All England Reporter/2003/June/Wrexham County Borough Council v National Assembly of Wales and others - [2003] All ER (D) 246 (Jun)

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Wrexham County Borough Council v National Assembly of Wales and others

[2003] EWCA Civ 835

Court of Appeal, Civil Division

Auld, Clarke and Jonathan Parker LJJ

19 June 2003

Town and country planning - Planning permission - Gipsy caravan site - Determination of gipsy status - Correct test to be applied in determining gipsy status - Test to be applied to applicant's way of life at time of determination of planning application - Caravan Sites and Control of Development Act 1960, s 24(8).

The second and third defendants were granted planning permission, by an inspector appointed by the first defendant, to develop land as a private gipsy caravan site in open countryside. The inspector was of the view that they remained gipsies for the purposes of the planning legislation although they had given up travelling because of the second defendant's illness, and that their family circumstances outweighed any conflict with applicable planning policies against development in that location. 'Gipsies' were defined in s 24(8) of the Caravan Sites and Control of Development Act 1960 as 'persons of nomadic habit of life, whatever their race or origin'. The claimant local planning authority appealed against the grant of permission under ss 288 and 289 of the Town and Country Planning Act 1990. The judge held that, as a matter of principle, traditional gipsies who had been obliged to give up travelling and settle in one place because of illness or age nevertheless retained a nomadic way of life and were thus gipsies as a matter of planning law and policy; and that, on the facts of the case, the inspector had been entitled to conclude that the second and third defendants were still gipsies. The authority appealed.

The appeal would be allowed.

Whether applicants for planning permission were of a 'nomadic way of life' as a matter of planning law and policy was a functional test to be applied to their way of life at the time of the determination. The fact that they might have a permanent base from which they set out, and to which they returned, from their periodic travelling might not deprive them of nomadic status, nor might the fact that they were temporarily confined to their permanent base for reasons such as sickness, or possibly in the interests of their children, depending on the reasons and the length of time of the abeyance of their travelling life. If, however, they had retired permanently from travelling for whatever reason, they no longer had a 'nomadic way of life'. That was not to say that they could not recover it later, if their circumstances and intention changed. Where, as in the instant case, a question was raised before an inspector as to whether applicants for planning permission were gipsies for the purposes of planning law and policy, he should clearly direct himself to, and identify, the statutory and policy meaning of that word, and, as a second and separate exercise, decide by reference to that meaning on the facts of the case whether the applicants fell within it. In the instant case, the inspector had done neither. The inspector's decision would accordingly be quashed, and remitted for fresh consideration and determination by a different inspector.

Decision of Sullivan J [2002] All ER (D) 477 (Oct) reversed.

Timothy Straker QC and Robin Green (instructed by Sharpe Pritchard) for the authority.

Richard Drabble QC and Stephen Cottle (instructed by The Community Law Partnership) for the second and third defendants.

Kate O'Hanlon Barrister.

Judgment

COURT OF APPEAL, CIVIL DIVISION

10 JUNE 2003

[2003] EWCA Civ 835

LORD JUSTICE AULD, LORD JUSTICE CLARKE and LORD JUSTICE JONATHAN PARKER

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Lord Justice Auld:

1. These consolidated appeals concern three related, but quite separate, questions that may arise for decision when gypsies seek to resist enforcement notice proceedings and/or apply for planning permission in respect of their use of land as a gypsy caravan site. The first two concern the status of applicants - in this case Mr. and Mrs. Berry, who are traditional gypsies - as gypsies for the purpose of planning law and policy. The third concerns the nature of the planning decision according to whether they have that status. The questions are:

> 1) one of principle - as to what is meant by the word "gypsies" in planning law and policy in the context of national and local planning policies permitting a more relaxed approach to use of land in the countryside for gypsy caravan sites; more particularly, whether an ethnic or traditional family that ceases to follow a nomadic way of life because of illness and/or old age of one or more of its members remain gypsies within the meaning of those policies;
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> 2) one of gypsy status on the facts of each case - as to the factors that a decision-maker should take into account when deciding, as a matter of fact or degree in the particular circumstances of each case, whether the appellants before him are gypsies within the meaning of the policies; and
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> 3) one of planning judgment - namely the nature of the planning decision, according to the decision-maker's conclusion on the facts as to the gypsy status of the appellants.

2. For the purpose of planning control, national planning policy, in two Departmental Circulars, adopts the definition of "gypsies" currently contained in section 24(8) of the Caravan Sites and Control of Development Act 1960, as amended, namely "persons of nomadic habit of life, whatever their race or origin".

3. The Planning Inspector, whose decision to grant Mr. and Mrs Berry planning permission to develop land as a private gypsy caravan site in open countryside in Wrexham is the subject of these appeals, was of the view: 1) that Mr. and Mrs. Berry remained gypsies "for the purposes of the planning legislation" although they had given up their travelling because of Mr. Berry's illness; and 2) that the personal circumstances of the Berry family outweighed any conflict with applicable planning policies against development in that location.

4. On the Council's statutory challenges under sections 289 and 288 of the Town and Country Planning Act 1990 to quash that decision, Sullivan J. held: 1) seemingly as a matter of principle, that traditional gypsies who had been obliged to give up travelling and settle in one place because of illness or age nevertheless retained a nomadic way of life and were thus gypsies as a matter of planning law and policy; and 2) that, on the facts of the case, the Inspector had been entitled to conclude that they were still gypsies for the purposes of the planning legislation although they had ceased travelling because of Mr. Berry's ill-health.

5. The appellant Council maintains that the Inspector's reasons for his decision were inadequate and that the matter should be remitted for reconsideration and fresh determination by another Inspector. And it contends that Sullivan J. in the purported exercise of statutory review and appellate jurisdictions, embarked on impermissible judicial policy-making and, in so doing, decided the matter contrary to planning law and policy.

6. Mr. and Mrs. Berry, who were the second and third defendants in the proceedings before Sullivan J, and are the only respondents to these appeals, rely on the Judge's decision and his reasons for it in upholding the Inspector's decisions.

7. The National Assembly of Wales, the first defendant below, has taken no part in the proceedings below or on this appeal. But it has written to the Court and to the other parties: 1) indicating its view that the Inspector's reasons for his decisions were inadequate; and 2) expressing unease about any interpretation and application of the meaning of "gypsies" in planning law and policy that would, as a matter of principle, widen the definition to those who are not nomadic.

8. The starting points for the Court's considerations of the appeals are the definition of "gypsies" in section 24(8) of the 1960 Act and its adoption in national planning policy in Departmental Circulars *WO 2/94 - Gypsy Sites And Planning - and WO Circular 76/94 - Gypsy Sites Policy And Unauthorised Camping.*

The statutory definition of "gypsies"

9. Section 24(8) of the 1960 Act provides:

> "... 'gypsies' means persons of nomadic habit of life, whatever their race or origin, but does not include members of an organised group of travelling showmen, or persons engaged in travelling circuses, travelling together as such."

