Neutral Citation Number: [2013] EWCA Civ 585

Case No: C1/2012/1950

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH (ADMINISTRATIVE COURT)
MR JUSTICE HOLMAN
[2012] EWHC 1303 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2013

Before :

LORD JUSTICE GOLDRING
LORD JUSTICE AIKENS
and
LORD JUSTICE McCOMBE

- -

Between :

DELANEY	**Appellant**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT &	**First Respondent**
BASILDON BOROUGH COUNCIL	**Second Respondent**

- -
- -

Stephen Cottle (instructed by **Community Law Partnership**) for the **Appellant**
Stephen Whale (instructed by the **Treasury Solicitor)** for the **First Respondent** and
Melissa Murphy (instructed by **Basildon Borough Council Legal Department**) for the **Second Respondent**

Hearing date: 13 May 2013

- -

Approved Judgment

Lord Justice Goldring :

Introduction

1. Since October 2007 the appellant, who has traveller status for planning purposes, has been living on a site which he owns at Highview, Hovefields Drive, Wickford in Essex. It is Green Belt land. The site was previously owned by someone called Mrs. Casey. She and her family were in 2006 granted temporary personal planning permission to occupy the site. She left in 2007. That year the applicant bought the site and moved in with his family. His application for retrospective permission was refused by what is now the Basildon Borough Council in June 2010. By a Decision Letter of 1 February 2011 the Inspector dismissed the appellant's appeal. He refused both permanent and temporary planning permission. On 23 April 2012 Holman J rejected his application under section 288(5)(b) of the Town and Country Planning Act 1990 to quash the Inspector's decision. Before the judge the only subject of the appeal was the refusal of a grant of temporary permission; the refusal of permanent permission was not challenged.

The ground of appeal

2. Jackson LJ granted permission on one ground only. Its essential point can be encapsulated in the following way: whether, contrary to its statutory duty to do so, the failure of the Council to carry out an assessment of the accommodation needs of gypsies and travellers residing in its district, and to prepare a strategy in respect of the meeting of that need, was a material factor in the appellant's favour when considering whether or not to grant temporary planning permission; whether, having accepted a breach of statutory duty and found an unmet need for gypsy and traveller site provision in the area, the Inspector placed any or sufficient weight on the absence of a strategy in the light of paragraphs 45 and 46 of Circular 1/2006; finally, whether Holman J's conclusions in respect of these matters were correct.

The legal framework

3. By section 8(1) of the Housing Act 1985:

> "Every local housing authority shall consider housing conditions in their district and the needs of the district with respect to the provision of further housing accommodation."

4. By section 87 of the Local Government Act 2003 ("Housing strategies and statements"):

> "The appropriate person [the Secretary of State] may-
>
> (a) require a local housing authority to have a strategy in respect of such matters relating to housing as [he]…may specify…"

5. Subsection (4) states that housing "includes accommodation needs for gypsies and travellers within the meaning of section 225 of the Housing Act 2004."

6. Section 225 of the Housing Act 2004 provides:

> "(1) Every local housing authority must, when undertaking a review of housing needs in their local district under section 8 of the Housing Act 1985…carry out an assessment of the accommodation needs of gypsies and travellers residing in or resorting to their district.
>
> (2) Subsection (3) applies where a local housing authority are required under section 87 of the Local Government Act 2003…to prepare a strategy in respect of the meeting of such accommodation needs.
>
> (3) The local authority who are that local housing authority must take the strategy into account in exercising their functions…
>
> …(5) In this section…
>
> (b) "accommodation needs" includes needs with respect to the provision of sites on which caravans can be stationed…"

7. By section 72 of the Town and Country Planning Act planning permission may be granted for a limited period.

8. Circular 11/95 concerns the "Use of conditions in planning permission." Paragraphs 108-113 deal with "Temporary Permissions." Paragraph 110 states:

> "Where a proposal relates to a building or use which the applicant is expected to…continue only for a limited period…because it is expected that the planning circumstances will change in a particular way at the end of that period, then a temporary permission may be justified…"

9. Circular 1/2006 emanated from the Office of the Deputy Prime Minister on 2 February 2006. It is titled "Planning for Gypsy and Traveller Caravan Sites." It applied in the present case. Paragraph 12 stated that its "main intentions" were, among other things:

> "a)…to reduce the number of unauthorised encampments…and to make enforcement more effective…
>
> b)…for local authorities to develop strategies to ensure that needs are dealt with fairly and effectively…
>
> e)…to identify and make provision for the resultant land and accommodation requirements…
>
> f)…to help to avoid gypsies and travellers becoming homeless through eviction from unauthorised sites without an alternative to move to…
>
> i) to help to avoid gypsies and travellers becoming homeless through eviction from unauthorised sites without an alternative to move to."

