Monkhill Ltd v Secretary of State for Housing, Communities and Local Government and Waverley DC

Case Comment

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Monkhill Ltd v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 74; [2021] P.T.S.R. 1432; [2021] 1 WLUK 326 (CA (Civ Div))

J.P.L. 1178 The appellant appealed against the order of Holgate J dismissing its application under the Town and Country Planning Act 1990 ("the 1990 Act") s.288 for an order quashing the decision of an inspector appointed by the Secretary of State dismissing the appellant's appeal under s.78 of the 1990 Act against the refusal of planning permission by Waverley BC for a development of housing. Most of the proposed site was in the Surrey Hills Area of Outstanding Natural Beauty ("AONB"). The remainder was within an Area of Great Landscape Value ("AGLV"). The issue on appeal was whether the inspector was wrong to interpret the first sentence of paragraph 172 of the National Planning Policy Framework ("NPPF"), which stated that "great weight should be given to conserving and enhancing landscape and scenic beauty" in an AONB, as a policy whose application was capable of providing "a clear reason for refusing" planning permission under the NPPF para.11(d)i.

The inspector stated that, given his findings regarding the effects on the character and appearance of the area, he considered that applying policies of the NPPF for the AONB provided a clear reason for refusing the proposed development so that the provisions of para.11(d)i disengaged the tilted balance. The planning balance in this case was a straight or flat balance of benefits against harm. The scheme would provide additional housing, including affordable units in an area of need. There would also be some benefits to the local economy and to biodiversity. However, these benefits would be outweighed by the harm to the character and appearance of the area, along with the harm to the AONB which attracted great weight. He found that the planning balance fell against the proposal. The proposal would be contrary to the provisions of the development plan taken as a whole. It would not gain support from the NPPF and there were no material considerations which would indicate that determination of the appeal should be other than in accordance with the development plan. The inspector concluded that the appeal should be dismissed.

Held, dismissing the appeal:

1. The inspector's decision was not flawed by a mistaken or unlawful application of relevant policy. When a question of the proper interpretation of planning policy arose in legal proceedings, one had to remember that the court was not construing a statute or a contract. It was seeking to discern the true, practical meaning of a policy issued by the Government, whose purpose was to bring clarity, consistency and predictability to the operation of the planning system. ***J.P.L. 1179***

2. In considering policies in the revised versions of the NPPF, published in 2018 and 2019, the court would bear in mind that when the Government prepared these policies it was able to take into account the ample case law in which their predecessors—the policies in the original 2012 version of the NPPF—had been the subject of judicial interpretation and comment. This certainly applied to the NPPF's policy for "the presumption in favour of sustainable development", which was reformulated in the 2018 version. This did not mean that the court should adopt a less than objective approach to interpreting new policies or strain the meaning of the words used to give them a different sense from their natural meaning when read in their proper context. The court's role was merely one of interpreting the policy as written, and in context.

3. The crucial question was whether, on its true construction, the policy in the NPPF para.11(d)i included the application of the policy in the first part of the NPPF para.172, because the application of that policy was capable of providing a "clear reason for the refusal of planning permission". The sense of the word "provides" in para.11(d)i was that the application of the policy in question yielded a clear reason for refusal, in the decision-maker's view, as a matter of planning judgment. It was not that the policy itself contained some provision expressed in words one might expect to see in a local planning authority's decision notice.

4. The court did not accept that a policy, when applied, could only provide a "clear reason for refusal" if it included its own self-contained criteria or test, failure of which would be, or would normally be, fatal to the proposal. That was not what the policy in para.11(d)i said and it was not to be inferred from the policy. Nor was there any indication in fn.6 to para.11d)i that this was what the Government intended. Nowhere was it suggested that the footnote included only some parts of the policies to which it referred or that only a policy formulated in a particular way would qualify as relevant for the purposes of para.11(d)i.

5. The policy in the first part of the NPPF para.172, which referred to the concept of "great weight" being given to the conservation and enhancement of landscape and scenic beauty in an AONB, clearly envisaged a balance being struck when it was applied in the making of a planning decision in accordance with the statutory regime under s.70(2) of the 1990 Act and the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") s.38(6). This was plain on a straightforward reading of para.172 in its context, having regard to its obvious purpose.

6. The policy was not actually expressed in terms of an expectation that the decision would be in favour of the protection of the "landscape and scenic beauty" of an AONB, or against harm to that interest. But that, in effect, was the real sense of it, although this was not the same thing as the proposition that no development would be permitted in an AONB. If the effects on the AONB would be slight, so that its highly protected status would not be significantly harmed, that expectation might be overcome. Or it might be overcome if the effects of the development would be greater, but its benefits substantial. This would always depend on the exercise of planning judgment in the circumstances of the individual case. The most important point here was that the requirement in the policy in the first part of para.172 for "great weight" to be given to the conservation and enhancement of landscape and scenic beauty in an AONB did not prevent its application providing a clear reason for the refusal of planning permission. That it could be so applied was plain from the policy's context and purpose.

