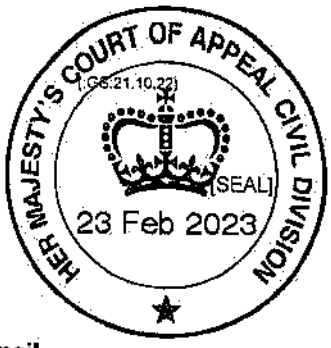
PTA Template 269E1 - OCT16 – JR (Admin)

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: CA-2022-002339



The King, on the application of

R (Monkton and Somerford Home Farm Partnership) **–v–** **Staffordshire County Council** CA-2022-002339

ORDER made by the Rt. Hon. Lord Justice Warby

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal, against the refusal of the High Court to grant permission to apply for judicial review and an application for interim relief prohibiting reconsideration of the decision under challenge.

Decision:

Applications refused.

Permission to appeal: Refused

OR

Permission to apply for judicial review: N/A

Where permission to apply for judicial review is granted, the application should be returned to the Administrative Court ☐

OR

There are special reasons (set out below) why the application should be retained in the Court of Appeal ☐

Background

1. On 16 July 2021, a committee of the respondent council considered an application to modify the Definitive Map and Statement of Public Rights of Way ("the DMS") for the District of South Staffordshire, pursuant to the Wildlife and Countryside Act 1981 ("the 1981 Act"). They made a resolution to order modification of the map ("the Resolution") on the basis that the evidence about use prior to 1954 showed that a right of way which was not shown in DMS "subsists or is reasonably alleged to subsist".

2. The appellants applied for judicial review of the Resolution contending (among other things) that it involved a plain error of law in the light of an order made by the Court of Quarter Sessions on 5 November 1965 ("the 1965 Order") that, as of 1954, no public right of way subsisted over part of the route that is now proposed. The appellants' case was that by virtue of s 31 of the National Parks and Access to the Countryside Act 1949 ("the 1949 Act") the 1965 Order was legally conclusive. That is because it created a right that could not be abrogated in the light of s 16 of the Interpretation Act 1978 ("The 1978 Act"). The respondent contended that on its true construction the 1981 Act evinced an intention to override any binding effect of the 1965 Order.

3. After a rolled-up hearing Lang J refused permission for judicial review on two main grounds: (1) The Resolution is only the first step in a much longer statutory process, during which the appellants would have several opportunities to make their case. (2) In all the circumstances the making of the Resolution did not involve a "serious and obvious error which gives rise to a compelling need to intervene by way of judicial review" in the meantime.

4. The appellants now seek permission to appeal contending that (1) contrary to the judge's view the council's resolution was clearly and seriously erroneous and this gave rise to a compelling reason for the court to intervene (2) the proposed appeal raises an important point of principle of general public interest about the status of orders made under the 1949 Act. The appellants seek interim relief against reconsideration of the Resolution in light of the evidence uncovered during these JR proceedings.

Reasons

5. As a rule, Court intervention at such an early stage of a statutory process of this kind is inappropriate. The statutory scheme is such that a party complaining of a decision such as this Resolution has several opportunities to put their case without resorting to litigation. Those alternative remedies may succeed in which case the judicial review process will have been unnecessary. The ordinary and unobjectionable course would be to refuse permission for judicial review on these grounds.

6. The appellants' case before the judge therefore turned essentially on the argument that the Resolution involved such an obvious and egregious error of law that early judicial intervention was essential despite these points. The Judge was not arguably wrong to reject that argument.

7. First, the evidence about the 1965 Order was thin and there remains factual uncertainty surrounding its precise nature and status. It remains possible for instance that it was appealed or amended. Judicial review is not apt to resolve such uncertainties. The statutory process may do so. Secondly, the impact of the 1965 Order on the proposed route remains to be identified. The alignment of the proposed route does not need to be plotted with precision at this stage of the process: *R (Roxlena Ltd) v Cumbria CC & Anor* [2019] EWCA Civ 1639. The route ultimately identified may not be one that is affected by the 1965 Order. Thirdly, even if the 1965 Order does affect the route, there are plausible arguments for and against the proposition that an order under s 31 of the 1949 Act retains conclusive effect notwithstanding the repeal of that section and the commencement of the 1981 Act. There is no authority on the point and the answer is not self-evident or obvious on the face of the legislation.

8. For these reasons, an appeal on the merits would have no realistic prospect of success. There is no other compelling reason to hear an appeal on the point of law. It is far from clear that a decision on the point would have an important practical impact on other cases. The absence of any decision on the issue in the last 40 years would suggest otherwise. If the point of law does not turn out to be academic in this case it can be raised later after the inquiry and on a sound factual basis, rather than, as here, prematurely.

9. In the light of these conclusions there is no good or sufficient reason to restrain the respondent from re-making the decision. The interests of good administration suggest that this is the appropriate course of action.

Where permission has been granted, or the application adjourned, any directions to the parties (including, if appropriate, any abridgement of the 35 day time limit for filing evidence provided for in CPR 54.14)

Signed:
Date: 22 February 2023
BY THE COURT

Notes

(1) Rule 52.6(1) provides that permission to appeal may be given only where –
   a) the Court considers that the appeal would have a real prospect of success; or
   b) there is some other compelling reason why the appeal should be heard.

(2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.

(3) Rule 52.15 provides that, in granting permission, the Court of Appeal may grant permission to appeal or permission to apply for judicial review. Where the Court grants permission to apply for judicial review, the Court may direct that the matter be retained by the Court of Appeal or returned to the Administrative Court.

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