
Articles

Article 8 ECHR, Gypsies, and Some Remaining Problems after *South Buckinghamshire*

By Robert McCracken¹ and Gregory Jones²

Introduction

“[L]e dernier refuge des plaideurs en difficulté”³ was how the late Judge René Joliet of the European Court of Justice (“ECJ”) described resort to the European Convention on Human Rights⁴ (“ECHR”). This article examines the implications of the Court of Appeal’s decisions in four appeals,⁵ commonly known as *South Bucks v Porter*⁶ (“*South Bucks*”), concerning the application of article 8 ECHR to the Court’s discretion under s.187B of the Town and Country Planning Act 1990 (as amended) (“TCPA 1990”). This article addresses the criticism that the judgment may have undermined s.187B as an effective tool to end breaches of planning control. It seeks also to set the judgment in the context of the history of injunctive relief for breaches of planning control.

Origins of Injunctive Relief for Breaches of Planning Control

The evolution of a power for local planning authorities (“LPAs”) to seek injunctive relief for a breach of planning control has been slow.⁷ Prior to 1933 LPAs had no right to seek injunctive relief for breaches of planning control. Nonetheless, it was already established that the Attorney General could bring an action at the relation of the LPA to uphold the “public right”. Where there was a “clear breach” of

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³ Joliet: *La Libre Circulation des Marchandises: L’Arrêt Keck et Mithouard et les Nouvelles Orientations de la Jurisprudence*. Journal des Tribunaux Droit Européen 20 octobre, n° 12-2ième année. Exposé présenté lors de la visite des magistrats des cours suprêmes à la Cour de Justice le 6 juin 1994.

⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome 1950).

⁵ Two of the appeals, *Porter v South Bucks D.C.* and *Searle v Chichester D.C.* concerned injunctions granted prior to the coming into force of the Human Rights Act 1998 (“HRA 1998”) on October 2, 2000. The relevant respondent authorities conceded that, save for the issue of costs they should be treated in the same way as the appeals from injunctions granted post October 2, 2000.

⁶ *South Bucks D.C. v Porter*, *Chichester D.C. v Searle*; *Wrexham County B.C. v Berry*; *Hertsmere B.C. v Harty* [2001] EWCA Civ 1549; [2002] 1 W.L.R. 1359; [2002] 2 All ER 425; [2002] J.P.L. 608. The authors appeared as counsel for the successful respondent local authority in *Hertsmere BC v Harty*. The petition by the unsuccessful gypsies in Hertsmere to the House of Lords for leave to appeal was refused on February 7, 2002, the same date upon which the House of Lords granted the three unsuccessful local planning authorities leave to appeal.

⁷ Indeed, even today, a third party adversely affected by an unlawful development cannot himself seek injunctive relief from the courts. Given that such development might impact upon a person’s rights to respect for family and home life under article 8 of the ECHR or to his right to quiet enjoyment of his property pursuant to article 1 to the first protocol to the ECHR, one may soon see developing case law on whether such a person can require an LPA to take effective enforcement action as part of its positive

planning control injunctions would be refused only in exceptional circumstances.⁸ Nor was it necessary for the Attorney General to demonstrate that all alternative remedies had been exhausted, it would be enough if the defendant demonstrated by his conduct that he intended to avoid complying with planning control and continue in breach for as long as he could.⁹ By s.276 of the Local Government Act 1933 LPAs were themselves given the power to bring proceedings, "... for the promotion or protection of the interests of the inhabitants of their area". However, the courts were reluctant to accept that this conferred upon LPAs a right equivalent to the "public interest" given to the Attorney General.¹⁰

The Local Government Act 1972 ("LGA 1972") re-enacted this power but with added words expressly authorising LPAs to "institute civil proceedings" in their own name.¹¹ This dealt with the particular earlier misgiving.¹² However, the courts did not treat LPAs with the same deference as they had the Attorney General. As Grant noted, there was "... no suggestion in the post-1972 cases that an authority ought, like the Attorney General, to have their injunction in all but exceptional cases ..."¹³

The success of s.222 proved to be qualified. Part of the problem lay in the perception that s.222 was outside the planning statutory code under the Town and Country Planning Act 1971.¹⁴ This is well reflected by contemporary commentators.¹⁵

In *Runnymede B.C. v Ball*, the Court of Appeal accepted that s.222 could be used to supplement existing remedies and was not confined to deliberate and flagrant breaches of planning control.¹⁶ But, in *Runnymede B.C. v Smith*¹⁷ Millet J. refused to grant an injunction on the grounds that there was no evidence of permanent injury to the land, that the developers had an arguable case on appeal and that there was nothing improper *per se* in exploiting the statutory machinery.¹⁸ Millet J implied that a local

duty to ensure that those rights are not violated by third parties. On the existence of positive duties, see *Hatton v UK* (Application No.36022/9), para.[96] of the judgment of the Third Section of the ECtHR and *Antonetto v Italy* (Application No.159158/89). See Paradis *Unlawful Planning Development and the Right to Peaceful Enjoyment of Possession: the Antonetto Case* [2002] J.P.L. 674 and the interesting correspondence it generated: Raine [2002] J.P.L. 1188 and Carnwath L.J. [2002] J.P.L. 1189.

⁸ *Attorney-General v Bastow* [1957] 1 Q.B. 514.

⁹ *Attorney-General v Smith* [1958] 2 Q.B. 173 at 186 per Lord Goddard C.J.

¹⁰ *Prestatyn U.D.C. v Prestatyn Raceway Ltd* [1970] 1 W.L.R. 33 at 45A–D *per Goff J.*; *Hampshire C.C. v Shonleigh Nominees Ltd* [1970] 1 W.L.R. 865. See further Grant: *Urban Planning Law* (Sweet & Maxwell) (1982) at p.426.

¹¹ Section 222 provides: "Where a local authority consider it expedient for the promotion of the interest of the inhabitants of their area ... they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name."

¹² See, e.g. *Solithull M.B.C. v Maxfern Ltd* [1977] 1 W.L.R. 127.

¹³ Grant: *Urban Planning Law* (Sweet & Maxwell) (1982) at p.426.

¹⁴ The town and country planning legislation was regarded as a comprehensive code, see *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] A.C. 132.

¹⁵ "... [T]he result of an injunction would be to pre-empt the developer's statutory right of appeal to the Secretary of State and also to permit the court to impose penalties other than those specified by the planning legislation, *i.e.* [sic] imprisonment for contempt." Alder: *Development Control* (Sweet & Maxwell) (1989) (2nd Ed.) at 184. "It is not a power granted to [local planning authorities] for the sole purpose of enforcing planning control. Therefore, as it is an 'extra' beyond that contemplated by Parliament when the enforcement regime was enacted, the court will not grant an injunction unless there are good reasons." Millichap: *The Effective Enforcement of Planning Controls* (Butterworths) (1991) para.9.1 at p.222.

¹⁶ [1986] 1 W.L.R. 353. Purchas L.J. stated that: "In cases where it is necessary to resort to relief at civil law in order to prevent irreparable damage, which might well not be prevented by process in the Magistrates' Court, then ... a local authority should be able to act under section 222 ... [such as where] the failure to avoid fire hazards or the execution of development on land which may in practice prove irreversible." at p.363. See also *City of London Corporation v Bovis Construction Ltd* 86 L.G.R. 660 which although under the Control of Pollution Act 1974 seemed to recognise that "irreversible damage" was not necessarily confined to physical works: "Every disturbed night [the local residents] suffer involves irreversible damage." *Per* Taylor L.J. at p.685.