7. The language of the first part of para.172 could perfectly well found a clear reason for refusal in accordance with para.11(d)i. It embodied the principle that decisions on applications for planning permission, as well as policies in development plans, should work to conserve and enhance landscape and scenic beauty in an AONB, so that in a relevant case, when the policy was applied, a balance would be struck in which appropriate weight would be given to any conflict with that objective, and in striking the balance the decision-maker would have in mind the need to protect the AONB ***J.P.L. 1180*** and to limit the scale and extent of development within it. In doing this, the decision-maker would have to exercise planning judgment. The application of the policy necessarily involved a balancing exercise in which any harmful effects of the proposed development on the AONB were given due weight, having regard to what the policy said, and any benefits of the proposal were set against them, leading to a conclusion, as a matter of planning judgment, on whether there was a clear reason for refusing the development

proposed. If there were no benefits to set against the harm to the AONB, or if there were benefits but they were insufficient to outweigh the harm, the decision-maker might properly conclude that the application of the policy did indeed provide a clear reason for refusing the development proposed.

8. There was nothing at odds with this understanding of the first part of NPPF para.172 in the inspector's relevant conclusions. He discerned the true meaning of the policy, rightly applied it under para.11(d)i, and conducted an impeccable balancing exercise, setting benefits against harm. His conclusions demonstrated a lawful application of the policies in both of those paragraphs in the NPPF, consistent with their correct interpretation and fully in compliance with the statutory requirements for decision-making in s.70(2) of the 1990 Act and s.38(6) of the 2004 Act. Appeal dismissed.

Mr Charles Banner QC and *Mr Matthew Fraser* (Penningtons Manches Cooper LLP) for the appellant.
Mr Richard Moules (Government Legal Department) for the first respondent.

The following judgments were given.

The Senior President of Tribunals

Introduction

1. On many occasions since the National Planning Policy Framework ("the NPPF") was first published by the Government in March 2012, its provisions have had to be considered by the courts. These cases have formed a large part of the work of the Planning Court since it came into being in 2014. Several have come before this court. Two—*Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] UKSC 37; [2017] 1 W.L.R. 1865; [2017] J.P.L. 1084* and *R. (on the application of Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire CC [2020] UKSC 3; [2020] J.P.L. 903* —have reached the Supreme Court. This is another in that series. It invites the court to determine the meaning of the policy relating to development in an Area of Outstanding Natural Beauty ("AONB") in the revised version of the NPPF published in July 2018, and the relationship of that policy to the "presumption in favour of sustainable development".

2. With permission granted by Flaux LJ, as he then was, the appellant, Monkhill Ltd, appeals against the order of Holgate J, dated 24 July 2019, dismissing its application under the Town and Country Planning Act 1990 ("the 1990 Act") s.288 for an order to quash the decision of an inspector appointed by the first respondent, the Secretary of State for Housing, Communities and Local Government, dismissing Monkhill's appeal under s.78 of the 1990 Act against the refusal of planning permission by the second respondent, Waverley BC, for a development of housing on land at Longdene House, Hedgehog Lane in Haslemere. The proposal was to construct up to 29 dwellings in place of several existing buildings on the site, and for the change of use of Longdene House to provide a new dwelling. Most of the site is in the Surrey Hills AONB. The remainder is within an Area of Great Landscape Value ("AGLV"). The inspector's decision, in a decision letter dated 10 January 2019, was a re-determination of the s.78 appeal. The previous decision was quashed in April 2018.

3. Although the version of the NPPF published in July 2018 has now been superseded by a further revised version published in February 2019, the policies we are concerned with were reproduced in the same form, and I shall therefore refer to them in the present tense. ***J.P.L. 1181***

The issue in the appeal

4. Monkhill's single ground of appeal gives rise to one principal issue for us to decide: whether the inspector was wrong to interpret the first sentence of NPPF para.172, which says "great weight should be given to conserving and enhancing landscape and scenic beauty" in an AONB, as a policy whose application is capable of providing "a clear reason for refusing" planning permission under of NPPF para.11(d)i.

NPPF para.11

5. In NPPF Ch.2, "Achieving sustainable development", under the heading "The presumption in favour of sustainable

development", para.11 states in its relevant part:

> 11. "Plans and decisions should apply a presumption in favour of sustainable development. … For decision-taking this means:
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> c) approving development proposals that accord with an up-to-date development plan without delay; or
>
> d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, 7 granting permission unless:
>
> i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed 6 ; or
>
> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

Footnote 6 states:

" 6 The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those listed in paragraph 176) and/or designated Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an [AONB], a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 63); and areas at risk of flooding or coastal change."

Footnote 7 states:

" 7 This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites …"

6. Paragraph 12 acknowledges that "[the] presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision making".

7. The original policy for the "presumption in favour of sustainable development", in para.14 of the 2012 version of the NPPF, was in different terms:

> 14. "At the heart of [the NPPF] is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking. … For decision-taking this means:
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> - approving development proposals that accord with the development plan without delay; and ***J.P.L. 1182***
> - where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
>
> - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> - specific policies in this Framework indicate development should be restricted. 9 "

Footnote 9 stated:

" 9 For example, those policies relating to sites protected under the Birds and Habitats Directives … and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion."

