Moore *v* Secretary of State: The Consequences for Gypsy and Traveller Planning

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Initial history

1. Charmaine Moore a Romani Gypsy and a single mother of 3 dependent children. She and one of her daughters are disabled. She owns and occupies land in the London Borough of Bromley. In 2010 she applied for planning permission to live on her land. That application has still to be determined finally. The application was a modest one *"change of use – private Gypsy and Traveller Caravan Site comprising 1 pitch, accommodating one mobile home and one touring caravan".* She has never sought more.

2. As is its practice, Bromley LBC rejected her application. She applied to quash this. An inspector rejected her appal, but this rejection was quashed by Cox J in the High Court.[1] The Secretary of State unsuccessfully appealed against this to the Court of Appeal.[2]

3. In the normal course of events the matter would have gone back to a different inspector who would have redetermined the planning appeal bearing in mind what Cox J and the Court of Appeal had said. Bromley did not wait for did not await the redetermination, but issued 2 enforcement notices. The Claimant appealed these.

4. The original planning appeal and the enforcement notice appeals were now back with the planning inspectorate. An inquiry that would deal with these was scheduled for 18th and 19th February 2014.

The written ministerial statements

5. Meanwhile on 1st July 2013 the Local Government Minster, Brandon Lewis issued a written ministerial statement (WMS1).

"The Secretary of State wishes to make clear that, in considering planning applications, although each case will depend on its facts, he considers that the single issue of unmet demand, whether for traveller sites or for conventional housing, is unlikely to outweigh harm to the green belt and other harm to constitute the 'very special circumstances' justifying inappropriate development in the green belt.

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1 [2012] EWHC 3192 (Admin).

2 [2013] EWCA Civ 1194, [2014] JPL 362.

The Secretary of State wishes to give particular scrutiny to traveller site appeals in the green belt, so that he can consider the extent to which Planning policy for traveller sites is meeting this government's clear policy intentions. To this end he is hereby revising the appeals recovery criteria issued on 30 June 2008 and will consider for recovery appeals involving traveller sites in the green belt.

For the avoidance of doubt, this does not mean that all such appeals will be recovered, but that the Secretary of State will likely recover a number of appeals in order to test the relevant policies at national level. The Secretary of State will apply this criteria [sic] *for a period of 6 months, after which it will be reviewed."*

6. Before WMS1 the criterion for recovering appeals issued in 2008 had been where the proposal was considered to be *"significant development in the Green Belt"*. Not surprisingly, this did not included one pitch single-family Gypsy caravan sites.

7. In May 2013 an internal memorandum advised recovering between 3 and 6 Gypsy and Traveller cases, not to restrict the grant of planning permissions, but *"to send clear messages in the decision letters in relation to the importance of effective provision in the Local Plan (or at least significant progress towards getting provision in place)"* Mr Lewis did not follow this advice or take any other step to assist in sending a clear message about effective provision.

8. In early July 2013 Peter F. Burley, the then Chief Planning Inspector at the Planning Inspectorate wrote a letter to Mr Lewis which, among other things pointed out that:

- notification *"should not… be used as an avenue for the recovery of appeals where Ministers do not agree with the planning judgement being exercised by the appointed inspector."*
- the recovery of jurisdiction had been *"exercised selectively, and then only under one of the published recovery criteria" and that less than 1% of appeals each year [were] recovered"*;
- in 5/13, 17 cases had been selected for consideration by Ministers and that it was agreed that *"the decisions on the remaining cases would be issued"*;
- the understanding had been that Mr Lewis "did not wish to recover **all**[3] traveller appeals in the Green Belt – a point [Mr Lewis] made clear in the Written Ministerial Statement on 1 July – the normal recovery criteria would apply;
- there was *"a recent instruction from the secretary of state's office"* to hold *"back the decision"*;

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[3] The Chief Planning Inspector's emphasis.

- *"continual recovery would lead to significant pressure to recover many, if not all, traveller appeals in the Green Belt – contrary to* [Mr Lewis'] *statement"*
- he would continue to apply the Protocols as normal and notify Ministers in advance of all successful appeals involving travellers sites in England"

9. The 6-month period mentioned in WMS1 ended on 1st January 2014. On 17th January the Minister on behalf of the Defendant issued another written ministerial statement (WMS2). This included:

"The Secretary of State remains concerned about the extent to which planning appeal decisions are meeting the government's clear policy intentions, particularly as to whether sufficient weight is being given to the importance of green belt protection. Therefore, he intends to continue to consider for recovery appeals involving traveller sites in the green belt."

