The Planning Inspectorate

Appeal Decision

by Michael R Lowe **BSc (Hons)**

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 29 November 2017

Appeal Ref: FPS/G1250/14A/1

Appeal by Antonio Perez Jimenez against a decision of Bournemouth Borough Council

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Bournemouth Borough Council (the Council) not to make an Order under section 53(2) of that Act.
- The Application by Antonio Perez Jimenez, dated 18 March 2017, was refused by Bournemouth Borough Council on 10 May 2017.
- The Appellant claims that 3 appeal routes between Tedder Road and Moorside Road, Bournemouth, should be added to the definitive map and statement for the area as footpaths.

Decision

1. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Bournemouth Borough Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area by adding the two claimed footpaths to the west of footpath U25 as set out in the application dated 18 March 2017, but not the claimed footpath to the east of footpath U25.

2. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Preliminary Matters

3. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine the appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.

4. The appeal has been decided on the basis of the papers submitted.

Main issue

5. In considering the evidence and the submissions, I take account of the relevant parts of the 1981 Act and court judgments.

6. Section 53(3)(c)(i) of the 1981 Act states that an order should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land to which the map relates. In considering this issue there are two tests to be applied, as identified in the case of R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994] 68 P & CR 402, and clarified in the case of R v Secretary of State for Wales ex parte Emery [1996] 4 All ER 1.

Test A: Does a right of way subsist? This requires clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that a right of way subsists? If there is a conflict of credible evidence but no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then a public right of way has been reasonably alleged.

For the purposes of this appeal, I need only be satisfied that the evidence meets test B.

7. Section 31 of the Highways 1980 Act (the 1980 Act) provides that a way may be presumed to have been dedicated as a highway if it has actually been enjoyed by the public "as of right" (without force, secrecy or permission) and without interruption for a full period of 20 years calculated retrospectively from the date on which the right of the public to use the way is brought into question. Landowners can, however, take steps to negate the presumed intention to dedicate a right of way.

8. A highway may be created at common law by the dedication of the owner with the acceptance of and use by the public. Dedication may be express or implied. Dedication is inferred where the acts of the owner point to an intention to dedicate. Use by the public of a way "as of right" for a sufficient period could be evidence of an intention of the landowner to dedicate a public right of way. The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. User, which is acquiesced in by the owner, is "as of right". However, user which is with the licence or permission of the owner, is not "as of right". Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence. Before there can be a dedication or implied dedication of a public right of way there must be an owner of the land legally capable of dedicating the way as public.

Reasons

9. The appellant seeks to establish three public footpaths on land between Tedder Road and Moorside Road. The land may be described as back-land and is crossed by public footpath U25. Two of the claimed footpaths are to the west of footpath U25 and the third is east of footpath U25. The westerly footpaths are formally laid out and surfaced in asphalt, whilst the easterly route is unmade but defined by the wear of regular use.

10. Evidence has been submitted in the form of statements of local residents consistent with their use of the claimed ways over a period in excess of 20 years. Such user is not disputed by the Council, which is both the surveying authority for the definitive map of public rights of way and the owner of the land.

11. The Council acquired the land concerned in 1946 as part of Kitson post-war housing scheme, a local authority housing project under the Housing Act 1936. The Council's statement of case describes the land as "left undeveloped, which serves as open space". The Council now wishes to develop the land by the provision of 14 dwelling houses and it is that proposal that has led to the claim by some local residents for additional public footpaths.

12. In 2014 the Supreme Court[1] considered the issue of whether the use of land by the public for recreational purposes was "as of right" where land is provided and maintained by a local authority pursuant to section 12(1) of the Housing Act 1985 or its statutory predecessor, the Housing Act 1936. The case concerned the registration of a village green under the Commons Act 2006, but there is some commonality with public rights of way cases that are also dependent upon public user "as of right".

