Case Name: *Rights Community Action Ltd, R, (On the Application Of) v Secretary of State for Levelling Up, Housing And Communities* [2024] EWHC 359 (Admin) (20 February 2024)

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Commentary:
This was a successful application for judicial review arising from the Inspectors' recommendations following their examination of an Area Action Plan ("the AAP"). The AAP included a draft policy ("Policy OS2") which set out very detailed requirements for achieving net zero-carbon development, and the Inspectors considered that Policy OS2 was unsound: partly their concern was whether the policy approach was justified by the evidence base, and partly they had formed the opinion that the Policy OS2 would be inconsistent with national policy in the form of a written ministerial statement ("the WMS") dating from 2015. The WMS had included wording to the effect that local planning authorities should not set conditions requiring energy performance beyond level 4 of the (now defunct) Code for Sustainable Homes.

The Claimant and the Council disagreed with the Inspectors, although the latter did not appear at the hearing. The claim was brought on three substantive grounds, with two preliminary issues. The first preliminary issue was whether or not the Inspectors' recommendations were a justiciable decision: i.e., whether the recommendations could be the subject of judicial review. The Court's finding on this issue was based on the fact that, at the stage in the local plan process that an Inspector's recommendation to make modifications is published, the local planning authority has only two options: (1) to accept the Inspector's recommendation and adopt the plan with the modifications; or (2) abandon the plan altogether. The Council has no legal ability to adopt the plan in its unmodified form. On behalf of the Secretary of State ("the Defendant") and the developer of the area covered by the AAP ("the Second Interested Party") it was argued that the recommendations were not a "decision" and that there would be no decision to challenge until the AAP had either been adopted or abandoned by the Council. At that stage, it was said, the Council could challenge its own adoption decision. This rather unedifying prospect of the Council challenging its own adoption decision was averted by the judge finding that the Inspectors' recommendations were in fact a decision (given that they led to unavoidable practical and legal consequences for the Council) and could be challenged at the stage that they were published.

The second preliminary issue was standing – in order to bring an action in judicial review, the Claimant must have a sufficient interest in the decision to which the application relates. On behalf of the Defendant and the Second Interested Party, it was submitted that the Claimant (being in this case a non-governmental organisation working on climate change issues) did not have standing, for a variety of reasons. For present purposes it is sufficient to note that the Court found that Claimant did have standing.

The judge having found that the challenge could proceed, the substantive issues were:

1. Whether the Inspectors had misinterpreted the WMS;
2. Whether the Inspectors had failed to deal properly with inconsistencies in their approach to the WMS when compared to the approaches taken by other Inspectors;
3. Whether there was procedural unfairness arising from the alleged failure of the Inspectors to explain their reasons for finding Policy OS2 to be unsound.

Ground 1 turned on the approach to be taken to the WMS in circumstances where it had not (at the date of the hearing) been formally withdrawn, but had been much overtaken by events. The Claimant submitted that the purpose of the WMS had been to confirm that local planning authorities could require higher standards than those required by the Building Regulations for a limited period until certain legislative amendments had been brought into effect, and at the time that had been anticipated in late 2016. Some 9 years after the WMS, however, those amendments still have not been brought into force and in fact the Government indicated in 2021 that it has no intention to do so. The Inspectors had opposed Policy OS2 on the basis that it conflicted with the WMS, but this was based on misinterpretation of the WMS in the light of subsequent events. This ground was therefore successful. It is somewhat puzzling that the Defendant resisted this conclusion – it being the Secretary of State within a Government that had in 2022 confirmed that "*Local authorities have the power to set local energy efficient standards that go beyond the minimum standards set through the Building Regulations*".

Ground 2 related to inconsistency of approach to the WMS. The Claimant relied on two separate Inspectors' reports on plan examinations, in which each had found that the WMS did not restrict the ability of a local planning authority to set demanding targets on energy efficiency. The Defendant and Second Interested Party sought to argue that the Inspectors in those cases were dealing with sets of facts particular to those cases, but the judge disagreed and found that the Inspectors in the instant case had taken an entirely different approach to the WMS. Having already found in favour of the Claimant on ground 1, however, the judge found that ground 2 added nothing to the case.

The third ground concerned what was alleged by the Claimant to be a failure of the Inspectors to explain their concerns about Policy OS2. By the time the Inspectors set out their full reasoning in their report, it was said, it was too late for the Claimant or the Council to make representations. The Claimant was, however, unable to demonstrate that it had been prejudiced by the procedure adopted by the Inspectors, and the judge found that the Council had understood from the hearing sessions the nature of the Inspectors' concerns. Accordingly ground 3 failed.

The WMS has, following the hearing but before the judgment, been withdrawn by the Secretary of State.

For further discussion see Simonicity.

Case summary prepared by Aline Hyde