

CASE COMMENTARY

THE SETTING OF THE SUN ON THE VILLAGE GREEN ERA?

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

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INTRODUCTION

The United Kingdom Supreme Court has recently handed down the much anticipated judgment in *R (Barkas) v North Yorkshire County Council*¹ (“*Barkas*”). The case addressed the “by right” defence in village green law and whether use that is pursuant to a statutory right could be use “as of right” for the purposes of village green registration.

The court unanimously ruled that use “by right” could not be considered as use “as of right” and would not be qualifying use for the purposes of registration. Use will be “by right” when it is pursuant to a statutory right to use the land, and is usually engaged when the land in question is in public ownership. In reaching this judgment the court overruled the previous authority of *R (Beresford) v Sunderland City Council*² (“*Beresford*”).

The Supreme Court left many questions unanswered, although the culmination of recent activity in village green law now makes it considerably harder to register new greens. The inability to protect recreational spaces through village green registration potentially makes this land available for development, thus tipping the balance in favour of the economic aim, at the expense of the social and environmental aims, of sustainable development.

CONTEXT

To understand the facts of *Barkas* it first important to understand the legal context in which they occur and the law surrounding village green registration.

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¹ [2014] UKSC 31, [2014] 2 WLR 1360.

² [2003] UKHL 60, [2004] 1 AC 889.

Land can be registered as a town or village green (“TVG”) pursuant to s15 Commons Act 2006 and previously under s22 Commons Registration Act 1965. Under the Commons Act it must be shown that the land has been used as of right for lawful sports and pastimes, for a period of at least twenty years, by the inhabitants of a locality or neighbourhood within a locality. The key requirement is that the use must be “as of right”, which has been taken to mean the tripartite test of *nec vi, nec clam* and *nec precario*: that the use must be without force, without stealth and without the licence of the landowner.³ The rationale behind these factors was explained by Lord Hoffmann in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* as being that every legal system needs rules of prescription that protect long established de-facto enjoyment of land.⁴ Each of these three factors gives the landowner the opportunity to object to the use, if they opt not to do so then they are taken to have acquiesced in the use by the local inhabitants. It can therefore be seen that village green law is underpinned by the principles of prescription in English Law.⁵

Village green registration confers rights of recreation upon the users of the land who are from the relevant locality or neighbourhood within a locality,⁶ and has the practical effect of protecting the land as it cannot be used in a way that is inconsistent with these recreational rights. TVG law therefore seeks to promote the social value of land (arguably there are some environmental benefits of village green registration, but these concerns are directly addressed by other mechanisms through which land can be protected), often at the expense of the economic value that can be attached to open spaces. Registration of land as a village green is often used as an attempt to thwart development plans, to the extent it has been referred to as “being used as a weapon of guerrilla warfare against development of open land.”⁷

Recent developments in village green law appear to have reversed this trend of prioritising the social aim and lean more towards favouring the economic dimension and development of open spaces. The Growth and

³ *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 (HL), 350H (Lord Hoffmann).

⁴ [2000] 1 AC 335 (HL), 349D.

⁵ Village green law is described as being “traceable” to prescription by Patten LJ in *Taylor v Betterment Properties (Weymouth) Ltd* [2012] EWCA Civ 250, [2012] 2 P&CR 3 [36].

⁶ *R (on the application of Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530, [2010] BLGR 631 [80] (HHJ Waksman QC).

⁷ *R (Lewis) v Redcar and Cleveland Borough Council and Another* [2010] UKSC 11, [2010] 2 AC 70 [48] (Lord Walker).

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Infrastructure Act 2013 amended the Commons Act 2006 to introduce additional bars to registration of land as a TVG. Section 15C now provides that registration will be barred where a trigger event under schedule 1A, which are all linked to planning applications, has occurred. There is a tremendous housing shortage in England and Wales and the sterilisation of potential development sites by village green registration is proving controversial. As Leslie Blohm QC has noted in a recent article, “[t]here is no innate superiority in land being held for recreation as opposed to land being held for housing, business transport or health... at any given time the community may require one rather than the other”.⁸ At this given time land protected for recreation is clearly not finding favour with Parliament and their perceived needs of the economy and society as a whole.

