Case Name: *Parkes, R (on the application of) v Secretary of State for the Home Department* [2023] EWHC 2580 (Admin) (11 October 2023)

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Commentary: The claimant was unsuccessful in securing permission for judicial review of the lawfulness of the Defendant's "actions and anticipated actions" in performing her duty to provide accommodation for destitute asylum seekers.

Background

In April 2023, the Government announced its intentions for constructing a barge in the Portland Port, Dorset, to house asylum seekers. Following this, the Defendant completed an equality impact assessment for the purposes of s.149 of the Equality Act 2010, which was further reviewed in August 2023. The Defendant also instructed consultants to provide a "screening appraisal" on the use of the barge, which concluded that the project would not be likely to result in unacceptable adverse effects on the environment. The barge, now built and in use, is called "the Bibby Stockholm".

In May 2023, the Claimant and others raised the issue of whether the mooring of the barge in the harbour to provide such accommodation required planning permission. Dorset Council ("the Council"), following receipt of legal advice, stated that the barge would not be subject to planning control because its position would be below the mean "low water mark", and so no planning permission was required to be obtained.

In August 2023, the Claimant sent a pre-action protocol letter to the Home Office which asked the Home Office to confirm whether it is proceeding on the same basis as the Council regarding planning jurisdiction over the barge.

In response to the letter, the Government Legal Department noted that it was not for the Secretary of State to determine whether planning permission would be needed and that this was a task for the local planning authority, and it was also up to the local planning authority to decide whether it would be expedient to take any enforcement action. Nevertheless, the response also noted that the Defendant agreed with the Council that the barge is not within its jurisdiction.

The Claimant, who is the Mayor of Portland and a local resident, brought the claim for judicial review on her own behalf seeking the following declarations:

"(a) The accommodation of asylum seekers on the Bibby Stockholm in Portland Harbour is:

> *(i) Capable of constituting "development" within the meaning of section 55 of the Town and Country Planning Act 1990;*
> *(ii) May amount to a breach of planning control; and*

(iii) May be the subject of enforcement action by the Council (whether or not the Bibby Stockholm is fully within the Council's jurisdiction: although for the reasons given below, it is).

(b)There has not been compliance with environmental impact assessment duties in relation to the accommodation of asylum seekers on the Bibby Stockholm in Portland Harbour.
(c) The defendant has not complied with her duties under section 149 of the Equality Act 2010 in connection with the proposed accommodation of asylum seekers on the Bibby Stockholm in Portland Harbour."

Proposed grounds

The proposed grounds of challenge were:

(a) The Defendant has erred in law in acting on the basis that the stationing and use of the Bibby Stockholm is incapable of constituting 'development' within the meaning of s.55 of the Town and Country Planning Act 1990 ("TCPA 1990") such that planning permission may be required, or enforcement action taken ("Ground 1");
(b) The Defendant has erred in law in acting on the premise that the proposed development is outside the jurisdiction of the Council and may not be the subject of enforcement action ("Ground 2");
(c) In purporting to carry out an Environmental Impact Assessment ("EIA") screening exercise, the defendant unlawfully failed to comply with the Town and Country Planning (Environment Impact Assessment) Regulations 2017 and/or retained EU law on EIA "(Ground 3"); and
(d) The Defendant has unlawfully failed to comply with the public sector equality duty in s.149 of the Equality Act 2010 ("Ground 4").

Grounds 1 and 2

Mr Justice Holgate held that the carrying out of "development" by the Crown, or any other entity amenable to judicial review, without obtaining any planning permission that may be required under the TCPA 1990, does not in itself amount to an error of public law. Such an action constitutes a breach of planning control which is susceptible to enforcement action by the Council. However, the Council are not obliged to take enforcement action unless it considers that it is expedient to take such action and judicial review cannot be used to usurp those discretionary powers of local planning authorities. Any error that may have been made as to whether the Bibby Stockholm was located within the planning jurisdiction of the Council would have been an error committed by the Council (see [18] and [20]).

