Neutral Citation Number: [2013] EWCA Civ 1194

Case No: C1/2012/3236

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mrs Justice Cox
[2012] EWHC 3192 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2013

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE FLOYD
and
MR JUSTICE SALES

- -

Between :

Charmaine Moore	**Claimant/ Respondent**
- and -	
(1) Secretary of State for Communities and Local Government **(2) London Borough of Bromley**	**Defendant/ Appellant**

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- -

Stephen Whale (instructed by **The Treasury Solicitor**) for the **Secretary of State**
Charles George QC and Stephen Cottle (instructed by **Community Law Partnership**) for the **Respondent**
The London Borough of Bromley did not appear on the appeal

Hearing date : 15 July 2013

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Approved Judgment

Lord Justice Richards :

1. This appeal relates to a site known as Archies Stables, situated in Green Belt countryside to the south of Cudham, near Sevenoaks, Kent. The claimant below (the respondent to the appeal) is a single parent who owns the site and lives on it in a mobile home with her three children, aged 14, 13 and 7. She and her family are Romany gypsy travellers. She applied for planning permission for change of use of the site to use as a "Gypsy and Traveller caravan site comprising 1 pitch accommodating one mobile home and one touring caravan". The application was refused by the local planning authority (the London Borough of Bromley) and, on appeal, by an inspector appointed by the Secretary of State. The claimant brought a challenge under s.288 of the Town and Country Planning Act 1990 against the inspector's decision. Cox J upheld the challenge in so far as it related to the refusal of temporary planning permission and quashed the inspector's decision. The Secretary of State now appeals against Cox J's order. The issues in the appeal are fact-specific rather than of wider importance.

The factual background

2. The background is set out at paras 6-18 of Cox J's judgment, from which I take the following.

3. Before she moved to the appeal site in July 2010, the claimant and her children had lived for some 12 years in a caravan situated on the front drive of a rented Housing Association property at Orpington. The house was used only as a day room and the family always slept in the caravan. The inspector accepted that the claimant clearly had "an aversion to living in bricks and mortar".

4. In May 2008 the claimant was granted conditional planning permission for a change of use of the appeal site from agricultural use to the keeping of a horse and the retention of a newly created access and hardstanding. Details of post and rail fencing were also subsequently approved. In late 2008 further planning permission was granted for a stable and storeroom, and for hardstanding for a horsebox and trailer parking. In 2009 planning permission was granted for a brick-built toilet building. A condition restrained the stationing or storage of a caravan on the site. In April 2010 planning permission for the stationing of a caravan on the site was refused, and in June 2010 planning permission for an additional storage building was refused.

5. In March 2010 the claimant was given notice by the Housing Association to remove her vehicles from the drive of the property at Orpington. Notwithstanding the absence of relevant planning permission, in July 2010 she and her children moved to the appeal site with her mobile home and touring caravan, and her tenancy with the Housing Association was terminated. Her evidence to the inspector, which was accepted, was that she could not afford to buy a site with planning permission. She had not applied to the council for a pitch on one of the two council-run sites in the borough, but as at the date of the hearing before the inspector they were found to be full and with waiting lists.

6. Immediately after moving onto the appeal site the claimant made the planning application which is the subject of the present proceedings. Further development has taken place on the site since then, without planning permission, including the

construction of a further area of hardstanding, the erection of close-boarded timber fencing and steel gates, and the erection of a timber shed and lamppost.

7. The planning application was refused in September 2010. In late 2010 the council commenced injunction proceedings, which were deferred pending the outcome of the claimant's appeal to the inspector (and thereafter the outcome of the challenge to the inspector's decision). It was not in dispute before Cox J that the council's application was for the immediate removal of the unauthorised development and thus the claimant's immediate eviction from the site.

The inspector's decision

8. The main issues before the inspector were (a) the effect of the development on (i) the openness of the Green Belt, (ii) the character and appearance of the Green Belt, (iii) highway safety in the vicinity of the appeal site; and (b) whether the harm to the Green Belt by reason of inappropriateness and any other harm was clearly outweighed by other considerations, so as to amount to the very special circumstances necessary to justify the development. This approach reflected the relevant provisions of PPG2, accurately summarised at para 27 of the inspector's decision:

> "Paragraph 3.1 of PPG2 sets out the general presumption against inappropriate development in the Green Belt and says that such developments should not be approved, except in very special circumstances. Paragraph 3.2 says that inappropriate development is, by definition, harmful to the Green Belt and that it is for the appellant to show why permission should be granted. It further says that very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness and any other harm is clearly outweighed by other considerations."

