

Supporting High Court Cases

to support the case on
absence of alternative sites,
and the burden of proof in relation to that

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Dear Sirs,

Within this document you will find two separate High Court cases in which support our application and our case that there are no alternative sites.

I've attached:

The **Angela Smith case**, which is the formula for determining whether there is an available alternative site, and also

The case of *South Cambridgeshire District Council v SSCLG and Brown* [2009] PTSR 37, [2008] EWCA Civ 1010, where the Court of Appeal at para 20 - 36 sets out that there is no burden upon an appellant to demonstrate that there is no alternative, and no burden to carry out a search.

These cases go to the heart of our case which states there are no alternative sites for those who wish to occupy the site.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

CO.3346/2006

Royal Courts of Justice
Strand
London WC2

Monday, 19 February 2007

B E F O R E:

MR GEORGE BARTLETT QC
(Sitting as a Deputy High Court Judge)

THE QUEEN ON THE APPLICATION OF DONCASTER METROPOLITAN
BOROUGH COUNCIL

(CLAIMANT)

-v-

(1) THE FIRST SECRETARY OF STATE
(2) ANGELA SMITH

(DEFENDANTS)

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(Official Shorthand Writers to the Court)

MR CHRISTOPHER YOUNG (instructed by Doncaster MBC) appeared on behalf of the
CLAIMANT

MR RUPERT WARREN (instructed by Treasury Solicitors) appeared on behalf of
DEFENDANT (1)

MR ALAN MASTERS (instructed by Community Law Partnership) appeared on behalf of
DEFENDANT (2)

J U D G M E N T
(Draft for approval)

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- 1 THE DEPUTY JUDGE: This is an application under section 288 of the Town and Country Planning Act 1990 by the local planning authority to quash the appeal decision of an inspector granting planning permission for the use of land at OS Field 5566, Hall Villa Lane, Toll Bar, Doncaster, as a private gypsy caravan site for ten plots.
- 2 The appeal site is situated in the Green Belt about 300 metres north-west of the village of Toll Bar, which itself lies just to the north of Doncaster. It is an irregularly-shaped plot of about 1.3 hectares, separated from surrounding fields by former sewage treatment works to the west, an access track to the south, a disused railway line to the north, and Hall Villa Lane to the east.
- 3 In her decision, the inspector, Lucy Drake BSc MSc MRTPI, said that until about five years earlier, the land had been in agricultural use. The previous owner had stationed two caravans and a shed on it, and had laid a hardcore access. Enforcement action had been taken against this use and there was an unsuccessful appeal. In the summer of 2004, land was sold to a group of ten gypsy families. They included the appellant in the appeal (the second defendant in these proceedings). They cleared the site of fly-tipped materials, laid down hardcore, divided the greater part of the land into ten plots separated by fencing and gates, erected a number of utility blocks and a stable, and over the following few months brought caravans onto the site and took up residence.
4. The gypsies' application for permission to use the land as a private gypsy caravan site was refused by the Council in January 2005, and the inspector held an inquiry over two days in January 2006. In her decision, she identified the main issues in the case as:
 - "(a) The impact of the development on the character of the area, the openness of the Green Belt and the purposes of including land in it.
 - (b) The consequences of allowing the appeal for the Council's approach to residential development on Greenfield sites.
 - (c) The provision of and need for gypsy sites within the District.
 - (d) The accommodation needs and personal circumstances of the site occupants.
 - (e) Their alternative accommodation options were the appeal to be dismissed.
 - (f) whether the harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."
- 5 The inspector identified the relevant planning policies, which included UDP Policy ENV3 (Development in the Green Belt). She said that the development would be contrary to that policy unless very special circumstances could be shown to exist. She noted that paragraph 3.2 of PPG2: Green Belts provided that very special circumstances

to justify inappropriate development would not exist unless the harm was clearly outweighed by other considerations.

- 6 The inspector referred to a new Circular, Circular 01/2006: Planning for Gypsy and Traveller Sites, which had replaced Circular 1/94 just after the close of the inquiry. At paragraph 14, she said this about it:

'Circular 01/2006 recognises that the advice set out in 1/94 has failed to deliver adequate sites for gypsies and travellers in many parts of England over the last ten years. The most significant change in Government policy relates to the requirement of all local planning authorities to undertake a Gypsy & Traveller Accommodation Assessment and provide additional sites through the development plan process to meet assessed needs as determined in collaboration with Regional Planning Boards (RPBs). Development Plan Documents (DPDs) will be expected to identify specific sites to provide for identified needs on the basis of criteria set out in the Core Strategy and following community involvement. DPDs will additionally be expected to include criteria-based policies to meet unexpected demand.'

- 7 The inspector then went on to deal with the six main issues that she had earlier identified. She concluded that the visual impact of the development could be mitigated by additional planting, but that even with this, the development would have a locally harmful effect upon the essentially rural character and appearance of the area and the openness of the Green Belt. It would not, however, conflict with the other purposes of including land in Green Belts.
- 8 The inspector said that allowing the appeal would have no material consequences for the Council's approach to residential development on greenfield sites. She went on to consider the evidence on the provision of, and need for, gypsy sites within the district. She referred to the Council's recent Draft Gypsy and Traveller Action Plan and the approach set out.
- 9 She went on at paragraph 24:

'Regrettably this commendable approach has not yet involved a quantitative analysis of gypsy and traveller accommodation needs, either in terms of whether existing 'provision' meets existing needs, or whether and to what extent it is capable of meeting future needs. A needs assessment for both short and long-stay sites is included as item 4.4 of the Draft Action Plan, but the expected timescale is described as "Long" (on the spectrum of Immediate, Short and Long).'

- 10 In paragraphs 26 and 27 she said:

'26. The picture built up from these various elements is of a limited availability of permanent residential pitches for gypsies on Council-owned sites with the total number of permanent pitches reduced

following the change of Gibbons Lane to a transit site and a substantial demand for any vacancies. There is a mixed picture with regard to private sites, with some of the larger ones no longer accepting gypsies and other family sites full to capacity. 'Doubling up' of caravans on pitches on authorised sites and a steady increase in the number of caravans on unauthorised sites, with no additional authorised permanent gypsies sites provided in at least the last five years, or planned.

27. The Council's Gypsy Liaison Officer and his colleagues recently estimated an immediate need for between 25 and 50 additional pitches. This figure is based on their personal knowledge of need by individual families but excludes those on unauthorised sites, those doubled up on authorised sites and those travelling away from Doncaster. Setting aside any need arising from gypsies living in houses who would wish to live on a caravan site if one were available, I consider it likely that the number of authorised pitches required is considerably in excess of this estimate and that there is a substantial and growing mismatch between the provision of and need for gypsy sites within the borough. This factor weighs in favour of the development."

