



Neutral Citation Number: [2010] EWCA Civ 703

Case Nos: C1/2009/2198B &
C1/2009/2198

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QBD, ADMINISTRATIVE COURT
KEITH LINDBLOM QC (sitting as a deputy High Court judge)
[2009] EWHC 2329 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2010

Before :

LORD JUSTICE PILL
LADY JUSTICE ARDEN
and
LORD JUSTICE SULLIVAN

Between :

The Queen on the Application of Janet Harris	Appellant
- and -	
The London Borough of Haringey	Respondent
- and -	
(1) Grainger Seven Sisters Ltd	Interested Parties
(2) Northumberland And Durham Property Trust Ltd	
- and -	
The Equality and Human Rights Commission	Intervener

Mr David Wolfe (instructed by **Bindmans Solicitors LLP**) for the **Appellant**
Mr Peter Harrison QC (instructed by **The London Borough of Haringey**) for the
Respondent
Ms Helen Mountfield QC (instructed by **The Equality and Human Rights Commission**) for
the **Intervener**

Hearing date : 5 May 2010

Approved Judgment

Lord Justice Pill :

1. This is an appeal from a decision of Mr Keith Lindblom QC, sitting as a Deputy High Court Judge on 14 July 2009. The judge refused an application for judicial review of a decision of London Borough of Haringey (“the council”), as local planning authority, granting a planning permission on 24 December 2008. The application for planning permission had been made by the first interested party, Grainger (Seven Sisters) Ltd (“Grainger”).

2. Permission was granted for the development of a site known as Wards Corner on High Road, Tottenham. The grant permitted:

“Demolition of existing buildings and erection of mixed use developments comprising Class C3 residential and Class A1/A2/A3/A4 with access, parking and associated landscape and public realm improvements.”

3. Ms Janet Harris (“the appellant”) has lived in Tottenham for many years and has been active in community life. In 2006 she helped to set up the Tottenham Civic Society. Her standing to make the application for judicial review is not now challenged. The lawfulness of the decision was originally challenged on three grounds. Only one ground is now pursued and it is that the council, when granting permission, failed to discharge its duties under section 71 of the Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000. Section 71 provides, in so far as it is material:

“(1) Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need—

(a) to eliminate unlawful racial discrimination; and

(b) to promote equality of opportunity and good relations between persons of different racial groups.”

The council accept that it was required to discharge the section 71 duty when making the decision challenged. The breach alleged is of section 71(1)(b).

4. In his judgment, the judge adopted the summary of facts in the written submissions of Mr Wolfe, who appears for the appellant:

“[The site] is in the West Green Road/Seven Sisters District Centre. The area is predominantly made up of local independent traders with a mix of Turkish, Cypriot, Colombian and Afro Caribbean influences. The site incorporates an indoor market comprising 36 units of which 64 per cent of traders are from Latin America or are Spanish speaking. The total retail floor space on the site is 3,182 square metres and the site includes 33 residential units along Suffield Road as well as first

floor accommodation above the retail units on Tottenham High Road, Seven Sisters Road and West Green Road. At present, those business units and homes are predominantly occupied by members of BME [black and minority ethnic] communities . . . During the consultation process and subsequently, a great many people have expressed their concern that the level of business rents that would be charged in a redeveloped site (the Council itself anticipates these increasing threefold . . .) and the fact that the Grainger scheme makes no provision at all for affordable housing, will bring about a significant shift in the commercial and residential make up of the area . . .”

The resolution to grant planning permission was passed by 5 votes to 4.

5. Mr Wolfe submitted that section 71 was engaged because of the mixed racial influences, the large percentage of Latin American traders in the existing indoor market and the predominant occupation of homes and business units by members of the BME communities. The council was under a duty before granting permission to have due regard to the needs specified in the section, it was submitted.
6. The development is substantial and an important part of the regeneration of the Borough of Haringey. A considerable number of people, of different racial groups, are involved. The appeal turns on whether the council, in granting permission, has discharged its duty under section 71. The council claims to have done so; it has not been submitted that the circumstances are such that the grant may stand even if the statutory duty had not been performed.
7. Section 71 has been in force since 2 April 2001. It replaced a section which put the duty in less specific and focused terms. It was a duty “to make appropriate arrangements”. There is substantial agreement between the parties as to how the case should be approached: has the council in substance had due regard to the requirements of section 71(1) when granting permission for this particular development?
8. I state the obvious in saying that the statute must be construed as a statute. This is not one of those many cases in planning law where emphasis is placed by the courts on documents not being required to be construed like a statute. Mr Wolfe emphasised the need for the council to focus on the requirements of the section and not merely to deal in generalities. On the other hand, such focus requires attention to the language of the section to determine the content of the duty. In this litigation, section 71(1) has at times been treated as if it is a general duty when taking decisions to improve the lot of ethnic minority communities. It is a duty, when taking decisions, to have due regard to three specific needs:
 - (a) The need to eliminate unlawful racial discrimination,
 - (b) The need to promote equality of opportunity between persons of different racial groups,
 - (c) The need to promote good relations between persons of different racial groups.

