Neutral Citation Number: [2008] EWCA Civ 692

Case No: C1/2008/0246

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QBD, ADMINISTRATIVE COURT
MR JUSTICE MITTING
CO/2223/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2008

Before :

MASTER OF THE ROLLS
LORD JUSTICE CARNWATH
and
LORD JUSTICE WILSON

- -

Between :

WYCHAVON DISTRICT COUNCIL	**Claimant/ First Respondent**
-and –	
(1) SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT	**Defendant/ Second Respondent**
(2) KATHLEEN BUTLER **(3) LEONARD BUTLER**	**Defendants/ Appellants**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Robin Green (instructed by **Wychavon District Council)** for the Claimant/First Respondent
Charles George QC & Stephen Cottle (instructed by Community Law Partnership) for the Defendants/Appellants
The Secretary of State was not represented.

Hearing date : 4th June, 2008

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Judgment

Carnwath LJ :

Introduction

1. This is an appeal against the judgment of Mitting J, quashing a decision of a planning inspector, Mr G M Hollington. He had granted temporary planning permission (for five years) for the continued stationing of a mobile home and a touring caravan on a site in the Green Belt at Upton Warren, Worcestershire. The judge held that the decision was flawed by a misinterpretation of the relevant Green Belt policy and perversity. The Secretary of State herself had not resisted the application to quash the decision. Although she is not a party to the appeal, she has submitted a written statement in which she takes issue with only a small part of the judge's reasoning.

2. The present appeal is brought by Mr and Mrs Butler, the applicants. They acquired the site in late 2005, and stationed a caravan there. They have been living there ever since. One can glean various facts about their circumstances from the decision. They have two young children, Megan and Leonard. At the time of the Inspector's decision, Megan was on the Special Needs Register and attended a primary school about 17km away from the site, though she had a place at a more local school. Leonard was not yet at nursery school, though was to be expected to be doing so as he was turning three in October 2007. Leonard suffered from asthma, which his doctor attributed to his living circumstances, and had had to be admitted to hospital on at least two occasions. Mrs Butler had recently been prescribed antidepressants because of the worry of the appeal. Mr Butler then worked as a landscape gardener. Since moving to the site he had developed a business of breeding, dealing and breaking horses.

3. In December 2005 they made their application for permission to station a mobile home and caravan. It appears from the decision-letter that planning permission had previously been granted for a change from agricultural to equestrian use, but it is unclear whether this covered the business as it was developed by Mr Butler. There had been some previous enforcement action relating to uses on the site, but again the details of this are not clear from the decision. It is not in dispute that the present residential use of the site is in breach of planning control, and that it is "inappropriate development" in the context of Green Belt policy.

Policy background

4. There were relevant policies relating first to development in the Green Belt and secondly to gypsy sites. The former was contained in Planning Policy Guidance Note 2 ("PPG2"), issued in January 1995 and amended in March 2001. The key paragraphs are 3.1 and 3.2 which set out the general presumption against "inappropriate development" in the Green Belt, and the principle that such development should not be approved except in "very special circumstances". Paragraph 3.2 continues:

> "… 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 . . . "

5. Guidance in relation to gypsy sites was formerly given by Circular 1/94. That made clear that in general provision for gypsy sites should not be made in areas of open land where development is "severely restricted" such as the Green Belt. That guidance was replaced in 2006 by Circular 01/2006. The background of the new policy was explained in the introduction:

> "A new circular is necessary because evidence shows that the advice set out in Circular 1/94 has failed to deliver adequate sites for gypsies and travellers in many areas of England over the last 10 years. Since the issue of Circular 1/94, and the repeal of local authorities' duty to provide gypsy and traveller sites there have been more applications for private gypsy and traveller sites, but this has not resulted in the necessary increase in provision." (para 3)

6. Paragraph 12 set out the main intentions of the Circular including:

> "(b) to reduce the number of unauthorised encampments and developments and the conflict and controversy they cause and to make enforcement more effective where local authorities have complied with the guidance in this Circular;
>
> (c) to increase significantly the number of gypsy and traveller sites in appropriate locations with planning permission in order to address under-provision over the next 3 - 5 years;
>
> …
>
> (i) to help to avoid gypsies and travellers becoming homeless through eviction from unauthorised sites without an alternative to move to."

