C1/2004/2427, Neutral Citation Number: [2005] EWCA Civ 859
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mr Justice Sullivan
Co/4241/2004

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 21st July, 2005

B e f o r e:

LORD JUSTICE BUXTON,
LORD JUSTICE SEDLEY
AND
MR JUSTICE RIMER

– – – – – – –

N.SMITH

Appellant

– v –

THE FIRST SECRETARY OF STATE MID−BEDFORDSHIRE DISTRICT COUNCIL

Respondent

– – – – – – – – –

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Marc Willers (instructed by South West Law) for the Appellant
Mr Andrew Sharland (instructed by The Solicitor to HM Treasury) for the First Respondent
Mr Eian Caws (instructed by the Director of Legal Services, Mid−Bedfordshire District Council) for the Second Respondent

J U D G M E N T
As Approved by the Court

Lord Justice Buxton :

The nature of the case

1. This is an application for permission to appeal, with appeal to follow if permission granted, against a decision of Sullivan J on an application to him under section 288 of the Town and Country Planning Act 1990. The complaint before the judge was against his dismissal of the claimant's, now applicant's, appeal against a planning inspector's refusal of his appeal from a decision of the second respondent refusing permission for a gypsy caravan park at Woodside Caravan Park, Hatch, Bedfordshire [Woodside]. The proceedings are thought to raise issues of general importance about planning policy in relation to gypsy caravan sites.

2. The history can be succinctly stated in the terms adopted by the judge in paragraphs 3−8 of his judgment:

3. "Since the site had been used as a gypsy caravan park since 1998, the inspector treated the appeal as being made against a refusal to retain the four plots on the site which were occupied by four family groups.
4. Woodside Caravan Park comprises two parts: the back or northern field and the front or southern field fronting onto Hatch Road. Access from Hatch Road runs through the southern field to the northern field. The inspector summarised the lengthy planning history of the site in paragraph 17 of the decision letter. So far as relevant for present purposes, the history is as follows. The most recent occupation of the site by gypsy caravans began in 1998, when caravans were brought onto the site and various works, such as the construction of hard−standings and roadways, were undertaken. On 1st October 1998 the Council served an enforcement notice, stop notices were also served, but development continued and resulted in a layout of some 27 plots. Appeals were made against the enforcement notices and in a decision letter dated 29th June 1999 an inspector dismissed those appeals and upheld the enforcement notice. In doing so, the inspector extended compliance with the notice to a period of 12 months and suggested that consideration should be given to the possibility of approving a smaller site with substantial additional landscaping.
5. In a decision letter dated 8th January 2001, an appeal relating to 22 pitches on the site was dismissed. The inspector concluded that the site was a noticeable and incongruous feature in the countryside and on a scale that would not be small enough to avoid harm to the countryside. He felt that it would be possible to meet some of the need for gypsy accommodation in the district by what he called a "genuinely smaller scale gypsy site".
6. In due course applications for planning permission were made to retain 11 plots on that part of the site comprising the northern field. Those applications were refused. There were further appeals, and in a decision letter dated 20th June 2002 those appeals were dismissed by the Secretary of State following an inspector's report. In his decision letter, the Secretary of State said that he shared the inspector's view that a reasonable interpretation of a "much reduced site" could be a caravan park on the southern field forming a limited extension to Hatch and screened behind substantial

landscaping but, the Secretary of State said, significantly different considerations applied to the northern field.

7. In June 2002 the High Court granted an injunction requiring the removal of all the occupants from the site, both the northern and southern fields. The injunction was to come into effect on 1st November 2002, but so far as the southern field was concerned a stay was granted pending the outcome of the appeal which is the subject of this application.
8. By the time the inspector considered the appeal at an inquiry held between 30th March and 1st April 2004, the occupants of the northern field had been removed and all of the plots had been cleared, with the exception of one of them.