10. This was causing great delay to Gypsy and Traveller Green-Belt cases. In the past they would almost always be dealt with in 8 weeks. Now almost all were taken at least a year and some over two years.

The recovery of Ms Moore's appeals

11. On 11th February 2014, just 7 days before the inquiry was due to start, the Secretary of State recovered the Claimant's planning and enforcement appeals, *i.e.* he decided that he, not the planning inspector would decide them. This is an exceptional step contrary to normal practice. The sole reason was: *"this is an appeal involving a Traveller site in the green belt"*.

12. The inquiry took place on 18th and 19th February 2014 with the inspector as a reporting inspector, not a decision-maker. Almost all inspectors' decisions are received within 8 weeks of the close of an inquiry; so that, had the inspector remained the decision-maker, it is almost certain that the decision would have been received no later than 16th April. The Secretary of State has never said when he received the inspector's report, but he did say on 14th July that it had been received and was under active consideration.

13. Ms Moore and a Ms Coates brought judicial review proceedings challenging the Secretary of State's recovery decisions. Such proceedings can only be brought with permission of a High Court judge – Singh J gave this. Because of the importance of the case, the Equality and Human Rights commission was given permission to intervene. The matter was allocated to the Planning Court, a part of the High Court.

14. Gilbart J heard the case. In his judgment[4] he found against the Secretary of State on three grounds, which may be summarised as discrimination, breach of the equality duty that public-sector bodies have and breach of the human right to have civil rights determined within a reasonable time.

Discrimination

15. The type of discrimination that had to be considered was indirect discrimination. This was because the acts of the Secretary of State were not targeted solely at an ethnic group but at Gypsies and Travellers in general. This includes both ethnic minorities (mainly Romany Gypsies and Irish travellers) and non-ethnic Travellers (essentially New Travellers). Although it applied to some non-ethnic Travellers, it applied disproportionately to ethnic Gypsies and Travellers. Indirect discrimination occurs in the circumstances set out in Equality Act 2010 ("EA 2010") s 19. Gilbart J stated that *"the test of whether* [a provision, criterion or practice] *is discriminatory is its effect, not its purpose"*. In other words it was not necessary to prove that the Secretary of State intended to discriminate. He continued, *"A policy which imposes greater delays on a racial group's planning appeals than it does on others who also wish to set up a habitation in the Green Belt is patently discriminatory, subject of course to whether the SSCLG can show it to be a proportionate means of achieving a legitimate aim."*

16. It was common ground that delay was caused to the determination of the appeals of Mrs Moore, Ms Coates and other ethnic Romany Gypsies and Travellers and, as Gilbart J said, *"That must constitute a disadvantage"*. The contentious issue was whether the Secretary of State could show that it was a proportionate means of achieving a legitimate aim. The learned judge approach this by applying the test in the House of Lords authority of De Freitas *v* Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing:[5] In order to justify his recovery practice, the Defendant had to demonstrate:

i. That the objective is sufficiently important to justify limiting a fundamental right;
ii. That the measure is rationally connected to the objective;
iii. That the means chosen are no more than is necessary to accomplish the objective.

17. Applying that to policy he held *"…in the context of a policy, if a choice exists between a method which discriminates against an ethnic group, and one which does*

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4 [2015] EWHC 44 (Admin)

5 [1999] 1 AC 69, 80.

not, or one which advances the specified objectives in s 149,[6] *and one which does not, there must be good proportionate reason advanced by the policy maker to choose the former pair and not the latter."*

18. Applying that approach Gilbart J clearly had no doubt that the Secretary of State and his Minister had failed to act proportionally:

… the Secretary of State and his Minister have in my judgment fallen far short of showing that the recovery of all such appeals was a proportionate way of achieving his objective. Indeed a notable feature of the evidence for the SSCLG is that it shows that his officials repeatedly advised against the course being followed, and recommended the course of selecting a few cases so that a clear message could be given, while drawing attention to the increasing delays being caused to interested parties. Yet there is an absence of any evidence from the SSCLG in these proceedings of why the Minister or the SSCLG thought that their preferred approach was proportionate, and why none of the alternatives being suggested to them would not meet the objectives they had identified.

19. He concluded: *"… the application of WMS1 was in fact a practice whereby all appeals were recovered… the practice therefore adopted after its publication was discriminatory within the meaning of s 19."*

Public-sector equality duty

20. The Public-sector equality duty ("PSED") arises under Equality Act 2010 s149, which has remained unaltered since it came into effect on 5th April 2011. It states, among other things:

(1) A public authority must, in the exercise of its functions, have due regard to the need to —

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. …

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to —

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

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6 Paragraph 20 below.