7. The Circular contained detailed proposals for "structured assessments" to be made on a regional basis of the general accommodation needs of gypsies and travellers, and the number of pitches required to meet them; and for local planning authorities to identify suitable sites for allocation in their development frameworks. Where there was evidence of a "clear and immediate need", planning authorities were advised to bring forward site allocations in advance of the regional consideration of pitch numbers.

8. Before us, there was no criticism of the Wychavon Council's actions in pursuance of the new policy as set out in the Circular. The inspector noted, when deciding to grant a five-year permission, that the Council anticipated that the joint Core Strategy would be adopted in three years, but he added a further two years "to allow for slippage" (para 44).

9. For present purposes, the material parts of the Circular come in the advice given in relation to development control, specifically in respect of use of temporary permissions, and of applications in rural areas and the Green Belt. The former was referred to in paragraphs 45 and 46:

> "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 sites 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.
>
> 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. The fact that temporary permission has been granted on this basis should not be regarded as setting a precedent for the determination of any future applications for full permission for use of the land as a caravan site."

10. Advice in relation to proposals in rural areas was contained in paragraphs 47 to 55. (I shall need to return to aspects of this advice in connection with one of the issues in the appeal.) Specific reference was made to Green Belts in paragraph 49:

> "There is a general presumption against inappropriate development within Green Belts. New gypsy and traveller sites in the Green Belt are normally inappropriate development, as defined in Planning Policy Guidance 2: Green Belts (PPG2). National planning policy on Green Belts applies equally to applications for planning permission from gypsies and travellers, and the settled population. Alternatives should be explored before Green Belt locations are considered. Pressure for development of sites on Green Belt land can usually be avoided if the local planning authority allocates sufficient sites elsewhere in its area, in its LDF, to meet identified need."

11. The judge commented fairly that the guidance given in the various policy documents "pulls in opposite directions", but added:

> "Nevertheless, on a fair reading of the guidance, it cannot properly be concluded that the Secretary of State was advising local planning authorities that in cases of unmet need for gypsy sites, Green Belt considerations should be put aside. On the contrary, the guidance draws attention to the continuing validity of PPG2. Thus, it was rightly common ground in this case that the outcome of the appeal turned upon the proper application of PPG2, paragraphs 3.1 and 3.2."

12. This is a fair comment as far as it goes. However, it can with respect be criticised as giving insufficient weight to the change of emphasis in the 2006 Circular, signalled by its introduction. It is noteworthy that paragraph 49 does not entirely preclude the possibility of permission being granted for sites within the Green Belt, at least as a last resort. Although alternatives should first be explored, and it should "usually" be possible to allocate sufficient sites elsewhere, the implication is that if this does not prove possible a Green Belt site may have to be accepted. Further, although the Green Belt paragraphs contain no specific cross-reference to the paragraph on temporary permissions, there is nothing to suggest that this part of the advice is inapplicable to Green Belt applications. These parts of the advice must also be seen in the context of the general intention to avoid gypsies becoming homeless through eviction from unauthorised sites where no alternatives are available.

The Inspector's decision

13. As the judge noted, the Inspector found against the proposal that it would represent a material encroachment on the Green Belt; that there would be some loss of openness and so some harm to the purpose of the Green Belt policy; and that it would harm the surrounding area's rural character and mostly unspoiled appearance. On the other hand, he found that there was a significant general unmet need for additional gypsy sites in the adjacent area, and a clear lack of alternative sites available to this family.

14. To set the decision in context, I should set out the inspector's reasoning on the "other considerations" in full:

> "Conclusion – Other Considerations
>
> 37. I have come to the views that, while not resulting in unacceptable patterns of travel, the proposed development would be inappropriate and cause unacceptable harm to the Green Belt and the surrounding area's character and appearance. The Green Belt harm, in particular, is a matter to which substantial weight should be given.
>
> 38. Of the other considerations put forward by the appellants, I consider that the cost of unauthorised encampments, the ability in general to address concerns by conditions and the treatment of Circular 01/2006 are matters which are neither exceptional nor out of the ordinary. The conflict of Policy COM6 with national guidance is a neutral factor.
>
> 39. The need for more gypsy sites and employment needs are matters to which some weight should be attached, but the former is not unusual and the latter can carry little weight in view of the enforcement breach. Worthy of greater weight are the education and health needs, for which a settled base would be beneficial, although these are not exceptionally serious and they do not point only to a site in the Green Belt. On the other hand, and despite the occupation of the site after enforcement action had been initiated, significant weight needs to be attached to the lack of alternative sites – no place has been identified for the appellants to move to now or in the near future.
>
> 40. The appellants have not claimed these other considerations individually outweigh the harm to the Green Belt and it is my view that even in combination,

when balanced against the substantial Green Belt and other harm I have identified, the considerations do not clearly outweigh the harm. They do not, therefore, amount to the very special circumstance necessary to justify inappropriate development and a permanent permission would not be appropriate.

