

CO/10260/2005

Neutral Citation Number: [2006] EWHC 1249 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Wednesday, 10th May 2006

B E F O R E:

MR JUSTICE COLLINS

THE QUEEN ON THE APPLICATION OF

HENRY CARL JEEVES AND RACHEL BAKER

(CLAIMANTS)

-v-

GRAVESHAM BOROUGH COUNCIL

(DEFENDANT)

Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

MR MARC WILLERS (instructed by Messrs Bromwell, Browne & Odedra) appeared on
behalf of the CLAIMANTS

MISS NATASHA PETER (instructed by the Gravesham Borough Council) appeared on
behalf of the DEFENDANT

J U D G M E N T

Wednesday, 10th May 2006

1. MR JUSTICE COLLINS: This is a claim for judicial review of a decision of the Gravesham Borough Council whereby it refused to entertain a planning application relying on section 70A of the Town and Country Planning Act 1990. The claimants seek to set that decision aside, to require the defendant to reach a decision upon the application and, if that decision is adverse, that will enable them to appeal to the Secretary of State. As things stand, by virtue of the provisions of section 70A there is no right of appeal. Since there is in existence an enforcement notice which cannot now be appealed, they will, of course, be liable to criminal proceedings and other proceedings, if necessary, whereby they will not be able to remain on the land.
2. The background is as follows. The claimants are Romany gypsies and, of course, as such, are members of a recognised ethnic minority. They reside with their two children in a mobile home which is stationed on the land in question, known as The Robins, Heron Hill Lane, Meopham in Kent. There is no planning permission to enable them to have their caravan there and the land is, indeed, in the Green Belt. Not only, as I have indicated, is there no planning permission, but there is an enforcement notice in existence. The land was acquired by the first claimant, Mr Jeeves, on 21st December of last year. The previous owner of the land was a gentleman called Mr Frank Smith. On 23rd September 1999 Mr Smith applied for planning permission for the retention of two caravans and a toilet hut for a gypsy family on the land. That application was refused by the defendant. He appealed, and his appeal was successful, and on 20th July 2000 he was granted a three year temporary planning permission which was subject to various conditions. It is not, I think, necessary for me to go into any detail of those. The conditions included the requirement that the caravans should only be occupied by Mr and Mrs Smith and members of their immediate family and at the end of the permitted use the caravans, vehicles, materials and equipment brought onto the premises should be removed. There were also requirements for a landscaping scheme which was not, it seems, in the result, put into proper effect.
3. However, at the end of the three year period, Mr Smith applied for further planning permission. It was in the form of an application to extend the temporary permission and that was an application made in May 2003. He then wanted there to be one mobile home and touring caravan for a gypsy couple on the land. The application was refused by the defendant. An appeal was lodged and that appeal was eventually dismissed on 22nd December 2004. The Inspector who considered that appeal noted that there was a major defect in the defendant's inaction in taking any steps to try to identify or to provide any sufficient sites for gypsies in its area. The Inspector noted that the absence of specific policies for gypsy provision was a major defect and that was a matter which strengthened the appellant's case. He decided that there would be harm to the Green Belt because the development was inappropriate and there would be a marginal reduction of openness; only marginal because the site is in a wooded area and there are indeed other bungalows nearby, so there would not be a wide visibility of the development. There is also a traffic problem and the additional traffic generated by the development would, in the Inspector's words, weaken the Council's long-standing endeavours to protect the Culverstone valley area from further development.