The inspector's decision

3. In paragraph 19 of the decision letter the inspector identified six main issues arising from the proposed continued use of the site as a gypsy caravan park, namely whether that use would: (i) unacceptably spoil the character and appearance of the countryside, or (ii) harm the amenities nearby residents might reasonably expect to enjoy, or, (iii) undermine important policy aims relating to the provision of sites for gypsies, or, (iv) exacerbate flood risks, or, (v) meet a need for further gypsy sites that should be met here, or, (vi) meet the special needs of specific gypsy families.

4. The inspector concluded that the needs of the residents on the site were outweighed by what he saw as the serious harm that the site would cause. Of that, he said at paragraph 57 of his report:

> "Because I cannot be certain that adequate drainage arrangements can be secured or properly maintained, a risk from flooding and the possibility of pollution remains. And, it seems to me that the size, position and origins of the site would combine to swamp the hamlet, harm the amenities nearby residents might reasonably be expected to enjoy, and give grounds for resident[s] to be apprehensive that previously experienced problems might recur. The character and appearance of the countryside here would also be altered irrevocably. For those reasons, the retention of [Woodside] would not just be harmful, it would also be contrary to the relevant planning policies emerging here. And given the origins and continued unlawful occupation of the site I consider that its retention would serve to undermine fundamental aims of Government policy"

The judge was satisfied that the inspector had set out his reasoning in clear and adequate detail; was entitled to take a different view from that of his predecessors; and had made no error of law. He therefore dismissed the appeal.

This application

5. In the appeal that is sought to be brought in this court complaint is made of three elements in the inspector's reasoning. It is right to say that the Notice of Appeal dealt with these matters in terms very different from, and much more attenuated than, the form that they took both in Mr Willers'skeleton argument and in the debate before the court. With some hesitation, we permitted the application to be extended in this way, as we were satisfied that the respondents had had adequate opportunity to understand, and to respond to, the way in which the case is now put. The three errors said to have been committed by the inspector, each of which separately is said to have been sufficient to undermine his order, can be stated, at the moment for purposes of identification only, as (i) the fear of crime issue; (ii) the shift from authorised to unauthorised sites issue; and (iii) the competition for local work issue. I will consider those in turn.

Fear of crime

6. Under the heading of "residential amenities" the inspector first, at paragraph 25 of his report, recorded the finding summarised in his paragraph 57 (see paragraph 4 above) that the scale of the proposed development "would still be sufficient to swamp the hamlet and so alter the perception of those living within it". He then referred to particular difficulties between the inhabitants of Woodside and the occupier of an immediately adjoining property, which he thought (paragraph 26) to arise from "the juxtaposition of two largely incompatible land uses". Neither of those conclusions is the subject of appeal.

7. The inspector then turned to past complaints about crime and vandalism since the Woodside site was created, and fears that such would continue. Those were the "grounds for resident[s] to be apprehensive that previously experienced problems might recur" to which the inspector referred in his summary in paragraph 57 of his report. The judge cited the inspector's reasoning on this point in full, and so must I. He said in his paragraphs 27−28 that at all three previous Inquiries:

"evidence was submitted of increased crime, trespass, vandalism and anti−social behaviour since the Woodside caravan park was set up. The last inspector was satisfied that the residents of Hatch were then being subjected to levels of nuisance and disturbance which was unacceptable and absent prior to the establishment of the encampment. The catalogue of police incidents submitted to me supports that view. But, it is also clear that more recently, and since the partial implementation of the injunction, the number of incidents has substantially decreased. At first sight the schedule appears to indicate that the removal of the gypsies from the land to the north has resulted in an almost complete absence of police attendance at Woodside. However, PC Knowles enumerated 5 occasions (excluding the one that might have related to activities on the fields beyond the poplar plantation) between August 2003 and March 2004 when police inquiries or ‘complaints' to the force were associated with the site in some way. Unfortunately, the evidence presented does not distinguish between incidents associated with those remaining on the northern land and

