

**PATRICK DELANEY ANN MARIE DELANEY EMMA
SUSANNE DELANEY MARGARET ANN BRIEN v.
SECRETARY OF STATE FOR ENVIRONMENT LONDON
BOROUGH OF BROMLEY [1999] EWHC Admin 76 (29th
January, 1999)**

IN THE HIGH COURT OF JUSTICE CO/570/98

QUEEN'S BENCH DIVISION
(CROWN OFFICE LIST)

Royal Courts of Justice
Strand
London WC2

Friday, 29th January 1999

B e f o r e:

MR NIGEL MACLEOD QC
(Sitting As A Deputy Judge of the Queen's Bench Division)

PATRICK DELANEY
ANN MARIE DELANEY
EMMA SUSANNE DELANEY
MARGARET ANN BRIEN

-v-

THE SECRETARY OF STATE FOR THE ENVIRONMENT
THE LONDON BOROUGH OF BROMLEY

(Computer-aided Transcript of the Stenograph Notes of
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Official Shorthand Writers to the Court)

MR A MASTERS (instructed by Lance Kent & Co., Berkshire, Herts HP4 3DX) appeared on behalf of the Applicants.

MR T MOULD (instructed by the Treasury Solicitor, London SW1H 9JS) appeared on behalf of the First Respondents.

THE RESPONDENTS did not appear on behalf of the Second Respondents.

J U D G M E N T
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Friday, 29th January 1999 .

1. MR NIGEL MACLEOD QC: This matter concerns a decision of the first Respondent's Inspector. That decision concerned an appeal against the Council's refusal to grant planning permission for the change of use from disused agricultural land to residential use and for siting of four mobile homes at land adjacent to the pumping station at Salt Box Hill, Biggin Hill in Kent.

2. The site is situated a short distance from Biggin Hill Airport and is located in rolling countryside primarily in agricultural use. The Inspector found that the main issue in the appeal was whether the very special circumstances claimed by the Appellants, on the basis of their status as Gypsies and their medical and educational needs, are sufficient to outweigh the presumption against inappropriate development within the Green Belt together with any additional harm which might be identified in terms of the purposes, openness and visual amenities of the Green Belt and the character and quality of the Area of Special Landscape Character.

3. At paragraph 15 of her decision she referred to policies within the approved Unitary Development Plan. She said:

"The site lies within Green Belt defined on the Proposals Map in the approved Unitary Development Plan ... for Bromley under Policy G1. Policy G2 of the UDP states that within the Green Belt, approval will not be given, except in very special circumstances, for the construction of new buildings or for the change of use of existing buildings for [various purposes]."

4. She then explained that Policy G12 states:

"... that within Areas of Special Landscape Character defined on the Proposals Map, the Council will seek to conserve, improve and enhance the individual quality and character of each area, protecting nature conservation interests, archaeological and landscape features, skylines and views where appropriate."

5. The site lay within a Green Belt and also within an Area of Special Landscape Character.

6. At paragraph 16, she says this:

"You contend [that is the Applicants through their advocate, Mr Masters, who appeared before me today] that as the UDP does not contain policies for the provision and location of sites for gypsies in accordance with the guidance in Circular 1/94, as advised in PPG1 the appeal should be determined on its merits in the light of all the material considerations. You state that this advice is echoed in para 21 of Circular 1/94 and that para 22 of the Circular states that as with any other planning applications, proposals for gypsy sites should continue to be determined solely in relation to land-use factors. As the UDP Review will not be completed until the year 2000 you contend that there is no relevant development plan."

7. Before commenting upon that, I would like to read paragraph 17, which says:

"It is clear from the timing that the UDP for Bromley was on the brink of adoption when Circular 1/94 was issued. It does not therefore contain policies dealing explicitly with the provision of gypsy sites. However, due to changes in national planning guidance the UDP is currently being reviewed with adoption of the revised Plan anticipated by the year 2000. Reflecting the spirit of the advice of para 12 of Circular 1/94 the Council have published UDP Review Paper 16: Gypsy Site Policy & Issues Arising. This is a consultation paper which sets out the scope of and difficulties arising regarding gypsy site provision in the Borough as a whole and considers how the UDP should be reviewed to take such matters into account. Appendix 1 to the Paper sets out suggested criteria based policies for gypsy site provision and the design of new gypsy sites. In accordance with the guidance in PPG1, I attach little weight to the Review Paper and its draft policies as the UDP Review is at an early stage in its statutory preparation, though it is a material consideration. The Council have received a number of responses to their consultations on the Review Paper. These are for the Council to consider and take into account in drafting the policies and proposals for formal public consultations at the deposit stage of the UDP Review."

