommodation in this area where they can continue to live together as an extended family group and where they can obtain adequate health care and regular schooling for children. There are children living on the site, however the exact numbers and ages have not been provided by the applicants."

31. In the absence of such information, after preparing the Officer's Report, but before the meeting of the Council's Planning and Development Control Committee ("the Committee") convened to consider the application, Ms Hancock visited the Site and spoke to Mr Hamilton. He told her that there were eleven children in four families living on the Site, all "Hamiltons"; and that those of primary school age attended Glan Aber Primary School. Ms Hancock also contacted the Council's Education Department to obtain any further information they had on the children, but received no substantive response prior to the Committee meeting. In respect of medical conditions suffered by occupants of the Site, she was told by Mr Hamilton that three

adult Site occupants suffered from arthritis, and a fourth from diabetes and high blood pressure. Two were being treated at Glan Clwyd Hospital, and two by doctors in Holywell. This information concerning the children and medical conditions of Site occupants was put into a Late Observations Report that was circulated to the Committee members prior to the meeting.

32. At paragraphs 7.63-7.67, the Officer's Report set out the guidance in WAGC 30/2007 and WGC 16/2014, observing that in 2011 the Inspector concluded that, although the use of the Site as a Gypsy site harmed the character of the area and the setting of the listed building, temporary permission should be granted for five years as there was no alternative for occupants of the Site and it was realistic that the LDP would have advanced sufficiently to secure alternative provision within that period. The report concluded that it would be appropriate to grant a further temporary permission for five years, effectively on the same basis, i.e. that there was no alternative provision, but five years should be sufficient time for the LDP to be adopted and for planning permission to have been granted on allocated sites. That was considered to be a decision in accordance with the Council's article 8 obligations (paragraph 8.02).

33. The application first came before the Committee on 20 January 2016, when it was deferred for advice to be taken on whether a condition could be imposed by which the planning permission would terminate if an alternative site became available for the Site occupants. It returned to the Committee on 24 February 2016, when the Committee resolved to grant temporary planning permission as recommended in the Officer's Report, but with an amended condition that permission should cease six months after the identification of a suitable alternative site. Permission was formally granted on 7 April 2016.

34. Mr Jayes sought judicial review of the decision to grant planning permission, on several grounds, including that there was insufficient evidence as to the circumstances of the children occupying the Site to justify considering any of their needs as material. As a sub-ground, it was submitted that the Council erred in this context by considering the Site as a whole, rather than each plot on the Site separately.

35. At a hearing on 19 August 2016, Holgate J gave permission to proceed with the claim; and asked for clarification of certain matters, which resulted in Ms Hancock preparing and filing a witness statement dated 19 October 2016. That set out further details of the available alternative sites – concluding there was none – and of a response she had by then received from the Council's Education Department, which had identified five children at Glan Aber Primary School who gave Dollar Park as their address. Three were surnamed "Jones", and one (due to start at the school in October 2016) surnamed "McDonagh". Four gave plot numbers other than the plot numbers recorded by Ms Hancock in the Late Observations Report as children's homes. In her statement, she explained that the list did not include home educated children or children otherwise not attending schools; and that, in addition to pre-school age children, Gypsy children do not generally attend school after the age of eleven. She stated (at paragraph 8 of her statement) that the latest information would not have altered her advice to the Committee, "given that it is clear on either basis that there are children living at the site of which several attend the local school".

