

R. v. SECRETARY OF STATE FOR THE ENVIRONMENT, ex p. BAGSHAW AND NORTON

QUEEN'S BENCH DIVISION (Owen J.): April 28, 1994

Footpaths—Definitive map and statement—Secretary of State refused to direct modifications to add public footpath and by-way—Judicial review—Whether Secretary of State erred in law—Wildlife and Countryside Act 1981, s. 53(3)(c)(i)—Whether right of way subsists or is reasonably alleged to subsist—Different evidential tests to be applied—Whether public right of way could end in a cul-de-sac in the countryside

Bagshaw and Norton had applied separately to their respective county councils for orders to modify the definitive maps and statements of the by-ways, public paths and rights of way in their areas. Bagshaw had sought to add a public footpath to the map, whilst Norton had sought to add a by-way, relying upon witness evidence of at least 20 years of uninterrupted use. Both Norton and Bagshaw appealed to the Secretary of State against the county councils' decisions not to make the orders for which they had applied. The Secretary of State considered that he should not direct the councils to make the order. In the case of Bagshaw, the Secretary of State agreed with the county council that Bagshaw had not provided "sufficient evidence" to support his claim and that the evidence was "irreconcilable" and as such no public right of way could reasonably be alleged to subsist. In the case of Norton, the Secretary of State considered that the evidence Norton submitted did not convince him that a presumption of dedication has arisen, that there was a need for "conclusive" proof, and that Norton had provided "insufficient evidence" to show that there was a public by-way along the claimed route.

Both Bagshaw and Norton applied to quash the decisions by way of judicial review on the basis that the Secretary of State had applied the wrong test in considering the evidence. Norton's case contained an added allegation that the Secretary of State had erred in law by not accepting the proposition that a public right of way, which ended in a cul-de-sac, could not exist in law in the countryside.

Held, allowing both applications and quashing the Secretary of State's decisions, that (1) under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, the tests which the county council and then the Secretary of State needed to apply were whether the evidence produced by the claimant, together with all the other evidence available, showed that either (a) a right of way subsisted or (b) that it was reasonable to allege that a right of way subsisted. On test (a), it would be necessary to show that the right did subsist on the balance of probabilities. On test (b), it would be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. Neither the claimant nor the court were to be the judge of that, and the decision of the Secretary of State was final if he had asked himself the right question, subject to an allegation of *Wednesbury* unreasonableness. The evidence necessary to establish that a right of way is reasonably alleged to subsist is less than that needed to show that a right of way does subsist. The Secretary of State had erred in law in both cases as he could not show that test (b) had been satisfied.

(2) In a case where the evidence from witnesses as to user is conflicting, if the right would be shown to exist by reasonably accepting one side and reasonably rejecting the other on paper, it would be reasonable to allege that such a right subsisted. The reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.

(3) There was no rule of law that you cannot have a right of way to a cul-de-sac in the countryside. The Secretary of State had made no error of law in this regard.

Cases referred to:

- (1) *Attorney-General v. Antrobus* [1905] 2 Ch. 188; 69 J.P. 141.
- (2) *Eyre v. New Forest Highway Board* (1892) 56 J.P. 517.
- (3) *Moser v. Ambleside Urban District Council* [1925] 89 J.P. 118.
- (4) *Poole v. Huskinson* [1843] 11 Meeson & Welsby 827.
- (5) *R. v. Cornwall County Council, ex p. Huntingdon and Another* [1992] 3 All E.R. 566; [1992] C.O.D. 223; (1992) 142 New L.J. 348; and [1994] 1 All E.R. 694.
- (6) *R. v. Isle of Wight County Council, ex p. O'Keefe* (1990) 59 P. & C.R. 283; [1989] J.P.L. 934.
- (7) *R. v. Secretary of State for the Environment, ex p. Simms and Burrows* [1991] 2 Q.B. 354; [1990] 3 All E.R. 490; [1990] J.P.L. 746; (1991) L.G. Rev. 464, C.A., reversing [1990] C.O.D. 37, D.C.
- (8) *R. v. Secretary of State for the Environment ex p. Smith & Deller*, May 5, 1993, CO/1128/9, Q.B.D.
- (9) *Rubinstein v. Secretary of State for the Environment* (1989) 57 P. & C.R. 111.

