Case No: CO/3043/2014

Neutral Citation Number: [2014] EWHC 4041 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 5 December 2014

Before:

THE HONOURABLE MRS JUSTICE LANG DBE

- -

Between:

WIND PROSPECT DEVELOPMENTS LIMITED

Claimant

- and -

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

(2) EAST RIDING OF YORKSHIRE COUNCIL **Defendants**

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Gordon Nardell QC & Rose Grogan (instructed by **Eversheds LLP**) for the **Claimant**
Stephen Whale (instructed by **The Treasury Solicitor**) for the **First Defendant**
The **Second Defendant** did not appear and was not represented

Hearing date: 25th November 2014

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Judgment

Mrs Justice Lang:

Introduction

1. The Claimant applies under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") to quash a decision of the First Defendant ("the Secretary of State"), dated 21st May 2014, to dismiss an appeal by the Claimant against refusal by the Second Defendant ("the Council") of planning permission for a wind farm at Thornholme Field, between Driffield and Bridlington, East Yorkshire ("the site").

2. The Council refused planning permission for the erection of 6 wind turbines at the site on 19th December 2012, for the following reasons:

   i) The turbines would cause unacceptable interference to the radar at a nearby RAF station.

   ii) The proposal did not accord with the Development Plan or the NPPF.

   iii) The site is located in the Yorkshire Wolds, designated as an Area of Landscape Protection in the Local Plan. The East Riding of Yorkshire Landscape Character Assessment (Landscape Character Type 13D) assessed the landscape as high quality with a high sensitivity to wind farm development.

   iv) The height, number and location of the turbines would introduce uncharacteristic vertical structures into a relatively unspoilt part of the Wolds. They would be visually dominant, detrimental to the landscape quality, visual amenity and rural character of the area.

   v) Visual perception on the part of walkers, motorists and visitors to Burton Agnes Hall would be affected.

   vi) The impact on the setting of the nationally significant heritage assets at nearby Burton Agnes Hall (Grade 1 listed) would be harmful, introducing turbines within important views.

   vii) Benefits relating to the provision of renewable energy would not outweigh these adverse landscape and visual effects.

3. The Claimant appealed, and on 12th March 2013, the Secretary of State decided to determine the appeal himself, pursuant to section 79 and paragraph 3 of Schedule 6 to the TCPA 1990.

4. An Inspector (Mr P. Griffiths) was appointed to prepare a report and recommendation for the Secretary of State. He held an inquiry, at which he heard evidence for and against the proposal, and he conducted a series of site visits. By the time of the inquiry the Ministry of Defence had withdrawn its radar objection, accepting that its concerns could be met by conditions, so the Council did not seek to maintain that reason for refusal.

5. The Inspector reported on 21st November 2013, recommending that the appeal should be allowed and planning permission granted, subject to conditions. He concluded:

> "10.108 The proposal would cause a limited degree of harm to the landscape and to the setting and thereby less than substantial harm to the significance of designated heritage assets. On that basis, the proposal fails to accord with JSP Policies SP4, SP5 and ENV6 and LP Policies EN2, EN3 and EN20, and their successors in the DSD. Against that, the proposals would bring significant benefits through the generation of renewable energy, general economic activity, and in terms of the improved viability of the farms concerned. Given that those benefits could be secured without undue harm to the landscape, living conditions, ecology or archaeology, the proposal complies with LP Policy EN25, said by the main parties to be overarching. However, it is the approach of paragraph 14 of the Framework … that is the most important consideration. "
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> "10.110 ... paragraph 14 … sets out that where the relevant policies of the development plan are out of date, permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework, taken as a whole…. in my judgment, the harm that would be caused by the proposal would not come close to that and the benefits the proposal would bring would far outweigh the harmful impacts. Paragraph 98 of the Framework says that a proposal such as this should be approved if its impacts are, or can be made, acceptable. That is very clearly the case here."

6. The Secretary of State did not agree with the Inspector's conclusions and did not follow his recommendations. In his decision letter dated 21st May 2014, he dismissed the appeal, concluding that the harmful aspects of the proposals significantly and demonstrably outweighed the benefits. Factors such as visual impact, impact on residential amenity, harm to tourism, coupled with the failure of the scheme to preserve the setting of Burton Agnes Hall and other heritage assets, together outweighed the need for the proposal and its wider economic benefits.

Statutory framework

7. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with and in consequence, the interests of the applicant have been substantially prejudiced.

8. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety. The exercise of planning judgment and the weighing of the various issues are entirely matters for that decision-maker and not for the Court. See *Seddon Properties v Secretary of State for the Environment* (1978) 42 P &CR 26.

9. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise: section 38(6) of the Planning and Compulsory Purchase Act 2004, read together with section 70(2) TCPA 1990. The National Policy Planning Framework ("NPPF") is a material consideration for these purposes.

10. The duty under the equivalent Scottish provision was explained by Lord Clyde in *Edinburgh City Council v. Secretary of State for Scotland* [1997] 1 W.L.R. 1447, at p.1459:

> "In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will be required to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

11. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] P.T.S.R. 983. Lord Reed (with whose judgment Lord Brown, Lord Hope, Lord Kerr and Lord Dyson agreed) rejected the proposition that each planning authority was entitled to determine the meaning of development plans from time to time as it pleased, within the limits of rationality. He said, at [18], that development plans should be "interpreted objectively in accordance with the language used, read in its proper context". They are intended to guide the decisions of planning authorities, who should only depart from them for good reason.