The Deputy Judge's Judgment

36. The Deputy Judge was highly critical of the Officer's Report, upon which her recommendation for grant of temporary planning permission – and, in its turn, the Committee's resolution to grant such permission – was based. He found as follows.

    i) The investigation into the occupants of the Site was "rather casual, to put it mildly", in that enquiries into the children's circumstances were made only a few days before the first meeting of the Committee (paragraph 31 of the judgment).

    ii) The answers gleaned from the investigation appear to have been "almost wholly wrong", because the Late Observations Report only referred to children with the surname Hamilton, whereas, although they had a record of one child named Hamilton under four years of age, the Education Department had no record of any Hamilton children attending school; and the plot numbers given in the Late Observations Report were different from those recorded in the school records for pupils giving Dollar Park as their address (paragraph 31).

    iii) Consideration of the application proceeded on the premise that there were children on the Site, but their number, identity and age were unknown. The Deputy Judge continued (paragraph 34):

> "The statement that the Children Act 2004 requires the Council to safeguard and promote the welfare of the children is of course correct, as is the fact that 'the impact of [any children] not having a settled base' would need to be taken into consideration if the application were to be refused outright. But in context, those assertions are seriously misleading. First, they imply that there has been an assessment of the needs of actual children on the site, so that the loss of a 'settled base' could be identified as contrary to their best interests. Secondly, they imply that the statutory and any other duties stand alone and are not merely factors (albeit important factors) to take into account. Thirdly, they imply that refusal in the present case would not be an option."

    iv) That, he considered, was confirmed by the Officer's Report, which demonstrated that Ms Hancock had adopted the flawed approach of treating "the existence of children attending a local school [as] sufficient to motivate and justify the advice [to grant permission] without any further investigation" (paragraph 35). He continued (paragraph 36):

> "… [T]he problem is that the view that the existence of children, rather than an analysis of their interests, justifies the grant of planning permission in the situation under examination pervades the report itself and the advice in it."

37. The Deputy Judge concluded (paragraph 37):

> "For these reasons I have reached the view that the first ground of challenge is made out… on the general basis that [the Council] ought to have ascertained and evaluated the relevant facts in relation to children. In these circumstances it is impossible to say what the decision would have been if the error of law had not occurred, because the facts remain unclear and the evaluation has not been made. [Mr Jayes] succeeds on the first ground."

38. On that basis he quashed the grant of planning permission.

The Parties' Contentions

39. In seeking to support the Deputy Judge's decision, Mr Langham accepted that the Council through its officer had no legal obligation to make any enquiries into the circumstances of the children who were on the Site. The officer could simply rely upon Mr Hamilton to give relevant information as part of the application. However, he submitted that, given the identified planning harm and the lacunae in the evidence relating to the children, it was Wednesbury unreasonable (and thus unlawful) for the officer to recommend grant of planning permission – and for the Committee, in its turn, to resolve to grant such permission – on the basis that the best interests of the children, together with the other factors in favour of the grant of planning permission, outweighed countervailing considerations. Looking at his judgment as a whole, that was the true analysis and conclusion of the Deputy Judge; and, Mr Langham submitted, in neither aspect did he err in law.

40. Mr Hunter submitted that the Deputy Judge's conclusion was legally untenable. As Mr Langham accepted, sufficiency of information was essentially a matter for the decision-maker; and, here, the officer did not assume that refusal would be contrary to the children's best interests merely because there were there were children living on the Site. The information provided to the Committee was that there were eleven children living on the Site, some of whom attended the local school. Neither the officer nor the Committee had any reason to doubt that information. The Officer's Report found that, if planning permission were not granted, the resident families would be homeless, in the sense that they would be driven to stay at the roadside with no base to access healthcare and education facilities. That finding was unimpeachable. It could not be said that the officer and Committee erred in considering that that was sufficient information upon which to conclude that the best interests of the children, together with the other factors in favour of the grant of planning permission, outweighed countervailing considerations. That was a conclusion to which they were legally entitled to come.