10. The circular deals with development plan documents ("DPDs"). Paragraphs 45 and 46 provide:

> "45. Advice on the use of temporary permissions is contained in paragraphs 108-113 of Circular 11/95…Paragraph 110 advises that a temporary permission may be justified where it is expected that the planning circumstances will change in a particular way at the end of the period of the temporary permission. Where there is an unmet need but no available alternative gypsy and traveller site provision in an area but there is a reasonable expectation that new sites are likely to become available at the end of that period in the area which will meet that need, local planning authorities should give consideration to granting a temporary permission.
>
> 46. Such circumstances may arise for example, in a case where a local planning authority is preparing its site allocation DPDs [Development Plan Document]. In such circumstances, local planning authorities are expected to give substantial weight to the unmet need in considering whether a temporary planning permission is justified."

11. Paragraph 49 refers to the general presumption against inappropriate development within Green Belts. It suggests that pressure for development of sites in the Green Belt may be avoided if there are sufficient sites in the area.

12. Finally, by section 288(5)(b) of the Town and Country Planning Act 1990, the High Court may quash an inspector's decision "…if satisfied that…the order or action in question is not within the powers of this Act, or…the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to [the order or action in question]…"

The Inspector's decision

13. In paragraph 7, the Inspector set out the main issues. He stated that the site lay within the Green Belt; that:

> "…the proposal is inappropriate development in the Green Belt, a matter upon which the parties concur."

14. In paragraph 14, under the heading "Green Belt Openness and Purposes," he concluded that:

> "…the proposal leads to loss of Green Belt openness and undermines three of the purposes of including land in the Green Belt. On its own the site's harm to the Green Belt could be seen as small scale. However, in the wider context of the purposes of Green Belt designation and particular vulnerability of the area, the harm is substantial."

15. He dealt with "other considerations" in paragraph 21 and following. As he put it:

> "The other considerations to be taken into account are principally (i) the need for provision of gypsy sites; ii) the appellants need for accommodation and alternative options; and (iii) the other personal circumstances of the appellant and his dependants."

16. He dealt with "The Need for and Provision of Gypsy Sites" in detail. He said (in paragraph 22) that:

> "…Policy H3 within the single issue revision to the RSS [Regional Spatial Strategy] contains minimum targets for the provision of additional gypsy pitches for the period 2006-2011. For Basildon District the requirement is for 62 additional pitches for the period. The provision was based on the need arising from natural growth, overcrowding on existing authorised pitches and from those currently resident on sites without planning permission.
>
> 23….[the Council] remains of the view that the large number of unauthorised sites in the District is a reflection of the availability of small individually-owned plots of relatively cheap Green Belt land and should not be used as a means of assessing need.
>
> 24…Policy H3 remains the only development plan policy basis for need and still carries weight in determining the provision that ought to be made for gypsy pitches. Whilst I note the basis for the Council's dissatisfaction with the assessment of need and that the Green Belt is a significant environmental constraint in the District, the RSS and the supporting Gypsy and Traveller Accommodation Assessments…are the best available evidence before me for assessing need…the figures to an extent reflect the Council's duty to meet locally generated need for sites arising from those families residing and resorting to the area on the Basildon public site or the authorised private sites in the District. In addition further provision will need to be made to meet the need beyond 2011.
>
> 25. The Council has not sought to progress any Development Plan Document (DPD) or other method of meeting the need since…2006…Instead it has concentrated its efforts on dealing with the significant number of unauthorised pitches within the District. As a result the only new provision within the period 2006-2011 has been one plot granted on appeal. The Council estimated at the Inquiry that the process of a revised assessment of need, site search, allocation and provision would take up to 3 years. There appeared to be no prospect of earlier provision through the bringing forward of a DPD in advance of the Core Strategy. Based on the evidence and my experience a more realistic timetable for provision would be closer to 5 years.
>
> 26. I conclude that, despite the state of flux in the policy position, there is an unmet need for gypsy sites in the area. That need will not be met by planned provision by the council in the foreseeable future. In the meantime provision to meet the need will rely on the granting of planning permissions for private sites."

17. The Inspector dealt with the appellant's dependants' accommodation needs and alternative options. In paragraph 30 he said that:

> "Although there is a need to provide a settled base for the appellant and his family, the case for choosing the appeal site is not compelling. The appellant's ties to the Basildon area are not significant. The area of search for a site could be fairly wide. Other private sites may be difficult to find, particularly in Essex where the Green Belt is extensive. There is no burden of proof on the appellant to prove that there are no alternative sites. However, it seems to me that alternative options to meet the appellant's accommodation needs have not been fully explored. Overall I conclude that it is likely that an alternative site could be found which would be less harmful than the appeal site and which is also likely to be affordable and suitable."