This definition was introduced as an amendment to the 1960 Act by the Criminal Justice and Public Order Act 1994 as an identical replacement of that in section 16 of the Caravan Sites Act 1968, the long title of which included the purpose:

> "... to secure the establishment of ... [caravan] sites by local authorities for the use of gipsies and other persons of nomadic habit, and control in certain areas the unauthorised occupation of land by such persons;...".

10. As Mr. Timothy Straker QC, for the Council, has observed, the definition is generally regarded as having been prompted by the Divisional Court's decision in *Mills v. Cooper* [1967] 2 QB 459, a case concerning the meaning of the word "gypsy" in section 127 of the Highways Act 1959. Section 127 made it an offence for a

gypsy to pitch a booth or to camp on a highway. Lord Parker CJ and Diplock LJ, with whom Ashworth J agreed, held, at 467B-C and 468C-D respectively, that the word "gypsy" could not, in that context, bear the dictionary meaning of a member of the Romany race, but should be given its colloquial or popular meaning of a person leading a nomadic life with no, or no fixed employment and with no fixed abode. Lord Parker said, at 467C-D:

> "Looked at in that way, a man might well not be a gipsy on one date and yet be one on a later date"

And Diplock LJ, at 468C-D, defined the word:

> "... as a person without fixed abode who leads a nomadic life, dwelling in tents or other shelters, or in caravans or other vehicles.
>
> If that meaning is adopted, it follows that being a gipsy is not an unalterable status. It cannot be said, 'once a gipsy always a gipsy'. By changing his way of life a modem Borrow may be a gipsy at one time and not a gipsy at another."

11. Although living a nomadic life for this purpose does not necessarily connote constant movement, it does require a habit or a rhythm of movement. Thus, in *Greenwich London Borough Council v. Powell* [1989] 1 AC 995, HL, Lord Bridge of Harwich, with whom the other Law Lords agreed, said that a person could be a gypsy for the purpose of section 16 of the 1968 Act if he led a nomadic way of life only seasonally. To similar effect were the observations of Neill and Leggatt LM in a case concerning the duty to provide adequate accommodation for gypsies under section 6 (now repealed) of the 1968 Act, *R v. South Hams District Council, ex p. Gibb* [1995] QB 158, CA, where they said, at 169E-F and 172G-H respectively, that the nomadic habit of life contemplated for that purpose by section 16 of the Act was one that enabled gypsies to take their home to their work - to go where the work is. The following analysis of Neill LJ, giving the leading judgment, at 169A-E, indicates the necessary confines of the statutory language and the purpose for which it was adopted as part of national planning policy:

> "In seeking to apply the statutory definition of gipsies it is important to keep the actual words used in section 16 in the forefront of one's mind. At the same time it is necessary to take account of the purpose behind Part II of the Act of 1968 and the extent of the duty imposed by section 6(1). In the light of these considerations I have come to the conclusion that one can identify the following matters as being relevant to a decision whether or not any particular group is composed of gipsies. (1) The links between members of the group and other groups who are either at the site or visit the site. Living and travelling together in cohesive groups is a feature of nomadic peoples. (2) The pattern of the journeys made by the group. Though a group of gipsies may have a permanent residence (*Greenwich London Borough Council v. Powell* ...), a nomadic habit of life necessarily involves travelling from place to place. Furthermore, as the duty imposed by section 6(1) relates to the provision of adequate accommodation 'for gipsies residing in or resorting to' the area of the county council, it is relevant to inquire whether the group visits sites in the county on a regular basis. (3) The purpose of the travel. I accept that the word 'nomadic' no longer has any connection with the concept of 'seeking pasture,' but it seems to me that in the context of the Act the word 'nomadic' adds to the words 'habit of life' a sense of purpose for the travelling. The powers conferred by section 6(4) of the Act are conferred on local authorities ... I but it is to be noted that the power is to provide 'working space' and 'facilities for the carrying on of such activities as are normally carried on' by gipsies. These words seem to me to mean that 'habit of life' involves purposive activities including work and that travel forms part of that habit of life."

12. The decision in each case whether persons are "of nomadic habit of life" within section 24(8) of the 1960 Act and, therefore, within the policy set out in the Circulars is one of fact and degree. It is to be made in the light of all the circumstances, which may include such persons' intention for the future as well as their past

and present circumstances and way of life. A good example of the approach required of the decision-maker is *Horsham District Council v. The Secretary of State for the Environment & Anor.* (unreported) 13th October 1989. There, the issue was whether the Inspector had lawfully determined that a traditional gypsy who had lived permanently on a site for a long time, was a gypsy within section 16 of the 1968 Act and, as such, entitled to be excepted from local planning policy restraint on development. McCullough J., in quashing the Inspector's decision, said, at pages 4 and 5 of the transcript:

> "The criterion 'nomadic way of life' ... leads to a certain ambiguity, especially in relation to gypsies who settle for lengthy periods on authorised sites. It is a fact .... that many gypsies - and I use the term ethnically - do settle sometimes for several years, indeed many years, in the same place. Where this happens, as in this case, it may not be easy to determine whether they have lost their status as gypsies for the purpose of the relevant legislation.
>
> Clearly there can, and indeed must, come a time when as matter of fact the nomadic habit of life has been lost. When it is lost the gypsy is no longer a gypsy for the purposes of the Act. He remains, of course, a gypsy by descent, by culture and by tradition, but that is not the issue. The question is whether he is a gypsy for the purposes of the relevant Acts."

13. Given the pragmatic and functional statutory definition of gypsy and its express adoption for the purpose of giving national guidance in the two Departmental Circulars, it is necessary to keep in mind the time at which the gypsy status of an applicant for planning permission falls for decision. In *Hearne v. National Assembly for Wales*, The Times, 10th November 1999, CA, the Court of Appeal, not surprisingly, held that the relevant time is the date of the planning decision. On its facts, the Court held that the appellant had lost his gypsy status when he moved onto land with the intention of giving up a nomadic way of life. Pill LJ, with whom Lord Woolf MR and Judge LJ agreed, said, following the reasoning of the Court in *Greenwich London Borough v. Powell*, that the guidance in Circular WO 2/94 applied to gypsies who combine a nomadic life and a permanent site or base to which they return from time to time. Where applicants for permission have retreated to their permanent base, the question for the decision-maker in a planning case is essentially one of fact whether, in doing so, they have abandoned their nomadic way of life. In such circumstances, their intention may be relevant to that question of fact.