- 11 The inspector then considered the accommodation and personal circumstances of the site occupants; including their ties with the area, the fact that most of the children of primary school age had secure school places (none having previously had more than a very small amount of schooling), and that, since moving onto the site, the families had been able to register with GPs and dentists, often for the first time in their lives.

- 12 She said at paragraph 32:

"The site occupants' need for a suitable site on which to live and from which they can have a normal family life with access to education and health care and the ability to integrate into the local community is an important consideration which has to be given considerable weight."

- 13 On the alternative accommodation options, the inspector said at paragraph 34 that the Council appeared to be a long way off commencing gypsy accommodation needs assessment and identifying alternative additional sites. She noted at paragraph 38 that Doncaster's Gypsy Liaison Officer was unaware of any suitable alternative site within the Borough or in other parts of Yorkshire and Humberside to accept any or all of the residents, and that he accepted that the only alternatives to the residents staying on the site would be "a return to the roadside".

- 14 The inspector concluded at paragraph 40:

"The absence of any alternative, available, affordable, acceptable, and suitable land to which the site occupants could move has to be afforded considerable weight in favour of the development."

- 15 The inspector then went on to consider whether the harm to the Green Belt by reason of inappropriateness and any other harm was clearly outweighed by other considerations. Having referred to the harmful effect on the rural character of the locality and the openness of the Green Belt, she said at paragraph 43:

"On the other side of the balance is the unquantified, but on the basis of the limited information substantial and growing, mismatch between the provision of and need for additional gypsy sites within the Borough; the site occupants' need for a suitable site on which to live and from which they can have a normal family life with access to education and health care and the ability to integrate into the local community; the absence of any alternative, available, affordable, acceptable and suitable land to which they could move; and the limited progress made by the Council in undertaking their responsibilities with regard to the assessment of the accommodation needs of gypsies and travellers and the identification of suitable sites."

- 16 The inspector went on to say that the disproportionate consequences for the families concerned that would arise from a dismissal of the appeal was a substantial factor weighing in favour of the development. She considered and rejected the option of a temporary permission -- a matter which is raised in the grounds of challenge and to which I shall return. Her conclusion was that the harm was clearly outweighed by the totality of the other considerations, and that very special circumstances existed that justified the development. She granted planning permission subject to conditions.
- 17 The first ground of challenge advanced by Mr Christopher Young, for the claimant, is a surprising one. It relates to the publication of the new Circular 01/2006. This was known to be imminent at the time of the inquiry, and following its publication a week after the inquiry, letters were written both to the appellant and the Council, inviting them, if they wished, to comment on any relevant matters arising from it. The inspector recorded that the decision was delayed to enable this to be done and that neither of the parties chose to make any further comments.
- 18 Mr Young's submission is that, despite the fact that neither of the parties wished to comment on the new Circular, the inquiry should have been reopened in order that they might do so. He says that the failure to re-open the inquiry meant that the procedure adopted for the decision was, as he puts it, "Woefully inadequate, procedurally unfair and Wednesbury unreasonable". Specifically, Mr Young says that the new Circular was radically different from the one that it replaced. What the Inspectorate should have done, he says, was either to re-open the inquiry or write to the parties, indicating that the inspector would be making a decision on the basis of the new Circular, and raising questions for the parties to address in respect of her proposed approach.
- 19 The complaint, however it is expressed, is of procedural unfairness, and I cannot begin to see how the Council could complain of unfairness. They were given the opportunity to make representations on the Circular and they chose not to do so. They had the opportunity to request the re-opening of the inquiry, and they did not do so. It cannot

possibly be said in these circumstances that they have been unfairly treated. The contention is palpably hopeless and should never have been advanced.

20. The second ground of challenge relates to the inspector's rejection of the option of a temporary permission. The application grounds asserted that the inspector's consideration of a possible temporary permission was wholly inadequate, perverse, Wednesbury unreasonable and/or procedurally unfair in that she failed to relate it to the guidance in the new Circular.

21. Mr Young says that the challenge is on the grounds of perversity, and he recognises that a challenge on this ground faces a high threshold and is only very seldom accepted by the courts. He does not suggest that the inspector left out of account any relevant consideration. His argument is that the harm which the inspector identified to the rural character of the area and the openness of the Green Belt could have been avoided by the grant of a temporary permission, because at the end of the permitted period, an alternative site outside the Green Belt would have been identified in development plan documents (or DPDs). Not to impose a time limit was, therefore, he says, perverse.

22. The new Circular says this about temporary permissions at paragraphs 45 and 46:

"45. Advice on the use of temporary permissions is contained in paragraphs 108 - 113 of Circular 11/95, *The Use of Conditions in Planning Permission*. Paragraph 110 advises that a temporary permission may be justified where it is expected that the planning circumstances will change in a particular way at the end of the period of the temporary permission. Where there is unmet need but no available alternative gypsy and traveller site provision in an area but there is a reasonable expectation that new sites are likely to become available at the end of that period in the area which will meet that need local planning authorities should give consideration to granting a temporary permission.

46. Such circumstances may arise, for example, in a case where a local planning authority is preparing its site allocations DPD. In such circumstances, local planning authorities are expected to give substantial weight to the unmet need in considering whether a temporary planning permission is justified."

23. The inspector dealt with the question of a possible temporary permission at paragraph 45 of her decision. She said:

"45. The option of a temporary permission, perhaps for a period of three years was raised. This would lessen the longer term harm to the Green Belt and the character and appearance of the area, but is only justifiable where there is likely to be a material change in circumstances, in particular a realistic likelihood that suitable, affordable and acceptable alternative accommodation will become available before the end of that time. The longer the occupants remain on the site, the greater their ties to the local area, and the more children will be enrolled at local schools ... I

do not consider a temporary planning permission to be an appropriate response in this case."

