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Case No: CO/6767/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2012

Before:

MR JUSTICE HADDON-CAVE

- -

Between:

HARROW COMMUNITY SUPPORT LIMITED	**Claimant**
- and -	
THE SECRETARY OF STATE FOR DEFENCE	**Defendant**

- -
- -

Marc Willers and Owen Greenhall (instructed by **Howe and Co**) for the **Claimant**
David Forsdick and Jacqueline Lean (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing date: 9 July 2012

- -

APPROVED JUDGMENT

Mr Justice Haddon-Cave:

Introduction

The 2012 Olympics

1. London has the privilege of hosting the 2012 Olympic Games. A magnificent Olympic Park has been constructed in Stratford to the east of the City. The Olympic Park includes the Olympic Stadium and other major sports venues as well as the Olympic Village which will house thousands of Olympic athletes from all round the world. The Games are due to commence in just under three weeks time, following the opening ceremony on Friday 27th July 2012. Hundreds of thousands of spectators are expected to attend the events daily over the period of the Olympics from 27th July to 12th August and the Para-Olympics from 29th August to 9th September 2012. The eyes of world will be focussed on the Olympic Park.

2. A wide variety of security measures for the 2012 Olympics have been planned. This includes an Air Security Plan. This case concerns a challenge to a decision by the Secretary of State for Defence to locate a Ground Based Air Defence ("GBAD") system and military personnel (part of the Air Security Plan) on the roof of a residential tower block in Leytonstone for the duration of the 2012 Olympics.

3. The urgency of this matter arises because the Air Security Plan needs to be deployed and operational before the Olympic Village opens in just 5 days time, on Sunday 15th July, to begin to receive the athletes.

4. The claim for Judicial Review was served and filed on 28th June 2012. Mr Justice Burton immediately ordered an *inter partes* 'rolled-up' hearing to be listed before 13th July 2012.

5. The parties appeared before me yesterday, on Monday 9th July, with Counsel and argued the matter fully. Given the urgency, I am delivering my decision and judgment as soon as possible.

The Claimant

6. The Claimant is the Harrow Community Support Group. This is a residents' association formed by residents of Fred Wigg Tower ("FWT") in the London Borough of Waltham Forest on 4th May for the purposes of "*advocating and protecting the rights of the residents of FWT*".

7. FWT is a 15-storey residential block of council flats situated on Montague Road in Leytonstone, owned by the London Borough of Waltham Forest. It is one of two identical blocks which enjoys fine panoramic views over Wanstead Flats behind and over the Olympic Park in front. It comprises 117 flats of which 108 are occupied. The residents in 61 of the 108 occupied flats signed a petition which read "*We, the undersigned residents of FWT, Montague Road, Leytonstone E11 3 EP, do not want*

explosive missile systems placed on the roof of our home". The petition contained 86 signatures.

The claim

8. The Claimant's Claim Form put the challenge to the Secretary of State's decision on three grounds:

    (1) a failure to carry out an adequate consultation process;

    (2) a failure to comply with the public sector equality duty;

    (3) a breach of Article 8 and/or Article 1 of the First Protocol (A1P1) of the European Convention on Human Rights (the 'Convention').

9. The Claim Form sought by way of final relief: (1) an injunction prohibiting the use of FWT for the stationing of the GBAD missile system prior to (a) completion of a fair and proper consultation process, which requires the Defendant to consult with the Claimants and other residents of the FWT, and (b) completion of a proper Equality Impact Assessment which includes consideration of the needs of disabled residents of the FWT; and (2) a declaration that the Defendant's decision to base missiles on the roof of the FWT was unlawful.

10. The Claim Form recognised that, if the claim was successful, the Secretary of State would have to reconsider the Air Security Plan. The Claimant's position was modified somewhat in argument.

