

C3/2003/0762

Neutral Citation Number: [2003] EWCA Civ 1614
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(Mr Rabinder Singh QC)

Royal Courts of Justice
Strand
London, WC2

Thursday, 30th October 2003

B E F O R E:

LORD JUSTICE PETER GIBSON
LORD JUSTICE WALLER
LORD JUSTICE CARNWATH

MRS M BUTLER

Claimant/Appellant

-v-

BATH AND NORTH EAST SOMERSET DISTRICT COUNCIL & OTHERS

Defendants/Respondents

(Computer-Aided Transcript of the Palantype Notes of
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MR TIMOTHY JONES (instructed by Community Law Partnership, Birmingham B4 6RP)
appeared on behalf of the Appellant.

MS NATHALIE LIEVEN (instructed by Sharpe Pritchard, London WC1V 6HG) appeared
on behalf of the Respondents.

J U D G M E N T
(As Approved by the Court)

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Thursday, 30th October 2003

J U D G M E N T

1. **LORD JUSTICE PETER GIBSON:** I will ask Carnwath LJ to give the first judgment.

LORD JUSTICE CARNWATH:

Introduction

2. This appeal raises a short but important question relating to a structure plan policy for identifying suitable sites for Gypsies. The applicant, who is a Romany Gypsy (living in South Gloucestershire), says that in the adopted structure plan the strong language recommended by the examining panel has been significantly weakened. Although planning authorities have power to depart from panel recommendations, she says that the necessary procedure for such a departure has not been followed.
3. The respondent authorities submit, and the judge accepted, that there was no such departure, and therefore no need to follow that procedure.
4. It is common ground that, if the appeal succeeds, the relevant policy (Policy 37) will have to be quashed, but that no other part of the adopted plan would be affected.
5. The judge set out in helpful detail the background and the relevant policy history. I can therefore concentrate on the main points, starting with the structure plan.

The Structure Plan

6. The plan in question is the Bath and North East Somerset, Bristol, North Somerset and South Gloucestershire Joint Replacement Structure Plan. As its somewhat indigestible title implies, it was prepared by the four respondent authorities jointly. (They are authorities in what was formerly the Avon County Council area, and there was formerly an "Avon Structure Plan".) The respondents are unitary authorities. To coordinate the drafting of the replacement structure plan, they established a Joint Strategic Planning and Transportation Committee, which I will refer to as "the Joint Committee".
7. The draft structure plan was deposited in draft in June 1998 and an examination in public ("EIP") was held in March 1999, at which evidence was given by groups representing Gypsies. Following the panel's report, there was some delay in the final adoption of the plan, the reasons for which are not material to the issues before us. It was finally adopted by the four authorities on 23rd September 2002. The present application was duly made, under the statutory procedure for challenging the legality of such plans, within the six weeks allowed for that purpose.

Policy 37

8. The challenge is directed to Policy 37, which reads:

"Local plans will set out policies to secure an appropriate level of site provision for gypsies and travellers within their area, including the provision of temporary stopping places to reduce unauthorised encampments.

Permanent sites should be located within a reasonable distance of local services and facilities, readily accessible from main roads, avoiding the encroachment of open countryside and minimising noise, visual impact and disturbance.

Sites should not normally be located within the Green Belt, on areas of open land subject to special policies on conservation and/or restriction of development, or on the best and most versatile agricultural land.

Mixed use sites will be considered where appropriate incorporating provision for residential and small scale light business use undertaken by gypsies and travellers.

The monitoring of the provision of facilities by Local Authorities will be coordinated in order to ensure that provision reflects the level and changing pattern of need."

9. This policy was formulated in response to the Panel's recommendation, which was thus:

"A separate policy should be inserted in the Plan which requires that suitable locations for gypsy and traveller sites *will be identified in Local Plans*, that the provision of sites will be encouraged in accordance with local assessment of need and that sites should be located close to services and facilities including schools, readily accessible from main roads, and wherever possible should be suitable for mixed residential and business uses in accordance with gypsies and travellers' needs." (emphasis added)

10. The appellant's case in short is that the adopted policy does not require sites to be "identified in local plans", as the recommendation required; it does no more than require them to set out policy criteria. That is the main point made by Mr Jones who appeared for the appellant. There are, however, two subsidiary points that the language in relation to the other parts of the policy has been watered down. In particular, he says that there is no specific reference to the provision of sites being "encouraged in accordance with the local assessment of need"; and, secondly, that there is no specific reference to sites for mixed use being provided "wherever possible ... in accordance with Gypsies and travellers' needs". The adopted policy refers only to an "appropriate" level of site provision and providing mixed use sites where "appropriate".
11. Before returning to the merits of his contentions, it is necessary to explain a little more about the development of the relevant policies, nationally and locally.