- 24 Mr Young submits that the inspector's reference in that paragraph to a realistic likelihood that suitable, affordable and acceptable alternative accommodation becoming available imposed a much higher threshold than the policy in which paragraph 45 referred to a reasonable expectation that new sites will become available, and made no reference to suitability, affordability or acceptability. This criticism is groundless, in my view.
- 25 Mr Alan Masters, for the second defendant, points out that there are references to what is suitable or acceptable elsewhere in the Circular. For instance in paragraphs 33 and 54, and paragraph 57, dealing with the relocation of gypsy sites due to major development projects refers to regard being had to the gypsies' social, economic and environmental needs. The ECHR case of Chapman v United Kingdom 2738/95, Mr Masters points out, in dealing at paragraph 104 with the evaluation of suitable alternative accommodation for gypsies says that this would involve a consideration of the particular needs of the person concerned, his or her family requirements and financial resources. It is, in my judgment, clear in the light of this that the inspector did not misrepresent the policy in what she said in paragraph 45. On the contrary, what she said appears to be entirely in accord with the policy as a whole and with Chapman. Nor do I think the inspector reached a conclusion on the option of a temporary permission that she was not entitled to reach. The new Circular enjoined her to give consideration to granting a temporary permission where there was a reasonable expectation that new sites were likely to become available at the end of the period. It did not require that there should be a time-limited permission if there was such a reasonable expectation. That would be a matter for the judgment of the decision-maker in the light of all the circumstances.
- 26 Mr Rupert Warren, for the Secretary of State, relies on the fact that the inspector had earlier addressed the timescale of identifying alternative sites in paragraphs 34 and 35. She said:

"34. The Council appears to be a long way off commencing a gypsy accommodation needs assessment and identifying alternative additional sites. The Planning Officer's expectation that sites would be identified as part of the Housing Policy Preferred Options paper this summer, to be incorporated in the LDF by 2007, seems to me to be unrealistic, both in the approach and timescale, given the requirement to undertake a separate needs assessment in both PPG3, s225 of the 2004 Housing Act and the new Circular.

35. About half of the Borough lies outside the Green Belt, so it may well be possible to find suitable sites elsewhere to meet identified [needs]. But as the search process has not yet started, and there is no certainty of a suitable, available, affordable and acceptable site (or sites) being found outside the Green Belt to meet the needs of the site occupants within any firm timescale, this cannot be relied upon to meet their short or even

medium term needs."

27 I accept Mr Warren's submission that it is appropriate, since a decision must be read as a whole, to read paragraph 45 of the decision in the light of paragraphs 34 and 35, and indeed the earlier paragraphs that I have already quoted, and that it is clear from this that the inspector found on the facts that, in the terms of the Circular, there was no reasonable expectation of new sites becoming available within the period being considered. It is, I think, implicit in what the inspector said in paragraph 45 in relation to the ties that would be built up and the enrolment of children at local schools, that she considered that the longer the occupants remained on the site, the less suitable and acceptable any alternative would become. That was a view that was, in my judgment, reasonably open to her. I do not think that she misunderstood or misapplied the guidance in the Circular, or that her consideration of the option of a temporary permission is remotely open to the epithets that Mr Young attaches to it.

28 The third and fourth grounds of challenge related to two of the conditions in the planning permission. Condition 1 provided:

"The occupation of the site hereby permitted shall be carried on only by the following and their resident dependants: Sandra Swales; Peter and/or Marina Wilson [and further listed individuals]."

29 Condition 2 was in these terms:

"When the land ceases to be occupied by those named in condition 1 above, the use hereby permitted shall cease and all caravans, structures, materials and equipment brought on to the land in connection with the use shall be removed. Within three months of that time, the land shall be restored to its condition before the use commenced."

30 Mr Young originally submitted that each of these conditions was imprecise and unenforceable, even though each of them is one of the model conditions set out in the Planning Inspectorate's Guidance, Suggested Conditions in Gypsy Permissions. The challenge to condition 1 was in relation to the use of the term "resident dependant", which appears not only in the Gypsy Suggested Conditions, but also in Circular 11/95, in which both the agricultural workers condition (No 45) and the staff accommodation condition (No 46) include any residence dependants among those to whom occupation is restricted. Such words have been employed in countless permissions over many years. In the event, Mr Young withdrew this ground of challenge when it was pointed out that, in Fawcett Properties Limited v Buckinghamshire County Council [1961] AC 636, the reference in an agricultural condition to dependants had been held by the House of Lords to be valid.

31 I have to say that I do not understand the basis of Mr Young's contention that condition 2, the site restoration condition, is invalid. Circular 11/95, dealing at paragraph 115 with the restoration of sites, says:

"Where the permission is for temporary use of land as a caravan site,

conditions may include a requirement to remove at the expiry of the permission any buildings or structures, such as toilet blocks, erected under Part 5 of the General Permitted Development Order "

- 32 If, as the Council would prefer, a temporary permission only were to be granted, they would presumably wish to have a site restoration condition attached. Why such a condition should be become invalid if attached to a permanent permission is unexplained. Mr Young said that it would be unenforceable because by the time it came to be applied, all the occupants would have left the site. The same would however go for many discontinued uses, as well as a terminated temporary use. But an enforcement notice would fall to be served on the owner of the land and any successor occupier that there might be, and the Council itself would have power, if the notice was not complied with, to carry out the necessary works and to make a charge on the land. The condition would not be unenforceable.
33. This ground, like the others, fails and the application is refused.
- 34 MR WARREN: My Lord, in those circumstances, I make an application for an order in those terms and for an order that the claimant pays the costs of the first defendant. There has been a schedule served. I do not know, my Lord, whether you have a copy of that.
35. THE DEPUTY JUDGE: Yes, I do have that.
36. MR WARREN: In terms of the figures themselves, I do not think there is a dispute.
- 37 MR YOUNG: I do not resist the principle or the figures.
38. THE DEPUTY JUDGE: Yes.
- 39 MR MASTERS: My Lord, I simply make an application for the second defendant's costs. my Lord, I do so for two reasons: firstly, I say that the contribution made by the second defendant in this appeal has been of assistance to the court, and it is important -- and in this case I think it has shown it to be -- that counsel who represented the second defendant at the original planning inquiry was here to add assistance to those matters. My Lord, there is a substantial great difference between the way that the case should be approached in terms of the first and second defendant's costs. The first and second defendant will have an entirely separate agenda. I point out that, in the case of the second defendant and the other claimants, of course there was a very real danger of their Article 8 rights being affected by any decision that was being made. Protecting those rights is very different from protecting a decision of the inspector appointed by the Secretary of State. My Lord, costs should follow the event, particularly having in mind passages in the White Book that say that -- reference in particular to part 48.12.5.
- 40 My Lord, the second point we make is that my instructing solicitors and I wrote to the Treasury Solicitors as long ago as 15 June 2005 to ascertain what the position of the Secretary of State was going to be in defence of this matter. The letter confirmed that they were seeking counsel's advice shortly and would respond substantially once this was to hand. My Lord, a further letter on 18 January 2007 says:

"We note ... the last correspondence between ourselves was dated 15 June. In that letter you stated you received counsel's advice shortly ... you will respond to us substantially once counsel ... we would be grateful if you could confirm as to whether or not you will be defending these proceedings ... if you could provide us with details of counsel instructed ... "

41. No response to either of those letters was received by the Treasury counsel. In fact, my instructing solicitor had taken the view that until the skeleton was upon us, we were not in a position to know whether the action would be defended and the basis upon which certain action would be defended. For all those reasons, it is entirely appropriate to say that the costs should follow the event and that our costs involved in this should be paid for by the Council.
42. THE DEPUTY JUDGE: Mr Masters, I am grateful for your contribution, but the circumstances in which it is appropriate for two sets of costs to be awarded in these proceedings are, as you know, very restricted, and whilst I hear what you have to say, I do not take the view that this is one of the cases in which a second set of costs should be ordered.
43. MR YOUNG: My Lord, if I cannot persuade you further, I cannot. I am grateful.
44. THE DEPUTY JUDGE: Very well. The application is refused and the claimant will pay the first defendant's costs in the sum of £6,254.