NPPF para.172

8. In NPPF Ch.15, "Conserving and enhancing the natural environment", para.170 states that "[planning] policies and decisions should contribute to and enhance the natural and local environment by … a) protecting and enhancing valued

landscapes … (in a manner commensurate with their statutory status or identified quality in the development plan) …". The relevant statutory provision for Areas of Outstanding Natural Beauty is in the Countryside and Rights of Way Act 2000 s.85(1), which provides that "[in] exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty, a relevant authority shall have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty".

9. NPPF para.172 states:

> 172. "Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to these issues. The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas, and should be given great weight in National Parks and the Broads. The scale and extent of development within these designated areas should be limited. Planning permission should be refused for major development 55 other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest. Consideration of such applications should include an assessment of:
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> a) the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;
>
> b) the cost of, and scope for, developing outside the designated area, or meeting the need for it in some other way; and
>
> c) any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated."

Footnote 55 states:

" 55 For the purposes of paragraphs 172 and 173, whether a proposal is 'major development' is a matter for the decision maker, taking into account its nature, scale and setting, and whether it could have a significant adverse impact on the purposes for which the area has been designated or defined."

10. Paragraph 173 states: ***J.P.L. 1183***

> 173. "Within areas defined as Heritage Coast (and that do not already fall within one of the designated areas mentioned in paragraph 172), planning policies and decisions should be consistent with the special character of the area and the importance of its conservation. Major development within a Heritage Coast is unlikely to be appropriate, unless it is compatible with its special character."

The inspector's decision letter

11. The council's case before the inspector was based on its first reason for refusing planning permission, which was that "the proposal, as a result of the urbanising impact and harm to the landscape character would cause material harm to the intrinsic character, beauty and openness of the Countryside beyond the Green Belt, the AONB and the AGLV".

12. In his decision letter the inspector identified three main issues: first, "the effects of the proposed development on … [the] character and appearance of the area and the AONB"; secondly, its effects on "highway safety"; and thirdly, its effects on the "[supply] of housing land" (para.9). Having summarised the content of the relevant provisions of the development plan, he referred to relevant policies in the NPPF, noting that "[paragraph] 11 of [the NPPF] … sets out how decisions should apply a presumption in favour of sustainable development", and para.172 "provides that great weight should be given to conserving and enhancing landscape and scenic beauty in AONBs which have the highest status of protection in relation to these issues" (para.15).

13. On the first main issue, the inspector found that although the proposal was not for "major development" in the AONB, it "would result in significant overall harm to the character and appearance of the area" (para.31). His assessment led him to this conclusion (in para.33):

> 33. "… I consider that the outline proposal … would be likely to result in a scheme that had a significant adverse

> effect on the character and appearance of the area. This would not conserve or enhance the landscape and scenic beauty of the AONB. The resultant harm, in accordance with [the NPPF], should be given great weight in the planning balance. The proposal would not safeguard the intrinsic character of the countryside and so would be at odds with LPP1 Policy RE1. It would also conflict with LPP1 Policy RE3 because it would not respect the distinctive character of the landscape. LPP1 Policies RE1 and RE3 are consistent with [the NPPF]."

14. On the second main issue he did "not consider that any … harm to highway safety should weigh significantly against the proposal" (para.37).

15. On the third main issue he found that the "housing land supply … would be between 3.37 years and 4.6 years", which he described as a "significant shortfall" (para.41). He concluded that "[given] the housing land supply situation and the degree of shortfall", these additional dwellings, including affordable housing, were "benefits which should be given significant weight in the planning balance" (para.42).

16. In his "Conclusions", taking into account the support it gained from development plan policies favouring the provision of housing in Haslemere, the increase in the supply of affordable housing and the enhancement of biodiversity, but also its conflict with plan policies for the protection of the AONB, the AGLV and the countryside, the inspector concluded that the proposal would be "contrary to the provisions of the development plan taken as a whole". Sub-paragraph (c) in para.11 of the NPPF did not apply, because the proposal did "not accord with an up-to-date development plan" (para.46).

