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C1/2013/0011

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
(MR JUSTICE STUART-SMITH)

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 11 March 2014

B e f o r e:

LORD JUSTICE SULLIVAN

LORD JUSTICE McFARLANE

LORD JUSTICE LEWISON

BALL

Applicant

-v-

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

Respondent

(DAR Transcript of
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Mr M Rudd (instructed by FBC Manby Bowdler LLP) appeared on behalf of the **Applicant**
Mr R Warren QC appeared on behalf of the **Respondent**

J U D G M E N T
(As approved by the judge)

1. LORD JUSTICE SULLIVAN: T his is an appeal from the order dated 13 December 2012 of Stuart-Smith J, dismissing the appellant's application under section 288 of the Town and Country Planning Act 1990 to quash a decision by the respondent Secretary of State, dismissing the appellant's appeal against the second respondent's decision to refuse planning permission for a change of use of plot 3 Oak Tree Farm, Chelmsford Road, Blackmore in Essex to provide six residential gypsy pitches together with ancillary facilities, including hard standing and amenity areas and stabling for horses.

2. The background to the challenge is set out in some detail in the judgment below, [2012] EWHC 3590 (Admin). For the purposes of this appeal it is unnecessary to repeat all of that detail.

3. In brief summary, the appellant's appeal against the refusal of planning permission was originally to be determined by an inspector appointed by the Secretary of State. The inspector, Mr Clegg, held an inquiry over seven days, concluding on 26 February 2010.

4. On 6 April 2010 a general election was called and the customary purdah period began, during which no planning appeal decisions relating to sensitive or controversial developments were issued by the planning inspectorate. This appeal proposal for a gypsy caravan site within the green belt fell within that category of appeals.

5. The proposed development is located within the constituency of Mr Eric Pickles MP. In a letter dated 15 January 2010, written in his capacity as the constituency MP, Mr Pickles had objected to the proposed development in vigorous terms.

6. Following the general election, Mr Pickles became the Secretary of State for Communities and Local Government on 12 May 2010. The next day, the purdah period having expired, the inspector sent his draft decision letter to the planning inspectorate. In that draft decision letter the inspector would have allowed the appellant's appeal and granted permanent planning permission for the proposed development.

7. The inspector's decision letter was not issued because the appeal in the present case was one of a number of appeals in respect of gypsy caravan sites within the green belt, or in other sensitive locations, which were recovered for determination by the Secretary of State. The inspector therefore converted his draft decision letter into an inspector's report, in which he recommended that permanent permission should be granted.

8. The inspector considered that a temporary planning permission could not be justified but he said that if the Secretary of State took a different view on that issue then a temporary planning permission for three years would allow time for other sites to come forward through the development plan document process.

9. Although the appeal had been recovered for determination by the Secretary of State rather than by one of his inspectors, it was obvious that the Secretary of State could not personally take the decision on this particular appeal, given his interest in the matter as

a constituency MP. In a witness statement which was before the judge, Mr Quartermain, the Chief Planner at the Department for Communities and Local Government, explained that the department had well established procedures in place to deal with such potential conflicts of interest. His evidence was that both the Ministerial Code and the department's own Planning Proprietary Guidance, which I will collectively refer to hereafter as "the code", were followed in this case. It was decided that the decision in this appeal (and in four other gypsy and traveller appeals) would be taken by the parliamentary Undersecretary of State, Mr Bob Neill MP ("the minister").

10. The minister was given advice by the department's planning case work section. In an advice dated 8 September 2010, the minister was told that the inspector had recommended allowing the appeal and that planning permission be granted. The advice continued in paragraph 2:

> "The options open to you are to:
>
> (i) grant permanent planning permission, if you agree that the general need for more sites in Brentwood, the personal need for these families to have a settled base, the absence of alternative accommodation and the potential interference with the families' human rights, when taken together, amount to the very special circumstances required to justify this scheme;
> (ii) grant temporary planning permission, if you consider that the harm is too great to allow the scheme on a permanent basis, but that it is acceptable for a limited period of time and you expect planning circumstances to change by the end of a temporary consent; or
> (iii)dismiss the appeal, if you consider that the harm to the green belt and to the character and appearance of the area are not outweighed by the considerations put forward in support of the scheme."

The advice continued in paragraph 3:

> "This is a difficult case and we have no easy solution to offer you. Dismissal of the appeal, given the absence of alternative sites, may well see these families forced on to the road or setting up unauthorised encampments elsewhere. This would shift their accommodation problems but seems unlikely either to resolve them or alleviate the associated public concerns. On balance, given the site's green belt location and its scale, we recommend that you refuse permanent permission but allow the appeal and grant a temporary planning consent for three years."