4. He decided that there were material considerations that supported the proposal. The first was a general need for gypsy sites in the Borough and in Kent generally. There was, in addition, a lack of available suitable alternatives nearby, although, as he said, he would not rule out the possibility of finding a site slightly further away and outside the Green Belt. The Council had not taken a proactive role in providing for gypsies in line with Government guidance. But on the other hand, he noted that the policy objections to residential development in the Green Belt were considerable. There were the environmental and traffic objections, to which I have already referred, and in his view the material considerations in favour of the development did not outweigh the totality of the harm. Indeed, the development in the Green Belt would only be permissible, as the Inspector himself noted, in specifying what the main issues were, if there were very special circumstances sufficient clearly to outweigh the harm that would be caused the Green Belt by reason of the inappropriateness of such a development and any other harm occasioned by it.
5. He also went on to consider the question of human rights, in particular Article 8. He noted that the appellant, through his representative, had made, as he put it, passing reference to Article 8. "Passing" because Mr Smith did not, in the result, attend the appeal and it appears that he had, to a degree, lost interest in maintaining it. I say that because there was little evidence to support his contention that this was his home. Indeed, he gave no evidence as to his need to reside there and this led the Inspector to decide that there was no firm indication that the caravans did indeed comprise the appellant's home. Of course, if they did not, there would be no question of any breach of Article 8. But he did go on to say that even if it was his home, for the reasons that he had indicated there was not sufficient by way of exceptional circumstances to justify the grant of permission. In those circumstances, he was satisfied that, on balance, if he dismissed the appeal it would not have a disproportionate effect on Mr Smith's Article 8 rights. Certainly, even if it was his home, there would not be a violation of his rights under Article 8 because of the application of Article 8.2. But the absence of Mr Smith from the inquiry did mean that there was little evidence, if any, before the Inspector to support the contention that this was needed by Mr Smith for his home and there was no evidence to indicate what inquiries Mr Smith had made about alternative sites and what efforts he had made to find any alternative sites. As I have indicated, even if it was his home, it was a home in which he lived for very short periods of the year. Accordingly, it is obvious that his case under Article 8 and his case to establish exceptional circumstances was very weak indeed.
6. On 1st February 2005 the defendant issued an enforcement notice, alleging the land had been used for the stationing of residential caravans, et cetera, and requiring that the items be removed. Mr Smith did not appeal against that enforcement notice, no doubt because he had by then lost interest in the land in the sense that he no longer intended to reside there. The notice took effect and the time for compliance expired on 6th September 2005. On 29th April 2005 a Mr John Baker purchased the land for a relatively small sum of £3,000. On 24th August the claimant's planning agent sent the defendant a full planning application for the stationing of one mobile home for a gypsy family in the name of John and Rachel Baker. That application was met with a letter from the head of Planning and Regeneration Services of the Council, a Mr Gilbert, in

which he said that he was not prepared to accept a further application for the site. The letter continued:

"Planning permission for the stationing of one mobile home and a touring caravan was refused on this site in February 2004. This refusal was subsequently appealed and was determined in December 2004 by means of dismissal. In accordance with Section 70A of the Principal Act this Authority [is] declining to determine your application due to the fact that it is submitted within the two year period from which the Secretary of State determined a similar application. ...

I would further comment that when Mr Baker called at these offices, before he purchased this site from Mr Smith, he was advised by my Planning Enforcement Officer of the planning situation and given a copy of the enforcement notice. It was explained to him that this was a confirmed enforcement notice and of the actions required by 6th September to clear the site."

7. Advice was given that if the enforcement notice was not complied with by 6th September, a criminal offence would be committed.
8. The full planning application was amended on 6th September and the first claimant, Mr Jeeves, was substituted as the applicant and that was resubmitted. On 10th September the first claimant wrote a letter to the authority in which he set out his reasons for seeking the permission. What he said was that he believed that he had stood a chance of a permanent home on the site, that he had not had much of an education, travelling around, and he wanted his children to be able to go to local schools and, indeed, that was happening and they were getting on well. His younger son had suffered from asthma and had been in and out of hospital but had not had an attack since they had been living on the site. There is a doctor's letter which was produced which said that it was because of being able to live in an unpolluted environment. He said that he had done all he could to stop misuse of the area, that is to say to prevent rubbish dumping and leaving of cars in the lane, and he well understood the desire to keep the area as natural-looking as possible. He only wanted the premises for his personal home.
9. The response to that was on 15th September. Mr Gilbert indicated that there was no change in his view and he relied upon the letter from which I have already cited and maintained his refusal to accept the application in accordance with section 70A of the 1991 Act.
10. On 15th November the claimant's solicitor sent a pre-action protocol letter in which he asserted that there were a number of factors distinguishing the claimant's application from that which had been lodged by Mr Smith and which had been considered and rejected by the Inspector in December 2004, and asking for reconsideration. The reply to that was that in the view of the defendant there was no significant change in the relevant considerations and the defendant was not prepared to reverse its decision.

11. That then is the material background. I should now refer to the terms of section 70A which was substituted by the Planning and Compulsory Purchase Act 2004 with effect from 24th August 2005. So far as material, it reads:

"(1) A local planning authority may decline to determine a relevant application if -
(a) any of the conditions in subsections (2) to (4) is satisfied, and
(b) the authority think there has been no significant change in the relevant considerations since the relevant event.

...

(3) The condition is that in that period the Secretary of State has dismissed an appeal -
(a) against the refusal of a similar application, or
(b) under section 78(2) in respect of a similar application."

12. That, of course, is fulfilled because the Inspector in September 2004 refused the application.

13. Subsection 5 defines a "relevant application" as:

"an application for planning permission for the development of any land."

