Neutral Citation Number: [2019] EWCA Civ 250

Case No: C1/2018/1297

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR NEIL CAMERON Q.C. (Sitting as a Deputy Judge of the High Court)
[2018] EWHC 2029 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2019

Before:

Lady Justice Sharp
and
Lord Justice Lindblom

- -

Between:

Binning Property Corporation Ltd.	**Applicant**
- and -	
Secretary of State for Housing, Communities and Local Government	**Respondent**
- and -	
London Borough of Havering Council	**Interested Party**

Ms Celina Colquhoun (instructed by **Addleshaw Goddard LLP**) for the **Applicant**
Ms Victoria Hutton (instructed by **the Government Legal Department**) for the **Respondent**
The Interested Party did not appear and was not represented.

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Hearing date: 18 December 2018

Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. Does this court have jurisdiction to hear an appeal against a decision of the High Court, under section 289(6) of the Town and Country Planning Act 1990, refusing leave to appeal against the dismissal by an inspector of an appeal against an enforcement notice? The question is not new. It has been considered by this court several times, and on each occasion the answer has been "No". But here it arises again.

2. The applicant, Binning Property Corporation Ltd., had appealed under section 174 of the 1990 Act against two enforcement notices issued on 14 August 2017 by the interested party, the London Borough of Havering Council, alleging breaches of planning control on land at East Hall Lane, Wennington, near Rainham – in the first notice, the unauthorized storage of aggregates and containers, and in the second, the unauthorized display and sale of motor vehicles. The land is owned by Binning. The respondent, the Secretary of State for Housing, Communities and Local Government, appointed an inspector to determine Binning's appeals. In a decision letter dated 27 February 2018 the inspector dismissed the first appeal and allowed the second.

3. On 26 March 2018 Binning appealed to the High Court under section 289 of the 1990 Act, seeking an order to quash the inspector's decision on the first appeal. At a hearing on 24 May 2018, at which both Binning and the Secretary of State were represented by counsel, Mr Neil Cameron Q.C., sitting as a deputy judge of the High Court, refused leave to appeal against the inspector's decision. On 31 May 2018 Binning made an application for permission to appeal to this court against the judge's order. On 22 June 2018 the Secretary of State filed a statement of reasons under paragraph 19 of Practice Direction 52C, contending that the Court of Appeal had no jurisdiction to hear the appeal. On 6 August 2018 Binning filed a response, challenging the contention that the court lacked jurisdiction. On 19 September 2018 the Secretary of State filed further submissions. On 12 November 2018 I ordered that the matter be listed for an oral hearing – which took place on 18 December 2018.

4. At the hearing, having heard submissions on either side, we concluded that we had no jurisdiction to hear the application for permission to appeal against the judge's order, told the parties so, and refused the application without hearing argument on the merits. We said we would give our reasons later. In this judgment I explain why, in my view, previous relevant authority in this court remains good law, so that we were bound to refuse Binning's application for permission to appeal for lack of jurisdiction.

The issue before us

5. The issue we had to decide – in the light of previous authority on the same point – was whether this court has jurisdiction to hear the proposed appeal against the judge's order refusing leave to appeal to the High Court against the inspector's decision under section 289(6). As I said when I ordered an oral hearing, "[in] contending that this court has jurisdiction to hear the proposed appeal, [Binning] evidently seeks to challenge the well-established jurisprudence in *Wendy Fair Markets Ltd. (Strandmill Ltd.) v Secretary of State*

for the Environment [1996] J.P.L. 649, [1995] 159 L.G.L.R. 769, 1995 WL 1082736, *Prashar v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 1231 and *Walsall Metropolitan Borough Council v Secretary of State for Communities and Local Government* [2013] EWCA Civ 370 as "per incuriam" or redundant, and in any event to argue that the court may, and should, depart from it".

Section 289 of the 1990 Act

6. The statutory scheme for the enforcement of planning control is in Part VII of the 1990 Act. A person who has an interest in land to which an enforcement notice relates may appeal against the notice to the Secretary of State under section 174(2). Under section 175(4), when an appeal has been made under section 174, "the enforcement notice shall subject to any order under section 289(4A) be of no effect pending the final determination or the withdrawal of the appeal".