8. In my judgment, that paragraph indicates that the Inspector understood perfectly well what the character and nature of the UDP Review paper was. She understood perfectly well that there were not any UDP policies dealing explicitly with the provisions of gypsy sites, and she was of the view that the Review Paper was attempting to take forward the advice set out in paragraph 12 of Circular 1/94.

9. When she said that she attached little weight to the Review Paper and its draft policies, she was following explicitly the advice which is in paragraph 48 of the National Guidance PPG1. It is quite clear that she was attaching little weight to it as to the extent that the policies therein should guide her decision, but she clearly explicitly stated that she took it as a material consideration.

10. I go back to paragraph 16 because the argument which is referred to by the Inspector there is repeated in the Notice of Motion at ground 3 and pursued by Mr Masters before me. The Notice of Motion says this, so far as material:

"In respect of ... the Section 78 appeal, the Inspector failed to understand the issues before her and misdirected herself in her approach to those issues and in particular the Inspector failed to understand that since the Development Plan ... did not contain policies relevant for a proposal for a gypsy site, the starting approach to be adopted was to consider the application in the light of all material considerations."

11. Then there is a reference to paragraph 21 of the Circular 1/94 and to PPG1. It is a misconceived and incorrect argument.

12. It is necessary to look properly at a number of matters. Section 70(2) of the Town and Country Planning Act 1990 requires a determining authority to have regard to the provisions of the development plan so far as material to the application and to any other material considerations.

13. Next, section 54A of the same Act requires determination of applications to be in accordance with the development plan unless material considerations indicate otherwise. One of the effects of these two statutory provisions is that to disregard a relevant policy in the development plan would be an error of law.

14. I draw attention to PPG1 and to paragraph 40 of that document. It says this:

"The Government is committed to a plan-led system of development control. This is given statutory force by section 54A of the 1990 Act. Where an adopted or approved development plan contains relevant policies, section 54A requires that an application for planning permission or an appeal shall be determined in accordance with the plan, unless material considerations indicate otherwise. Conversely, applications which are not in accordance with relevant policies in the plan should not be allowed unless material considerations justify granting a planning permission. ... In all cases where the development plan is relevant, it will be necessary to decide whether the proposal is in accordance with the plan and then to take into account other material considerations. ..."

15. Therefore, that ministerial guidance accords with the legislation.

16. I turn to Circular 1/94. At paragraph 1 it says, amongst other things, this:

"... The Circular comes into effect immediately. Its main intentions are -
..."

- to withdraw the previous guidance indicating

that it may be necessary to accept the establishment of gypsy sites in protected areas, including Green Belts.

2. This Circular does not affect the advice given generally in other Departmental Circulars and Planning Guidance Notes ... Those which may be of particular relevance are-

- PPG1 ('General Policy Principles');

- PPG2 ('Green Belts') ..."

17. At paragraph 13, it says this:

"As a rule it will not be appropriate to make provision for gypsy sites in areas of open land where development is severely restricted, for example, Areas of Outstanding Natural Beauty, Sites of Special Scientific Interest, and other protected areas. Gypsy sites are not regarded as being among those uses of land which are normally appropriate in Green Belts. Green Belt land should therefore not be allocated for gypsy sites in development plans. ..."

18. At paragraph 22, it says, amongst other things:

"... Whilst gypsy sites might be acceptable in some rural locations, the granting of permission must be consistent with agricultural, archaeological, countryside, environmental, and Green Belt policies ... The aim should always be to secure provision appropriate to gypsies' accommodation needs while protecting amenity."

19. In my judgment, the meaning is absolutely clear in those paragraphs from that Circular and the paragraph to which I have referred in PPG1: the fact that a proposal in the Green Belt is a very severe problem for that proposed development. It is also clear, in my judgment, that the policies to which the Inspector referred in paragraph 15 of the decision letter (the Green Belt policy and the policy relating to the Area of Special Landscape Character) were highly relevant policies which she took into account, and that in taking them into account she properly acted in accordance with section 54A of the Act and also she approached the proposal before her in accordance with the national policy.