18. The Inspector referred to other personal circumstances.

19. Finally, the he dealt with "The Overall Balance and Conclusions." He said:

> "39…inappropriate development in the Green Belt should not be approved, except in very special circumstances…Very special circumstances will not exist unless the harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by the other considerations.
>
> 40. I attach substantial weight to the harm to the Green Belt arising from inappropriate development, loss of openness and conflict with three of the purposes of including land in the Green Belt…
>
> 41. In terms of those considerations in favour, I am satisfied that the appellant has traveller status which brings into play traveller policies. There is a need for more gypsy sites in the District. This need will remain to some extent…Due to the timetable for the [Core Strategy] and any DPD, provision to meet the existing need will have to be met by the grant of planning permissions for private sites. The unmet need for gypsy and traveller sites weighs in favour of the grant of planning permissions.
>
> 42. I attach some weight to the need to provide a settled base for the appellant and his family…There are no strong family or personal reasons to support the choice of this particular site. Therefore I attach limited weight to the need to locate on the appeal site…
>
> 44. Taking all relevant matters into account I conclude that the substantial harm to the Green Belt including to its visual amenities is not clearly outweighed by the other considerations

> I have identified. Therefore, very special circumstances do not exist to justify development…
>
> 45. I have considered whether a temporary permission could be granted as such a course of action would prevent permanent harm and would provide an extended period for finding an alternative site. However, the site has already had the benefit of temporary planning permission and has been occupied on and off for more than 8 years. A further period of occupation would perpetuate the harm for an unacceptable length of time which would not be outweighed by other material considerations. As there is no realistic prospect of planned provision in the foreseeable future a condition limiting the period for which the permissions to be granted would not be appropriate. …"

The judgment

20. As to Mr. Cottle's submission on behalf of the appellant that the Inspector had failed to place any or sufficient weight on the Council's failure to review the accommodation needs of gypsies and travellers and to prepare a strategy in respect of meeting such needs (in accordance with section 225) the judge said:

> "53. On the facts of the present case, the inspector clearly did recognise both the duty and the failure to discharge the duty. See paragraph 24 of his decision letter which refers to the duty and the conclusion at paragraph 26…that the council will not discharge that duty in the foreseeable future.
>
> 54…I agree with Miss Murphy [on behalf of the Council] that those conclusions should properly be read across into paragraph 45 dealing with temporary permission and the inspector did not need in paragraph 45 to repeat express reference to breach of statutory duty.
>
> 55. In any event, I also agree with Mr. Whale [on behalf of the Secretary of State] that the fact of a breach of statutory duty by [the]…Council adds nothing on the facts of this case since, as the inspector found, the appellant's ties to the Basildon area are not significant…
>
> 56. For similar reasons, I also reject Mr. Cottle's third…point; namely that the lack of policy by Basildon in relation to gypsies and travellers impacts upon the assessment of proportionality. The inspector gave express consideration to proportionality in paragraph 46 of his decision letter. It is true that in that paragraph he did not expressly advert to the absence of a policy, but even if he had done so, the answer would have been the same. The appellant has no particular connection with the Basildon area and can look much further afield."

The appellant's approach to temporary permission at the hearing

21. I should refer to one matter which is relevant to the argument now being advanced by Mr. Cottle. It was referred to by the judge in paragraph 36 of his judgment. Although in his opening and closing to the Inspector Mr. Cottle suggested that temporary permission should be granted "until the Council puts its house in order," Dr. Murdoch, the appellant's very experienced expert in evidence, suggested two alternative approaches to the Inspector. The first related to the grant of temporary permission and paragraph 45 of 1/2006, the second to permanent permission. As Dr. Murdoch put it, if the Inspector considered there was a reasonable expectation of suitable sites coming forward, then substantial weight should be attached to that factor (in favour of temporary permission). If he considered that provision by the local planning authority was unlikely, then permanent permission should be granted.

