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HOUSE OF LORDS

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House of Lords

Judgments - South Bucks District Council and another (Respondents) v. Porter (FC) Appellant

HOUSE OF LORDS

SESSION 2003-04
[2004] UKHL 33

on appeal from: [2003] EWCA Civ 687

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

South Bucks District Council and another (Respondents)

The Appellate Committee comprised:

Lord Steyn
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

South Bucks District Council and another (Respondents) v. Porter (FC) Appellant)

[2004] UKHL 33

LORD STEYN

My Lords,

1. I have read the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood. I am in complete agreement with it. I would also make the order which he proposes.

LORD SCOTT OF FOSCOTE

My Lords,

2. I have had the advantage of reading a draft of the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood and am in full agreement with the reasons he has given for allowing this appeal.

LORD RODGER OF EARLSFERRY

My Lords,

3. I have read the speech of my noble and learned friend Lord Brown of Eaton-under-Heywood. I am in complete agreement with it. I too would make the order which he proposes.

LORD CARSWELL

My Lords,

4. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Brown of Eaton-under-Heywood. I agree with his reasons and conclusion and I would allow the appeal and make the order which he proposes.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

Introduction

5. This is the fourth appeal before the House in recent years in which your Lordships have had to consider the adequacy of reasons given in decisions made under the Town and Country Planning legislation. The three previous decisions were *Westminster City Council v Great Portland Estates plc* [1985] 1 AC 661 ("*Westminster*") concerning an aspect of the council's adopted district plan, *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153 ("*Save*") concerning the Secretary of State's grant of planning permission on appeal from the local planning authority's refusal of permission, and *Bolton Metropolitan District Council v Secretary of State for the Environment* (1995) 71 P & CR 309 ("*Bolton*") concerning the Secretary of State's grant of planning permission on a called-in application. In each of those three cases the reasons challenge failed before the judge at first instance, succeeded before the Court of Appeal, but failed again before your Lordships. In the present case too your Lordships are asked to overturn a decision of the Court of Appeal, in this case allowing a local planning authority's appeal from the judge's dismissal of a statutory challenge and quashing an inspector's grant of planning permission, principally on the ground that he gave inadequate reasons for his decision. A further ground of the Court of Appeal's decision was that the inspector failed to have regard to the unlawfulness of the appellant's occupation of the land.

6. The second respondent, the Secretary of State for Transport, Local Government and the Regions ("the Secretary of State"), chose not to appear in either court below. Concerned, however, at the Court of Appeal's decision and regarding both issues as of general importance, he appears before your Lordships in support of the appellant's case.

The appeal

7. The appeal is brought against a decision of the Court of Appeal (Pill, Mance and Longmore LJJ) on 19 May 2003, [2003] EWCA Civ 687; [2004] JPL 207, allowing an appeal by South Bucks District Council ("the council") against the order of His Honour Judge Rich QC sitting in the Administrative Court on 17 September 2002, [2002] EWHC 2136 Admin, dismissing the council's application under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") seeking to quash a decision of the Secretary of State given by his duly appointed inspector by letter dated 19 February 2002. The inspector had allowed an appeal by the appellant ("Mrs Porter") against a decision of the council on 5 September 2000 refusing planning permission for the retention of a residential mobile home at Willow Tree Farm, Love Lane, Iver, Bucks ("the site"). The permission granted by the inspector was subject to conditions including a condition that it was personal to Mrs Porter.

History

8. The appeal has something of a history. This is, indeed, the second time within just over a year that your Lordships have had to consider the circumstances of Mrs Porter's occupation of the site—see *South Bucks District Council v Porter* [2003] 2 AC 558 ("*South Bucks*").

9. Mrs Porter is a 62 year old Romany gipsy who bought the site in 1985 and has ever since lived there with her husband in breach of planning control. The site lies within the South Bucks Green Belt, very close to its eastern boundary with the village of Iver and within the Colne Valley Park. As described in the inspector's decision letter:

"[The] mobile home provid[es] a kitchen, living room, bedroom and bathroom. It has the appearance of a permanent dwelling with a pitched roof and chimney. It forms part of a cluster of buildings made up of stables, tack room and a barn; there is a yard area with some touring caravans on it and, to the west, is a field also owned by [Mrs Porter] and her husband."

10. The detailed planning history of Mrs Porter's occupation of the site is set out, at pp 567-568, in para 7 of Lord Bingham of Cornhill's speech in *South Bucks*. For present purposes it is sufficient to record, as the inspector did, two previous planning decisions of relevance. The first, in 1994, concerned Mrs Porter's appeal against six enforcement notices relating variously to her residential use of part of the site, the erection of some buildings and the construction of hardstanding. All the enforcement notices were upheld save for that directed to the hardstanding. The second decision was the dismissal of Mrs Porter's appeal in 1998 against the refusal of planning permission for the retention of her mobile home and associated outbuildings.