Claimants' Witness statements

11. The claim was supported by witness statements from two residents. Ms Patricia Dinnell explained she had been a resident of FWT for 27 years and raised her family there. She explained that she was a founder member of the Residents Association which was originally set up following two fires which occurred in December 2011, one of which resulted in the entire evacuation of the residents. To this extent it seemed that some of the residents had been sensitised to risks in their block. She also explained how she was suffered from long term disability, including an over active thyroid, which affected her joints and muscles. In paragraph 6 of her statement she said:

> *"I am very worried and very anxious about the fact that the Defendant is going to put high explosive missiles on the top of the FWT. This worry and anxiety has caused me a lot of concern and I feel that it is not right that such missiles should be placed on the top of the flats where I live. We, the residents, were not even consulted about the plans or allowed to express our views in any meaningful process."*

12. The second witness statement was from Ms Sonia McKenzie who has lived at FWT for 20 years. She explained how she suffered sometimes from severe back pains which on occasion made her immobile and unable to get out of bed. She said that if this happened during an emergency then she might not be able to evacuate swiftly. She too said was shocked and worried about the Secretary of State's plan to site *"explosive missiles"* on the roof and *"simply could not believe that we, the residents, had not been consulted on the matter and our voices seem not to matter"*.

13. A further particular concern was expressed by the Claimant that, as a result of the location of the GBAD system on their roof, FWT would become a target for terrorism.

14. It is immediately apparent that Ms Dinnell and Ms McKenzie and other residents are under something of a misapprehension both as to the nature of the equipment being deployed (which is not *"high explosive")* and as to the lack of attendant risks which the deployment will bring (see further below).

Claimant's alternative arguments

15. Mr Marc Willers, who appeared with Mr Owen Greenhall of Counsel, for the Claimant, did not challenge the need for an Air Security Plan or its construct. He recognised that his case essentially turned on his Article 8 argument rather than Article 1 of Protocol 1 (A1P1). He also recognised that the timescale was such that his claim to require the Secretary of State to consult before deployment was no longer practical. He put his case on two alternative basis:

    (1) First, the Secretary of State should order the Royal Engineers immediately to build a stand-alone tower or gantry somewhere on Wanstead Flats where there was plenty of space.

    (2) Second, in the alternative, hotel accommodation should be made available to those residents who objected to living below the GBAD for the duration.

The Secretary of State's Response

16. Mr David Forsdick, who appeared with Ms Jacqueline Lean of Counsel, for the Secretary of State for Defence, submitted in response:

    (1) First, in the circumstances here pertaining to national security, operational deployment and the exercise of the Royal Prerogative to defend the State and its citizens and lawful visitors against threats, there was no duty on the Secretary of State to consult the residents of FWT or anyone else.

    (2) Second, the Secretary of State did in fact carry out an Equality and Diversity Impact Assessment before coming to his decision.

    (3) Third, whilst Article 8 Rights were potentially engaged (and the matter was justiciable), there was no breach of Article 8 (or A1P1) because (a) interference with the residents' enjoyment of their homes would be minimal, (b) it was 'in accordance with law', (c) it was manifestly proportionate in all the circumstances, in particular given the risks and the wide margin of appreciation accorded in this

arena of security and the exercise of the Royal Prerogative, and (d) Article 8 rights were, in fact, taken into account during the decision making process, which was made at the very highest levels.

(4) Fourth, in any event, the Court should exercise its discretion to refuse the application because of delay in bringing it. The decision to deploy the GBAD system on FWT was notified to the residents on 27th April 2012, but the application was not filed until 2 months later and 1 month after the Claimants were warned than any challenge must be made *"extremely promptly"* given the imminence of the Olympic Games and the need for deployment.

17. As regards the alternative cases put forward by the Claimant, Mr Forsdick submitted:

(1) First, the construction of a stand-alone tower or a 'gantry' to house a GBAD had been dismissed at a high level as obviously impractical.