The appellant relies on the second and third of those duties.

9. It is well established that the duty to have “due regard” involves a “conscious approach and state of mind” (Scott Baker LJ in *Brown v Secretary of State for Work & Pensions* [2008] EWHC 3158 (Admin), in the context of disability). (See also Davis J in *Meany v Harlow District Council* [2009] EWHC 559 (Admin) “conscious directing of the mind to the obligations”, and Munby J in *R (E) v Governing Body of JFS* [2008] EWHC 1535/1536 (Admin), at paragraph 213, “direct its mind”.)
10. In *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293, Arden LJ, at paragraph 274, described the purpose of section 71, in that case the provision at issue being section 71(1)(a):

“It is the clear purpose of s.71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation. It is not possible to take the view that the Secretary of State's non-compliance with that provision was not a very important matter. In the context of the wider objectives of anti-discrimination legislation, s.71 has a significant role to play. I express the hope that those in government will note this point for the future.”

11. For the council, Mr Harrison QC accepted that, on the material before the council, the threshold giving rise to the need to apply section 71(1) in the decision making process had been crossed. However, it is necessary to consider, in summary at any rate, the evidence capable of giving rise to the section 71(1) duty in this case. Before taking its decision, the council conducted an appropriate consultation exercise. The officers' report (“the report”) to the appropriate committee of the council was very full and referred to representations made. The meeting at which the decision to grant planning permission was taken lasted 3 hours and a very full record of proceedings was kept.

Evidence before the council

12. Before the council was a letter of objection from a local resident, Mr Lagu Sukumaran:

“May I kindly request you and all decision makers to carefully consider the Human suffering the loss of achievement, of the Ethnic Minority Businesses in West Green Road, Seven Sisters Road and the High Road, known as the Wards Corner.

I live above my Business with by family, and it is a live and work business concept ... I am part of this Diverse local Ethnic minority Community who I serve and depend on my Shop for their unique and specialist Food products that is non available in National Supermarkets.

Demolition will destroy the existing Ethnic Minority Business, the Owners, their families, employees and their suppliers. The owners and their families have built up their existing businesses with many years of hard work and determination, in some cases hard work of three generations of the family. There are a number of traders who live above their businesses and in this case they will be forced out of their homes. The traders will not be able to relocate their business to a new location and be successful due to the poor state of the world economy ... The customers and residents will lose their choice of shopping and the specialist shops.”

13. Identified as response 54, the WCCC (Wards Corner Community Coalition) submitted as a part of its representation:

“Local planning processes are required to demonstrate that meaningful community engagement and equalities issues have been accounted for and that diverse groups are not systematically disadvantaged by public authority processes. There is no reference in this planning application to the impact on diverse communities and the needs of diverse local communities, including ethnic minority communities. Members of particular minority ethnic communities are being disproportionately disadvantaged by these proposals. Virtually all the businesses that will be ended by the proposals are from ethnic minority communities that provide some ethnically distinct and important services and goods. The Coalition contends that the needs of the growing Latin American community are being explicitly negated in these proposals.”

They added:

“Public authorities should support the social and business networks in an area. These plans from Grainger represent the destruction of existing community and replacement by an alternative, selected community. This is Council-backed, unethical social engineering which WCC rejects.”

14. Response No. 181 included comment from Ms Siobhan Crozier:

“This is of great importance for Seven Sisters as it contains, within the proposed development, businesses that provide “essential convenience and specialist” shops which provide for, and add to, the cultural diversity of Tottenham. These shops would be lost forever if the demolition goes ahead and the local community would be bereft. Several long-established businesses will lose their livelihood and in some cases, their homes. Local authorities are supposed to support SMEs [small and medium enterprises], not eradicate them in favour of units designed to appeal to high street multiples.”