41. Dismissal of the appeal would interfere with the family's rights to respect for their private and family life and their home (Article 8 of the European Convention on Human Rights). The appellants acknowledge that moving on the land in breach of an enforcement notice weakens their rights and I consider the interference with these rights would be justified when weighed against the wider public interest of avoiding harm to the Green Belt and the area's character and appearance.

42. However, bearing in mind the approach offered by Circular 01/2006…, there is a particular, time-limited factor: the forthcoming assessment of the need for gypsy sites, regionally and locally, and the Council's intention to address the matter in a joint Core Strategy, when it expects to allocate sites. A temporary permission would enable the GTAA to be completed and allow additional sites to be made available, while giving the appellants somewhere to live and continue to seek an acceptable alternative. Bearing in mind also the undisputed need for gypsy sites generally and, particularly, the lack of any current alternative site, I consider that these matters, when taken together, clearly outweigh the Green Belt and other harm.

43. My overall conclusion, therefore, is that these concerns combine to become sufficient to constitute the very special circumstances necessary to justify a temporary planning permission. Nevertheless, as Circular 01/2006 points out, such permission should not be regarded as setting a precedent for the determination of any future applications for full permission for use of the land as a caravan site. I appreciate the restriction would itself interfere with the family's human rights but, weighed against the legitimate aims of protecting the Green Belt and the area's character and appearance, I consider temporary permission would not have a disproportionate effect on the appellants."

The judge's reasoning

15. Before the judge, Mr Green for the authority criticised that reasoning because it failed to apply what he said was the correct "twofold test". This he took from the judgment of Sullivan J in *R (Chelmsford Borough Council) v First Secretary of State* [2003] EWHC Admin 2978, [2004] 2 P & CR 677 at para 58, where he said:

> "The combined effect of paragraphs 3.1 and 3.2 is that, in order to justify inappropriate development in the Green Belt, (a) there must be circumstances which can reasonably be described not merely as special but as very special, and (b) the harm to the Green Belt by reason of inappropriateness and any other harm must be clearly outweighed by other considerations. Those other considerations must be capable of being reasonably described as very special circumstances. If they are capable of

> being so described, whether they are very special in the context of the particular case will be a matter for the decision-maker's judgment."

Mitting J accepted that formulation as "plainly correct".

16. He noted that in a later judgment, *R (Basildon District Council) v First Secretary of State and Temple* [2004] EWHC (Admin) 2759 para 17, Sullivan J had said that:

> "… in planning, as in ordinary life, a number of ordinary factors may when combined together result in something very special. Whether any particular combination amounts to very special circumstances for the purposes of PPG2 will be a matter for the planning judgment of the decision-taker."

He did not accept, however, that anything in the later judgment indicated a departure by Sullivan J from the two-stage test as stated previously.

17. Mitting J concluded that on a fair reading of the inspector's decision in the present case (including in particular his use twice of the word "therefore" in paragraphs 40 and 43), he had adopted the wrong approach:

> "He decided that because the considerations which favoured the grant of temporary permission outweighed the harm by inappropriateness and by any other reason thereby caused, so the circumstances were very special. I have no doubt that that approach was wrong in law." (para 23)

18. However, he expressed reluctance to quash the decision if the result was capable of being sustained on the correct basis. He continued:

> "It is therefore necessary to ask whether the factors identified by the Planning Inspector in paragraph 42 were capable of amounting to very special circumstances. I am bound to say, I do not see how they can be. First, the forthcoming assessment of the need for gypsy sites, regionally and locally, even coupled with this Council's intention to address the matter, is not a special circumstance, let alone a very special circumstance. It is one that will be *commonplace* in local planning authorities up and down the country. The fact that the local Council intends to address them in a joint Core Strategy and expects to allocate the sites is clearly not a special circumstance. It is the local planning authority fulfilling its obligation. Secondly, the undisputed need for gypsy sites generally cannot amount to a very special circumstance. There is a national need for gypsy sites. This local planning authority's district is *no different from the picture across the country as a whole*. Thirdly, the lack of any current alternative site is the closest factor identified as a very special circumstance. Mr Cottle, counsel for Mr and Mrs Butler, submits that this is shorthand for a wider basket of considerations which would include the fact that Mr and Mrs

> Butler are of local origin, that they have children, one of whom at least goes to a local school, and the remainder of the considerations discussed by the Inspector when considering their application for permanent planning permission. I am prepared to accord to his brief reasoning in this respect something of that breadth. But to say in relation to this family that for those *commonplace* reasons that factor amounts to a very special factor, in my judgment, deprives the phrase of any real meaning. It is a *commonplace* not a very special factor."

He concluded:

> "Following Sullivan J's approach in the **Basildon** case, one must step back and ask whether the three factors taken together are capable of amounting to very special circumstances. In my view, they are not. They are three *commonplace* factors. Although a collection of ordinary and unexceptional factors can, when taken together, amount to very special circumstances, the aggregation of three *commonplace* factors such as these, in my judgment, cannot." (paras 24-25, emphasis added)

The issues in the appeal

19. Although the issues have been formulated in different ways in grounds of appeal and the skeleton arguments, they can be reduced in my view to three points:

    i) Was Mitting J correct to hold that the inspector misinterpreted paragraph 3.2 of the Green Belt Guidance?

    ii) If not, was the inspector's reasoning in any event perverse or otherwise open to challenge in law?

    iii) (Under a respondent's notice) In assessing the applicants' prospects of finding an alternative site, did the Inspector leave out of account a material consideration, namely the more flexible planning policy now applicable in rural areas beyond the Green Belt?

    It is to the first point that the argument has been principally directed.

20. The Secretary of State was not represented either before Mitting J or on the appeal to this court. Her present position is stated in a letter to this court from the Treasury Solicitor dated 30th May 2008. The letter supports Mitting J's actual decision, on the basis of the reasoning in paragraph 20-21 and 23 of the judgment (see above). However, she takes issue with the later part of the judgment (para 25) in which the judge expressed the view that the aggregation of "three commonplace factors" as in this case could not in law amount to "very special circumstances". The letter suggests that this aspect of the reasoning is wrong in law, because it is –

> "well established in the case-law that whether factors amount to special circumstances is a matter of planning judgment for the

> decision maker… (The judge) went too far in saying that certain factors such as the need for gypsy sites and the lack of alternative sites are *never* capable of amounting to very special circumstances".

(i) Interpretation of Green Belt guidance

21. I say at once that in my view the judge was wrong, with respect, to treat the words "very special" in the paragraph 3.2 of the guidance as simply the converse of "commonplace". Rarity may of course contribute to the "special" quality of a particular factor, but it is not essential, as a matter of ordinary language or policy. The word "special" in the guidance connotes not a quantitative test, but a qualitative judgment as to the weight to be given to the particular factor for planning purposes. Thus, for example, respect for the home is in one sense a "commonplace", in that it reflects an aspiration shared by most of humanity. But it is at the same time sufficiently "special" for it to be given protection as a fundamental right under the European Convention. Furthermore, Strasbourg case-law places particular emphasis on the special position of gypsies as a minority group, notwithstanding the wide margin of discretion left to member states in relation to planning policy (see *Chapman v UK* 33 EHRR 399; and the comments of Lord Brown in *Kay v Lambeth LBC* [2006] 2 AC 465 para 200). Thus, in *Chapman* the Strasbourg court recognised that the gypsy status did not confer "immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment", but added:

> "…the vulnerable position of Gypsies as a minority means that some *special consideration should be given to their needs and their different lifestyle* both in the relevant regulatory planning framework and in reaching decisions in particular cases… To this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life…" (para 96, emphasis added)

The special position of gypsies in this respect is reflected in the 2006 guidance.

22. Against this background, it would be impossible in my view to hold that the loss of a gypsy family's home, with no immediate prospect of replacement, is incapable *in law* of being regarded as a "very special" factor for the purpose of the guidance. That, however, is far from saying that planning authorities are bound to regard this factor as sufficient in itself to justify the grant of permission in any case. The balance is one for member states and involves issues of "complexity and sensitivity" (see *Chapman v UK* para 94). That is a judgment of policy not law, and it needs to be addressed at two levels: one of general principle, the other particular to the individual case.