FACTS

Barkas concerned a playing field of some two hectares, known as Helredale playing field (“the Field”), situated in North Yorkshire and owned by Scarborough Borough Council (the “Council”). The Field was originally acquired in 1951 by the predecessor of the Council as part of a larger plot of land, extending to some fourteen hectares, pursuant to powers under s73(a) Housing Act 1936. The majority of this plot was subsequently developed into a housing estate with the Field being laid out and maintained as recreation grounds pursuant to s80(1) of the Housing Act 1936. The 1936 Act was subsequently repealed and re-enacted with amendments in 1957 and 1985 and by the time litigation commenced the land was now held under s12(1) Housing act 1985 which provides:

A local housing authority may, with the consent of the Secretary of State, provide and maintain in connection with the housing accommodation provided by them under this Part-

- (a) Buildings adapted for use as shops,
- (b) Recreation grounds, and
- (c) Other buildings or land which, in the opinion of the Secretary of State, will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided.

The Field was surrounded by at least three estates that were developed as local authority housing and had four entrances that were open at all times,

⁸ Leslie Blohm, “The ‘by right’ doctrine and village green applications - a response” [2014] 1 Conv 40, 51.

with signs advising dog owners to clear up after their dogs and keep them on leads. It was largely grass, with the exception of a hard surface path that crossed the field, which the Council maintained and marked out a football pitch on. For at least fifty the years the park had been used openly and extensively by the local inhabitants for recreation.

In October 2007 an application was made on behalf of the Helredale Neighbourhood Council to North Yorkshire County Council, the relevant commons registration authority, to register the land as a TVG under s15 Commons Act 2006.

Section 15(2) Commons Act 2006 provides that land may be registered as a TVG where:

- (a) A significant number of the inhabitants of any locality, or of any neighbourhood within a locality have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
- (b) They continue to do so at the time of the application.

North Yorkshire County Council appointed Vivian Chapman QC to conduct an inquiry in order to determine the application. He reported in June 2010 and determined that the use of the inhabitants had not been “as of right”, but rather “by right”,⁹ because the inhabitants had only used it for the purpose for which it was provided by the local authority in the exercise of its statutory powers. Accordingly, North Yorkshire County council rejected the application for registration and Christine Barkas, a member of the Helredale Neighbourhood Council, applied for judicial review of this decision.

The application failed in the High Court¹⁰ before Langstaff J and the appeal to the Court of Appeal¹¹ was dismissed by Sullivan LJ, with whom Richards and McFarlane LJ agreed. Christine Barkas then appealed to the Supreme Court.

ISSUE

The issue before the Supreme Court was relatively basic:

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

⁹ To use the terminology of Sullivan LJ in the Court of Appeal, [2012] EWCA Civ 1371, [2013] 2 All ER 69 [3].

¹⁰ [2011] EWHC 3653 (Admin).

¹¹ [2012] EWCA Civ 1371, [2013] 2 All ER 69.

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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

Lord Neuberger also helpfully explained key terminology and the “by right” principle in his speech at paragraph fourteen:

“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”.

For use to be “as of right”, and more specifically *nec precario*, it is required that the user be a trespasser. As soon as there is a pre-existing right to use the land then there can be no prescriptive acquisition of rights. The additional limbs of *nec vi* and *nec clam* require the trespasser to be peaceable.

Section 12 Housing Act 1985 in itself does not technically confer any rights on the public to use the land. However, Sullivan LJ explains that:

[m]ost statutes dealing with local authorities do not expressly confer rights on members of the public, they tend to impose duties upon the authority and thereby confer rights that are enforceable as a matter of public law.¹³

Therefore the local inhabitants have a statutory right to use the land which has been appropriated for recreation because the local authority, in appropriating the land for this purpose, is under a duty to use it for this purpose until it is formally appropriated for an alternative purpose.

DECISION

Both Lord Neuberger and Lord Carnwarth (with whom Lady Hale, Lord Reed and Lord Hughes agreed) delivered fully reasoned speeches and dismissed the appeal of Christine Barkas. Although the land had been used for over twenty years it had not been used “as of right” but rather “by right” under s12(1) Housing Act 1985. The land will not be registered as a TVG.

¹² *Barkas* [12] (Lord Neuberger).

¹³ *Barkas* Court of Appeal [2012] EWCA Civ 1371, [2013] 2 All ER 69 [42].