41. Of the particular criticisms of the Officer's Report made by the Deputy Judge, summarised in paragraph 36 above, Mr Hunter made the following submissions.

    i) It was unfair to describe Ms Hancock's investigations into the children as "casual". Because of her previous dealings with the Site, including several previous visits, she already had some knowledge of the occupants. She made enquiries of the Education Department; and, when no substantive response was forthcoming, she visited the Site and spoke to Mr Hamilton. She had no reason to disbelieve the information that he had given her. In any event, she

made clear that the additional information later obtained from the Education Department would not have altered her conclusions or advice to the Committee.

ii) The Council did not accept that the evidence as to children obtained from Mr Hamilton and passed on to the Committee was "wholly wrong" – differences from time-to-time in names or plots at which they reside do not necessarily mean a difference in identity of the relevant children, or the position may have changed in the interim – but, in any event, as the Deputy Judge himself accepted (at paragraph 32 of his judgment), that would not in itself render the decision unlawful, because (a) there was no reason for the officer or the Committee to disbelieve the information given, and (b) whether or not the information was accurate, it is clear that there are children resident at the Site who are registered as pupils at the local school.

iii) The Deputy Judge's criticisms set out in paragraph 34 of his judgment are also not well-founded. The reference to the Children Act 2004 in the Officer's Report did not imply that a formal assessment of the children's needs had been carried out: a formal assessment had not been carried out, and, for the reasons given in Stevens, there was no need for such an assessment. Nothing in the Officer's Report suggested or implied that the Children Act duty – or any other relevant duty – "stood alone". Neither did the report possibly imply that refusal of planning permission was not a possibility, as is clear from her warning (at paragraph 7.62) that, if refusal was contemplated, then the impact of the children losing their settled base would have to be taken into account as a primary consideration.

iv) It is not a fair reading of the Officer's Report to say that it demonstrated that Ms Hancock had adopted the flawed approach of treating "the existence of children attending a local school [as] sufficient to motivate and justify the advice [to grant permission] without any further investigation". The officer did not assume that the mere existence of children on the Site meant that refusal of planning permission would be contrary to the children's best interests, and justified refusal: she assessed that it would be in the children's best interests to remain on the Site rather than be forced into roadside living; and that the interests of the children, taken with other factors that favoured grant of permission, outweighed the identified planning harm such that temporary planning permission should be granted.

Discussion and Conclusion

42. Despite the able submissions of Mr Langham, essentially for the reasons put forward by Mr Hunter, it is my firm view that the Deputy Judge unfortunately erred in his conclusion that, given the evidence with regard to the children such as it was, it was Wednesbury unreasonable for the officer to recommend grant of planning permission – and for the Committee, in its turn, to resolve to grant such permission – on the basis that the best interests of the children, together with the other factors in favour of the grant of planning permission, outweighed countervailing considerations.

43. In coming to that conclusion, I have taken into account, in particular, the following.

44. It is trite law, acknowledged by the Deputy Judge at [27] of his judgment, that, when challenged, an officer's report is to be read as a whole, fairly and in a common sense manner, and not subjected to the same exegesis as might be appropriate to a statute. The report merely has to be sufficient to allow the planning decision-maker (i.e. in this case, the Committee) properly to understand the relevant issues and exercise its statutory function by determining those issues.

45. It is also well-established that, in the absence of contrary evidence, where a planning committee adopts the recommendation in an officer's report, it is a reasonable inference that members of the committee follow the reasoning in the report. There was no contrary evidence in this case.

46. It is similarly trite law that matters involving planning judgment are for the relevant planning decision-maker; and that the court will only interfere with such an assessment on traditional public law grounds including that the decision-maker's conclusion is Wednesbury unreasonable in the sense that it is a conclusion to which no reasonable decision-maker could have come. As I have indicated (see paragraph 14 above), the decision as to whether the available information is sufficient to enable an authority to determine that planning permission should be granted is, in itself, a decision involving planning judgment with which the court will only interfere on public law grounds.

47. In this case, the officer concluded that, because of the lack of alternatives, if planning permission were not granted, then the Site residents would be required to live roadside. As Mr Langham accepts, that conclusion is unassailable.