¹⁷ [1986] J.P.L. 592, HC.

¹⁸ The problem was, some thought, "... that the court may be willing to grant an injunction only in situations where the threat to environmental harm is seen as particularly serious." Morgan & Nott: *Development Control: Policy into Practice* (Butterworths) (1988).

authority would have great difficulty in securing an injunction in the absence of a breach of criminal law—a serious handicap to its effectiveness as a remedy. In *Bedfordshire C.C. v CEGB*¹⁹ Piers Ashworth Q.C.²⁰ stated that he was not, “shut out from granting such an injunction where there had been no previous history but where a defendant proposed to breach the criminal law.”²¹ The Court of Appeal took a more robust approach towards s.222 in *Mole Valley v Smith*²² although the LPA had failed to fulfil its then existing functions in connection with gypsies. Lord Donaldson M.R. emphasised the importance of leaving discretionary policy matters to the LPA. He cited²³ with approval a passage from the then Hoffmann J. when granting the injunction at first instance:

“There can be no doubt that requiring the appellants to leave the site would cause considerable hardship, this court, however, is not entrusted with a general jurisdiction to solve social problems. *The striking of a balance between the requirements of planning policy and the needs of these defendants is a matter which, in my view, has been entrusted to other authorities.*” [Emphasis added]

This passage foreshadows the approach Lord Hoffmann took in the *Alconbury*²⁴ cases—matters of planning policy are for the democratically accountable bodies, not the courts. Since the decision to grant planning permission by balancing the needs of society against the needs of the individual is one which Parliament has given the planning authority, such considerations were outside the court’s discretion whether to refuse injunctive relief.²⁵ Balcombe L.J. identified that the practical consequence of not giving injunctive relief was in effect to grant temporary planning permission.²⁶

¹⁹ [1985] J.P.L. 43, HC. Unfortunately at this time the J.P.L. reported judgments by way of a third person narrative rather than a verbatim reproduction of the judgment.

²⁰ Sitting as a Deputy High Court Judge. However, it is also interesting to note Jowitt J.’s comments upon the use of s.222 made after the *Carnwath Report* and the introduction of s.187B which appear to suggest that the council need only satisfy the court that criminal sanction are unlikely to be a deterrent, not that they have been and failed.: “So far as use of the power under the Local Government Act is concerned, the Court will remind itself that no public authority should lightly invoke the assistance of this Court’s injunctive powers when there are other proceedings available in the criminal courts. Nonetheless, *the power is one which is properly invoked when it is apparent that the decision of the criminal courts are not able to provide a successful deterrent and the Local Authority has to act in the interests of residents generally, . . .*” [Emphasis added] *Runnymede Borough Council v Fulke-Greville & Another* (CO/2572/96) (10 October 1996) (unreported) per Jowitt J. pp.3F–4C. See also, *Southwark L.B.C. v Frow* [1989] J.P.L. 645.

²¹ *ibid.* at p.44. This extract from the J.P.L. report, appears to have later prompted Robert Carnwath Q.C. in *Enforcing Planning Control* (the so-called “Carnwath Report”) to consider that the judge was taking the view that it would be possible to obtain an injunction where there was an unauthorised development even though it did not involve the commission of an offence. If that be so, the position was not quite as clear as Carnwath suggested. Indeed, Professor Purdue’s commentary to the same case ended by stating: “. . . it may be that even where it is absolutely clear that a breach of planning control has occurred, section 222 may not be available unless the local planning authority has brought in the criminal law by immediately serving a stop notice.” [1985] J.P.L. 43 at 49.

²² [1992] 3 P.L.R. 22.

²³ At p.31A–B.

²⁴ *R (on the application of Alconbury Developments Limited) v Secretary of State for the Environment Transport and the Regions and other cases* [2001] UKHL 23; [2001] 2 W.L.R. 1389; [2001] 2 All E.R. 929 the latter of which reports the decision of both the Divisional Court and the House of Lords. See also *R. (Runa Begum) v London Borough of Tower Hamlets* [2003] UKHL 5.

²⁵ Lord Donaldson M.R. put the matter thus “No doubt there are potential disadvantages for the public in moving the appellants off their existing sites if no other site is available, *but where the balance of the public interest lies is for the respondent councils to determine and not for this court.*” [Emphasis added] At p.31C–D. In answer to the submission that on general equitable principles an injunction should be refused on the grounds that the respondent councils were not themselves blameless, Lord Donaldson M.R. remarked: “Suffice it to say that it is not for the courts to usurp the policy decision making functions of the Secretary of State as it were by a side wind.”

²⁶ “[T]he argument is that no injunction should be granted, or the operation of an injunction granted should be suspended, until the county council provides sufficient caravan sites for the use of gypsies. This is equivalent to saying that the appellants should be granted temporary planning permission for the use of their land pending the availability of sufficient authorised sites, that is a failure to provide alternative sites is not considered to be other than in the discretion of the local planning authority and not a bar to injunctive relief.” (p.33C–D).

The Carnwath Report

Robert Carnwath Q.C.²⁷ was commissioned by the Department of the Environment to prepare a report on the general enforcement of planning control. The Report demonstrated that there was a small minority of people who were determined to contravene planning control.²⁸

One of the principal complaints made of the then existing planning enforcement regime was said to be its failure to respond with, “sufficient urgency to breaches of planning control”.²⁹ There was “a wide gap between what the public expects and what is achieved.”³⁰ Delay in the taking of effective enforcement action was the major concern. This meant that it could be some significant time before an unlawful use could be brought to an end. Where the profit to be obtained from a breach of planning control was large, the level of any criminal penalty might not be sufficient to act as an effective remedy.

The Report identified two possible answers under the then current system to the problem of delayed enforcement action; firstly, the issue of stop notices³¹ but noted, among other things, that these must be accompanied by an enforcement notice and could only take effect after three days; and second, the seeking of injunctive relief under s.222.

Whilst s.222 had proved “a useful back-up” to the statutory scheme in difficult cases, there were “still doubts about the circumstances” in which the remedy of an injunction was available and it was unclear to what extent it was available to restrain an actual or threatened breach of planning control before it had become a criminal offence (following the service of an enforcement notice or stop notice). Carnwath recommended that LPAs be able to seek an injunction to restrain any threatened or actual breach of planning control whether or not a stop or enforcement notice had been served.³²

There were two areas where it would be “especially useful” in providing:

- a. an urgent remedy in cases where there is a serious threat to amenity, “to deal with either a threatened breach (before stop notice can be served) or an actual breach (*e.g.* where there are problems in preparing an effective enforcement and stop notice in time).”
- b. “a stronger back-up power in cases where the existing remedies have provided, or are thought likely to be, inadequate.”

Intriguingly, Carnwath continued:

“... it would be a mistake to attempt to prescribe too closely the circumstances in which the remedy would be available, or the forms of order which could be granted ... the merit of the remedy is its flexibility and its ability to meet changing needs. What is required is its recognition in the Act as a normal back-up to the other remedies, and acceptance *that it is for the authority to judge*

²⁷ Now Carnwath L.J.

