

'Kinsey'

Neutral Citation Number: [2021] EWHC 1286 (Admin)

Paragraphs 88 and 89 confirms that when considering harm, whether substantial or less than substantial, the extent of harm within each category should be articulated, in line with the PPG (noting that this is only guidance).

B e f o r e :

MRS JUSTICE LANG DBE

Between:

THE QUEEN	
on the application of	
HELEN ELIZABETH KINSEY	Claimant
- and -	
LONDON BOROUGH OF LEWISHAM	Defendant
CITY OF LONDON CORPORATION	Interested Party

Richard Harwood OBE QC (instructed by Harrison Grant) for the Claimant
Saira Kabir Sheikh QC and Charles Merrett (instructed by Womble Bond
Dickinson (UK) LLP) for the Defendant
Sasha White QC and Matthew Henderson (instructed by Comptroller and
City Solicitor) for the Interested Party

Hearing dates: 27 & 28 April 2021

HTML VERSION OF JUDGMENT APPROVED

84. Thus the decision-maker must apply a weighted or tilted balancing exercise, giving the assessed degree of harm to the heritage asset "considerable importance and weight" as against other considerations. The same principles apply to a finding of harm to conservation areas under section 72.
85. In the *Liverpool City Council* case, the High Court held (per Kerr J. at [46] – [48], [78] – [85]) that, although the OR set out the relevant statutory provisions and the Framework provisions, when the planning officer later undertook the balancing exercise, he simply weighed the "less than substantial harm" to heritage assets against the public benefits of the proposal, without mentioning the need to apply "considerable importance and weight" to the harm to the heritage assets and without mentioning a "clear and convincing justification" for any such harm (paragraph 194 of the Framework). Kerr J.'s decision on this ground was upheld on appeal.
86. In this case, the balancing exercise was referred to on three occasions in the OR: at OR 319, OR 328-330, and OR 641 - 644. On a fair reading of the OR, taken as a whole, I conclude that the planning officer undertook an unweighted balancing exercise, weighing the "less than substantial harm" to heritage assets against the "significant" benefits of the proposed housing development. Unsurprisingly, the conclusion was that the harm was significantly outweighed by the benefits. As in the *Liverpool City Council* case, the effect was to "play down the part of the exercise represented by [paragraph 193 and 194 of the Framework] and to tilt the balance towards emphasising the absence of substantial harm and the public benefits to be weighed on the other side of the balance" (per Kerr J. at [81]).
87. In the *Liverpool City Council* case, Kerr J. was not satisfied that the Planning Committee would have remembered the isolated references to "great weight" and "clear and convincing justification" earlier in the officer's report (at [85]). Similarly, I am not persuaded that the reference to "great weight" at OR 291 was sufficient to correct the misleading approach to the balancing exercise demonstrated later in the OR. In this case Members were never expressly advised as to the need for a "clear and convincing justification" and regrettably the SCO's reference to the need for a "clear and convincing justification" was withheld from Committee Members. Even if the reference to relevant paragraphs in Chapter 16 in OR 291 could be said to incorporate paragraph 194 of the Framework, I consider that Committee Members would need much explicit guidance on how to give effect to the statutory duties under the Listed Buildings and Conservation Areas Act 1990.
88. A further flaw was that the OR did not disclose the SCO's classifications of the level of harm within the category of "less than substantial harm", and instead referred to "a degree of less than substantial harm". The effect of

those omissions was to downplay to Committee Members the level of heritage harm and the weight to be attached to it, as I found under Ground 2 (see paragraph 66 above).

89. I would have reached that conclusion even in the absence of the guidance in the PPG that the extent of the harm within each category should be articulated, as it may vary. The PPG is only guidance, and not binding. However, where a planning officer decides to depart from national guidance, I consider that he should give reasons for doing so, especially if he is departing from the approach taken by the Council's conservation expert. I do not consider that this part of the PPG ought to be treated with "considerable caution", as suggested by Lieven J. in respect of a different part of the PPG in *Solo Retail Limited v Torridge DC* [2019] EWHC 489 (Admin).
90. The Claimant submitted that the Council acted in breach of the duties in sections 66 and 72 of the Listed Buildings and Conservation Areas Act 1990 by failing to give close consideration to the SCO's expert advice. I refer to my conclusions on Ground 2 where I found that Lindblom LJ's observations at [73] – [78] and [81] in the *Liverpool City Council* case, where he found a breach of the duty under section 66, applied to this case, for the reasons I set out.
91. The Claimant also submitted that the Council acted in breach of the duties under sections 66 and 72 of the Listed Buildings and Conservation Areas Act 1990 by failing to give close consideration to the letter from the Twentieth Century Society.
92. The Twentieth Century Society objected to the proposed development in a letter dated 16 April 2020. After describing the significance of the heritage assets, it said:

"Comments

The Society's principal concern is the height of the residential block proposed to replace Mais House, and how views of this new block will intrude on the Lammas Green's idyllic atmosphere, which we consider to be a key aspect of its significance.

Visitors to Lammas Green experience an astonishing sense of seclusion and calm, with surrounding trees creating a pleasant backdrop from viewpoints around the central green. The scale, aesthetic, layout and green qualities of the estate set it apart from most other housing schemes built in this period, and it is remarkable that even after over 60 years the sense of peace remains undisturbed by insensitive alterations. Views of the proposals submitted by the