12. Lord Reed re-affirmed well-established principles on the requirement for the planning authority to make an exercise of judgment, particularly where planning policies are in conflict, saying at [19]:

> "That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 659, 780 per Lord Hoffmann)."

Grounds

13. The Claimant submitted that the Secretary of State's decision ought to be quashed on the ground that the Secretary of State failed to give proper, adequate and intelligible reasons for his conclusions.

14. The Claimant also submitted that the reasons or lack of them demonstrated the following errors of law:

    i) the Secretary of State's conclusion on the visual impact of the turbines on local residents was irrational; applied the wrong tests; and misapplied the National Planning Policy Framework;

    ii) the Secretary of State misunderstood the judgment of the Court of Appeal in *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2014] 1 P&CR 22 on section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990;

    iii) the Secretary of State applied an unintelligible test in relation to tourism and purported to make a factual finding without evidence to support it;

    iv) in conducting the balancing exercise and reaching his overall conclusion, the Secretary of State failed to identify any respect in which the Inspector had overstated the renewable energy benefits of the scheme and he failed to correctly apply, and weigh in the balance his own policies in favour of renewable energy.

Conclusions

The role of the Secretary of State in a 'recovered appeal'

15. Mr Nardell placed great emphasis on the high quality of the Inspector's report, referring to his sound reasoning, his planning expertise, and his understanding of the evidence, as well as the advantage which he gained from hearing the witnesses and conducting site visits. Mr Nardell submitted that the Secretary of State should have accorded more respect to the Inspector's expertise and he should have been more cautious about disagreeing with his conclusions.

16. The Claimant's approach thus raised a general issue about the degree of deference which the Secretary of State ought to accord to an Inspector's decision, which I now address.

17. By section 79 TCPA 1990, Parliament has conferred responsibility for determining appeals made under section 78 on the Secretary of State. The Secretary of State has made the Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) Regulations 1997 under which the majority of section 78 appeals are determined by Inspectors, on behalf of the Secretary of State. However, the Secretary of State has power to "recover" an appeal and determine it himself, under paragraph 3(1) of Schedule 6 to the TCPA 1990. His decision to do so in this case has not been challenged.

18. When the Secretary of State decides to determine an appeal himself, he has power to make his own decision and not to follow the conclusions and recommendations of his appointed Inspector.

19. Rule 17(5) of the Town and Country Planning (Inquiries Procedure)(England) Rules 2000 ("the 2000 Rules") provides:

> "(5) If, after the close of an inquiry, the Secretary of State–
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> (a) differs from the Inspector on any matter of fact mentioned in, or appearing to him to be material to, a conclusion reached by the Inspector; or
>
> (b) takes into consideration any new evidence or new matter of fact (not being a matter of government policy),
>
> and is for that reason disposed to disagree with a recommendation made by the Inspector, he shall not come to a decision which is at variance with that recommendation without first notifying …. the persons entitled to appear at the inquiry who appeared at it of his disagreement and the reasons for it; and affording them an opportunity of making written representations to him or (if the Secretary of State has taken into consideration any new evidence or new matter of fact, not being a matter of government policy) of asking for the re-opening of the inquiry."

20. This provision and its predecessor have led to challenges to ministerial decisions on the ground that the Minister has differed from the Inspector's findings on "matters of fact" under 17(5)(a) and therefore should have afforded the parties the opportunity to make representations. In *Lord Luke of Pavenham v Minister of Housing and Local Government* [1968] 1 QB 172, the Court of Appeal distinguished between "findings of fact" and "expressions of opinion on the planning merits" (per Lord Denning at 191F-G). The Minister was entitled to differ from the Inspector's opinion without notifying the parties under the predecessor provision to Rule 17(5) (per Lord Denning at 192D). Davies LJ explained, at 193E, that the Inspector's conclusions were not "findings of fact"; they were the reasons for his recommendations. If the Minister was of the opinion that the Inspector had wrongly applied planning policy to the proven and observed facts, then it was his function so to decide (per Davies LJ at 191F-G).

21. In *Coleen Properties Ltd v Minister of Housing and Local Government* [1971] 1 All ER 1049, the Court of Appeal held that the Minister erred in not following his Inspector's conclusion that a compulsory purchase order was not "reasonably necessary" under section 43(2) Housing Act 1957, when there was no material on which he could properly reach a different conclusion. Lord Denning MR said, at 1053b/c:

> "I know that on matters of planning policy the Minister can overrule the Inspector, and need not send it back to him, as happened in *Lord Luke of Pavenham v Minister of Housing and Local Government*. But the question of what is 'reasonably necessary' is not planning policy. It is an inference of fact on which the Minister should not overrule the Inspector's recommendation unless there is material sufficient for the purpose. There was none here."

22. Mr Nardell particularly relied upon a passage in the judgment of Sachs LJ, at 1054h, in which he said that whereas the Inspector "may well be looked on as an expert for the purpose of forming an opinion of fact, the Minister is in a different position….no Minister can personally be an expert on all matters of professional opinion with which his officers deal with from day to day."

23. In my judgment, in a case where the Secretary of State has decided to determine the appeal himself, it is important to bear in mind that the Secretary of State is the primary decision-maker. He is not reviewing or conducting an appeal against an Inspector's decision.

24. The Inspector's report is the starting-point for the Secretary of State's deliberations. In his report, the Inspector sets out the evidence; makes findings of fact; identifies the relevant planning policies and applies them to the facts as found. In carrying out this exercise, the Inspector gives effect to the requirements of fairness by considering and recording the competing submissions of the parties. Thus, the report contains the essential information which the Secretary of State requires in order to make a decision. However, the Secretary of State will also have sight of the written evidence, pictures and plans submitted by witnesses and parties to the Inspector, on which he can form his own opinions.