14. Subsection 6 defines "the relevant considerations" as being:

"(a) the development plan so far as material to the application; and
(b) any other material considerations."

15. Subsection 7 defines "the relevant event" as being:

"(a) for the purposes of subsections (2) and (4) the refusal of a similar application; and
(b) for the purposes of subsection (3) the dismissal of the appeal."

16. Subsection (8) provides:

"An application for planning permission is similar to another application if (and only if) the local planning authority think that the development and the land to which the applications relate are the same or substantially the same."

17. So far as similarity is concerned, Mr Willers accepts, and rightly accepts, that he cannot argue that the applications are not similar. They are both, of course, for permission to site a residential caravan or caravans for the purpose of providing a home for gypsies. Of course, the details differ and the parties differ, but that does not prevent the applications being similar. The statute does not require them to be identical; it would clearly be an abuse of language to suggest that they were not similar.

18. Mr Willers has relied upon the requirement in 70A(1)(b) that the authority think that there had been no significant change in the relevant considerations since the relevant event. He says the material considerations are the fact that, unlike the application made

by Mr Smith, there is here positive evidence that the claimants required the site in order that they could live there with their family and that there is a need for their children to have settled education at the schools which they now attend. There is, in addition, so far as the younger child is concerned, that his medical condition is being alleviated by being able to remain on the site.

19. Those are factors which are not only different from those which affected Mr Smith's claim, but are material because of the question of children's education and the fact that the claimant is a gypsy and therefore has a particular need for a particular sort of accommodation. As Mr Willers points out, it is plain that notwithstanding that this is Green Belt and an inappropriate development, the fact that it is for a gypsy for whom there is no alternative site provided is something which could result in planning permission because that is exactly what the Inspector decided in 2000 when he granted temporary permission to Mr Smith. He points out that it is clearly material that Mr Smith did not in his appeal put forward any material which could establish his needs for this particular accommodation to constitute his home.
20. Apart from that, Mr Willers also relies upon the guidance which has been issued by the department in relation to the approach that local planning authorities should take to their powers under section 70A. The relevant circular is 14/91. It is true that the 2004 Act has substituted the new section 70A, but it is clear, and I do not need to cite in detail the previous section 70A, that there is no material change in what is set out. There has been no subsequent guidance given, and so one can assume that the Secretary of State is satisfied that the same guidance is appropriate for the substituted section 70A and, indeed, there is absolutely no reason why that should not be the case since, as I have said, there is no material change.
21. The relevant paragraphs in the guidance are paragraphs 5 and 6 and I should read them both:

"5. Section 70A(2) defines applications as 'similar' if they relate to development and land which are, in the opinion of the local planning authority, the same or substantially the same."
22. Pausing there, the old section 70A referred to the opinion of the local planning authority; the new says "if the local planning authority thinks", but there really is no distinction between those differences in language. Continuing with the Circular:

"The Government's intention in introducing this section was to allow authorities to prevent repetitive planning applications from being used to wear down the resistance of local communities. Authorities should use the power only where they believe that the applicant is intending to exert pressure by submitting repeated similar applications. If an application has been revised in a genuine attempt to take account of objections to an earlier proposal, it should not be regarded as 'similar' for the purposes of this section.

6. A change in the development plan or another material consideration will be 'significant' for the purposes of this section if it might be expected

significantly to alter the weight of any planning consideration of importance in the decisions taken by the local planning authority and/or the Secretary of State. If the weight of the evidence was such that the decision taken by the authority and/or the Secretary of State was only marginally inclined towards refusing the proposal, the amount of change which will significantly alter the weight will be less than if the original decision(s) had been clear cut."