15. Analysis of the material submitted need not for present purposes be comprehensive. Much of it, as Mr Wolfe to a degree accepted, cannot be related to section 71(1), given its wording. Responses refer to the need, regardless of ethnic considerations, to upgrade the area and to do so in an architecturally and socially acceptable way. The report also referred to objections including an objection that “the Market which has been created, and which has added vibrancy, richness and diversity to the area, would be lost”.
16. A further letter from WCCC (8 July 2008) is reproduced in the report:

“The Wards Corner Community Coalition takes the view that the Grainger scheme for the site will not deliver regeneration for the people of Tottenham and will damage the material, social and economic fabric of this diverse community. Further, the Wards Corner Community Coalition believes the Grainger proposals to be based upon questionable premises and have put forward an alternative vision for the site.”

The council’s decision

17. The report did of course refer to the positive aspects of the proposed development and to policies in the Unitary Development Plan (“UDP”). There is general acceptance of the need for environmental improvement in the area. Policy AC3 “seeks to promote regeneration through development along the Tottenham High Road corridor” and policy AC4 states that “the Bridge New Deal for Communities aims to improve the quality of life for residents by seeking to change the area so that it becomes a better place to live.” Reference is made to a Development Brief for Wards Corner in which it is acknowledged that the Borough of Haringey is a deprived area. The Brief provided a number of development principles for any proposed development or regeneration.

18. At page 30 of the report, it is stated:

“... the proportion of small retailers can also assist the needs of local business, small and medium sized enterprises (SMEs) and black and minority ethnic businesses which in turn can support the needs of the local community.”

19. By reference to an Urban Space Management Report, the report provides:

“The Report concludes that it would not be sensible or economically viable to relocate the market in the proposed development. However the report also states that, most if not all of the traders could be of interest to other market operators as potential tenants and that there is an option of integrating the non Spanish speaking traders into alternative locations independently while trying to keep the Latin American traders together to move as a group at the right time.”

20. In the minutes, it is recorded:

“The Committee was informed that the proposed development was unpopular and would not be considered a landmark development. It would have extremely negative impacts on existing local businesses, homes, social amenity and community cohesion. Objections related specifically to loss of longstanding, diverse and viable businesses and jobs, detriment to community cohesion in Tottenham through targeted harm to ethnic minority communities. . .”

21. The objection of Councillor Diakides was recorded. It included the representation:

“. . . the local traders reflected the rich cosmopolitan mixture of the local community and their businesses responded to the special needs of those communities...these would not be accommodated within the proposed development.”

22. In neither of these lengthy documents, the report and the minutes, is there specific reference to section 71(1) or the duties it imposes. Nor is there specific reference to the substance of the duties, even without a reference to their source.

Submissions

23. However, Mr Wolfe accepted that if the decision maker applies some other policy, including a planning policy, the application of which in effect means that the requirements of section 71 are met, the section 71 duties can in substance be discharged by that indirect route. What is required, he submitted, is a performance of the duty in substance and in relation to the particular decision to be taken.

24. In her submissions for The Equality and Human Rights Commission, Ms Mountfield QC supported Mr Wolfe’s approach. She submitted that the presence before the decision maker of documents making reference to equality issues was not a sufficient compliance with the section 71 duty. **There must be a demonstrable application of the statutory duty to the particular facts.** Focus on the needs of minority groups was required. Ms Mountfield referred to the Code of Practice on the Duty to Promote Racial Equality issued by the Commission. At 3.16, a series of questions is posed as a means of assessing the effects of a decision. The first of them is:

“Could the policy or the way the function is carried out have an adverse impact on an equality of opportunity for some racial groups? In other words, does it put some racial groups at a disadvantage?”

The fourth question is:

“Could the adverse impact be reduced by taking particular measures?”

25. Mr Harrison accepted that the decision maker must be conscious of its duties but may be conscious even if their source is not known. A long list of policies relevant to the proposed development was specified in the report and councillors would have been aware of their contents. Mr Harrison referred to policies 1.1 and 1.2 of the UDP.

Councillors knew that they were dealing with a deprived area. To grant the permission, he submitted, was an attempt to regenerate the area and was of overall benefit to the community, including ethnic minorities. The overall effect of the decision should be considered.