(2) Second, the claim for relocation to a hotel presupposed (a) there was a credible threat (which there was not), (b) there was more than negligible interference with Article 8 or A1P1 rights (which there was not) and (c) the only legitimate response of the State was relocation (which was not correct since the response of the State to the threat was proportionate).

Witness Statement from Joint Commander UK

18. The Court has had the benefit of a full statement from General Parker, the Standing Joint Commander (UK) at the Ministry of Defence ("MOD") responsible to the Chief of the Defence Staff, Sir David Richards, for the provision of Defence support to the Civilian Authorities tasked with delivering the military contribution to the safety of the Olympic and Para-Olympic Games in support of the Home Office and Police.

19. General Parker explained in his statement that, at the request of the Home Secretary, who is responsible on behalf of the United Kingdom for the safety and security of the Olympic and Para-Olympic Games, Air Command in the MOD has formulated an Air Security Plan to protect the Olympic Park from air attack. The Plan is necessarily 'multi-layered' to ensure that the Olympic Park is protected by concentric lines of defence. This will include the following: (a) temporarily restricted airspace over London for the period of the Games to be in place for the opening of the Olympic Village (mid July); (b) Typhoon fighter jets operating from RAF Northolt; (c) Helicopters operating from HMS OCEAN moored on the Thames at Greenwich and elsewhere; (d) a network of air observers and radars; (e) four Rapiers sites (Blackheath, Oxleas Meadows, Barn Hill, William Girling Reservoir) providing the first part of the Ground Based Air Defence ("GBAD") system in a ring within 7-14 km of the Park; and (f) two High Velocity Missile ("HVM") sites overlooking the Park and covering the airspace above and around it forming the inner part of the GBAD system.

The Background Facts

The air defences for the 2012 Olympics

20. The following background facts are clear from the evidence before me and I find as follows:

(1) It is clearly necessary to protect the Olympic Park from potential terrorist attack, both from the air and ground. Previous Olympics have similarly had to be protected (particularly since 9/11). The 2012 Olympic are potentially a *"major target"* (as David Anderson QC, the independent reviewer of terrorist legislation, was reported as pointing out in the press only a couple of days ago). It is worth noting, however, that the threat state in London remains only at 'substantial' where it has been for much of the past decade (rather than 'severe' or 'critical') as emphasised by the Treasury Solicitors in a letter to the Claimant's solicitors dated 5 July 2012 which was specifically approved by the Head of Counter-Terrorism, Dr Campbell McCafferty CBE.

(2) The Air Security Plan, as described by General Parker (without disclosing valuable operational information), necessarily has to be multi-layered so as to ensure that the Olympic Park is protected by a number of inter linked lines of defence broadly consisting: (1) an outer layer based on fighter aircraft (based at RAF Northolt); (2) a middle layer consisting air observers and attack helicopters (including those based on HMS Ocean); and (3) an inner layer formed by ground based missiles – the GBAD.

(3) The GBAD consists of two parts: the Rapier sites which provide a ring of ground based missile defence at 7-14 km from the Olympic Park and two HVM sites within that ring close to and overlooking the Olympic Park. The GBAD arrangements are designed as an integrated whole providing complete surveillance and 360 degree coverage of the airspace over and around the Park. The two HVM systems are an essential part of this package as a 'last resort' measure in the unlikely event of any hostile air attack and the extremely unlikely event of any hostile aircraft being able to penetrate the outer layers of the GBAD.

(4) In 2011 surveys were conducted to identify suitable sites which could meet the technical and operational requirements for the GBAD, and in particular the HVM sites. Only six sites were identified which would meet operational and technical requirements (including only two HVM sites) and all are required to meet the operational requirements and integrity of the Air Security Plan.

(5) FWT was selected specifically because of its proximity to the Olympic Park, its clear sight lines towards the Olympic Park and the lack of obstructions from its roof, and its 360 degree views of the airspace. There was no alternative site which could perform this essential function as part of the last line of defence.