7. In Part XII of the 1990 Act, section 285(1) provides that "[the] validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought". The provisions governing appeals against decisions of the Secretary of State, or his inspector, on appeals made to him under section 174 are in section 289, which provides:

> "(1) Where the Secretary of State gives a decision in proceedings on an appeal under Part VII against an enforcement notice the appellant or the local planning authority or any other person having an interest in the land to which the notice relates may, according as rules of court may provide, either appeal to the High Court against the decision on a point of law or require the Secretary of State to state and sign a case for the opinion of the High Court.
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> …
>
> (3) At any stage of the proceedings on any such appeal as is mentioned in subsection (1), the Secretary of State may state any question of law arising in the course of the proceedings in the form of a special case for the decision of the High Court.
>
> (4) A decision of the High Court on a case stated by virtue of subsection (3) shall be deemed to be a judgment of the court within the meaning of section 16 of the Senior Courts Act 1981 (jurisdiction of the Court of Appeal to hear and determine appeals from any judgment of the High Court).
>
> (4A) In proceedings brought by virtue of this section in respect of an enforcement notice, the High Court or, as the case may be, the Court of Appeal may, on such terms if any as the Court thinks fit … , order that the notice shall have effect, or have effect to such extent as may be specified in the order, pending the final determination of those proceedings and any re-hearing and determination by the Secretary of State.
>
> …
>
> (5) In relation to any proceedings in the High Court or the Court of Appeal brought by virtue of this section the power to make rules of court shall include power to make rules –
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> (a) prescribing the powers of the High Court or the Court of Appeal with respect to the remitting of the matter with the opinion or direction of the court for re-hearing and determination by the Secretary of State … ; and
>
> (b) providing for the Secretary of State … , either generally or in such circumstances as may be prescribed by the rules, to be treated as a party to

any such proceedings and to be entitled to appear and to be heard accordingly.

(5A) Rules of court may also provide for the High Court or, as the case may be, the Court of Appeal to give directions as to the exercise, until such proceedings in respect of an enforcement notice are finally concluded and any re-hearing and determination by the Secretary of State has taken place, of any other powers in respect of the matters to which such a notice relates.

(6) No proceedings in the High Court shall be brought by virtue of this section except with the leave of that Court and no appeal to the Court of Appeal shall be so brought except with the leave of the Court of Appeal or of the High Court.

(7) In this section "decision" includes a direction or order, and references to the giving of a decision shall be construed accordingly."

The requirement in subsection (6) that the leave of the High Court be sought and obtained for an appeal under section 289 was an amendment proposed by Robert Carnwath Q.C., as he then was, in his report of February 1989, "Enforcing Planning Control". It was introduced by section 6(5) of the Planning and Compensation Act 1991.

Section 16 of the Senior Courts Act 1981

8. Section 16(1) of the Senior Courts Act 1981 provides:

"(1) Subject as otherwise provided by this or any other Act … , the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court."

Section 54 of the Access to Justice Act 1999

9. Section 54 of the Access to Justice Act 1999 provides:

"(1) Rules of court may provide that any right of appeal to –

…

(b) the High Court, or

(c) the Court of Appeal

may be exercised only with permission.

…

(4) No appeal may be made against a decision of a court under this section to give or refuse permission (but this subsection does not affect any right under rules of court to make a further application for permission to the same or another court)."

The relevant authorities

10. The Court of Appeal has considered the jurisdictional issue that arises here on at least the three previous occasions I have mentioned: in *Wendy Fair Markets*, in *Prashar*, and in *Walsall Metropolitan Borough Council* (see also the judgment of John Howell Q.C., sitting as a deputy judge of the High Court, in *Miaris v Secretary of State for Communities and Local Government* [2015] 1 W.L.R 4333, in particular at paragraphs 24 and 25). On all of

those occasions this court's conclusion has been the same: that it has no jurisdiction to entertain an appeal against the High Court's refusal of leave to appeal to itself under section 289(6).

11. In *Wendy Fair Markets* Sir Thomas Bingham M.R., with whom Kennedy and Millett L.JJ. agreed, referred (on p.3) to the evolution of the statutory provisions, noting that section 289(6) had been amended by section 6(5) of the 1991 Act. As originally enacted, subsection (6) had stated:

> "(6) No appeal to the Court of Appeal shall be brought by virtue of this section except with the leave of the High Court or the Court of Appeal."