11. Paragraph 5 of the advice referred to Mr Pickles' interest in the appeal as the constituency MP. The advice included the following:

> "Given his interest in this appeal, it would be particularly inappropriate for Mr Pickles to have any involvement in this determination, so please

do not discuss the case with him."

This part of the advice was underlined in the original.

12. In the remainder of the advice, planning case work analysed the inspector's conclusions and, with one exception, agreed with all of them. The one exception was planning case work's view that a temporary planning permission could be justified in the circumstances of this case. Paragraph 23 of the advice was in these terms:

> "on balance, we think that granting a three year temporary permission is a better option than either allowing a permanent permission as recommended by the inspector (which would result in ongoing harm to the green belt) or dismissing the appeal (which seems likely to result in the families having to quit the site with no settled base to move to). Do you agree?"

13. Mr Quartermain's evidence was that this advice was considered by the minister at a meeting with officials on 14 September 2007, but that he took no decision at that meeting. At a further meeting, on 23 September 2010, the minister told officials that he considered that the appellant's appeal should be dismissed and that planning permission should be refused.

14. The despatch of a formal decision letter to that effect was delayed because the appellant had mounted a judicial review challenge to the lawfulness of the decision to recover the appeal. That judicial review claim failed and there is no longer any challenge to the lawfulness of the decision to recover the appeal.

15. A draft decision letter dismissing the appeal and refusing planning permission was provided to the minister under cover of an advice dated 1 September 2011. That advice said, in paragraph 2:

> "When you considered this case last September you indicated that you wished to dismiss the appeal and refuse planning permission on both a permanent and a temporary basis. The draft decision letter at Flag DL is written on that basis ..."

16. The advice pointed out that there had been various changes since the previous advice in September 2010, but said that those changes did not, in the officials' view, significantly alter the planning balance. The advice continued, in paragraph 13:

> "Accordingly, the decision letter at flag DL is drafted as a refusal in line with your earlier view. Are you content to issue the letter as drafted?"

17. The decision letter dismissing the appellant's appeal and refusing planning permission is in substantially the same terms as the draft decision letter that was provided to the minister, and is dated 3 October 2011.

18. Before the judge, the minister's decision was challenged on five grounds (see paragraph 32 of the judgment). The judge rejected all five grounds. Only one of those original

grounds is pursued in this appeal, namely that in reaching his decision the minister acted in a manner that gave rise to a perception of bias. Actual bias on the part of the minister is not suggested by Mr Rudd.

19. The judge observed in paragraph 64 of his judgment that the main, if not the sole, basis for the allegation of perceived bias, at that stage at least, was the respondent's approach to disclosure. That contention is no longer pursued. Instead, Mr Rudd relied in his skeleton argument on two factors as establishing a real perception of bias. Those two factors were: (1) the fact that the Secretary of State had not merely opposed the proposed development but had continued in his opposition, at least until the hearing before Mr Justice Stuart-Smith; and (2) the fact that the minister had asked to be provided with reasons to support his desire to dismiss the appeal. In his oral submissions, Mr Rudd relied principally upon the second factor.

20. There is a second ground of appeal. Mr Rudd now contends that, in deciding to refuse planning permission, the minister failed to have proper regard to the best interests of the 12 children who were on the site. That submission was not put to the judge and permission to appeal on this new ground was granted, largely, it seems, on the basis that permission to appeal had been granted in another gypsy/traveller/caravan site case, Collins v Secretary of State for Communities and Local Government, in which the Court of Appeal was due to consider how the obligation to treat the best interests of the child as a primary consideration should be given effect to in this particular statutory context. The Court of Appeal's decision in Collins is now reported at [2013] EWCA (Civ) 1193 [2013] PTSR 1594.

I will consider these two grounds of appeal in turn.

Perceived bias

21. As I mentioned, there is no longer any challenge to the lawfulness of the decision to recover the appeal for determination by the Secretary of State rather than by one of his inspectors. Mr Rudd accepted that it follows that a decision on the appeal had to be made by a planning minister. He also accepted that it was an inevitable consequence of the application of the code that the decision on this particular appeal would not be taken by the Secretary of State himself but would be taken by a more junior minister within his department. The procedure in the code was designed to deal with precisely the kind of conflict of interest that is found in this case, where a minister has expressed a view about an appeal in his capacity as a constituency MP. Mr Rudd does not submit that the code was not followed in the present case.

