

**Case Name:** *Kazalbash v Secretary of State for Levelling Up, Housing And Communities*  
[2023] EWCA Civ 904 (27 July 2023)

**Full case:** [Click Here](#)

**Commentary:** This is a successful Court of Appeal case that allowed an appeal against the decision of Mr David Elvin K.C. sitting as a deputy judge of the High Court (the “**Judge**”). The Court of Appeal decided that an Inspector did not err in law when concluding that a proposed development involving the subdivision of a dwelling house would “harm the character and appearance of the area”.

### **The issue considered by the Court of Appeal**

The Court of Appeal had to decide whether, in the High Court, “[the] Judge erred in restricting the Inspector’s decision to contemplation of visual impact only”. Therefore, the single issue for the Court of Appeal to decide was whether the Judge was right that the Inspector’s Decision was “irrational” to conclude that the proposed development “would harm the character and appearance of the area...”.

### **The proposed development**

The proposed development concerned the “[conversion] of existing dwelling to 1 x 3 – bed unit and 1 x 2-bed unit with associated amenity space and parking”. The proposed development would subdivide the semi-detached dwelling house on the site to create an additional dwelling, with a separate garden and an area for car parking.

The Council refused to grant planning permission for the proposed development.

### **The Inspector’s Decision**

The Council’s decision to refuse permission was subject to a section 78 appeal which was decided by written representations. The Inspector carried out a site visit in early January 2022 and issued his decision letter on 19 January 2022 (the “**Inspector’s Decision**”) dismissing the section 78 appeal.

The “main issue” in the section 78 appeal was the effect of the proposed development on the “character and appearance of the area”. The Inspector in making his decision to dismiss the appeal, considered that whilst the proposed development would not change the external fabric of the building, the creation of a new and separate dwelling with a fence erected in the rear garden to make two gardens, would have created a visual change. The Inspector found that the side extension (set back from the building line) would be inconsistent with the prevailing pattern of development – which would harm the character and appearance of the area. The Inspector then went on to decide that the fence would create two plots that were visibly narrower than those of neighbouring

dwellings - which would appear incongruous in the “street scene”.

The section 78 appeal was dismissed.

### **The section 288 decision**

The Inspector’s Decision was subject to a successful section 288 challenge brought by the Applicant. The second ground of challenge is notable as the Judge found that the Inspector, when considering the character and appearance of the area, “[took] into account an immaterial consideration”. The Judge considered that since the Inspector’s Decision did not identify any change to the physical form or appearance of the extension as a result of the proposed development, it was irrational to point to the “visual impact” of the development being harmful to the character and appearance of the street scene.

The section 288 challenge to the Inspector’s Decision was successful.

### **The Court of Appeal decision**

In the present case, the judgment praised the Inspector’s Decision stating that when read as a whole, it does not betray any error of law. The judgment goes on to state that *“[h]is planning assessment is logical, coherent, properly reasoned, and sufficient to discharge his statutory obligations as decision-maker... [i]t is, I think, legally impeccable.”*

The judgment then further considered that the phrase “character and appearance” is self-evidently a larger concept than appearance alone. Consideration of character and appearance was determined to certainly include matters in relation to *“building lines, plot widths, plot sizes, the “composition of buildings” on the street and so on.”* Noting in particular that *“[d]istinguishing here between considerations of “character” and those of “appearance” is not necessary.”*

The Court of Appeal deemed the Inspector’s approach *“true to the broad definition of “street scene” in the National Design Guide”*. The judgement clarified that the definition of “street scene” extended to *“[the] appearance of all elements of a street, including... the buildings... along its edges, particularly the composition of the buildings on each side of the street”*, therefore also encompassing the various considerations of the Inspector.

The judgment considers that the Inspector was aware that the proposed changes to the site would be visible as he used the word “appear” several times in his decision, showing that the harm he referred to would be visibly noticeable. Additionally, the judgment places weight on the site visit as a means of enabling the Inspector to ascertain the effects of the proposed development and its surroundings for himself.

The Court of Appeal moved to allow the appeal, concluding that *“[o]n a straightforward reading of the Inspector’s conclusions... I do not think his decision can be faulted in law”*.

*Case summary prepared by Amy Penrose*