A

Court of Appeal

**South Cambridgeshire District Council v Secretary of State
for Communities and Local Government**

[2008] EWCA Civ 1010

B

2008 June 26;
Sept 5

Sir Mark Potter P, Scott Baker LJ, Sir Robin Auld

C

Planning — Development — Local authority's development plan — Gipsies and travellers — Gipsy applicants with disabled daughter proposing development on rural land in conflict with development plan — Inspector granting conditional personal planning permission — Whether "material considerations" justifying departure from development plan — Whether burden of proof on applicants to show no alternative site available — Planning and Compulsory Purchase Act 2004 (c 5), s 38

D

The gipsy applicants sought to remain on an open fenland site to enable their severely disabled third child to obtain the ongoing medical care and schooling that she needed, and they applied for planning permission for certain structures on the site. A planning inspector allowed their appeal against the council's failure to determine the planning application and granted them conditional planning permission, concluding that while the relevant development was not in accordance with the development plan and would cause harm to the character and appearance of the area, the harm was outweighed by other material considerations including the family's exceptional circumstances, the needs of their disabled daughter, and the absence of evidence that a suitable and affordable alternative site would become available to the family in the foreseeable future. The council applied to the High Court to quash the inspector's decision. The judge dismissed the application holding, inter alia, that section 38(6) of the Planning and Compulsory Purchase Act 2004¹ required the inspector to determine whether material considerations existed which outweighed the provisions of the development plan and the harm which would be caused if the proposed development was allowed to proceed, and that there was no requirement in planning policy or case law for an applicant for planning permission to prove that no other sites were available or that particular needs could not be met from any other site.

E

On appeal by the council—

F

Held, dismissing the appeal, that the position was governed by section 38(6) of the Planning and Compulsory Purchase Act 2004 so that the development plan was determinative unless material considerations indicated otherwise; that it was a matter of judgment for the planning authority, or in this case the inspector, to decide what those material considerations were and, having done so, to give each of them such weight as was considered appropriate with no burden of proof on any party concerning availability of alternative sites; and that this was an exceptional case where the personal family circumstances justified departure from the development plan (post, paras 36, 37, 42, 43, 44, 45).

G

Rhodes v Minister of Housing and Local Government [1963] 1 WLR 208, *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1986) 53 P & CR 293 and *McCarthy v Secretary of State for Communities and Local Government* [2006] EWHC 3287 (Admin) considered.

H

Decision of Keith J [2007] EWHC 2117 (Admin); [2008] JPL 519 affirmed.

¹ Planning and Compulsory Purchase Act 2004, s 38(6): see post, para 11.

The following cases are referred to in the judgment of Scott Baker LJ:

Bolton Metropolitan Borough Council v Secretary of State for the Environment [1995] JPL 1043; 94 LGR 387; 71 P & CR 309, HL(E)

Clarke Homes Ltd v Secretary of State for the Environment (1993) 66 P & CR 263, CA

McCarthy v Secretary of State for Communities and Local Government [2006] EWHC 3287 (Admin)

North Wiltshire District Council v Secretary of State for the Environment [1992] JPL 955; [1992] 3 PLR 113; 65 P & CR 137, CA

R v Derbyshire County Council, Ex p Woods [1998] Env LR 277; [1997] JPL 958, CA

Rhodes v Minister of Housing and Local Government [1963] 1 WLR 208; [1963] 1 All ER 300; 61 LGR 194

Secretary of State for the Environment v Edwards [1994] 1 PLR 62; 69 P & CR 607, CA

Seddon Properties Ltd v Secretary of State for the Environment [1978] JPL 835; 42 P & CR 26

Simmons v First Secretary of State [2005] EWCA Civ 1295; [2006] JPL 575, CA

South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953; [2004] 4 All ER 775, HL(E)

South Somerset District Council v Secretary of State for the Environment [1993] 1 PLR 80; 66 P & CR 83, CA

Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636; 93 LGR 403, HL(E)

Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1986) 53 P & CR 293; [1986] JPL 834

The following additional cases were cited in argument:

Chapman v United Kingdom (2001) 33 EHRR 399

Pye (JA) (Oxford) Estates Ltd v Secretary of State for the Environment [1982] JPL 575

The following additional cases, although not cited, were referred to in the skeleton arguments:

Clarke v Secretary of State for Transport, Local Government and the Regions [2002] EWCA Civ 819; [2002] JPL 1365, CA

Codona v Mid-Bedfordshire District Council [2004] EWCA Civ 925; [2005] HLR 1; [2005] LGR 241, CA

Edinburgh Council (City of) v Secretary of State for Scotland [1997] 1 WLR 1447; [1998] 1 All ER 174, HL(Sc)

R v Lincolnshire County Council, Ex p Atkinson [1997] JPL 658; Admin LR 529, DC

R (Jones) v North Warwickshire Borough Council [2001] EWCA Civ 315; [2001] PLR 59, CA

Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153; [1991] 2 All ER 10; 89 LGR 809, HL(E)

APPEAL from Keith J

By a claim form dated 23 May 2006 South Cambridgeshire District Council ("the council"), applied under section 288 of the Town and Country Planning Act 1990 to quash the decision of the planning inspector, Ms Lucy Drake, contained in a letter dated 12 April 2006, whereby she allowed an appeal under section 78 of the 1990 Act by the applicants, Mr and Mrs Brown, and granted them personal permission for residential

- A use including the siting of caravans, utility block and a mobile chalet/medical unit for a disabled person on condition that all structures and equipment were to be removed when they ceased to occupy the land. The grounds of application were: (1) that the inspector's approach to the evidence was flawed; (2) that there was no evidence to found the conclusion that there were no alternative sites; and (3) that the inspector erred in placing the onus of demonstrating the availability of an alternative site upon the council, rather than on the applicants, and in so doing ran counter to the Secretary of State's established approach. On 18 September 2007 Keith J dismissed the council's application challenging the validity of the inspector's decision.