17. His crucial conclusions, culminating in the dismissal of the appeal, followed (in paras 47–51):

> 47. "I have found that [the council] cannot demonstrate a 5 year supply of deliverable housing sites, and so paragraph 11d) is engaged by virtue of Footnote 7. Paragraph 11d) i. refers to ***J.P.L. 1184*** the application of [the] policies [of the NPPF] that protect areas or assets of particular importance. The appellant argues that no such policies are engaged in this case. I disagree. In paragraph 11d) i. the reference to 'protect' has its ordinary meaning to keep safe, defend and guard. It seems to me that that is precisely what paragraph 172 seeks to achieve with respect to landscape and scenic beauty in AONBs. This … policy [of the NPPF] for AONBs states that they have the highest status of protection in relation to conserving and enhancing landscape and scenic beauty, and that within AONBs the scale and extent of development should be limited. The inclusion of AONBs in Footnote 6 brings into play the whole of paragraph 172, not just that part which deals with major development, as the appellant's closing submissions seem to imply.
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> 48. Given my findings about the effects on the character and appearance of the area, as set out above, I consider that applying … policies [of the NPPF] for the AONB here provides a clear reason for refusing the proposed development. So the provisions of paragraph 11 d) i. disengage the tilted balance. Therefore, the planning balance in this case is a straight or flat balance of benefits against harm.
>
> 49. The appeal scheme would provide additional housing in Haslemere, including affordable units, in an area of need. There would also be some benefits to the local economy and to biodiversity. But in my judgment these benefits would be outweighed by the harm to the character and appearance of the area, along with the harm to the AONB which attracts great weight. I find that the planning balance falls against the proposal.
>
> 50. The proposal would be contrary to the provisions of the development plan taken as a whole. It would not gain support from [the NPPF]. There are no material considerations here which indicate that the determination of the appeal should be other than in accordance with the development plan.
>
> 51. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should be dismissed …"

The judgment of Holgate J

18. Holgate J set out (in [39] of his judgment) 15 points on the "meaning and effect" of the NPPF para.11, and a shorter, eight-point "practical summary" (in [45]). The 15 points are common ground in this appeal, and in my view rightly so. They include these propositions:

"…

> 5) Where there are relevant development plan policies, but the most important for determining the application are out-of-date, planning permission should be granted (subject to section 38(6) [of the Planning and Compulsory Purchase Act 2004]) *unless either* limb (i) *or* limb (ii) is satisfied;
> 6) Because paragraph 11(d) states that planning permission should be granted *unless* the requirements of either alternative is met, it follows that if either limb (i) or limb (ii) is satisfied, the presumption in favour of sustainable development ceases to apply. The application of each limb is essentially a matter of planning judgment for the decision-maker;
> 7) Where more than one 'Footnote 6' policy is engaged, limb (i) is satisfied, and the presumption in favour of sustainable development overcome, where the individual or cumulative application of those policies produces a clear reason for refusal; …
> 10) Under limb (i) the test is whether the *application* of one or more 'Footnote 6 policies' provides a clear reason for refusing planning permission. The mere fact that such a policy is *engaged* ***J.P.L. 1185*** is insufficient to satisfy limb (i). Whether or not limb (i) is met depends upon the outcome of *applying* the relevant 'Footnote 6' policies (addressing the issue on paragraph 14 of NPPF 2012 which was … resolved in [*Barwood Strategic Land II LLP v East Staffordshire BC [2017] EWCA Civ 893*] at [22(2)]);
> 11) Limb (i) is applied by taking into account only those factors which fall within the ambit of the relevant 'Footnote 6' policy. Development plan policies and other policies of the NPPF are not to be taken into account in the application of limb (i) (see Footnote 6) …;
> 12) The application of some 'Footnote 6' policies (e.g. Green Belt) requires *all* relevant planning considerations to be weighed in the balance. In those cases because the outcome of that assessment determines whether planning should be granted or refused, there is no justification for applying limb (ii) in addition to limb (i) …;
> 13) In other cases …, the relevant 'Footnote 6 policy' may not require all relevant considerations to be taken into account. For example, paragraph 196 of the NPPF requires the decision-maker to weigh only 'the less than substantial harm' to a heritage asset against the 'public benefits' of the proposal. Where the application of such a policy provides a clear reason for refusing planning permission, it is still necessary for the decision-maker to have regard to all other relevant considerations before determining the application or appeal (s.70(2) of the 1990 Act and s.38(6) of the 2004 Act). But that exercise must be carried out without applying the tilted balance in limb (ii), because the presumption in favour of granting permission has already been disapplied by the outcome of applying limb (i). That is the consequence of the decision-making structure laid down in paragraph 11(d) of the NPPF; …"

19. Rejecting Monkhill's argument that the first part of NPPF para.172 does not qualify under "limb (i)" because it does not state any test for a balancing exercise, and therefore cannot provide "a clear reason for refusing the development proposed", the judge said (in [51]–[53]):