20. I turn then to look at the UDP Review Paper 16, which the Inspector had referred to in paragraph 17, which I have read out. In paragraph 3.6 it says, amongst others things, this:

"... However, it is known that the two unauthorised sites have in the past accommodated up to 5 families. Whilst it may be argued that the occupiers of these sites have no particular link with the Borough, consideration should be given as to whether there is any suitable unused or under utilised land within the Borough which could be used to accommodate these families. In carrying out such an exercise it must be

remembered that gypsy sites are not regarded as being amongst those uses of land which are normally appropriate within the Green Belt, and therefore the land potentially available is considerably restricted."

21. If I may comment there, that last sentence is clearly in accordance with the National Guidance to which I have drawn attention.

22. At paragraph 4.2, it says:

"Whilst the Council have a substantial level of provision, consideration should be given to the owners/families who utilise the two unauthorised sites.

Therefore, it is recommended that land availability within the Borough be reviewed to identify any possible locations suitable for a small gypsy site(s), whether local authority or private."

23. The conclusion at paragraph 5.1 states:

"This report identifies the key areas where research/policy formulation is required in recognition of the needs of the Borough's gypsy community. This reflects the plan led nature of the planning system in relation to gypsy site provision which has now evolved and the withdrawal of the previous acceptance that gypsy sites may be established in protected areas such as the Green Belt."

24. That statement is again entirely in accord with the National Guidance to which I have drawn attention. Then there is set out at Appendix 1 a draft policy, headed: "Policy G? GYPSY SITE PROVISION".

"Proposals for the use of land by gypsies for the stationing of caravans will normally be acceptable provided that:

(i) ...

(ii) the site is situated outside any areas of constraint, including the Green Belt, Areas of Outstanding Natural Beauty, Areas of Special Landscape Character and Metropolitan Open Land."

25. If I may comment there, two of those constraints are constraints which apply to the site in question.

26. The third, but not the last, of the provisos is that:

"(iii) the proposal would not be visually intrusive and adequate land is made available for permanent landscaping works to ensure that the site is integrated within the local

environment."

27. So quite clearly any proposed development would have to have those matters taken into account and weighed as well in considering the use of land by gypsies. That policy is clearly in accordance with the National Guidance and does accord with the current policy of the approved UDP.

28. In my judgment, it is not possible to find that the development plan policies set out in paragraph 15 of the decision letter (to which I have just referred) are other than relevant. They plainly are relevant and it was necessary for the Inspector to make her decision on the basis that there were relevant development plan policies. Section 54A was the appropriate approach for her to take.

29. I next turn to a claim made by the Applicant as it is set out in paragraph 4, Part 1 of the Notice of Motion. It says this:

"[She] Further failed to consider the following matters as material or to be material.

i) Wrongly determined that the failure of the UDP to include specific policies in respect of gypsies accommodation needs and adequate site provision was NOT material and had NO prejudicial effect on the appellants case, (see par 20 of the Decision letter); despite the fact that (inter-alia) it was conceded by the Council's own expert that it was a material consideration ..."

-- and reference is made to the dicta in the case of Webb. This is a proposition which means that I must read paragraph 20 of the decision letter. It says this:

"For the above reasons therefore I conclude that Policies G1, G2 and G12 of the development plan for the area, the adopted UDP for Bromley, are consistent with advice in Circular 1/94 and are therefore relevant to the development of the appeal land as a gypsy caravan site. I therefore further conclude and share the view of the Inspector, endorsed by the Secretary of State, on the most recent of the appeal decisions against refusal of planning permission for a private caravan site on land at the junction of Layhams Road and Sheepbarn Lane, Keston (January 1996), that the omission from the UDP of specific policies in respect of gypsy sites has in practice had no prejudicial effect upon the appellants' case. As stated by the Inspector, outside the built-up areas of Bromley, virtually all land is included within Green Belt. Current UDP policy therefore already offers the certainty that gypsy site development will not be permitted on such land, except in very special circumstances. While I attach little weight to the draft criteria based policy on gypsy site provision in the UDP Review Paper 16 for the reasons already given, I consider that it is consistent with the guidance in Circular 1/94."