Decision-making

(6) On 15th December 2011, the Secretary of State for Defence announced to Parliament the intention to provide 'a multi-layered plan' including forward based Typhoon aircraft, helicopters and appropriate Ground Based Air Security Plans.

(7) The MOD engaged with the owners of the six sites to secure their use. In respect of FWT, the MOD entered into a lease with the landowner, the London Borough of Waltham Forest to provide exclusive rights over (and rights of access to) the roof of FWT. The MOD also liaised with local Councils and local police.

(8) At no stage did the MOD consult with any of those bodies, or any residents or members of the public, as to the need for, or elements of, the Plan or the appropriate sites for GBAD.

(9) A live test exercise of all security elements for the Olympic was planned for early May 2012 to ensure that the various security Plans worked in various scenarios and were properly integrated.

(10) Prior to this exercise, on 27th April 2012, the residents were informed of the deployment, the need for it and that FWT was the only suitable site in this location through a detailed leaflet. The leaflet also answered a number of questions which the residents might raise:

"Are there no other suitable buildings nearby? FWT proved to be the only suitable site in this area for the HVM system.
Will the equipment be noisy? The equipment is not noisy. It will be powered by mains electricity or, in the event of a power supply failure, a silent generator which will be procured especially for the Games.
Will the Armed Forces be there 24/7? During the rehearsal and the Games deployment, there will be a permanent presence of up to 10 soldiers at the building. They will be supported by the Police.
How can we be sure this is safe? The Air Security Plan will be manned by fully trained, professional soldiers. It will be securely protected, and it does not pose any hazard to residents. The system will be used to monitor the airspace and will only be authorised for active use following specific orders from the highest levels of Government in response to a confirmed and extreme security threat.
Will having missiles on our building make us a target? Having a 24/7 Armed Forces and Police presence will improve your local security and will not make you a target for terrorists."

(11) The live exercise was successful and the Secretary of State has therefore decided to confirm the deployment for the 2012 Olympic Games.

(12) A 'drop-in' session took place on at Buxton School, Cann Hall Road in Leytonstone, at which some 30 residents who turned up were able to find out more about the deployment and have any questions and concerns answered. In my judgment, the MOD's voluntary engagement with the community and residents has been both sensible and immaculate.

Summary

21. Both the Law and the Facts militate against this claim for Judicial Review.

The Facts

22. I turn to the key Facts first because, in my judgment, the claim for Judicial Review simply founders on the facts, and, if there had been a correct understanding of the facts by the Claimant from the beginning, the Judicial Review would not have been brought.

23. The following facts are established by the evidence (in particular by the statement of General Parker and the Treasury Solicitor's letter to the Claimant's solicitors dated 5

July 2012 which was approved by the Head of Counter-Terrorism as explained above) are not susceptible to sensible challenge:

(1) First, the establishment of an Air Security Plan, involving the deployment of a GBAD system, is essential to protect the 2012 Olympics. In particular, deployment is necessary *"for the purpose of preventing a situation which threatens serious damage to human welfare and for the protection of human life and is the least intrusive means possible to achieve that objective."*

(2) Second, the GBAD system has been subject to the most rigorous examination at the highest level and the GBAD system generally, and the two High Velocity Missile (HVM) systems in particular, are considered essential to the overall coherence and effectiveness of the plan.

(3) Third, as the residents of FWT were informed in the leaflet, FWT is the *"only suitable site in this area for the HVM system"*, given its unrestricted 360 degree view and perfect location overlooking the Olympic Park. General Parker said that he and his team had personally reviewed the position and concluded that *"there were no other options or alterative sites which would secure the objectives of the plan."* Further, each component of the GBAD is vital and *"there is simply no alternative to FWT."*

(4) Fourth, the Air Security Plan was approved by the Secretary of State following a conscientious analysis of all relevant factors, the Home Secretary, and the Cabinet Committee for the Olympics, chaired by the Prime Minister, all of whom agreed with the deployment. The decision was taken at the highest level because of the recognition that such deployment within the UK was unusual and should only occur if rigorously justified and decided at a high level.