²⁸ Described by the then Parliamentary Under Secretary of State for the Environment as, “people who bring the system into disrepute.”

²⁹ Chapter 2, section (i) paragraph 2.1 at p.37 of the Report.

³⁰ Chapter 2, section (i) paragraph 2.2 at p.37 of the Report.

³¹ Section 90 Town and Country Planning Act 1990.

³² “... there [should] be an express power for authorities exercising planning functions to apply to the high court or County Court for an injunction to restrain any threatened or actual breach of planning control (whether or not an enforcement or stop notice has served), where they consider it necessary or expedient in order to prevent serious damage to amenity or otherwise to supplement the powers available under the Act...” Paragraph 10.3. at p.86 of the Report. Although part of a package of proposals advocated by the Report, this was regarded as a “central recommendation”: *Encyclopaedia of Planning Law and Practice* Volume 2 at P187B.02.2 Edited by Professor Malcolm Grant.

(subject to the ordinary judicial review criteria of reasonableness) when its use is appropriate.”³³ [Emphasis added]

Section 187B TCPA

Section 187B was introduced as part of a package of amendments to the Town and Country Planning Act 1990, in particular, by way of section 3 of the Planning and Compensation Act 1991. Section 187B provides:

(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, it may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.

(2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for restraining the breach”

Pre-South Bucks Case Law

In *Horsham District Council v Cales Newman & Others*³⁴—one of the first applications of s.187B to come before the high court—Laws J. considered that Parliament had given the Court a “free hand” in “dealing” with injunctions not “trammelled or restricted in the use of its discretion”.³⁵

Rejecting the submission that no injunction should be issued until the “criminal process” had been tested,³⁶ Laws J acknowledged that even when the breaches of planning control were continuing and substantial nonetheless, the Court might refuse an injunction.³⁷ He appears to have accepted that a plea of hardship comprising enforced homelessness including disruption to the education of the defendants’ children and the delay in seeking injunctive relief were, as a matter of principle, relevant to whether injunctive relief should be granted (although not sufficient on the actual facts). Subsequent case law, however, limited the scope of the discretion in such a way that a “free hand” would no longer seem apposite as a description of the court’s power.

Without reference to *Horsham*, the Court of Appeal held in *Runnymede B.C. v Harwood*³⁸ that Section

³³ Paragraph 10.3 at p.86 of the Report. Reliance was placed on this passage in oral argument by counsel for the local authorities (excepting Hertsmere B.C.) in *South Bucks* in order to support the view that the where there was an admitted breach of planning control the Court must grant the injunction, and could only refuse so to do where the LPA had acted in an unreasonable way which could be challenged by way of judicial review (as recorded at para.35 of the judgment of Simon Brown L.J.). The problem with this argument is first, it limits the apparent general discretion given to the Court, and secondly, it ignores Camrath’s own caution against prescribing the circumstances where the remedy would be available.

³⁴ (29 September 1992 in Chambers) (unreported).

³⁵ “. . . a legislative policy different from that which preceded it [*i.e.* s.222 LGA 1972], a legislative policy which cannot be described as encapsulated by the dicta in the earlier cases. It is clearly the intention of parliament that the Court should have a free hand in dealing with applications of this kind and not be trammelled or restricted in the use of its discretion. There is no need to justify a failure to have earlier recourse to the criminal process; nor I think, when to demonstrate that the criminal procedure is bound to be ineffective.

In my judgment where a planning authority comes to Court under this provisions demonstrating, as I see it, beyond argument plain in and continuing breaches of planning control, that is a case where parliament provided a remedy which would fall readily to be exercised. It must have been the intention of the legislature to widen the category of cases in which pre-emptive action by civil injunction may properly be taken in order to protect the environment though the medium of the planning legislation.” (p.16G) *per* Laws J. (now Laws L.J.).

³⁶ “I cannot perceive any public interest in accepting a proposition whose real effect is that while the Defendants decline to obey the law in the face of the enforcement notices, the Court should wait and see whether the threat or actuality of a fine might make a difference.” (p.17F–G).

³⁷ “The fact is that the breaches are plain, continuing and substantial. *If there is no current availing consideration sufficient to deprive the Council of relief* in the face of that circumstances then the injunction should go.” [Emphasis added] (pp.17G–18A).

³⁸ [1994] P.L.R. 22.

187B should be given a broad interpretation and it was not appropriate to treat s.187B as subject to the same limitations as s.222. The LPA need not show that “by prosecutions of the particular defendant that the criminal penalties were not enough to deter him from infringement of planning law.”³⁹ At the interlocutory stage, there was no requirement that the injunction be aimed at maintaining the *status quo*.⁴⁰ Hobhouse L.J. considered that s.187B had “radically transformed the matters which the court has to consider.” He contrasted the position under s.222 where the Court was considering to grant injunctive relief as part of “an exceptional jurisdiction” with that of s.187B:

“[T]he position, as manifestly intended by the legislature, is a much more simple one. It is an application for an injunction which may be made when the criteria in section 187B are satisfied and it is not necessary to consider the more difficult questions of public policy and statutory intent, which have to be considered when an injunction in support of criminal law is being applied for.”⁴¹

The Court of Appeal considered s.187B again in *Hambleton v Bird*⁴² Pill L.J. stated:

“The granting of an injunction in any particular case is dependent on the court’s discretion. This does not however entitle a judge in the present context to act as a court of appeal against a planning decision or to base a refusal to grant an injunction upon his view of the overall public interest.”

Pill L.J. held that the deputy judge had misdirected himself by taking into consideration the merits of the planning decision and the possibility of a successful further appeal by the respondents; he was held to have wrongly considered amongst other things the availability of alternative accommodation for the respondents and the evidence of the official site was unsuitable, and the hardship to respondents.⁴³ The deputy judge was also criticised for taking into account changes in circumstances since the date of the previous unsuccessful planning appeal.

In *Leeds City Council v Rogers and Others*⁴⁴ Sir John Wood⁴⁵ having reviewed most of the authorities (although not *Horsham*) stated that:

“The discretion whether or not to grant an injunction exists but it is very limited; for instance, I can see a situation where the application might be adjourned because undertakings have been given to vacate. I can also see the possibility that, if there was an abuse of process (in the sense that there was a malicious decision), that could be well set aside. . . .

³⁹ Page 24G–H per Dillon L.J. who then went onto to contrast the position under s.187B with the position articulated by Bingham L.J.’s “guiding principles” in *City of London Corp v Bovis Construction* [1992] 3 All E.R. at p.714H (see note 16 above): “(1) that the jurisdiction is to be invoked and exercised exceptionally and with great caution . . . (2) that there must certainly be something more than a mere infringement of the criminal law before the assistance of civil proceedings can be invoked and accorded for the protection of the area . . . (3) that the essential foundation for the exercise of the court’s discretion to grant an injunction is not the offender is deliberately and flagrantly flouting the law but the need to draw the inference that the defendant’s unlawful operations will continue unless and until effectively restrained by the law and that nothing short of an injunction will be effective to restrain them . . .”.

⁴⁰ This means that the under s.187B the principles in *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 396 do not apply as confirmed in *Leeds City Council v Rogers and Others* HC, discussed below. This is to be contrasted with the position under s.222 LGA 1972 in which the *American Cyanamid* principles were held to apply to interlocutory relief see *East Hampshire D.C. v Davies* [1991] 2 P.L.R. 8, CA.