48. Before the Committee, the evidence was that the Site residents included eleven children. There was no evidence as to the ages of those children, nor how many were of primary school age; but there was evidence that all of the primary age children attended the local primary school.

49. Mr Hunter submitted that it is difficult, if not impossible, to conceive of a plausible scenario in which losing a settled base and being forced to live a roadside existence could be considered as being anything other than seriously detrimental to a child's interests, regardless of their precise particular circumstances. As I said in Stevens (at [58], quoted in full at paragraph 18 above): "… [A] stable home is almost always going to be in [a] child's best interests, together with all that that brings including educational opportunities…". Certainly, in my view it was obvious that it was in the best interests of the children in this case to remain on the Site, rather than live by the roadside. Mr Langham does not suggest otherwise.

50. The issue then becomes one of proportionality: is the interference with the article 8 rights of the various individuals who occupy the Site, including the rights of the children looked at through article 3 of the UNCRC, proportionate to the countervailing interests, particularly the public interest in avoiding the identified planning harm?

51. In considering the balance inherent in this issue, I fully accept that the evidence available to the Committee as to the circumstances of the children was limited: it did not have the ages of the children, nor details of which children attended school.

However, they were aware that there were eleven children; that *some* were of primary school age; and that those who were of that age attended the local primary school.

52. In addition to the evidence relating to the children, the Committee also had evidence that (i) for the families resident on the Site, there were no alternatives for accommodation, so that, if planning permission were not granted, all of the families, including all eleven children, would have to live roadside; (ii) if they were required to live by the roadside, the children who went to school would lose the base from which to access such a facility; and (iii) four adults were having medical treatment at local doctors or the local hospital, and that, if they lived roadside, they would not have a base from which to access medical facilities.

53. The officer considered that the identified planning harm that would be consequent upon permanent planning permission outweighed the harm that would result from the interference with the article 8 rights of the families including the children (paragraph 1.02 of the Officer's Report). However, that was not the end of the matter; because she was required by paragraph 110 of WOC 35/95 and paragraph 13 of WAGC 30/2007 to consider whether temporary planning permission would be proportionate. The preconditions were satisfied, the officer having been satisfied that (i) there was an unmet need, (ii) there was no available alternative Gypsy and Traveller site provision in the area, and (iii) there was a reasonable expectation that new sites were likely to become available in the area at the end of a five year period, because the LDP (with Gypsy and Traveller site allocations) was due to be adopted in 2019. There was therefore an expectation that the planning circumstances would change in a particular and identified way within a five year period.

54. I recognise Mr Jayes' understandable concern that successive temporary planning permissions may in effect amount to permanent permission, or may form the basis for an application for permanent permission. The Officer's Report makes clear that Gypsy caravans have been on the Site since 2007, and that there has been the identified planning harm as a result since then. However, as I have described, the second temporary planning permission was granted on the basis that an alternative site would become available within its term of five years; and, indeed, that the permission would cease if a suitable alternative site becomes available before then. In respect of the suggestion that the grant will be of some precedential value, (i) paragraph 14 of WAGC 30/2007 (quoted at paragraph 10 above) expressly states that temporary planning permission granted in the circumstances of this case will not have any value as a precedent, (ii) in paragraph 44 of the Inspector's decision letter on the 2011 application, he makes clear that his decision should not be regarded as setting a precedent in any way for the determination of any future applications for full permission to use of the Site as a caravan site, and (iii) the minutes of the 20 January 2016 meeting of the Committee record the Council's Housing and Planning Solicitor advising that "there was no legal basis for a further five years to set a precedent for a permanent permission". Although I accept that in the context of future planning decisions it may be a material consideration, the grant has no precedential value as such.

55. In my view, on all of the available evidence, the officer was clearly entitled to conclude that the best interests of the children, together with the other factors in favour of the grant of temporary planning permission, outweighed countervailing considerations including the planning harm she had identified.