> the appeal site. Indeed, there was nothing to link any incident with the appellants. Nevertheless incidents continue to occur.
>
> 28. The fear of crime is capable of being a material consideration, as is clear from the *West Midlands Probation Committee v SSE and Walsall MBC* (1997) JPL 323. In the present case the continued occurrence of incidents involving the police provides some grounds for residents to remain apprehensive about the prolonged existence of this gypsy caravan site. Moreover, residents have previously experienced some quite alarming events, one involving over 100 officers, of whom 18 were armed, backed up by 3 dog handlers and a helicopter. In those circumstances I do not find it surprising that they should express some apprehension that apparently quite innocuous inquiries might herald the on−set of something more disturbing. Even more so as the limited level of occurrences that now persists seems to me to be well in excess of what might ordinarily be expected in a small rural hamlet such as this."

The judge held that on the basis of that evidence the residents' fears could not possibly be said to be unjustified, or based on pure prejudice. Although the number of incidents had substantially decreased, they had continued.

8. The Inspector correctly cited the *West Midlands Probation Committee* case, as the ruling authority in this court. That case concerned a bail and probation hostel, which had attracted numerous visits by the police, and given rise to a fear of crime. That diminished the amenity of the area. Giving the judgment of this court, Pill LJ, at p395 held that justified public concern in the locality about emanations from land as a result of its proposed development may be a material consideration, but that the "particular purpose of a particular occupier of land" is not normally a material consideration in deciding whether the development should be permitted. He continued:

> "A significant feature of the present case is the pattern of conduct and behaviour found by the Inspector to have existed over a substantial period of time. I include as part of that pattern the necessary responses of the police to events at the hostel. That behaviour is intimately connected with the use of the land as a bail and probation hostel×.The established pattern of behaviour found by the Inspector to exist, and to exist by reason of the use of the land as a bail and probation hostel, related to the character of the use of the land, use as a bail and probation hostel× Given such an established pattern, I would not distinguish for present purposes the impact of the conduct upon the use of adjoining land from the impact of, for example, polluting discharges by way of smoke or fumes×.Fear and concern felt by occupants of neighbouring land is as real in this case as in one involving polluting discharges and as relevant to their reasonable use of the land×..it is a question of planning judgement what weight should be given to the effect of the activity on the neighbouring land "

9. I respectfully draw from that guidance the conclusions that (i) fear and concern must be real, by which I would assume to be required that the fear and concern must have some reasonable basis, though falling short of requiring the feared outcome to be proved as inevitable or highly likely; and (ii) the object of that fear and concern must be the use, in planning terms, of the land. As we have seen, Pill LJ went to some trouble to demonstrate that it was the use of the land as a bail hostel, and not just the behaviour of some of the hostel's occupants, that grounded the legitimate concern: however much that behaviour was relied on to demonstrate the nature and likely effect of that use.

10. The inspector's approach in our case therefore presents two problems. First, not only had the number of incidents diminished, but those reported to the enquiry could not be reliably attributed either to the appeal site or to the applicants. Second, it was necessary in order to take these incidents into account to attribute them not merely to the individuals concerned but also to the use of the land. But a caravan site is not like a polluting factory or bail hostel, likely of its very nature to produce difficulties for its neighbours. Granted that the evidence of recently past events attributable to the site was sparse, or on a strict view non−existent, the fear must be that the concern as to future events was or may have been based in part on the fact that the site was to be a gypsy site. It cannot be right to view land use for that purpose as inherently creating the real concern that attaches to an institution such as a bail hostel.

11. Because of this difficulty, and the state of the evidence, the issue of fear of crime needed in this case to be very carefully explored. If the concern for the future rested not wholly on extrapolation from past events, but at least partly on assumptions not supported by evidence as to the characteristics of the future occupiers, then in accordance with the guidance contained in the *West Midlands* case it could not be taken into account.

12. These points were not put to the judge in quite this way. If they had been, I have little doubt that he would have held that the evidence before the inspector did not suffice to establish real concern of the kind that the authorities require before that concern can enter into the planning judgement.