- C By a notice of appeal dated 8 October 2007 the council appealed, with permission granted by Hallett LJ on 4 February 2008, on the single issue of whether there was a requirement in planning policy or case law for an applicant to prove that no other sites were available or that particular needs could not be met from another site.

The facts are stated in the judgment of Scott Baker LJ.

- D *Robert McCracken QC* and *Saira Kabir Sheikh* (instructed by *Sharpe Pritchard*) for the council.

James Strachan (instructed by *Treasury Solicitor*) for the Secretary of State.

Marc Willers (instructed by *Community Law Partnership, Birmingham*) for the applicants.

The court took time for consideration.

- E 5 September 2008. The following judgments were handed down.

SCOTT BAKER LJ

- F 1 This is an appeal by South Cambridgeshire District Council ("the council") against the decision of Keith J on 18 September 2007 when he dismissed the council's application under section 288 of the Town and Country Planning Act 1990: see [2008] JPL 519.

- G 2 By that application the council had sought to challenge the decision of an inspector, Lucy Drake BSc, MSc, MRTPI, given in a decision letter dated 12 April 2006. She had allowed an appeal under section 78 of the 1990 Act by Mr and Mrs Brown, who are the second and third respondents to the present appeal. The first respondent is the Secretary of State for Communities and Local Government. The inspector granted the Browns personal permission for "Residential use—the siting of caravans, utility block and mobile chalet/medical unit for a disabled person" on land at The Arches, Schole Road, Willingham, Cambridgeshire ("the appeal site").

Background

- H 3 The Browns are gipsies. They come from gipsy families in the local area to the appeal site. They previously led a travelling lifestyle but this was curtailed by the birth of their third child, a daughter, Kelly Marie at Hinchinbrook Hospital, Huntingdon in 1996.

4 She was born with an acute and life threatening condition. It is called microcephaly with severe global developmental delay. She was expected to

live for no more than a few weeks, but she is now 11 and has managed to survive with the support of regular medical assistance and special care. This continues to be required both on an ongoing and emergency basis. She cannot walk unaided and has a wheelchair. All intimate and personal care has to be undertaken by a responsible adult.

5 Since her birth the Browns have sought to remain on sites in the local area to enable Kelly to obtain the ongoing medical care and attention that she needs and to attend a nearby special school.

6 The inspector concluded that while the development proposed was not in accordance with the development plan and would cause harm to the character and appearance of the local area, that harm was outweighed by other material considerations, most particularly the exceptional circumstances of the Brown family and the needs of their disabled daughter. She therefore granted conditional personal planning permission. Those conditions are important and in particular, for present purposes, conditions 1 and 2 which are:

“1. The occupation of the site hereby permitted shall be carried on only by Archie and/or Julie Brown and their resident dependants.

“2. When the land ceases to be occupied by those named in condition 1 the use hereby permitted will cease and all caravans, structures, materials and equipment brought onto the land in connection with the use including the utility block hereby approved shall be removed. Within three months of that time the land shall be restored to its condition before the use commenced.”

7 Keith J rejected the council's various grounds of challenge to the validity of the inspector's decision. He subsequently refused permission to appeal to this court and permission to appeal was again refused on paper by Pill LJ. However, at an oral hearing before Hallett LJ on 4 February 2008 she granted permission “with a very considerable degree of hesitation and on one ground only”. That ground is whether Keith J was correct in stating, as he did in his judgment at para 34, reciting para 74 of the inspector's determination, that,

“In seeking to determine the availability of alternative sites for residential gipsy use, there is no requirement in planning policy or case law for an applicant to prove that no other sites are available or that particular needs could not be met from another site.”

The subject matter of this appeal is therefore a very narrow point.

Legislative background

8 Section 57 of the Town and Country Planning Act 1990 provides the general requirement that, subject to certain exceptions, planning permission is necessary to carry out any development of land. Development means the carrying out of certain operations or the making of any material change in the use of the buildings or the land: see section 55.

9 A person may apply to a local planning authority for planning permission: see section 62. Where such an application is made a local planning authority may grant it unconditionally or subject to such conditions as it thinks fit, or it may refuse permission: see section 70(1).

A 10 Section 70(2) provides that in dealing with an application for planning permission the authority should have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations.

11 Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides:

B “(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.”

C 12 Section 78 of the Town and Country Planning Act 1990 provides that a person may appeal to the Secretary of State against a local planning authority’s failure to determine an application for planning permission within the prescribed time period. Section 79(1) provides:

D “On an appeal under section 78 the Secretary of State may—(a) allow or dismiss the appeal, or (b) reverse or vary any part of the decision of the local planning authority (whether the appeal relates to that part of it or not), and may deal with the application as if it had been made to him in the first instance.”

13 The development plan in the present case comprised: (i) the Cambridgeshire and Peterborough Structure Plan 2003, and (ii) the South Cambridgeshire Local Plan adopted in 2004.

14 Section 288 of the 1990 Act provides:

E “(1) If any person—(a) is aggrieved by an order to which this section applies and wishes to question the validity of that order on the grounds—(i) that the order is not within the powers of this Act, or (ii) that any of the relevant requirements have not been complied with in relation to that order . . . he may make an application to the High Court under this section.”

F The remainder of the section is not relevant for present purposes.

15 It is necessary to make the following general observations about section 288. (1) A decision may only be challenged on ordinary administrative law grounds: *Seddon Properties Ltd v Secretary of State for the Environment* (1978) 42 P & CR 26. (2) Interpretation of policy is the matter for the decision-maker. Where the interpretation is one that the policy is reasonably capable of bearing there is no basis for intervention by the court: *R v Derbyshire County Council, Ex p Woods* [1997] JPL 958. (3) The weight to be attached to material considerations and matters of planning judgment are within the exclusive jurisdiction of the decision-maker: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759. (4) A decision letter must be read in good faith, and references to policies must be taken in the context of the general thrust of the reasoning. (5) The adequacy of the reasons is to be assessed by reference to whether the decision in question leaves room for general doubt as to what the decision-maker has decided and why: *South Somerset District Council v Secretary of State for the Environment* [1993] 1 PLR 80 and *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263. (5) There is

no obligation on the decision-maker to refer to every material consideration, only the main issues in dispute: *Bolton Metropolitan Borough Council v Secretary of State for the Environment* [1995] JPL 1043. (6) Reasons can be briefly stated, the degree of particularity depending on the nature of the issues falling for decision. The reasoning must not give rise to substantial doubt as to whether there was error of law, but such an inference will not readily be drawn: *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953.