12. As the Master of the Rolls said, "it is plain that as originally enacted there was no requirement of leave to appeal to the High Court, but a party did need leave to appeal from the High Court to the Court of Appeal". He went on to say this:

> "We have been told, and there is no reason to doubt, that the reason why subsection (6) was amended to introduce a requirement of leave to appeal against an enforcement notice to the High Court was because the unrestricted right of appeal to the High Court on a point of law was becoming the subject of abuse by those who were the subject of enforcement notices and regarded an appeal to the High Court on a point of law as a means of gaining an extension of time during which they could continue to do that which the enforcement notice treated as prohibited. When the lists of the Crown Office were subject to very considerable delay, this was an obvious loophole available to unscrupulous advocates. Accordingly, as a means of providing a filter to prevent the bringing of wholly unmeritorious appeals, the subsection was amended so as to provide that leave was needed for an appeal to the High Court as well as for an appeal from the High Court to the Court of Appeal."

13. He rejected an argument based on the provision in section 16(1) of the Supreme Court Act 1981 that "… the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court" – the contention being that "the refusal of leave by a High Court judge to appeal to the High Court is such a judgment or order of the High Court and therefore falls within section 16 and [opens] the jurisdiction of the Court of Appeal to entertain applications such as that". He said (on p.4):

> "The difficulty … with that submission is that although … none of the reported cases have arisen in the planning field, there is a considerable body of authority which makes it plain that appeals against refusals of leave to appeal to the court below are not something which the higher court has jurisdiction to entertain. The relevant line of authority begins with *Lane v Esdaile* (1891) A.C. 210, continues through *Ex parte Stevenson* (1892) 1 Q.B. 609, embraces *Bland v Chief Supplementary Benefit Officer* [1983] 1 W.L.R. 262, and perhaps ends with *Geogas S.A. v Trammo Gas Ltd.* [1991] 1 W.L.R. 776. Those authorities make plain that a decision of this kind refusing leave to appeal to the court below does not give rise to an order or judgment of a kind which can be challenged in the court above. …".

The cases had all "emphasised that the requirement of leave is intended to deter frivolous or unmeritorious appeals and that this object would be frustrated were the refusal of leave itself to be the subject of appeal". As Lord Jauncey had said in *Geogas* (at p.780H), "…

[the] legislative intention of limited review would be rendered nugatory if appeals were to lie to the Court of Appeal and then to this House against a decision of a judge refusing or granting leave to appeal an award to the High Court and if an appeal were to lie against a decision of the Court of Appeal to refuse or grant leave to appeal from the High Court itself under section 1(7) [of the Arbitration Act 1979]". That observation was, in the Master of the Rolls' opinion, "entirely consistent with the purposive construction" placed on similar provisions in the cases to which he had referred (p.5).

14. The Master of the Rolls also rejected a submission that there would be "the risk of discrepancy and inconsistent decisions if an appeal could be brought without any leave at all under section 288 but a refusal of leave could not be challenged under section 289". There was, he said, a "plain disparity" between the two sections. One imposed a requirement for leave; the other did not. The legislature "must have intended the procedures to be different, because the provisions of the two sections are different". He "[could not] see any intention that there should be less dissimilarity between these two sections than the language would itself suggest" (ibid.).

15. A further argument, also rejected by the Master of the Rolls, was that section 289(6) "conveyed the impression" that there was intended to be a right of appeal to the Court of Appeal against any decision of the High Court. There were, he thought, "powerful reasons" for holding, "as a matter of construction", that this argument was wrong. As he explained (ibid.):

> "… [As] initially drafted before the amendment, subsection (6) cannot have been intended to embrace an appeal against the refusal of leave by the High Court, because there was then no requirement to obtain leave from the High Court. [Counsel] is therefore obliged to say that the second half of the subsection bears a different meaning after the amendment from the meaning it bore before. There are, however, additional points, one of which is that when the legislature wished to make it clear that a decision was to be regarded as a decision falling within section 16 of the Supreme Court Act 1981, that was made plain as in the case of subsection (4). Furthermore, it would appear to me right to assume that, when subsection (6) was drafted, the parliamentary draftsman responsible for the provision would have been well aware of the meaning which had for a hundred years been put on a provision of this kind by courts at all levels. In other words, it must have been appreciated that if leave to appeal were refused by the High Court there would be no jurisdiction in the Court of Appeal to entertain an appeal against that refusal of leave. …".