26. Policy AC4(e) provided that proposals for development should promote an entitlement and conditions where opportunities for enterprise are open to all. Reference was made in the report to a poll conducted by consultants on behalf of Grainger and to the proposed development resulting in “the physical regeneration of the site through comprehensive redevelopment”. Reference was made to the option of “integrating the non-Spanish speaking traders into alternative locations independently while trying to keep the Latin American traders together to move as a group at the right time”, an approach not in the event adopted. Concern was expressed about the position of existing traders in the market to be demolished. It was suggested that the traders could move to alternative locations which would be suitable. The Greater London Authority stated that “the regeneration of this site with a mixed use development is generally consistent with London planning policies”. The “mixed use development” is welcomed but section 71 is not mentioned.
27. I say at this stage that I can only commend the thoroughness of the report, its focus on regeneration and its expression of concern for the future of displaced market traders. I find it impossible, however, to find any focus on the substance of the section 71 duty when the complex issues to be decided by the council’s committee are set out and debated.
28. Mr Harrison submitted that policies AC3 and AC4 embodied the purpose of paragraphs 1.1 to 1.5 of the UDP which provided:

“. . . a large proportion of minority ethnic communities are concentrated in those parts of the borough where the greatest concentrations of disadvantage are found. Therefore the regeneration initiatives will be targeted at the centre and the east to narrow the gap between the east and west of the borough.”
29. Wards Corner is in about the centre of the Borough. On the basis of that reference, Mr Harrison submitted that the purpose of policies AC3 and AC4 is to promote acceptable regeneration with the express objective of narrowing the gap between the east and west of the Borough and as a consequence to reduce inequalities experienced by ethnic minority communities. Section 71 considerations effectively merged with the planning considerations, it was submitted.
30. In deciding whether the section 71(1) duty had been discharged, the court is entitled to take a general view of the impact of a generally beneficial policy and the overall policy context, Mr Harrison submitted. It was not necessary to consider each component of the duty on a local planning authority item by item. Mr Harrison relied on the decision of this court in *Baker v Secretary of State for Communities & Local Government* [2008] EWCA Civ 141 and of Elias J in *R (On the Application of Isaacs) v Secretary of State* [2009] EWHC 557 (Admin).
31. In *Baker*, Dyson LJ, at paragraph 31, defined the section 71(1) duty. He stated:

“In my judgment, it is important to emphasise that the section 71(1) duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to have due regard to the need to achieve these goals. The distinction is vital. Thus the Inspector did not have a duty to promote equality of opportunity between the appellants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity.”

32. At paragraph 36, Dyson LJ stated:

“I do not accept that the failure of an inspector to make explicit reference to section 71(1) is determinative of the question whether he has performed his duty under the statute. So to hold would be to sacrifice substance to form.”

That is not disputed. Dyson LJ added, at paragraph 37:

“The question in every case is whether the decision-maker has in *substance* had due regard to the relevant statutory need. . . . To see whether the duty has been performed, it is necessary to turn to the substance of the decision and its reasoning.”

33. Both *Baker* and *Isaacs* involved the application of a specific government planning policy on gypsies. The policy was set out in Circular 01/2006. In both cases the relevant paragraphs of the Circular were analysed by the court with a view to considering whether complying with them in substance discharged the duties in section 71(1). It was held in each case that the duty had been discharged. Elias J stated, at paragraph 53 in *Isaacs*:

“But where a policy has been adopted whose very purpose is designed to address these problems, compliance with section 71 is, in my judgment, in general automatically achieved by the application or implementation of the very policies which are adopted to achieve that purpose.”

Mr Harrison submitted that, on a parity of reasoning, consideration of planning policies in the UDP was equivalent to a specific consideration of section 71(1).

Judgment of Mr Lindblom QC

34. The judge, in a conspicuously careful and thorough judgment, applied the approach adopted in *Baker* and *Isaacs* to the present facts. He stated:

“In the present case the statutory needs were in the very focus of the Council's own policies dedicated to the regeneration of Wards Corner. In the UDP there is both a general impetus for regeneration and the specific aim of promoting the welfare of the communities, including the racial minority communities,

which are principally concentrated in the most deprived parts of the borough. This is the background to policies AC3 and AC4. The Bridge NDC initiative also sprang from a recognition of the problems afflicting the ethnic minority communities in these areas. The development brief for Wards Corner had its genesis in those issues too. I am satisfied that the authors of the UDP believed they must reflect in its provisions for the Wards Corner area the imperatives of advancing the interests of diversity and racial equality, and recognized that securing social, economic and physical regeneration in this area would advance those interests.”

