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United Kingdom House of Lords Decisions

Judgments - South Bucks Distict 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)

v.

Porter (FC) Appellant)

ON

THURSDAY 1 JULY 2004

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

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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."

33. *Save* was followed by the decision of the Court of Appeal in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263 where, on another reasons challenge, Sir Thomas Bingham MR felicitously observed, at pp 271-272:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

34. Passing finally to *Bolton,* the last of the three earlier cases before the House concerned with the scope of the reasons requirement in the planning context, I need refer only to a short passage in Lord Lloyd of Berwick's speech at pp 314-315:

> "[I]n so far as [the Court of Appeal in that case] was saying that a decision letter must refer to 'each material consideration' I must respectfully disagree. This seems to go well beyond Phillips J's formulation in *Hope v Secretary of State for the Environment* [(1975) 31 P & CR 120, 123]. What the Secretary of State must do is to state his reasons in sufficient detail to enable the reader to know what conclusion he has reached on the 'principal important controversial issues'. To require him to refer to every material consideration, however insignificant, and to deal with every argument, however peripheral, would be to impose an unjustifiable burden.
>
> . . .
>
> Since there is no obligation to refer to every material consideration, but only the main issues in dispute, the scope for drawing any inference [the inference suggested being 'that the decision-maker has not fully understood the materiality of the matter to the decision'] will necessarily be limited to the main issues, and then only, as Lord Keith pointed out [in *R v Secretary of State for Trade and Industry, Ex p Lonhro plc* [1989] 1 WLR 525, 540], when 'all other known facts and circumstances appear to point overwhelmingly' to a different decision."

The law summarised

35. It may perhaps help at this point to attempt some broad summary of the authorities governing the proper approach to a reasons challenge in the planning context. Clearly what follows cannot be regarded as definitive or exhaustive nor, I fear, will it avoid all need for future citation of authority. It should, however, serve to focus the reader's attention on the main considerations to have in mind when contemplating a reasons challenge and if generally its tendency is to discourage such challenges I for one would count that a benefit.

36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not

give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.

The law applied

37. Having identified Mrs Porter's hardship as consisting of being "a very unwell gipsy without another pitch to occupy", the Court of Appeal decided that if this was to constitute "very special circumstances" which "clearly outweighed" this "inappropriate development", then the inspector had to provide what was variously described as "a much fuller analysis", "a more comprehensive approach to the issue", "clear and cogent analysis", "the case for hardship considered in a broader context and with fuller reasoning" and "a more comprehensive approach" (see paras 21 and 22 above).

38. Mr George QC for Mrs Porter and Miss Lieven for the Secretary of State submit that this was substantially to overstate the reasons requirement upon the inspector. The main issue before him, really the only issue, was whether Mrs Porter's hardship constituted "very special circumstances" for granting her the personal planning permission she sought. There was no issue of law in the case; no issue of fact (certainly none once the inspector had concluded that an alternative site was "unlikely" to be available to Mrs Porter "for a considerable time"); and no *Wednesbury* challenge, i.e. no suggestion that the inspector could not reasonably have reached his conclusion on the facts. What was required of him was above all a value judgment whether the hardship which would result from dispossessing Mrs Porter from her land was sufficiently extreme and unusual to justify the environmental harm occasioned by her remaining there as long as she needed.

39. That personal circumstances are themselves capable of being a material consideration in a planning case is well established—see *Westminster* at p 670F ("the human factor . . . can . . . and sometimes should, be given direct effect as an exceptional special circumstance"—per Lord Scarman), and *South Bucks* at p 580, para 31, ("the Secretary of State was entitled to have regard to the personal circumstances of the gipsies"—per Lord Bingham). Indeed Lord Clyde in *South Bucks* at p 593C-D, para 75 described Mrs Porter's (and Mr Berry's) circumstances as "quite special": in part because they owned the land in question and in part because, although the land lies within the Green Belt, "it is not suggested that there is any urgent environmental problem".