⁴¹ Page 30A–B.

⁴² [1995] 3 P.L.R. 8, CA.

⁴³ In giving the second judgment, Sir Ralph Gibson stated: “There was, in my judgment, no defence to the claim for an injunction. The efforts of the defendants’ advisers should have been directed to securing the best terms which could properly be granted for the suspension of enforcement of the injunction so as to enable the breach of planning control to be brought to an end without excessive hardship to the families of the defendants.” (p.17A–B).

⁴⁴ 1997/L/84 (23 July 1997 in Chambers) (unreported).

⁴⁵ Sitting as a judge of the High Court.

Planning considerations, public policy and social problems are not within that discretion.”⁴⁶

He thought:

“... judicial review issues might very well be thought to fall *outside* the discretion indicated by the Court of Appeal [in *Hambleton*], and in any event the Court of Appeal have indicated that planning, public policy and social problems, really fall outside the court’s discretion when considering the grant of an injunction. *If judicial review issues were to be introduced, then I can see huge problems arising.*”⁴⁷ [Emphasis added]

In *Tandridge DC v Delaney*⁴⁸ Robin Purchas QC⁴⁹ expressly applied the principles set out by Pill L.J. in *Hambleton*. He acknowledged that article 8 gave rights to respect for home and family life but noted that these rights were qualified and that it was not for the Court to strike the appropriate balance between those private rights and the public necessity. However, he noted that the Court must “carefully examine” whether there had been any change in circumstances since the matter was considered as part of the planning process.

Article 8 of the ECHR

Article 8 provides that everyone has:

“(1) ... the right to respect for his home and family life ... (2) there shall be no interference by a public authority with the exercise of this right except as such as in accordance with the law and is necessary in a democratic society in the interests of ... the economic well being of the country ... or the protection of the rights of others”.

The application of article 8 to planning laws restricting the ability of gypsies to station caravans on their own land has been considered by the ECtHR on a number of occasions.⁵⁰ Some principles can be derived from the case law. It is accepted by the ECtHR that TCPA 1990 is system of planning control in general accordance with law and that the protection of the environment is amongst other things for the “protection of the rights and freedoms of others”.

Article 8 does not, in the view of the narrow majority of the Strasbourg Court, give a right to be provided with a home⁵¹ nor oblige member states to provide enough sites for gypsy encampments.⁵² When considering whether a requirement that someone leave his home is proportionate it is “highly relevant” that the home was established unlawfully.⁵³

The ECtHR accepted that the national planning authorities were best placed to make judgments about

⁴⁶ The judgment is also of interest because it refers to a note of a judgment of Carnwath J. *R. v Basildon D.C., Ex p. Clarke*. No report or transcript of this judgment appears to have been available to Sir John Wood who made clear his concern that the note may not be accurate. It now appears at [1996] J.P.L. 866: see Professor Purdue’s comment at 869–870. The case arose because a county court judge had adjourned an application for an injunction so that judicial review should take place. According to Sir John Wood, Carnwath J. had rejected judicial review and indicated that he thought that there was a danger of such applications merely being for the purpose of delay, or in any event causing delay, and he indicated that perhaps, the county court judge could have considered the circumstances which were before him. A judgment of Carnwath J. touching upon s.187B injunctions obviously had a special twist given that Carnwath J. had been the author of the report which led to its introduction. Counsel for the gypsies before Sir John Wood endeavoured to rely upon this note to justify the argument that the court under s.187B could consider issues that would otherwise be raised by judicial review.

⁴⁷ Transcript at pp.20F–21A.

⁴⁸ [2000] 1 P.L.R. 11.

⁴⁹ Sitting as a Deputy High Court Judge.

⁵⁰ See, e.g. *Buckley v UK* (1997) 23 E.H.R.R. and *Chapman v UK* (App. No.27238/95) 10 B.H.R.C. 48.

⁵¹ *Chapman* para.[99]; p.72d.

⁵² *Chapman* para.[98]; p.72b–c.

⁵³ *Chapman* para.[102]; p.72g–h.

the planning merits so that a wide margin of appreciation would be afforded to national planning authorities by the ECtHR.

South Bucks v Porter

With the exception of *Searle*, which was in an area of strictly controlled countryside, each case concerned sites in the Green Belt. However, the Court of Appeal considered the key issue on all appeals was whether the judges below had adopted a HRA 1998 compliant approach to s.187B. Whilst the substantive decision to grant the injunction would certainly depend upon their particular facts, the question whether the judges below directed themselves correctly upon the exercise of their discretion.⁵⁴ Accordingly, the decision did not turn upon the particular facts of any appeal. The Court also took the view that *Chapman* was principally concerned with the relationship between the ECtHR and national authorities and, in particular, the wide margin of appreciation that it would afford those authorities. The Court of Appeal as a domestic court was not in the same position.

Arguments by the Gypsies

The word “may” in s.187B conferred a clear discretion on the court.⁵⁵ The circular advice which accompanied the coming into force of s.187B, Circular 21/91 at paragraph 7 of Annex 4 stated that the decision to grant injunctive relief was in the “absolute discretion” of the court.⁵⁶ The third criteria suggested by the guidance stated that relief should be “commensurate” with the circumstances of the particular case.

Section 187B was not merely a review power, it conferred original jurisdiction on the court. The Court was obliged to address the issues arising under article 8, and in particular 8(2), and reach its own decision on whether removing on pain of imprisonment of gypsies from the Green Belt or countryside, was proportionate to then public interest in preserving then environment.

Carnwath’s recommendation for the repeal of the provision preventing stop notices being issued in respect of residential caravans had been rejected. Injunctions were the most effective measure for remedying breaches of planning control precisely because of the severe sanctions which accompanied them—not merely a fine but also imprisonment. By contrast, criminal proceedings for a breach of an enforcement notice could result only in a fine. A court should only issue an injunction if it were prepared to commit the person to prison for failing to comply.⁵⁷

The appellant in *Searle* argued that article 8 required the judge hearing a s.187B injunction was required to form a view upon the planning merits of the case. However, the appellants in the other three appeals accepted that the issue as to whether or not planning permission should be granted was exclusively a matter for the LPAs, and that the planning history of the site, and in particular, any recent decisions about it would be highly relevant. The Court recorded an acceptance that: decisions by the Secretary of State and his inspectors are independent and “carry particular weight.”⁵⁸ and that decisions by LPAs, as

⁵⁴ Per Simon Brown L.J. at [4].

⁵⁵ This is a powerful submission despite *Julius v Bishop of Oxford* (1880) 5 App. Cas. 214.

⁵⁶ The absolute nature of the court’s discretion is reflected in the words used by Laws J. in *Horsham* a case not cited to the Court of Appeal.

⁵⁷ There are, of course, other penalties for defiance of a court order. A person can also be fined for a breach of an injunction. His assets may be sequestrated. But see also *Guildford B.C. v Smith* [1994] J.P.L. 734, CA.