National and local planning policies

14. Circular WO 2/94 - *Gypsy Sites And Planning* - contains guidance to local planning authorities on planning control in relation to gypsy caravan sites. Paragraph 1, which sets out its main intentions, states that it applies equally to local authority sites and to applications for planning permission from gypsies themselves or from others wishing to develop land for use as a gypsy caravan site. The main thrust of the new policy, which was underpinned by the 1994 Act, was a move away from local authority gypsy sites to provide more opportunity for private gypsy sites through relaxation of planning control to accommodate gypsies' nomadic needs. Paragraph 1 of the document identifies three main intentions:

> " to provide that the planning system recognises the need for accommodation consistent with gypsies' nomadic lifestyle;
>
> to reflect the importance of the plan-led nature of the planning system in relation to gypsy site provision, in the light of the Planning and Compensation Act 1991 ... ; [and]
>
> to withdraw the previous guidance indicating that it may be necessary to accept the establishment of gypsy sites in protected areas, including Green Belts."

15. Paragraph 5 of the Circular expressly provides that references to gypsies in the Circular are references to gypsies in the sense defined in section 16 of the 1968 Act, now, as I have said, section 24(8) of the 1960 Act as a result of the 1994 Act amendment.

16. Circular WO 76/94 - *Gypsy Sites Policy And Unauthorised Camping* - issued towards the end of the year, expressly adopts, in paragraph 3, the Court of Appeal's gloss on the statutory definition in *ex p. Gibb* that "gypsies" meant those who lived a nomadic life for the purpose of work. And, in paragraph 23, it reminds local authorities of the advice in the earlier Circular.

17. Consistently with the incorporation as a matter of policy in both Circulars of the statutory definition of a nomadic way of life, the guidance in Circular 2/94 recognises the variety of its different patterns and rhythms. Paragraphs 17 and 19 illustrate the range for which the planning process might have to provide, including "settled occupation" in the sense of a main base to which gypsies may periodically return from their nomadic and working life; an aspect, as I have noted, recognised by Pill LJ in *Hearne*.

18. The role of local planning policies in the system of planning control is identified in sections 54A and 70(2) of the 1990 Act, as amended, namely that a local authority, in dealing with an application for planning permission, shall have regard to the provisions of the development plan and to any other material considerations, and must determine the matter in accordance with the development plan unless other material considerations indicate otherwise.

19. The elements of the Council's development plan at the material time were: the Wrexham local plan approved in 1996; the Clwyd County Structure Plan, First Alteration, approved in 1991; and an unadopted Second Alteration, which, so far as it related to the Wrexham. area, the Council had adopted for development control purposes. Policy HSG 10 of the Second Alteration provided that the development of residential caravans and mobile homes in the open countryside, apart from gypsy sites, would not be permitted on a permanent basis. Policy HSG 12 set out a number of requirements that should normally be met when selecting gypsy caravan sites. The effects of these few local policy provisions in this case were:

> 1) that, if Mr. and Mrs. Berry were gypsies as a matter of planning law and policy, their proposed use of the site, which was in the open countryside, for an individual gypsy family was not, in principle, contrary to the objectives of the local plan and other material planning policies; and
>
> 2) that, as the Inspector was to find, there was slight conflict with two of the requirements of policy HSG 12 as to the location of gypsy sites and conflict with other general policies concerning development outside settlement boundaries and within special or local landscape areas.

20. The fact that there was such conflict with local policy was not, however, determinative against Mr. and Mrs. Berry's appeals to the Inspector since, as I have said, by virtue of sections 54A and 70(2) of the 1990 Act, the Council was only required to determine a planning matter in accordance with that policy if material considerations did not indicate otherwise. And even if, contrary to the Inspector's apparent finding and Sullivan J's ruling, there was a further conflict with the policy because, on a proper application of planning law and policy to the facts, Mr. and Mrs. Berry were not gypsies within the local plan, their personal circumstances could still be among the other material considerations to be brought into the balance in the planning decision.

The facts

21. In summarising the facts I draw heavily on the judgment of Sullivan J., for which I am indebted. The appeals, as I have said, relate to land in Wrexham on which Mr. and Mrs. Berry, who came from an Irish traditional travelling family, had stationed a static caravan, a touring caravan and a number of sheds. The site is outside the settlement boundaries in the local plan and in an area of open countryside. The Council had served on them an enforcement notice alleging an unauthorised change of use to use for provision of resi-

dential caravan accommodation, asserting that it was an inappropriate use of the land having regard to various local policies protecting the openness of the countryside within the Green "Barrier". They in turn, appealed to the Inspector, under section 174(a) of the 1990 Act, against the enforcement notice and applied, under section 78 of the Act, for retrospective permission for the changed use as a private gypsy caravan site. The appeals raised the same issues.

22. The Inspector quashed the enforcement notice and granted Mr. and Mrs. Berry the sought planning permission subject to conditions, including one that the use should be personal to them and to any resident dependents. At the inquiry held by the Inspector the evidence of Mr. and Mrs. Berry and others on their behalf was that, because of Mr. Berry's ill-health, heart disease, they and their dependant five children had given up their nomadic way of life three years before, and that Mr. Berry's ill-health and the educational needs of the children, who were at school in the Wrexham area, were such that there was no reasonable prospect of them resuming it. Their only travelling was and was likely to be two annual visits to their family in Ireland. They could have been accommodated at the Council's gypsy site at Ruthin Road, Wrexham, but Mr. Berry had refused to move there because he did not got on well with the other gypsy families on the site.

23. The argument put to the Inspector on behalf of Mr. and Mrs. Berry was that gypsies who had had to give up travelling for good reason such as old age or, like Mr. Berry, because of ill-health, are still entitled to be treated as gypsies for planning purposes. Circumstances had moved on since *ex p. Gibb*, and sedentary gypsies had now been recognised as a social phenomenon by the European Court in *Chapman v, United Kingdom* (2001) 33 EHRR 18.

24. The argument advanced on behalf of the Council was that the meaning of "gypsies" for the purpose was still to be found in the statutory definition, as interpreted by the Court of Appeal in *ex p. Gibb*, namely persons who lead a nomadic existence for the purpose of their work. Mr. and Mrs. Berry did not, as a matter of fact, satisfy that definition because they had effectively and permanently given up the gypsy way of life; this was not a temporary interruption of it. They were not, therefore, gypsies for planning purposes and, accordingly, the development was not a gypsy caravan site within the Council's local policy.

25. The Inspector, in paragraph 5 of his decision letter, identified the main issues as:

> "the effect of the proposal on the character and appearance of the area bearing in mind the Council's policies for the area, the effect of the proposal on highway safety and the effect on the amenities of the occupiers of nearby dwellings."

He went on to consider the extent to which the proposal conflicted with local planning policies, including Policies HSG 10 and 12, and to balance that conflict against the personal circumstances of Mr. and Mrs. Berry as traditional gypsies who had settled on the appeal site. He found that, although they had given up their mobile life, there was no clear evidence to suggest that were not still gypsies for the purpose of planning control. This is how he put it, in paragraphs 9 and 11 of his decision:

> "9. I note that Mr. Berry has had to give up his previous mobile employment and that his travels are now normally restricted to about two visits to Ireland each year. However this is due to his ill-health and I see no clear evidence to suggest that the appellants are no longer within the normal definition of gypsies for the purposes of the planning legislation."
>
> "11. In general terms it appears to me that the possible location of a site for an individual gypsy family in the open countryside is not, in principle, contrary to the objectives of the Development Plan and other material planning policies. I attach significant weight to the criteria included within policy HSG 12 which ... the Council adopted for development control purposes. These criteria give the clearest guidance as to where a gypsy site might be acceptable."