30. In my judgment, that is a correct conclusion and is apparent from what I have already indicated.

31. It would not be correct to say that the Inspector did not have regard to the fact that specific policies in respect of gypsy sites were omitted from the UDP, nor that she did not regard this as a material consideration. She plainly did regard it as material, and it can be seen from paragraph 20 that she made an assessment of what effect that had on the Applicant's case. For reasons which are clearly set out in that paragraph, she found that the omission did not make the case worse. This was a reasoned planning judgment which she was entitled to make and which appears to me to be entirely justifiable.

32. The Applicant next alleges that the Inspector failed properly to consider the material effects of the UDP Review Paper. It is put in the Notice of Motion at paragraph 4(ii)(a) and (b) in this way:

"Failed properly to consider the material effects of the UDP Review Paper 16 ... and in particular:-

(a) the unique fact that the applicants personal needs for accommodation had been included AS A POLICY within the proposed draft UDP Review Paper 16 ... by the Second Respondents, AS a material consideration in its own right and separate from the question of the need for provision of gypsy accommodation generally, (See par 30 ... and par 3.6 and 4.2 of the draft UDP ...)"

33. I comment that I have read out those two latter paragraphs:

"(b) Failed to appreciate the material effect of the draft policy. Namely the fact that the Second Respondent council had specifically accepted responsibility for the families in the draft policy ... created a legitimate expectation, that a site would be identified within the near future for the applicants. That this fact was specifically material to her consideration of the personal circumstances of the applicants in a way in which a normal policy draft would not be."

34. I should read paragraph 30 of the decision letter, but I precede that by reading paragraph 29 to put paragraph 30 into its immediate context in the decision letter. She says:

"29. In the context of the guidance in Circular 1/94 you contend that the draft policies in the UDP Review Paper assist in an exceptional way as the Review Paper identifies the appellants by referring to two sites in the Green Belt at the junction of Layhams Road and Sheepbarn Lane, Keston and Hawleys Corner, Main Road, Biggin Hill, owned by gypsies; by referring to the fact that the two unauthorised sites have in the past accommodated up to 5 families, and that whilst it may be argued that the occupiers of these sites have no particular link with the Borough, consideration should be given as to whether there is any suitable unused or under utilised land within the Borough which could be used to accommodate these families; and therefore recommending that land availability within the Borough be reviewed to identify

any possible locations for a small gypsy site(s), whether local authority or private. You therefore consider the Council have acknowledged the families as their responsibility."

35. In my judgment, that paragraph and the following paragraph indicates that the Inspector understood entirely clearly what was being put to her by way of submission, and which is the submission I am considering now. At paragraph 30, she said:

"As UDP Review Paper 16 is a discussion document setting out the scope of and difficulties arising regarding gypsy site provision in the Borough and how the UDP should be reviewed to take such matters into account, I do not find it exceptional that the Paper should refer to the two unauthorised sites in the Borough including the unauthorised sites at Layhams Road and Sheepbarn Lane, Keston formerly occupied by the appellants. Nor do I find it exceptional that the Paper should conclude that whilst it may be argued that the occupiers of these sites have no particular link with the Borough, consideration should be given as to whether there is any suitable unused or under utilised land within the Borough which could be used to accommodate these families. I consider that this approach is entirely within the spirit of the advice in Circular 1/94 and PPG 12. ..."

36. If I may interject there, that is a reason as to why she did not find for the proposition being put to her in terms of the factual basis. She did not find it to be unexceptional and she gave her reason there for that. She goes on in the paragraph:

"... It does not in my view indicate, as suggested at the inquiry, that the Council have assumed a particular responsibility amounting to exceptional circumstances, to accommodate these families, over and above their existing responsibility to have regard to the needs of gypsies generally in the UDP Review. ..."

37. She has answered the point directly. It is obvious from this, that the Inspector looked very closely at the matter raised here in the Notice of Motion. She did not give the weight to it which the Applicants desired. That was a judgment she was entitled to make. The question of legitimate expectation (which, in my judgment, she has answered) really could have little bearing on the appeal being allowed because Appendix 1 of the review document and part of the text to which I have referred made it absolutely clear that any provision for the Applicants could not be expected to be on the Green Belt appeal site.