> 51. "It is necessary to read the policy in paragraph 172 as a whole and in context. Paragraph 170 requires planning decisions to protect and enhance valued landscapes in a manner commensurate with their statutory status and any qualities identified in the development plan. Paragraph 172 points out that National Parks, the Broads and AONBs have "the highest status of protection" in relation to the conservation and enhancement of landscapes and scenic beauty. Not surprisingly, therefore, paragraph 172 requires 'great weight' to be given to those matters. The clear and obvious implication is that if a proposal harms these objectives, great weight should be given to the decision-maker's assessment of the nature and degree of harm. The policy increases the weight to be given to that harm.
> 52. Plainly, in a simple case where there would be harm to an AONB but no countervailing benefits, and therefore no balance to be struck between 'pros and cons', the effect of giving great weight to what might otherwise be assessed as a relatively modest degree of harm, might be sufficient as a matter of planning judgment to amount to a reason for refusal of planning permission, when, absent that policy, that might not be the case. But where there are also countervailing benefits, it is self-evident that the issue for the decision-maker is whether those benefits outweigh the harm assessed, the significance of the latter being increased by the requirement to give 'great weight' to it. This connotes a simple planning balance which is so obvious that there is no interpretive or other legal requirement for it to be mentioned expressly in the policy. It is necessarily implicit in the *application* of the policy and a matter of planning ***J.P.L. 1186*** judgment. The 'great weight' to be attached to the assessed harm to an AONB is capable of being outweighed by the benefits of a proposal, so as to overcome what would otherwise be a reason for refusal.
> 53. Interpreted in that straight forward, practical way, the first part of paragraph 172 of the NPPF is capable of sustaining a clear reason for refusal, whether in the context of paragraph 11(d)(i) or, more typically where that provision is not engaged, in the general exercise of development management powers."

20. Holgate J concluded that "the first part of paragraph 172 … qualifies as a policy to be applied under limb (i) of paragraph 11(d) …", and "is also capable of sustaining a freestanding reason for refusal in general development control in AONBs, National Parks and the Broads" ([63]).

Did the inspector misinterpret NPPF para.172?

21. For Monkhill, Mr Charles Banner QC argued that the inspector misunderstood the policy in NPPF para.172, and in particular, that he misinterpreted the policy in the first part of the paragraph by concluding that it could, in principle, satisfy para.11(d)i, thus disapplying the so-called "tilted balance" under para.11(d)ii. The judge was wrong to support the inspector's interpretation of the policy.

22. The main contention advanced by Mr Banner is that a policy that simply specifies a degree of weight to be given to a particular consideration is not capable of providing, in its application, a "clear reason for [refusal]". Merely giving "great weight" to "conserving and enhancing landscape and scenic beauty" in an AONB does not provide a "clear reason for [refusal]". Whether planning permission should be refused requires a balancing of all considerations for and against the proposed development.

23. On Mr Banner's argument, the application of a policy will only be capable of providing a "clear reason for [refusal]" if that policy itself provides that permission should, or should normally, be refused unless certain requirements or criteria are met, or if it provides for its own, self-contained balancing exercise. The first sentence of NPPF para.172 says nothing about the weight to be given to any other considerations, including the benefits of a proposal. Its application is incapable of providing a "clear reason for refusing" planning permission. By contrast, the second part of para.172, which relates specifically to "major development", says that "planning permission should be refused … other than in exceptional circumstances and where it can be demonstrated that the development is in the public interest", and then identifies three matters to be assessed. Apart from the policy in the first part of NPPF para.172, policies referred to in fn.6, though framed in differing terms, are of that nature. The range of the fn.6 policies is so wide, Mr Banner submitted, that it will often be necessary for a decision-maker to consider whether the application of the relevant policy provides a "clear reason for refusing the development proposed". In every such case the conclusion reached will determine whether the "tilted balance" under para.11(d)ii is disapplied.

24. Mr Banner did not criticise the inspector's conclusions (in para.33 of his decision letter) that the proposed development "would not conserve or enhance the landscape and scenic beauty of the AONB" and that the "resultant harm, in accordance with [the NPPF] should be given great weight in the planning balance". But, he submitted, the inspector erred when concluding (in para.48) that the application of para.172 "[provided] a clear reason for refusing the proposed development" under para.11(d)i, instead of applying the "tilted balance" under para.11(d)ii, and giving "great weight" to the conservation and enhancement of the landscape and scenic beauty of the AONB when he did so.

25. Elegantly as those submissions were presented by Mr Banner, I cannot accept them. They do not, in my view, reflect an accurate understanding of the policies we are considering and the way in which those policies are intended to operate. I think Holgate J was right to reject them, for the reasons he gave. ***J.P.L. 1187*** I agree with him that the inspector's decision is not flawed by a mistaken interpretation, or unlawful application, of relevant policy.

26. When a question of the proper interpretation of national planning policy arises in legal proceedings, one must remember that the court is not construing a statute or contract. It is seeking to discern the true, practical meaning of a policy issued by the Government, whose purpose is to bring clarity, consistency and predictability to the operation of the planning system. It is trite that the court does not adopt the same linguistic rigour in construing a planning policy as it does to the construction of a legislative provision or a clause in a contract (see *East Staffordshire BC* at [8] and [9]).