26. It is notable that, in those passages, the Inspector made no reference to the first issue of principle argued before him, as to the statutory and national planning policy definition of gypsies in this context. Nor did he give a clear and reasoned finding on the second issue that he had to decide, namely whether Mr. and Mrs. Berry were on the evidence before him gypsies in the statutory and planning policy sense, namely that they were at the time of his determination "persons of a nomadic habit of life". As Mr. Straker commented, he seems to have disposed of the important issue as to their gypsy status almost as a minor preliminary point.

27. As to third, the planning, issue, the Inspector found, as I have already indicated, some slight conflict with local planning criteria and also conflict with more general policies for development, prompting him to consider any countervailing material considerations under sections 54A and 70(2) of the 1990 Act. This is how he dealt with that issue in paragraph 20 of his decision letter:

> "In weighing the proposal against the slight conflict with two of the criteria that I have identified and the conflict with other general policies concerning development outside settlement boundaries and in Special or Local landscape Areas I must take into account other material considerations. In this case I attach significant weight to the health of Mr. Berry and to the needs of his younger children's education. I further note that his grandchildren also benefit from regular school attendance because they are collected and returned to his property on school days. Whilst there is pitch available on the official Ruthin Road site the history of conflict with other residents are [sic] such that it is unreasonable to expect Mr. Berry to return to that site. The alternative would be to resume a mobile existence which would be harmful to Mr. Berry's health and disruptive to the education needs of his children. In any event Circular 2/94 at paragraph 21 makes it very clear that 'authorities should not refuse private applications on the grounds that they consider public provision in the area to be adequate, or because alternative accommodation is available elsewhere on the authorities' own sites'. In my view these other material considerations in this case more than outweigh any degree of conflict with appropriate policies."

28. It looks as if the Inspector, in his balance of the local plan against other material considerations for the purpose of sections 54A and 70(2) of the 1990 Act, was proceeding on the basis that Mr. and Mrs. Berry were gypsies in the statutory and national policy sense and thus had the benefit of the more relaxed local planning control regime set out in the Council's Policy HSG 10. However, he added, in paragraphs 22 to 24 of his decision letter, that even if, contrary to his view, the site fell within a the Green Belt or Barrier and was thus subject to more rigorous control than open countryside not so designated, the personal circumstances of Mr. and Mrs. Berry and their family, coupled with the relatively slight effect of the proposal on the openness of the area, constituted "very special circumstances which would more than outweigh the harm that the proposal would have on the green barrier" In expressing that view, he did not make clear whether, in his reference to the personal circumstances of the Berry family, he was proceeding for this purpose too on the basis that they were gypsies in the statutory and planning policy sense.

Sullivan J's judgment

29. At the hearing before Sullivan J. Mr. and Mrs. Berry held to their contention before the Inspector that Mr. Berry's ill-health, preventing them from continuing with a nomadic way of life, did not stop them from being gypsies for the purpose of planning control; and the Council repeated its argument that it did. The Judge approached the matter on a *Wednesbury* basis. He held that the Inspector had not erred in law and had been entitled to conclude that Mr. and Mrs. Berry had not abandoned their nomadic way of life. However, there were two strands to the Judge's judgment, which, to some extent, he elided. First, he suggested that the national policy's requirement of a nomadic way of life included, as a matter of interpretation, traditional gypsies who had become too ill and/or old to travel to find work (paragraphs 17 to 22 and 26). Second, he acknowledged that each case must turn on its own facts, but that, here, the Inspector was entitled to find in the circumstances that Mr. and Mrs. Berry continued to meet the policy's criterion of having a nomadic habit of life, notwithstanding that they had ceased travelling because of Mr. Berry's ill-health (paragraphs 23 to 25 and 28).

30. The Judge, in upholding Mr. and Mrs. Berry's contention that a traditional gypsy who becomes unable to travel to find work by reason of illness and/or old age nevertheless remains a gypsy for the purpose of planning control, relied on the absence of any definition of "gypsy" in the planning legislation itself and the fact that the definition in section 16 of the 1968 Act had, as he put it, only been "borrowed" for the purpose of national planning guidance. And he dismissed *Gibb* and the statements of principle in it on two main grounds. First, it was concerned with the ambit of local authorities' duties under the 1968 Act, not, as here, with the application of planning policies for sites for gypsy caravans. Second, the Court's ruling in it was applicable only to its facts, namely to persons who were not traditional gypsies and who were wandering according to fancy, not travelling to find work. The heart of the Judge's reasoning on this first issue of principle is to be found in paragraph 20 of his judgment:

> "I can see nothing in the judgments to suggest that had the Court of Appeal been confronted with what might be described as a 'retired' gypsy, it would have said that he had ceased to be a gypsy because he had become too ill and/or too old to travel in order to search to find work. In my judgment such an approach would be contrary to common sense and common humanity. As a matter of common sense, the time comes for all of us, gypsy and non-gypsy, when we become too old and/or too infirm to work. Old habits, whether nomadic or not, die hard. It could not be right for a gypsy who had been living all his life on a gypsy caravan site or sites whilst he was still young enough and fit enough to travel to seek work to be told when he reached retirement age that had thereby ceased to be gypsy for the purposes of the application of planning policy. It would be inhuman pedantry to approach the policy guidance in Circulars 2/94 and 76/94 upon that basis."

31. Sullivan J. found support for his narrow interpretation or disregard of *Gibb* in the European Court of Human Rights' decision in *Chapman*, a case in which an ethnic gypsy, and one whose status as a gypsy for the purpose of UK planning law and policy was not in issue, maintained that a local authority's refusal of planning permission and issue of enforcement proceedings infringed various of her human rights, in particular that under Article 8 of respect for her private life, family life and home. Sullivan J. said, at paragraph 22 of his judgment, that, since planning policies relating to sites for gypsy caravans must show respect for home and private and family life:

> "there could be no possible justification for construing the policies as though they cease to apply to a gypsy who, through no fault of his own, has become too old and/or too ill to work."

32. As to Sullivan J's second strand of reasoning on the facts of the case, he seemingly accepted that a traditional gypsy family could lose the status of gypsies for planning purposes if, as in *Horsham*, they had taken a conscious decision permanently to give up a nomadic way of life. He also appeared to accept that the onset of illness or old age could be a relevant factor along with other considerations in determining whether that status was lost. His reasoning in the end on the facts was that the Council's argument focused too much on Mr. Berry's illness as a reason for giving up travelling, at the expense of other relevant considerations. He said, at paragraph 24:

> "I accept that the mere fact that someone comes from a gypsy family does not of itself mean that he falls within the definition of a gypsy for the purpose of section 24 of the Act (as amended). I further accept that a mere intention to engage in or resume a nomadic lifestyle will not of itself mean that someone is 'of nomadic habit of life'. But in deciding whether someone who is too ill or old to continue to travel to find work is still to be regarded as of nomadic habit of life all the surrounding circumstances have to be considered. ..."