22. Provided the code is followed, it is, in my view, difficult to see how there could be any reasonable basis for a perception of bias. As I understood Mr Rudd's submission, he accepted that this would generally be the position, but he submitted that it was what he called "the train of events" in this case that gave rise to a reasonable perception of bias. The train of events relied upon by Mr Rudd was the fact that planning case work's advice in September 2010 had agreed with the inspector in all respects, save for the recommendation that a temporary rather than a permanent permission should be granted. That advice was followed by a meeting at which the minister had said that he

wished to refuse planning permission, but there were no minutes of that meeting so the minister's reasons for wishing to refuse planning permission were unknown.

23. The September 2010 meeting was followed by the September 2011 advice in which officials set out reasons for refusing planning permission. Mr Rudd submitted that it was not proper for officials "to come up with reasons for refusal" after the minister's decision to refuse. That decision had to be taken for proper planning reasons and, in the absence of any minutes of the meeting in September 2010, he submitted that we could not be certain what the minister's reasons might have been.

24. Contrary to the impression conveyed by certain passages in his skeleton argument, Mr Rudd accepted in his oral submissions that the minister was not obliged to accept the advice of his officials. He further accepted that the minister had to form his own planning judgment. Mr Rudd submitted, however, that that planning judgment had to be based upon what he called "an informed assessment" of all the material factors. However, he did not suggest that any material factor was omitted from the September 2010 advice.

25. If officials advise a minister to grant planning permission for a proposed development and the minister disagrees with that advice and wishes to refuse planning permission, officials will then draft a decision letter setting out what they understand to be the minister's reasons for wishing to refuse planning permission. There is nothing in the least unusual in such a decision making process and nothing that could possibly give rise to a perception of bias. The "train of events" in this case is simply a reflection of the underlying constitutional position, namely that civil servants advise and ministers decide.

26. On further analysis, Mr Rudd's complaint about the train of events in this case was limited to a very narrow point indeed, that there is no minute of the September 2010 meeting which records the minister's reasons for disagreeing with planning case work's advice and wishing to refuse planning permission.

27. In my judgment, this complaint has no substance. The minister was advised in paragraph 2(iii) of the September 2010 advice that one of the options open to him was to:

> "Dismiss the appeal if you consider that the harm to the green belt and to the character and appearance of the area are not outweighed by the considerations put forward in support of the scheme."

28. In September 2010 the minister was provided with a draft decision letter which was "drafted as a refusal in line with your earlier view." He was asked whether he was content to issue the letter as drafted. If the minister had thought that the reasons for refusal set out in the draft decision letter were not in line with the view that he had expressed earlier, then he could, and no doubt would, have said so and the draft decision letter would have been altered accordingly. As I have said, the decision letter dated 3 October 2011 follows the draft decision letter.

29. Although the decision letter was issued in the name of the Secretary of State, paragraph 4 of the decision letter explained that the Secretary of State was not personally involved in taking the decision, because it involved an application in his own constituency, and that, in line with published departmental propriety guidance, the decision was taken on his behalf by another planning minister in the department.

30. Paragraph 3 of the decision letter said that the inspector had recommended that planning permission be granted, subject to conditions, but it made it clear that:

> "For the reasons given below, the Secretary of State disagrees with the inspector's recommendation."

31. The decision letter then set out, in considerable detail, where the Secretary of State (that is to say the minister in this particular case) agreed and where he disagreed with the inspector's conclusions. If one reads the decision letter, it is plain that the minister decided to refuse planning permission because he attached greater weight to the "severe harm" to the green belt which he thought would be caused by the proposed development, and because he was not satisfied that this harm was outweighed by the factors in support of the scheme (see paragraph 30 of the decision letter). So we know why the minister decided that planning permission should be refused. In summary, he considered that the option set out in paragraph 2(iii) of the September 2010 advice (see paragraph 27 above) was the appropriate course. That was entirely a matter for his planning judgment.

32. Mr Rudd accepts that there is no evidence that Mr Pickles did play any part in the decision making process. The proposition in his skeleton argument that Mr Pickles' continued opposition to the proposal was, in some way, out of the ordinary and might therefore have been perceived as improperly influencing the minister's decision, was not pressed with any great vigour in Mr Rudd's oral submissions, save as part of the background circumstances which had to be taken into account.

33. Even as part of the background circumstances, it adds nothing of substance in my judgment. The point appears to be based on the fact that Mr Pickles' letter of objection to the inspector remained on his constituency website, but website or no website, unless the letter of objection to the inspector was withdrawn, it continued to be one of the many representations which would have to be considered by any minister who was determining the appeal. Provided the minister's consideration was carried out in compliance with the code, there is no reasonable basis for any perception of bias.

For these reasons, I would reject the first ground of appeal.