11. It was following the 1998 refusal of planning permission that the council in December 1999 applied to the court for an injunction under section 187B of the 1990 Act requiring her to cease her residential use of the land, an application granted by Burton J on 27 January 2000 to take effect a year later. Burton J's order was made just two days after Mrs Porter's application for planning permission (the application refused by the council on 5 September 2000) which began the history of the present appeal. On 12 October 2001 the Court of Appeal (myself, Peter Gibson and Tuckey LJJ) allowed Mrs Porter's appeal against Burton J's order—that being the decision unsuccessfully appealed by the council to your Lordships' House in *South Bucks*. The speeches in *South Bucks* were delivered on 22 May 2003, just three days after a differently constituted Court of Appeal had allowed the council's appeal in the present proceedings.

The inspector's decision

12. In determining the appeal the inspector (just as the council on the original application) was required (a) by section 70 (2) of the 1990 Act to "have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations," and (b) by section 54A of the 1990 Act, as inserted by section 26 of the Planning and Compensation Act 1991, to decide the matter "in accordance with the plan unless material considerations indicate otherwise".

13. The statutory development plan consisted of the County Structure Plan and the council's Local Plan. Put shortly, both provide for a general presumption against allowing inappropriate development in the Green Belt, reiterating national guidance in PPG 2 which states:

"3.1 The general policies controlling development in the countryside apply with equal force in Green Belts but there is, in addition, a general presumption against inappropriate development within them. Such development should not be approved, except in very special circumstances. . . .

3.2 Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. 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. . . ."

14. Having summarised those provisions the inspector continued:

"Main Issue

6. For the appellant it was accepted that the appeal development constituted inappropriate development in Green Belt terms. The main issue in this case, therefore, is whether there are any very special

circumstances why the appeal development should be permitted despite this."

15. The inspector then turned to state his reasons for allowing Mrs Porter's appeal subject to conditions. The most material reasons for present purposes were these:

"7. The appellant has occupied the appeal site as a home for a considerable period of time purchasing the land in 1985. However, the council does not dispute the gipsy status of the appellant or her family either in the ethnic or statutory sense and I have, accordingly, given this some weight in my considerations. . . .

9. ... I consider that, bearing in mind the difficulties involved, the council has made reasonable provision for gipsy sites. Nevertheless, the appellant has only just recently made an application for one of these, there are no vacancies at present and waiting lists are long. On this basis I conclude that there is no alternative location available to the appellant at present and unlikely to be one for a considerable time.

10. It is also apparent from the evidence that the appellant suffers from serious ill-health. The written evidence from those treating her medically is that she suffers from chronic asthma, severe generalised arthritis and chronic urinary tract infection: she also has diabetes and high blood pressure. I accept also that displacing her and her husband from their home on the appeal site would make it difficult for her to continue with the medical treatment she is currently undergoing and the stress involved would probably make her condition worse.

11. [The inspector here summarised the two previous appeal decisions of 1994 and 1998 to which I have referred above].

12. I have considered whether there has been any material change in circumstances since these decisions, particularly that in 1998, that would lead me to a contrary view and I have concluded that there has been in two major respects. First, on the basis of the evidence before me, no alternative council based sites are available at present whereas, at the time of the 1998 case there was some, albeit limited, spare capacity. Second, the evidence suggests that the appellant's state of ill-health has worsened considerably since the last appeal.

13. These changes in the situation since 1998 are sufficient for me to take a contrary view to that of the previous inspector. The status of the appellant as a gipsy, the lack of an alternative site for her to go to in the area and her chronic ill-health constitute very special circumstances which are, in this case, sufficient to override national and statutory development [Green Belt] policies.

14. I have taken account of all the other matters raised but none of these has been of sufficient weight to override my conclusions on the main issue. . . . [B]ecause of the very special circumstances which I consider apply, I shall allow the appeal subject to conditions to which I now turn."

16. The inspector then imposed two conditions, the first making the planning permission personal to the appellant, the second

concerning the landscaping of the site. The inspector expressly stated that a personal condition would be justified "because of the very special circumstances which centre to some extent on the appellant herself". The condition imposed was that:

"When the residential mobile home the subject of this appeal is no longer required by [Mrs Porter] for living purposes it shall be removed, together with all fixtures and fittings, from the site and all service connections stopped off."

The statutory challenge

17. The council challenged the inspector's grant of planning permission pursuant to section 288 (1) of the 1990 Act, contending both that the decision was not within the powers of the Act (section 288 (1) (b) (i)) and (5) (b)), and also that a relevant requirement had not been complied with—namely the requirement under rule 19 (1) of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 (SI 2000/1625) to "notify his decision . . . and his reasons for it in writing"—(section 288 (1) (b) (ii)), such failure having substantially prejudiced their interests (section 288 (5) (b)). It is convenient to refer to these grounds of application respectively as "the vires challenge" and "the reasons challenge".