⁵⁸ At [33]. On the particular added relevance of appeal decisions see also *R (on the application of Rank) v East Cambridgeshire D.C.* [2002] EWHC 2081 (Admin) George Bartlett Q.C. (sitting as a Deputy High Court Judge) at [17]: “In my judgment a previous appeal decision has a particular potential relevance to a determination by a local planning authority by reason of the fact that it is a decision of the Secretary of State or by an inspector with delegated powers. It is the decision of a authority superior to the local planning authority, made in the reasoned decision letter of an expert inspector (or in the reasoned decision letter of the Secretary

the democratically accountable bodies, were also to be “accorded respect”. But in either case, it would be necessary for the LPA seeking a s.187B injunction to show that the gypsy’s article 8 rights were properly considered and in the pre-HRA 1998 cases that was unlikely to be so.

In any event, even if the Court’s power on a s.187B application were restricted to a mere review of the Council’s decision it would nevertheless be obliged to form its own independent assessment about on the proportionality of the relief sought to the object obtained.⁵⁹

Argument by the Respondent Councils

South Bucks, Chichester and Wrexham took the approach that the judge in exercising his power under s.187B was more or less bound to grant an injunction to restrain a breach of planning control unless the local planning authority’s decision to seek the injunction could be said to be flawed on *Wednesbury* grounds. In *Porter* itself, the LPA could only succeed if such a position was adopted.

The decision to grant an injunction was a “public law” decision. Section 187B was deliberately inserted into the TCPA 1990 and that Act was regarded as a “comprehensive code”.⁶⁰ The Carnwath report especially at paragraph 10.3,⁶¹ supported the view that the Court’s power was essentially one of supervision. The words in s.187B referring to “such an injunction as the court thinks appropriate for the purposes of restraining the breach” suggest as a matter of construction that the question for the court is *how* to enforce planning control rather than *whether* to enforce it. It was submitted that both *Mole Valley* and *Hambleton* were correctly decided (and still represented the law notwithstanding the HRA 1998). It was not until the committal stage was reached that the Court steps outside the planning code and is entitled to reach an independent view on proportionality. At the injunction stage the Court was to consider only whether the gypsies should leave the site, not whether they should suffer a serious penalty if they failed to comply with the injunction. *Alconbury* supported the view that such decision were for the democratically elected LPAs.

Hertsmere accepted that s.187B(2) gave the Court a discretion whether or not to grant an injunction and accepted too that the judge should only do so on the basis of a preparedness to fine or if necessary imprison the defendant gypsy for a breach of the injunction. However, the Court should not arrogate to itself the power to decide whether or not planning permission should be granted, that question being exclusively one for the planning authorities subject only to appeals under ss.288 and 289 of the TCPA 1990. The planning status of the land having been determined, the judge must therefore recognise, when he comes to carry out the proportionality test, that no lesser interference with the gypsies rights than their removal from the site would achieve the legitimate aim of preserving the environment.

The Approach of the Court of Appeal

The Court of Appeal’s approach was set out in the leading judgment of Simon Brown L.J., with whom Peter Gibson and Tuckey L.JJ. agreed. It had no hesitation in rejecting “the more extreme submissions made on either side”. The judge on an application under section 187B has neither a duty nor a power to make an independent judgment as to the planning merits. He must however be prepared to contemplate committal to prison for disobedience. In reaching that decision he must consider:

of State on the basis of a reasoned report by an inspector), in the light of representations from the appellant on the one hand and the local planning authority on the other. The planning judgment that it contains has a potential relevance in itself that derives not simply from the desirability of consistency but from the status of the decision-maker, the expertise of the inspector and the process that has enabled the judgment to be formed.”

⁵⁹ The appellants relied upon *R (Daly) v Home Secretary* [2001] UKHL 25; [2001] 2 A.C. 532 per Lord Bingham at 546.

⁶⁰ See footnote 14 above.

⁶¹ See footnote 33 above.

- the hardship to the defendant and his family in being forced to move.
- the availability of alternative sites
- personal circumstances such as the family's health and education needs.

Against those considerations, potentially leading to the withholding of injunctive relief, are to be set the countervailing interests of society as a whole such as:

- the importance of the need to enforce planning control
- the planning history of the site
- the (potentially critical) degree and flagrancy of breach.
- the degree (broadly assessed) of the environmental damage resulting from the breach
- health and safety factors
- the degree of urgency
- previous planning decisions
- the local authority's decision to seek an injunction
- the extent to which the above decisions had considered the relevant personal circumstances and properly posed and answered the questions arising under Article 8(2) as to necessity and proportionality⁶²
- the possibility of a change in the planning judgement by the planning authority.⁶³

The Court held that the principle of proportionality⁶⁴ required not merely that the injunction be necessary for the attainment of the public interest objective but also that it must not impose an excessive burden on the individual whose private life, home and ethnic identity were at stake. Courts must strike a balance between those competing interests, which cannot easily be weighed one against another. The key is that the task must be undertaken in a structured and articulate way.⁶⁵

⁶² This raises some interesting issues of practice for LPAs. Very often the officer's report recommending the taking of legal proceedings is considered as an exempt item under the Local Government Act 1972. LPA's will now have to consider whether they have sufficient confidence in the soundness of the report to waive the right of non disclosure and place it before the court considering the s.187B injunction. The committee might alternatively decide to give a minuted detailed reasoned decision. In our view, in most cases the LPA would be best served by disclosing the majority of the officer's report to committee (although any advice on the likely prospects of success could remain undisclosed). Indeed, the LPA could invite comments from the gypsies or their representatives on the contents of the report, in order that the gypsies be given the opportunity to take issue with any aspect of the report before the committee, and to ensure that the LPA could not be subject to criticism later that it had not afforded the gypsies an opportunity to be fairly heard. Similarly, since the court will give weight to decisions made by democratically accountable bodies, LPAs will usually wish to proceed by way of members decision rather than by delegated officer action. Action by a council officer, is of course action by a democratically accountable body, but if the decision is taken directly by persons who are elected there is a more obvious causal link. Of course, there will be circumstances where there is a need for urgency and action is most appropriately taken under delegated powers. In such circumstances the relevant officer would be well advised to make a full and careful note recording his decision making process and the matters he took into account.

⁶³ The planning authority could be the local or national planning authority.

⁶⁴ "Proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought—here the safeguarding of the environment—but also that it does not impose an excessive burden on the individual whose private interests—here the gypsy's private life and home and the retention of his ethnic identity—are at stake." *Per* Simon Brown LJ at paragraph 41 of the judgment. It should be noted that the Court of Appeal acknowledged that the retention of "ethnic identity" is a relevant factor in applying article 8, (see below). For a discussion of this principle in a planning context see Jones and Pike: *Proportionality and Planning—A Difficult and Nice Point to be Decided* [2002] J.P.L. 908 and more generally, Clayton: *Regaining a Sense of Proportionality* [2001] EHRLR 512 and Lester & Pannick *Human Rights Law and Practice* (1999) (Butterworths) at 3.10.

⁶⁵ Applying those principles to the cases in question, the Court of Appeal held that the decision in *South Bucks* "plainly" could not stand because whether or not Burton J. had been right to regard all questions of hardship as "entirely foreclosed" by the Court of Appeal's decisions in *Mole Valley* and *Hambleton* that approach could not stand following the coming into force of the HRA 1998. In *Chichester* Judge Barratt Q.C. had regarded himself as having "only the barest residual discretion" to withhold relief and accordingly, that decision was unsustainable. In *Wrexham* McCombe J. had considered that the *Chapman* case had effectively decided the application before him, and thereby erred. Only in the case of *Hertsmere* did the Court of Appeal find that Judge Brunning had properly appreciated the scope of his discretion and uphold the injunction.