9. The inspector's detailed findings in respect of harm are set out in Cox J's judgment. For present purposes it suffices to set out the inspector's own summary, at para 28 of his decision:

> "28. There is no dispute that there is harm arising from inappropriateness which attracts substantial weight. In addition there is some harm to the openness of the Green Belt. There is also harm to the appearance of the area, although this is localised and it is probable that this harm could be reduced, in time, with the implementation of a suitable landscaping scheme and the removal of some of the unauthorised development. However, further analysis of the access requirements may result in the loss of some of the frontage planting. All told, however, the effect of the development on the Green Belt and the appearance of the area amount to a considerable level of harm."

10. The "other considerations" relied on cumulatively by the claimant as clearly outweighing the harm were the need for sites for gypsies and travellers in the area; the individual needs of the claimant and her family; the lack of suitable alternative sites

that were both available and affordable; the likely outcome of refusing planning permission, including human rights considerations; and personal considerations including health and education. The inspector's detailed findings in respect of those matters are again set out in Cox J's judgment. In short, the inspector found that there was some immediate need for sites in the borough but that the figures did not weigh heavily in favour of the claimant; and that the circumstances surrounding the claimant's departure from her Housing Association property were such that the current lack of suitable accommodation carried only limited weight. He referred to the fact that the claimant suffered from "joint laxity" for which she was on strong painkillers and anti-inflammatories; she was on anti-depressants for depression and anxiety; her doctor had written that moving to a caravan in a field would have a positive effect on her mental health and her joints; and moving to a roadside existence would be harmful to her health. He said that her health needs carried some weight. He referred to the fact that two of the children attended school (and one of them saw a specialist dyslexia teacher), whilst the third received home education. He said that a settled education was a benefit and carried some limited weight.

11. The inspector went on to consider whether those other considerations clearly outweighed the harm he had identified:

> "29. Against this harm it is necessary to weigh the other considerations advanced by the appellant. In particular there appears to be an immediate need for additional Gypsy and Traveller sites, although the exact level of such need is not known. The need arising in the Borough, 19 pitches by 2017, as identified in the Panel Report is significantly lower than the agreed level of need in other recent appeals in the Borough. The caravan count figure for non-tolerated caravans in January 2010 was low. Notwithstanding the absence of an exact known level of immediate need, some weight must be attached to the unmet need. It is not disputed that there are no suitable alternative sites in the area that are affordable and available; there is no evidence to show that any will become available in the foreseeable future. There is no 5-year supply of deliverable sites and this weighs in favour of the development.
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> 30. I give considerable weight to the probability that a refusal of permission will result in the appellant having to leave the site. An injunction has been applied for by the Council. However, the appellant has not applied to the Council for a pitch on a Council-run site and it may be that the Council would not seek her eviction from the appeal site before a suitable pitch became available. Her failure to apply for a pitch means that this possible source of alternative accommodation has not been explored.
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> 31. Due to her proven inability to settle in a house, and the fact that she has voluntarily given up the tenancy of her Housing Association accommodation, means that it is probable she could not settle into bricks and mortar. It is possible, therefore, that a refusal of permission may result in the appellant resorting

> to roadside camping. This would result in serious harm to the quality of her life and to that of her children and it could adversely impact upon her health and on the children's education. As most of the Borough is either urban or in the Green Belt, roadside camping would be likely to be equally harmful to the Green Belt and potentially more harmful to the countryside. However, there is no certainty that refusal of planning permission would result in her having to resort to roadside camping.
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> 32. Nevertheless, the appellant and her children could be evicted from this site if this appeal fails. This would be likely to result in the loss of their home and result in a serious interference with their rights under Article 8 of the *European Convention on Human Rights*. However, these are qualified rights and so there needs to be a balance between the rights of the appellant and her children and those of the wider community. In this case the interference would be due to pursuing the legitimate aim of protecting the environment.
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> 33. The protection of the Green Belt is accorded great importance in national and local policy; it is reiterated in emerging policy. ODPM Circular 01/2006 supports a plan-led process of the identification and allocation of sites and also reaffirms the policy advice in PPG2. While the Council no longer has a target date for the production of a site allocations DPD the plan-led process is nonetheless on-going as evidenced by the *Draft Replacement London Plan*. I conclude that the harm by reason of inappropriateness, and the other identified harm, is not clearly outweighed by the other considerations."