Legislation construed:

Wildlife and Countryside Act 1981 (c. 69), s. 53(3)(c)(i) and Schedule 14, para. 4. Section 53(3)(c)(i) is set out in the judgment below at p. 407. Paragraph 4 of Schedule 14 states:

- (1) Where the authority decided not to make an order, the applicant may, at any time within 28 days after service on him of the notice of the decision, serve notice of appeal against that decision on the Secretary of State and the authority.
- (2) If on considering the appeal the Secretary of State considers that an order should be made, he shall give to the authority such directions as appear to him necessary for the purpose.

Applications for judicial review of two decisions of the Secretary of State for the Environment. On February 11, 1992 the Secretary of State refused to direct Devon County Council to modify the definitive map for its area to include a public footpath which Bagshaw alleged should be added on basis of evidence of user. On January 6, 1992, the Secretary of State refused to direct Suffolk County Council to modify the definitive map to include a by-way open to all traffic in the Parish of Polstead. Mrs Norton had alleged that it was a by-way, relying on evidence of user and documentary evidence. Both county councils had refused the applications, and the claimants had appealed to the Secretary of State of the Environment under Schedule 14 to the Wildlife and Countryside Act 1981.

George Laurence, Q.C. for the applicants.
John Hobson and Reuben Taylor for the respondent.

OWEN J. Mr Bagshaw seeks judicial review of a decision of the Secretary of State for the Environment, dated February 11, 1992, and refusing to direct Devon County Council to make an order modifying its definitive map by adding as a public footpath the highway, shown coloured red on the plan attached to his application, in the parish of Dartmoor Forest within that county.

Mr Bagshaw's case was that user evidence of a former mine track indicated that it was used by the public as of right and without interruption until 1982 and this gave rise to a presumption of dedication. For the purposes of this application it is not necessary to examine that evidence in any detail nor to examine the evidence submitted to the county council against Mr Bagshaw's contention. At the time of giving their decision the county council clearly had in mind the decision of McPherson J. in *R. v. The Isle of Wight*

County Council, ex p. O'Keefe.¹ Mr Laurence, for Mr Bagshaw, has sought to place some gloss upon this decision and in particular has pointed out that *Rubinstein v. Secretary of State of the Environment*² has since been overruled; see *R. v. Secretary of State for the Environment, ex p. Simms and Burrows*.³ He also points out that *O'Keefe* itself has been held probably to have been wrongly decided albeit for quite other reasons: *R. v. Cornwall County Council, ex p. Huntingdon*.⁴ I was also referred to a decision of my own given last year *R. v. Secretary of State for Environment, ex p. Smith and Deller*.⁵ This was said to bear on the proper interpretation of "subsist or is reasonably alleged to subsist" in section 53(3)(c)(i) of the 1981 Act. However, that decision, which was concerned with other matters, does not, I consider, assist me one way or the other with what I have to decide here. However, I see no reason not to accept the judgment of McPherson J. that an order should not be made lightly. This statement, however, does not assist the respondent. More to the point, it is to be noted that in the county council's decision it was stated that:

The evidence of use from 1955 is thus completely irreconcilable and makes it difficult to be satisfied that a public right of way is reasonably alleged to exist.

It is on this irreconcilability and the respondent's attitude to it that Mr Laurence rests the main part of his case.

The Secretary of State, Mr Laurence says, started his conclusions (at paragraph 6) by stating the correct consideration, namely:

Whether the evidence shows that a right of way exists or is reasonably alleged to exist.

The Secretary of State then proceeded to deal with an argument based upon section 31 of The Highways Act 1980. He summarised this by saying that:

There is a statutory presumption that a right of way has been dedicated to the public where it has been used for at least 20 years without interruption unless there is sufficient evidence that there was no intention during that period to so dedicate.