Among those surrounding circumstances, he included. in paragraphs 23 and 24: that, although Mr. Berry was too ill to travel to find work, all his older children were continuing to live a nomadic life, giving the picture of a traditional gypsy family; that, as the Inspector had found, Mr. Berry intended to continue living in a cara-

van, not to live in a "bricks and mortar" home; and that, if forced off the site, he and his family would resume a mobile existence rather than move to available space at the Council's gypsy site. The Judge seems to have regarded that last circumstance as conclusive, for this is how, at paragraph 26, he ended his judgment:

> "Returning to the principal point in issue, it is plain that the Inspector concluded that the Berry family had not abandoned their nomadic way of life. Mr. Berry was not able to pursue that way of life because of his ill-health but, if push came to shove, he would again be out on the road. That conclusion makes it clear that this was indeed a gypsy family for the purposes of the relevant planning policies: notwithstanding Mr. Berry's ill-health they had not lost the nomadic habit of life."

The submissions

33. Mr. Straker, in the light of the statutory definition of "gypsies", the national policies adopting it and the jurisprudence to which I have referred, made the following propositions:

> 1) for planning purposes, the definition of a gypsy is not concerned with a person's race or origins;
>
> 2) to be a gypsy, a person must pursue a nomadic habit of life, that is, he must wander or travel in his caravan to make a living;
>
> 3) a person is a gypsy if he is nomadic only seasonally or periodically, returning regularly to a fixed abode; and
>
> 4) a person who ceases to be nomadic is not a gypsy.

34. Mr. Straker submitted that the Inspector's decision to allow Mr. Berry's appeal against the enforcement notice amounted to an error of law and/or was perverse in that Mr. and Mrs. Berry could no longer follow a nomadic way of life and/or was deficient in its reasoning, and that his grant of planning permission was not, therefore, within his powers.

35. Mr. Straker's main attack on Sullivan J's reasoning on the first point for determination, the meaning of "gypsies" in planning law and policy, was that it was incorrect and an impermissible intrusion into policy making. Whether national policy should encourage the establishment of "retirement" sites for traditional gypsies is, he said, a matter for the Executive, not for Courts. As to the Judge's fall-back point in paragraphs 23 and 24 of his judgment that the surrounding circumstances indicated that Mr. and Mrs. Berry could still be regarded as having a nomadic or "mobile" way of life, Mr. Straker submitted that none of the circumstances to which the Judge referred was relevant to whether they had that way of life at the date of the planning determination. He submitted that the reality of the Judge's reasoning in these concluding paragraphs was that he found Mr. and Mrs. Berry to be gypsies for the purposes of planning policy because of their origins, thus ignoring the intent and expression of the policy, which are to support a nomadic way of life.

36. Lastly, Mr. Straker criticised the apparent distinction drawn by the Judge between gypsies who are forced to retire through illness or old age and those who can still work in a nomadic way, but choose not to do so. Why, he asked, should a traditional gypsy who is too ill or old to work remain within the policy but one who is forced to stop travelling because of the educational needs of his children, or because of economic circumstances, or simply because he no longer wishes to submit to the privations of nomadic life, be outside it?

37. Mr. Richard Drabble QC, for Mr. and Mrs. Berry, supported the Judge's decision and reasoning that the Inspector had not erred in law or on the facts. He submitted that the fundamental question is whether a gypsy on day 1 ceases to be a gypsy on day 2 because he has become unable to travel for reasons beyond

his control, as distinct from being unwilling to travel. He maintained that one of the purposes of national planning policy is to protect the traditional gypsy way of life and that Sullivan J correctly held that the policy includes traditional gypsies who become too ill or too old to travel. On that premise, he submitted, the Inspector's reasoning in paragraph 9 of his decision letter was sufficient; he, the Inspector, did not need to say any more.

38. Mr. Drabble drew attention to the fact that Field J had adopted Sullivan J's approach in *O'Connor v. Secretary of State* [2002] EWHC 2649, and suggested that both judgments accorded with long established "policy" exemplified in the judgment of Otton J., as he then was, in *R v. Shropshire County Council, ex p. Bungay* [1991] 23 HLR, in which he upheld a planning decision that a gypsy family had retained their nomadic way of life notwithstanding that they had not travelled for many years. He submitted that the approach of the courts in those three decisions ensured that gypsy policy constitutes "a coherent whole" when read with the decision of the European Court of Human Rights in *Chapman*. Adopting the reasoning of Sullivan and Field JJ., he maintained that *Mills*, *Powell*, *Gibb* and *Hearne* had not concerned the issue in this case of the enforced "retirement" of a traditional gypsy family from travelling by reason of ill-health or old age. He said that they were all, therefore, distinguishable as a matter of law and/or on their facts.

39. As to *Chapman*, Mr. Drabble submitted that its importance is that the Strasbourg Court looked at ethnic background in the context of Article 8. He said that the policy in Circular WO 2/94 of encouraging self-help and the existence of development plan policies such as those in this case is a way in which the United Kingdom can fulfil its positive obligation under Article 8 to facilitate the gypsy way of life. He went further - he suggested that if the protection given by Article 8 and domestic policy is to form a coherent whole, it is necessary to adopt the approach of Sullivan and Field JJ. He maintained that the Strasbourg Court would have considered a "retired" gypsy in the same light as the gypsy in that case. He agreed that there was nothing in the judgments in *Chapman* dealing with "retired" gypsies, but said that it, nevertheless, underlined the relevance of gypsies' traditional way of life to the engagement of the regulatory framework.

40. Finally, Mr. Drabble submitted that, even if the Inspector in the present case had not applied the gypsy policies of the local plan, he would still have concluded in Mr. and Mrs. Berry's favour because he found in paragraphs 20-21 and 22-24 of his decision that the personal circumstances of the Berry family were: 1) other material considerations under section 54A of the 1990 Act entitling him not to follow the development plan; and/or 2) if, contrary to his view, the site was in a Green Belt or Barrier, they would have constituted "very special circumstances" for not following it. Accordingly, Mr. Drabble submitted that, as Mr. and Mrs. Berry's formal status as gypsies has no bearing on either of those conclusions, the Council's appeal should be dismissed in any event.

Conclusions

41. For the purpose of planning control, the gypsy status of applicants for planning permission is relevant to the question whether they are entitled to a more relaxed regime of planning control than is generally applicable to others. The rationale for that is that their nomadic lifestyle brings with it special needs in that it renders them more vulnerable to homelessness if subject to the normal rigours of planning control. As a matter of history, this different treatment developed to meet the needs of ethnic or traditional gypsy families who typically travelled to find work. Now, as a matter of statute and national planning policy, gypsy status has been both extended and confined - extended to those who are not traditional gypsies, and confined to persons "of nomadic habit of life, whatever their race or origin".