12. That was the reasoning that led the inspector to refuse permanent planning permission. He went on immediately to consider the question of temporary planning permission, as follows:

> "34. Paragraphs 45 and 46 of ODPM Circular 01/2006 set out the transitional arrangements for considering planning applications in circumstances where sites have not yet been secured through the development plan process. It identifies how this relates back to paragraphs 108-113 of Circular 11/95 *The Use of Conditions in Planning Permissions*. In this case there is a limited level of unmet need for sites. There are no alternative suitable sites that are available and affordable. The plan-led process may result in sites becoming available in 2014. In these circumstances advice in the Circular is that substantial weight should be given to the unmet need in considering whether a temporary permission is justified.
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> 35. There is therefore a change in the balance in that substantial weight must now be attached to the unmet need. In addition, there would be reduced harm to the Green Belt due to

> that harm being for a limited period. However, in view of the amount of harm and all the other circumstances identified above, I do not consider that the balance would be tipped sufficiently for the material considerations to clearly outweigh the harm. In such circumstances temporary planning permission would not be appropriate."

The judgment of Cox J

13. Cox J found that the inspector's refusal of temporary planning permission was unlawful. Her reasoning was as follows (at paras 64 ff). She pointed out that the substantial weight attaching to the harm arising from inappropriate development in the Green Belt fell to be reduced in the case of a temporary permission, because it would be limited in time. Further, the advice in Circular 01/2006 meant that substantial weight was now to be attached to the level of unmet need in the area: she cited paragraphs 45-46 of the Circular, to which the inspector had referred, and noted that they seemed to give effect to one of the main intentions of the Circular as identified at paragraph 12, namely "to help to avoid gypsies and travellers becoming homeless through eviction from unauthorised sites without an alternative site to move to". She then summarised the inspector's findings in relation to the other material considerations, including the findings relating to the claimant's health and the children's education, the fact that refusal of permission would probably result in the claimant and her children having to leave the site, and the absence of evidence that there were any alternative sites that were suitable, available and affordable.

14. Having repeated that the nature of the balancing exercise changed when the inspector was considering a temporary rather than a permanent permission, she continued:

> "73. … Further, in this case, the vulnerable position of Gypsies generally and the need for special consideration to be given to their needs, to which Carnwath LJ referred in *Wychavon* [*Wychavon District Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 692, [2009] PTSR 19], had a particular focus when considering temporary permission for this Claimant. In addition to her status as a single Gypsy mother with three young children, she was a person with compelling health needs, for whom the consequences of refusal of a temporary planning permission were potentially extremely serious.
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> 74. In circumstances where no alternative sites were available, or likely to become available in the foreseeable future; where injunction proceedings for immediate eviction had already been started; where the inspector found that the Claimant and her children would probably have to leave the site if permission were refused; where there was a recognised risk that the Claimant and her children, once evicted, would have to resort to roadside existence, which would harm the Claimant's health and cause serious harm to the quality of life of the Claimant and her children; and where there was no evidence that the Claimant, once evicted, would in fact be offered a pitch on one

> of the Council-run sites or indeed anywhere else in the area, the decision that the other material considerations in this case were not sufficient to clearly outweigh the identified harm and to justify the grant of temporary permission was, in my judgment, irrational.
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> 75. The inspector's tentative findings, that there was no certainty that the Claimant would resort to a roadside existence, and that the Council may not evict the Claimant before a pitch becomes available, do not save the decision to refuse a temporary permission, when considered in the context of the other findings referred to above. The probability that the Claimant and her children would have to leave the site; the lack of any finding as to where they would go once evicted; and, in particular, the medical opinion as to the adverse effects of roadside existence upon this Claimant's health, the adverse effects upon the continuity of her children's education and upon the quality of life for them all cannot in my judgment be said to constitute other than very special circumstances."