16. There was, in his view, no ambiguity in section 289(6). On the contrary, he said (ibid.):

> "… I have no doubt that the legislature felt that it was safe to rely on the threshold test, given that a High Court judge, if asked to give leave on a question of law, would be bound to give it if he thought there was a seriously arguable point. For my part I am quite unpersuaded that Parliament intended that there should be any further right of challenge in a case where a High Court judge, having considered the matter, had concluded that there was no arguable point of law which merited the grant of leave."

It was "plain", in his view, that there was "nothing in section 16 [of the Supreme Court Act 1981] or in section 289(6) [of the 1990 Act] which confers a right of appeal to this court against the refusal of leave to appeal to the High Court" (p.6). He continued (ibid.):

> "… There is a great weight of authority which makes plain that such an application is not to be entertained by this court. I respectfully think that the policy reasons which have been adumbrated are very strongly in favour of restricting rights of appeal in this class of case, given the factor I have already mentioned that High Court judges would be bound to give leave in any case that they regard as arguable."

He concluded, therefore, that the court had no jurisdiction to determine the applications before it.

17. The Master of the Rolls' analysis in *Wendy Fair Markets* was adopted and applied in *Prashar*, in the context of the Civil Procedure Rules. As Maurice Kay L.J. said (in paragraph 4 of his judgment), when the provisions in Order 94, rules 12 and 13, of the Rules of the Supreme Court were in force, it was "quite clear that … the Court of Appeal did not have jurisdiction to hear an application for leave to appeal against a refusal by the High Court to grant leave" under section 289(6). The decision in *Wendy Fair Markets*, he said (in paragraph 6), "clearly establishes certainly that under the old rules there was no possibility of this court dealing with an application for permission to appeal whatever its view on the possible merits". Now, as he pointed out (in paragraph 7), Part 52 of the Civil Procedure Rules "created one system of rules for all appeals", including appeals to the High Court under section 289. The matter was, he said (in paragraph 8), made "perfectly clear" in the relevant practice direction, which referred to section 54(4) of the 1999 Act in confirming that "[there] is no appeal from a decision of the appeal court made at an oral hearing to allow or refuse permission to appeal to that court".

18. In *Walsall Metropolitan Borough Council*, where the applicants were two local planning authorities whose enforcement notices had been quashed on appeal, the Court of Appeal again affirmed the reasoning of the Master of the Rolls in *Wendy Fair Markets*. Sullivan L.J., with whom Pill and Tomlinson L.JJ. agreed, observed that the new subsection (4A) did not prevent "unmeritorious appeals" under section 289. Parliament had therefore accepted the recommendation in "Enforcing Planning Control", and introduced a further provision that leave was needed to bring a section 289 appeal (paragraph 7 of the judgment). The Civil Procedure Rules had not removed the need for that provision. Section 289(6), as originally enacted, had provided that no appeal could be brought to the Court of Appeal from a decision of the High Court under section 289 without the leave of either the High Court or the Court of Appeal. The procedural amendments brought about by the Civil Procedure Rules "[did] not lessen the need for the further filter mechanism … introduced by the amended subs. (6)". In Sullivan L.J.'s view, the "policy reasons for that additional procedural requirement" were "as strong now as they were found to be in 1995". In *Prashar* Maurice Kay L.J. had followed *Wendy Fair Markets* having considered the effect of the procedural changes made by the Civil Procedure Rules, concluding that the Court of Appeal had no jurisdiction to entertain applications for permission to appeal against refusals of leave to appeal to the High Court under section 289(6). The correctness of the decisions in *Wendy Fair Markets* and *Prashar* had not previously been questioned (paragraph 8).