National policy

12. The national policy background was set by Circular 1/94 "Gypsy Sites and Planning". This circular referred to the prospective repeal (in November 1994) of the former statutory duty imposed upon authorities by the Caravan Sites Act 1968 to make adequate provision for Gypsies. The Circular said:

"Repeal of the statutory duty will make it all the more important that local planning authorities make adequate gypsy site provision in their development plans, through appropriate use of locational and/or criteria-based policies. Structure plans and Part I of unitary development plans should continue to set out broad strategic policies, and provide a general framework for site provision. Local plans and Part II of unitary development plans should continue to provide detailed policies." (Para 9)

There followed the passage on which the appellant particularly relies:

"Local plans and Part II of unit development plans should wherever possible identify locations suitable for gypsy sites, whether local authority or private sites. Where this is not possible, they should set out clear, realistic criteria for suitable locations, as a basis for site provision policies." (Paragraph 12)

13. In relation to national policy, it is relevant to note that the government has in the past expressed concern about the failures of the authorities in the Avon area to provide adequate sites for their Gypsy population. We were referred to a letter in October 1990 from the Department of the Environment. This expressed the Secretary of State's concern that, over the past 16 years of the County Council's existence, it had failed to provide sites for more than 40 per cent of the current Gypsy population.
14. In 1999 the Department, then the Department of the Environment Transport and the Regions, sent a letter to all Chief Planning Officers reminding them of the advice in Circular 1/94. The relevant paragraph read thus:

"The Minister agreed that the Department would draw the authorities' attention to these concerns and remind them of the emphasis in Circular 1/94 on identifying suitable locations for Gypsy sites in plans, wherever possible. The key message of the Circular will be underlined in the revised version of Planning Policy Guidance Note 12 on Development Plans, which is due to be issued shortly."

15. We were also referred by Mr Jones to a more recent statement by the Secretary of State on an appeal in the South Gloucestershire area. This is a decision dated 5th February 2001, relating to a site at Bury Hill Quarry, Wick, South Gloucestershire. The inspector in his report on the inquiry referred in paragraphs 56 and 57 to the need for Gypsy sites. He said:

"The Council has done little to meet the identified need. It has been unable to allocate any sites through the Local Plan process and to my mind it is unreasonable to expect the appellants to do so with fewer

resources. It has also disposed of large areas of land which could possibly have been used to provide sites. Despite the existence of criteria-based policies in the extant and emerging development plans it has consistently refused applications and accepts that the local need is unlikely to be met in the foreseeable future."

The Secretary of State in the decision letter said that, for the reasons given in those paragraphs, he considered that there was "a substantial local and regional need for Gypsy sites". He found that need to be sufficiently important to outweigh the Green Belt policy objections in that case.

16. Returning to local policy, the judge set out the background which led to the adoption of Policy 37, quoting in some detail from a statement by one of the officers directly responsible, Mr Roger Daniels.
17. Policy 37 evolved from Policy 33 of the Deposit Draft Structure Plan. Policy 33 stated as follows:

"The location of sites for mobile homes will generally be subject to the same planning policies as other residential developments; requiring access to local services and facilities, especially for sites in long-term use, and reflecting local environmental considerations. A site for mobile homes is not appropriate in the Green Belt and may be unacceptable in some locations where permanent housing would be permitted ... Sites to accommodate mobile homes for gypsies and travellers, which may involve special requirements, will be addressed in local plans... ."

18. This was explained by Mr Daniels as follows:

"Policy 33 of the Deposit Draft was a combined policy for mobile homes and Gypsy sites. It was one of three policies (Policies 31 to 33) concerned with housing numbers and with qualitative aspects of housing including affordability and housing mix. It sought to address the needs of Gypsy and traveller sites and other mobile homes, as special kinds of housing need requiring special consideration ..."