(5) Fifth, General Parker, General Sir David Richards, the Home Secretary, the Deputy Prime Minister and the members of the Olympic Cabinet Committee consider that the decision to deploy to FWT and other sites is *"essential to public safety, national security and the defence of the realm."*

(6) Sixth, any fears as to the location of the HVM on the roof of FWT causing danger are objectively unfounded because the modern HVM system does not depend on *"high explosives"* but relies on kinetic energy (*i.e.* speed and mass on impact) to destroy its target and only contains a few grammes of explosive. The HVM is a discrete system. The missile is fired at two stages. The first is a 'soft launch' which gets the missile into the air without knocking the operator off his feet. The second stage (at about 10 metres distance) comprises an in-air boost to accelerate the missile to its design speed. The missile is not armed until after it is fired. The decision to fire the missiles would only be taken at the most senior levels of Government in the highly unlikely eventuality of any rogue aircraft having evaded the other layers of the Air Safety Plan.

(7) Seventh, any fears as to the location of the HVM on the roof of FWT would cause FWT to become a target for terrorism are objectively unfounded because the relevant agencies and military experts, including General Parker, have considered the matter carefully and determined that, given the presence of armed police and other measures, it is *"inconceivable"* that any attack on the HVM or FWT could occur. The location of a HVM system on the roof of FWT does not give rise to a

credible threat to the residents of FWT (see the letter of 5th July 2012 approved by the Head of Counter-Terrorism). As the residents of FWT were informed in the leaflet, *"Having a 24/7 Armed Forces and Police presence will improve your local security and will not make you a target for terrorism."*

(8) Eighth, any fears as to the location of the HVM on the roof of FWT causing disruption are objectively unfounded because the HVM system is small and requires only small number of trained operators using civilian cars and the deployment would have no discernable impact on residents.

(9) Ninth, the notion of a tower or gantry being built by and dismissed in the Treasury Solicitor's letter dated 5 July 2012 in the following terms:

> *"Sangers.*
> *We have made it clear that the HVMs have to be able to look down on the Olympic Park and have an entirely unobstructed view (360 degrees) of the sky. Any such tower would therefore have to be at least as tall as FWT. It is inconceivable that such a tower could be built."*

The Law

Approach of the Courts in matters of national security

24. I turn to consider the law. In matters of national security and deployment of the armed forces, it is well know that *"the Courts will be very slow to review the exercise of prerogative powers..."* and will avoid being drawn *"into an area which, in the past, they have entered, if at all, with reluctance and the utmost circumspection"* (*per* Lord Bingham in *R v. Jones* [2006] UKHL 16 at [30]). The deployment of military personnel and equipment for national security and defence of the realm purposes *"has always been regarded as a discretionary power of the Crown into the exercise of which the courts will not inquire"* [per Lord Hoffmann in *Jones* at [65]]. (See also *R(Gentle) v. Prime Minister* [2008] UKHL 20; *R (Marchiori) v. Environment Agency* [2002] EWCA Civ 3, *R(CND) v. Prime Minister* [2002] EWHC 2777 (Admin) (DC) and *R(Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; *R (Hassan) v. Secretary of State for Defence* [2009] EWHC 309 (Admin); *Smith v. MOD* [2009] EWHC 1676 (QB)).

25. There are three limited exceptions to this principle. First, where the act in question falls outside the ambit of the discretionary power (see *Jones (supra)* at [66]). Second, where the act is not done in good faith (see *Marchiori (supra)* at [40]). Third, where a statute requires a review of the act in question (see *Marchiori (supra)* at [40]). The proposed deployment is clearly within the ambit of the discretionary power and is made in good faith and, accordingly, the first two exceptions can be dismissed. The only relevant exception is the third, in view of the Claimant's claim under the Human Rights Act 1998.