23. At the general level, a judgment must be made as to whether, or in what circumstances, the societal value attached to the protection of the homes of gypsies as individuals can in principle be treated as sufficiently important to outweigh the public value represented by the protection of the Green Belt. That might have been thought to be a matter properly to be addressed by the Secretary of State by way of national guidance. It would perhaps have been more helpful if the PPG or the 2006 guidance had addressed this issue in terms. As it is, the guidance neither excludes nor restricts the consideration of any potentially relevant factors (including personal

circumstances). The PPG limits itself to indicating that the balance of such factors must be such as "clearly" to outweigh Green Belt considerations. It is thus left to each inspector to make his own judgement as to how to strike that balance in a particular case.

24. At the particular level there has to be a judgement how if at all the balance is affected by factors in the individual case: for example, on the one hand, public or private need, or personal circumstances, such as compelling health or education requirements; on the other, particular factors increasing or diminishing the environmental impact of the proposals in the locality, or (as in this case) limiting its effect in time. This judgement must necessarily be one to be made by the planning inspector, on the basis of the evidence before him and his view of the site.

25. Although the matter may need to be considered at different levels, I see no reason to draw a rigid division between the two parts of the question posed by paragraph 3.2, as was done by Sullivan J in *Chelmsford*. Indeed to do so seems contrary to the thrust of most of the first instant decisions to which we have been referred. (I do not find it necessary or useful to review the decisions under the earlier guidance, which was in different terms.) It is sufficient to cite the most recent, *McCarthy v Basildon DC and EHRC* [2008] EWHC 987 (Admin), in which Collins J said:

> "There is no question …that what they have done amounts to inappropriate development in the Green Belt so that planning permission can only be granted if they can show that there are very special circumstances. It is accepted and the planning and enforcement decisions confirm that the individual circumstances of the claimants are capable of amounting to very special circumstances provided that those circumstances clearly outweigh the damage done to the Green Belt by the development and any other harm." (para 14)

26. If Sullivan J, in the passage relied on by the judge, intended to draw such a rigid division, I would respectfully disagree. I see no reason, in terms of policy or common sense, why the factors which make a case "very special" should not be the same as, or at least overlap with, those which justify holding that green belt considerations are "clearly outweighed". To my mind, the wording of paragraph 3.2 ("… will not exist unless…") reinforces that view. I prefer the formulation used by Sullivan J himself in a judgment the previous year on somewhat similar facts, *Doncaster MBC v SSETR* [2002] JPL 1509 para 70, where (also in the context of 3.2 of PPG2) he said:

> "Given that inappropriate development is by definition harmful, the proper approach was whether the harm by reason of inappropriateness and the *further* harm, albeit limited, caused to the openness and purpose of the Green Belt was *clearly* outweighed by the benefit to the appellant's family and particularly to the children so as to amount to *very* special circumstances justifying an exception to Green Belt policy" (original emphases).

This passage, rightly in my view, treats the two questions as linked, but starts from the premise that inappropriate development is "by definition harmful" to the purposes of the Green Belt.

27. I agree, however, with Mr George that the actual decision in the *Chelmsford* case is unremarkable. As he explains (in his skeleton):

> "The Gypsy did not rely on "accommodation need" (having "left a secure pitch": paras 11 and 16), so that the *only* balancing factor was "the children's educational needs" (described in paras 12) and of which Treasury Counsel "does not suggest that there is anything out of the ordinary" and which Sullivan J described as "entirely normal" (para 65). The decision of the Secretary of State on the facts was perverse, as recognized by Sullivan J at para 67:
>
> > "*it is impossible to see how these perfectly ordinary educational needs of two children can reasonably be described as special circumstances, let alone very special circumstances for the purposes of para.3.1 of PPG2*."

28. I also agree with Mr George that the terms of Sullivan J's judgment in *Chelmsford* may well have been influenced by the approach of the Court of Appeal in a similar Green Belt case: *South Bucks DC v Secretary of State* [2003] EWHC Civ 687; [2004] JPL 207. Pill LJ (at para 31) had noted that the only special circumstance relied on was "the hardship that (the applicant) is a very unwell gipsy without another pitch to occupy". He commented:

> "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. . ."