40. Whilst, however, acknowledging that personal hardship can give rise to very special circumstances, Mr Straker QC for the council argues that more explanation was required than the inspector gave as to why he reached that particular judgment on the facts of this case. The Court of Appeal, he submits, was right to demand "a much fuller analysis".

41. I cannot accept that submission. To my mind the inspector's reasoning was both clear and ample. Here was a woman of 62 in serious ill-health with a rooted fear of being put into permanent housing, with no alternative site to go to, whose displacement would imperil her continuing medical treatment and probably worsen her condition. All of this was fully explained in the decision letter (and, of course, described more fully still in the reports produced in evidence at the public inquiry). Should she be dispossessed from the site onto the roadside or should she be granted a limited personal planning permission? The inspector thought the latter, taking the view that Mrs Porter's "very special circumstances" "clearly

outweighed" the environmental harm involved. Not everyone would have reached the same decision but there is no mystery as to what moved the inspector.

42. Quite why the Court of Appeal thought that some fuller explanation was demanded is unclear. It may be that they focused so closely on the importance of maintaining the Green Belt that they inflated the reasons requirement in this particular case. But this would be to offend against the principle established in *Save* that the standard of reasoning required is not dependent upon the importance of the issues involved—see para 28 above. In any event the test to be satisfied under the policy guidance in PPG2—whether there exist very special circumstances which clearly outweigh the environmental harm resulting—of itself provides the Green Belt with its necessary protection. Or it may be that the Court of Appeal relied more heavily upon *Doncaster* (referred to in para 31 of its decision—see para 21 above) than was appropriate here. The decision letter in *Doncaster*, it should be noted, "left [Sullivan J] in real doubt as to whether, in striking the Green Belt policy balance, the inspector applied the correct policy, as set out in PPG 2" (p 1523, para 73). He added at para 74:

> "Even if it cannot be categorised as perverse, this decision is so perplexing on its face that it is of particular importance that the inspector should be seen to have applied the correct test in Green Belt policy terms."

The personal circumstances in question there, one notes, consisted of no more than the gipsy's concern that his two children's education should not be disrupted by a move. Small wonder that the inspector's grant of planning permission was regarded as perplexing to the point of perversity, and the decision letter as leaving real doubt whether the inspector had erred in law. In the present case, by contrast, no rationality challenge was ever advanced and nor was there any basis in the inspector's reasoning for inferring a material misdirection whether of fact, law, policy, or anything else. This inspector was, I may point out, highly experienced and qualified both as a planner and a surveyor.

II - The vires challenge

43. The Court of Appeal found that the inspector had failed to have regard to a material consideration, namely "the unlawfulness of the applicant's occupation . . .in persistent breach of planning control".

44. It is, of course, plain that Mrs Porter's occupation of the site has been unlawful from the outset. What arises for decision under this head of challenge is, first, whether that was a material consideration, and secondly, if so, whether the inspector failed to have regard to it. As already indicated, the judge at first instance thought it material (going to "the weight to be attached to this long period of occupation"), but held that the inspector took account of it. Before your Lordships, however, both the Secretary of State and Mrs Porter question even the materiality of the unlawful occupation of the site. I shall therefore consider this question first.

The materiality of unlawful use

45. Miss Lieven for the Secretary of State points out that section 73A of the 1990 Act, as inserted by section 32 of and Schedule 7 to the Planning and Compensation Act 1991, expressly provides for the grant of retrospective planning permission for development carried out without permission prior to the date of the application. Nothing in the 1990 Act (or the predecessor legislation making like provision) suggests that a retrospective application should be treated any differently from an application for future development. True it is that by section 57 (1) of the 1990 Act "planning permission is required for the carrying out of any development of land". But a breach of planning control is not itself a criminal offence and indeed, although unlawful, cannot be enforced against after (in most cases) four years. Even within the four year period, the Secretary of State's guidance on enforcement (contained in paragraph 6 of PPG 18) provides:

> "In assessing the need for enforcement action, LPAs should bear in mind that it is not an offence to carry out development without first obtaining any planning permission required for it. . . . Accordingly, where the LPA's assessment indicates it is likely that unconditional planning permission would be granted for development which has already taken place, the correct approach is to suggest to the person responsible for the development that he should at once submit a retrospective planning application (together with the appropriate application fee)."