23. It is plain from paragraph 5 that the Secretary of State is indicating that this is a power which should be used in only somewhat narrow circumstances and, effectively, only where there was reason to believe that an applicant was misusing the right to apply for planning permission in attempting to exert pressure upon, as is put, the local communities. As a matter of fact in this case, there was certainly no evidence of any opposition from any in the immediate vicinity who would otherwise be expected to be able to object and who should have been notified of the application. But I accept, and indeed it must be obvious, that the reference to wearing down the resistance of local communities is also apt to apply to the local planning authority which, if bombarded again and again with similar applications may simply get fed up with having to refuse, or there may be those who are minded, as a result, to change their minds. But it is that sort of misuse, according to the guidance, that is intended to result in a decision to refuse to deal with a planning application made in accordance with section 70A.
24. Accordingly, submits Mr Willers, the decision here was contrary to the guidance since there was no evidence which could justify the belief that there was such a misuse, or that the application in question was in any way intended to exert pressure by submitting repeated similar applications. The situation here was that there was, as indeed the letter from the first claimant showed, a genuine desire by this family to settle down, for the sake of themselves and their children, in this site. They wanted no more than that. True it was that they should have appreciated that what they were doing was contrary to an enforcement notice and they had no right to be there. They had no right to settle in the way in which they wished to do.
25. However, that in itself, as Mr Willers submits, is not sufficient to come within the guidance of the Circular. There is no reason why a retrospective application for permission should not be made in any particular case. Although it may be that in due course their conduct will be held against the claimants if an application is refused and if there is an appeal to the Secretary of State, it is not of itself necessarily fatal.
26. So far as the most significant change is concerned, there was, I am bound to say, very little evidence put before the local planning authority which explained what efforts, if any, were made by the claimants to find any other accommodation and why it was that it was necessary for them, in their view, to live in this accommodation. What were the possible alternatives so far as education for the children was concerned? Why was it necessary for their education that they remained on this site, and why any other rural site would not be as beneficial to their younger child? There was little material which went beyond that which was put before the Inspector in the Smith appeal, other, of course, than the fact that this was genuinely needed as a home, a matter which was not put forward by Mr Smith.

27. It is pertinent to note that the Inspector decided that even if it had been Mr Smith's home he still would have decided that planning permission should be refused because of the harm. It is also to be noted that there are a number of authorities which deal with the problems of gypsies and, in particular, developments in the Green Belt. The mere fact that it is desirable that the children's education be maintained, the mere fact that there are difficulties in finding other accommodation because of the failure to provide sufficient sites, do not necessarily of themselves produce the exceptional circumstances that are needed to override the Green Belt policy which militates against any development of this sort.
28. It seems to me in all the circumstances that it is very difficult to say that the authority was acting unlawfully in the sense that it was not a decision which they were entitled to reach in thinking that there had been no significant change. The Act does not require an objective decision. The Act requires that the authority thinks that there has been no significant change. Accordingly, in terms of judicial review, I cannot overturn that decision if it was reasonable, on the information given to the authority, for it to think that there had been no significant change in the relevant considerations. So far as this is concerned, the only relevant consideration is whether there has been a change in a material consideration. The material consideration here is, of course, the need for the claimants, as gypsies, to be able to live on his site.
29. Accordingly, I would not find it possible to decide this claim in favour of the claimants if I were purely concerned with whether there had been significant change in the relevant considerations. I have, of course, to bear in mind that the adjective "significant" is contained in the subsection and it is not "any change" which entitles to the claimant to succeed.
30. But that is not the end of the case because of the guidance. In his statement, which has been produced for the purposes of these proceedings, Mr Gilbert has dealt with the question of the guidance. He states that he is familiar with it and he considered that the decision he took was consistent with the spirit of the guidance. He says this:

"21. ... Although this was not a case of a single applicant making repeat applications to 'wear down' the local planning authority, I considered that there was a clear link between Mr Smith's unsuccessful application to renew the temporary planning permission, and the Claimants' application. In Mr Jeeves' letter dated 10th September 2005, he referred to a meeting with the Council's Senior Enforcement Officer, Mr John McCann, in March or April 2005. I understand that at that meeting, which the Claimants and Mr John Baker attended, Mr Jeeves was handed a copy of the Inspector's decision of December 2004 together with the enforcement notice, and was told that the site had to be cleared by September 2005. Following a site visit by the Council's Senior Enforcement Officer, a letter was sent, addressed to the occupiers of the Land, on 8 April 2005 to confirm the effect of the Enforcement Notice.

22. According to the Land Registry the site was acquired on 29 April 2005 by Mr John Baker (whom I understand to be the father of Ms Rachel Baker, the Second Claimant), and transferred to the Claimants on 21

December 2005."

31. Indeed, there is produced the relevant document which confirms that that transfer took place. He goes on:

"The purchase and occupation of the site was therefore carried out either very shortly before, or after, the Claimants became aware of the existence of an enforcement notice which would require them to move off the site. The Claimants continued to occupy the site after the enforcement notice came into effect, notwithstanding their knowledge that they were not entitled to do so.

23. In my view the occupation of the site was carried out or continued in defiance of the advice provided by the Council, and this amounted to comparable circumstances to those mentioned in Circular 14/91. I did not consider that this was a 'doubtful case' and therefore did not consider that the 'benefit of the doubt' should be applied in this case."

