CLARKE v. SECRETARY OF STATE FOR THE ENVIRONMENT TRANSPORT AND THE REGIONS [2001] EWHC Admin 800 (9th October, 2001)

[2001] EWHC Admin 800

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(THE ADMINISTRATIVE COURT)

Royal Courts of Justice
Strand
London WC2

9th October 2001

B e f o r e :

MR JUSTICE BURTON

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THOMAS GEORGE CLARKE
THE SECRETARY OF STATE FOR THE ENVIRONMENT TRANSPORT AND THE REGIONS
and
TUNBRIDGE WELLS BOROUGH COUNCIL

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MR M WILLERS (instructed by Lance Kent and Company, Chesham, Buckinghamshire HP5 1EG) appeared on behalf of the Claimant.
The First Respondent did not appear and was not represented.
MR R GROUND (MISS J BOYD for judgment only) appeared on behalf of the Second Defendant.

J U D G M E N T
(As Approved by the Court)

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Tuesday, 9th October 2001

1. MR JUSTICE BURTON: The Appellant, Mr Thomas Clarke, who appeals under section 288 of the Town and Country Planning Act 1990 (the 1990 Act) against the decision taken by a Planning Inspector appointed by the First Respondent, the Secretary of State for the Environment, Transport and the Regions, is a Romany Gypsy, as are his wife and children. The family lives on land owned by the Appellant known as OS Plot 4462, Wisley Pound, Sissinghurst, Cranbrook in Kent. On 28th March 2001 the First Respondent's Planning Inspector dismissed the Appellant's appeal against a decision by the Tunbridge Wells Borough Council, the Second Respondent, to refuse him planning permission to use such land as a site on which to station a caravan for residential use by himself and his family as Gypsies.

2. By section 54A of the 1990 Act, an application for planning permission must be made to the local planning authority, which has to determine the application in accordance with the Local Development Plan unless material considerations indicate otherwise, and of course the same principle applies on appeal to an Inspector. There is a circular issued by the Department of Environment number 1/94, so far as England is concerned, which provides the following at paragraphs 5 onwards:

> " 5.'Gypsies' are defined in section 16 of the 1968 Act [that is the Caravan Sites Act 1968] As "persons of nomadic habit of life, whatever their race or origin". References to gypsies in this Circular are references to gypsies in that sense. The term does not include members of an organised group of travelling showpeople or circus people, travelling together as such. Planning advice relating to travelling showpeople is given in DoE Circular 22/91...
> 6. Gypsies make up a tiny proportion of the population of England and Wales, but their land-use requirements need to be met. Many gypsies are self-employed people, sometimes occupied in scrap and scrap-metal dealing, laying tarmacadam, seasonal agricultural work, casual labouring, and other employment associated with their itinerant lifestyle. The gypsy community also includes groups of long-distance travellers who nowadays earn their living mainly from trades such as furniture dealing, carpet selling and other related occupations. Local planning authorities need to be aware of the accommodation and occupational needs of gypsies, having regard to their statutory duties, including those in respect of homelessness under Part III of the Housing Act 1985.
> ...
> 13. 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. Gypsy sites are not regarded as being among those uses of land which are normally appropriate in Green Belts. Green Belt land should therefore not be allocated for gypsy sites in developed plans."

3. The land in question in this case lies in the High Weald Special Landscape Area. The Special Landscape Areas are abbreviated as SLAs. They fall short, so far as protection is concerned, of Green Belt, but are regarded as equivalent to the other protected areas mentioned in the Circular, and are obviously of considerable importance to the public, so far as the protection of the environment is concerned.