25. Once the Secretary of State has considered all the relevant information, as he is bound to do, it is his statutory function to make a planning judgment, which by its very nature is both objective and subjective. Whilst he should give due consideration to the Inspector's planning judgment, because of the Inspector's knowledge of the particular case and his planning expertise, he is not required to follow it. Unlike a Judge hearing an application to quash a planning decision, he is entitled to substitute his planning judgment for that of the Inspector.

26. I do not accept the submission that, on the evidence in this case, the Secretary of State ought to have deferred to the Inspector's judgment because the Inspector had the benefit of a site view. The fallacy in this submission was convincingly exposed by Sullivan J. in *R (Novalong Ltd) v Secretary of State for the Communities and Local Government* [2008] EWHC 2136 (Admin), at [25] – [28]:

> "[25] Mr Katkowski referred to the decision in *R (on the application of) Newsmith Stainless v Secretary of State for the Environment Transport and the Regions* [2001] EWHC 74 (Admin) in which I referred in para 8 of my judgment to the importance, often the crucial importance in a planning context, of the site [inspection] [a]nd said in para 11 that:
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> > "maps and paragraphs may be helpful but they are no substitute for a site [inspection. As] those who intend planning inquiries know [only too well, photomontages are often very far from being uncontroversial] when produced in evidence and [photographs] not infrequently contradict the proposition that the camera cannot lie [particularly] when questions of landscape impact are in dispute."
>
> Mr Katkowski submitted that since the Inspector who had had the benefit of a site visit had concluded that the proposed development would be unlikely to have a harmful impact (see para 186 of the report), the First Defendant was not entitled to reach a different conclusion unless one of her officials had visited the site to ascertain whether a different conclusion could be justified. He accepted that the First Defendant, herself, was not required to visit the site.
>
> [26] I have no hesitation in rejecting this submission as being wholly misconceived. It is one thing to say that an Applicant in s 288 proceedings will have an uphill task in persuading a judge that an Inspector who has seen the site has reached a Wednesbury perverse conclusion on a matter of planning judgment. It is quite another to submit that the Secretary of State is not entitled to disagree with an Inspector's judgment on the planning merits because she will have been considering plans and photographs, or in some cases photomontages and not personally have visited the site.

> [27] The two situations are not at all comparable. The court hearing an application under s 288 is exercising a *legal* judgment. Was the Inspector's conclusion so unreasonable as to be unlawful? Whereas, the Secretary of State on appeal under s 78 is exercising a *planning* judgment. Does she agree or disagree with the views expressed by the Inspector? Subject to giving adequate reasons, she is entitled to disagree with the Inspector on matters of planning judgment, even though she will not have seen the site herself. It is in the nature of recovered appeals that the decision-taker will not have seen the site and will be relying upon the Inspector's report and the documents, maps photographs etc accompanying the report. In the present case those included not merely the environmental impact assessment, there was also a landscape appraisal and a number of drawings, including a height contour plan and an illustrative masterplan.
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> [28] Unlike the position in *Newsmith Stainless* where the Claimant was attempting to introduce new material: photomontages etc, that had not been before the Inspector at the inquiry (see para 9 of the judgment), in the present case the First Defendant was basing her conclusions upon the material that had been provided by the Inspector. All of the detailed concerns expressed in para 32 of the decision letter related to matters which would have been readily apparent from the plans accompanying the Inspector's report, one of which was included in the court bundle. Based on those detailed concerns the First Defendant was entitled to conclude in para 33 of the decision letter that the proposed flats would not reflect the distinct character of the area (which had been described in some detail in the Inspector's report) and would detract rather than add to the experience of those living within it. In reaching those conclusions the First Defendant was doing no more than agreeing with one of the Second Defendant's reasons for contesting the appeal (see para 9 of the Inspector's report)."

27. In this case, the Secretary of State had the benefit of maps, illustrations and predicted views of the proposed turbines at the site. The pictures of the landscape with the turbines superimposed are admirably clear. Since the turbines are not yet built, the Secretary of State was in much the same position as the Inspector in assessing how they would appear on the landscape.

The standard of reasons required

28. The Secretary of State was under a statutory duty to give reasons for the decision pursuant to Rule 18(1) of the 2000 Rules. It was common ground that the reasons should explain why he was either agreeing or disagreeing with the Inspector's conclusions, but there was a dispute over the degree of particularity required.

29. The Claimant submitted that, because the Inspector was an expert in his field, where the Secretary of State disagreed with his conclusions, he must provide a "coherent reasoned rebuttal" of the Inspector's reasoning. That phrase came from the judgment of Bingham LJ in *Eckersley v Binnie* (1988) 18 Con L.R. 1, at 77-78:

> "In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate attempt to mislead ...., a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reasons."

30. Bingham LJ's judgment was cited with approval in *Flannery v. Halifax Estate Agencies Ltd* [2000] 1 All ER 373, CA, at 377g. Henry LJ set out the general duty of a "professional judge" to give reasons (at 377d), stating (at 378d):

> "where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other."

31. Both Bingham and Henry LJJ were giving guidance on the duty of professional judges hearing expert evidence in the course of civil litigation. *Eckersley* was a High Court negligence claim involving engineering evidence. *Flannery* was a County Court negligence claim involving expert property valuation evidence.

32. It is well-established that a higher standard of written reasons is expected of professional judges than of other decision-makers, including Inspectors and Ministers, who are not lawyers.

