18 March 2015

PRESS SUMMARY

R (on the application of Trail Riders Fellowship and another) (Respondents) v Dorset County Council (Appellant) [2015] UKSC 18
On appeal from [2013] EWCA Civ 553

JUSTICES: Lord Neuberger (President), Lord Clarke, Lord Sumption, Lord Carnwath and Lord Toulson

BACKGROUND TO THE APPEAL

Councils (known in this context as "surveying authorities") are required by section 53 of the Wildlife and Countryside Act 1981 to maintain a definitive map and statement of the public rights of way in their local area. Under the 1981 Act, members of the public may apply to surveying authorities for an order modifying the definitive map and statement in light of new evidence of the existence of a public right of way. Schedule 14 to the 1981 Act specifies in paragraph 1 that such applications must be accompanied by "a map drawn to the prescribed scale and showing the way or ways to which the application relates". The scale is prescribed by the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, which provide by Regulation 2 that a definitive map shall be on a scale of not less than 1:25,000 and by regulation 3 that maps accompanying an application for a modification order must also comply with regulation 2.

The Natural Environment and Rural Communities Act 2006, section 67, extinguished all unrecorded rights of way for mechanically propelled vehicles in England as of 2 May 2006. However, such rights of way could be preserved if an application for a modification order had been made before 20 January 2005. Section 67(6) specifies that an application under this section is made when it is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.

Before the deadline, the Friends of Dorset's Rights of Way made five applications to Dorset County Council (the appellant) under the 1981 Act for orders modifying the definitive map and statement to show various byways open to all traffic. The maps accompanying the applications were produced using a computer program which printed out maps which were to a presented scale of 1:25,000 or larger but which were derived originally from Ordnance Survey 1:50,000 maps. The Trail Riders' Fellowship (the first respondent) has now taken over conduct of those applications. On 7 October 2010, the council rejected all of the applications on the basis that the accompanying maps were not drawn to a scale of not less than 1:25,000. If the council's decision is upheld, the vehicular rights of way in question will no longer exist.

Supperstone J upheld the council's decision on the basis that: (i) the application maps did not comply with the statutory requirements; and (ii) applying the decision of the Court of Appeal in the case of *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2008] EWCA Civ 431 ("*Winchester*"), the applications were invalid because the extent of the non-compliance was not negligible (*de minimis*). The Court of Appeal allowed the appeal, holding that (i) the maps did comply with the statutory requirements, but (ii) if the appeal had failed on the first point, the non-compliance "could not sensibly be described as *de minimis*".

JUDGMENTS

The Supreme Court dismisses the council's appeal on the basis of point (i) and upholds the Court of Appeal's decision that the maps did comply with statutory requirements by a majority of 3-2. Lord Clarke gives the leading judgment; Lord Toulson and Lord Carnwath agree with Lord Clarke. Lord Sumption and Lord Neuberger would both have decided in the appellant council's favour on point (i). Point (ii) therefore does not arise. Had point (ii) arisen, Lord Neuberger, Lord Sumption and Lord Toulson would have held that the effect of non-compliance with the statutory provisions is that the applications would not have been valid, while Lord Carnwath would have held, contrary to *Winchester*, that they would nonetheless have been valid. Lord Clarke prefers not to express a view on point (ii).

REASONS FOR THE JUDGMENTS

(i) Did the maps submitted with the applications comply with the statutory requirements?

Lord Clarke explains that the only question is whether the maps were drawn to a scale of not less than 1:25,000 **[18-19]**. He holds that they were. Each map was in fact produced to a presented scale of 1:25,000 or larger **[20]**. The statute and regulations could have but did not require that a map with the amount of detail of an Ordnance Survey 1:25,000 map be used, and the mere fact that one might ordinarily expect the use of an Ordnance Survey 1:25,000 map does not tell us whether that is a requirement **[22-25]**. Maps drawn to a scale of 1:25,000 without any reference at all to an Ordnance Survey map would satisfy the statutory provisions, even if they contained only as much detail as an Ordnance Survey 1:50,000 map **[25-26]**. Although the prescribed scale requirement applies to the application map and the definitive map and statement in the same terms, it is important to note that the surveying authority is under a public law duty to prepare and maintain the definitive map and statement to a professional standard, whereas lay applicants are only required to put relevant material before the surveying authority for investigation **[28]**. A map could be "drawn" by a computer program **[29-30]**. Lord Toulson **[35, 40]** and Lord Carnwath **[51]** agree with Lord Clarke.

Lord Neuberger and Lord Sumption would have allowed the appeal in relation to point (i); each agrees with the other **[106, 109]**. Lord Neuberger considers that: the most natural meaning of Schedule 14 is that it requires that, where an applicant uses a copy of an original map, the original map must have been prepared on a scale of at least 1:25,000 **[86-87]**; the justification for the use of a minimum scale must have been that such a map would normally show more contextual detail **[88]**; it is not natural to say that a map is "drawn" to a certain scale if it has not been prepared to that scale **[90]**; and the terms in question must have had the same meaning in relation to both the definitive map and the map accompanying an application **[91]**. Lord Sumption says that the Regulations were drafted on the assumption that a 1:25,000 scale map would have more detail than a 1:50,000 map. A magnified 1:50,000 map is therefore not the same thing as a 1:25,000 map **[107]**.

(ii) Does non-compliance with the statutory requirements mean that the maps are invalid?

Lord Neuberger explains that the ultimate question of one of statutory construction: can Parliament fairly be taken to have intended that the applications would be totally invalid if they did not comply with the statutory requirements **[93]**? Prior to the deadline imposed by the 2006 Act, it would have been open to the council to waive the defect by accepting a non-compliant application, or to the applicant to validate the application after its submission by providing compliant maps. The defect could not simply have been overlooked unless it could be said that the defect was *de minimis* (a suggestion rightly rejected by the first instance judge) **[92-97]**. But under section 67 of the 2006 Act, Parliament has spelled out the consequence of non-compliance: a non-compliant application is not to be treated as a valid application, and there is no jurisdiction to waive or amend the defect **[99]**. Any other interpretation would deprive section 67(6) of the 2006 Act of all meaning **[100-105]**. Lord Sumption agrees: the point may be technical, but the technicality is unavoidable **[108]**. Lord Toulson agrees with the approach taken by Lord Neuberger and Lord Sumption **[41]**. He notes that all statutes must be construed in their own context but in this case section 67(6) puts the answer beyond doubt **[48-50]**.

Lord Carnwath starts from the principle that procedural requirements such as those in the 1981 Act should be interpreted flexibly and in a non-technical way **[69]**, and adds that such a flexible approach is particularly appropriate given that the primary duty to keep the definitive map up to date rests on the surveying authority and that the effect of the statute is retrospective **[71, 78]**. In this context, substantial compliance with the statutory provisions would suffice to achieve validity. *Winchester* was therefore too narrowly decided **[73-75]**. Section 67(6) is simply included for clarity **[77]**. He would therefore have dismissed the appeal on this basis as well (and notes that the grounds are closely related) **[80-81]**.

Lord Clarke is sympathetic to Lord Carnwath's general approach but prefers not to express a view on the issue until it arises on the facts of a particular case **[34]**.

References in square brackets are to paragraphs in the judgment