18. Before Judge Rich the reasons challenge was put on the narrow ground that the inspector "fails to give any reasons as to why he has concluded in law that the issue of the status of [Mrs Porter] as a gipsy amounts to a very special circumstance", a challenge unsurprisingly rejected by the judge on the basis that it was not Mrs Porter's gipsy status *alone* which the inspector regarded as a very special circumstance but rather that status in combination with her chronic ill-health and the unavailability of an alternative site. Her status was clearly of some significance: as recorded in the judgment, the council accepted that Mrs Porter, as a gipsy, "has a rooted fear of and objection to being put in permanent housing where she feared she would be unable to cope".

19. Although a number of grounds were advanced both to the judge and the Court of Appeal in support of the vires challenge the only one accepted by the Court of Appeal and still live before your Lordships is that already referred to: the inspector's alleged failure to have regard to the unlawfulness of Mrs Porter's occupation of her land as a material consideration in the case. In rejecting this ground of challenge the judge accepted, at para 7, that "it must be material whether [a person's occupation of premises] was at all times in breach of planning control" because it "goes to the weight to be attached to this long period of occupation", but concluded that the inspector plainly had it in mind since he had expressly referred to the past planning history of the site and in any event recognised that the application was for *retrospective* planning permission.

The Court of Appeal's decision

20. The reasons challenge in the form advanced to the judge was not pursued before the Court of Appeal. Indeed we are told that no reasons challenge whatever was pursued in the grounds of appeal and that it was the Court of Appeal itself which took the point.

21. In a reserved judgment helpfully rehearsing the substance of the inspector's decision, the planning policies in play, the rival submissions on the appeal, the basis of the European Court of Human Rights' decision in *Chapman v United Kingdom* (2001) 33 EHRR 399 ("*Chapman*"), and the planning considerations in the case, Pill LJ—who gave the only reasoned judgment of the court—stated his conclusions as follows, at pp 215-216:

"31. The very special circumstances found by the inspector to be present are the personal hardships to Mrs Porter, if permission is refused. It is those which, in the language of paragraph 3.2 of PPG 2, are held 'clearly to outweigh' the terms of inappropriate development. The hardship is that she is a very unwell gipsy without another pitch to occupy. I do not seek to diminish the hardship involved but, if a planning authority is to decide that such hardship constitutes not merely special, but very special, circumstances so as to override planning policies, a much fuller analysis, in the planning context, is in my judgment required. . . . [I]f what the inspector recognised to be established planning policies are to be overridden, on grounds of the personal hardship to the applicant, a more comprehensive approach to the issue is required, as recognised in [*Chapman*] and [*Westminster*], than was followed in this case. As Sullivan J stated in *Doncaster [Doncaster Metropolitan Borough Council v Secretary of State for Environment, Transport and the Regions [2002] JPL 1509]*, it is important that the need to establish very special circumstances is not watered down. Clear and cogent analysis is required.

32. Conspicuously absent from the decision letter is a consideration of the unlawfulness of the applicant's occupation, which has been in persistent breach of planning control. That of itself requires the decision to be quashed. I would venture to mention other considerations. One is that the applicant has not, until recently, applied for an alternative site though sites have, in the recent past, been available. This is not a case

where, on the inspector's findings, a lack of reasonable provision in the district of gipsy sites can be relied on to justify a grant, nor is it relied on; current hardship is the only factor present. The relevance to the application of the applicant's status as a gipsy, as compared with a similar application by a non-gipsy, is also material, especially when the development concerned has the 'appearance of a permanent dwelling with pitched roof and chimney'. The council were entitled to have the case for hardship considered in a broader context and with fuller reasoning. Merely to set out a list of hardships was not a sufficient way to deal with what was essentially a land use question. Even the personal circumstances, in themselves, are insufficiently dealt with by that listing."

22. Later in his judgment, at p 216, para 35, in the course of rejecting other grounds of the appeal, Pill LJ reiterated his earlier view as to the inadequacy of the inspector's reasoning:

"If very special circumstances can be established simply by relying on a catalogue of hardship, the concept would be devalued and the planning system tend to be undermined. For reasons already given, a more comprehensive approach is required."

23. Before your Lordships both Mrs Porter and the Secretary of State take issue with those conclusions. They dispute both the suggested inadequacy of the inspector's reasons and that the inspector failed to consider "the unlawfulness of [Mrs Porter's] occupation . . . in persistent breach of planning control" which "of itself requires the decision to be quashed".

I - The reasons challenge

24. As already noted, three previous decisions of this House have considered the reasons requirement in a planning context. In this, the fourth, it is I hope convenient to start by assembling a number of the more authoritative and useful dicta from the many cases in the field. I begin with Megaw J's oft-cited judgment in *In re Poyser and Mills' Arbitration* [1964] 2 QB 467, 478:

"Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised."

