In his Post Case Management Conference Note, the Inspector identifies that for relevant appeal decision and judgments “each must be prefaced with a note explaining the relevance of the Decision to the issue arising in the current Inquiry case, together with the propositions relied on, with the relevant paragraphs flagged up”.

Neutral Citation Number: [2008] EWCA Civ 692

Case No: C1/2008/0246

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QBD, ADMINISTRATIVE COURT
MR JUSTICE MITTING
CO/2223/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2008

Before :

MASTER OF THE ROLLS
LORD JUSTICE CARNWATH
and
LORD JUSTICE WILSON

- -

Between :

WYCHAVON DISTRICT COUNCIL	Claimant/ First Respondent
-and –	
(1) SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT	Defendant/ Second Respondent
(2) KATHLEEN BUTLER (3) LEONARD BUTLER	Defendants/ Appellants

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Robin Green (instructed by Wychavon District Council) for the Claimant/First Respondent
Charles George QC & Stephen Cottle (instructed by Community Law Partnership) for the

Carnwath LJ :

Introduction

1. This is an appeal against the judgment of Mitting J, quashing a decision of a planning inspector, Mr G M Hollington. He had granted temporary planning permission (for

5. Guidance in relation to gypsy sites was formerly given by Circular 1/94. That made clear that in general provision for gypsy sites should not be made in areas of open land where development is "severely restricted" such as the Green Belt. That guidance was replaced in 2006 by Circular 01/2006. The background of the new policy was explained in the introduction:

> "A new circular is necessary because evidence shows that the advice set out in Circular 1/94 has failed to deliver adequate sites for gypsies and travellers in many areas of England over the last 10 years. Since the issue of Circular 1/94, and the repeal of local authorities' duty to provide gypsy and traveller sites there have been more applications for private gypsy and traveller sites, but this has not resulted in the necessary increase in provision." (para 3)

6. Paragraph 12 set out the main intentions of the Circular including:

> "(b) to reduce the number of unauthorised encampments and developments and the conflict and controversy they cause and to make enforcement more effective where local authorities have complied with the guidance in this Circular;
>
> (c) to increase significantly the number of gypsy and traveller sites in appropriate locations with planning permission in order to address under-provision over the next 3-5 years;
>
> …
>
> (i) to help to avoid gypsies and travellers becoming homeless through eviction from unauthorised sites without an alternative to move to."

7. The Circular contained detailed proposals for "structured assessments" to be made on a regional basis of the general accommodation needs of gypsies and travellers, and the number of pitches required to meet them; and for local planning authorities to identify suitable sites for allocation in their development frameworks. Where there was evidence of a "clear and immediate need", planning authorities were advised to bring forward site allocations in advance of the regional consideration of pitch numbers.

8. Before us, there was no criticism of the Wychavon Council's actions in pursuance of the new policy as set out in the Circular. The inspector noted, when deciding to grant a five-year permission, that the Council anticipated that the joint Core Strategy would be adopted in three years, but he added a further two years "to allow for slippage" (para 44).

9. For present purposes, the material parts of the Circular come in the advice given in relation to development control, specifically in respect of use of temporary permissions, and of applications in rural areas and the Green Belt. The former was referred to in paragraphs 45 and 46:

“Advice on the use of temporary permissions is contained in

when balanced against the substantial Green Belt and other harm I have identified, the considerations do not clearly outweigh the harm. They do not, therefore, amount to the very special circumstance necessary to justify inappropriate development and a permanent permission would not be appropriate.

41. Dismissal of the appeal would interfere with the family's rights to respect for their private and family life and their home (Article 8 of the European Convention on Human Rights). The appellants acknowledge that moving on the land in breach of an enforcement notice weakens their rights and I consider the interference with these rights would be justified when weighed against the wider public interest of avoiding harm to the Green Belt and the area's character and appearance.

42. However, bearing in mind the approach offered by Circular 01/2006…, there is a particular, time-limited factor: the forthcoming assessment of the need for gypsy sites, regionally and locally, and the Council's intention to address the matter in a joint Core Strategy, when it expects to allocate sites. A temporary permission would enable the GTAA to be completed and allow additional sites to be made available, while giving the appellants somewhere to live and continue to seek an acceptable alternative. Bearing in mind also the unmet need for gypsy sites generally and, particularly, the lack of any current alternative site, I consider that these matters, when taken together, clearly outweigh the Green Belt and other harm.