19. Although the court had now been invited to "revisit" the decision in *Wendy Fair Markets*, Sullivan L.J. emphasized that the Court of Appeal was bound by that decision and could not depart from it unless it fell within one of the categories of case identified by Lord Greene M.R. in *Young v Bristol Aeroplane Co. Ltd.* [1944] 1 K.B. 718 as those in which the court could depart from a previous decision of its own. Lord Greene M.R. (on pp.725 and 726) referred to four categories of case: first, those "where this court finds itself confronted with one or more decisions of its own or of a court of co-ordinate jurisdiction which cover the question before it and there is no conflicting decision of this court or of a court of co-ordinate jurisdiction"; second, those "where there is such a conflicting decision"; third, those "where this court comes to the conclusion that a previous decision, although not expressly overruled, cannot stand with a subsequent decision of the House of Lords"; and fourth, "(a special case) is where this court comes to the conclusion that a previous decision was given per incuriam" – though such cases "would obviously be of the rarest occurrence" (p.729).

20. Sullivan L.J. rejected the notion that *Wendy Fair Markets* was decided "per incuriam". It had not been submitted that the court had overlooked any relevant authority – or any relevant enactment apart from section 289(4A). But as Parliament had not considered that provision to be more than a "partial answer" to the problem of "abusive appeals" and had also introduced the filter mechanism in subsection (6) (paragraph 11), the fact that the Master of the Rolls had not referred to it was "not in the least surprising, and … most certainly does not mean that the judgment was per incuriam". The case appeared to fall squarely within the first category in *Young v Bristol Aeroplane*. The court's decision in *Wendy Fair Markets* had been followed in *Prashar*, and there was no conflicting decision dealing with the position under section 289(6) (paragraph 12).

21. In Sullivan L.J.'s view, "the rigour of the *Lane v Esdaile* principle" had been "tempered" in subsequent decisions of the Court of Appeal – including, in particular, the decisions in *North Range Shipping Ltd. v Seatrans Shipping Corporation (The Western Triumph)* [2002] EWCA Civ 405, [2002] 4 All E.R. 390 and *CGU International Insurance Plc v AstraZeneca Insurance Co. Ltd.* [2006] EWCA Civ 1340 (paragraphs 13 and 14). But the principle was still good. As Sullivan L.J. said (in paragraph 15):

> "15. It seems to me that far from casting doubt on the continued applicability of the *Lane v Esdaile* principle, as it was applied by this court in *Wendy Fair*, these more recent decisions of the court reaffirm the continued existence of the principle, subject to a "residual jurisdiction" which does not apply in the circumstances of the present case. There is no criticism of the process by which Eder J. reached his decision to refuse permission to appeal under s.289. In particular, there is no suggestion of misconduct or unfairness, or indeed of mischance. … The challenge before us is to the merits of Eder J.'s decision to refuse permission to appeal, and not the process by which he arrived at that decision. I am not persuaded, therefore, that this case falls into the second class of case referred to in *Young v Bristol Aeroplane Co.*"

22. He also rejected the submission that the decision in *Wendy Fair Markets* fell into the third category. He considered cases in which it was suggested that, at the highest level, the "absolute rule" in *Lane v Esdaile* had not been applied in proceedings for judicial review – in particular, the decision of the House of Lords in *R. (on the application of Burkett) v Hammersmith and Fulham London Borough Council (No.1)* [2002] UKHL 23, [2002] 1 W.L.R. 1593, the decision of the Supreme Court in *R. (on the application of Cart) v Upper*

Tribunal [2011] UKSC 28, [2012] 1 A.C. 663 and the decision of the Privy Council in *Kemper Reinsurance Co. v Minister of Finance* [2000] 1 A.C. 1 (paragraph 16). He referred (in paragraph 17) to Lord Steyn's observation in *Burkett* (in paragraph 11 of his speech):

> "11. … *Lane v Esdaile* is only authority for the general proposition that whenever a power is given to a court or tribunal by legislation to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive … ."

Sullivan L.J. went on to say (in paragraph 20):