The decision letter

16 The inspector set out her findings and the reasons for them in a very full and careful decision letter. It is perfectly clear from that letter that the case turned on exceptional circumstances.

17 She began by setting out the background to the appeal, identifying the nature of the appeal site and the Brown family's occupation and circumstances. Importantly, she referred to a previous appeal decision dismissing an appeal against an enforcement notice by the council, reciting key conclusions of the previous inspector. She acknowledged that that recent decision was an important material consideration in the appeal before her.

18 She then summarised the relevant planning policy before distilling what she saw as the four main issues. These were:

“(1) Whether, and the extent to which, the development complied with the criteria within Local Plan Policy HG23. (2) The provision of and need for additional gipsy sites in the district. (3) The personal circumstances of the Brown family. (4) The accommodation needs and alternative accommodation options for the Brown family.”

It has never been challenged that these were the main issues before her.

19 The inspector then set out the reasons for her decision addressing each of the four main issues in turn. She began with the issue of compliance with Local Plan Policy HG23 and concluded that while the proposal satisfied seven out of the nine criteria it failed to accord with two. These were whether the site would, either on its own or cumulatively, have a significant adverse effect on the rural character and appearance or the amenities of the surrounding area, and whether the site could satisfactorily be assimilated into its surroundings by existing or proposed landscaping. Accordingly she found that the development conflicted with the policy as a whole. She also found corresponding conflict with the terms of Structure Plan Policy 7/4 and Local Plan Policy EN1 (at least in the short to medium term) in respect of the impact of the development upon the character and appearance of the area. She correctly directed herself that it was therefore necessary to consider whether there were other material considerations that outweighed the provisions of the development plan and the harm that would be caused to the character and appearance of the area.

20 The inspector next set out her reasoning for concluding that there was a substantial need for additional gipsy sites in the district. She said, at para 52:

“There is limited, and over-subscribed, capacity on the local authority owned sites and recent grants of planning permission for additional

- A sites, especially at Chesterton Fen Road, have only partially eased the situation there. The council accept (para 6.19 of Mr Koch's proof) that other parts of the allocation may not come forward in the near future. While this situation does not justify, on its own, the grant of planning permission for gipsy use on land which fails to meet the requirements of [Local Plan Policy HG23], the clear evidence of currently unmet need at
- B a local level and the recent quantitative estimates of demand at local and sub-regional levels with limited immediate availability of suitable land it is a material consideration in assessing such proposals, and in particular the realistic alternative accommodation options for the individuals involved [sic]."

I should add that it is accepted that the provision for gipsies in the South Cambridgeshire District Council area is better than in many others.

- C 21 At para 50 the inspector considered newly issued government guidance in para 33 of Office of Deputy Prime Minister ("ODPM") Circular 01/06: Planning for Gipsy and Traveller Caravan Sites, 2 February 2006, and the requirement not just to identify gipsy sites for development plan documents, but the need for local planning authorities to demonstrate that they were suitable and that there was a realistic likelihood that such sites
- D would be made available for that purpose, how much land would be made available and the time scales for such provision. In the following paragraph she noted that the council was still facing significant problems in dealing with the demand, despite its best endeavours and that there were disappointingly few grants of planning permission pursuant to Local Plan Policy HG23.

- E 22 The inspector dealt with the third issue namely the personal circumstances of the Brown family, at paras 53–65. She said, at para 59:

- "I have no reason to doubt the genuine nature of Mr Brown's statement that during 2004 he made extensive inquiries locally in and around Cambridge, Huntingdon and Ely for another site but all his inquiries came to nothing, there being no official or legal sites available to them; nor Mrs Brown's comment that finding alternative land to move to
- F was the constant topic of conversation amongst the indigenous gipsies on Smithy Fen from around 2002. My own experiences of gipsy inquiries in East Cambridgeshire (May 2004) and Huntingdonshire (January 2006) would support the position that in East Cambridgeshire all three local council-owned gipsy sites were full and that vacancies rarely arose and that the only public site in Huntingdonshire, at St Neots, had been full for many years."
- G

- 23 She recorded that Mrs Brown had asked Mr Duncan, who regularly undertook the gipsy count for South Cambridgeshire, was well known to them and had been aware that they were looking for an alternative site for some time. She asked him for help and advice but he had not been able to assist her. As far as she was concerned the council was aware of her predicament but was unable to help. Mr Koch's
- H evidence was that, had the family contacted the planning department, officers would have explained the substance of the council's policies but not directed them to any particular site. The inspector reached this conclusion, at para 65:

“In my view the personal circumstances of the Brown family are exceptional, even amongst the gipsy community, because of the intolerable situation they found themselves in at Smithy Fen and the acute needs and strains on the family arising from Kelly Marie’s difficulties. Not surprisingly these factors and the outstanding dedication of Mrs Brown to her family’s needs and the uncertainty arising from their current and possibly future situation, has taken its toll on Mrs Brown who is taking medication for stress-related matters. The personal circumstances of the family must be given considerable weight as a material consideration in this case.”

24 The inspector then turned to the fourth issue namely the accommodation needs and alternative accommodation options for the Brown family. She accepted that the local historic ties and complex network of support for Kelly Marie made a strong case for the appropriate site to be in the triangle formed by Huntingdon, Cambridge and Ely. She dealt with specific site size requirements for two caravans due to Kelly Marie’s needs. She found a lack of availability of any suitable council-run sites to meet the family’s needs. She also noted that affordability was a key consideration for the Brown family. She then dealt with the issue of other private sites. Whilst accepting that there might be other pieces of land in the relevant area that would meet all the criteria in Local Plan Policy HG23 she found that, to be realistic, they needed to be available, affordable and suitable for the Brown family; and that Mr Brown (who had been looking from 2002–2004) had been unable to find such a site. She concluded that Chesterton Fen Road did not currently have any sites to meet the Browns’ needs. She summarised the position, at para 74:

“In seeking to determine the availability of alternative sites for residential gipsy use, there is no requirement in planning policy, or case law, for an applicant to prove that no other sites are available or that particular needs could not be met from another site. Indeed such a level of proof would be practically impossible. *Simmons v First Secretary of State* [2006] JPL 575, relied upon by the council, establishes no such requirement, even in the Green Belt. The lack of evidence of a search and the clear availability of alternative sites in more suitable locations elsewhere, can undoubtedly weigh against the applicant where there are policy or other objections to a proposed development. Equally, evidence of a search by an applicant over a reasonable area for a reasonable length of time and the absence of any obvious alternatives weigh in favour of him. But there is no absolute requirement for an applicant to prove he has explored and exhausted all possible alternative options before planning permission can be granted; or for a local authority to identify an alternative site before being able to refuse planning permission for another and adequately justify their decision at appeal. These are just material considerations to be weighed in the overall balance.”