The best interests of the children:

34. The arguments and evidence at the inquiry before the inspector pre dated the Court of Appeal's guidance in Collins. Mr Rudd accepted that the fact that neither the inspector nor the minister referred in terms to the best interests of the children as a primary consideration was not fatal to the decision in this case. It is common ground that what matters is whether, in substance, the decision making process took proper account of the children's best interests by treating them as a primary, but not necessarily as the

determinative, issue. Mr Rudd accepted that there was no error of law in this respect in the inspector's report.

35. The inspector set out the appellant's case on this aspect of the matter in paragraph 30 of his report:

> "The personal circumstances of the occupants of the appeal site comprise health needs, educational needs and the desire to live together as an extended family unit. Information concerning health and education for each of the families is set out in the table at appendix 35 of document A9. Three of the children on the site attend primary school and two are at a nursery. Removal from the current schools would represent upheaval in the children's lives. Access to educational facilities is extremely difficult from road side encampments and eviction from the appeal site will probably bring schooling to an end.
>
> The medical needs of three of the families are significant and the weight to be given to education and health needs must be determined in the light of the threat of imminent eviction and the absence of alternative accommodation. Considerable weight should be given to the education and health needs of the families, together with their need and desire to stay together as part of their traditional way of life and to provide mutual support and assistance."

In paragraphs 41 and 45 the inspector recorded details of the appellant's evidence as to their children's educational and health needs.

36. In paragraph 92 under the sub heading "personal need", the inspector concluded, in part:

> "The occupants of the appeal site have a need for a settled base and I am satisfied on the information before me that none have suitable alternative accommodation to which they could move. I have taken into account that members of the group knew about the extant enforcement notice before they moved on to the site in what appears to have been a well organised operation. This is not in the family's favour but I consider that their personal needs nevertheless carry considerable weight."

The inspector then considered the availability of alternative accommodation and concluded in paragraph 95:

> "No alternative site has been identified in relation to the appeal proposal. Consequently, if the six families are required to leave Oak Tree Farm at the present time, it is likely they would again seek to make use of temporarily vacated pitches, doubling up, and resort to unauthorised encampments. I consider that the lack of an available alternative site adds further important weight to their personal need for a settled base."

37. The inspector dealt separately with "personal circumstances" in paragraphs 97 to 99 of his report. He dealt specifically with the children's needs in paragraph 98:

> "There are several children living on the appeal site; three attend primary school and two are at a nursery. It is intended that the four older children will receive home tutoring. Circular 01 of 2006 identifies children attending school on a regular basis as a factor to take into account in assessing the sustainability credentials of gypsy sites, and both school attendance and home tutoring can be more readily maintained from a settled base. In the absence of an alternative site, the function of the appeal site in facilitating access to education and healthcare services is an important factor in support of the appeal proposal."

38. When considering Article 8, the inspector concluded (paragraph 102) that dismissing the appeal would result in significant interference with the appellant's Article 8 rights. In paragraph 104 he concluded that that interference would be disproportionate. It is important, however, to note that that conclusion was reached in the context of his conclusion that the considerations in favour of allowing the appeal outweighed the harm to the green belt, and his conclusion that very special circumstances existed which justified a permanent planning permission.

39. In paragraph 26 of the decision letter, the Secretary of State agreed with the inspector's conclusion in paragraph 98 of the report. In paragraph 24 of the decision letter the Secretary of State also agreed with the view that the inspector had expressed in paragraph 95 of the report, that the lack of an available alternative site added further important weight to the appellant's personal need for a settled base.

40. The only relevant difference between the Secretary of State's approach and that of the inspector in respect of this aspect of the appeal is to be found in paragraph 23 of the decision letter in which the Secretary of State said, in part:

> "With regard to the fact that the members of the group knew about the extant enforcement notice before they moved on to the site in what appears to have been a well organised operation, the Secretary of State agrees with the inspector that this is not in the family's favour. The inspector attributes considerable weight to the site occupants' personal need for suitable accommodation (IR92). Whilst the Secretary of State agrees that the occupants have a need for accommodation, he gives this factor less weight than the inspector because the group moved on to the site despite being aware of the extant enforcement notice. Overall, having taken account of all the evidence available to him, he attributes moderate weight to the occupants' personal need for accommodation."