He then set out certain conflicting evidence and continued (in paragraph 8):

In the Secretary of State's opinion, on a balance of probabilities, the most likely date for the locking of the access gate and the painting of "private" on it is 1982, as he finds the detailed evidence of Captain Cross the most convincing.

It is necessary to appreciate that this assessment of Captain Cross's evidence was by reading statements and not by any examination or assessment of him as a witness. Paragraph 8 continues:

If 1982 is taken as the date when the right of the public to use the path was first questioned, then the evidence of use between 1962-82 (and

¹ (1990) 59 P. & C.R. 283

² Referred to in *R. v. Isle of Wight C.C., ex p. O'Keefe* *ibid.* at 288.

³ [1991] 2 Q.B. 354.

⁴ [1992] 3 All E.R. 556.

⁵ Not yet reported, judgment on May 26, 1993.

indeed since 1955) is contradictory. The Secretary of State agrees with the County Council that the evidence of use from those who claim unimpeded use as of right is balanced by the amount of evidence supporting the claims of the tenants of the Slade Newtake (the Coakers) and the Hexworthy Newtake (the Mudges) that walkers were challenged and there never was a right of way over the track. In these circumstances, the Secretary of State agrees with the County Council that the evidence is *irreconcilable and as such no right of way can reasonably be alleged to subsist, on the basis that unimpeded public use of the route ceased in 1982.*

It is not necessary to read the whole of paragraph 9 of the Secretary of State's letter. Reliance is placed, however, on the use of the words "counter-balanced by" when referring to the evidence, and criticism is also made of the last words of that paragraph:

... the Secretary of State considers that the evidence of unimpeded public use of the track as of right is insufficient to indicate that a presumed dedication as a public right of way had occurred.

Mr Laurence also takes exception to paragraph 11 which states:

Accordingly, after taking into account all representations received, and for the reasons given above, the Secretary of State considers that there is not sufficient evidence to support your claim that a public footpath exists ...

On behalf of Mr Bagshaw, Mr Laurence now argues that the respondent applied the wrong test.

Mrs Norton seeks judicial review of a decision of the Secretary of State for the Environment dated January 6, 1992 and refusing to direct Suffolk County Council to make an order modifying the definitive map by adding a by-way open to all traffic to the county's definitive map for the parish of Polstead in that county.

Again, the applicant relies on user evidence. In addition she relies upon documentary evidence, the *Layham Tithe Map* (1841), *Greenwood's Map* (1824/5), *Bryant's Map* (1826) and the *Ordnance Survey 6" Maps* of 1884, 1904 and 1927. She also relies on a copy of a Sale Plan for Pope's Green Farm dated 1877. Connected to the submission on the documentary evidence is a contention that it is illogical for the public part of Pope's Green Lane effectively to form a cul-de-sac. Mr Laurence argues that a public right of way cannot end in a cul-de-sac except in very limited circumstances which do not exist in this case and accordingly the Secretary of State was not entitled to conclude, or at least could not reasonably conclude, that it was not reasonable to allege the existence of a right of way. Again, it is not necessary to make any analysis of this evidence nor of the body of evidence on paper much greater, submitted against the applicant by the landowner.

From paragraph 6 of the Secretary of State's decision letter it may be seen that the county council in rejecting the application first did not accept:

... that it is illogical that cul-de-sac routes may exist in the country ... taking the

... view that the continuation of such routes cannot be assumed and that the evidential tests required under the 1981 Act must be met to show that, *on a balance of probabilities, public rights do exist.*

The Secretary of State's conclusions are set out in paragraphs 7, 8, 9 and 10. It is Mrs Norton's contention that he applied an incorrect test to the evidence before him.

Paragraph 7 starts by saying:

The Secretary of State has carefully considered all the representations and documentary evidence submitted by yourself and by the County Council. He takes the view that, whilst surveying authorities are required to take into consideration all other relevant evidence available to them concerning the status of a right of way the subject of a request for a modification order, the onus is upon the applicant to provide evidence to support the claim.