He referred with approval to Sullivan J's own observation in the *Doncaster* case [2002] JPL 1509 that:

> "… it is important that the need to establish very special circumstances is not watered down. Clear and cogent analysis is required."

29. At the time of the decision in *Chelmsford*, that was the most recent Court of Appeal authority on this topic. Subsequently, the Court of Appeal's decision was reversed by the House of Lords: *South Bucks DC v Porter (No 2)* [2004] 1 WLR 1953. Lord Brown, in the leading speech, said

> "What was required of [the Inspector] was above all a value judgment whether the hardship which would result for 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…

> … 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." (paras 38-41)

He distinguished Sullivan J's reasoning in the *Doncaster* case (see above), where:

> "The personal circumstances [relied on as very special circumstances] …consisted of no more than the gipsy's concern that his two small 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…" (para 42)

30. I note also that in a later case (*(R(Dartford BC) v Secretary of State* [2004] EWHC 2549), Sullivan J himself was careful not to extend the reasoning in *Chelmsford*. He regarded it as "plainly distinguishable" from the instant case, which depended not merely on personal circumstances but also on the finding of "an unmet need for gypsy sites in the area" (paras 41 and 42).

31. Finally I should comment on the Secretary of State's acceptance, through the Treasury Solicitor's letter, of Mitting J's reasoning on the construction of the policy. It is not suggested that this is in any way binding on us. It is accepted that the meaning of the policy, once promulgated as the basis for local decision-making, is properly a matter for the court (see, for example, per Brooke LJ, in *R v Derbyshire CC ex p Woods* [1997] JPL 958, 967). In any event, I would have attached more weight to the Secretary of State's views if the Department had itself adopted a more consistent approach. It is noteworthy that before the decision in the *Chelmsford* case, as is apparent from the arguments in that case (p 689), the Secretary of State was advancing an approach very similar to that proposed by Mr George in this case.

32. In conclusion, I disagree respectfully with Mitting J's decision on this aspect of the case. The inspector did not err in failing to apply a two-stage test under paragraph 3.2. It follows that his decision was not liable to be quashed for that reason.

(ii) The inspector's application of the test

33. There remains the question whether, even accepting that he applied the correct test, his decision was perverse or otherwise open to legal challenge.

34. Factually, the present case may be seen as falling somewhere between *Doncaster* and *South Bucks*. The Butlers' circumstances are not perhaps as "extreme and unusual" as those of Mrs Porter. (I do not take Lord Brown's use of those words as intended as a redefinition of the test, rather a comment on the facts of the case.) On the other hand, by contrast with the *Doncaster* case, the personal circumstances of the Butlers and their children must be seen in the context of the real prospect of forced eviction from their home with no immediate alternative. This was an immediate threat, as the inspector noted, since the authority were already threatening prosecution (para 34).

35. In his concluding paragraphs, the inspector was careful to spell out in detail the relative weight he gave to the different factors; including those of "little weight" (the employment needs of Mr Butler), those worthy of "greater weight" (the education and health needs of the children), and that attracting "significant weight" (the lack of alternative sites). These considerations taken together did not amount to the "very special circumstances" needed to justify permanent permission. However, he took a different view of the case for a temporary permission, having regard to the prospect of the allocation of new sites over the next 3 to 5 years under the council's strategy. In that context, "these matters, when taken together" clearly outweighed Green Belt considerations; and "therefore" he concluded that "these concerns combine" to constitute the very special circumstances necessary to justify grant of planning permission.

36. The judge fixed on the word "therefore" as indicating that the inspector had wrongly treated the two parts of paragraph 3.2 as involving the same test. To some extent I share the judge's difficulty in determining precisely the import of the word "therefore" in the crucial paragraph 43; and consequently whether "these concerns" (para 43) are the same as "these matters, when taken together" (para 42), and in turn to what extent they encompass any of the personal considerations previously referred to. It might have been more helpful if the letter had spelt this out more clearly. However, I do not think this criticism is sufficient to undermine the validity of the decision, once the two-stage test has been rejected. Against the background of the 2006 policy, and the expectation of sites becoming available in the near future, the inspector was entitled in law to treat the prospect of immediate eviction of a gypsy family with young children, who had nowhere else to go, as sufficiently "special" in itself to support his conclusion. As Lord Brown said of *South Bucks,* other inspectors might have taken a less generous view. But the conclusion is not perverse.