26. The rationale for this judicial restraint is obvious. There are aspects of decision-making which the Court must necessarily accept lie properly, and solely, with the Executive. These include questions of pure policy and the substantive merits of factual decisions in sensitive fields like those of national security, defence and foreign relations. These are fields in which the Court is manifestly ill-equipped to judge the merits of any decision. Further, the Court should never presume to do so since this would be to trespass on the rightful province of the Executive and to fail to accord

proper respect to a democratically elected government which is answerable politically for its actions (*c.f.* generally *CND (supra)* at [22] and *Marchiori (supra)* at [38]; and see *A v. Secretary of State for the Home Department* [2005] 2 AC 68). Decisions as to the actual operational deployment of armed forces and weapons for reasons of national security are akin to, or perilously close to, the *"forbidden territory"* referred to in *Abbasi (supra)* at [106], *i.e.* lying within the exclusive curtilage of the Executive.

27. Military operational deployments for reasons of national security are matters for which the Government is answerable to Parliament and not - absent bad faith or acting outside the limits of the discretion - the Courts.

Duty to consult

28. It was common ground that public bodies are under a general public law duty to act fairly and in accordance with natural justice. When decisions will have a specific impact on a definable group, fairness and natural justice may entail a duty to consult with those affected by the decision depending on the context of the decision. Fairness will often require that a person who is adversely affected by the decision will have an opportunity to make representations before the decision is taken *"with a view to producing a favourable result or*; after it is taken with a view to procuring its modification; or both" (per Lord Mustill in *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 at 560). When a voluntary consultation has been entered into, it must be conducted fairly and properly (See *e.g. R (Eisai Ltd) v NICE & Ors* [2008] EWCA Civ 438 at [24]; *R (Medway Council & Ors) v Secretary of State for Transport* [2002] EWHC 2516 Admin at [28]; *R v North and East Devon Health Authority* [2001] Q.B. 213 at [108]).

29. A duty to consult does not arise in all circumstances. If this were so, the business of government would grind to a halt. There are four main circumstances where consultation will be, or may be, required. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors there will no obligation to consult. (See *R (Cheshire East Borough Council) v. Secretary of State for Environment, Food and Rural Affairs [2011] EWHC 1975 (Admin)* ([68-82] esp. [72]).

30. The general law will be slow to require a public body to engage in consultation if there is no obligation or promise so to consult. In *R(Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at [41] and [48] Laws LJ said as follows:

> *"There is an underlying reason for this. Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel."*
>
> *"Where there has been no assurance either of consultation (the paradigm case of procedural expectation) or as to the continuance of the policy*

> *(substantive expectation) there will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. And generally, there can be no objection to that, for it involves no abuse of power."*

31. Mr Willers submitted that *Bhatt* was not an Article 8 case and therefore not relevant. I disagree. The observations of Laws LJ are of general application and apply *a fortiori* in respect of military deployments under the discretionary powers of the Crown for the purposes of national security and defence of the realm.

No statutory duty to consult

32. There is no statutory obligation to consult identified in the present case, nor is one suggested by Claimant.

33. Indeed, the opposite would appear, if anything, to be the case. The proposed use falls with the scheme under the Town and Country Planning Act 1990 relating to emergency development by the Crown which does away with the need for an express application for, and grant of, planning permission or consultation ("emergency" being defined as any event or situation which threatens serious damage to human welfare). Even if the temporary use of the roof of FWT for deployment of the GDAP constituted a material change of use and required planning permission (which the Secretary of State does not accept), permission is *automatically* granted by article 3 and Part 37 of schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995. The legislature scheme would, therefore, appear to militate against the imposition of a duty to consult in this case.

No legitimate expectation, past practice, abuse of power

34. There is no evidence of any promise to consult or any past practice in respect of such deployment decisions. Nor, in my judgment, could there ever be said to be 'conspicuous unfairness' in not consulting in the arena of military operational deployment and national security.