> "20. All of these authorities emphasise the distinction between the High Court's judicial review powers and its powers on a statutory appeal. They also emphasise the need for decisions by lower courts and tribunals not to be "immune from scrutiny in the higher courts". Mr Coppel rightly submits that in substance, an appellant on a point of law under s.289 will be raising the kind of arguments that he would be able to raise in judicial review proceedings. But the fact remains that Parliament has chosen to provide a statutory appeal process for challenges to enforcement notices on the very comprehensive grounds set out in s.174. It has not rendered Inspectors' decisions under s.174 immune from scrutiny in the higher courts; but it has deliberately excluded a challenge to the validity of an enforcement notice on the grounds set out in s.174 by way of judicial review. The court in *Wendy Fair* would have been well aware of the fact that in 1995, as is the position now, an applicant for permission to apply for judicial review who is unsuccessful in the High Court can ask the Court of Appeal to reconsider the refusal of permission to apply for judicial review. Although the grounds of challenge may well be somewhat similar, whether a challenge is mounted in a statutory appeal or by way of judicial review, we are concerned with a statutory appeal process, and where there is a statutory appeal process Parliament is able, subject of course to compliance with art.6 of the European Convention on Human Rights, ... to impose conditions and limitations on the statutory right of appeal. It has chosen to do so in s.289, and the court in *Wendy Fair* noted the difference in this respect between challenges under s.288 to an Inspector's decision to dismiss a planning appeal, where there is no requirement to [obtain] leave to apply to the High Court to quash the Inspector's decision, and challenges under s.289 to Inspectors' decisions on enforcement notice appeals. Although the wording of ss.288 and 289 is somewhat different, the basis on which an Inspector's decision may be challenged in the High Court is the same in substance in both cases, namely that the Inspector has erred in law in allowing or dismissing the appeal."

The Master of the Rolls had recognized in *Wendy Fair Markets* that there was a "plain disparity" between the two sections. One imposed a requirement of leave; the other did not. There was, said Sullivan L.J., an "inconsistency between the position under s.289 and the position in judicial review proceedings, and between the position under ss.288 and 289, but it is an inconsistency which Parliament has deliberately enacted" (paragraph 21). He accepted that the procedure for an appeal under section 289 complied with article 6 of the Convention, observing that "[the] filter requirement in s.289(6) simply enables the High Court, exercising its "full jurisdiction", to make sure that the court's resources are used in an effective way, and time is not wasted on unarguable challenges" (paragraph 27).

23. Sullivan L.J. therefore concluded that the court was bound by the decision in *Wendy Fair Markets*, and that it has no jurisdiction to entertain an application for permission to appeal against the High Court's refusal of leave to appeal against an inspector's decision under section 289(6) (paragraph 28).

Does this court have jurisdiction to hear Binning's application?

24. For Binning, Ms Celina Colquhoun submitted that since the decision of this court in *Walsall Metropolitan Borough Council* significant changes have been made to the arrangements for the determination of statutory proceedings challenging the validity of planning decisions. She argued, in effect, that the relevant previous decisions of this court have been overtaken by the reform of the procedure for costs capping in Aarhus Convention claims under section VII of CPR Part 45 (by section 90 of the Criminal Justice and Courts Act 2015 and rule 8(5) of the Civil Procedure Amendment Rules 2017), and by the amendments to the 1990 Act – among them the amendment to section 288 introducing a leave filter for such challenges (by section 91 of, and paragraph 4 of Schedule 16 to, the 2015 Act). She argued, first, that with the advent of costs protection for Aarhus Convention claims – including now, under CPR r.45.41(2)(a)(i), both "judicial review" and "review under statute", and, under CPR r.45.41(3), appeals brought under section 289(1) – it is clear that all such proceedings are to be treated alike. And secondly, she submitted that it is no longer possible to rely on a "disparity" between section 288 and section 289 after the introduction of subsection (4A) into section 288 – which provides that "[an] application under this section may not be made without the leave of the High Court". The insertion of a requirement for leave into section 288 was for the same purpose as the introduction of the parallel requirement into section 289(6), and the procedure for claims for judicial review – to filter out unmeritorious cases. The Court of Appeal has jurisdiction to entertain appeals against the refusal of leave in challenges under section 288 and in claims for judicial review. Even though an appeal under section 289 is not a "planning statutory review", as defined in CPR Part 8, a refusal of leave may be a "judgment or order of the High Court" under section 16 of the Senior Courts Act 1981. Thus, submitted Miss Colquhoun, there is now no justification – if ever there was – for retaining an obvious "discrepancy" in the treatment of proceedings under section 289.

25. I cannot accept that argument. It does not, in my view, justify a decision in this case in conflict with relevant authority.