25. In *Westminster*, Lord Scarman at p 673 set out the above passage and continued:

"[Megaw J] added that there must be something 'substantially wrong or inadequate' in the reasons given.

In *Edwin H Bradley & Sons Ltd v Secretary of State for the Environment* (1982) 264 EG 926, 931 Glidewell J added a rider to what Megaw J had said: namely, that reasons can be briefly stated. I accept gladly the guidance given in these two cases."

26. In *South Somerset District Council v Secretary of State for the Environment* [1993] 1 PLR 80, 83, Hoffmann LJ, giving the only reasoned judgment in the Court of Appeal, quoted from Forbes J's judgement in *Seddon Properties Ltd v Secretary of State for the Environment* (1978) 42 P & CR 26, 28 — "Because the letter is addressed to the parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument . . ."—and continued:

"The inspector is not writing an examination paper One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood a relevant policy . . ."

27. Turning next to Lord Bridge of Harwich's leading speech in *Save*, one notes first his citation at p 165 of Phillips J's judgment in *Hope v Secretary of State for the Environment* (1975) 31 P & CR 120, 123 as providing a "very similar indication of the scope of the duty" to that given in *In re Poyser and Mills' Arbitration* and as being "particularly well expressed":

"It seems to me that the decision must be such that it enables the appellant to understand on what grounds the appeal has been decided and be in sufficient detail to enable him to know what conclusions the inspector has reached on the principal important controversial issues."

28. At p 166G, Lord Bridge "emphatically reject[ed] the proposition that in planning decisions the 'standard', 'threshold' or 'quality' of the reasons required to satisfy the statutory requirement . . . depends upon the degree of importance which attaches to the matter falling to be decided". He held, in short, that a consistent standard of reasoning is required in all planning decisions, adding at p 167C: "the degree of particularity required will depend entirely on the nature of the issues falling for decision."

29. Lord Bridge then turned to consider how the court should approach a reasons challenge advanced under section 245 of the Town and Country Planning Act 1971 (now section 288 of the 1990 Act):

"There are in truth not two separate questions: (1) were the reasons adequate? (2) If not, were the interests of the applicant substantially prejudiced thereby? The single indivisible question, in my opinion, which the court must ask itself whenever a planning decision is challenged on the ground of a failure to give reasons is whether the interests of the applicant have been substantially prejudiced by the deficiency of the reasons given."

The burden of proof, Lord Bridge pointed out at p 168B, lies on the applicant "to satisfy the court that he has been substantially prejudiced by the failure to give reasons".

30. As to the circumstances in which a deficiency of reasons would cause substantial prejudice, Lord Bridge said at p 167:

"I should expect that normally such prejudice will arise from one of three causes. First, there would be substantial prejudice to a developer whose application for permission has been refused or to an opponent of development when permission has been granted where the reasons for the decision are so inadequately or obscurely expressed as to raise a substantial doubt whether the decision was taken within the powers of the Act. Secondly, a developer whose application for permission is refused may be substantially prejudiced where the planning considerations on which the decision is based are not explained sufficiently clearly to enable him reasonably to assess the prospects of succeeding in an application for some alternative form of development. Thirdly, an opponent of development, whether the local planning authority or some unofficial body like Save, may be substantially prejudiced by a decision to grant permission in which the planning considerations on which the decision is based, particularly if they relate to planning policy, are not explained sufficiently clearly to indicate what, if any, impact they may have in relation to the decision of future applications."

31. The first of those three possible causes of substantial prejudice—the developer's (or, as the case may be, his opponent's) uncertainty, through the inadequacy of the reasons, whether or not the decision is properly open to a vires challenge—Lord Bridge elaborated at p 168 as follows:

"If it was necessary to the decision to resolve an issue of law and the reasons do not disclose how the issue was resolved, that will suffice. If the decision depended on a disputed issue of fact and the reasons do not show how that issue was decided, that may suffice. But in the absence of any such defined issue of law or fact left unresolved and when the decision was essentially an exercise of discretion, I think that it is for the applicant to satisfy the court that the lacuna in the stated reasons is such as to raise a substantial doubt as to whether the decision was based on relevant grounds and was otherwise free from

any flaw in the decision-making process which would afford a ground for quashing the decision."

32. Lord Bridge's final words on the subject, at pp 170-171, were that the requirement "is a salutary safeguard to enable interested parties to know that the decision has been taken on relevant and rational grounds and that any applicable statutory criteria have been observed", adding:

"But I should be sorry to see excessive legalism turn this requirement into a hazard for decision-makers in which it is their skill in draftsmanship rather than the substance of their reasoning which is put to the test."

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