Lord Neuberger explained that where land has been held under a statutory provision such as s12(1) Housing Act 1985 the public have always had a statutory right to use the land for recreation and therefore they use the land “by right”. They will not be trespassers and as such there can be no possibility that use “as of right” has taken place.¹⁴ In addition his Lordship indicated at paragraph twenty one that, assessed objectively, the reasonable local authority in this situation would have regarded any use by the local inhabitants as being pursuant to their statutory right to use the land for recreation.¹⁵ Following this there can be no question with regards to the acquiescence of the landowner: the landowner (the Council) could not prevent the use of the land because it would be unlawful to do so, *a priori* the landowner is unable to acquiesce in the use and it cannot be “as of right”.

This principle is further explored at paragraph twenty four where Lord Neuberger states that:

it is impossible to see how...in the absence of any unusual additional facts, it could be appropriate to infer that members of the public have used the land “as of right” simply because the local authority have not objected to their using the land...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.

R (Beresford) v Sunderland City Council

A major factor for the court to consider was the authority of *Beresford*, which concerned land that had been acquired by the Washington Development Corporation under the wide powers of the New Town Act 1965, and for no specific purpose. Section 3 of the Act granted the development corporation the power to “acquire, hold, manage and dispose of land and other property”, “to carry on any business or undertaking”, and “generally do anything necessary or expedient” for the purposes of the new town. Furthermore, s21(1) provided that:

[a]ny land being, or forming part of, a common, open space... which has been acquired for the purposes of this Act... may... be used by

¹⁴ *Barkas* [20]-[21].

¹⁵ An observation that has relevance following the indication of Lord Hoffmann in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 (HL), 352H-353A that use “as of right” should be judged by “how the matter would have appeared to the owner of the land”.

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them, or by any other person, in any manner in accordance with planning permission

Section 4 New Towns Act 1965 defined “open space” as “any land laid out as a public garden, or used for the purposes of public recreation”. When the 1965 Act was repealed these provisions were replaced by the New Towns Act 1981 which had an identical effect.

The facts summarised by Lord Walker at paragraph eighty-nine of *Beresford* detail that the land had been identified in the 1973 New Town Plan as an area for developing a sports centre that included a swimming pool, football pitch and running track. Entry to these facilities would be charged. The field was subsequently grassed over in 1974 and the public continued to use it for recreation, and in 1977 the development corporation organised for the maintenance of the grass and put benches on the land. The land was transferred to the Commission for New Towns in 1989 and was retained due to its potential for commercial development. When the land was finally transferred to Sunderland City Council in 1996 it was subject to the covenant that it would only be used for courts or community health, leisure or recreation facilities.

Sunderland City Council, despite making no argument in relation to the provisions of the New Town Act 1965 and 1981, successfully argued that the land had been used by the public pursuant to a licence. This was overturned by the House of Lords which found that there was no express licence granted to use the land, and that there could be no implied licence without an “overt act which is intended to be understood, and is understood, as permission to do something that would otherwise be an act of trespass”.¹⁶ The court also invited counsel back to a further hearing to hear argument on whether the public had a statutory right to use the land for recreation, which the court then concluded that they did not. Lord Walker in particular had reservations over whether the land had been subject to a “formal appropriation...as a recreational open space”.¹⁷ The land in question was therefore registered as a TVG.

The question for the Supreme Court in *Barkas* to determine was whether it should apply *Beresford* and find that the Field had been used “as of right” for the purposes of village green registration, or whether *Beresford* could be distinguished or overruled entirely.

Lord Neuberger initially indicates at paragraph forty seven that *Beresford* could, and should, be distinguished from the issue in *Barkas*. This can be done on the basis that the Field in *Barkas* was acquired and maintained as a

¹⁶ *Beresford* [75] (Lord Walker).

¹⁷ *Beresford* [90].

recreation ground under a specific statutory power. Conversely, the land in *Beresford* was not acquired or appropriated for any specific use. Indeed, the land was not even intended to be used for free public access as it had been identified as a site on which fee charging leisure facilities would be developed. As such, the use could not be characterised as “by right”.