For the above reasons, Mr Justice Holgate held that grounds 1 and 2 are not arguable in

a claim against the Defendant. However, he went on to make some further observations on Grounds 1 and 2.

Ground 1

Mr Justice Holgate noted that there was in truth no issue on Ground 1 since the Defendant had accepted that, subject to the jurisdiction issue raised in Ground 2, the mooring and the use of the Bibby Stockholm to accommodate asylum seekers is capable of being treated as a material change of use amounting to development requiring planning permission.

Ground 2

Mr Justice Holgate noted that under the TCPA 1990, planning permission is required for the development of "land" (s.57(1)) and "land" means "any corporeal hereditament, including a building…" (s.336(1)). The Claimant's case on Ground 2 centred around defining the geographical extent of the Council's development control powers in the interface between land and sea. He noted that the authorities cited by the Claimant regarding development on rivers did not assist them on the issue since there was "no doubt that the boundaries of a local authority generally include land over which a river flows and that planning control applies to such areas" (see [27]).

It was also argued that the Council had accreted boundary from the sea as per s.72 of the Local Government Act 1972 which, in essence, states that every accretion from the sea, whether natural or artificial, and any part of the sea-shore to the low water-mark, shall be annexed to and incorporated with the parish or parishes which the accretion or part of the sea-shore adjoins and to the district(s) in which that parish is situated within. If the whole or part of any such accretion from the sea or part of the sea-shore does not adjoin a parish, it shall be annexed to and incorporated with the district(s) which it adjoins.

First, dealing with the phrase "any part of the sea-shore to the low water mark", Mr Justice Holgate applied the definition provided by Bridge LJ in Loose v Castleton (1978) 41 P & CR 19, which stated that the seaward extent of the foreshore extends to "the whole of the shore that is from time to time exposed by the receding tide". Counsel for the Claimant accepted that the site of Bibby Stockholm is never exposed by the receding tide and so Ground 2 is not arguable on the basis. Second, Mr Justice Holgate noted that it was not clear to him why he should support any of the Claimant's various suggestions as to how far any accretion extends. Therefore, Ground 2 was held to not be arguable on this basis either (see [30-31]).

Alternatively, the Claimant argued that if the territorial extent of planning control does not include something in the sea which could be described as "a project" for the

purposes of the EIA directive, then the Marleasing principle should be applied to the construction of the definition of "land" in the TCPA 1990. Crucially, however, this point had not been pleaded or raised in the skeleton by the Claimant and the words which the Court was being asked to read into the legislation was also not yet identified. The Claimant further suggested that planning control may be taken to extend to 12 nautical miles from the coast, however Mr Justice Holgate found the basis for this assertion to be "wholly unclear" (see [33-34]).

Mr Justice Holgate held that such arguments could have wide implications going far beyond the circumstances of this case. Therefore, such arguments should not be given permission without "clear identification in the pleadings of the points sought to be pursued with a sufficient statement of the basis for the case being advanced for the court to be able to consider arguability". Further, he held that it is important that those requirements are satisfied so that other parties may have a proper opportunity to respond (see [35]).

Ground 3

Ground 3 was found to be parasitic on Ground 2 and since Mr Justice Holgate held that it was inappropriate to grant permission for Ground 2 to proceed, the same applied for Ground 3.

Ground 4

The Claimant argued that under s.149(1)(c) linked to s.13(5) of the Equality Act 2010 there was a requirement to assess the effects of segregation, namely the segregation of non-British asylum seekers and British non-asylum seekers living in the area, and that the equality impact assessment conducted by the Defendant did not go far enough in addressing this. Mr Justice Holgate concluded that this ground depends upon showing irrationality on the part of the Defendant and, having read the assessments, he was not persuaded that this point was arguable.

Mr Justice Holgate also refused an application to amend the grounds such that, if permission was given for the challenge, then the Claimant can join the Council as the Second Defendant to the claim. He refused the application since he held the Claimant had already brought the claim against the "wrong defendant" (i.e. the Secretary of State) and so it would be inappropriate to allow the amendment.

For the above reasons, permission for judicial review was refused.

Case summary prepared by Chatura Saravanan