27. In considering the policies in the revised versions of the NPPF, published in July 2018 and February 2019, the court will bear in mind that when the Government prepared those policies it was able to take into account the ample case law in which their predecessors—the policies in the original, 2012 version of the NPPF—had been the subject of judicial interpretation and comment. As Mr Banner's submissions demonstrated, this certainly applies to the NPPF's policy for "the presumption in

favour of sustainable development", which was reformulated in the July 2018 version. At least some of the court's observations on the previous policy seem to have come through (see, for example, *East Staffordshire BC* at [22] and [23]). This does not mean that the court should adopt a less than objective approach to interpreting the new policies, or strain the meaning of the words used to give them a different sense from their natural meaning when read in their proper context. The court's role is merely one of interpreting the policy as written, and in context. Planning policies are meant to be intelligible to a wide audience, not merely to lawyers and other professional people. They should not be subjected to over-interpretation. A straightforward reading of them should always be favoured. Otherwise their true meaning and effect, as intended by the policy-maker, is liable to be lost.

28. The crucial question in this appeal is whether, on its true construction, the policy in the NPPF para.11(d)i includes the application of the policy in the first part of para.172, because the application of that policy is capable of providing a "clear reason for refusing" planning permission. In my opinion, as Holgate J held, it does. The sense of the word "provides" in para.11d)i is that the application of the policy in question yields a clear reason for refusal—in the decision-maker's view, as a matter of planning judgment (see [51]–[53] and [63] of the judgment of Holgate J). It is not that the policy itself contains some provision expressed in words one might expect to see in a local planning authority's decision notice. And I do not accept that a policy, when applied, can only provide a "clear reason for [refusal]" if it includes its own self-contained criteria or test, failure of which will be, or will normally be, fatal to the proposal. That is not what the policy in para.11(d)i says, and it is not to be inferred from the policy. Nor is there any indication in fn.6 that this was what the Government intended. Nowhere is it suggested that the footnote includes only some parts of the policies to which it refers, or that only a policy formulated in a particular way will qualify as relevant for the purposes of para.11(d)i.

29. In my view, as Mr Richard Moules submitted for the Secretary of State, the policy in the first part of para.172, which refers to the concept of "great weight" being given to the conservation and enhancement of landscape and scenic beauty in an AONB, clearly envisages a balance being struck when it is applied in the making of a planning decision in accordance with the statutory regime under s.70(2) of the 1990 Act and s.38(6) of the 2004 Act (see *Hopkins Homes Ltd* at [21] and [75], and *East Staffordshire BC* at [13]). It is, as the judge recognised, a balance between what can properly be seen, on one hand, as a breach of, or conflict with, the policy and, on the other, any countervailing factors. To speak of a breach of the policy when the development would harm the AONB, or of a conflict with the policy in those circumstances, seems entirely realistic.

30. This, in my view, is plain on a straightforward reading of para.172 in its context, having regard to its obvious purpose. The policy is not actually expressed in terms of an expectation that the decision will be in favour of the protection of the "landscape and scenic beauty" of an AONB, or against harm to that ***J.P.L. 1188*** interest. But that, in effect, is the real sense of it—though this, of course, is not the same thing as the proposition that no development will be permitted in an AONB. If the effects on the AONB would be slight, so that its highly protected status would not be significantly harmed, the expectation might—I emphasise "might"—be overcome. Or it might be overcome if the effects of the development would be greater, but its benefits substantial. This will always depend on the exercise of planning judgment in the circumstances of the individual case.

31. In *Bayliss v Secretary of State for Communities and Local Government [2014] EWCA Civ 347* at [18] of his judgment (cited by Ouseley J in *Franks v Secretary of State for Communities and Local Government [2015] EWHC 3690 (Admin)* at [25]), Sir David Keene said this of the concept of "great weight" in the equivalent policy in the first sentence of para.115 of the original version of the NPPF, which was in almost exactly the same terms as the first sentence of the para.172 of the July 2018 version:

> 18. "… [That] national policy guidance, very brief in nature on this point, has to be interpreted in the light of the obvious point that the effect of a proposal on an AONB will itself vary: it will vary from case to case; it may be trivial, it may be substantial, it may be major. The decision maker is entitled to attach different weights to this factor depending upon the degree of harmful impact anticipated. Indeed, in my view it would be irrational to do otherwise. The adjective 'great' in the term 'great weight' therefore does not take one very far …"

32. I agree. The most important point here, however, as Holgate J recognised (in [53] of his judgment), is that the requirement in the policy in the first part of para.172 for "great weight" be given to the conservation and enhancement of landscape and scenic beauty in an AONB does not prevent its application providing a clear reason for the refusal of planning permission.

33. That it can be so applied is plain from the policy's context and purpose. Its context is a chapter of the NPPF whose objectives, as stated in the chapter heading, are "Conserving and enhancing the natural environment". The central aim of the policies in that chapter, stated in para.170, is "protecting and enhancing valued landscapes", including those in AONBs. This is consistent with the statutory obligation in the Countryside and Rights of Way Act s.85(1) to "have regard to the purpose of conserving and enhancing the natural beauty of the [AONB]". Paragraph 172 itself is in terms that stress the imperative of protection. Emphasis is placed on "conserving", as well as "enhancing", an AONB's landscape and scenic beauty. AONBs are described there as having "the highest status of protection in relation to these issues", and the "scale and extent of development" within them and the other designated areas, the policy says, "should be limited".

