21 May 2014

PRESS SUMMARY

R (on the application of Barkas) (Appellant) v North Yorkshire County Council and another (Respondents) [2014] UKSC 31
On appeal from [2012] EWCA Civ 1373

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Reed, Lord Carnwath and Lord Hughes

BACKGROUND TO THE APPEALS

Helredale playing field ("the Field") is situated in Whitby, North Yorkshire, and is owned by Scarborough Borough Council ("the Council"). The issue raised in this appeal is whether the Field should be registered as a "town or village green" under section 15 of the Commons Act 2006.

The Field is approximately two hectares and was acquired in 1951 by the predecessor local authority of the Council, who maintained the Field as "recreation grounds" pursuant to section 80(1) of the Housing Act 1936, now section 12(1) of the Housing Act 1985. For at least the last fifty years, the Field has been used extensively and openly by local inhabitants for informal recreation. The Council arranges for the regular mowing of the grass and the marking out of the football pitch.

In October 2007 the Helredale Neighbourhood Council applied to the North Yorkshire County Council to register the Field as a town or village green under section 15 of the 2006 Act. Section 15 allows an application to register land as a town or village green where a significant number of inhabitants of the locality have "indulged as of right in lawful sports and pastimes on the land" for at least 20 years. An inquiry commissioned by North Yorkshire County Council concluded that, although a significant number of the inhabitants had indulged in lawful sports and pastimes on the land for at least 20 years, their use had not been "as of right". North Yorkshire County Council accordingly rejected the application to register the Field as a town or village green in October 2010. Christine Barkas, a member of the Neighbourhood Council, applied for judicial review of this decision. Her application was unsuccessful and the Court of Appeal unanimously dismissed her subsequent appeal. Ms Barkas now appeals to this court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Neuberger gives the main judgment, and Lord Carnwath gives a full supporting judgment. The other members of the Court agree with both judgments. The court rules that so long as land is held under a provision such as section 12(1) of the 1985 Act, members of the public have a statutory right to use the land for recreational purposes, and therefore use the land "by right" rather than "as of right".

REASONS FOR THE JUDGMENT

The issue

Where land is provided and maintained by a local authority pursuant to section 12(1) of the Housing Act 1985 or its statutory predecessors, is the use of that land by the public for recreational purposes "as of right" within the meaning of section 15(2)(a) of the Commons Act 2006 [**12**]?

The meaning of "as of right"

If a person uses privately owned land "of right" or "by right", the use is rightful because it has been permitted by the landowner. However, if the use of such land is "as of right", a number of cases relating to the acquisition of rights of way and other easements by prescription establish that it means that the use is without the permission of the landowner. Accordingly such use is not "of right" or "by right", but is carried on as if it were by right, hence "*as* of right". The significance of the word "as" is therefore crucial, making the expression "as of right" effectively the antithesis of "of right" or "by right" [**14**]. Rules of prescription have been created by a combination of statutory and common law under which the *de facto* enjoyment of land has to have been for twenty years "not by force, nor stealth, nor licence of the owner" before prescriptive rights are acquired. These three vitiating factors set out the circumstances in which it would have been reasonable to expect the owner to resist the exercise of the right [**15**].

Was the public use in this case "as of right"?

So long as land is held under a provision such as section 12(1) of the 1985 Act, 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 use "as of right" can arise. A reasonable local authority in the Council's position 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 [**21**].

Where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use, 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 decision to allocate the land for public use 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 [**24**].

The proceedings in Beresford

The decision in *Beresford v Sunderland City Council*, in which the House of Lords held that the public's use for more than 20 years of land maintained by the local authority with that authority's knowledge was "as of right", should no longer be relied on. It is clear on the facts in that case that the city council and its predecessors had lawfully allocated the land for the purpose of public recreation for an indefinite period, and that, in those circumstances, there was no basis upon which it could be said that the public use of the land was "as of right" rather than by right [**48-49**]. Lord Carnwath's concurring judgment analyses the "as of right" test in context and explores *Beresford* in greater detail [**51-87**].

References in square brackets are to paragraphs in the judgment