25 The inspector went on to say, at paras 77 and 78, that there was no evidence to indicate a suitable and affordable alternative site would become available in the foreseeable future. If the planning authority were to enforce the requirements of the notice the only realistic option would be a return to life on the road. Although it was unlikely that the authority would take such

A a course it could not be ruled out and the hardship to the family would be unimaginable.

26 The inspector's overall conclusions are at paras 84 et seq. She said the appeal site did not lie in the Green Belt and there was no need for a finding of very special circumstances to justify the development. In many ways it was a good site for a single gipsy family. It was compliant with most of the local plan policy criteria in HG23 but it conflicted with the structure plan policy and local plan policy in that the development would have a significant adverse effect at least in the short to medium term on the rural character and appearance of the local area. However, against this had to be weighed other material considerations. These were: (1) the clear evidence of a significant under-supply of gipsy sites in the district and wider area which was unlikely to be resolved for several years. (2) The particular and exceptional circumstances of the Brown family, including their forced displacement from their home in Smithy Fen, their accommodation needs and the additional and compelling special needs of Kelly Marie. (3) The absence of any evidence to suggest that a suitable and affordable alternative site would become available to the family in the foreseeable future.

D *The issue on this appeal*

27 Turning to the point on which permission to appeal was granted, namely whether there is any requirement on the Browns to prove non-availability of other sites or that their particular needs could not be met from another site, the critical passage in the inspector's decision is at para 74, which I have recited above. Keith J's conclusion is to be found at [2008] JPL 519, para 39 where he said:

F "The fact of the matter is that section 38(6) of the 2004 Act required the inspector to conduct a balancing exercise. That involved first determining whether there were material considerations which might suggest that the development should be allowed even though it conflicted with the provisions of the development plan. If the evidence revealed the existence of one or more such material considerations, the inspector then had to conduct a balancing exercise and decide whether those considerations in fact outweighed the provisions of the development plan and the harm which would be caused if the development was allowed to proceed. I see no basis for saying that if one of those material considerations is said to be the non-availability of a suitable alternative site it is for the [applicant] for planning permission to prove such non-availability. As with any other material consideration, the question is whether the evidence which the parties have chosen to call reveals the existence or non-existence of another site which would meet the needs of the applicant for planning permission. In these circumstances I do not believe that the inspector's approach to the burden of proof was flawed."

28 Before the inspector it was an unchallenged finding of fact that the Browns had a need for a site on which to station their caravans and maintain their gipsy lifestyle. None of the family had ever lived in a house and this was not an appropriate alternative option.

29 Mr McCracken, for the council, takes issue with the inspector's statement, at para 84, that this is not a Green Belt case and that therefore there is no need for a finding of very special circumstances to justify the development. For my part, I can see no objection to the inspector's statement. We were referred to a number of authorities as was Keith J. Before Keith J the council relied on three. Keith J found that none of them supported the council's contention that the burden was on the Browns to show that they had done all that reasonably could be done to find a site that catered for their needs but that no such site was available.

30 The first authority is *Rhodes v Minister of Housing and Local Government* [1963] 1 WLR 208. The question there was whether the minister, on a planning application for use of land as an airport, had to consider whether an alternative site for the airport was available. Paull J concluded, at p 213, that it was not for the minister to "rout round" for an alternative site, though if it had been shown at the inquiry that there was an alternative suitable site that was a material consideration which the inspector had to take into account. Keith J said the judge was doing no more than stating what would be a material consideration for the minister to consider if the existence of an alternative suitable site emerged at the hearing. He was not laying down how the existence of such a site should be established. I agree.

31 The second case was *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1986) 53 P & CR 293. In that case an application for planning permission to build a hotel within the Green Belt was refused on the basis that the severe shortage of hotel accommodation in the area could be met at an alternative site, though no such sites were identified. Simon Brown J concluded that while it was generally desirable that a planning authority should identify the possibility of meeting any supposed need by reference to specific identifiable alternative sites it would not always be essential or appropriate to do so. He said, at p 299:

"Where, however, there are clear planning objections to development upon a particular site then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere. This is particularly so when a development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it."

And he said, at p 301:

"The extent to which it will be for the developer to establish the need for his proposed development on the application or appeal site rather than for an objector to establish that such need can and should be met elsewhere will vary. However, in cases such as this, when the Green Belt planning policy expressly provides 'that the need for a motel on the site proposed, not merely in the area generally, has to be established in each case' the burden lies squarely upon the developer."

32 *Trusthouse Forte Hotels Ltd* 53 P & CR 293 was a Green Belt case and at that time neither section 38(6) of the Planning and Compulsory Purchase Act 2004 nor its predecessor had become part of our law. As

A Keith J pointed out in the present case, there was nothing in the development plan akin to the provision in the Green Belt planning policy which Simon Brown J regarded as decisive. In my judgment all that *Trusthouse Forte Hotels Ltd* establishes is that whether the developer is required to justify why he should be allowed to develop the site depends upon the circumstances.

B 33 The third case was *Simmons v First Secretary of State* [2006] JPL 575. That was another Green Belt case in which Planning Policy Guidance 2: Green Belts, para 3.1, published on 24 January 1995 and amended in March 2001, required very special circumstances to justify inappropriate development. Pill LJ said, at para 22:

C “The comment that the lack of evidence of a search, a finding which I accept the Secretary of State was entitled to make on the evidence, weighed against the respondent’s case could have been better put, as counsel for the appellant at this hearing has put it. He put it on the basis that an applicant for permission in this context, who has not done all he might have done to seek a site which is less unattractive in planning terms, may have more difficulty in discharging the burden of showing very special circumstances justifying the grant of planning permission on this site.”

Keith J rightly dismissed the *Simmons* case as adding nothing to the argument because, like *Trusthouse Forte Hotels Ltd*, it was a case about development within the Green Belt.

E 34 Mr McCracken further relies on *McCarthy v Secretary of State for Communities and Local Government* [2006] EWHC 3287 (Admin). That case concerned the land at Smithy Fen which the Browns had left in 2004. The *McCarthy* case was not drawn to the attention of the judge. In the *McCarthy* case Judge Gilbert QC, who was sitting as a deputy judge of the High Court, said, at paras 37–39:

F “37. The issue here turned in part on whether there were alternative sites to which the claimants could move if permission was refused. There was some discussion between Mr Mould QC and the court in argument about whether in such a case it is incumbent on an applicant for planning permission to demonstrate that no alternative sites exist. There can be a danger of turning the principles derived from *Secretary of State for the Environment v Edwards* [1994] 1 PLR 62 into a test which applicants for planning permission must pass. *Edwards* is a case on whether the existence of alternative sites can justify refusal, not a case on whether it is necessary to prove that there is an absence of alternative sites in order to gain a consent. An applicant for planning permission will only have to show that there is an absence of alternative sites if: (a) the relevant development plan policy, Secretary of State’s policy or other policy, which is a material consideration states that an applicant will be expected to do so; (b) his proposal would otherwise cause harm or conflict with policy to a degree which would justify refusal, and he argues that there are reasons why a site must be found to accommodate the use which he proposes. Then the absence of an alternative site may be considered by the decision-maker to outweigh the harm done.