Some Remaining Problems

The Court of Appeal impliedly distinguished between the planning merits in general of the controversial land use, which was a matter exclusively for the planning authorities, and the personal considerations, which might ultimately justify a departure from what would otherwise be the natural tendency to enforce the decisions of planning authorities; the latter were matters which the courts must examine. This is consistent with the acknowledgement of the House of Lords in *Great Portland Estates Plc v Westminster City Council*⁶⁶ that personal circumstances could sometimes be given direct effect as an exceptional or special circumstance. However, the conscientious application of this sensible approach designed to ensure the protection of the fundamental rights guaranteed by the Convention may not be entirely straightforward.

The first issue which must be addressed is whether the interests of gypsies have been adequately considered in the process which led to the adoption of the statutory plans which should have had a primary influence on the decision.⁶⁷ Government guidance in DoE Circular 1/94, *Gypsy Sites and Planning* accepts that there is “need”⁶⁸ to meet gypsies’ land use requirements. This applies to “persons of a nomadic way of life, whatever their race or origin”. It would be unrealistic to expect that such persons would necessarily have been sophisticated enough to have exercised their rights of participation in that process. It may be that little weight should be given to the statutory plan unless the local planning authority can show that it had actively undertaken of its own volition a consideration of their interests, as recommended by the Government.⁶⁹

Undoubtedly some of the high judicial observations at Strasbourg seriously critical of the planning system’s approach to the meeting of gypsy needs are strident and exaggerated. Judge Pettiti in his dissenting opinion in *Buckley* spoke of the “superimposition and accumulation of administrative rules (each of which would be acceptable taken singly) result . . . in its being totally impossible for a Gypsy family to make suitable arrangements for its accommodation . . . ‘if the *Buckley* case were transposed to a family of ecologists or adherents of a religion instead of Gypsies, the harassment to which Mrs Buckley was subjected would not have occurred.’ It is difficult to accept that many people in England would agree that the making of unauthorised trailer parks in the Green Belt or other valuable areas of countryside is justified today because “Europe has a special responsibility towards Gypsies. During the Second World War states concealed the genocide suffered by Gypsies”⁷⁰

Nonetheless, the criticisms by UK judges of the stature of Sedley J.⁷¹ and the Minority of Seven in *Chapman* cannot be easily dismissed. Sedley J. characterised the period between the Caravans Act 1968 and the repeal of its relevant provisions as “a quarter century . . . of non compliance with the duties imposed by the Act of 1968, marked by a series of decisions of this court holding local authorities to be in breach of their statutory duty, to apparently little practical effect”⁷² The powerful dissenting opinion of the Minority of Seven in *Chapman* drew attention to the fact “there was still a significant shortfall of

⁶⁶ [1985] A.C. 661.

⁶⁷ Statutory and policy importance is given to statutory development plans by section 54A TCPA 1990 and PPG 1 (especially, paragraphs 2.40 and 54) and PPG 12.

⁶⁸ Paragraph 6.

⁶⁹ Paragraph 7–10 of Circular 1/94.

⁷⁰ Favours one ethnic group risks giving less favourable treatment to other ethnic groups leading to a possible violation of article 14 ECHR, a point apparently recognised by the majority of the ECtHR in *Chapman* at paragraphs 94 and 95 of the judgment.

⁷¹ Now Sedley L.J.

⁷² *R v Lincolnshire CC ex p Atkinson* (22 September 1995).

official, lawful sites available for gypsies in the country as a whole⁷³” In their view “it was disproportionate to take steps to evict a family from their home on their own land in circumstances where there has not been shown to be any other, lawful alternative site reasonably available to them”.

A considerable weakness of the planning system’s approach to the nationally acknowledged needs of gypsies is that there are great variations in the capacity of planning districts to provide for them in environmentally acceptable ways. Thus some districts are predominantly Green Belt or else contain large proportions of otherwise specially protected countryside.⁷⁴ Such a district is likely to experience great difficulty in finding suitable sites. It would be odd if local planning authorities were expected, for example, to adopt a more flexible approach to inappropriate development in the Green Belt simply because the majority of the district is considered in need of Green Belt protection.⁷⁵ When such problems arise in relation to the differences in capacity of districts for general (impliedly conventional) housing they are addressed in Regional Planning Guidance and Structure Plans. Three difficult questions present themselves in this context.

Three Difficult Questions

- Does Circular 1/94 adequately address the issues raised by the relevant international agreements?
- Is a figure of assessed need for caravan sites (indicating the number of spaces for which provision should be made in each county or unitary district) provided in Government Regional Planning Guidance and Structure Plans, as it is for general (impliedly conventional) houses?
- Do local plans designate some of their housing sites for gypsies and others pursuing or wishing to pursue a lifestyle which does not depend upon the provision of conventional housing by volume housebuilders?

Circular 1/94 makes no distinctions based on the ethnic origin of travellers.⁷⁶ This leads some to think it surprising that it does not suggest that local authorities should feel free to decide that those who wish to live in their areas should adopt a conventional way of life. However the ECtHR noted “an emerging international consensus . . . recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle . . . not only for the purpose of safeguarding the interests of the minority themselves but to preserve a cultural diversity of value to the whole community.”⁷⁷ The ECtHR went on to say that “. . . the vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the regulatory planning framework and in reaching decisions in particular cases”⁷⁸ The general tenor of the ECtHR’s judgments, both majority and minority, suggests that the ethnicity of gypsies is important. Article 5.1 of the 1995 Framework Convention for the Protection of Minorities⁷⁹ speaks of minorities in terms of “religion,

⁷³ Minority Opinion paragraph 4.

⁷⁴ Circular 1/94 at paragraph 13 advises against local plans making allocations in protected areas but saying that “as a rule it will not be appropriate to make provision for gypsy sites in areas of open land where development is severely restricted, for example, Areas of Outstanding Natural Beauty, Sites of Special Scientific Interest, and other protected areas.” and that areas of the Green Belt “should not be allocated for gypsy sites in development plans.” [Emphasis added]. See also PPG 2 paragraph 3.3 and Annex E.

⁷⁵ See the caution expressed by Sullivan J. against watering down the approach to the need for “very special circumstances” in order to justify inappropriate development in the Green Belt in the gypsy case of *Doncaster MBC v Secretary of State for the Environment Transport and the Regions* [2002] EWHC 808 (Admin) especially paragraphs 70 and 74 of the judgment.

⁷⁶ Paragraph 5. It does distinguish travelling show people in respect of whom advice is given in Circular 22/91. It adopts the definition of gypsy given by section 16 of the Caravan Act 1968.

⁷⁷ Judgment paragraph 93.

⁷⁸ Judgment paragraph 96.

⁷⁹ The UK ratified it on 15 January 1998. In its Report to the Advisory Committee in July 1999 it accepted that gypsies were such a group. Tepee dwelling alternative lifestyles would probably not qualify.

language, traditions and cultural heritage". Article 5.2 imposes an obligation to "refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will . . ."