33. There is already extensive guidance from the courts on the standard of reasoning required of planning inspectors and Ministers making planning decisions.

34. In *South Bucks District Council and another v Porter (No 2)* [2004] 1 WL.R. 1953, Lord Brown summarised the content of the duty on inspectors at [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."

35. In *Save Britain's Heritage v No. 1 Poultry Ltd* [1991] 1 WLR 153, Lord Bridge considered the nature of the statutory duty on the Minister to give reasons under what was then Rule 17(1) of the 1988 Rules. He said, at 166H:

> "The three criteria suggested in the dictum of Megaw J. in *In re Poyser & Mills Arbitration* [1964] 2 QB 467, 478 are that reasons should be proper, intelligible and adequate. The application of the first of these presents no problem. If the reasons given are improper they will reveal some flaw in the decision-making process which will be open to challenge on some ground other than the failure to give reasons. If the reasons are unintelligible, this will be equivalent to giving no reasons. The difficulty arises in determining whether the reasons given are adequate, whether in the words of Megaw J., they deal with the substantial points that have been raised or in the words of Philips J. in *Hope v Secretary of State for the Environment* 31 P. & C.R. 120, 123 enable the reader to know what conclusion the decision-maker has reached on the principal controversial issues. What degree of particularity is required? It is tempting to think that the Court of Appeal or your Lordships' House would be giving helpful guidance by offering a general answer to this question and thereby "setting the standard" but I feel no doubt that the temptation should be resisted, precisely because the court has no authority to put a gloss on the words of the statute only to construe them. I do not think one can safely say more in general terms than that the degree of particularity required will depend entirely on the nature of the issues falling for decision."

36. Although Mr Nardell referred me to a number of cases in which the courts had considered the adequacy of reasons given by Inspectors where expert evidence was in issue, the courts did not apply the *Flannery/Eckersley* standard in those cases. The *South Bucks* formulation was applied, adapted as appropriate to the evidence of the experts in the particular case. Those cases were *Tegni Cymru Cyf v. Welsh Ministers* [2010] EWCA Civ 1635, [2011] J.P.L. 1342; *Georgiou v. SSCLG* [2011] EWCA Civ 775, and *RWE NPower Renewables Ltd v. the Welsh Ministers* [2012] EWCA Civ 311, [2012] Env LR 29. *Flannery* was referred to in the *Welsh Ministers* case, but

only the passage from Henry LJ's judgment (at 377 – 378) where he explained the rationale behind the duty to give reasons, not the passage relied on by Mr Nardell.

37. Similarly, in *Dunster Properties v. FSS* [2007] EWCA Civ 236, where the Court of Appeal held that an Inspector ought to give reasons for departing from the decision of a previous Inspector, the *South Bucks* formulation was applied. The judgment of Henry LJ in *Flannery* was referred to in *Dunster* to explain the value of the duty to give reasons, not to indicate that the Inspector was a planning expert whose opinions, if dissented from, required a "coherent reasoned rebuttal".

38. In this case, the Secretary of State did not dispute that his decision letter ought to be both 'coherent' and 'reasoned'. But it was apparent from Mr Nardell's critique of the Secretary of State's decision letter that, in his view, "a coherent reasoned rebuttal" entailed a detailed response to each step of the Inspector's reasoning, analysed paragraph by paragraph. This would go considerably beyond the "conclusions" on the "principal important controversial issues" (the standard set by Lord Brown in *South Bucks*). Lord Brown also said that "reasons can be briefly stated". The text of the Inspector's report was 53 pages in length. His conclusions ran from pages 29 to 53. In order to meet Mr Nardell's expectations, the Secretary of State's reasons would have to go far beyond the degree of particularity adopted in this decision letter (which was typical of its kind). The Secretary of State's decision letter was 8 pages in length. I estimate that it would have to double in length to address the issues in the manner Mr Nardell regarded as necessary. In my judgment, Mr Nardell was inviting me to apply a heightened standard of reasons in those cases where the Secretary of State disagreed with an Inspector.

39. I have concluded that I should follow Lord Bridge in *Save Britain's Heritage* in declining to put a gloss on the words of rule 17, by imposing a standard which the Secretary of State must apply when disagreeing with the conclusions of an Inspector. As Lord Bridge said, "the degree of particularity required will depend entirely on the nature of the issues falling for decision". Lord Bridge's phrase was repeated in Lord Brown's formulation in *South Bucks*. In my judgment, where the Secretary of State disagrees with an Inspector, the standard of reasons should be in accordance with the speeches of Lord Bridge in *Save Britain's Heritage* and Lord Brown in *South Bucks*, applied as appropriate to the particular case.

Improper reasons

40. In *Save Britain's Heritage*, Lord Bridge said (at 166H) that, where reasons are improper, "they will reveal some flaw in the decision-making process which will be open to challenge on some ground other than the failure to give reasons". In my view, it is more appropriate for these grounds to be pleaded separately, rather than subsumed within a reasons challenge.

41. I turn now to consider the specific criticisms of the Secretary of State's decision letter.

Landscape impact

42. The Claimant submitted that the Secretary of State failed to explain why he rejected the Inspector's opinion that the qualities of the landscape would "serve to allow a

relatively comfortable absorption of the proposal" and would only cause limited harm. The Claimant was unable to tell how or why he had reached his decision. As a developer, it was prejudiced in not knowing how it might adapt its proposal so as to succeed in another application at the same site.