13. Mr Sharland sought to counter this difficulty by pointing out that investigation of the fear of crime formed part of the inspector's analysis of the "residential amenities" issue. He had already determined that to grant permission would unreasonably interfere with the residential amenities of the area before he came to the fear of crime issue: see paragraph 6 above. He would therefore have determined that permission should be withheld on amenity grounds even if he had come to a different conclusion about the fear of crime. I cannot accept that argument. Although listed for convenience as an amenity issue, fear of crime was plainly regarded by the inspector, as it had been by the objectors, as a discrete, and important, issue. That is shown by the summary of his conclusions in paragraph 57 of his report: see paragraph 4 above. Whether the inspector would have come to the same final decision if he had taken a different view of the issues complained of in this appeal, including fear of crime, is a

question that I shall have to consider at the end of this judgment. But it is a question that has to be assessed in the context of the inspector's determination as a whole.

14. This aspect of the determination is also important when addressing the other two issues in this appeal. Although they have to be taken separately, both of them arose in the context of the inspector's consideration of whether there was an established need for another gypsy site in Mid−Bedfordshire; or, if there was that need, whether there was a need for the site to be provided at Woodside. The issue of need arose because of what the inspector had found to be valid objections to Woodside. Those objections might be balanced out by demonstrating need for accommodation that would be fulfilled by provision at Woodside; but in those circumstances it was for the applicants to prove the need.

Shift from authorised to unauthorised sites

15. The inspector found, and the judge held that he was justified in finding, that there had been a history of movement from authorised to unauthorised caravan sites. The judge said that it was a matter for him what weight he gave to that fact. The inspector explained the point in his paragraph 47 as follows:

> "I am also concerned that the data derived from the last 5 counts of gypsy caravans in the District seems to indicate a shift of caravans from authorised sites to unauthorised encampments. No one could provide an explanation at the Inquiry. Hence, I simply observe that there is a large reduction of caravans on authorised sites indicated by the count undertaken in July 2002 and a modest increase in unauthorised encampments. The decline in the latter shown by January 2003 clearly reflects the injunction at Woodside. But, by July 2003, not only had the number of caravans on unauthorised sites almost returned to previous levels, but also the number on authorised sites was substantially below levels that had previously been achieved. In the absence of any proffered information to the contrary, this seems to me to reflect a reduction in the use of authorised sites in favour of unauthorised encampments. I am not prepared to support such a trend, which in my view can only serve to undermine local and national policies to provide sites for gypsies. And, of course, it must follow that the number of unauthorised encampments in the District would be most unlikely to be a direct reflection of the need for additional gypsy caravan sites."

16. The inspector therefore drew two conclusions. First, the flight from authorised sites in the district supported the doubts that he had already expressed about the need for further such sites. Second, there was a danger that a grant of planning permission would undermine government policy to direct gypsy caravans to authorised sites. Mr Willers took us to the figures, in greatly more detail than he appears to have done before the judge, and argued that, properly understood in the context of seasonal

migration, they did not support the existence of a "trend". There is, however, a more fundamental difficulty than that about both of the inspector's conclusions.

17. The figures were "snapshot" counts of vehicles at particular points in time, which said nothing about where the caravans had come from, or whether and if so why caravans had left authorised sites to go on to unauthorised sites. These figures therefore told one nothing about demand for authorised sites. That might be established by a count of vacancies on authorised sites, but the Decision Letter did not rely on any such evidence. Second, it might seem a paradox that the transformation of Woodside from an unauthorised to an authorised site (Mr Sharland, for the Secretary of State, having confirmed that in terms of government policy Woodside, with planning permission, would count as authorised) could be opposed as undermining governmental policy as to the extension of authorised sites. I do not exclude the possibility of such an argument, but it needed to be made in much more detailed and expositive terms than are adopted in the Decision Letter.