4. As I have indicated, this is an appeal under section 288 of the 1990 Act against the refusal of such planning permission by the Inspector. Mr Willers, representing the Appellant, has put forward the case on his behalf. His primary argument has been that the Inspector acted in breach of Article 8 of the European Convention on Human Rights, now a part of English law as a result of the Human Rights Act 1998. Article 8, dealing with the right to respect for private and family life, reads as follows:

> 1. "(1) Everyone has a right to respect for his private and family life,
> 2. his home and his
> 3. correspondence
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

5. In fact, on analysis, the case for the Appellant did not simply rest on breach of Article 8, but on breach of a combination of Articles 8 and 14. Article 14, which is headed: “Prohibition of discrimination” does not provide a self-standing right or cause of action to the citizen or litigant. What Article 14 does is inform, strengthen and expand other rights which are the subject of independent existence such as Article 8. Article 14 reads as follows:

> “The enjoyment of the rights and freedoms set fourth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

6. The Appellant's case is that the Inspector, in breach of Articles 8 and 14, took into account in his planning decision the previous offer by the Respondent to the Appellant and his family of conventional housing accommodation. The relevant parts of his decision are in paragraphs 18 and 21 of the Decision Letter, dated 28th March 2001. After setting out, in considerable detail, to which I shall return, the important detrimental planning effects of the possibility of this land being used by way of permanent residence, the Inspector turns to what he calls the Appellant's personal circumstances:

> “18. The appellant argues that his personal circumstances are equally relevant. It is accepted that the Council has offered permanent accommodation, but Mrs Clarke, who also has close family in the area, has never lived in a conventional house and found the prospect distressing.”

7. Then at 21 he says:

> “It is unfortunate, in my view, that the appellant felt unable to accept the offer of permanent housing. However, it is not unknown for gypsy families to find that such accommodation would represent an unacceptable change in their lifestyle, and I have no reason to doubt the evidence of Mrs Clarke in that respect. On the other hand, I do consider that the offer of that accommodation does detract somewhat from the appellant's contention that the only alternative to the appeal site has been an illegal roadside pitch. It is also relevant to note that, on the evidence, the offer (by the High Weald Housing Association) was for a property in Benenden which is only a short distance from Cranbrook.”

8. Mr Willers submits that in taking into account those matters the Inspector took into account what he calls “irrelevant considerations”. In fact on analysis Mr Willers' case is that in reality the Inspector has taken into account an impermissible consideration, that is one that is legally, as opposed to factually, irrelevant. It is difficult to see how it cannot be said to be relevant, in consideration of the personal circumstances of an Appellant for planning permission, that there could be available somewhere else for that person to live if the planning permission were refused. The real thrust of Mr Willers' submission is that by taking that matter into consideration the Inspector was in breach of Articles 8 and 14, and took into account matter which was, in the circumstances, impermissible or indeed unlawful for him to take into account.

9. The Appellant's secondary case is that even if he were to fail on the first proposition, such that it were not the case that the Inspector erred in taking into account such considerations, the Inspector's decision to refuse planning permission plainly interferes with or affects the Appellant's right to his private and family life and his home, and that this court is obliged, by section 6 of the Human Rights Act, to look again at the Inspector's decision in order to be satisfied that there has been no breach of the Convention.

10. The most central parts of the Inspector's decision are as follows: In paragraph 8, which is headed “Visual impact of the Use”:

> “I therefore turn to the visual impact of the use and, again, the conclusions of the previous Inspector are important because there has been no subsequent change in development plan policies. He took the view that what he described as the attractive open countryside of the locality extends to the roadside in the gap which includes the appeal site and that its undeveloped rural character is in sharp contrast to the suburban appearance of the opposite frontage. It was found that, although the hedge provides some screening, the front boundary fence and the top of the mobile home above it, were open to view and gave a clear perception that the site is in residential

use, which would be emphasised by the various forms of domestic activity. Given the site's location within a SLA, my colleague concluded that the development had a markedly adverse effect on the character and appearance of its surroundings."