42. Before leaving the definition, I should mention two unresolved questions about its extent. First, now that the statutory definition of gypsies is unshackled from the repealed duty in section 6 of the 1968 Act of a local authority to provide accommodation to gypsies resorting to its area - the issue in *Gibb* - it is open for future consideration where the issue arises, whether the ratio of *Gibb* requires in *planning* cases the nomadic habit of life to be for the purpose of work. The answers may be that the statutory definition does not stand alone

for this purpose, but has to be considered in its policy context; that Circular WO 76/94, though concerned with unauthorised camping by gypsies, expressly applied the *Gibb* definition; and that it is unlikely that the Department can have intended that it and the earlier planning Circular, WO 2/94, which concerned planning control, should give different meanings to the word, Second, although the definition is of "gypsies", not "a gypsy", given its functional criterion of nomadism or travelling, there seems to me no intention against applying it as part of *planning* policy or otherwise to a single gypsy who is of nomadic habit of life: see Interpretation Act 1978, section 6 (c) and cf. *Gibb*, per Neill LJ at 168F-G and 169A-B, and Millett LJ at 173D-E

43. However, the fact that applicants for planning permission may not, on the facts, qualify as gypsies in the statutory and policy sense, does not mean that their traditions and lifestyle and personal circumstances are irrelevant to the planning decision or that they cannot be set and weighed against local plans and polices as section 54A and 70(2) "material considerations". The overall issue for the Inspector was, as Pill LJ put it in *Hearne*, at page 3 of the transcript of his judgment, whether the planning application should have been determined on the basis of their status as gypsies or upon planning considerations without reference to that status. And, as McCullough J. put in *Horsham*, at page 6 of the transcript of his judgment, the question in each case is one of fact and degree to be judged against the statutory definition as interpreted by this Court in *Powell*.

44. On the first issue for the Inspector, the correct meaning of the word "gypsies" in national planning policy, Mr. Straker rightly underpinned his submissions with two main observations on planning law and policy. First, the only definition of "gypsies" adopted by national planning policy for planning control is that now in section 24(8) of the 1960 Act. That definition has as its touchstone a nomadic habit of life. Without it, a person is not a gypsy, whatever his race or origins. With it, a person is a gypsy, whatever his race or origins. Second, Circular 2/94 has as one of its main intentions, the provision of a planning system that recognises the need for accommodation for gypsies consistent with their "nomadic lifestyle". The Circular does not purport to provide for all who consider themselves gypsies, not even for those who so claim by reason only of their gypsy origins. However, as Mr. Straker acknowledged, although ethnic background or race are not the test, they may be an aid to determination of the second and factual question in any planning determination, namely whether the applicant or applicants come within the definition.

45. In my view, Sullivan Ps proposition, in paragraphs 17 to 20 of his judgment, that a retired gypsy can be a gypsy for the purpose of planning policy, and his distinction for the purpose of *Gibb* (and implicit disregard of *Hearne*) on the basis that the case did not concern "retired" gypsies, is contrary to the ratio of the judgments of the Court, even if shorn, in this planning context, of their gloss that a nomadic life must be for the purpose of work. The statutory definition of gypsies and its use in the planning context have as their central purpose the making of special provision for those who need it because they are at the material time nomadic.

46. As Mr. Straker observed, the invocation by Sullivan L, in paragraph 20 of his judgment, of common sense and common humanity misses the purposes and effect of the Circulars, which are there to provide land for those who are nomadic. Those who are not nomadic, for whatever reason, whether through "retirement", as in *Hearne*, or through illness, as here, are outside the ambit of the policy. As Burton J. observed in *Albert Smith*, there is other provision for those who are not nomadic. And, as I have said, though outside the policy, the individual circumstances and needs of former gypsies in the statutory and planning sense may still be taken into account, as provided in sections 54A and 70(2) of the 1990 Act. This feature of every planning decision seems to have been overlooked or confused by Sullivan J, first, in maintaining, in paragraphs 17 to 22 and 25 of his judgment, that the national policy should be interpreted to apply to traditional gypsies who are no longer nomadic, and in paragraphs 23 and 24, that, when looked at on its own facts, a person who was too old or ill to live a nomadic life, could nevertheless be said to be of "a nomadic way of life".

47. The circumstances on which Sullivan J. relied to so hold here, namely that Mr. Berry came from a travelling family and some of his family were still nomadic, that he intended to continue living in a (static) caravan, and that he might be forced to resume a "mobile" life by an adverse decision in this case, were no doubt material considerations in the third issue - planning decision. But they could not affect the statutory meaning

of the word "gypsies" for this purpose or the extent of its incorporation in the national policy. And, insofar as I can tell, that does not appear to have been the basis of the Inspector's reasoning in paragraph 9 of his decision letter. Nor could they be relevant considerations in support of any argument that Mr. Berry's non-nomadic lifestyle at the date of the planning determination, which took the form of a planning permission to him and his wife and their *resident* dependants, was in fact nomadic so as to engage the policy. In short, the fact of the Berry family's former traditional gypsy life and family connections had to be looked at against their own present and indicated future way of life and also the feature of statutory and planning policy that gypsy status is, as Diplock LJ said in *Mills*, alterable.

48. The effect of the statutory and policy definition is to focus on the current nomadic life-style of applicants for planning permission, that is, their way of life at the time of the planning determination. The rationale for that focus is to be found in the first of the three main intentions of Circular WO 2/94 that I have set out in paragraph 14 of this judgment, namely "to provide that the planning system recognises the need for accommodation consistent with the gypsies' nomadic lifestyle". If that lifestyle, as a matter of fact, is no longer present, there is no justification, as Pill LJ said, at page 10 of the transcript of his judgment in *Hearne*, for applying a more relaxed approach to them:

> "The circulars give guidance upon the approach to planning applications which aim to provide accommodation for gypsies. That presupposes the continuation of that status upon the grant of permission. They do not provide that gypsies shall have an advantageous position when applying for permission which is not for gypsy use. Any relaxation in ordinary planning policies with respect to planning applications for gypsy caravan sites does not apply when the application is not for a gypsy caravan site, but which is, on the facts, for a residential caravan site without that status."

49. I can see no basis for unseating that well established approach by reference to the two first instance decisions of *Bungay* and *O'Connor* to which Mr. Drabble has referred the Court. They were simply illustrations of the decision-maker determining, or on which he should have determined, on the material before him and as a matter of fact, that the applicant and/or his family had not given up a nomadic way of life. It is true that in *O'Connor*, Field J. sought to justify his decision also by reference to the wider proposition of Sullivan J. in this case. But he did not need to do so and, for the reasons that I give below, was wrong to do so.