He noted that there were objections from various groups representing Gypsies, who called for "a more positive and prescriptive policy" for the provision of Gypsy sites in local plans.

The EIP Panel

19. These issues were considered at the EIP in October 1998. The judge set out some of the evidence considered by the Panel, which highlighted both the need for further provision for Gypsies and the difficulties experienced by the authorities in meeting that need. We have also been referred by Mr Jones to the panel's note of the submissions and evidence it received on this point, in an annex to its report at paragraph A15.11. It is clear from that note that there was some discussion as to whether a "criteria-based local plan policy", as had been applied in the past, was the right way forward. There

was also reference to the Gypsy groups asking for "a stronger more prescriptive strategy statement" to assist local authorities in the face of the usual local opposition.

20. The Panel dealt with this issue at paragraphs 3.61-63. In paragraph 3.61 it noted that:

"... no sites for travellers or gypsies have been provided in Bristol after 20 years of seeking, and that there has been 100% refusal rate of gypsy site applications by South Gloucestershire Council and its predecessor authority, despite the very great pressure in the Plan area for accommodation for gypsies and travellers."

21. Its conclusions were set out as follows:

"3.62 The Panel appreciate that since the 1994 Structure Plan the statutory duty of local authorities to provide sites for gypsies has been repealed. The advice in Circular 1/94 anticipated this change and it encourages gypsies and travellers to provide accommodation for themselves. In general, the existing and emerging Local Plans for the Plan area are compatible with this advice so far as they set out criterion-based policies against which planning applications are judged. However, it is abundantly clear that this approach is failing to meet the housing needs of this group within the community.

3.63 We are strongly of the view that the Plan must seek to do more to guide and assist the Unitary Councils in fulfilling their obligations to all sections of the community. Therefore the Plan should set out a broad strategy which will ensure that local planning authorities assist gypsies to find suitable sites in accordance with their needs. This issue should not be treated as an adjunct to a general policy about mobile homes but should have separate policy status. We do not consider that it would be appropriate to set a numerical target for site provision at structure plan level, but we would expect that in monitoring the Plan, the JSPTU will work closely with the Unitary Councils to quantify the need for sites within the area and to review the planning and other measures which may be required to achieve an appropriate level of provision."

22. The Panel recommended ("R21") that Policy 33 should be modified by the deletion of the reference to sites for Gypsies and travellers, and that a separate policy should be inserted in the plan dealing with that issue. I have already set out the relevant terms of that recommendation, but I repeat the statement that the policy should "require that suitable locations for Gypsy and traveller sites will be identified in local plans". (I note, however, as Mr Daniels fairly points out, that this recommendation is to be contrasted with other cases, where the panel recommended a specific form of words for the policy to be adopted in the Structure Plan.) To that extent some area of judgment was allowed to the authorities in formulating the particular policy wording.

Consideration of the Panel recommendation

23. The Joint Committee considered the panel's report initially at its meeting on 27th July 1999, but it resolved to reserve judgment for further consideration by officers. At a further meeting on 14th October 1999 the Joint Committee agreed the modifications for publication in November. They included a new Policy 37, substantially in the form that I have already quoted (separate from the new Policy 36 dealing with mobile homes).
24. The Committee's stated reasons for proposing this modification were:
- "The proposed addition of a new policy on gypsy and traveller sites follows the approach recommended by the panel (R21). The new policy is based on guidance to LPAs contained in Circular 1/94 and a DETR/Home Office document 'Managing Unauthorised Camping -- a good Practice Guide' (October 1998)."
25. Objections were received to the new Policy 37, but led to only minor changes of wording. On 3rd February 2000, the Joint Committee resolved to adopt the plan without further modification. In March 2002, following the delay on other matters to which I have referred, the Joint Committee resolved to recommend adoption of the plan by its four constituent councils. The four councils agreed, between May and July 2002, to adopt the plan. It was formally adopted on 23rd September 2002, following the publication of notices of intention to adopt on behalf of the four councils.