15. She expressed agreement with Ouseley J in *R (Sheridan) v Basildon District Council* [2011] EWHC 2938 (Admin), para 129, that for the purposes of article 8(2) there was a duty to have regard to the best interests of the children as a primary consideration, and that the crucial factors for consideration were health and education. She said that in the present case the inspector appeared to recognise these as important factors. She accepted the submission of Mr Cottle, counsel for the claimant, that the question whether or not, on eviction from the site, there was likely to be suitable alternative accommodation available for the family went directly to the balancing exercise required under article 8 when considering the application for a temporary permission. She continued:

> "78. I accept [Mr Cottle's] submission that, in this case, it was incumbent on the inspector, for the purposes of that balancing exercise, to make clear findings as to what would happen in this case once the Claimant was evicted and, in particular, whether it was more likely than not that the Claimant and her children would have to move to a roadside existence or whether, alternatively, they would be offered accommodation on a suitable, alternative site.
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> 79. I do not accept Mr Whale's submission that such a finding was not necessary. In my view this issue went to the heart of the balancing exercise required in this case. Nor do I accept his submission that the inspector was not asked expressly to make such a finding and cannot now be criticised for not making it. The Claimant's case, as expressed in the witness statement she submitted at the hearing, was that the appeal site was her only home and that she and her children had no lawful site where they could park their caravans and live. The whole basis of her case in support of a temporary permission was that she had nowhere else to go.

> 80. Given the importance of these factors and their relevance to the necessary, balancing exercise I cannot accept Mr Whale's submission that the inspector's findings on these points would have made no difference to his decision. Nor does the inspector's finding that roadside camping would be likely to be equally harmful to the Green Belt answer the point, without clear findings as to all the relevant circumstances to be weighed in the balance.
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> 81. For all these reasons I consider that the inspector failed to make relevant findings, as required, and that his decision to refuse a temporary planning permission to this Claimant was irrational and cannot stand. Alternatively, I consider that his decision on the issue of temporary permission was inadequately reasoned and that, for that reason in addition, his decision cannot stand.

The Secretary of State's case on the appeal

16. There are three grounds of appeal: (1) Cox J was wrong to find that the inspector's decision not to grant temporary planning permission was irrational; (2) she was wrong to find that it was necessary for the inspector to make a finding as to what would happen once the claimant was evicted, and that such a finding might have made a difference to the decision; and (3) she was wrong to find that the inspector's decision on temporary planning permission was inadequately reasoned and that this was a sufficient basis for quashing the decision.

17. In his submissions on ground 1, Mr Whale emphasised that a *Wednesbury* challenge is not to be used as a cloak for a rerun of the arguments on the planning merits, that the *Wednebsury* threshold is a difficult obstacle for an applicant to surmount, and that an applicant alleging that an inspector has reached a *Wednesbury* unreasonable conclusion on matters of planning judgment faces a particularly daunting task (see *R (Newsmith Stainless Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, per Sullivan LJ at paras 6-8). The inspector did not take irrelevant matters into account or fail to take relevant matters into account. The factors on the "debit" side and "credit" side considered by him in the context of permanent planning permission were carried over into his consideration of temporary planning permission, with an express recognition that the balancing exercise changed in the context of temporary permission. The conclusion he reached was a matter of planning judgment and was reasonably open to him: it cannot be said that no reasonable inspector would have refused temporary planning permission. In deciding to the contrary, Cox J entered impermissibly into the area of judgment on the planning merits.

18. In relation to ground 2, Mr Whale submitted that the inspector was entitled in the circumstances to find that resort to roadside camping was a "possibility" if planning permission was refused, without going further. It was probable that if permission was refused the claimant would have to leave the site, and probable that she could not settle into bricks and mortar; but, as the inspector said at paragraph 30, she had not applied to the council for a pitch on a council-run site and it might be that the council would not seek her eviction from the appeal site before a suitable pitch became

available. The absence of necessity for the inspector to go further was reinforced by the fact that the main issues identified at paragraph 5 of his decision did not include the *likelihood* of the claimant having to resort to roadside camping.

19. Mr Whale submitted in any event that a clear finding that the effect of refusal of permission was likely to be roadside camping would have made no difference to the decision. The inspector took into account the adverse effects of roadside camping on the family and also the harm it would cause to the Green Belt and the countryside.

20. Mr Whale described ground 3 as parasitic upon grounds 1 and 2. He pointed to the limited basis on which Cox J found an inadequacy of reasons, and submitted that the inspector's reasoning met the test articulated in the well known passage from the judgment of Lord Brown in *South Bucks District Council v Porter (No.2)* [2004] 1 WLR 1953, at para 36. He submitted further that even if Cox J's conclusion on reasons was correct, it should not have led to the quashing of the inspector's decision, though he recognised that this was an exercise of judicial discretion with which this court would be reluctant to interfere.