11. In subsequent paragraphs this was expanded upon by the Inspector, and he agreed with the previous Inspector's conclusions:

> "13.... given the sensitivity of the location, I do not consider that these factors [factors which he had set out previously relating to the attempts by the Appellant to endeavour to reduce the intrusiveness of his use of the land] are sufficient to overcome the harm which is being caused by a residential use, albeit for a gypsy family. In my opinion, the very presence and extent of the panels of domestic, close boarded fencing in a prominent position beside the road creates an artificial feature which is alien to its setting.
> ...
> 15. In any event, the concealment of the site from the road is partly dependent on the access gates being closed. As my predecessor commented, 'there are likely to be various forms of activity, such as the movement of cars and even simple domestic features life refuse collection arrangements' which would reinforce the impression of a residential use. In summary, therefore, I do not consider that I have adequate grounds for departing from his firm conclusion that the relevant land use policies make such a use unacceptable on this site. Furthermore, although I recognise that every application should be treated on its own merits, I would also be concerned about the precedent that could be established for other similar locations in the area."

12. Then having set out the personal circumstances of the Claimant and his family, as material considerations to be set against and together with the planning considerations, he continues at paragraph 24, under the heading "The Human Rights Act 1998":

> "As regards the submissions made under Article 8, I recognise that dismissal of the appeal would result in an interference with the appellant's home and private and family life. However, that interference must be balanced against the public interest in pursuing the legitimate aims stated in the Article, particularly the economic well-being of the country (which includes the preservation of the environment.) In my opinion, the objections of the development that has taken place on the appeal site are serious and could not be overcome by granting a temporary planning permission, or one subject to other conditions. I consider that the public interest can only be safeguarded by the refusal of permission and that, in all the circumstances, such a decision is necessary in a democratic society in furtherance of the legitimate aims stated. They do not place a disproportionate burden on the appellant and I therefore consider the dismissal of the appeal would not result in a violation of his rights under Article 8."

13. In submitting that there is a duty on the court effectively to carry out that weighing exercise again on this appeal, Mr Willers refers, as I have indicated, to section 6 of the Human Rights Act 1998 which provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. By subsection (3) of section 6 a public authority is defined as including a Court or Tribunal. He submits that the duty on this court not to act in a way which is incompatible with a Convention right means that this court must effectively reconsider the issue which was so carefully considered by the Inspector pursuant to his statutory obligations.

14. In so submitting Mr Willers seeks assistance from the obiter statements of some of their Lordships in the case of Regina (Daly) v the Secretary of State for the Home Department [2001] 2 WLR 1622, which was a case relating to a claim by a prisoner that there had been an impermissible interference with legal and privileged correspondence kept by him in his cell. He points first to the words of the senior Law Lord, Lord Bingham of Cornhill, at 1633 paragraph 23, where he states as follows:

> "I have reached the conclusions so far expressed on an orthodox application of common law principles derived from the authorities and an orthodox domestic approach to judicial review. But the same result is achieved by reliance on the European Convention. Article 8(1) gives Mr Daly a right to respect for his correspondence. While interference with that right by a public authority may be permitted if in accordance with the law and necessary in a democratic society in the interests of

national security, public safety, the prevention of disorder or crime or for protection of the rights and freedoms of others, the policy interferes with Mr Daly's exercise of his rights under article 8(1) to an extent much greater than necessity requires. In this instance, therefore, the common law and the Convention yield the same result. But this need not always be so. In **Smith and Grady v United Kingdom** (1999) 29 EHRR 493, the European Court held that the orthodox domestic approach of the English courts had not given the applicants an effective remedy for the breach of their rights under article 8 of the Convention because the threshold of review had been set too high. Now, following the incorporation of the Convention by the Human Rights Act 1998 and the bringing of that Act fully into force, domestic courts must themselves form a judgment whether a Convention right has been breached (conducting such inquiry as is necessary to form that judgment) and, so far as permissible under the Act, grant an effective remedy."

15. In his own obiter remarks Lord Cooke of Thorndon has taken that proposition seemingly much further. Mr Willers referred to what Lord Cooke said at paragraph 32, page 1636 when he says:

> "And I think that the day will come when it will be more widely recognised that **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] I KB 223 was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the defence due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd."