35. At paragraph 130, the judge stated:

“This, in my view, is a case in which the achievement of such benefits was in compliance with the statutory goals in section 71. And I believe it is right to discern a parallel in the present case with the circumstances in *Isaacs*. This too is a case in which the considerations arising under section 71 effectively merge with the matters to which the Council had to have regard by virtue of its fundamental duties under the planning legislation to make decisions on applications for planning permission having regard to all material considerations, including the development plan, and in accordance with the plan unless material considerations indicate otherwise. It is to be noted that no failure to go through that statutory exercise in a legally satisfactory way has been alleged by the Claimant. To my mind, this is significant in itself.”

36. The judge’s conclusion is at his paragraph 133:

“In my judgment, therefore, the Council did at least as much as it had in substance to do to comply with its duties under section 71. It did so in the pragmatic fashion endorsed by the Court of Appeal in *Baker* . . . Viewing the whole of the Council’s conduct in this case, I am satisfied that it met the substance of the statutory requirements, and thus had regard to the section 71 needs in a way that was appropriate in all the circumstances. I conclude that although the Council did not at any stage articulate the fact that it was going about the discharge of its section 71 duties as they bore on the traders in the Latin American market and on the BME communities, it achieved this end and it did so fully.”

Conclusions

37. I am satisfied that, on the material before the council, there was sufficient potential impact on equality of opportunity between persons of different racial groups, and on good relations between such groups, to require that the impact of the decision on those aspects of social and economic life be considered. This was not a planning application, as Mr Harrison accepted, in which the impact of the decision on section

71 considerations was so remote or peripheral that the substance of the duty could be ignored. I have referred to the representations made to the council during the decision making process. They do raise issues to which the section is capable of applying. Concerns about Latin American traders or loss of housing by ethnic minorities, for example, were expressed though the representations were not put in the context of the specific statutory criteria.

38. The lack of focus in this case has to some extent affected all parties. Neither the objectors nor the council focused on the specific statutory considerations. The council argued that because the development would, as required by UDP policies, assist that part of the Borough where a large proportion of minority ethnic communities are concentrated, the duty is discharged. Some of the contrary submissions appear to me to be based on the premise that the section requires promotion of the interests of a racial minority or racial minorities. It does not; the requirements are of a specific nature; due regard to the need to promote equality of opportunity and good relations between persons of different racial groups. Neither aim is necessarily achieved by a proposal which may promote the economic interests of a particular racial group, even a deprived group. The subsection operates in a more nuanced way than has at times been advocated. The promotion of equality of opportunity and good relations *between* persons of different racial groups [my emphasis] is not the same as the promotion of the interests of a particular racial group or particular racial groups, though the two will usually be interrelated.
39. I have come to the conclusion that the section 71(1) duty was not discharged by the council when granting this planning permission. The case is distinguishable from *Baker* and *Isaacs* where policies had been adopted in a Circular whose very purpose was to address the issues addressed in section 71(1). It cannot be said that the policies cited in this case were focused on specific considerations raised by section 71. The council policies to which reference has been made may be admirable in terms of proposing assistance for ethnic minority communities, and it can be assumed that they are, but they do not address specifically the requirements imposed upon the council by section 71(1).
40. Not only is there no reference to section 71 in the report to committee, or in the deliberations of the committee, but the required 'due regard' for the need to "promote equality of opportunity and good relations between persons of different racial groups" is not demonstrated in the decision making process. "Due regard" need not require the promotion of equality of opportunity but, on the material available to the council in this case, it did require an analysis of that material with the specific statutory considerations in mind. It does not, of course, follow that considerations raised by section 71(1) will be decisive in a particular case. The weight to be given to the requirements of the section is for the decision maker but it is necessary to have due regard to the needs specified in section 71(1). There was no analysis of the material before the council in the context of the duty.
41. I would allow the appeal and quash the permission.
42. I reach that conclusion with some regret because of the general desire in the Borough for regeneration of this area, because of the amount of public and private resources expended on this proposal and, because the council, subject to section 71 considerations, followed a thorough and fair procedure which led, albeit by a bare

majority, to a democratic decision. Though I hope it does not, the quashing of the permission may lead to a long delay in the regenerative process in the Borough. The issues which arose on this planning application were, however, such that it was necessary for the requirements of section 71 to form in substance an integral part of the decision making process and I am unable to hold that they did.

Lady Justice Arden :

43. I agree.

Lord Justice Sullivan :

44. I also agree