46. The mere fact, therefore, that the development was in breach of planning permission and the application for permission was made retrospectively cannot of itself, submits Miss Lieven, be a material consideration militating against the grant of permission. Rather the question for the LPA (and, on appeal, the Secretary of State) is simply whether the development as carried out is acceptable in planning terms.

47. Miss Lieven's argument goes further. She points to the Court of Appeal's decision in *R v Leominster District Council, Ex p Pothecary* [1998] JPL 335 holding that the fact that a building has already been constructed before planning permission is sought can, in certain circumstances, lawfully be regarded as a consideration *in favour of* a permission which would not otherwise have been granted. Following the building's erection there, the LPA had chosen not to serve an enforcement notice but rather had invited an application for retrospective planning permission. Schiemann LJ, giving the leading judgment, said at p 345:

> "The authority are only empowered by section 172 (1) to issue an enforcement notice if it appears to them that it is expedient to issue the notice, having regard to the provisions of the development plan and to other material considerations. I therefore reject the submission that a planning authority is never entitled to consider the likelihood of enforcement action at the time when the application for retrospective planning permission for a building erected without planning permission is before them. It is not rare that buildings are put up without the appropriate planning permission. Sometimes there is no planning objection at all. Sometimes there is an insuperable objection. There are many situations between the two ends of what is a continuum. There are situations where the authority would not have given permission for the development if asked for permission for precisely that which has been built, but the development is not so objectionable that it is reasonable to require it to be pulled down. To require this would be a disproportionate sanction for the breach of the law concerned. That is why Parliament has imposed the requirement of expediency. What weight the authority gives to the existence of the building is a matter for the authority. There are policy reasons . . . for not giving much weight to the existence of a building put up without the necessary planning permission, but these will not prevail in every case. . . .[T]here can . . . be cases where the authority can say that, while it would not have granted the permission for that precise building there, it is not expedient to require it to be pulled down. Circumstances vary infinitely."

48. Robert Walker LJ, at p 347, agreed with that approach:

> "I agree that the planning authority was not merely entitled, but in practice bound, to take account of the existence of the [building] which had been constructed without planning permission having been granted. It was a relevant fact that had to be taken into account. The weight to be attached to the *fait accompli* was another matter."

49. I too agreed, at p 349:

> "Reluctant though inevitably one is to allow a developer to be advantaged by having broken the law, that advantage must by definition accrue in certain cases - notably whenever the local planning authority do not think it 'expedient' to enforce against a breach of planning control - and yet it will be a rash developer who builds in

> expectation of such benefit: he is at risk of being ordered to pull down his development and thus stands to lose everything."

50. The Court of Appeal's view on this issue appears to have rested principally upon the European Court of Human Rights' judgment in *Chapman*, para 102 of which reads, at p 428:

> "Where a dwelling has been established without the planning permission which is needed under the national law, there is a conflict of interest between the right of the individual under article 8 of the Convention to respect for his or her home and the right of others in the community to environmental protection. When considering whether a requirement that the individual leave his or her home is proportionate to the legitimate aim pursued, it is highly relevant whether or not the home was established unlawfully. If the home was lawfully established, this factor would self-evidently be something which would weigh against the legitimacy of requiring the individual to move. Conversely, if the establishment of a home in a particular place was unlawful, the position of the individual objecting to an order to move is less strong. The court will be slow to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site. For the court to do otherwise would be to encourage illegal action to the detriment of the protection of the environmental rights of other people in the community."

51. But reliance upon that authority, submits Miss Lieven, was inappropriate: *Chapman* was concerned with an article 8 claim to respect for the individual's home and not, as here, with whether the individual has established very special circumstances outweighing the public interest in preserving the Green Belt.