41. It emerged during the course of Mr Rudd's oral submissions that the sole basis for the contention that the Secretary of State had failed to have proper regard to the best interests of the children on the site is the fact that the Secretary of State took the view that the inspector had been wrong to attribute considerable weight to the site occupants' personal need for suitable accommodation, and instead had attributed moderate weight

to the occupants' personal need for accommodation. Mr Rudd's submission was that, while the Secretary of State was entitled as a matter of planning judgment to reduce the weight he attributed to the personal needs of the adult occupants of the site for suitable accommodation because they had moved on to the site knowing that it was subject to an enforcement notice, he was not entitled to reduce the weight to be attributed to the children's personal need for suitable accommodation on that basis, because the sins of the parents could not properly be visited upon their children.

42. In support of that submission, he referred to the judgment of Lord Hodge in Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 [2013] 1 WLR 3690. In paragraph 10 of his judgment, Lord Hodge set out a number of legal principles which were not in dispute. Those principles included principle 7:

> "A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

The principle is not in doubt. The question is how, if at all, it impacts upon this particular decision.

43. Although in his skeleton argument Mr Rudd had submitted that the Secretary of State had not identified the best interests of the children on the site, in cases of this kind, unlike many family cases, there is usually no dispute as to what would be in the best interests of the children concerned, namely a settled base with their family to facilitate, amongst other things, their access to education and healthcare facilities.

44. While it is true, as Mr Rudd submitted, that a child's needs for education and healthcare are only part of the picture and a child will have a much broader need for a settled base, both the inspector's report and the decision letter must be read as a whole and in a common sense way. The inspector dealt separately with the particular needs of the children on the site in paragraph 98 of his report. Although the focus in that paragraph is on their educational and health needs, because that is the way in which the appellant's case was put to him at the inquiry, that paragraph in the inspector's report contains a clear recognition of the policy advice in circular 1 of 2006 that children need a settled base because, amongst other things, both school attendance and home tutoring can be more readily maintained from such a settled base. Given that recognised need for a settled base, in the absence of any alternative site, the function of the appeal site in providing a settled base was acknowledged by the inspector to be a matter which added important weight to the appellant's personal need (see paragraph 95 of the inspector's report).

45. Since the Secretary of State agreed with both paragraph 92 and paragraph 95 of the inspector's report, he clearly regarded the children's need for a settled base as an important factor in support of the appeal. A settled base was particularly important from the point of view of facilitating the children's access to education and healthcare facilities, but that does not alter the fact that the children's need for a settled base was expressly treated by both the inspector and the Secretary of State as an important factor in the overall balancing exercise. When considering the Article 8 balancing exercise, the Secretary of State said in paragraph 33 of the decision letter:

> "The Secretary of State has carefully weighed up these matters. For the reasons given in paragraphs 27 and 28 of this letter, he concludes that the harm which the scheme would cause to the green belt is severe. Whilst he considers there are a number of factors weighing in support of the scheme, he is not satisfied that those matters, either individually or cumulatively, outweigh the harm he has identified and he concludes that very special circumstances to justify this development in the green belt do not exist."

46. It is plain, therefore, that the Secretary of State did not disagree with the inspector as to the degree of interference that there would be with the appellants' Article 8 rights. He disagreed with the inspector as to the weight to be attributed to the harm to the green belt. In reality, the Secretary of State's conclusion on the Article 8 issue did not turn on the Secretary of State's view that moderate rather than considerable weight should be given to the appellants' general need for suitable accommodation.

47. The submission that the Secretary of State in some way blamed the children on the site for the fact that their parents had moved onto the site in the knowledge that it was subject to an enforcement notice, is based on plucking two sentences in paragraph 23 of the decision letter out of context, and in reading them in a manner that fails to accord with the approach that one should adopt when construing decision letters of this kind -- namely to read them in a common sense way. It is plain that in those two sentences the Secretary of State was concerned with the conduct of the adult occupiers of the site and was in no way seeking to blame the children for the sins of their parents. In the decision letter, the Secretary of State followed the inspector's approach, which was to consider the particular needs of the children for a settled site, albeit through the prism of their need to be able to access education and healthcare facilities as a seperate issue: see paragraph 98 of the inspector's report, which was accepted in paragraph 26 of the decision letter.

48. The fact that paragraph 98 in the inspector's report is in the section headed "personal circumstances" and paragraph 92 is in the section of the report headed "personal need", does not mean that the inspector, or the Secretary of State in adopting the inspector's approach, somehow lost sight of the children's more general need for a settled site. On any common sense reading of the decision letter, that need was treated as a primary consideration but it was not regarded by the Secretary of State as determinative. Mr Rudd did not submit that there was any other basis for concluding that the Secretary of State had failed to have proper regard to the best interests of the children on the site.

For these reasons, I would reject the new ground 2 and, for my part, I would dismiss this appeal.

49. LORD JUSTICE MCFARLANE: I agree.

50. LORD JUSTICE LEWISON: So do I.