43. The Secretary of State's reasons were as follows:

i) The Planning Practice Guidance on Renewable and Low Carbon Energy ("the Guidance"), paragraph 007, stated that local topography was an important factor in assessing whether wind turbines could have a damaging effect on landscape and recognise that the impact can be as great in predominantly flat landscapes as hilly ones. This updated guidance was issued in March 2014, after the Inspector's report, though was not materially different from the previous guidance on which the Inspector relied.

ii) The Written Ministerial Statement 'Local Planning and onshore wind' of June 2013 also stated that local topography was a factor in the assessment.

iii) The East Riding of Yorkshire Landscape Character Assessment (Landscape Character Type 13D) assessed the landscape as high quality with a high sensitivity to wind farm development.

iv) The Inspector disagreed with the Landscape Character Assessment, concluding that the grand scale of the landscape and long distance views would allow a relatively comfortable absorption of the proposal (at paragraph 10.28).

v) The Secretary of State agreed with the Landscape Character Assessment and disagreed with the Inspector. In his view the landscape was particularly sensitive to wind turbine development and would be harmed by the proposal. This was expressly stated to be a planning judgment.

vi) The Secretary of State noted and agreed with the Inspector's finding (at para 10.41) that the proposal would cause some harm to the landscape and thus was contrary to the Development Plan and the replacement proposals in the emerging plan.

vii) The Secretary of State agreed with the Inspector's finding, also at 10.41, that the proposal would not protect or enhance the valued landscape, as required by paragraph 109 National Planning Policy Framework ("NPPF").

viii) Although the Inspector considered the harm would be temporary and reversible, the Secretary of State had regard to the significant length of time over which harm would be experienced (25 years). The Claimant agreed in cross-examination at the Inquiry that this could be described as "long-term".

ix) The Secretary of State disagreed with the Inspector's opinion that the proposal would only cause a limited degree of harm to the landscape. He concluded that the proposal would cause unacceptable harm to the local landscape and that this adverse impact should be given significant weight.

44. In my judgment, the Secretary of State's reasoning was both adequate and intelligible. He plainly gave careful consideration to the Inspector's assessment, but disagreed with it. It was not necessary for him to conduct a site visit in order to do this. The Secretary of State's assessment was informed by the national Guidance, the ministerial statement and the Landscape Character Assessment, and the undisputed conclusions that the proposal would cause landscape harm, in conflict with development plan policies and emerging policies. The Council had made the same assessment. This was not, as the Claimant contended, "a bare statement that he had a difference in view". The Claimant complains that it is uncertain how it could make a successful application for planning permission in this locality. It is not the Secretary of State's role to provide unsuccessful applicants for planning permission with a template for a future successful application. That said, it is plain from the reasons that the Secretary of State is of the view that a wind farm in this locality would cause unacceptable harm to the local landscape.

Visual impact on living conditions

45. At the inquiry, residents argued that most of the homes in the three villages around the site would look out onto massive wind turbines, which would appear higher by half as much again because they would be situated on an upward slope above the properties. These turbines, combined with others, would make it impossible for them to travel in any direction without being confronted by turbines, as if they were living in the middle of one huge wind farm.

46. In his conclusions at paragraph 10.86, the Inspector set out the so-called 'Lavender test'[1] (were the turbines present in such number, size and proximity that they represent an unpleasantly overwhelming and unavoidable presence in main views from a house or garden, such that the property would be widely regarded as an unattractive place to live) and a test postulated by the Secretary of State[2] in another appeal (would the proposal affect the outlook of these residents to such an extent i.e. be so unpleasant, overwhelming and oppressive that this would become an unattractive place to live), finding that there was little difference between the two.

47. The Inspector conducted site visits and concluded:

> "10.93 ….the landscape is grand in scale and there are wide, open vistas looking out from dwellings … given the relatively significant separation distances, the wind turbines at issue here, coupled with others built and permitted, would not be pervasive, and there would be no reasonable sense of residents and visitors being surrounded, or hemmed in, by wind turbines."
>
> "10.94 Essentially what would happen in this case is that views out from properties and villages would change. It is a long-established planning principle that views are not inviolable. None of the properties concerned .. would become unattractive

[1] Originating from an appeal decision of an Inspector, Mr Lavender, on a wind scheme at Enifer Downs, Langdon, on 28th April 2009.
[2] When allowing a proposal for a wind farm in August 2011.

> or unsatisfactory places to live and there would be no significant impact on living conditions as a result of the visual impact of the proposal considered in isolation or in concert with other wind farms built or permitted."

48. The Claimant submitted that the Secretary of State failed to give proper, adequate or intelligible reasons for disagreeing with the Inspector's conclusions, and the Secretary of State's conclusion was irrational. Having agreed on the application of the 'Lavender test', it was confusing and inappropriate for him to refer to a concept of "potential deterioration". The Secretary of State's conclusions on cumulative impact were "opaque, confused and repetitious" and erroneously applied differing standards of harm and adverse impact. Unlike the Secretary of State, the Inspector conducted a site visit and heard 'live' evidence, and so the Secretary of State should have been slow to disagree with his assessment, and should have adopted the approach of an appellate court.

