



23 May 2024

**R (Parkes) v Secretary of State for the Home Department [2024] EWHC 1253
(Admin)**

Summary

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are publicly available. A copy of the judgment as handed down can be obtained after 10.30 am on 23 May 2024 from the following websites:

- <https://www.judiciary.uk/judgments/>
- <https://caselaw.nationalarchives.gov.uk/>

Mr Justice Holgate, sitting in the High Court, today handed down judgment in the application for judicial review brought by Ms. Carralyn Parkes, a local resident of Portland.

Introduction

The Bibby Stockholm, a barge, has been hired by the Home Office and moored in Portland Harbour for the purpose of accommodating asylum seekers. It is moored adjacent to a “finger” pier above a part of the sea bed which always lies below the low water mark (“LWM”) and is never exposed by the ebb and flow of the tide.

Ms. Parkes contends that the area of the seabed above which the barge is moored forms part of the “land” that is subject to planning control under the Town and Country Planning Act 1990 (“TCPA 1990”). She contends that the mooring of the barge amounted to “development” - a material change in the use of that land – and so required planning permission. On that basis, Ms. Parkes says that it is open to the local planning authority Dorset Council (“DC”) to consider enforcement action. She asked the court to grant a declaration that the Council had erred in law when it decided that the area occupied by the barge falls outside planning control. DC and the second and third interested parties, the Secretary of State for the Home Department and the Secretary of State for Levelling Up, Housing and Communities, contended that planning control under the TCPA 1990 does not extend below the low water mark (“LWM”).

Grounds of challenge

The claimant relied upon five grounds of challenge:

- (1) The boundaries of DC encompass Portland Harbour;
- (2) By virtue of being moored indefinitely in Portland Harbour, the Bibby Stockholm has become an “accretion from the sea” within the meaning of s.72 of the Local Government Act 1972, and therefore falls within planning control;

- (3) Even if the geographical extent of the administrative area of DC does not extend further into the harbour than the finger pier, applying a purposive interpretation of the legislation, DC's enforcement powers apply to the Bibby Stockholm;
- (4) DC has erred by failing to consider taking enforcement action in respect of any breach of planning control through a material change in the use of the quay, the finger pier and access road;
- (5) If on an ordinary interpretation of the legislation, DC would not have power to take enforcement action in relation to the area in which the Bibby Stockholm is moored, it nevertheless does have such a power by interpreting the legislation in accordance with the *Marleasing* principle, to give effect to the requirement of the Environmental Impact Assessment ("EIA") Directive (Directive 2011/92/EU) that there be an assessment of the likely significant effects of relevant projects on the environment (see *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89); [1992] 1 CMLR 305).

Ground (1)

The Court found that neither the area of the seabed above which the barge was moored, nor Portland inner harbour, nor the "internal waters" in Weymouth Bay, form part of the area of DC and so ground (1) failed [158]. In any event, even if any of those areas did form part of the Council's area, that would be insufficient to make the site of the barge subject to planning control; it would also have to constitute "land" under s.336(1) of the TCPA 1990 [159].

Under parallel legislation in Scotland, planning control does not extend below the mean LWM (*Argyll and Bute District Council v Secretary of State for Scotland* (1976) S.C. 248). The Inner House of the Court of Session decided that the seabed below the LWM was excluded from planning control by necessary implication [170]. Parliament had found it necessary in the Town and Country Planning (Scotland) Act 1972 to include a provision in Scottish planning legislation which treated "tidal lands" (the area between the high and low water marks) as being subject to planning control. Therefore, the sea bed below the LWM was not [171].

The statutory purposes of planning legislation and the system of development control are the same in both England and Wales and in Scotland. Parliament has never indicated that the geographical extent of the planning system is different in the two jurisdictions.

The "tidal lands" provision is not peculiar to Scotland. It was included in both the English and Scottish versions of the 1932 Planning Acts, as well as English planning legislation passed in 1947, 1962 and 1971. The mere fact that it was not repeated in the English Act of 1990 does not indicate that Parliament intended at that stage to widen the geographical scope of the planning system. If Parliament had meant to do this, it would have said so in clear and express terms. It did not.

The Court went on to address other reasons as to why the area of the seabed below the Bibby Stockholm does not constitute "land" within the meaning of s.336(1) of the 1990 Act [178]-[195].

Ground (2)

Ms. Parkes submitted that the expression "accretion from the sea" includes accretions of land *into* the sea, and so the finger pier should be considered an accretion and therefore part of the area of Dorset. The barge should also be treated as an accretion as it is to be moored in Portland Harbour for up to 18 months, which is more than a temporary period [77].

While it was common ground that the finger pier is an accretion from the sea, the argument that the barge is too was found to be unsound by the Court [154]. A barge or ship is a chattel capable of being moved. Even if a barge is moored in one position for substantial period of

time it remains a chattel. It does not become land or an accretion to land. There is nothing in the Local Government Act 1972 to suggest that the extent of a local government area can be influenced by the positioning of a chattel over land. Accordingly, ground (2) failed [157].

Ground (3)

The claimant submitted that enforcement action can still apply to the area of the Bibby Stockholm as the purpose of the TCPA 1990 is to control the use of land in the public interest. That includes controlling activities beyond the boundary of a local planning authority's area that have a significant impact within that area. But the Court decided that an LPA does not have power to serve an enforcement notice in relation to development outside its area. That would be contrary to the statutory scheme and clear case law [200]. In addition, the language used by Parliament confines planning control to "land" including the foreshore (ie. tidal lands), but does not include the sea bed. A purposive statutory construction cannot contradict the clear language of the legislation [201]. Therefore, Ground (3) was rejected.

Ground (4)

The Court found no merit in the complaint that DC had failed to consider taking enforcement action. The council said that it is considering the issue – it has not refused to do so [203]. Additionally, an allegation that a public body has failed to take action depends upon there being a corresponding obligation or duty to take that action. The claimant did not identify any such obligation, or timescale within which the Council had to take action, and so did not advance any proper legal basis for claiming that the DC had acted unlawfully.

Ground (5)

Ms. Parkes submitted that the TCPA 1990 fails to give effect to Article 2(1) of the EIA Directive that "projects" located within England and Wales but beyond the LWM which are likely to have significant effects on the environment "are made subject to a requirement for development consent" and environmental impact assessment. However, the Court found that the positioning of the Bibby Stockholm in Portland Harbour and its use to accommodate asylum seekers, even for 18 months or so, does not qualify as a project for the purposes of the EIA Directive [216]. In addition, even if the Court agreed with the premise of Ground (5), *Marleasing* cannot be used to read words into legislation that are at odds with the fundamental principles of the statute, or which go against its grain [219].

Conclusion

Grounds (2) to (5) are unarguable. While ground (1) is arguable, it fails on the merits as explained above. The overall conclusion is that the Bibby Stockholm lies outside the area which is subject to planning control [222]. The claim for judicial review is dismissed.