43. My overall conclusion, therefore, is that these considerations combine to become sufficient to constitute the very special circumstances necessary to justify a temporary planning permission. Nevertheless, as Circular 01/2006 points out, such permission should not be regarded as setting a precedent for the determination of any future applications for full permission for use of the land as a caravan site. I appreciate the restriction would itself interfere with the family's human rights but, weighed against the legitimate aims of protecting the Green Belt and the area's character and appearance, I consider temporary permission would not have a disproportionate effect on the appellants."

The judge's reasoning

15. Before the judge, Mr Green for the authority criticised that reasoning because it failed to apply what he said was the correct "twofold test". This he took from the judgment of Sullivan J in R (Chelmsford Borough Council) v First Secretary of State [2003] EWHC Admin 2978, [2004] 2 P & CR 677 at para 58, where he said:

> "The combined effect of paragraphs 3.1 and 3.2 is that, in order to justify inappropriate development in the Green Belt, (a) there must be circumstances which can reasonably be described not merely as special but as very special, and (b) the harm to the Green Belt by reason of inappropriateness and any other harm must be clearly outweighed by other considerations. Those other considerations must be capable of being reasonably described as very special circumstances. If they are capable of

> Butler are of local origin, that they have children, one of whom at least goes to a local school, and the remainder of the considerations discussed by the Inspector when considering their application for permanent planning permission. I am prepared to accord to his brief reasoning in this respect something of that breadth. But to say in relation to this family that for those commonplace reasons that factor amounts to a very special factor, in my judgment, deprives the phrase of any real meaning. It is a commonplace not a very special factor."

He concluded:

> "Following Sullivan J's approach in the Basildon case, one m

> decision maker… T(he judge) went too far in saying that certain factors such as the need for gypsy sites and the lack of alternative sites are never capable of amounting to very special circumstances".

(i) Interpretation of Green Belt guidance

21. I say at once that in my view the judge was wrong, with respect, to treat the words "very special" in the paragraph 3.2 of the guidance as simply the converse of "commonplace". Rarity may of course contribute to the "special" quality of a particular factor, but it is not essential, as a matter of ordinary language or policy. The word "special" in the guidance connotes not a quantitative test, but a qualitative judgment as to the weight to be given to the particular factor for planning purposes. Thus, for example, respect for the home is in one sense a "commonplace", in that it reflects an aspiration shared by most of humanity. But it is at the same time sufficiently "special" for it to be given protection as a fundamental right under the European Convention. Furthermore, Strasbourg-case-law places particular emphasis on the special position of gypsies as a minority group, notwithstanding the wide margin of discretion left to member states in relation to planning policy (see Chapman v UK 33 EHRR 399; and the comments of Lord Brown in2 (a)4 (qua)4 ([4 (s)-1 (pe)4 (c)4 (i

circumstances). The PPG limits itself to indicating that the balance of such factors must be such as "clearly" to outweigh Green Belt considerations. It is thus left to each inspector to make his own judgment as to how to strike that balance in a particular case.

24. At the particular level there has to be judgment how if at all the balance is affected by factors in the individual case: for example, on the one hand, public or private need, or personal circumstances, such as compelling health or education

This passage rightly in my view, treats the two questions as linked, but starts from the premise that inappropriate development is “by definition harmful” to the purposes of the Green Belt.

...

34.

> the land were obtainable and, given the undisputed national and regional needs for sites, I have no indication that searching over a wide area would be more fruitful." (para 33)

39. The only evidence before us of what was said at the inquiry is in the witness statement

43. The court's task is to enforce the law, not to fill in gaps in national policy. Recent House of Lords decisions in relation to asylum cases and other contexts have cautioned against undue intervention by the courts in policy judgments by expert tribunals within their areas of specialist competence:

> "Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently". (AH (Sudan) v Secretary of State [2007] UKHL 49 para 30, per Baroness Hale).