REXWORTHY AND OTHERS v. SECRETARY OF STATE FOR ENVIROMENT and LEOMINISTER DISTRICT COUNCIL [1998] EWHC Admin 59 (23rd January, 1998)

IN THE HIGH COURT OF JUSTICE CO/2405/97
QUEEN'S BENCH DIVISION
(CROWN OFFICE LIST)
Royal Courts of Justice
Strand
London WC2

Friday, 23rd January 1998

B e f o r e:

MR MALCOLM SPENCE QC

(Sitting as a deputy judge of the Queen's Bench Division)

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REXWORTHY AND OTHERS

-v-

THE SECRETARY OF STATE FOR THE ENVIROMENT

and

LEOMINISTER DISTRICT COUNCIL

- - - - - - -

(Computer-aided Transcript of the Stenograph Notes of
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MR S CRAGG and MR DF WATKINSON (for judgment) (instructed by Gill and Company Solicitors, London WC1X 8PF) appeared on behalf of the Applicants.

MR D ELVIN and MR J MAURICI (for judgment) (instructed by the Treasury Solicitor) appeared on behalf of the, First Respondent.

The Second Respondent did not appear and was not represented.

J U D G M E N T
(as approved)

Friday 23rd January 1998

1. THE DEPUTY JUDGE: This is another case in the long line of Gypsy cases which find their way into this Court under section 288 or 289 of the Town and Country Planning Act 1990. This one is section 288. The Applicants in the case, together with many others, use what is called "a travellers haven" for up to 30 pitches and ancillary accommodation. In 1993 they were granted temporary planning permission by an Inspector. That has now expired and they applied for a further permission. They were refused permission by the Second Respondents and appealed to the Secretary of State for the Environment. An inquiry was held. The Inspector dismissed the appeal. They now apply to this Court to quash the decision. I shall first read the relevant paragraphs of the decision letter.

"3. Although the description of the development includes the use as a travellers' haven, both main parties accepted that there were some residents who would fall within the legal definition of gypsies and that gypsy considerations apply to the case.

4. From the evidence at the inquiry, my inspection of the site and its surroundings and from the representations which have been received, I consider the main issue in this case is whether the continued use of the land would significantly harm the character and appearance of the countryside having regard to the aims of the planning policies of the area, including those relating to gypsy sites and affordable housing.

...

8. ... I consider that the visual impact of the development in an Area of Great Landscape Value would be unacceptable in that significant harm would occur to the character and appearance of the countryside. Therefore, the development would be contrary to Policies CTC2 of the CSP and A38 of the LMLP.

9 . ... In addition, the adopted LMLP also includes low cost housing as an exception and gypsy caravan sites may also be included following approved Policy G2 of the CSP and Policy A60 of the Deposit Draft of the LDLP.

10: Policy A5 of the LMLP sets out eight criteria which need to be satisfied before low cost housing would be acceptable on the site. I accept that the proposals would be additional to housing allocations, it would not be mixed development and that the local market cannot satisfy the demand for accommodation

of the type on the site. Nevertheless, I am not convinced that the need, however genuine, is local, especially in view of the evidence about the origins of many of the existing residents of the site. The scheme would not be environmentally acceptable in that it would be visually intrusive in an Area of Great Landscape Value. Services at Upper Hill may well be adequate for those who have little need to call on them but relative lack of public transport support which is available does not fall within my definition of there being a reasonable access to facilities. In any event, no mechanism such as legal agreement was offered to ensure that the development, if it fell under the affordable housing category, would continue to comply with the policy. Therefore, having regard to advice in Circular 13/96 and the adopted, approved and emergent planning policies, I do not consider that the development applied for could reasonably be allowed under the affordable or low cost housing definition. Therefore, the proposal would not conform to adopted policy A5.

11. Policy G2 of the CSP described criteria which should be used to assess the acceptability of land for use as a gypsy caravan site... Consequently, I do not accept that the development would be in accordance with policy G2 of the CSP. Similarily, for the same reasons, it would not conform with the emergent policy A60 with the LDLP.

12. I have taken account of advice in Circular 1/94 and I do not dispute the demand for accommodation on the site. Whether this amounts to need is a different matter, especially as the current occupants, so far as evidence was presented, appear to come from a wide variety of backgrounds and places. Nevertheless, Circular 1/94 recognises that applications may be received which have no local connections and which could not have been foreseen in development plan policies. Applications should not be refused on the grounds that public provision in the area is considered adequate or because alternative accommodation is available elsewhere. The accommodation for gypsies as indicated in the February 1997 information sheet from the County Council and the 1996 spot counts demonstrates a very limited amount of spare capacity. However, Circular 1/94 advises that, as with any other planning applications, proposals for gypsy sites should continue to be determined solely in relation to land use factors. In this case, the application would be clearly contrary to development plan policy and it would also adversely affect the character and appearance of the countryside.