32. Clearly, if occupation is continued in defiance of an enforcement notice, then that is capable of being used to suggest in an appropriate case that the application was not being made in good faith but was being used to wear down the resistance of local communities. But it cannot, in my view, by itself, be relied on to justify a refusal to view the planning application within the terms of the guidance.
33. Mr Gilbert's statement that he considered there was a clear link between Mr Smith's unsuccessful application and the claimants' application is not entirely easy to follow. It is, I know, suggested that the representative who put in the application was the same as the representative of Mr Smith, but there is really no evidence to support any contention, and indeed it is not positively known that Mr Smith was in some way behind this or was involved in this application. There is no evidence to support the contention that this was other than a separate application based upon the circumstances of the claimant and his family. So quite what the relevant link was I am not sure I fully understand. If he means no more than that there was a similarity, then of course that does not take the matter any further.
34. In all the circumstances, it seems to me that it is quite impossible on the material that was before Mr Gilbert for him reasonably to conclude that this was covered by the guidance, in particular paragraph 5 of the Circular.
35. What then is the effect of that? The guidance, of course, does not and cannot override the terms of the statute. On the other hand, the purpose behind the guidance is to indicate to local planning authorities how they should exercise the discretion that they have with a view to ensuring that there is a consistent approach countrywide to applications for permission. It is clear that in reaching a decision under section 70A the existence of and the terms of the guidance are a material consideration which the relevant authority should take into account. Here, as it seems to me, Mr Gilbert purported, according to his statement, to take it into account but was wrong in his approach. He misconstrued the guidance and what he did was not in accordance with that guidance. The claimant was entitled to expect that there would be compliance with

the guidance. To put it in terms which are familiar to judicial review cases, he had a legitimate expectation that that guidance would be applied. Of course, if a particular authority takes the view that it wishes to modify its approach, it may be that it would be entitled to do so, but only if it made it clear in advance that that is what it was going to do. I doubt, in fact, if any authority would be bold enough to do that because it would know that in any appeal to the Secretary of State, the Secretary of State would apply his own guidance, and the whole purpose behind the guidance is to achieve consistency. So it is unrealistic to believe that any planning authority would not follow the guidance that the Secretary of State promulgated.

36. In all those circumstances, in my judgment, this decision is one which should not have been reached. The application should have been entertained. Whether or not it would succeed, of course, is another matter. It may well be, indeed I think it is the case, that further detailed information should be provided to the authority which spells out clearly the circumstances of these claimants and why it is necessary, in their view, that they should be able to remain on this site, and setting out all the relevant circumstances in that respect. The authority will, in its turn, then consider that and reach a decision. It may or may not be favourable, but in the light of the history it seems to me that it is impossible to say that an application for planning permission has no chance of success. If I had taken the view that, notwithstanding the failure to have proper regard to the planning guidance, an application for planning permission would be doomed to failure, it may well be that it would have been appropriate not to grant relief in the exercise of discretion, but I cannot reach that conclusion. I cannot say that it is impossible that a favourable decision will not be reached. Of course, that favourable decision may include the possibility of a temporary planning permission.
37. I should add, although, of course, it was a matter which was not relevant at the time the decision was reached, there is now a new guidance which was published in February of this year, to deal with the applications of local authorities in relation to gypsies and their accommodation. It is the case that there is now a much more positive obligation upon local authorities, such as the defendant, to identify appropriate sites for such gypsies, even if those sites may have to exist within the Green Belt. That process of identification will, no doubt, have commenced, or certainly should commence, and that also will be a relevant consideration in due course in deciding whether any permission should be granted or not.
38. Accordingly, I propose to quash the decision of the defendant and indicate that, for the reasons that I have given, they are not entitled to rely on section 70A of the 1991 Act.
39. MR WILLERS: I am very grateful, my Lord, for your Lordship's consideration of the matter. The claimants seek not just an order quashing the decision but a mandatory order asking that the defendant determine the application.
40. MR JUSTICE COLLINS: You do not need that because once it has been decided that they are not entitled to rely on 70A, they have got to. Of course, if they do not, then you get a right of appeal in any event.

41. MR WILLERS: My Lord, yes. The only other application, my Lord, I have is for costs. The claimants are publicly funded. The certificate, I think, appears in the bundle.
42. MR JUSTICE COLLINS: Yes. Miss Peter, they follow the event, do they not?
43. MISS PETER: My Lord, they do, and there is no objection to that.
44. MR JUSTICE COLLINS: Because it is a legal aid case they have to be subject to detailed assessment.
45. MR WILLERS: Yes, my Lord, I am very grateful.
46. MR JUSTICE COLLINS: You also have a formal order which I think is now for detailed assessment as well, is it not?
47. MR WILLERS: Yes, it is, my Lord. Perhaps I can consult with your Associate at a later stage, just to formalise those words. Thank you very much, my Lord.