50. *Bungay* was a case in which a planning committee concluded, some fifteen years after a gypsy family had stopped travelling because of the father's age and ill-health, that they were still of a nomadic habit of life because they had not abandoned their nomadic lifestyle but held it in abeyance to care for the father. Otton J. refused judicial review, holding that the committee's decision was not impugnable on Wednesbury principles. In doing so, he acknowledged the statutory test and its emphasis on the activity of persons claiming to be gypsies and not on their ethnic origins, but he held that, on the facts, the committee had been entitled to reach the decision that the family had retained a nomadic way of life. He did not dissent from the approach of McCullough J in the *Horsham* case, but, at pages 205-6 of his judgment, distinguished it on its facts, saying of the applicants in *Bungay*:

> "They gave an explanation to the Gipsy Working Party as to why they had ceased travelling because of the father's failing health. It was open to the Gipsy Working Party to infer that this was a closely knit family, that the explanation was true and understandable and was arrived at from a genuine desire to cease travelling for the purpose of caring for the father and that the nomadic lifestyle had not been abandoned but only held in abeyance. The Committee were entitled to put into the balance the fact that the family were undoubtedly of gipsy descent; that their past lifestyle reflected many of the gipsy lifestyles; they were Romany speaking; and that gipsies do settle for long periods and yet still retain their nomadic way of life."

51. In *O'Connor* a traditional Irish traveller had lived on the road for most of her life, but, by the time of the planning decision against her, had settled with her children on a site for about two years. She claimed not to

have abandoned her nomadic way of life, but to be holding it in abeyance because of ill-health and the educational needs of the children. Field J, while expressing agreement with Sullivan Ps reasoning in this case, based his decision in favour of the application on its particular facts, the most notable of which were those going to show that Mrs O'Connor had not in fact given up her nomadic lifestyle, but intended "to resume travelling once the reasons for settling had ceased to operate".

52. Sullivan Ps resort to human rights in the form of the Strasbourg Court's decision in *Chapman* that planning policies affecting a gypsy's stationing of her caravan engages Article 8 is, with respect, also misplaced. It cannot and does not purport to override the statutory definition and its application to the facts as part of the exercise to identify the local planning policy or policies governing the planning decision. Engagement of the right to respect for private and family life and home under Article 8(1) is an important but variously relevant factor according to the facts, the nature of the regulatory planning framework and the issues in play. It is necessary, by virtue of Article 8(2), to consider whether the conduct complained of accords with law and is necessary in a democratic society for its protection in various ways. If it does accord with the law and is so necessary, there is no interference with the Article 8(1) right. As to engagement of the right for gypsies in the general planning context, the Court said this at paragraph 73 of the majority judgment:

> "The Court considers that the applicant's occupation of her caravan is an integral part of her ethnic identity as a gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or from their own volition, many gypsies no longer live a *wholly* nomadic existence and increasingly settle for *long periods* in one place in order to facilitate, for example, the education of their children. Measures which affect the applicant's stationing of her caravans have therefore a wider impact than on the right to respect for home. They also affect her ability to maintain her identity as a gypsy and to lead her private and family life in accordance with that tradition." [my emphases]

The Court also acknowledged, in paragraph 96 of the majority judgment, the vulnerable position of gypsies as a minority requiring special consideration of their needs and their different lifestyle, both in the regulatory planning framework and reaching decisions in particular cases. To that extent, the Court said, Article 8 imposed a positive obligation on the Contracting States to facilitate the gypsy way of life.

53. The main points to note in the context of the first issue - that of the meaning of "gypsies" in planning law and policy - raised by these appeals are: 1) that *Chapman* was concerned with enforcement measures against gypsies whose qualification for that status was not in issue; and 2) that the Court found that United Kingdom planning control in this respect was Convention compatible. Thus, although the Court held that Article 8 was engaged, it held, by a majority, that the interference in the circumstances of the case was justified under Article 8(2), not only because it accorded with the law, but also because it pursued the legitimate aim of protecting the rights of others through preservation of the environment, a necessary aim in a democratic society. I can find no support in that judgment for the proposition drawn from it by Sullivan J, at paragraph 22 of his judgment, that there can be no possible justification for construing the policies as inapplicable to a traditional gypsy who, through no fault of his own, has become too old and/or too ill to work.

54. The whole premise of the Strasbourg Court's judgment and observations in those passages was that gypsies, by reason of their nomadic, though not necessarily wholly nomadic, lifestyle, require special consideration. There is nothing in Article 8 or the reasoning of the Court to suggest that such special consideration should continue in the manner indicated in the policies after they have given up that lifestyle, whatever the reason for doing so. As Mr. Straker observed, and as the Court itself acknowledged in the following passage at paragraph 114 of the majority judgment, what is required is that, within the planning framework, such respect is shown:

> "In the circumstances, the Court considers that proper regard was had to the applicant's predicament both under the terms of the regulatory framework, which contained adequate proce-

> dural safeguards protecting her interest under Article 8 and by the responsible planning authorities when exercising their discretion in relation to the particular circumstances of her case. The decisions were reached by those authorities after weighing in the balance the various competing interests. It is not for this Court to sit in appeal on the merits of those decisions, which were based on reasons which were relevant and sufficient, for the purposes of Article 8, to justify the interferences with the exercise of the applicant's rights."

55. Any person, whether a traditional gypsy, a statutory, that is, a nomadic, gypsy, or one who is neither, is entitled to the Article 8 right to respect for his private and family life and home, and, in determining the planning merits in each case, such respect falls to be considered alongside and weighed against all relevant policies, including the local plan and any other material considerations, as required by sections 54A and 70(2) of the 1990 Act.

56. On the subject of Convention rights, it should be noted that Burton J., in *R (on the application of Albert Smith) v. London Borough of Barking and Dagenham and the Secretary of State* [2002] EWHC 2400 Admin, declined to declare Part 1 of the 1968 Act incompatible with the Convention because it did not give the same security of tenure to occupiers of gypsy caravan sites as to secure tenants of local authority housing. He held, rightly in my view, that there was sufficient justification for the lesser protection *in that form* provided to gypsies.

> "33... There is, in my judgment, quite apart from any simple question of giving security of tenure to those in council caravan sites, a necessary, indeed crucial, concomitant question to be considered and resolved, before it can be concluded that the present position is unjustified. I conclude that there is a very difficult question of how to define gypsies, to whom security of tenure in such sites is to be given (if it is). If security of tenure is to be given to all long-term caravan occupiers on council sites, as they are on private sites, then how, if at all, is there to be any differentiation between gypsy/traveller such occupiers and any other occupiers who wish to place a mobile home on a Council site, with security of tenure? And if there is to be no such differentiation, then the last state of gypsies, *whose cultural heritage or spiritual and cultural state of mind* is nomadism or travelling may be worse than its first. At present that actual or potential nomadism ('*a substantial nomadic habit of life*') is the justification both for the lack of security of tenure and also for the special arrangements for local authority sites catering especially for them, i.e. within section 24 of the ... [1960] Act. Dr. Kenrick himself refers obliquely to the problem in ... his witness statement: '*The residents of council sites do not have to retain their Gypsy status (by travelling for an economic purpose ...) in order to retain their pitches*'
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> 34.. .... I am also influenced by ... [the witness statement of Mr. Gahagan ...]:
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> 'The Government is trying to make sure that there is provision for gypsies who have a nomadic way of life. There are other alternative forms of accommodation for those with a settled way of life, which are as equally available to gypsies as they are to any other person.'