13. I have also taken advice in Circular 18/94 into account and the need for shelter of the occupants but, based on the land use merits of the case, I believe that the appeal which is under Section 78 of the Act, should be dismissed. The development which is currently on the site may well be of the low impact type and relatively sustainable compared to more conventional housing, but the site still fails to meet the criteria set out in the planning policies and would still cause harm to the countryside which I have identified above. The development may well lead to a strengthening of the local rural economy as identified above. The development may well lead to a strengthening of the local rural economy as advised in PPG7, but that would be at the expense of the appearance and the character of the countryside which PPG7 also advises should be protected.

14. The case of Regina v Wealden DC ex parte Wales and Stratford was quoted at the inquiry together with Regina v Kerrier DC ex parte Uzell Blythe and Sons. The need for common humanity to prevail was stressed at the inquiry, but the planning system is plan led and I have given the weight which is due to the adopted, approved and emerging planning policies. Other submitted case law which described the definition of a gypsy is largely immaterial to this particular case as the Council accepted that some of the

existing residents were gypsies, even though at no time at the inquiry was it suggested that all the residents were gypsies. The description of the development was a '...travellers' haven...' without a mention of gypsies. Nevertheless, even if all the current occupants had been gypsies it would not have altered my conclusions about the case. I have noted the appeal decisions T/APP/C/94/QO125/635478 & T/APP/QO125/A/94/243662/P6, but in this case, although other site specific and personal circumstances may differ, the landscape here does have a local designation which suggests that it is of a higher quality."

2. Mr Cragg, who appears for the Applicants, takes one single point: it is to the effect that owing to his reliance upon the passage from Circular 1/94, quoted in the penultimate sentence of paragraph 12 of the decision letter, the Inspector has relegated the relevance of need for accommodation and the personal circumstances of the Gypsies.

3. Five of the occupiers of the site gave evidence at the inquiry and evidence about the occupiers generally was extensive. Dr Home, who is a planning consultant, conducted the case on their behalf and also gave evidence. He said:

"There should be no doubt about the continuing need for this site."
He said:
"I attach official statistics (Annex B) which show a continuing shortage of accommodation for gypsies, at national, regional and county level. Hertfordshire still has one of the largest numbers of unauthorised caravans (over two hundred) of the English counties, statistics which take into account few or none of the site occupiers in this case."

"The 1993 appeal decision recognised that need existed ("a serious problem") and the situation has not improved since."

4. That is a reference to what the 1993 Inspector had said, namely that there was:

"... clearly a problem the scale of which is quite unknown to both County and District Councils".

5. Dr Home cited the cases and made the points which are made at the beginning of paragraph 14 of the decision letter. He drew attention to the judgment of Mr Gerald Moriarty QC, sitting as a Deputy Judge of this Court, in Hedges and Hedges v Secretary of State for the Environment and East Cambridgeshire District Council [1997] 73

6. P & CR 534 in which he said at page 545:

"... he [that is the Inspector] failed to consider the need for provision of sites for gypsies generally or, indeed, the personal needs for accommodation, independently of the question of personal circumstances or hardship to the family..."
and accordingly quashed the decision.

7. In my judgment this is not a Hedges category of case because the Inspector has considered the evidence presented with respect to need and personal circumstances; I draw attention, in particular, to the reference to low cost housing which includes travellers' sites in paragraphs 9 and 10 of the decision letter; the references to accommodation in paragraph 12 and, in particular, the anti-penultimate sentence, which is a reference to the statistics which I have already mentioned; the reference to Circular 18/94 in paragraph 13, which is actually a reference principally to paragraph 9 thereof, and I shall read it:

"The Secretaries of State continue to consider that local authorities should not use their powers to evict gypsies needlessly. They should use the powers in a humane and compassionate fashion and primarily to reduce nuisance and to afford a higher level of protection to private owners of land";
and the references to common humanity and the differing personal circumstances on other sites in paragraph 14. However, in my judgment the Inspector has been misled by the first sentence of paragraph 22 of Circular 1/94, which he quoted in paragraph 12 of the decision letter. I shall read the last sentence of that paragraph:
"The aim should always be to secure provision appropriate to gypsies' accommodation needs while protecting amenity."

8. I do not say that he did not have that sentence in mind because it appears from the earlier points made in the paragraph that he had the circular well in mind, especially paragraph 21, but he has certainly not given any weight to the last sentence. However, the sentence, which I shall now read in full:

"... as with any other planning applications proposals for gypsy sites should continue to be determined solely in relation to land use factors."
is ineptly and ambiguously worded and thus potentially misleading. It is impossible to tell what by the use of the word "solely" is being excluded from consideration. Is it personal circumstances? Is it financial considerations? Is it merely ulterior motive?

9. Mr Elvin, who appears for the Secretary of State, urged me to hold that "land use factors" means all material planning considerations and also personal circumstances. He urged me to hold that His Honour Judge Rich, sitting as a Deputy Judge of this Court, had fallen into error in his judgment in Webb v Secretary of State for the Environment [1996] 71 P & CR 411 at 414 in holding that personal circumstances were not land use factors. However, I find that there is no necessity in the present case to decide what "land use factors" means, nor whether His Honour Judge Rich was right or wrong, nor whether Lord Scarman's speech in Westminister City Council v Great Portland Estates [1985] 1 AC 661 at 670, which does not use the expression "land use factors", assists in construction.