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low. …

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to —

(a) tackle prejudice, and

(b) promote understanding.

(7) The relevant protected characteristics are — … race …

21. Gilbart J reminded himself of the principles that McCombe LJ stated in Bracking v Secretary of State for Work and Pensions: [7]

(1) Equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision-maker in seeking to meet the statutory requirements.

(3) The relevant duty is upon the decision-maker personally. What matters is what he or she took into account and what he or she knew. Thus, the decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice.

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision.

(5) These and other points were reviewed in R (Brown) *v* Secretary of State for Work and Pensions,[8] as follows:

i) The public authority decision maker must be aware of the duty to have *"due regard"* to the relevant matters;

ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

iii) The duty must be *"exercised in substance, with rigour, and with an open mind"*. It is not a question of *"ticking boxes"*; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

iv) The duty is non-delegable; and

v) The duty is continuing one; and

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7 [2013] EWCA Civ 1345.

8 [2008] EWHC 3158 (Admin), [2009] PTSR 1506.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.

(7) Officials reporting to or advising decision-makers, on matters material to the discharge of the duty, must not merely tell the decision maker what he or she wants to hear but they have to be rigorous in both enquiring and reporting to them.

(8) It is for the Court to decide for itself if due regard has been had, but providing this is done it is for the decision maker to decide what weight to give to the equality implications of the decision.

(9) The duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consideration with appropriate groups is required.

(10) The duty to have due regard concerns the impact of the proposal on all persons with the protected characteristic and also, specifically, upon any particular class of persons within a protected category who might most obviously be adversely affected by the proposal.

22. In one sense, this was a straightforward case. As Gilbart J said *"…this in truth not a case whether the regard the Secretary of State and his Ministers had was "due regard." The fact is that, on the evidence filed by the SSCLG, they had no regard at all."*

"I am therefore in no doubt that there has been a failure to comply with the PSED. It is not a case of the SSCLG and his Ministers addressing it but falling short; it is one of not addressing it all, and not doing so on either occasion when changes in policy were being considered. Even if I thought that the SSCLG and his Ministers had considered the issue, I would still have found on the evidence before me that they had not had due regard. That is because, as I have already concluded, the steps taken… have not been shown to be proportionate."

"In devising and considering a policy or practice, the PSED requires actual consideration, and the Court of Appeal expects evidence of a structured attempt to focus upon the details of equality issues. I reiterate that that principle applies as much to Ministerial consideration and decisions as it does to those of other public bodies. The disadvantaging of a racial group (to take the characteristic in issue here) without having a legitimate aim or without having a proportionate approach to its

achievement, or a failure to have due regard to issues of equality, is no more or less objectionable if it is occasioned by Ministerial decision making."

The human right to have civil rights and obligations determined within a reasonable time.

23. The European Convention on Human Rights article 6(1) begins: *"In the determination of his civil rights and obligations…, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"*

24. Gilbart J was able to deal with this matter briefly:

"Here I consider that the claimants are on strong ground. To anyone with experience of development control and planning inquiries, it is remarkable that cases involving a modest amount of evidence, and typically taking two days at most, could then require consideration for in excess of 6 months, let alone the 10 months that has elapsed in Mrs Coates' case. I recognise that Mrs Moore's case has involved some complexities, but there is no evidence at all that it was anything but atypical. But as Mr Watson's evidence showed with clarity, it is the effect of the recovering of all cases which was expected to, and has, caused significant delays in determination. It was not the issues raised by any of the cases which caused the delays but the Ministerial decision to recover them all for determination. No evidence has been put forward by the SSCLG to show that the delays were necessary in Travellers' cases, and it must again be observed that although WMS1 sought to stress the same substantive policy message for cases in the Green Belt relating both to Travellers' housing and "conventional" housing, yet appeals of the latter kind have not been delayed whereas appeals of the former kind have been delayed, and considerably so. The pitches concerned (and certainly so in the Claimants' cases) contain their homes where they live, or wish to live, with their children. The SSCLG has failed to show that the delays caused to the determination of the appeals was a proportionate response to the issue of giving the policy "steer." It follows that the appeals have not been determined within a reasonable time."