It is accepted that this is a clear and accurate statement of the law. The letter continues:

He notes that the user evidence submitted in support of a presumption of dedication is limited to four persons claiming 20 years of vehicular use as of right; he must weigh this against the statements from the landowner, supported by 115 signed forms and the Layham and Polstead Parish Councils, indicating the use of the route has been on permissive basis and that active steps to prevent a presumption of dedication arising have been taken. The Secretary of State concludes that the user evidence you have submitted does not, in itself, convince him that a presumption of dedication has arisen for the use of a route as a by-way.

Whilst accepting that decision letters are not to be construed as if they were statutes, Mr Laurence argues that the tenor of the last sentence and especially "convince him that a presumption of dedication has arisen" indicate that a wrong test has been applied. He also takes exception to the last sentence in this paragraph which reads:

Essentially, therefore, he considers that the case must turn on whether sufficient documentary evidence has been adduced to support the claim that a by-way exists along the claimed route.

Mr Laurence says that this clearly indicates that a wrong test has been applied.

It is not necessary to read out the whole of paragraph 8. Of this Mr Laurence says, again conceding that the letter must not be construed strictly as if a statute, it nevertheless indicates by its use of "conclusive proof" on two occasions, "conclusive" on one occasion and "inconclusive" on one occasion, that the wrong test was in the mind of the Secretary of State.

Paragraph 9 is criticised by Mr Laurence on the basis that it rejects his argument, as I understood him to be saying at one time, that it is a "legal principle" with strictly limited exceptions of which there is no evidence in this case that cul-de-sac routes cannot exist in the countryside. The letter states:

Whilst accepting that cul-de-sac routes may be unusual in the countryside, they are by no means unprecedented and he sees no reason why routes cannot continue over private land on a permissive basis, as appears to be the case here.

Mr Laurence criticises paragraph 10 as showing that the incorrect test was applied. Paragraph 10 reads:

After careful consideration of all the representations before him, the Secretary of State considers that you have provided insufficient evidence to show that, on balance of probability, *there is a by-way* along the claimed route.

On this short account of the two cases, it can be seen that each application raises the question of what is the right test to be applied. Whilst Mrs Norton's case contains an added allegation that the respondent erred in law by not accepting the proposition that a right of way ending in a cul-de-sac cannot, save with exceptions which do not exist here, exist in law, each application turns on a decision as to the proper approach of the Secretary of State when he is considering paragraph 4 of Schedule 14 to the Wildlife and Countryside Act 1981.

It will be as well not to turn to section 53 of the Wildlife and Countryside Act 1981. In general terms, by this section the council is required to maintain a definitive map of its area. The definitive map will show the various "byways open to all traffic", "public paths" and "rights of way". By subsection (2) the council is required to make modifications of that map as soon as reasonably practicable after "an occurrence". Subsection (3) lists that types of activating occurrence. At (c) of that subsection it is provided that:

(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—

(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land is the area to which the map relates, being a right of way to which this Part applies.

shall be such an occurrence. By subsection (5) of that section:

Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3).

Each applicant here claims to be acting under subsection (5). There is no dispute as to this.

It is also common ground that by subsection (5) of Schedule 14 "shall have effect as to the making and determination of applications under this subsection". By paragraph 3 of that Schedule, the authority is required to investigate the matter stated in the application, consult (if necessary) other local authorities and then decide whether or not to make the order sought. The councils did this.

By paragraph 4 of the Schedule, on refusal the applicant may serve notice of appeal on the Secretary of State and the authority. If he considers that an order should be made the Secretary of State "shall give to the authority such directions as appear to be necessary for that purpose." It has been pointed out, rightly, that Schedule 15 had no relevance here since no order has been made. The common question which is raised by these two applications is the construction of section 53(3)(c)(i).

It is necessary to give some meaning to all the words used. Accordingly, there must be a difference between showing "that a right of way which is not shown in the map and statement subsists" and showing that a right of way which is not shown in the map and statement "is reasonably alleged to subsist". Accordingly the questions for the council and subsequently for the

Secretary of State were: does the evidence produced by the claimant together with all the other evidence available show that either—

- (a) a right of way subsists? (I shall call this test “A”), or
- (b) it is reasonable to allege that a right of way subsists? (I shall call this test “B”).

