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The Barkas Case

Full name

R (on the application of Barkas) v North Yorkshire County Council and another, Supreme Court, 21 May 2014

Neutral citation number

[2014] UKSC 31

Link to judgment

http://supremecourt.uk/decided-cases/docs/UKSC_2013_0035_Judgment.pdf

Summary

The Supreme Court unanimously dismissed the appeal. The court held that where land is held under a provision such as section 12(1) of the Housing Act 1985, members of the public have a statutory right to use the land for recreation. Use of the land was found to be 'by right' rather than 'as of right'. The decision in *Beresford* should no longer be relied on.

Discussion

In October 2007 the Helredale Neighbourhood Council applied to register 14 hectares of land (known as the Field) owned by Scarborough Borough Council, as a green on the basis of 20 years' use by local people for lawful sports and pastimes, without permission, secrecy, or challenge ('as of right'). North Yorkshire County Council, the registration authority, held a public inquiry. The inspector, Vivian Chapman QC, concluded in July 2010 that the use of the land had not satisfied the criteria under section 15(2) Commons Act 2006, because the use had not been 'as of right' but that the public already had a right to use the land. This was because the borough council's predecessor, the Whitby Urban District Council, had acquired the land for housing in 1951 and had laid out the Field as a recreation ground under section 80(1) of the Housing Act 1936 (now section 12(1) Housing Act 1985).

In October 2010 North Yorkshire County Council rejected the application and Christine Barkas applied for judicial review of that decision. Her application was unsuccessful in the High Court and the Court of Appeal also dismissed her claim.

The point of principle considered by the Supreme Court was the meaning of 'as of right' and whether use could be 'as of right' when land is held under a statutory provision by a public body, ie here the Housing Act.

The leading judgment was given by Lord Neuberger, with whom Lady Hale, Lord Reed and Lord Hughes agreed. He considered the meaning of 'as of right'. If a person uses privately owned land 'of right' or 'by right' the use will have been permitted by the landowner, and the use is therefore rightful. However if use of the land is 'as of right', it is without the permission of the owner, and is not 'of right' or 'by right', but is carried on as if it were by right. The significance of the word 'as' is crucial and renders the expression 'as of right' the opposite of 'of right' or 'by right'. He went through various cases including *R(Lewis) v Redcar and Cleveland Borough Council*: [2010] UKSC11, on appeal from: 2009 EWCA Civ 3 <http://www.bailii.org/uk/cases/UKSC/2010/11.html>; *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC229, 239, and *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, 774.

It was argued that the land had been acquired and had always been held pursuant to Section 12(1) of the 1985 Act, and its statutory predecessors, so the Field had been held for public recreational purposes, consequently the public has always had a statutory right to use the Field for recreational purposes.

Lord Neuberger said that this argument was 'as compelling as it is simple'. So long as land is held under a provision such as section 12(1) of the 1985 Act, he held that members of the public have a statutory right to use the land, and therefore they use the land 'by right' and not as trespassers, so that no question of user 'as of right' can arise.

He said that a reasonable local authority, in the position of the council, would have regarded the presence of members of the public on the Field as being pursuant to the statutory right to be on the land, given that the Field was being held and maintained by the council for public recreation under section 12(1) of the 1985 Act.

He said it is a right which is clearly conditional on the Council continuing to devote the Field to the purpose identified in section 12(1).

Lord Neuberger then discussed the *Beresford* case. He said that paragraphs 43-50 in *Beresford* cannot be relied upon, as they include passages which are simply wrong in principle and contrary to well established authority. He concluded that the decision should no longer be relied on.

Conclusion

The public used the land 'by right' because the land was held under section 12(1) of the Housing Act 1985.

Comment

The court was clear that land held under the Housing Act gave the public a statutory right to use the land. What is not clear at present is whether this will be extended to any land held by a public body. It is very worrying that the court has held that the *Beresford* case can no longer be relied on.