Lord Carnwarth however advocated that while the powers under the New Town Act 1965 were very wide there was a comprehensive statutory framework in place that addressed the concerns of Lord Walker regarding a “formal appropriation”. The powers were sufficient to make land available for public recreation pending further development. Furthermore, Lord Carnwarth questioned the comments of Lord Bingham¹⁸ and Lord Rodger¹⁹ in *Beresford* that suggested that encouraging the use of the land by maintaining it and providing benches would not be inconsistent with use “as of right”. His Lordship concluded that where the acts of encouragement were done by a local authority they “lend force to the...inference that they are done under...statutory powers”.²⁰

This position was also eventually adopted by Lord Neuberger later in his speech.²¹ Accordingly, *Beresford* was wrongly decided and should no longer be relied upon. It is however unclear whether this holds true for the entirety of the judgment, and thus the much relied on comments regarding the nature of implied licences in village green law, or whether it applies merely to the consideration of the “by right” issue.

COMMENT

Conceptual Uncertainty

The tripartite test for use “as of right” is that the use must be *nec vi, nec clam* and *nec precario*. It is still unclear post *Barkas* as to whether use “by right” is a sub-species of *precario* or whether it forms a fourth vitiating factor itself.

Traditionally the courts had little problem with conceptualising “by right” use as a sub-species of *precario*.²² This sentiment has now been somewhat

¹⁸ *Beresford* [7].

¹⁹ *Beresford* [60].

²⁰ *Barkas* [82] (Lord Carnwarth).

²¹ *Beresford* [88]-[89].

²² See for example *R v Secretary of State for the Environment ex parte Billson* [1999] QB 374 (HC) where Sullivan J held that use of a common pursuant to s193 Law of Property Act 1925 would not be use “as of right” for the purposes of acquiring a prescriptive right of way because the use was by licence.

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challenged by recent Court of Appeal decisions such as *R (Newhaven Port and Properties Ltd) v East Sussex County Council*²³ where Richards LJ indicated that use pursuant to a statutory right should be characterised as “by right” rather than a sub-species of *precario* and use by licence.²⁴ Furthermore, it was also expressly stated in the Court of Appeal proceedings in *Barkas* that there may be instances in which a fourth vitiating factor could be relevant.²⁵

The Supreme Court failed to give a definitive answer on the proper characterisation of use pursuant to a statutory right in *Barkas*. It was initially indicated by both speeches delivered that “by right” use should be considered as an element of *precario* use,²⁶ however Lord Carnwarth then swiftly proceeds to frame his speech within an ““as of right/by right” dichotomy”.²⁷ His Lordship goes even further by asserting that the tripartite test is “not always the whole story. Nor is the story necessarily the same story for all forms of prescriptive right.”²⁸

It matters how this type of use is characterised because it informs our entire conceptual understanding of the village green. If the tripartite test is no longer sufficient to determine if a landowner, whether public or private, has acquiesced in the use of their land for lawful sports and pastimes then it is unclear what standard should be applied. It does not seem satisfactory to have such a level of ambiguity when rights over land (which is an important economic, social and environmental resource) are being determined. To say that the test is “not always the whole story” or not the same for all prescriptive rights leaves open the possibility of costly litigation to determine where the plot of this story ends. Such an assertion also unsettles an ingrained tradition of English law that spans back as far as Bracton²⁹ and Coke.³⁰

Publically Owned Land

It is clear that the possibility of registering local authority land as a village green has dramatically diminished with the acknowledgement that use pursuant to a statutory right will not amount to use “as of right”. It is however clear that public ownership of land will not automatically bar the acquisition of village green status, with cases such as *Oxfordshire County Council v*

²³ [2013] EWCA Civ 276, [2014] QB 186.

²⁴ *Ibid* [82].

²⁵ Sullivan LJ [38].

²⁶ *Barkas* [20] (Lord Neuberger), [51] (Lord Carnwarth).

²⁷ *Barkas* [58] (Lord Carnwarth).

²⁸ *Barkas* [58] (Lord Carnwarth).

²⁹ Bracton, Lib 2, f 51b, 52a, Lib 4, f 22b.

³⁰ Co Litt 11 3b.

*Oxford City Council*³¹ (“*Oxfordshire*”) evidencing this. The question therefore appears to be *in what circumstances* will land held by a local authority be used by the local inhabitants “by right” as opposed to “as of right”?