(iii) Alternative sites

37. The final point relied on by Mr Green, for the authority, although not dealt with by the judge, is the failure of the inspector to give sufficient weight to what is said to be the new flexibility signalled by the 2006 guidance in respect of sites outside the Green Belt.

38. The inspector did not in terms address the point. He referred to the family's unsuccessful attempts to find other land on which to live. He accepted that the site could have been sold and used to buy land in a rural area elsewhere, but he commented:

> "… the history of planning applications in the District shows how difficult it might be to gain planning permission even if

> the land were obtainable and, given the undisputed national and regional needs for sites, I have no indication that searching over a wide area would be more fruitful." (para 33)

39. The only evidence before us of what was said at the inquiry is in the witness statement of Mr Marshall, the Council's Solicitor, which exhibits his notes of the evidence, apparently recording an exchange between Mr Green and the Butlers' witness Mrs Heine. The notes are not in the court bundle, but his statement says:

> "In this exchange Mr Green put to Mrs Heine that national advice on locating caravan sites in the open countryside had changed, with reference to Circulars 01/2006 and 1/94. My recollection is that Mrs Heine accepted that this constituted a significant change."

40. In submissions, Mr Green attempted to put some flesh on that skeletal account by contrasting the relevant passages in, respectively, the 1994 and 2006 circulars:

> "… Sites on the outskirts of built-up areas may be appropriate, provided that care is taken to avoid encroachment on the open countryside. Many sites may be found in rural or semi-rural settings, but care needs to be taken ensure consistency with agricultural and countryside policies…" (1/94 para 14).
>
> "Sites on the outskirts of built-up areas may be appropriate. Sites may also be found in rural or semi-rural settings. Rural settings, where not subject to special planning constraints, are acceptable in principle…" (1/2006 para 54)

He submits that the latter reference to rural sites being "acceptable in principle" represents a significant shift of emphasis in Departmental policy.

41. How significant (if at all) the change is in practice can only be tested in future cases. There was certainly no evidence before the inspector or before us that the change has in fact led to the release of new sites, in the Wychavon area or anywhere else, nor to undermine the inspector's comment (on the evidence before him) that there was "no indication that searching over a wide area would be more fruitful". In any event, Mr Marshall's evidence falls far short of establishing that this was a substantial part of the council's case at the inquiry, so that the decision was legally defective in failing to deal with it.

Precedent

42. Finally I should comment briefly on the authority's concern, in which the judge saw some "force" (para 26) that the inspector's decision if upheld might set an undesirable precedent for gypsies or travellers seeking temporary permissions in the Green Belt. I understand the concern, but I do not think it is for the court to provide a remedy. The legal and policy framework which I have discussed leaves significant discretion to inspectors at both general and specific levels. It is unsurprising, albeit perhaps unhelpful to local planning authorities, that the results may not always be consistent. But that is not itself indicative of illegality or irrationality.

43. The court's task is to enforce the law, not to fill in gaps in national policy. Recent House of Lords decisions in relation to asylum cases and other contexts have cautioned against undue intervention by the courts in policy judgments by expert tribunals within their areas of specialist competence:

> "Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently." (*AH(Sudan) v Secretary of State* [2007] UKHL 49 para 30, per Baroness Hale).

In my view the same reticence should apply in considering the decisions of inspectors on issues of planning judgement (as indeed the *South Bucks* case exemplifies). Responsibility for providing consistent policy guidance lies with the Secretary of State. If the present guidance is insufficiently clear or complete, it is to her that complaints should be addressed.

44. That also has consequences for the question of precedent. I would also repeat the comment I made, again in an asylum case:

> "Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case… The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law… Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future…" (*Mukarkar v Secretary of State* [2006] EWCA Civ 1045)

45. The same comments may be applied *mutatis mutandis* to the position of local authorities in respect of inspectors' decisions, at least until the Secretary of State decides to provide more specific national guidance (perhaps through an amended circular or a called-in decision) on the issues of principle arising in this case,

Conclusion

46. For these reasons I would allow the appeal and restore the inspector's decision, and his grant of permission.

Lord Justice Wilson :

47. I agree.

Master of the Rolls :

48. I also agree.