To answer either question must involve some evaluation of the evidence and a judgment upon that evidence. For the first of those possibilities to be answered in the affirmative, it will be necessary to show that on a balance of probabilities the right does exist. For the second possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.

The first of those possibilities does not apply here. Accordingly the question which was for decision by the councils and also by the Secretary of State is whether a reasonable person could reasonably allege a right of way, having considered all the relevant evidence available to the council. The question is not: was it reasonable for the claimant so to allege?—since the claimant is not to be the judge of that. At this stage the authority is to be the judge. At a later stage it is to be the Secretary of State. Even less is it for me to be the judge of that. Subject to an allegation of *Wednesbury* unreasonableness, which may have been in part alleged here (although I think that in the end it was not), the decision of the Secretary of State must be final if he asked himself the right question.

The wording of the section indicates, as I consider, that the evidence necessary to establish that a right of way is reasonably alleged to subsist over land must be less than that which is necessary to establish that a right does subsist. Indeed, bearing in mind the structure of the Act, this seems to be clear. That structure is, in this respect, that an application under section 53(3)(c)(i), if upheld, will be followed by an order, consequent upon which, after an objection, there may be some form of inquiry with either confirmation or a refusal to confirm.

If the evidence were merely that a claimant had on a limited number of occasions not been stopped when using the way, such an allegation that a right of way subsists might well not be reasonable. In this connection the words of Parke B. in *Poole v. Huskinson* (1843) 11 *Meeson & Welsby* 827, approved in *Moser v. Ambleside Urban District Council* 89 J.P. 59 are relevant. There Parke B. said at p.61:

... that a single act of interruption by the owner was of much more weight upon the question of intention than many acts of enjoyment.

If, however, as probably was so in each of these cases, there were to be conflicting evidence which could only be tested or evaluated by cross-examination, an order would seem likely to be appropriate. Again in *Moser v. Ambleside Urban District Council* a case which was cited to me with enthusiasm by Mr Laurence, Pollock M.R. said of the evidence in that case: “It is also to be remembered that he (the trial judge) had the great advantage of seeing the witnesses”.

Atkin L.J. also dealt with the apparent necessity to weigh and judge the evidence when he said:

In a right of way case such as this, no doubt a very great deal of importance must be attached to the fact that the learned judge heard a vast amount of oral testimony, and was able to judge the value of that

evidence by observing the persons who gave it, and in a case where the oldest inhabitants are the persons who are the most valuable and the most able witnesses it obviously is a great advantage to see exactly how the old gentlemen and the old ladies do deport themselves in the witness box, because the judge is able to tell in that way whether he can rely upon their testimony or whether he cannot.

Mr Hobson argues that "if the decision maker accepts the evidence of the objectors, which he may do without rejecting the evidence of the claimants as untruthful, he is entitled to conclude that the right of way cannot reasonably be alleged to exist". However, this cannot be an answer in Mr Bagshaw's case since the conflict is said to be irreconcilable, at least on paper, and there would then seem to be only one way to resolve that conflict.

If, on the other hand, the evidence were to be wholly documentary it might be possible, satisfactorily and reliably, to evaluate that evidence without any necessity for a hearing, and in these circumstances answer the question whether a reasonable person could reasonably allege a right of way to subsist. In argument Mr Laurence did not wish to accept this proposition and argued that inquiries frequently lead to the discovery of yet more unknown evidence which may affect the answer to the question. This may be true. However, as the question which has to be answered is: "Does the evidence produced by the claimant together with all the other evidence available show that it is reasonable to allege a right of way?", it would be difficult to take into account unknown evidence.

Whether an allegation is reasonable or not will, no doubt, depend on a number of circumstances and I am certainly not seeking to declare as law any decisions of fact. However, if the evidence from witnesses as to user is conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it would seem to me to be reasonable to allege such a right. I say this because it may be reasonable to reject the evidence on the one side when it is only on paper, and the reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.