49. The Secretary of State's reasons were as follows:

i) After giving careful consideration to the Inspector's assessment of the impact on living conditions of local residents, he disagreed with the Inspector's reasoning and conclusions. He considered that more weight should be given to the potential deterioration in living conditions at these properties than the Inspector did in his report.

ii) Paragraph 007 of the Guidance stated that protecting local amenity was an important consideration which should be given proper weight in planning decisions.

iii) Although the turbines alone would not be uncomfortably close, overwhelming or oppressive, their location on raised land between 30 and 65 metres above ordnance datum meant that they will appear more prominent than if they were situated on flat land.

iv) The WMS and subsequent guidance stated that decisions should take into account the cumulative impact of wind turbines and properly reflect the increasing impact on local amenity as the number of turbines in the area increased.

v) The Secretary of State concluded that more weight should have been given to the harm caused to residential amenity because of the cumulative effect. Multiple wind farm sites would be visible from dwellings in the area. The Inspector's conclusions wrongly played down the cumulative effect of other wind farms in the vicinity. Having seen illustrations and predicted views of the wind farm, the Secretary of State's planning judgment was that the turbines would be pervasive and residents would reasonably feel surrounded or hemmed in by wind turbines. His judgment therefore differed from the Inspector's and accorded with the judgment of the Council.

50. I accept Mr Whale's submission that the Secretary of State's reasons for differing from the Inspector were proper, adequate and intelligible. The well-known dictum of

Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271 is particularly apt here:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

51. In my view, the Claimant has made the error which the Master of the Rolls warned against in *Clarke*. The submission that the Secretary of State was postulating alternative tests is an unfair and excessively legalistic reading of the text. Expressions such as "potential deterioration" and "adverse impact" were simply different ways of expressing the harm caused. As Mr Whale rightly observes, the Lavender test is neither a legal test nor a policy which is binding on the Secretary of State; it is merely a convenient formulation adopted by another Inspector.

52. It was part of the residents' case at the Inquiry that the fact that the turbines were on higher ground than the dwellings meant that they would be much more intrusive. The Secretary of State agreed. He explained that the same number of turbines of the same size, and the same distance away from the dwellings would not be "uncomfortably close, overwhelming or oppressive" if they were at the same level as the dwellings, but situated on high ground over the dwellings, they would be prominent and thus reduce residential amenity. As this was an issue at the Inquiry, it should have been readily comprehensible to the Claimant that this was the distinction which the Secretary of State was making. In my view, it was neither contradictory nor irrational. It was a valid planning judgment.

53. The Secretary of State was also entitled to make a different planning judgment to that of the Inspector in relation to the cumulative effect of this proposal combined with other wind farms, actual and proposed, in the area. It is apparent that the Secretary of State accepted the evidence of the residents that the cumulative effect would mean that they could not travel in any direction without being confronted by turbines, as if they were living in the middle of one huge wind farm. His view was not contradictory, nor was it irrational.

54. For the reasons I have already explained, the submission that the Secretary of State should have adopted the cautious approach of an appellate court in not overturning a first instance judge who has had the advantage of conducting a site visit and hearing 'live' evidence, is misconceived. The Secretary of State is the primary decision-maker who is entitled to exercise his own planning judgment, departing from the opinion of an Inspector where he thinks it appropriate to do so. As Sullivan J. said in *Novalong*, the Minister is not usually expected to conduct a site visit where he recovers an appeal; illustrations, plans and photographs will suffice. In my view, the visualisations and predicted views available to the Secretary of State, combined with the evidence in the report, were sufficient to enable him to make an informed judgment.

55. Finally, I agree with Mr Whale that it is apparent from paragraphs 8, 21 and 25 of the Secretary of State's decision letter that he correctly applied paragraph 14 of the NPPF.

Heritage assets

56. The proposed development was surrounded by a wide range of heritage assets, including Scheduled Ancient Monuments, listed buildings, conservation areas, archaeological monuments, hedgerows of historic importance, and Woldgate, believed to follow the course of a Roman road and a prehistoric ridgeway.

57. The Claimant submitted that the Secretary of State's reasons for differing from the Inspector's assessment of harm were inadequate and gave rise to a substantial doubt that he had misunderstood and misapplied the judgment of the Court of Appeal in *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2014] 1 P&CR 22 on section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("PLBCAA 1990").

58. Section 66(1) PLBCAA 1990 provides:

> "(1) In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which is possesses."

59. In his report, the Inspector concluded that the approach taken by the High Court in *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2013] EWHC 473 (Admin), which quashed his decision in respect of a wind turbine proposal near Barnwell Manor, should not be followed.

60. By the time the Secretary of State made his decision, the Court of Appeal had upheld the approach taken in the High Court [2014] EWCA Civ 137; [2014] 1 P&CR 22, 387). Sullivan LJ held that the term "preserving" in section 66(1) meant doing no harm, applying Lord Bridge's analysis in *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141, at 150. Parliament's intention was that decision-makers should give "considerable importance and weight" to the "desirability of preserving or enhancing the character or appearance" of the listed building and its setting when carrying out the balancing exercise. It was not open to decision-makers to afford this consideration less weight than this, in the exercise of their own planning judgment.

61. The Court of Appeal held that the same reasoning applied to section 72(1) PLBCAA 1990 which provides:

> "In the exercise, with respect to any building or other land in a conservation area, of any function under [the planning Acts], special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

62. The Secretary of State correctly noted that the Inspector's approach to the duties under the PLBCAA 1990 was not in accordance with the *East Northamptonshire* judgment. The flaw in the Inspector's approach meant that the Secretary of State could not rely upon the Inspector's conclusions in that respect.

63. The Claimant submitted that the Secretary of State's inadequate reasoning on the issue of harm indicated that he had misunderstood that there was a distinction between (1) the assessment of the level of harm, upon which there was no proper basis for him to disagree with the Inspector and (2) the weighing of the harm in the planning balance, which was determined by the PLBCAA 1990, as the Court of Appeal found in *East Northamptonshire*.