The Circular is, however, at times embarrassingly awkward in its language. It advises that "proposals for gypsy sites should continue to be determined solely in relation to land use factors".⁸⁰ This suggests that the planning system should ignore the family circumstances to which Article 8 requires that respect be given.⁸¹ It is difficult to reconcile this approach with *Great Portland Estates*. It cannot be reconciled with section 6 of the Human Rights Act 1998, without doing violence to language. The Circular goes on to state that "Local planning authorities should regard gypsies in the same manner as small businesses when considering possible enforcement action".⁸² No doubt small businesses are regarded more tenderly by the national planning authority and its inspectors than large businesses.⁸³ The international commitment, however, expressly requires particular attention to be paid to the family and home.⁸⁴

Ultimately and more importantly, however, the Circular is, like most such documents, so balanced in general overall tone that it is of limited value in making actual decisions that are likely to lead in practice to the satisfaction of the needs which it recognises. It acknowledges the need for clarity in policy and predictability in decision making both for traveller and settled communities but fails to provide guidance on issues of common concern on which national guidance is needed. It urges the necessity of the acquisition by local authorities of up to date information as to demand in plan making.⁸⁵ It offers, however, no guidance on how to distinguish between mere *demand* and *need*, (which is that element of demand which ought to be met in the public interest, after taking account of potential harm to the community's wider interests). If it intends that all gypsy demand should be met then they would be a highly privileged group. The guidance also fails to express any view on whether the "needs" of gypsies for which provision should be made are for touring caravans of a broadly similar scale to traditional Romany caravans or for trailers of the same scale as many multi-roomed apartments, requiring movement by special heavy transporter.⁸⁶ The guidance defines gypsies as "persons of nomadic way of life" but talks of provision for "sites for settled occupation"⁸⁷ It is not clear whether this means a place to stay for a few months or to settle permanently.⁸⁸ If it means the latter, it fails to explain how to define the

⁸⁰ Circular No. 1/94 at paragraph 22.

⁸¹ The court astutely adopted a Nelsonian construction to this advice in *Rexworthy v Secretary of State for the Environment* [1998] J.P.L. 864.

⁸² Paragraph 26.

⁸³ Paragraphs 14–17, PPG 18 are intended to encourage a greater latitude in enforcement against small businesses than is generally to be countenanced. The existence of Circular 18/94 (on enforcement) does not remedy the problem presented by 1/94. Although it encourages a "humane and compassionate" approach (para.9), it endorses Circular 1/94 (para.23).

⁸⁴ By virtue, for example, article 8 of the ECHR.

⁸⁵ Paragraph 11; see also PPG 3 para.13 which speaks of assessing travellers' "needs". In *R (on the application of Egan) v Secretary of State for Local Government and the Regions* [2002] EWHC 389 (Admin) Sullivan J. considered at paragraph 39 of his judgment, that it was "by no means self evident . . . that a policy in respect of gypsy caravan sites must contain a quantitative element in order to comply with the policy guidance in Circular 1/94."

⁸⁶ Even in Annex B, entitled "Characteristics of Sites".

⁸⁷ Paragraph 17.

⁸⁸ The English case law on the correct approach to "gypsy" is complicated. In *Horsham District Council v Secretary of State for the Environment*, *The Guardian*, October 31, 1989, the court held that a gypsy who, as a matter of fact, had lost the nomadic habit of life did not remain a gypsy for the purposes of the Caravan Sites Act 1968, even though he remained a gypsy by descent, culture, tradition or inclination. Seasonal work and travel may justify gypsy status (*Greenwich LBC v Powell* [1989] 1 A.C. 995). Indeed, in *R v Shropshire County Council, Ex p. Bungay* 23 H.L.R. 195 Otton J held a local authority has not erred in law in holding that persons still retained a nomadic habit of life, notwithstanding the fact that travelling had not been in evidence during a substantial period of time and they had stopped travelling because of the age of one of their family. However, in *R v South Hams DC, Ex p. Gibb* [1995] Q.B. 159, CA the Court of Appeal held that a person's movement must be for the purpose for seeking a livelihood in order to qualify as nomadic and is "not available to occupants of caravans who do not live in them for that purpose, and whose moves are actually not meet by need, but by caprice." The Court of Appeal held in *Heame v National Assembly for Wales* 22 October 1999 (QBCOF 1999/0648/C), that gypsy status can be lost in so far as the relevance of gypsy policies are concerned to that application, where the permission sought a permanent location for the stationing of mobile homes incompatible with a

groups to which it applies are made. Is an ethnic distinction in reality implied? Such a distinction was held to be in breach of article 14 of ECHR by the majority of the ECtHR in *Chapman*.⁸⁹ Nonetheless, there may be a tension between the way of life approach of English planning policy and the ethnicity approach of the ECtHR.

Regional Planning Guidance tends to ignore the needs of gypsies. Most RPG's talk of "housing" rather than "dwellings", implying that only conventional housing is being addressed. Occasionally there is a short discussion of gypsy sites. Thus there were two paragraphs in the 1996 RPG 3 for London entitled "gypsy sites"⁹⁰ and 1995 RPG 12 for Yorkshire and Humberside entitled "travellers".⁹¹ But they do not attempt to quantify needs or reconcile any conflicts between areas as to the contributions which each should make to meeting them. By contrast, efforts are made to quantify the need for general (impliedly conventional) housing and allocate a quantified proportion to individual planning areas.⁹² Until Structure Plans allocate specific quantities of caravan sites to the districts within their counties both district planning authorities and other participants in the local plan making process, such as representatives of settled communities and travellers will experience frustration in deciding how much space should be allocated.⁹³ It may be difficult for Local and Unitary Plans to strike a fair balance between the need to provide for travellers and protect the countryside if they do not specifically allocate some of their housing land as caravan/trailer parks. For example, Test Valley Local Plan 2002 (draft) Policy EN 12 is, subject to environmental constraints, positive about the sort of permissions where there is "demonstrable need in that locality". The policy does not however explain how such need is to be calculated or distinguished from mere demand. Understandably, land allocated for house building is unlikely to be used for a less remunerative trailer park.

Conclusions:

This area is a difficult one in which conscientious local authority decision makers are given limited assistance. In relation to gypsies the national planning system seems to fail both the community's interest in the protection of the shared environment and gypsy minority's interest in continuing their traditional lifestyle. It is vulnerable to the criticism that is unfair in principle and weak in practice. National planning policy fails to resolve central issues of nation-wide importance, such as the distinction between need and demand. Until the national planning hierarchy grapples with a quantification of gypsy needs and allocates between regions and districts appropriate requirements, conflicts will

nomadic lifestyle. The significance of *Heame* is often overlooked by local planning authorities. It can be highly relevant to the now very common situation where a person seeks planning permission for a permanent location for a mobile home in order that members of the family can have continuous access to medical and uninterrupted educational facilities. Often time, whilst the father travels to work his pattern of life is no more nomadic than contract builders or planning inspectors and the rest of the family are settled at the site. Applying *Heame* the local planning authority may be entitled to conclude that the planning application does not engage gypsy policies. It is to be noted that in most cases in this type applicants assert the gypsy status in the planning application itself by seeking permission for "a gypsy caravan site". *Clarke-Gowan v Secretary of State for Local Government, Transport and the Regions* [2002] EWHC 1284 provides an illustration of where a person may have been ethnically a gypsy but having a "peripatetic working life was typical of those engaged in sub-contractual work in the building industry" was held not to be a gypsy for planning purposes.