52. In my judgment Miss Lieven's argument goes too far. I do not accept that the unlawfulness of development can never properly militate against the retrospective grant of planning permission (but only, as in *Ex p Pothecary,* in its favour). Rather it seems to me that wherever the occupier seeks to rely upon the very fact of his continuing use of land it must be material to recognise the unlawfulness (if such it was) of that use as a consideration operating to weaken his claim. Take this very case and assume that Mrs Porter had been relying on her long period of residence to assert that her removal from the site now would cause her particular hardship beyond that resulting from removal after a substantially shorter period of occupation; hardship, for example, by breaking a number of local ties and friendships. Such a claim would seem to me to raise issues closely analogous to those arising on an article 8 claim and to require substantially the same approach to the lawfulness or otherwise of the period of occupation as the European Court adopted in *Chapman.*

53. A further point should be made. A development without planning permission is one thing: it is unlawful merely in the sense of being in breach of planning control. Where, however, as here, it has been persisted in for many years despite being enforced against, that is a rather different matter: it is then properly to be characterised as criminal.

54. I would find it impossible to say in such circumstances that the unlawfulness of Mrs Porter's prior occupation of the site was incapable of being of material consideration in the case. Whether in fact it was material, however, would depend on the way her hardship claim was advanced. If she was seeking actually to pray in aid her long period of occupation, then to my mind Judge Rich was clearly right to say that the unlawfulness of that occupation would diminish the weight of the case. As it seems to me, however, that really was not the nature or strength of Mrs Porter's hardship claim. The inspector's only mention of her occupation of the site "for a considerable period of time" appears in para 7 of his decision (see para 15 above) and its consideration there was not as a possible point in Mrs Porter's favour but rather as a possible point against her on the basis that it might have cost her her status as a gipsy (although in the event no such contention was advanced).

55. When the inspector came in para 13 of his decision to summarise the very special circumstances of Mrs Porter's case—her status as a gipsy, the lack of an alternative site in the area, and her chronic ill- health—none of these factors appears to have owed anything to the length of her residence on the site; her case would have been no different even had she occupied the site for an altogether shorter period.

56. Certainly the inspector found her case for a retrospective planning permission strengthened since its last consideration in 1998 by two subsequent changes of circumstance which, obviously, would not have occurred but for the passage of time whilst she remained in unlawful occupation of her mobile home. That is not to say, however, that she was relying on her continuing unlawful occupation in itself as constituting part of her hardship claim.

57. I therefore conclude that the unlawfulness of Mrs Porter's prior occupation of the site was of little if any materiality in the particular circumstances of this case.

Was regard had to this consideration

58. Assuming, however, in the council's favour that the unlawfulness (including, on the facts here, the actual criminality) of Mrs Porter's occupation of the site was a material consideration to which regard was required to be had under section 70 (2) of the 1990 Act —see para 12 above—was the Court of Appeal correct in concluding that it was overlooked?

59. This conclusion too I find unsustainable. The nature and extent of the unlawful use here was never in doubt. Even assuming it was a material consideration it did not give rise to a "main issue in dispute". Clearly, therefore, the inspector had no need to refer to it in terms —see Lord Lloyd's speech in *Bolton* cited at para 34 above. How, then, can it properly be inferred that the inspector overlooked the point for what it was worth? He knew, indeed recorded, that the application was for the "retention" of the mobile home and that "retrospective planning permission is sought". He knew, and indeed summarised, the planning history of the site including Mrs Porter's unsuccessful appeal against the council's enforcement action. That is no basis upon which to infer that the inspector wrongly ignored this consideration. Of course Mrs Porter could gain no credit from her long period of unlawful occupation. But nor was her claim for a retrospective planning permission necessarily to be defeated by it. This element of the case required no detailed discussion in the decision letter. Again, therefore, I conclude that there was no substance in this ground of challenge.

60. It follows from all this that I would allow Mrs Porter's appeal and restore Judge Rich's order dismissing the council's statutory application with costs. The council should also pay Mrs Porter's costs both here and below. There will be no order as to the Secretary of State's costs.

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