56. I accept that it was open to the officer to make further enquiries about the children – which, indeed, she sought to do by contacting the Council's Education Department – and that other officers may possibly have made more persistent enquiries than she. However, she had some information about the children, including that referred to in paragraph 51 above.

57. Mr Langham submits that the officer conducted no exercise of evaluating the weight of the interests of these particular children, as opposed to the weight generally given to children's interests (see Stevens at [63]). Those interests, it is said, were never identified. But the officer clearly engaged, to some extent, in an assessment of the harm to the interests of the actual children on the Site, the only issue being whether the assessment she conducted was legally adequate.

58. Contrary to Mr Langham's submission (as apparently found by the Deputy Judge), the officer did not consider only the existence of children on the Site, without making any analysis of their interests in the light of this information. In my view, without having more precise information concerning the children, it was clearly open to Ms Hancock to consider that, even given the identified planning harm, a refusal of temporary planning permission would be a disproportionate interference with the article 8 rights of the resident families including the children; or, in planning terms, the adverse impact of a refusal of permission, namely to force the eleven children to live on the roadside, with the consequent disruption of the schooling of at least some of them, when taken with the other considerations in favour of grant, was sufficient to outweigh the planning harm she had identified.

59. There was no evidence that further enquiries would or might disclose some external benefactor who would ensure that the children would not have to live roadside – indeed, as I have indicated, the conclusion of the officer that, if planning permission were not granted, then the families including the children would have to live roadside cannot be assailed – or any matter that would diminish the weight of the children's interests. The fact that further enquiries might have resulted in further information that *added* weight to that interest is not to the point. The officer cannot reasonably have been required to make investigations that could only have further endorsed the planning decision which she already considered was appropriate.

60. In the circumstances, it was not necessary as a matter of law or in practice for the officer or Committee to carry out further enquiries, before recommending the grant of temporary planning permission and granting such permission respectively, on the basis that the identified planning harm was outweighed.

61. The information that became available only after the Council's decision to grant permission does not assist Mr Langham's cause. Mr Hunter submitted with some force that it is far from clear that there are any inconsistencies between the information relied upon by the officer and the Committee on the on hand, and the information in Ms Hancock's statement on the other. But, insofar as there is, (i) that cannot render the officer's recommendation and decision of the Committee unlawful, as it was clearly reasonable for them to rely on the information before them as being accurate; and (ii) Ms Hancock says (and there is no reason not to accept) that the additional information would not have changed her advice and recommendation. Nor does the information that has been ascertained later still – that the three children called "Jones" live with their mother (a Hamilton) who married a man called "Jones",

and that the child McDonagh moved onto the Site after the decision had been made – assist the Respondent Mr Jayes.

Conclusion

62. For those reasons, in my judgment, the Deputy Judge did – unfortunately, but in my view clearly – err in law by concluding that it was Wednesbury unreasonable (and thus unlawful) for the officer to recommend grant of planning permission – and for the Committee, in its turn, to resolve to grant such permission – on the basis that the best interests of the children, together with the other factors in favour of the grant of planning permission, outweighed countervailing considerations. I consider that the officer and Committee acted entirely lawfully.

63. Subject to my Lord Lindblom LJ, I would consequently allow this appeal, quash the order of the Deputy Judge and, in its place, order that the judicial review be dismissed. That will leave in place the grant of temporary planning permission dated 7 April 2016.

Lord Justice Lindblom:

64. I agree that the appeal must be allowed, for the reasons given by Hickinbottom LJ. I would emphasize that his reasoning here is entirely congruent with the principles stated by him in his first instance judgment in Stevens (at [69]), which were endorsed by this court in Collins. Those principles recognize the need for the planning decision-maker, when taking into account the best interests of the child as a primary consideration, to adopt an approach that is realistic in the particular circumstances of the case in hand. That will not be the same in every case. In the particular circumstances of this case, as Hickinbottom LJ has concluded, the approach adopted by the Council was realistic, and lawful.