Neutral Citation Number: [2008] EWCA Civ 1010

Case No: C1/2007/2282/QBACF

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
(MR JUSTICE KEITH)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/09/2008

Before:

PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE SCOTT BAKER
and
SIR ROBIN AULD

- -

Between:

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL	**Appellant**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**First Respondent**
-and-	
ARCHIE BROWN	**Second Respondent**
-and-	
JULIE BROWN	**Third Respondent**

- -

(Transcript of the Handed Down Judgment of
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- -

Robert McCracken Q.C and Saira Kabir Sheikh (instructed by **Sharpe Pritchard**) for the **Appellant**
James Strachan (instructed by **The Treasury Solicitor**) for the **First Respondent**
Marc Willers (instructed by **Community Law Partnership)** for the **Second Respondent**

Hearing date: 26 June 2008

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Judgment

Lord Justice Scott Baker :

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 s.288 of the Town and Country Planning Act 1990 ("the 1990 Act").

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 s78 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

3. The Browns are gypsies. They come from gypsy 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 eleven 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 L.J. However, at an oral hearing before Hallett L.J on 8 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 paragraph 34 of his judgment reciting paragraph 74 of the inspector's determination, that:

> "In seeking to determine the availability of alternative sites for residential gypsy 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. S.57 of the 1990 Act 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. (s.55).

9. A person may apply to a local planning authority for planning permission (s.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 (s.70(1)).

10. S.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. S.38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") provides that:

> "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."

12. S.78 of the 1990 Act 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.

S.79(1) provides:

> "(1) On an appeal under s.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);

(c) 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. S.288 of the 1990 Act provides:

"(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 or…..

he may make an application to the High Court under this section."

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

15. It is necessary to make the following general observations about s.288.

(i) A decision may only be challenged on ordinary administrative law grounds. *Seddon Properties Ltd v Secretary of State* (1978) P + CR 26.

(ii) 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 parte Woods* [1997] JPL 958.

(iii) 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* [1995] 1WLR 759.

(iv) A decision letter must be read in good faith, and references to polices must be taken in the context of the general thrust of the reasoning. 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* [1993] 1PLR 80 and *Clarke Homes Ltd v Secretary of State* (1993) 66 P + CR 263.

(v) 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* (1995) 71 P + CR 309.

(vi) 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] UKHL 33.

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:

> "(i) Whether, and the extent to which, the development complied with the criteria within Local Plan Policy HG 23.
>
> (ii) The provision of and need for additional gypsy sites in the district.
>
> (iii) The personal circumstances of the Brown family.
>
> (iv) 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 HG 23 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 gypsy 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 sites, especially at Chesterton Fen Road have only partially eased the situation there. The Council accept (paragraph 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 gypsy use on land which fails to meet the requirements of Local Plan HG23, the clear evidence of currently unmet need at a local level and the recent quantative 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."

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

21. At para 50 the inspector considered newly issued Government Guidance in para 33 of Circular 01/06 and the requirement not just to identify gypsy 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 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 Policy HG23.

22. The inspector dealt with the third issue namely the personal circumstances of the Brown family at paras 53 – 65. She said this 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 was the constant topic of conversation amongst the indigenous gypsies on Smithy Fen from around 2002. My own experiences of gypsy inquiries in East Cambridgeshire (May 2004) and Huntingdonshire (January 2006) would support the position that in E. Cambs all three local Council-owned gypsy 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."

23. She recorded that Mrs Brown had asked Mr Duncan, who regularly undertook the gypsy count for South Cambridgeshire, was well known to them, 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 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 gypsy 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 gypsy 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. The case of *Simmons*, 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 course it could not be ruled out and the hardship to the family would be unimaginable.

26. The inspector's overall conclusions are in 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 gypsy 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 local area. However, against this had to be weighed other material considerations. These were:

- The clear evidence of a significant under supply of gypsy sites in the District and wider area which was unlikely to be resolved for several years.

- 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.

- The absence of any evidence to suggest that a suitable and affordable alternative site would become available to the family in the foreseeable future.

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 para 39 of his judgment where he said:

> "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 gypsy lifestyle. None of the family had ever lived in a house and this was not an appropriate alternative option.

29. Mr McCracken Q.C, for the appellant, 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 appellant relied on three. Keith J. found that none of them supported the appellant'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 ALL ER 300. 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.302 F-G 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 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. (as he then was) 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 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* was a Green Belt case and at that time neither s38(6) of the 2004 Act or its predecessor had become part of our law. As 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* establishes is that whether the developer is required to justify why he should be allowed to develop the site depends upon the circumstances.

33. The third case was *First Secretary of State v Simmons* [2005] EWCA Civ 1295. That was another Green Belt case in which para 3.1 of Planning Policy Guidance 2 (1995) required very special circumstances to justify inappropriate development. Pill L.J. said at para 22:

> "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 *Simmons* as adding nothing to the argument because, like *Trusthouse Forte,* it was a case about development within the Green Belt.

34. Mr McCracken further relies on *McCarthy v Secretary of State for Communities and Local Government* [2006] EWCA (Admin) 3287. That case concerned the land at Smithy Fen which the Browns had left in 2004. *McCarthy* was not drawn to the attention of the judge. At para 15 in *McCarthy* Judge Gilbart Q.C, who was sitting as a Deputy High Court Judge, said:

> "15.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 Q.C. 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 v Edwards* [1994] 1 PLR 62 (CA) 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."

16. 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.

17. 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 2004 Act. He found that the grant of permission would make a significant contribution to meeting the general need for sites. His conclusion at paragraph 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 learned 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 v Edwards* [1994] PLR 62 (CA) 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 that 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 Gilbart 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 s38(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 first respondent, advanced four propositions.

- The inspector was correct in her analysis at paragraph 74. Planning applications must be decided in accordance with the Development Plan unless material considerations indictate otherwise. The weight to be given to a material consideration is for the decision maker.

- The decision in the Smithy Fen appeal does not show any contrary policy.

- Even if the Smithy Fen appeal did manifest a different approach it is not a difference in policy.

- The debate is in any event sterile 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 *McCarthy*/*Smithy Fen* case and that that needed explanation and justification. Mr McCracken points out that the *Smithy Fen* decision was only a few months earlier than the inspector's decision in the instant case. It involved an application by gypsies 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 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* (1993) 65 P + CR 137, 145.

39. The judge dealt with this at paras 40 and 41 of his judgment. He referred to the inspector's report in the Smithy Fen case, saying para 7.40 was 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 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 extending to different areas all around the country. They have not searched widely for sites."

40. Keith J. said he did not think this showed the inspector was requiring *the appellant* to prove that no alternative sites were available. What he said was that it was a case where *the evidence* established that no 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 Smithy Fen 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

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 s.288 of the 1990 Act. This was an exceptional case where the personal circumstances of the Browns 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 s.38(6) of the 2004 Act. The grant of planning permission subject to the conditions cannot be faulted.

43. I would dismiss the appeal.

Sir Robin Auld:

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

The President:

45. I agree.