Consequences (1) Existing recovery decisions

25. The immediate concern of those who advise Gypsies and Travellers has been what to do about Gypsy and Traveller Green-Belt appeals that have been recovered. These can be divided into three categories: (1) Those that were decided some time ago, that is more that the statutory period under the Town and Country Planning Act 1990 Part XII for a High Court challenge or appeal; (2) those that are decided within those periods; and (3) those that are still be delayed because of the recovery. Within

categories (1) and (2) there will be a distinction between those where the Secretary of State has adopted his inspector's recommendation – in such cases there may be little or nothing to be gained from litigation. However in many cases the Secretary of State took a less favourable approach than his inspector, *e.g.* refusing permission where a permission of some sort had been recommended, granting a shorter temporary permission where a longer period had been recommended, or granting a temporary permission where a permanent permission had been recommended.

26. In the case of those that were decided some time ago, the obvious remedy is judicial review. Such applications have been made and at least 10 cases settled by the Secretary of State conceding to judgment and paying costs.

27. If a decision has been made in the last few weeks a judicial review may still be appropriate. However in the case of an enforcement notice appeal, a s289 appeal is the only way to stop the enforcement notice taking effect. If faced with an outright rejection of an enforcement notice appeal, the appellant will be guilty of a criminal offence unless there is a s289 appeal. Clients must be very clearly warned of this if they are considering not appealing under s289. Advisers should be careful not to say anything that could be interpreted as (or twisted to) meaning that our clients should break the criminal law. Section 289(7) should be noted, *"(7) In this section "decision" includes a direction or order, and references to the giving of a decision shall be construed accordingly."* This should enable s289 to be used both to challenge the final decision and to challenge an earlier recovery decision[9] (although the latter will need to be coupled with an application to extend time).

28. Where a final decision has not been issued, the situation will be the same as in Moore: judicial review is the appropriate remedy. If there has been delay, this will need to be justified. The High Court is looking for a selection of test cases that show a spread of the type of cases that arise from the Moore decision. Some inspectors have been adjourning appeals for the matter to be resolved.

29. While litigation is pending, applicants and appellants may find it helpful to submit the little weight should be given to Secretary of State's decisions where he has departed from an inspector's recommendation in a Gypsy and Traveller Green-Belt appeal.

(2) The PSED

30. It is clear from Gilbart J's carefully reasoned judgment that bodies subject to the public-sector equality duty must treat it seriously. It will not be enough merely to

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[9] This was the provisional view of John Howell QC sitting as a High Court Judge at the permission hearing in Bill Smith *v* SSCLG and Hillingdon LBC, CO/3941/2014, 29th January 2015.

assert that the body or individual concerned has borne the duty in mind. It imposes a real obligation that, in any case where persons subject to a protected characteristic may be disadvantaged, needs to be treated seriously and addressed. In planning this will apply to the Secretary of State, Ministers, local planning authorities, inspectors and examiners. (The public bodies to which section 149 applies are listed in the Act's Schedule 19, while schedule 18 gives exceptions to the duty – these exceptions are unlikely to apply to matters relating to planning and race discrimination.)

31. In the longer term it may well be that, as the Secretary of State's recovery practice becomes history, Gilbart J's finding on the PSED would have the most long-lasting effect of any part of his judgment. The principles he applied to a planning matter are not new; but, at least in some circumstances, in planning the duty has been seen as something of a "tick-box" exercise, rather than something that imposed substantial obligations. While all aspects of the judgment on s149 should be borne in mind, it will often be particularly helpful to remember that the duty must be *"exercised in substance, with rigour, and with an open mind"* and that it is not a question of *"ticking boxes"*. Rather there should be *"evidence of a structured attempt to focus upon the details of equality issues".* Many past officer's reports would fail this, as would some inspector's and examiner's reports and decisions.

(3) Delay

32. Secretary of State's decisions in planning have been notorious for their delay. Inspectors are expected to produce their reports in enough time for them to be checked before release within 8 weeks. Even if a further 8 weeks is allowed for the Secretary of State to consider an inspector's report (and that may be generous), this total of 16 weeks is very much less than many Secretary of State's decisions. By no means all of these involve matters of exceptional complexity. It is therefore likely that others involved in recovered appeals or called-in applications have involved a breach of article 6(1). Such breaches may give rise to losses for which damages are awarded and if these losses involve the loss of profits from a substantial enterprise, they may well be large. Of course, many recovered appeals or called-in applications are much more complicated than those relating to a single family Gypsy pitch, but that does not mean that there should be no limit to the time that the Secretary of State takes to deal with them. In this respect the European Court of Human Rights' judgment in *Sporrung and Lönnroth v Sweden*,[10] where a breach was help to exist for many years of delay in a complex capital-city compulsory-acquisition scheme and

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[10] 5 EHRR 35.

damages fixed on the basis that 4 years would have been enough, may sometimes assist. There will be cases where article 6(1) delay is pleaded in addition to other claims and a claim for damages added.

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