10. On any view, the expression and the sentence are ambiguous. What is relevant in the present case is to understand what this Inspector thought the sentence meant. It is clear to me that having referred to accommodation for Gypsies in the anti-penultimate sentence of paragraph 12 of the decision letter, by the use of the words "however" and "solely" in the penultimate sentence, he was relegating the subject of accommodation for Gypsies, including their personal circumstances and elevating -- as one sees from the last sentence -- the subject of development plan policy and the character and appearance of the countryside. That is a misdirection of himself because there is no circular advice apart arguably from this ambiguous sentence, which does otherwise than to say that all these subjects must be considered even handedly. As Mr Cragg points out, this misdirection purveys the decision letter.

11. After he has set up this approach in paragraph 12 the Inspector then, in the first sentence of paragraph 13, by the use of the word "but", puts the Circular 18/94 and "need for shelter" point on one side and determines the case in that sentence on the basis of "the land use merits." Again in the first sentence of paragraph 14 he puts the "common humanity" point on one side or at least relegates it by using the word "but" again and saying "the planning system is plan led".

12. I find it impossible to hold, with any confidence, that if the Inspector had not misled himself in this way he would nevertheless have reached the same determination. These subjects, the acute shortage of sites for travellers in Hertfordshire and Worcestershire and the personal circumstances of these

Applicants, and the others on the site, are important points to take into account as the 1993 Inspector, who was not misled in this way (because his decision predated the circular) thought. I do not need to read his decision letter. Moreover this aspect is more acute now because the Criminal Justice Act 1994 has been passed enabling those occupying unauthorised sites to be prosecuted. My view is that if this case were to be reconsidered giving proper weight to the variety factors a different conclusion might perhaps be reached.

13. I should not leave this case without repeating the words of His Honour Judge Rich in Webb (supra) at page 514 with respect to the first sentence of paragraph 22:

"I would express the hope that the Secretary of State will consider whether some amendment of that formulation in his Circular ought to be made in order to avoid possibly misleading those who seek to follow policies as explained in the Circular".

14. The application is allowed and the decision quashed.

15. MR WATKINSON: My Lord, I am obliged. I ask then for the Applicants' costs against the Secretary of State.

16. THE DEPUTY JUDGE: I do not think you can resist that.

17. MR MAURICI: There are two points I would wish to make. The Secretary of State would submit that in this case the reasonable Order in relation to costs is that the Applicants have half his costs. The Respondent says that, first of all, in relation to ground 4 of the Notice of Motion, which was amended in September and which was dropped at the very last moment after the exchange of the skeleton arguments, upon which the Respondent spent much time preparing to meet that point, that at least half of Mr Elvin's skeleton deals with that dossier 5 point. That is the first reason. The second reason, my Lord, is that in relation to the excessive size of the bundle the Respondent says he should not have to pay for the costs of the compilation of such an excessive bundle which again caused the Respondent to spend much time in preparing. In those circumstances the Respondent would say that the Costs Order should be that the Applicants can have half his costs.

18. THE DEPUTY JUDGE: Have you finished?

19. MR MAURICI: Yes, my Lord unless there is anything else I can say?

20. MR WATKINSON: As far as the bundle is concerned, that is a matter that can be dealt with upon taxation. If the Taxing Master thinks there was over-elaborate preparation of the bundle he can reduce the costs of the preparation of the bundle.

21. THE DEPUTY JUDGE: I think I will disallow the costs of the preparation of the bundle any way. I have previously,

22. Mr Wakinson, been very critical in this Court of this absurd preparation of a massive bundle. This extends to over 250 pages when, in fact, only a small quantity were required. It puts the Respondent, and indeed the Judge, to very considerable disadvantage in trying to understand what the case is about. I shall disallow the costs of the bundle in any event. I am inclined to allow you two thirds of your costs in view of the point about A5.

23. MR WATKINSON: The bulk of the argument is directed towards the point at which your Lordship has found in favour of the Applicants.

24. THE DEPUTY JUDGE: It was but Mr Elvin had to prepare himself to meet the other point as well.

25. MR WATKINSON: The Applicants had to come to Court in order to gain the relief they seek in any event. I think there is loss to be gained in my pursuing resistance to my learned friend's application in the terms that your Lordship proposes to allow it.

26. THE DEPUTY JUDGE: The order of the Court will be that the application is allowed. The Applicants will have two thirds of their costs paid by the First Respondent but there will be no order at all in respect of the preparation of the bundle of documents.

27. MR MAURICI: I am much obliged. Thank you.

28. MR WATKINSON: Would your Lordship order legal aid taxation in respect of the Applicants' costs?

29. THE DEPUTY JUDGE: Legal aid taxation.