26. As Ms Victoria Hutton submitted for the Secretary of State, the basic principle running through all the relevant case law, at least from *Lane v Esdaile* onwards, still prevails. That principle is clear from the authorities to which I have referred, but was perhaps most crisply defined by Lord Steyn in *Burkett* as "the general proposition that whenever a power is given to a court or tribunal by legislation to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive". And it has been repeatedly confirmed and applied by the Court of Appeal in the particular statutory context with which we are concerned – in *Wendy Fair Markets*, *Prashar* and *Walsall Metropolitan Borough Council*. In upholding it, this court has consistently held that a High Court judge's refusal of leave to bring a section 289 appeal before the court is not a "judgment or order of the High Court" within the reach of section 16 of the Senior Courts Act 1981 – as Lord Bingham M.R. explained in *Wendy Fair Markets*. The principle was tested again, and its scope described, in *Walsall Metropolitan Borough Council*. As Sullivan L.J. recognized in

that case, there is a "residual jurisdiction" – or discretion – to overturn a decision of the High Court to refuse leave to appeal to itself if the process by which that decision was made has demonstrably been vitiated by misconduct or unfairness. Subject to that qualification, however, the principle itself is secure.

27. The qualification is not engaged in this case. It is not suggested that the judge's order refusing leave to appeal to the High Court from the inspector's decision is vulnerable on the grounds of any misconduct or unfairness in his conduct of the hearing on 24 May 2016. As in *Walsall Metropolitan Borough Council*, the grounds of the proposed appeal to this court challenge the merits of the judge's decision to refuse leave to appeal, not the process by which he arrived at it.

28. In *Prashar* the court also referred to the statutory principle, in section 54(4) of the 1999 Act, that "[no] appeal may be made against a decision of a court under this section to give or refuse permission", which, however, "does not affect any right under rules of court to make a further application for permission to the same or another court". But that provision does not assist Binning here.

29. Ms Colquhoun's argument does not succeed in bringing this case within any of the categories of case identified in *Young v Bristol Aeroplane* in which this court can properly depart from its own previous decision – cases where the court must decide which of two conflicting decisions of its own it will follow, cases where the court is bound to refuse to follow a decision of its own that cannot stand with a decision of the House of Lords or the Supreme Court, and those rare cases where the decision in question was given "per incuriam". In the light of Sullivan L.J.'s reasoning and conclusions in *Walsall Metropolitan Borough Council* – which Ms Colquhoun rightly did not criticize – any such suggestion would in my view be untenable. There are no relevant conflicting decisions of this court. The previous decisions in which the point in issue here has been decided are all consistent with each other. They have all been based on the same legal principles and analysis. No authority at a higher level casts any doubt upon them. And none was "per incuriam". In the most recent of them, *Walsall Metropolitan Borough Council*, the court had to grapple with an argument that the judgment of the Master of the Rolls in *Wendy Fair Markets* – and also that of Maurice Kay L.J. in *Prashar* – was incorrect. That argument did not succeed then, and in my view it cannot succeed now. Indeed, I do not think Ms Colquhoun suggested that it should.

30. The contention that those three decisions can no longer be regarded as correct in the light of subsequent changes in legislation and procedure is, in my opinion, mistaken. I do not accept that any of the recent amendments to the legislative and procedural regime for challenging planning decisions – under the 2015 Act – or the adjustments made to the costs capping provisions in section VII of CPR Part 45 call for a different conclusion now.

31. There has been no significant change to the self-contained statutory scheme for the enforcement of planning control or, in particular, the provisions for appeals under section 289 since this court decided as it did in *Walsall Metropolitan Borough Council* in 2013. The procedure for an "appeal" under section 289 was left unchanged by the 2015 Act. It is true that the requirement for leave that has been introduced into the procedure for making an "application" under section 288 – in section 288(4A) – is in similar terms to the corresponding provision in section 289(6). But this amendment to section 288 did not affect the arrangements under which local planning authorities are empowered to take

enforcement action, landowners are given the right to appeal against enforcement notices on specified grounds under section 174, and appeals may be made under section 289 by "the appellant or the local planning authority or any other person having an interest in the land to which the notice relates". The addition of a statutory leave stage to enable the High Court to filter applications under section 288 did not, and could not, generate a new right of appeal to the Court of Appeal against the refusal by the High Court of leave to pursue an appeal to itself under section 289. For such a right of appeal to come into being there would have had to be an appropriate amendment to the arrangements for appeals under section 289. There has been no such amendment – either in the statute itself or in the relevant provisions of the Civil Procedure Rules.