13. The Council's case is that the public has used the land concerned "by right". In the Barkas case the distinction was explained by Lord Neuberger:

> 14. The origin of the expression "as of right" in the definition of "town or village green" in section 22(1) of the Commons Registration Act 1965, which is effectively for present purposes the statutory predecessor of section 15(2) of the 2006 Act, was authoritatively discussed by Lord Hoffmann in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 349D-351H. As he said, it originates from the law relating to the acquisition of easements by prescription. Before examining what Lord Hoffmann said, it is, I think, helpful to explain that the legal meaning of the expression "as of right" is, somewhat counterintuitively, almost the converse of "of right" or "by right". Thus, if a person uses privately owned land "of right" or "by right", the use will have been permitted by the landowner – hence the use is rightful. However, if the use of such land is "as of right", it is without the permission of the landowner, and therefore is not "of right" or "by right", but is actually carried on as if it were by right – hence "as of right". The significance of the little word "as" is therefore crucial, and renders the expression "as of right" effectively the antithesis of "of right" or "by right".

14. Was the public use in the Barkas case "as of right"? In the leading judgment Lord Neuberger said:

> 21. In my judgment, this argument is as compelling as it is simple. So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise. In Sunningwell at pp 352H-353A, Lord Hoffmann indicated that whether user was "as of right" should be judged by "how the matter would have appeared to the owner of the land", a question which must, I should add, be assessed objectively. In the present case, it is, I think, plain that a reasonable local authority in the position of the Council would have regarded the presence of members of the public on the Field, walking with or without dogs, taking part in sports, or letting their children play, as being pursuant to their statutory right to be on the land and to use it for these activities, given that the Field was being held and maintained by the Council for public recreation pursuant to section 12(1) of the 1985 Act and its statutory predecessors.
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> 22. It is true that this case does not involve the grant of a right in private law, which is the normal issue where the question whether a use is precario arises. Indeed, the fact that the right alleged in this case is not a conventional private law right, but a public law right, was rightly acknowledged by Ms Lieven. Thus, it is a right principally enforceable by public rather than by private law proceedings. It is also a right which is clearly conditional on the Council continuing to devote the Field to the purpose identified in section 12(1) of the 1985 Act (and it is unnecessary for present purposes to go into the question of what steps the Council would have to take to remove the Field from the ambit of the section). Accordingly, the right alleged by the Council to be enjoyed by members of the public over the Field is not precisely analogous to a public or private right of way. However, I do not see any

[1] R (on the application of Barkas) v North Yorkshire County Council and another [2014] UKSC 31.

reason in terms of legal principle or public policy why that should make a difference. The basic point is that members of the public are entitled to go onto and use the land – provided they use it for the stipulated purpose in section 12(1), namely for recreation, and that they do so in a lawful manner.

23. It is worth expanding on this. Section 12(1) of the 1985 Act and its statutory predecessors bestow a power on a local (housing) authority to devote land such as the Field for public recreational use (albeit subject to the consent of the Minister or Secretary of State), at any rate until the land is removed from the ambit of that section. Where land is held for that purpose, and members of the public then use the land for that purpose, the obvious and natural conclusion is that they enjoy a public right, or a publicly based licence, to do so. If that were not so, members of the public using for recreation land held by the local authority for the statutory purpose of public recreation would be trespassing on the land, which cannot be correct. Of course, a local authority would be entitled to place conditions on such use – such as on the times of day the land could be accessed or used, the type of sports which could be played and when and where, and the terms on which children or dogs could come onto the land. Similarly, the local authority would clearly be entitled to withdraw the licence permanently or temporarily. Thus, if and when it lawfully is able, and decides, to devote the land to some other statutorily permitted use, the local authority may permanently withdraw the licence; and if, for instance, when the land is still held under section 12(1), the local authority wants to hold a midsummer fair to which the public will be charged an entrance fee, it could temporarily withdraw the licence.

24. I agree with Lord Carnwath that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right", simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for twenty years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights.