34. I accept Mr Moules' submission that the language of the first part of para.172, read in that context and in the light of that purpose, can perfectly well found a "clear reason for [refusal]", in accordance with para.11(d)i. It embodies the principle that decisions on applications for planning permission, as well as policies in development plans, should work to "[conserve and enhance] landscape and scenic beauty" in AONBs, so that in a relevant case, when the policy is applied, a balance will be struck in which appropriate weight is given to any conflict with that objective, and in striking the balance the decision-maker will have in mind the need to protect the AONB and to limit the scale and extent of development within it. In doing this, the decision-maker will have to exercise planning judgment. The application of the policy necessarily involves a balancing exercise in which any harmful effects of the proposed development on the AONB are given due weight, having regard to what the policy says, and any benefits of the proposal are set against them, leading to a conclusion, as a matter of planning judgment, on whether there is a "clear reason for refusing the development proposed". If there are no benefits to set against the harm to the AONB, or if there are benefits but they are insufficient to outweigh the harm, the decision-maker might properly conclude that the "application" of the policy does indeed provide "a clear reason for refusing the development proposed". ***J.P.L. 1189***

35. I see nothing at odds with this understanding of the first part of para.172 in the inspector's relevant conclusions here. He discerned the true meaning of the policy, rightly applied it under para.11(d)i, and conducted an impeccable balancing exercise, setting benefit against harm. His conclusions demonstrate a lawful application of the policies in both of those passages of the NPPF, consistent with their correct interpretation, and fully in compliance with the statutory requirements for decision-making in s.70(2) of the 1990 Act and s.38(6) of the 2004 Act. And that is enough to dispose of Monkhill's appeal.

36. If the interpretation urged on us by Mr Banner were right, it would, in my view, produce a result incompatible with the objectives of paras 11 and 172, read together. As Mr Moules submitted, it would prevent the policy in para.172 being given its full potential effect under the policy in para.11(d). Here again I agree with the judge's analysis.

37. The "tilted balance", or positive presumption, under para.11(d)ii is not available in every case where there are "no relevant policies" of the development plan or the "most important policies" in the plan are "out-of-date". It is deliberately disapplied in the situation provided for in para.11(d)i, where policies of the NPPF that "protect areas or assets of particular importance"—the fn.6 policies—are engaged, applied and found to justify planning permission being withheld (see the first instance judgment in *Forest of Dean DC v Secretary of State for Communities and Local Government [2016] EWHC 421 (Admin); [2016] P.T.S.R. 1031* at [28]). Otherwise, the "tilted balance" could work against the protection afforded by those policies and undermine them. This would not only be hostile to the evident objective of the policy in paragraph 11(d)i. It would also be inimical to the explicit strategy of the NPPF itself for "sustainable development".

38. Under paragraph 11(d)i, it is not enough that a footnote 6 policy, restrictive of development, is engaged. The policy in question must actually be applied (see *R. (on the application of Watermead Parish Council) v Aylesbury Vale DC [2018] P.T.S.R. 43 at [45]; [2016] J.P.L. 918*, and *East Staffordshire BC* at [22(2)]), and its application must provide a "clear reason for [refusal]". Only then will the "tilted balance" under para.11(d)ii be disapplied by the operation of para.11(d)i. If the policy in para.11(d)i is to be operated effectively, it is therefore essential that policies referred to in fn.6 are not artificially excluded in the absence of clear words with that effect.

39. That, however, would seem to be a consequence of Mr Banner's suggested interpretation of the first part of para.172. Mr Banner's construction would create a distinction with artificial consequences between proposals for "major development" in an AONB, judged by the approach referred to in fn.55, and proposals not in that category. The consequence would be that proposals for less than "major development" could only be subject to the "tilted balance" under para.11(d)ii. The application

of the "tilted balance" under para.11(d)ii could depend on the decision-maker's finding on the question of whether the proposal was or was not for "major development". Despite AONBs having the "highest status of protection" under the policies in paras 170 and 172, proposed development in an AONB that was not "major", and regardless of the level of harm, would not be subject to the exercise required under para.11(d)i. Such proposals would enjoy the application of the positive presumption under para.11(d)ii. To this extent, the protection given to AONBs by government policy would be weakened.

40. As Mr Moules submitted, it makes no sense to read para.172 as confining the possible disapplication of the "tilted balance" under para.11(d)ii to "major development". The range in scale of development that might be proposed in an AONB runs from the very small to the very large. The interpretation of the policy in para.172 that I believe is correct allows for the policy it contains to be applied realistically to the whole range of proposals, giving suitable weight to any harm to the AONB on the facts of the case in hand. It avoids a stark divide in policy treatment between two similar proposals on either side of the line—wherever it happens to be—between "major" and non-"major", one gaining the application of the "tilted balance" under para.11(d)ii, the other not. ***J.P.L. 1190***

41. Though there are differences of degree and language, there is no material distinction between the protective nature of the policy in the first part of para.172 and the other policies in the NPPF whose application, Mr Banner accepted, is capable of providing a "clear reason for [refusal]" so as to come within the scope of para.11(d)i. I do not accept that a material distinction arises from the absence of a clearly stated criterion or requirement against which a proposal must be judged. And there is no other material difference, in principle, between the various policies gathered in fn.6. What they have in common is that they are all policies of protection for selected interests of "particular importance", even though, individually, they differ in the strength of that protection. There is no single formula used in them all.