The Regulations

26. The claimant submits that there has been a breach of a procedural requirement, contained in the Town and Country Planning (Development Plan) (England) Regulations 1999. Regulation 15, so far as material, provides as follows:
- "(4) Where the report of the person holding the examination in public contains recommendations that the proposals should be modified in a manner specified in the report and the local planning authority intend not to accept one or more of those recommendations:
- (a) the authority shall make a list of recommendations that they do not intend to accept available for inspection from the date on which, and at the places at which, the report is made available for inspection;
 - (b) the notice given in Form 3, or in Form 4, as the case may be, shall record the authority's intention not to accept those recommendations and invite objections and representations to be made in respect of that intention within six weeks of the date on which the notice is first published in a local newspaper."
27. The question therefore is whether, by proposing to adopt the new Policy 37, the authorities were indicating an "intention to depart" from the panel's recommendation. If they were, then they have failed to comply with the statutory requirement. The appellant is entitled to make this challenge, as someone "substantially prejudiced" by

that failure, not least because of the additional opportunities she and those of the same mind would have had to object.

The issue

28. The point is a short one, and at first sight the answer seems to me reasonably clear. National policy draws a clear distinction between the identification of actual locations in a local plan and the setting of policy criteria. The preference is for the former. The EIP panel must have had that distinction in mind. They took the view that the existing "criterion-based policies" of the local authorities had failed to meet the needs of the Gypsy community, and that more was needed by way of guidance. Their recommendation that local plans should "identify suitable location" must be read in that context. They wanted something more specific than mere policy criteria.
29. One does not need to be a planning expert to grasp the significance of that distinction. There may be all the difference in the world between abstract policy criteria which hurt no-one; and concrete proposals for specific locations, whose likely effects -- favourable and adverse -- are clear to all. Resolving disputes about such locations is, of course, more difficult than setting criteria; but the panel clearly thought that the nettle had to be grasped in the local plans if the need was to be met.
30. By contrast Policy 37 does not require local plans to identify locations. It requires them to "set out policies", and indicates some of the criteria which should guide the search. The form of the new wording must have been intentional. Whether or not the authorities thought they were departing from the recommendation, that in my view is the clear effect of what they did. The authorities were entitled to make such a change, but only after complying with the regulation.

The judge's reasoning

31. The judge's reasons for taking a different view were helpfully summarised by him, in six points:

"(1) R21 was, essentially, a statement of desirable planning policy, not a statement written by lawyers for lawyers ... It seems to me that Mr Jones' submissions, which advocated careful dissection and parsing of R21 into clauses and subclauses, invited me to fall into the temptation to treat a recommendation such as this with 'the austerity of tabulated legalism'. [That term being taken from Minister of Home Affairs v Fisher [1980] AC 319 at 328H, per Lord Wilberforce]

(2) Although the phrase 'identified in Local Plans' in the first part of R21 by itself might appear to refer to site specific allocations only, the remainder of R21 clearly envisages some criteria-based policies in local plans as well.

(3) R21 should be understood in its context, as both sides accept, including the factual history. What the Panel was responding to was principally to recommend alteration to the wording of the draft Policy 33,

not least because the reference to gypsy sites was very much an add-on at the back of a policy which was otherwise to do with mobile homes generally. Its focus was not on the suggested distinction between locational and criteria-based policies.

(4) Policy 37, as finally formulated, does not require criteria-based policies only. It simply enables the defendants to have a choice as between site specific allocations and criteria-based policies, or both.

(5) Such an approach is consistent with national policy, in particular paragraphs 9 and 12 of Circular 1/94, which I have already cited. Although national policy is not binding on local planning authorities, it is a material consideration, and if the Panel had intended to recommend departure from it, they could, and would, have said so in terms.

(6) It is in the expert view of the Joint Committee, as reflected in Mr Daniels' witness statement before this court, undesirable that an excessively rigid approach should be adopted, no matter what their different circumstances, particularly because the Structure Plan is to cover four different local planning authority areas."

Before us Miss Lieven has substantially adopted and repeated the judge's points.