15. This case in Bournemouth is similar to that of Barkas in North Yorkshire in that both concern land acquired under the Housing Act 1936 and now consolidated into the Housing Act 1985. However, in the Barkas case the land in question was clearly allocated as "recreation grounds" pursuant to section 80(1) of the 1936 Act, with the consent of the Minister as required by that section. In the present case the land was set out (or so it would appear) under section 79 of the 1936 Act (now s13 of the 1985 Act). Section 79(1)(a) of the 1936 Act enabled a Council to lay out and construct "public streets or roads and open spaces" on land acquired or appropriated for housing.

16. Footpath U25 appears to have originated and been laid out at the time of the development in the late 1940s, whilst the two claimed footpaths to the west of U25 are said by the Council to have been made-up in asphalt at a later date but before 1987. It therefore appears to me that, had the claimed footpaths crossed land set out under the Housing Act as recreational land, with the consent of the Minister, then public use of the claimed paths would have been attributed to use "by right". The same would also be the likely conclusion to

land set out as public open space (See Lord Neuberger para. 24 and Lord Carnwath at paras. 64 and 65, in the Barkas case).

17. However, where land is owned by a public authority but is not considered to be set out for recreational or public open space purposes then public user need not be explained by any form of implied permission and user "by right". That is demonstrated by the Trap Grounds case[2]. It is also important to note that the Housing Act makes provision for land acquired for housing to be set out as public streets or roads. In my view it is not necessary for any formal appropriation to highway purposes and all that is necessary for public highways to be established is for the Council to set out such ways de facto (see for example para 42 of the Barkas case). There is a distinction to be drawn between recreational type land use and land set out as a public highway. Indeed, the housing estate concerned is served by roads and footpaths and such ways are apparently public highways that originate from the 1940s housing development. The origin of such public highways can be attributed to dedication by the Council and acceptance by the public under common law principles.

18. In the light of the above, are the three claimed footpaths part of the land laid out by the Council as open space or as public highways? In the case of Oxfordshire County Council v Oxford City Council [2004] EWHC 12 Ch. Lightman J considered the alternatives of whether a public right of way or village green was being asserted:

> 102. The issue raised is whether user of a track or tracks situated on or traversing the land claimed as a Green for pedestrian recreational purposes will qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a Green. If the track or tracks is or are of such character that user of it or them cannot give rise to a presumption of dedication at common law as a public highway, user of such a track or tracks for pedestrian recreational purposes may readily qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a Green. The answer is more complicated where the track or tracks is or are of such a character that user of it or them can give rise to such a presumption. The answer must depend how the matter would have appeared to the owner of the land: see Lord Hoffmann in Sunningwell at pages 352H-353A and 354F-G, cited by Sullivan J in Laing at paras 78-81. Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential Green will ordinarily be referable only to exercise of a public right of way to the Green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential Green may be recreational use of land as a Green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a Green).

The judgement is not a precedent (the ruling was set aside by the House of Lords) but in my view the dictum of Lord Hoffmann is equally applicable here. Therefore the answer must depend upon how the matter would have appeared to the owner of the land. That test is an objective test - it is not a matter of the Council's view in retrospect.

[2] Oxfordshire County Council v Oxford City Council [2006] 2 AC 674

19. In my view the most logical explanation of the origin of the two claimed footpaths to the west of footpath U25 is that they were set out and dedicated by the Council as public footpaths and subsequently accepted by the public through user. The claimed footpath to the east of footpath U25 lacks any indication that the Council intended the route as a footpath and the user is explicable as use of public open space.

20. The Council has submitted that the dedication of a footpath would be incompatible with their ownership of land held for housing purposes as per section 31(8) of the 1980 Act. In my view that submission is contrary to section 79 of the Housing Act 1936 and subsequent consolidations.

Conclusion

21. The two claimed footpaths to the west of footpath U25 subsist as public footpaths in accordance with Test A. The claimed footpath to the east of footpath U25 cannot be substantiated.

22. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed in part.

Michael R Lowe

INSPECTOR