I must now return to the reasons given by the Secretary of State. In respects of Mr Bagshaw, it is argued on his behalf that the respondent applied the wrong test. Purporting to find that the evidence was balanced (as in paragraph 8, p. 13), or counterbalanced (p. 9) by evidence adduced on behalf of the objectors indicates that the wrong test was used. Such a balance might indicate that test (A) was not satisfied; it could not show that test (B) was not satisfied. Indeed it is argued that it is in such situations that it is reasonable to make the allegation.

Further, finding that the evidence was irreconcilable, and "*as such*" (paragraph 8, p. 13) no right of way can reasonably be alleged to exist indicates that a wrong test was applied.

My judgment is that those words, even construed favourably for the respondent, do indicate that the wrong test was applied.

In these circumstances, without indicating any further than I have already thought necessary what the answer should be, I must find that the respondent erred in law in such a manner as to make it necessary to quash the respondent's decision and require him to ask the right question in proper exercise of his powers.

Mrs Norton: Here it is argued:

- (a) that the respondent applied the wrong test; and
- (b) that in any event the respondent's decision was one which no reasonable person properly directing himself as to the law could have reached.

As to the first argument, the use of "conclusive proof" in paragraph 8 (p. 14), even when construed strongly in favour of the respondent, so indicates. The statement in paragraph 10 that Mrs Norton had provided insufficient evidence to show that, on the balance of probability, there *is* a by-way along the claimed route, seems to emphasise this since the question to be asked is, as I find, whether the evidence shows that on a balance of probability it is *reasonable to allege* a by-way along the claimed route. Accordingly, it seems to me that again the respondent erred in law and should be required to consider the matter afresh asking the right question.

In the course of opening his case, and in his skeleton argument, Mr Laurence sought to argue that the respondent and the council were also in error in law in their rejection of what has been called the "cul-de-sac point". The argument arises in this way. There is a track which leads from Layham to the U8512. The U8512 is undoubtedly a highway. The road from Layham to a point marked "E" on the map is also a highway—the U8504. The track continues but no right of way for vehicular traffic is shown on that track. The argument placed before the authority and before the Secretary of State was that if the map is right, the right of way ended as a cul-de-sac at "E", and that as a right of way leading to a cul-de-sac in this place could not have come into existence the right of way must have continued along the track to join the two undoubted highways.

It was suggested that the reason for the whole track not being shown as a by-way on the map is probably an administrative error caused by the fact that two authorities were involved with their boundaries meeting at the point marked "E". Relying upon *Eyre v. New Forest Highway Board*⁶ and *Attorney-General v. Antrobus*,⁷ Mr Laurence sought to argue that as a legal principle here "you must find a right of way as the track leads from one public place to another public place, and you cannot have a right of way to what is a cul-de-sac unless it be in a town." However, it is abundantly clear from the judgments in *Moser v. The Ambleside Urban District Council*⁸ that there is no such rule of law. Pollock M.R. declares⁹:

I find it difficult to accept as true *in all cases* that you must find a right of way from one public place to another public place, and that you cannot have a right of way to what is a cul-de-sac unless it be in a town. I do not think that is what was intended, and I do not think if that is what as intended that that is correct. It seems to me that there may be a number of cases in which the public need to go to a particular point, and there may well have been a dedication to them for their use for the purpose of reaching that point, although the return journey might be precisely the same route from the terminus ad quem to which the right of access is granted.

⁶ (1892) 56 J.P. 517.

⁷ [1905] 2 Ch. 188.

⁸ [1925] 89 J.P. 118.

⁹ *ibid.* at 119.

Atkin L.J. in the same cases cited:

It has been suggested that you cannot have a highway except insofar as it connects two other highways. That seems to me to be too large a proposition.

Sargant L.J. expressed similar doubts. Of course, that which Mr Laurence urges upon me may be factual evidence, possibly in some circumstances strong evidence upon which it may be reasonable to make an allegation. Further than that, I am not required to go and I will not. Suffice it to say that I do not regard the respondent as having been in error of law over this matter.

Applications allowed, with costs.

Solicitors—Messrs Godlove Pearlman, Leeds; Treasury Solicitor.

Reporter—William Upton.