The answer suggested by Lord Carnwarth in the Supreme Court is that for land to be used “by right” it must be “laid out or identified in any way for public recreational use”.³² If this is indeed the test it could still be submitted that the Field in *Barkas* does not fulfil it. Section 12(1) Housing Act 1985 denotes three purposes for which the land may be held (buildings adapted for use as shops, recreation grounds and any other beneficial purpose) and therefore the land is not solely laid out for recreation. There is no need for a formal appropriation process between these three uses as the holding power of s12 is consistent (at most all that is needed is a “formal decision”³³) and therefore the land is not deemed as being used for another purpose, or ceasing to be used for the statutory purpose for which it is held.³⁴ This objection is partially nullified by the overruling of *Beresford* which now allows for use of the land to be “by right” even if it has been acquired under wide powers and for no specific use. It does however seem quite unsatisfactory that the use of the land can change provided that the new use is still within the scope of the same holding power. It is little wonder why local inhabitants try to register their recreational spaces as a TVG to secure better protection for their use rights.

Where the distinguishing line lays between cases such as *Oxfordshire* and *Barkas* or *Beresford* is even harder to determine. It would appear that any appropriation of land under a statutory power, no matter how wide, will render the use “by right” provided that laying out the land for recreational use can be construed within the power. This would cover most public parks and land owned by local authorities, and it is probable that the land in *Oxfordshire* was only subject to a successful registration because some twenty five per cent of the surface area of the land is inaccessible; the local authority could hardly have laid this land out for recreation even if they had wanted to.

It has recently been suggested that “[i]t would be going very far indeed to suggest that Parliament, as a matter of fact, intended public parks to fall within the TVG legislation.”³⁵ This sentiment was shared by Lord Neuberger

³¹ [2006] UKHL 25, [2006] 2 AC 674; see also *Barkas* [66] (Lord Carnwarth).

³² *Barkas* [66].

³³ *Barkas* Court of Appeal [2012] EWCA Civ 1371, [2013] 2 All ER 69 [42] (Sullivan LJ).

³⁴ Applying Sullivan LJ in *Barkas* Court of Appeal [2012] EWCA Civ 1371, [2013] 2 All ER 69 [43].

³⁵ Leslie Blohm, “The “by right” doctrine and village green applications- a response” [2014] 1 Conv 40, 51.

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in *Barkas*.³⁶ It can be argued that TVG registration cannot be reconciled with the power of local authorities to hold land for the purposes of recreation. Parliament allows local authorities to change the purposes for which they hold the land under the mechanism of s122 Local Government Act 1972 depending on the needs and interests of the local community at any given time. It would seem highly peculiar that this power could then be impeded simply because they had held the land for recreational purposes for the twenty years required for village green registration.

Policy Considerations

The decision of the Supreme Court in *Barkas* is another firm indication as to the policy concerns surrounding village green registration.

Land that is registered as a village green is protected in the sense that it prevents any use of the land that is inconsistent with the recreational rights conferred on the local inhabitants. This hinders the economic value of the land and sterilises it in terms of development and commercial investment. The introduction of the “trigger events” that bar registration, as discussed earlier, will automatically preclude most attempts at registration when it is considered that a sizeable portion of applications have been to prevent development on open spaces.

Local authorities holding land for the purposes of recreation, and the right of the public to use these, does not give the public the same permanence and stability of right that is conferred upon TVG registration. The flexibility in allowing for the appropriation of the land to an alternative use, which can no longer be defeated by village green registration, is more favourable to an expanding economy that is seeking to extract the maximum economic value from natural resources such as land. Creating a class of land that cannot be registered as a village green makes available this valuable resource for purposes other than recreation.

CONCLUSION

To summarise, there is still some uncertainty as to when it can be inferred that land has been appropriated and laid out for recreational use by the local authority. One thing is however abundantly clear: in an era of economic growth the “village green industry”³⁷ is in decline. The additional protection

³⁶ *Barkas* [24].

³⁷ *R (Lewis) v Redcar and Cleveland Borough Council and Another* [2010] UKSC 11, [2010] 2 AC 70 [48] (Lord Walker); see also Rowena Meager, “The ‘village green industry’: back in business” (2010) 69(2) CLJ 238.

afforded to local authority land post *Barkas*, coupled with the recent amendments to the Commons Registration Act 2006 by the Growth and Infrastructure Act 2013, clearly tips the balance in favour of the development of land and the economic aim of sustainable development.³⁸

³⁸ Similar arguments are made in light of the decision in *Adamson and others v Paddico (267) Limited* [2014] UKSC 7, [2014] 2 WLR 300 see Natalie Pratt, “The application of the equitable doctrine of laches to the rectification of the town and village green register” [2014] 6 *Journal of Planning and Environment Law* 588, 595