Conclusion: no duty to consult in law

35. Accordingly, none of factors in *Cheshire East BC (supra)* which might give rise to the implication of a duty to consult, is present here. In my judgment, the Claimant's first ground, that the Secretary of State was in breach of his duty to consult, is unarguable in law.

The Public Sector Equalities Duty

36. The content of the Public Sector Equalities Duty (PSED) under section 149 of the Equality Act 2010 was helpfully summarised by Walker J in *R (W) v Birmingham City Council and R (M, G and H) v Birmingham City Council* [2011] EWHC 1147 (Admin) (see generally [151]).
37. The short answer to the Claimant's complaint that the Secretary of State did not comply with his PSED's duties is that he did. As Mr Willers accepted, contrary to the assumption in the Claim Form, the Secretary of State did in fact carry out a careful Equality and Disability Impact Assessment ("EDIA") during the decision-making process. The unchallenged, and unchallengeable, evidence is that the Secretary of

State's attention was specifically drawn to the section 149 PSED duty and that the EDIA was conscientiously taken into account at all levels of decision making including by General Parker, the Chief of Defence Staff and the Secretary of State. The Claimant's second ground is unarguable and fails.

38. It is noteworthy that in relation to Disability the EDIA recorded that the physically disabled *"may worry if they do not know the reality"* and any concerns about speed of evacuation would be *"perception rather than reality as in practice the normal emergency arrangements would not be affected by the deployment of military equipment and personnel."*

Human Rights legislation

Article 2

39. The first duty of the Government is to defend the realm, and to protect national security, including by protecting the public from terrorist attack (see *Marchiori (supra)* at [38]). The Crown also has a positive obligation to take measures to protect the public's Article 2 and other human rights (see *R (Middleton) v West Somerset Coroner* [2004] UKHL 10 [2004] 2 AC 182 at [2]).

40. The short answer to the Claimant's Article 8 point is the Government's Article 2 duty. The manifest purpose of the deployment is to prevent or deter an attack on the Olympic Park which would lead to massive loss of life. The Article 2 consideration necessitates the deployment of the GBAD on FWT in any event, *i.e.* even if it was to have a *substantial* impact on the resident's other rights. As General Parker said:

> *"Even if the impacts on individuals or groups of residents was judged to be very substantial, I can confirm that I (and those above me in the chain of command) consider that the interference is overwhelmingly necessary in the interests of national security and public safety."*

41. It is for the Crown to determine what steps are justified to secure these objectives. The Court should not attempt to 'second guess' such conclusions or be asked to do so.

Article 8

42. The fact that Article 8 is engaged does not mean that it is breached. Article 8 (and A1P1) are qualified rights. The Claimant first has to establish an interference with the Article 8 rights. If it passes this hurdle, the Secretary of State may demonstrate that the interference is 'in accordance with law' and is justified, *i.e.* pursues a legitimate objective which is 'proportionate'.

43. The question of proportionality is to be determined in accordance with the well-known guidance of Lord Steyn in *R (Daly) v SSHD* [2001] 2 WLR 1622 by the Court asking itself:

> *".. 'whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it: and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'"*

Interference with the right

44. A claimant must show a "*serious breach"* of the right to the physical area or quiet enjoyment of his home (see *Moreno Gomez v. Spain* App NO 4143/02 Judgment Nov 16 2004 [53] (concerning noise pollution)). (See also *MOD v. Dennis* [2003] EWHC 793 (QB) e.g. [19], [20] and [23] (noise from Harrier jets was a very serious interference with the ordinary enjoyment of the property whether judged from inside or outside the house); and *Powell and Raynor v. United Kingdom* (1990) 12 EHRR 355 (continuous high levels of aircraft noise pollution).