57. By way of summary, I conclude with the following propositions of law - none of them original - and conclusions on the questions with which these appeals are concerned:

> 1) Administrative policy is for Parliament and the Executive, not the Courts to decide. While the interpretation of planning policy is properly a matter for the Courts, its formulation is a matter for the Executive. Where the limit of policy is clear, the Courts should not seek to extend its ambit on grounds that they might consider to be desirable; see *R (Alconbury Ltd. v. Secretary of State for the Environment* [2001] 2 WLR 1389, HL, per Lords Slynn and Clyde, at paras. 48 and 139 respectively. That is what Sullivan J appears to have done here, under both bases of his judgment to the extent that they can be distinguished.

2) Whether applicants for planning permission are of a "nomadic way of life" as a matter of planning law and policy is a functional test to be applied to their way of life at the time of the determination. Are they at that time following such a habit of life in the sense of a pattern and/or a rhythm of full-time or seasonal or other periodic travelling? The fact that they may have a permanent base from which they set out on, and to which they return from, their periodic travelling may not deprive them of nomadic status. And the fact that they are temporarily confined to their permanent base for personal reasons such as sickness and/or, possibly, in the interests of their children, may not do so either, depending on the reasons and the length of time, past and projected, of the abeyance of their travelling life. But if they have retired permanently from travelling for whatever reason, ill-health, age or simply because they no longer wish to follow that way of life, they no longer have a "nomadic habit of life". That is not to say they cannot recover it later, if their circumstances and intention change, in keeping with Diplock LJ's observation that gypsy status in this sense is an alterable status. But that would arise if and when they made some future application for permission on the strength of that resumption of the status.

3) Where, as here, a question is raised before a Planning Inspector as to whether applicants for planning permission are "gypsies" for the purpose of planning law and policy, he should: 1) clearly direct himself to, and identify, the statutory and policy meaning of that word; and 2) as a second and separate exercise, decide by reference to that meaning on the facts of the case whether the applicants fall within it. The Inspector did neither, so it is impossible for this Court to see on what basis he approached the second question, whether Mr. and Mrs. Berry were gypsies at the material time, or the third question, what effect, if any, that finding had on the planning decision. I cannot agree with Mr. Drabble's submission that the Inspector's failure to do that can have had no effect on the planning decision for the reasons given by the Inspector in paragraphs 20 and 22 to 24 of his decision. It is not plain from the Inspector's failure, in paragraph 9, to grapple properly with the point whether he concluded that they were at the time of his determination of a "nomadic habit of life. And his references to the personal circumstances and "very special circumstances" of the Berry family in those paragraphs do not indicate whether he included among them a finding that they were gypsies in that planning sense (cf. *South Bucks District Council v. Secretary of State and Potter* (unreported) 19th May 2003), per Pill LJ at paras. 31 and 36). This is not a matter that Sullivan J appears to have considered or, if he did, to have been troubled by. Indeed, as I have said, his approach to the second issue betrays a similar ambiguity. In my view, for this reason - inadequate reasoning of the Inspector - if for no other, this appeal should be allowed so that the matter can be remitted to another Inspector to determine and properly reason it afresh and with the following propositions in mind:

4) In making the second, factual, decision whether applicants for planning permission are gypsies, the first and most important question is whether they are - to use a neutral expression - actually living a travelling life, whether seasonal or periodic in some other way, at the time of the determination. If they are not, then it is a matter of fact and degree whether the current absence of travelling means that they have not acquired or no longer follow a nomadic habit of life.

5) On such an issue of fact and degree, the decision-maker may find any one or more of the following circumstances relevant and, if so, of varying weight: 1) the fact that the applicants do or do not come from a traditional gypsy background and/or have or have not followed a nomadic way of life in the past - the possible relevance in either case being that respectively they may be less or more likely to give it up for very long or to abandon it entirely; 2) the fact that the applicants do or do not have an honest and realistically realisable intention of resuming travelling and, if they do, how soon and in what circumstances; 3) the reason or reasons for the applicants not living a travelling way of life at the time of the determination and their likely duration.

6) If the decision maker concludes that the applicants have the status of gypsies as a matter of planning law and policy, he should then give it whatever relevance or weight is accorded to it in

the local plan when having regard to that plan and any other material considerations under sections 54A and 70(2) of the 1990 Act.

7) If the decision-maker concludes that the applicants do not have the status of gypsies as a matter of planning law and policy, he may still have regard to their personal circumstances to the extent that he considers them relevant and of weight when considering material considerations, in addition to the development plan, under those provisions.

58. For the reasons I have given, I would allow the appeals so as to quash the Inspector's decisions and remit the matters for fresh consideration and determination by another Inspector in accordance with the law and procedural approach to the decision-making process that I have set out in this judgment.

Lord Justice Clarke:

59. I agree that these appeals should be allowed for the reasons given by Auld U and add a few words of my own on only one aspect of the problem potentially raised by cases of this kind.

60. The cases cited by Auld U support the following propositions, which I take from his judgment:

i) The time at which gypsy status falls for decision is the date of the planning decision.

ii) The decision in each case whether persons are "of nomadic habit of life" within section 24(8) of the 1960 Act and, therefore within the policy set out in the Circulars, is one of fact and degree.

iii) Depending upon the circumstances, a gypsy may retain his nomadic habit of life even though he is not travelling for the time being.

iv) Where applicants for permission have retreated to their permanent base, the question for the decision-maker is essentially one of fact whether, in doing so, they have abandoned their nomadic way of life.

61. It seems to me to follow from those propositions that, depending upon the circumstances of a particular case, a person may continue to have a "nomadic habit of life" even though he is not travelling for the time being and may not do so for some considerable time, perhaps because of illness or the educational needs of his children, provided that he has not abandoned his nomadic habit. As Auld LJ has observed, the decisions on the facts in *Bungay* and *O'Connor* are examples of a person and/or his family retaining his status notwithstanding that it was likely to be a considerable period before he or they were likely to resume travelling. Thus all depends upon the facts of the particular case.

62. I have added the above, not in order to disagree with any part of Auld LJ's judgment, with which I agree, but simply to underline the point that, although the decision must be taken as at the date of the planning decision, it is in principle possible for a person to retain his gypsy status for planning purposes even though it may be sometime before he can resume travelling, provided that he can show that he has not abandoned his "nomadic habit of life".

Lord Justice Jonathan Parker:

63. I agree with both Judgments.