⁸⁹ See paras 94 and 95 of the judgment. Perhaps, the only way to reconcile the proscription on forcible assimilation (Article 5.2 of the Minorities Convention) and inadmissible discrimination in their favour would be to make provision for everyone who so wishes to live in a caravan.

⁹⁰ 4.29 and 4.30.

⁹¹ 8.11 and 8.12. This approach continues in the 2002 RPG 8 for the East Midlands.

⁹² The RPG's generally indicate a figure for housing in each area. They also sometimes give figures for other unpopular developments. Thus the 1995 RPG 12 for Yorkshire and Humberside gives tonnages for both sand and gravel and crushed rock for the four counties covered by the RPG (Table 2 in paragraph 10.9).

⁹³ For example, the July 2002 preamble to the Devon Structure Plan removes former policies H8 and H9 (regarding gypsies) on the basis that such policies are "not essential elements" of Structure Plans and are covered by the requirement of national policy and legislation.

continue which do not admit of straightforward resolution. Local planning authorities and the courts will both have to continue devoting resources which they can ill afford to the *ad hoc* resolution on a piecemeal basis of individual disputes which reflect an underlying failure of joined up government.

The principal beneficiaries will be deliberate law breakers who will exploit the system's failures to justify their own irresponsibility; the community as a whole will be the loser. Respect for the rule of law is diminished when the system fails to ensure the existence of policies which enable individual decisions to strike a fair balance between conflicting interests. Decent people are outraged by the slow response of the enforcement process to flagrant lawbreakers.⁹⁴ In the ECtHR, however, a substantial minority of seven (dissenting from a majority of 10) by implication concluded that gypsies do not have a "practical and effective opportunity to enjoy their rights to home, private and family life"⁹⁵ in England. Courts should defer to democratically accountable specialist decision makers⁹⁶; they can only do so if those bodies make the necessary decisions. For the moment, however, it is difficult to see how the courts can avoid retaining a real power of supervision as articulated by the Court of Appeal held in *South Bucks*.⁹⁷ Perhaps, ultimately society will decide that gypsies must choose between a nomadic lifestyle and settled conventional housing,⁹⁸ and will be willing openly to justify that. Unless either such a decision is made or quantified provision is allocated in regional guidance and statutory plans confusion and conflict will continue.⁹⁹

⁹⁴ "... the public visibility of gypsies has grown, while the tolerance of the settled community has declined" Home *Planning aspects of the government consultation paper on gypsies* [1993] J.P.L. 13.

⁹⁵ Paragraph 9 of the Minority Opinion in *Chapman*.

⁹⁶ As decided by the House of Lords in *Alconbury*. For commentaries see McCracken *The Lords Light the Lamp of Judgment* [2001] J.P.L. B17; Lindblom: *Development and Democracy: The Place of Human Rights in Our Planning System After Alconbury* [2001] J.P.L. Occasional Papers No.29 at [3] and Elvin and Maurici [2001] J.P.L. 883.

⁹⁷ In *Cotswold DC v Ford* [2002] P.L.C.R. 24, HC one of the first cases decided following *South Bucks* the court held that because the personal circumstances of the defendant had changed since the report to committee, the court was "obliged to make [its] own assessment of the questions of necessity and proportionality." See also *Buckinghamshire C.C. v Northwest Estates Plc* [2002] EWHC 1088 (Ch).

⁹⁸ This problem is neatly illustrated by *Clarke v Secretary of State for the Environment Transport and the Regions and Tunbridge Wells BC* [2002] J.P.L. 1365 in which the question of the relevancy of a rejection of conventional housing by a gypsy might have on a planning decision for the creation of a permanent site for the stationing of mobile homes was considered by the Court of Appeal. It was argued on behalf of the local planning authority, that the judge at first instance, Burton J., had erroneously held that planning authorities were precluded from taking into account the rejection of the offer of conventional housing by a gypsy by virtue of articles 8 and 14 ECHR ([2001] EWHC Admin 800). The Court of Appeal dismissed the appeal on the basis that Burton J. had correctly held that "where article 8 was engaged, and engaged at the level of intensity [described by the judge] then it would not be enough for a local authority simply to say that conventional housing had been available and had been refused. The authority would have to go on, as the inspector would have to go on, and consider the personal planning considerations: that being an operation envisaged by and engaged in Article 8.2." (Buxton L.J. at para.12 of the judgment). The case is discussed in *Current Topics* [2002] J.P.L. 903.

⁹⁹ Václav Havel: "The Gypsies are a litmus test not of democracy but of civil society." (ODTCQ) (1998) (OUP) 142:7.

Travel Plans and the Planning System

By John Harrison*

Travel plans¹ are mechanisms for managing access to a specific site or development which focus on promoting access by sustainable modes of travel such as public transport, cycling and walking. Typically they aim to reduce car usage, traffic congestion and air pollution. They can contribute to improved road safety and promote healthier lifestyles. Recent research² demonstrates that effective travel plans can bring benefits both to existing communities and to new or expanding developments. They are increasingly being required by local planning authorities although this is still at a fairly embryonic stage and there is considerable diversity of practice between authorities.

This article examines the concept of the travel plan, its proper place in the planning process, a number of conceptual problems in using regulatory mechanisms to achieve travel plans and how these can be overcome. It draws on “Using the planning process to secure travel plans: Best practice guide”,³ to which the author contributed.

1 Why Travel Plans?

Travel plans originally were largely developed on a voluntary basis by schools, hospitals, local authorities, government offices and a number of socially responsible employers. As originally conceived they had little explicit connection with the planning system. They are credited with achieving shifts from one mode of transport to a more sustainable mode of 10–20 per cent, with shifts of 30 per cent or more being claimed as a possibility.

Travel plans are consistent with the policy of the Road Traffic Reduction Act 1997 which requires local traffic authorities to prepare reports specifying targets for a reduction in the levels of local road traffic in their area or a reduction in the rate of growth in the levels of such traffic.⁴ The Government set out the broad aims of its policy on the future of transport in *A New Deal for Transport: Better for Everyone*.⁵ Its main themes were to promote personal choice by improving the alternatives to existing modes of transport and to secure mobility that is sustainable in the long term. It promoted the concept of local authorities securing widespread voluntary take-up of green transport plans through partnership with business and the wider community. This was followed up by *Preparing your organisation for transport in the future: The benefits of Green Transport Plans*, published by DETR in 1999.⁶ This again promoted the use of voluntary travel plans and the commercial benefits of measures such as cutting the provision of workplace car parking.

The idea of using the planning process to secure travel plans was officially sanctioned in PPG 13: Transport,⁷ although a number of pioneering local authorities had been requiring transport plans for

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¹ Travel plans have been variously described as green transport plans, green travel plans and school travel plans.

² Using the planning process to secure travel plans: Research report, ODPM and Department for Transport, July 2002 (Addison and Associates).

³ Addison and Associates, published by the Office of the Deputy Prime Minister and the Department for Transport, July 2002. Copies are available free: 0870 1226 236 or by email: dft@twoten.press.net.

⁴ Section 2(2). Alternatively the authorities can explain why they have opted not to set targets for all or part of their area.

⁵ July 1998, Cm3950. See pp.19 and 142–144.

⁶ See also DETR, Guidance on Full Local Transport Plans, March 2000, paras 14–22.

⁷ Issued March 27, 2001.