64. In my judgment, these criticisms are based on an unfair and overly forensic analysis of the decision letter.

65. The Inspector found, at paragraphs 10.69 – 10.74:

    i) Visibility of the wind farm and in juxtaposition with the Burton Agnes Hall asset meant that there would be an impact on the settings of the individual assets within, and on the contribution those settings make to significance.

    ii) The wind turbines would be a distracting, modern, discordant presence in views of the Hall from the south and east, competing for the viewer's attention on the very important axial approach through the Gatehouse towards the Hall.

    iii) The visual presence of the wind turbines in views out from the east facing windows would have a similar impact on an appreciation of the interior of the hall.

    iv) The prominent presence of the wind turbines in views out from the ha –ha and from the woodland walk would detract from the existing relationship between the asset and its rural surroundings.

    v) As a consequence of the above, the impact on the settings of the individual assets within the Burton Hall asset, and on the contribution these settings made to significance of the individual assets, would be harmful and would compound the harmful impacts already occasioned, for much the same reasons, by the operational wind farm at Lissett, and those permitted at Fraisthorpe and Carnaby.

66. It is clear from the decision letter that the Secretary of State disagreed with the Inspector's assessment that the harm caused to the setting of heritage assets, particularly Burton Agnes Hall, was 'limited', as the Inspector found in paragraph 10.108 of his report. The Secretary of State considered that the harm would be greater than limited, on the Inspector's own findings, as summarised above. In particular, because the turbines would be visible from the Hall and its gardens, as a "distracting, modern, discordant presence".

67. The Secretary of State then went on to give effect to the PLBCAA 1990 duties, as explained by the Court of Appeal, to give considerable importance and weight to the

desirability of preserving (i.e. doing no harm to) the listed buildings and conservation areas when conducting the balancing exercise.

68. On a fair reading of the decision, I do not consider that the Secretary of State confused the assessment of harm with the balancing exercise.

69. In my judgment, the Secretary of State was entitled, in the exercise of his planning judgment, to differ from the Inspector in the assessment of the harm to the setting of the heritage assets which would be caused by the proposed wind farm. He stated that he gave careful consideration to the Inspector's views, as well as the evidence and Guidance, and the decision letter confirms that he did so.

70. The reasoning was adequate and does not disclose any error of law.

Tourism

71. In paragraph 10.101 of his report, the Inspector said:

> "Issues have been raised by local residents, but not, importantly, the Council, about the impact of the proposal on tourism. The area is clearly very attractive to visitors and there are lots of opportunities for recreation and other activities. Tourism is clearly a very important facet of the local economy. Nevertheless, as my colleague found in dealing with the appeal relating to the wind farm at Fraisthorpe, and in the appellant's evidence, there is no good evidence to suggest that the number of visitors to the area will be adversely affected by this proposal. Neither is there any good evidence that visitor numbers in other areas of the UK attractive to tourists have been adversely affected by the presence of wind farms."

72. The Secretary of State, in his decision letter, said that:

> "… he does not agree with the Inspector's conclusions regarding tourism because the Inspector has not considered the cumulative impact on tourism of the current scheme, along with the permitted wind farms at Fraisthorpe and Carnaby, and the operational wind farm at Lissett. Therefore, in view of the potential impacts of the proposal, the Secretary of State has given some weight to the proposal for adverse effects on tourism that needs to be considered in the balance."

73. The Claimant submitted that it was unclear whether the phrase "potential impacts" in the decision letter meant that the Secretary of State had found some likelihood that visitor numbers would be affected by the proposal, in which case he had made a finding without evidence, or had adopted "potential impacts" as a category of harm in its own right, which was a vague and incomprehensible criterion.

74. This submission echoed the Claimant's submission in relation to the phrase "potential deterioration in living conditions". In my judgment, it was an unfair and excessively legalistic reading of the decision letter. The Secretary of State was not applying a

new test or criterion when he used the phrase "potential impacts", he was merely adopting a turn of phrase to summarise his conclusions.

75. The Inspector, in his assessment of the evidence, had concluded that the proposal would not have an adverse effect on tourism. Although he referred to the wind farm at Fraisthorpe, he did so in order to demonstrate that a fellow Inspector had found that there was no evidence of an adverse effect on visitor numbers, not as part of a consideration of the cumulative effect of multiple wind farms.

76. In my judgment, the Secretary of State was entitled to make a different judgment about the impact on tourism (which, of course, includes the quality of the visitor experience and the length of time visitors spend in the area, as well as a head-count of visitors). There was sufficient evidence to enable him to do so, both summarised in the report and also set out in written and oral evidence submitted to the Inspector.

77. The Inspector acknowledged that there were many visitors to the area and tourism was an important facet of the local economy. He reported that JD, a parish councillor, expressed concerns among residents about tourism. Also, KD, a resident, expressed opposition to the proposal principally on the basis of the local impact on tourism and, as a result, the local economy. The Inspector referred to a 'transcript' of their evidence and their 'closing statement' which would have been available to the Secretary of State, but not to this court. Both these individuals came from Carnaby, the site of a planned wind farm. I do not know whether or not their evidence included any express reference to cumulative impact in the context of tourism.