38. The next point alleged as a failure is a failure to separate out the needs of the gypsies generally and the personal needs of the Applicants. That is explained in point 5 of the Notice of Motion, which says:

"Further again, the Inspector misdirected herself as to the question of 'Need' and failed to follow the approach set out in the decision of Hedges and Hedges v Secretary of State for the Environment and East Cambridgeshire District Council 73 P&CR 534 in particular:-

(a) failed to separate the question of need for gypsy sites generally and the personal needs of these applicants for accommodation and/or to consider those

matters independently of the applicants personal circumstances or hardship that would be created by a refusal to grant permission; and;

(b) Again in this context, failed to appreciate the significance of the Draft UDP as set out above, and;

"(c) Wrongly determined in respect to need of the applicants, that the effect of the Draft UDP was to put them in No better position than gypsies generally."

39. I have already found that the Inspector, in paragraph 20 of the decision letter, fully demonstrated a proper understanding of the draft UDP and that, in paragraph 30, she reasonably explained her findings about a particular position of these Applicants.

As to the Hedges case principles, relied upon here specifically, the Inspector, in paragraph 25, did refer to the case and what the case found. In my judgment, she did have it in mind. She said there:

"... Furthering this view you also referred to Hedges and Hedges v Secretary of State for the Environment and East Cambridgeshire District Council [1996] in which it was held that the need for provision of sites for gypsies generally or the personal needs for accommodation, should be considered independently of the question of personal circumstances or hardship."

40. The Applicant then makes a number of general allegations about the Inspector's approach, including allegations of Wednesbury unreasonableness with some particularisation given. They are set out in paragraphs 6, 8 and 9 of the Notice of Motion. I do not propose to go through all those points individually. The matters complained of were addressed or found to be against the merits of the Applicants or were on the margins of the case and would not affect the overall decision made in what I find to be a very carefully detailed and meticulous decision letter which dealt properly with all matters which needed to be addressed.

41. I find no merit whatsoever in the challenges which have been made to that decision and this application fails.

42. MR MOULD: My Lord, I apply for an Order that the application should be dismissed with the first Respondent's costs? Your Lordship is aware that this case has been funded out of the Legal Aid Fund and, therefore, I accept that that Order would be subject to the usual qualifications to enforcement.

43. MR MASTERS: My Lord, I cannot resist the normal Order in relation to the Legal Aid Fund. That would be appropriate to be made.

44. Practice requires, with no discourtesy to my Lord, that I must ask for leave to appeal. Practice also requires, with no discourtesy to me, that my Lord could refuse it, but may I formally do that?

45. MR NIGEL MACLEOD QC: I refused it, but not formally. I have explained why it should be refused.

46. MR MASTERS: Forgive me, my Lord, I did not ----

47. MR NIGEL MACLEOD QC: I know. I make the Order for costs as asked with the normal legal aid caveat. Can I just ask you something, Mr Masters? I referred at the start of this case to the enforcement appeal and the application for leave to appeal against the Inspector's decisions on the Enforcement Notices, and, as I understand the position, there was an appeal against Ground A of the Enforcement Notice appeal, the relevant section, which is that planning permission should be granted for the proposals. As I understand it, the application for leave on Ground A, amongst others, was refused. Is that correct?

MR MASTERS: My Lord, yes.

48. MR NIGEL MACLEOD QC: It would be refused because there was no arguable case; is that correct?

MR MASTERS: Yes.

49. MR NIGEL MACLEOD QC: Can you explain why there was legal aid for pursuing this appeal in this court, when, as I understand it, the issues are exactly the same and the High Court has found that it is not arguable?

50. MR MASTERS: My Lord, yes. That decision came before a single judge with no right of appeal. That single judge decided that the decision was unarguable. That position was clearly set out and explained to the Legal Aid Fund because I have a duty to do so. They considered the merits of the matter and decided that the decision was formally made and that the matter ought to proceed. Your decision, my Lord, has the position that that decision did not have, because it is not a leave application without the right of appeal and that this has a right to appeal. Those matters were clearly set out to the Legal Aid Board and to the lawyers there who made a valued judgment on the merits of the matter they saw.

51. If my Lord is unhappy about that, in my respectful submission, it was a proper view for them to take, they having been told of what occurred in the first instance properly by myself and my solicitors.

52. MR NIGEL MACLEOD QC: Of course, I accept what you say in terms of what you had done and explained to the Legal Aid Authorities, but I have to comment that I find it a most surprising decision on the part of the Legal Aid Authorities.

53. MR MASTERS: My Lord, it is a difficult area -----

54. MR NIGEL MACLEAD QC: I do not think you need say anything more.

MR MASTERS: I am grateful.