Discussion

21. I do not accept that in reaching her conclusions Cox J strayed impermissibly into a judgment on the planning merits. She directed herself by reference to the relevant authorities, including *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 and *R (Newsmith Stainless Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, and it seems to me that she approached the *Wednesbury* challenge with due regard to the hurdle to be overcome by a claimant advancing such a challenge.

22. The question of temporary planning permission fell to be considered in the light of the guidance contained in Circular 01/2006. Paragraphs 45-46 of the Circular were directly in point:

> "45. … Where there is 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.
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> 46. Such circumstances arise, for example, in a case where a local planning authority is preparing its site allocations DPD. 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 …."

The inspector cited those paragraphs and acknowledged that substantial weight had to be attached to the unmet needs when considering the question of temporary permission. Cox J was in my view right, however, to go further by spelling out the link between this and the Circular's stated intention of helping to avoid gypsies and travellers becoming homeless through eviction from unauthorised sites without an

alternative site to move to; and against that background, Cox J was right to scrutinise the inspector's reasoning with care.

23. I would attach particular importance, as did Mr George QC in his submissions on behalf of the claimant, to the judge's criticism of the inspector's failure to make any finding as to whether it was more likely than not that the claimant and her children would have to resort to roadside camping if temporary permission were refused. I agree with the judge that a finding on this issue went to the heart of the balancing exercise required and that it was not sufficient simply to treat it as "possible" or as "no certainty".

24. If the family was likely to face a roadside existence in the event of refusal of temporary permission, it would involve a far more serious interference with their article 8 rights, especially through the impact on health and education, than if they were likely to obtain alternative accommodation. Thus the issue went to the core of the article 8 analysis. Moreover, the "other material considerations" advanced by the claimant included "the likely outcome of refusing planning permission including human rights considerations" (para 17 of the inspector's decision), which underlined the need for a finding on likelihood.

25. The question whether the family was likely to resort to a roadside existence was also important in relation to the "harm" side of the balance. On the inspector's own finding, at para 31 of his decision, roadside camping would be likely to be equally harmful to the Green Belt and potentially more harmful to the countryside. Of course, the grant of temporary permission would still result in the harm identified by the inspector, and it may not be strictly accurate to describe that harm as being cancelled out or neutralised by the harm that would result from the refusal of temporary permission, but the overall balance would necessarily be affected if the harm resulting from the refusal of temporary permission would be equal to or greater than the harm resulting from the grant of such permission. The judge did not deal with the point in quite this way but it goes to support the conclusion she reached.

26. There was ample material before the inspector on which to make a finding as to the likelihood of roadside camping if temporary permission was refused. The point does not fall for decision, but I doubt whether on that material he could reasonably have reached any conclusion other than that roadside camping was a likelihood. The council's injunction application, although on hold pending the appeal to the inspector, was for the claimant's immediate eviction; and as the judge said at para 71(e) and (f) of her judgment, the council had adduced no evidence that there were any alternative sites or as to the circumstances in which pitches had been offered previously to those forced to move. It is difficult to see what realistic alternative the family had to a roadside existence.

27. In my judgment, it is far from inevitable that the inspector would have reached the same conclusion if he had made a finding on the likelihood of roadside camping and had followed through its implications in the respects considered above.

28. Accordingly, the judge was in my view correct to place the weight she did on this issue when reaching her conclusion on *Wednesbury* unreasonableness. More generally, her conclusion is one that in my view she was entitled to reach: I am not persuaded that the inspector's refusal of temporary planning permission was a

reasonable reflection of the factors he was required to take into account in that context.

29. That makes it unnecessary for me to consider her alternative finding that the inspector's decision was inadequately reasoned.

30. I should mention for completeness that Cox J's discussion of the duty to have regard to the best interests of the children as a primary consideration in the decision-making process (see paragraph 15 above) did not feature materially in the argument before us. The issue was left to one side, in the knowledge that the relevant principles were due to be examined in the case of *Collins v Secretary of State for Communities and Local Government*, which was listed for hearing at a later date and judgment in which has since been handed down (see [2013] EWCA Civ 1193).

Conclusion

31. For the reasons given, I would dismiss the appeal.

Lord Justice Floyd :

32. I agree.

Mr Justice Sales :

33. I also agree.