32. Emphasis has been given in the previous cases to the absence of a leave filter in section 288. But the decisions in those cases have not turned on the fact that there was, then, no requirement for the High Court to permit an application to be made under that section. Crucial in all of them has been the application of the principle in *Lane v Esdaile*, and the absence of an express right of appeal to this court against the High Court's refusal of leave to appeal to itself under section 289(6).

33. Ms Hutton also submitted, in my view correctly, that the "policy reasons" referred to by the Master of the Rolls in *Wendy Fair Markets* and Sullivan L.J. in *Walsall Metropolitan Borough Council* have not gone away. She mentioned the problem of "abusive appeals", as Sullivan L.J. described them in *Walsall Metropolitan Borough Council*, which bring needless uncertainty and delay to the enforcement of planning control. That this problem is mitigated by the finality of a High Court judge's refusal of leave to appeal against an inspector's decision on a section 174 appeal may be seen as some justification for the difference between the arrangements for appeals under section 289 and those for applications under section 288. Another difference to which Ms Hutton referred was that, under section 288(4B), a section 288 application must be made within six weeks of the decision under challenge, whereas, under paragraph 26.1(1) of Practice Direction 52D, a section 289 appeal must be made within 28 days.

34. But as Ms Colquhoun acknowledged, whatever may be said about those "policy reasons", there is also an important distinction in status between the two sections. An application under section 288 is a "planning statutory review", whereas an appeal under section 289 is not. CPR r.8.1(6) states that a rule or practice direction may, in respect of a specified type of proceedings "(a) require or permit the use of the Part 8 procedure". Practice Direction 8C was made under that rule. In the "General provisions applicable to planning statutory review", paragraph 1.1 of the practice direction says that it relates to "claims for statutory review" under various provisions, which include section 288 but not section 289. Paragraph 1.2 states that "[in] this Practice Direction "claim for planning statutory review" means a claim under any of the statutory provisions set out in paragraph 1.1". After the coming into force of the relevant provisions of the 2015 Act on 26 October 2015, and with effect from 3 October 2016, CPR r.52.10 provides, under the heading "Planning statutory review appeals":

> "… (1) Where permission to apply for a planning statutory review has been refused at a hearing in the High Court, an application for permission to appeal may be made to the Court of Appeal.
>
> (See Part 8 and Practice Direction 8C.)
>
> … ."

Under section 54 of the 1999 Act, rules of court may make such provision for a right of appeal. CPR r.52.10 has effectively done so for proceedings under section 288, but not for proceedings under section 289. This could have been done, but was not.

35. Ms Colquhoun pointed out that CPR r.52.10 was introduced to deal with amendments made by the 2015 Act to section 288 and other forms of statutory challenge for which leave was not previously required. She submitted that it should not be seen as reinforcing the disparity between sections 288 and 289, and also inimical to access to environmental justice under the Aarhus Convention – which the provisions for costs protection in section VII of CPR Part 45 seek to promote. But that argument cannot undo the principle in *Lane v Esdaile* and its continuing relevance to appeals under section 289 – which are still not subject to any provision allowing an application for permission to appeal to be made to the Court of Appeal against the High Court's refusal of leave to appeal to itself. The fact that the amended provisions for costs limits in Aarhus Convention claims now include in CPR r.45.41(2)(a)(i) claims for "review under statute" as well as claims for judicial review, and that it was considered necessary to provide, as CPR r.45.41(3) does, that appeals under section 289(1) are "for the purposes of this Section to be treated as reviews under statute" – with a corresponding provision in paragraph 26(17) of Practice Direction 52D – does not bear on the principle with which we are concerned. The consistent regime for costs protection does not yield a right of appeal to the Court of Appeal against the High Court's refusal of leave to appeal to itself under section 289(6). It does, however, confirm the deliberate distinction in the Civil Procedure Rules between a "planning statutory review" under section 288 and a section 289 appeal.

Conclusion

36. For those reasons I concluded that we had no jurisdiction to hear the proposed appeal and that the application before us must be therefore be refused.

Lady Justice Sharp

37. I agree.