42. For example, the policy in the second part of para.172, relating to "major development", states the approach to such proposals, which is that planning permission for them should be "refused … other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest". It identifies three matters to be assessed in the consideration of such a proposal. This policy indicates the need for the balance to be struck differently, as a matter of planning judgment, when the proposal is for "major development". It requires the decision-maker to strike the balance in that way to find whether it produces a "clear reason for refusing" planning permission. But it does not state, or imply, that the application of the first part of the policy is not, in itself, capable of doing that in a case where the proposal is for development other than "major development".

43. A similar exercise to that entailed in the first part of para.172 is also implicit in the first sentence of para.173. The policy requirement here, for decision-making, is that the decision "should be consistent with the special character of the area [of Heritage Coast] and the importance of its conservation". This too allows for the striking of a balance, the outcome of which may be that a clear reason for the refusal of planning permission emerges. A proposal may be, or may not, "consistent with the special character of the area and the importance of its conservation". If it is not, the inconsistency may be outweighed when the policy is applied in an individual case.

44. The second sentence of para.173 concerns "[major] development within a Heritage Coast", which is said to be "unlikely to be appropriate, unless it is compatible with its special character". Here too, as in para.172, there is a specific approach for "major development", which brings this part of the policy within the scope of para.11(d)i. But this does not prevent the policy for proposals other than "major development", in the first sentence of para.173, from coming within para.11(d)i as well. There is no such suggestion in the words of para.173, nor is it a necessary inference from them. In both paras 172 and 173, and for both "major development" and development that is not "major development", there is a steer for the decision-maker on the approach to take. As one might expect, the policy in each of these two paragraphs is in stronger terms for "major development". But the protection expressed in it also extends to development that is not "major". In both paragraphs the policies of protection qualify, in full, within fn.6 and para.11(d)i.

45. Likewise in my view, para.196, which says that "[where] a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal …", falls within the reach of para.11(d)i. This policy must be read together with the policy in para.194 that "[any] harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification". Like paras 172 and 173, it allows for an appropriate balancing exercise to be undertaken. It is inherent in the policy that if the harm to the heritage asset is not outweighed there may be a "clear reason"

for refusing planning permission. Here again, the policy does not prescribe the outcome of the balancing exercise in a particular case. That is for the decision-maker to resolve by applying the policy appropriately, in accordance with the relevant principles.

46. Similar points can be made about the policies for development in the Green Belt, in paras 143–145. Paragraph 143 contains the long-established policy that "[inappropriate] development" in the Green Belt "should not be approved except in very special circumstances"; and the second sentence in para.144, the ***J.P.L. 1191*** familiar concept that "['very] special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations". These policies would appear to meet Mr Banner's suggested qualification for inclusion in the scope of para.11(d)i. But the first sentence of para.144, which says that "[when] considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt", would seem not to qualify because it is simply an instruction on weight. As Mr Moules pointed out, if this were so, a proposal for development that was not "inappropriate"—because, for example, it fell within one of the exceptions in para.145—might only be dealt with in the "tilted balance" under para.11(d)ii, regardless of the "substantial weight" that government policy requires to be given to any harm to the Green Belt.

47. Finally, Mr Banner sought support for his argument in the "pedigree" of para.11(d)i. He drew our attention to the Government's consultation document on the proposed revision of the NPPF, published in March 2018. The new policy, he contended, was clearly a deliberate change from the formulation in the NPPF para.14 as originally published, which referred to development being "restricted", not "refused" (see the first instance judgments in *Telford & Wrekin BC v Secretary of State for Communities and Local Government [2016] EWHC 3073 (Admin)* at [36] to [38] and *Forest of Dean DC* at [25]–[29]). The policy in the first part of para.172 is not even in terms suggesting development should, in principle, be "restricted", let alone "refused"; it merely indicates the degree of weight to be given to one particular factor.

48. I do not find that submission persuasive. It does not confront the task of interpretation with which the court is faced on the current version of the NPPF. It does not undo the interpretation of the first part of para.172 as a policy whose "application" under para.11d)i, in the way I have described, is capable of providing a "clear reason for refusing" planning permission. The fact that the policy does not in its own terms articulate that "clear reason for [refusal]" does not disqualify it as a relevant policy under para.11(d)i.

Conclusion
49. For the reasons I have given, I would dismiss the appeal.

Lady Justice Andrews
50. I agree.

Sir Gary Hickinbottom
51. I also agree.