Mr. Cottle's submissions

22. As it seems to me Mr. Cottle's argument can be summarised in the following way. Paragraph 45 of Circular 1/2006 contemplates that given an unmet need a local authority should consider granting temporary permission where there is a reasonable expectation that new sites are likely to become available at the end of the period of temporary permission. Here, the Inspector found there was an unmet need. Paragraph 46 states that where that is the case, the local planning authority is expected to give substantial weight to that unmet need when considering whether temporary permission is justified. The Council has failed to fulfil its statutory duty to review the accommodation needs of gypsies and travellers and prepare a strategy. That failure is significant. It should be accorded substantial weight when considering whether or not temporary permission should be granted. The appellant should not be in a worse position because of the Council's breach of statutory duty than he would have been had it been complied with. Instead of applying merely the last sentence of paragraph 45 of 1/2006, the Inspector should have gone on to consider paragraph 46. Had he, he would have placed considerable weight on the Council's failure when considering temporary permission. The appellant has as a result lost out. The Council has benefited from its own failure. Recognition of the duty (as referred to by the judge) was not enough. The breach of duty was an independent matter of substantial weight which required separate consideration. Mr. Cottle did not suggest that such consideration would have been dispositive. He suggested that the Decision Letter should have contained something to the following effect:

> "The lack of an assessment of needs under section 225 of the Housing Act 2004 and so a breach of statutory duty is a factor to which I give significant weight."

23. In the circumstances, as the Ground of Appeal puts it (although I am not sure it was put this way to the judge), the possibility of a five year temporary grant of permission should have been considered. Given the previous 8 year on and off occupation, that would by now amount to a temporary permission on Green Belt land of some 12 years.

24. Among the authorities which Mr. Cottle drew to our attention was *Langton and McGill v Secretary of State for Communities and Local Government and another* [2008] EWHC 3256 (Admin), where, having referred to paragraph 46 of 1/2006, His Honour Judge Gilbart QC said:

> "…A case against development being advanced by a Council who relied on its own failure to advance Government policy on the identification of pitches is a significantly weaker one than a case advanced by an authority which is doing what it can to identify provision…"

25. Mr. Cottle also referred us to *Sheridan v Basildon Borough Council* [2011] EWHC 2938 (Admin), where, when dealing with a section 178 application by the second respondent under the Town and Country Planning Act, Ouseley J said that:

> "…a strategy for sites…would assist the need argument on other sites…"

My conclusion

26. As the contents of the Decision Letter make plain, the section 225 failure (as I shall for convenience refer to it) and its implications, formed a substantial topic before the Inspector. Mr. Cottle's skeleton argument makes that plain. It states that "…it was said on the Appellant's behalf that the lack of policy was a serious matter." The emphasis on the topic is reflected in the Decision Letter. Paragraphs 22 to 26 in terms concerned the need for and provision of gypsy sites. The Inspector referred to the need for 62 additional pitches (paragraph 22). (It does not seem to me that the dispute highlighted by Mr. Cottle as to the basis of the calculation is relevant for present purposes). The Inspector referred to the Council's duty to meet the need for sites "arising from those families residing and resorting to the area;" paragraph 24. That is plainly a reference to section 225(1). He was well aware of the Council's failure to progress a Development Plan Document; paragraph 25. He did not believe such a document could be provided for some 5 years. He found in terms, that the unmet need would not be met by a planned provision; reliance would have to be placed on granting planning permission for private sites; paragraph 26. As it seems to me, importantly, he found that unmet need favoured the grant of planning permission; paragraph 41. He considered whether temporary permission should be granted; paragraph 45 of the Decision Letter. He said that a "further period of occupation would perpetuate the harm for an unacceptable length of time which would not be outweighed by other material considerations." Those "other material considerations" included the Council's failure to make an assessment of need, his finding that there was unmet need and, that this favoured a grant of permission.

27. In short, the Inspector did take into account in the appellant's favour the Council's breach of duty and, importantly, its consequences and implications for him. He plainly gave significant weight to the Council's breach of statutory duty. However, it did not outweigh the other material considerations going against a further temporary permission on this piece of Green Belt land. The Inspector's approach was permissible. The Decision Letter adequately explained it. I do not accept Mr. Cottle's criticisms.

28. Moreover, what those considerations cannot do is create a reasonable expectation that new sites are likely to become available when, as it seems to me, it has reasonably been concluded that they are not. That would amount to re-writing paragraphs 45 and 46 of 1/2006. No doubt that was why Dr. Murdoch dealt with matters as he did on behalf of the appellant at the inquiry.

29. In the result, the Inspector weighed up the different factors in a way he was entitled to. He did so both regarding permanent and temporary permission. He sufficiently expressed his reasons for deciding as he did. There is no basis for suggesting (as Mr. Cottle did) that he failed to take into account the appellant's Article 8 rights, or the considerations reflected by the Framework Convention for the Protection of National Minorities or the public sector equality duty under section 149 of the Equality Act 2010.

30. It is in the circumstances unnecessary to deal with other aspects of the judgment.

31. It was for these reasons that we dismissed this appeal on 13 May 2013.

Lord Justice Aikens:

I agree

Lord Justice McCombe

I also agree