45. The present case is a far cry from the above cases of long-term, sustained noise pollution or other interference. As General Parker points out, the deployment would be "*unobtrusive"* and have no impact on the ability of residents to use their properties and be limited in time (see above). There is no arguable claim under Article 8 if the detriment complained of is "negligible" *(c.f. Hardy and Maile v United Kingdom* [2012] (Application No. 31965/07) (14th February 2012) ECtHR [188]).

In accordance with law

46. The European Court of Human Rights has repeatedly stressed that the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities. Thus, any interference must be 'in accordance with law'. In the present case, the exercise of the Crown's discretion regarding this deployment has clearly been carried out in accordance with law, *i.e.* in accordance with proper procedures and at the highest political and military level.

47. The Claimant's intention that the deployment was not 'in accordance with law' is based on lack of consultation and/or compliance with PSED. For the reasons set out above, these points are unarguable and, accordingly, this argument fails too. Article 8 does not entail a stand-alone right to be consulted.

48. A lack of 'appropriate safeguards' was not seriously argued, given the requirements of the GPDO Part 37, the enforcement powers of the local authority, the requirement to demonstrate sufficient reasons for such deployments, the PSED requirements and accountability to Parliament *etc.*

Necessary in a democratic society

49. Military deployments are necessary from time to time in a democratic society. It is manifestly obvious that a deployment of a GDAP is necessary at the current time to protect the Olympics. Mr Willers suggested that the deployment of missiles above homes on British soil homes in this way was 'unprecedented'. The short answer is, so are the current circumstances unprecedented, *i.e.* the need to protect the Olympic Park from an airborne attack.

50. The deployment is for the legitimate purpose of national security and public safety. I agree with the submission of Mr Forsdick, the 'proportionality' of the deployment is overwhelming.

Duty of candour

51. I reject the Claimant's suggestion of a breach of duty of candour on the part of the Secretary of State or the MOD. There is no evidence to support it. Furthermore, it is clear that very considerable candour been shown by General Parker and others despite the obvious sensitivity of subject matter. The complaint about the 'absence' of PII is unreal.

Delay

52. Claimants in Judicial Review must act with the *"utmost promptness"* (*R v. Director of Passenger Rail Franchising ex parte Save our Railways* [1996] CLC 589) or *"particular urgency"* (R v. Secretary of State for Trade and Industry ex p Greenpeace *[1998] Env LR 415)* where third party interests are involved. This approach which has been adopted in challenges to spending cut decisions, is applicable here.

53. The complaint is against the initial deployment decision on or about 27th April when the Claimants received the leaflets. The relevant facts were known to them at that time.

54. The claim was nevertheless brought: two months after the public were told of the initial deployment and the reasons why FWT was the "only" available site in this area for HVM; four weeks after a pre-action protocol response which stressed the need, given the circumstances, for any application to be brought "extremely promptly"; and less than two weeks before the deployment is required.

55. Given the subject matter, the need for very great promptness is obvious and that has not been met in this case. The Claimant's solicitors have explained the delay was due to the difficulties of obtaining legal aid and the need, eventually, to find after the event insurance. These excuses, whilst understandable, are not immutable. In cases of extreme urgency, it is incumbent on litigants to file proceedings notwithstanding difficulties in funding.

56. The failure to act promptly was seriously prejudicial to the Secretary of State and the public interest in appropriate measures being taken to defend the 2012 Olympics. Mr Willers accepts that consultation is now no longer possible because of the delay. Nor it is feasible for the Secretary of State to begin to explore 'alternatives' to FWT (including Mr Willers' alternative of building a tower).

Discretion

57. In all the circumstances, I exercise my discretion against the Claimant because of the delay in commencing Judicial Proceedings.

Result

58. In the result, the Claimant is refused permission to apply for Judicial Review on the grounds (a) that their Grounds are unarguable in Law and in Fact and (b) the proceedings were not brought promptly.

Postcript

59. I am grateful both sets of Counsel and their legal teams for their able assistance in this matter.