Competition for local work

18. Having found that need for further sites in Mid−Bedfordshire had not been established, the inspector continued in his paragraph 48:

"But, even if a general need for additional gypsy caravan sites were to be identified in Mid Bedfordshire, there are good reasons for not seeking to provide it here. This particular part of the District already serves as the principle location for almost all the authorised provision for gypsies. The 2 main ‘private' sites at Cartwheel and Talamanca lie just to the west of Sandy beside the A1(T), barely 1.5 km to the north. The main ‘public' site is at Potton, roughly 5 km to the east of Sandy. The other sites in the District are only for single family occupation. One has recently been permitted to the south of Biggleswade, another exists to the west of Letchworth and another is at Houghton Conquest. It is thus clear that almost all the authorised provision for gypsy accommodation in the District is in the vicinity of Sandy. The evidence from HRAG is that, at the first Inquiry, the Gypsy Liaison Officer indicated that the over−provision of sites in this part of the District was a defect in relation to the location of Woodside. The site was described as being too close to Cartwheel and Talamanca, risking undue competition for local work and potential conflicts between gypsy communities. In my view, this is yet another reason why the appeal site is not suitable for a location for a gypsy encampment."

19. The evidence referred to had been given in written form to the first inquiry. The witness had not been available for cross−examination either then or before this inspector, and therefore had not explained what she meant by her fears of "conflicts" between gypsy communities. Mr Caws very frankly said that the only sensible meaning that could be given to the word in its context was of social hostility or even physical violence between gypsies. The inspector should not have accepted this startling reason for refusing to meet need without a great deal more understanding of its meaning and implications.

20. Here again, the fundamental objection to this point does not seem to have been put to the judge, who was invited merely to reconsider the factual position as to work−habits of the potential inhabitants of Woodside. Had the matter been put to him as it was to us I doubt if he would have felt able to support this part of the inspector's determination.

The effect of my findings about the Decision Letter

21. I therefore find that in three respects the inspector relied on considerations that were not properly open to him. What is the effect of that upon his determination as a whole: which, as we have seen, contained further weighty objections to the development that have not been and could not have been appealed? Mr Caws very properly took us to the decision of this court in *Simplex v Secretary of State for the Environment* (1988) 57 P&CR 306, in relation to, in that case, factual errors made in a ministerial decision. At p 327 Purchas LJ said, with the agreement of Sir Roualeyn Cumming−Bruce, that

> "it is not necessary×to show that the Minister would , or even probably would, have come to a different conclusion. [The appellant] has to exclude only the contrary contention, namely that the Minister necessarily would still have made the same decision."

22. If we apply that test, I do not think that it can be said that the inspector would necessarily have seen the detrimental factors in this application as dispositive had he not concluded as he did on the matters that I have ventured to criticise. The issue is however put out of contention by a further element in his decision.

23. When the inspector summarised the serious harm that he found in the application, as set out in his paragraph 57 cited in paragraph 4 above, he did so to demonstrate that that harm was not offset by the particular needs that he had identified: see paragraph 58 of his determination. Those particular needs were not the need for further gypsy provision in general, so far discussed, but the educational and medical needs of some of the children resident on the site. He described these in his paragraphs 54 and 55:

> "the conditions of Mary and Lydia are cause for serious concern. Particularly in Lydia's case, the consultant recommends close supervision by her GP on a regular basis to avoid frequent admissions to hospital. Mary has also been admitted to Bedford Hospital. [55] Retention of [Woodside] would, therefore, help to meet some particular needs of at least 4 people in 3 of the gypsy families on the site. It would allow Isaac and Jason to continue at a school into which they appear to have settled, it would forestall future bouts of serious depression and it would enable necessary close medical supervision to continue. These important considerations need to be weighed in the balance with the matters previously considered"

24. The inspector thus gave proper and sensitive weight to the pressing and serious needs of some very disadvantaged children. I would expect such considerations also to weigh with the Secretary of State. It would do a serious disservice to the inspector to conclude that he would necessarily have found against those needs if significant elements in the factors that he had placed in the balance against them were to be removed.

Disposal

25. I would grant the application; allow the appeal; quash the inspector's determination; and remit the application for re−consideration by the Secretary of State.

Lord Justice Sedley:

26. I agree.

Mr Justice Rimer:

27. I also agree.