32. The first five points are concerned with the interpretation of the policy. I am unable, with respect, to agree with the judge's approach. I accept, of course, that the panel's report must be read in its context, and as a document addressed to planners and the interested public, not to lawyers. However, part of that context, as the judge accepted, is national policy in Circular 1/94. The distinction between the function of identifying locations, and that of setting out criteria for their identification, is clearly drawn. As I have said, the preference is for the former. It is unfair, with respect, to categorise Mr Jones' emphasis on the first part of Recommendation R21 as "tabulated legalism". The distinction in that part reflected the common language of the panel and those appearing before it. It was, as the Secretary of State had said, a key issue.
33. The judge rightly said that the circular was a material consideration. However, I find it difficult to understand his comment that the panel would have said in terms if they intended to depart from national policy. On Mr Jones' interpretation, there was no departure; they were giving effect to the policy preference for identification of locations. It is the authorities' interpretation which might require further explanation, since under the circular it is the second best option.
34. Equally, I do not see why it matters that the remainder of R21 sets out criteria for the selection of sites. That is precisely what one would expect the structure plan to do. Those concerned in the preparation of local plans need guidance for the selection of particular locations. So indeed do other potential developers, for the selection of sites throughout the plan area. There is nothing surprising in that guidance being related to the assessment of local needs and formulated in terms of defined criteria. It does not

detract in any way from the force or relevance of the obligation, in the first part of the recommendation, to identify locations.

35. I should add that I see some force in Mr Jones' contention that even those criteria have been watered down. If the authority were, indeed, intending to follow the recommendation, it is difficult to see why they did not stick more closely to the wording of the recommendation. However, I would not have regarded those other points as sufficient by themselves to justify upsetting the policy.

36. Returning to the judge's reasons, the last point, concerning the evidence of Mr Daniels, seems to me more like a reason for not following the panel, than an explanation of how they had followed it. The judge quoted Mr Daniels' evidence:

"There are significant differences between the four council areas that make up the joint structure plan, in terms of the needs of and provision for gypsies ... and the physical opportunities and constraints of each area for sites ... In these widely varying circumstances, the Joint Committee considered that a policy based on a single approach to be used in all four council areas would be unlikely to succeed in delivering appropriate provision."

37. Mr Daniels described the experiences in each of the four defendants' areas, including the difficulty in the South Gloucestershire area of finding any sites at all.

38. The judge saw this as relevant in providing what he called "helpful background" to the history, which he saw as part of the context in which policy recommendation R21 was to be construed. He said:

"It is unlikely, in my view, that the Panel would have intended to recommend that there should be a rigid approach requiring identification on a site specific basis in the local plans, where experience in at least one of the defendant's areas was that they had simply been unable to identify further sites to meet need."

39. With respect to the judge, I find that difficult to understand as an explanation of the authority having followed the recommendation. The problem in South Gloucestershire was one which would have been well-known to those attending the EIP. It was clearly in the minds of the panel because they mentioned it in the preceding paragraph of their conclusions. Nevertheless, they made quite clear that they thought that something stronger was needed than the existing policies, and that included the identification of locations. They did not distinguish between the different areas within the plan area, as they could have done. If they were shown to have been calling for the impossible in the area of one authority, that might have been a reason for the authorities to have proposed modifications to address that point. However, they would have been bound to follow the regulation 15 procedure.

40. The judge's overall conclusion was as follows:

"My conclusion as to the interpretation which it was reasonably open to

the defendants to reach in relation to R21 is also supported by the fact that what regulation 15(4) focuses on, as I have emphasised in the quotations from it above, is the 'intention' of the relevant planning authority. Intention is usually regarded in law as a subjective concept. It is difficult to see how the defendants could be said to have intended to depart from R21 when they considered that they were not doing so, unless their subjective view was irrational. But for the reasons I have already given, I do not consider that their subjective view was irrational. Accordingly, in my judgment, the procedural obligations imposed by regulation 15(4) have not been breached in this case."

41. If there were a reasonable interpretation of the recommendation which would support the policy adopted by the authority, then I can see the relevance of the reference to their subjective intention and the reasonableness of their view. However, in my view, the recommendation could only have one meaning. The reference to the need to identify locations in the plan, and not simply through the plan procedure, was clearly stated. In my view, Policy 37 cannot stand. For this reason I would allow the appeal.
42. **LORD JUSTICE WALLER:** I agree.
43. **LORD JUSTICE PETER GIBSON:** Although we are differing from the decision of the Deputy Judge, to the lucidity of whose judgment I would pay tribute, there is nothing which I would wish to add to the judgment of my Lord, Carnwath LJ with which I am in entire agreement.

Order: Appeal allowed with costs.