“38. Plainly the greater the harmful effects, or the more serious the breach of policy, the harder the applicant will have to work to show that there is no realistic alternative, and that his proposal would effect a real public convenience or advantage which would justify the grant of permission. Thus it is that, at the top end of the scale, in a case of proposed inappropriate development in a Green Belt the evidential and persuasive burden on the applicant is very substantial. It is less substantial, but may still be significant, lower down the scale.”

“39. In this case, all the parties must have appreciated that if the Secretary of State had concluded that there would be harmful effects on the countryside, and that the proposal did not for that reason comply with policy HG23, then he would be bound to dismiss the appeals unless the case for provision at this site outweighed the reasons for refusal; see section 38(6) of the Planning and Compulsory Purchase Act 2004. He found that the grant of permission would make a significant contribution to meeting the general need for sites. His conclusion, at para 37, shows that he did not consider that that outweighed the reasons for refusing permission. That was a decision which he was entitled to reach. He was then bound to refuse permission unless he had evidence which led him to conclude that there were no alternative sites to which the claimants could relocate. On the evidence, he was not satisfied that the claimants could not relocate elsewhere . . .”

35 In my judgment reading this passage as a whole the deputy High Court judge is doing no more than emphasising that the issue of alternative sites will depend on all the circumstances. He correctly identified the danger of turning the principles derived from *Secretary of State for the Environment v Edwards* [1994] PLR 62 into a test which applicants for planning permission must pass. As he noted, *Edwards* was a case on whether the existence of alternative sites could justify refusal, not a case on whether it was necessary to prove that there was an absence of alternative sites in order to gain consent. Nor do I think that the judge’s statement that he was bound to refuse permission unless he had evidence which led him to conclude that there were no alternative sites to which the claimants could relocate was intended to be a statement of the law. That observation was specifically directed to the case in front of him. The Smithy Fen applicants in the *McCarthy* case did not have the exceptional needs of the Browns, nor in fact had they searched for alternatives and the inspector had concluded that there were indeed alternatives that might be suitable for them in the general area. If Judge Gilbert QC was indeed intending to lay down a statement of principle of law, in my view he was wrong and in any event what he said is not binding on this court.

36 In my judgment the law is clear. The position is governed by section 38(6) of the 2004 Act. The development plan is determinative unless material considerations indicate otherwise. There is no burden of proof on anyone. It is a matter for the planning authority, or in this case the inspector, to decide what are the material considerations and, having done so, to give each of them such weight as she considered appropriate. That, so it seems to me, is a matter of planning judgment.

37 Mr James Strachan, for the Secretary of State, advanced four propositions. (1) The inspector was correct in her analysis at para 74.

- A Planning applications must be decided in accordance with the development plan unless material considerations indicate otherwise. The weight to be given to a material consideration is for the decision-maker. (2) The decision in the *McCarthy* case [2006] EWHC 3287 (Admin) does not show any contrary policy. (3) Even if the *McCarthy* case did manifest a different approach it is not a difference in policy. (4) The debate is in any event sterile
- B because the inspector identified that the Browns had in fact searched for alternative sites but none was available. I accept each of these submissions, the first of which seems to me to dispose of the appeal.

- 38 Although permission to appeal was given solely on the ground indicated, Mr McCracken also sought to argue that the inspector's reasons for her decision were inadequate. The thrust of this point is, I think, the suggestion that a different approach was being taken from that in the
- C *McCarthy* case and that that needed explanation and justification. Mr McCracken points out that the *McCarthy* decision was only a few months earlier than the inspector's decision in the instant case. It involved an application by gipsies and a nearby site within the same district. The same policies applied as did the likely availability of alternative sites within the locality. Mr McCracken puts it this way in his reply. The inspector did
- D not acknowledge that a different approach had been taken and did not even mention it in the decision letter. He says that this offends the principle of consistency in decision-making: see *North Wiltshire District Council v Secretary of State for the Environment* 65 P & CR 137, 145.

- 39 The judge dealt with this at [2008] JPL 519, paras 40 and 41. He referred to the inspector's report in the *McCarthy* case, saying para 7.40 was
- E the only one which could be said to show his approach had been to require the appellants to prove that no alternative sites were available. Para 7.40 reads:

- "This is not a case where the evidence establishes that no alternative sites are available. The occupants have not looked for alternative sites. They have not sought planning permission for the use of unused land at
- F the Pine Lane site. Nor have they investigated vacant authorised plots at Setchel Drove or Water Lane. Undoubtedly, finding sites is not easy but a structured, thorough search exercise is necessary if it is to be argued that harm in one location has to be accepted because no alternative sites exist. Furthermore, there is no reason for confining any search to South Cambridgeshire District as the occupants have no need to be resident in this district. The individual occupiers have different travelling histories
- G extending to different areas all around the country. They have not searched widely for sites."

- 40 Keith J said, at para 41, he did not think this showed the inspector was requiring *the appellants* to prove that no alternative sites were available. What he said was that it was a case where *the evidence* established that no
- H alternative sites were available. He did not say it was a case in which the appellants had not established that no alternative sites were available.

41 Both the inspector's report and the Secretary of State's decision letter in the *McCarthy* case were before the inspector in the present case; they were an appendix to the planning officer's report. For my part I am quite unpersuaded there is anything in this point.

Conclusion

A

42 In my judgment the inspector approached the question of alternative sites in an impeccable fashion and Keith J was correct to conclude that there was no basis for interfering under section 288 of the Town and Country Planning Act 1990. This was an exceptional case where the personal circumstances of the Brown family justified departure from the development plan. These circumstances were a material consideration which the inspector properly took into account as a material consideration under section 38(6) of the Planning and Compulsory Purchase Act 2004. The grant of planning permission subject to the conditions cannot be faulted.

B

43 I would dismiss the appeal.

SIR ROBIN AULD

44 For the reasons given by Scott Baker LJ I agree that the appeal should be dismissed.

C

SIR MARK POTTER P

45 I agree.

Appeal dismissed.

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J C B

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