78. In his summary of the evidence of the local residents, the Inspector said:

> *"Residential amenity*
>
> 6.10 … given the wind farms built and consented locally, what it boils down to is that residents of Burton Agnes, Thornholme and Haisthorpe will find it impossible to travel in any direction from their houses without being confronted by massive wind turbines. It will be like living in the middle of one huge wind farm…."
>
> *Recreational and Heritage Matters*
>
> …..
>
> 6.14 The appeal site is close to many amenities which are well-used and highly valued by local people and tourists alike: the Hockney Trail, the Scenic Motor Route and walking and cycling routes advertised by the Council under the 'big skies' banner. These would all be significantly damaged by the proposal.
>
> *Cumulative Impact*
>
> 6.15 The cumulative impact of this wind farm along with others built, consented and in the planning process, would be

> adverse and overpowering. The wind farms are completely out of scale and overwhelm local villages and their amenities."

79. Among the reasons why the Council refused planning permission was that:

> "2. The proposal would be visually dominant, detrimental to the landscape quality, visual amenity and rural character of the area. Sensitive receptors are present in the area as the vicinity of the site is used as a popular walking route and by motorists en route to nearby resorts and villages, and visitors to Burton Agnes Hall…."
>
> "3. … The site lies only 1.5 km from Burton Agnes Hall complex which contains a nationally significant group of Grade 1 Listed buildings which are open to the public…..The overall impact on the setting of the complex would be harmful due to the dynamic views by visitors moving through the historic property…"

80. There was a considerable body of evidence about the visitor experience to the heritage assets in the village of Burton Agnes, which I have referred to under the heading 'Heritage assets' above. In addition, the Inspector summarised the Council's evidence as follows:

> "5.26 There is little to be added in terms of cumulative landscape effects and considerable agreement about the extent of significant visual effects for the proposal itself and in conjunction with other schemes. It is useful to consider the Council's evidence in relation to the acceptance by the appellant that wherever there would be a clear view of the proposal by a high-sensitivity receptor within 7.5 kilometres of it, significant adverse effects would occur…
>
> 5.27 In assessing visual effects, it is also important to note the prominent role that Burton Agnes Hall and the adjoining settlement play in the local recreational route network.
>
> 5.28 There are five routes for a combination of pedestrians, cyclists, equestrians and motorists passing through Burton Agnes and in some cases, the appeal site. The site of the proposal is not some quiet backwater but a focus of activity for local people and visitors. The wind turbines would be an important element of the experience of a visitor to Burton Agnes itself, but also on the way to and from the settlement."

81. Although the report addressed both tourism and cumulative effects, it did not expressly consider them together. However, I consider that the Secretary of State was entitled to look at the evidence as a whole and draw the reasonable inference that the cumulative visual impact of the wind farms across the Wolds would affect visitors to the region, just as it did residents.

82. Overall, he made a planning judgment that "some weight to the potential for adverse effects on tourism" ought to be considered in the balance. I do not consider that he erred in law in doing so. Read in the context of the report as a whole, his reasons were proper, adequate and intelligible.

83. I do not consider that the Secretary of State was "taking into consideration any new evidence or new matter of fact" which required him to give all parties an opportunity to make further representations under Rule 17(5) of the 2000 Rules. It is apparent from the evidence that the cumulative effect of a number of wind farms in the area was a significant issue at the inquiry and all parties had an opportunity to give evidence about it and comment upon it.

Overall conclusion

84. The Claimant submitted that, in conducting the balancing exercise and reaching his overall conclusion, the Secretary of State failed to identify any respect in which the Inspector had overstated the renewable energy benefits of the scheme and he failed to correctly apply, and weigh in the balance his own policies in favour of renewable energy.

85. In paragraph 25 of the decision letter, the Secretary of State said:

> "The Secretary of State agrees with the Inspector that the main consideration is whether any adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies taken in the Framework taken as a whole. He considers it to be a matter of judgment and disagrees with the Inspector that the harmful impacts of the appeal scheme would be far outweighed by the benefits. He considers that the Inspector placed too much weight on the benefits and not enough weight on the harm that would be caused. Taking into account paragraph 98 of the Framework, the Secretary of State considers that the impacts of the proposal are such that no condition imposed could make them acceptable. Taken together, he considers that the harm significantly and demonstrably outweighs the benefits when assessed against the policies in the Framework. "

86. The sole basis for the Claimant's challenge is the sentence which begins "the Inspector placed too much weight on the benefits". Mr Whale conceded that this sentence was not well-expressed and pointed out that the test was correctly expressed in the final sentence which stated that the Secretary of State considered the harm significantly and demonstrably outweighed the benefits of the proposal. It was plain that the Secretary of State was not disagreeing with the Inspector's assessment of benefits as he had previously said in paragraph 24 that he agreed with the Inspector that the proposals would bring "significant benefits".

87. I accept Mr Whale's submission that the Claimant's reading of the letter was unduly pedantic. Adopting the guidance in *Clarke*, on a straightforward down-to-earth reading of the decision letter, there could be no genuine, as opposed to forensic doubt,

as to what the Secretary of State decided. I did not discern in the decision letter any failure to follow renewable energy policies or the NPPF.

88. Finally, the Claimant's counsel informed me that there was concern on the part of the Claimant and others in the "wind sector" that the Secretary of State was making politicised decisions on wind farm planning applications. Therefore it was of particular importance that the reasons should be sufficient to demonstrate convincingly that the decision was made for proper planning reasons. I asked Mr Nardell if he was alleging that the decision in this case was made for an improper motive or that the Secretary of State had taken into account irrelevant considerations, in which case that allegation could be considered on its merits. Mr Nardell said he was not making any allegation of an error of law; merely observations by way of background.

89. On the evidence before me, there was nothing to suggest that this decision was based on anything other than proper planning reasons, with which the Claimant happens to disagree.

90. For the reasons set out above, the claim is dismissed.