16. Perhaps it may be said that that in itself is an over-pessimistic description of the effect of Wednesbury, but nevertheless it has been relied on, and is relied on by Mr Willers, to indicate that the future of the Wednesbury case is, to put it at its lowest, not assured. Mr Willers relies then on that and other such propositions to assert that, as a secondary fall-back argument, this court ought to reconsider the decision of the Inspector and conclude that in the balancing exercise which he carried out the result was disproportionate interference with Article 8, that the Inspector ought to have so found, and that this court should now so find.

17. A third and minor argument, which was set out in his skeleton argument relating to a particularity of the Inspector's findings with relation to fencing, was not pursued before me.

18. The First Respondent, the Secretary of State responsible for the Inspector, has not contested the case, and has been willing to submit to judgment. The opposition to the Appellant's case has thus come from the Respondent Council, for whom Mr Ground of counsel has appeared. His submissions, in relation to these two contentions of the Appellant, have been as follows: first, that there has been no breach of Article 8 and/or 14. The Inspector was entitled to take into account, as part of the personal circumstances, the fact that there was, or has been, alternative accommodation available and that it had been refused, in the weighing exercise, albeit low down, as he submits it was, in that exercise.

19. The Inspector recognises, in terms, in his decision, that the offer of the accommodation had been unattractive, even unsuitable, but when the Inspector was considering whether a refusal of the planning permission rendered it necessary that the Appellant would be homeless, it was a factor to take into account and the Inspector was entitled to have done so. He could refuse planning permission even if it rendered the Appellant and his family inevitably homeless. But if the risk was being considered, there need not have been any risk of homelessness, had the Appellant chosen to accept the accommodation offered. He submits that this was a matter that the Inspector was entitled and indeed obliged to take into account, by virtue of the conclusion of the European Court of Human Rights in the recent and important decision of Chapman and Others v United Kingdom (2001) 10 BHRC 48. At paragraph 103 of the majority judgment in that case the Court said as follows:

> "A further relevant consideration, to be taken into account in the first place by the national authorities, is that if no alternative accommodation is available, the interference is more serious than where such accommodation is available. The more suitable the alternative accommodation is,

> the less serious is the interference constituted by moving the applicant from his or her existing accommodation."

20. Mr Ground submits that it is clear that the Inspector appreciated that in Gypsy terms the alternative accommodation that had been offered was not suitable because it would be likely to be distressing to Mrs Clarke, and he noted that and took that fact into account, but nevertheless eventually in the weighing exercise it at least reflected the issue as to whether there might have been alternative accommodation. Consequently when he concluded the matter he was able, and indeed entitled, to look at the whole of the personal considerations in the round, including that factor.

21. As to the second submission of Mr Willers, Mr Ground submitted that it was not appropriate for the Administrative Court to rehear or reconsider the whole decision, certainly not to carry out the weighing exercise which had been carried out by the Inspector all over again, a fortiori not to reconsider each factor within that weighing exercise, and particularly not planning considerations which were firmly within the expertise of the Inspector. He also referred to the House of Lord's decision in Daly, but, in his case, to the speech of Lord Steyn at 1636 paragraph 28 where Lord Steyn said as follows:

> "The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so."

22. Both parties have referred to a recent decision of the Court of Appeal: Regina (on the application of Samaroo) v Secretary of State for the Home Department (presently unreported) given on 17th July 2001 but available as 2001 All ER (D) 215 (July). Mr Willers referred to the words of Dyson LJ at paragraph 39 of his judgment which was effectively the judgment of the court. He said as follows, in the context of a Deportation Order made by the Secretary of State:

> "What is required is that the Secretary of State justify a derogation from a Convention right, and that the justification be 'convincingly established'.... In asking whether the justification has been convincingly established, the domestic court (as indeed the court in Strasbourg) should consider the matter in a realistic manner, and always keep in mind that the decision-maker is entitled to a significant margin of discretion. The Secretary of State must show that he has struck a fair balance between the individual's right to respect for family life and the prevention of crime and disorder. How much weight he gives to each factor will be the subject of careful scrutiny by the court. The court will interfere with the weight accorded by the decision-maker if despite an allowance for the appropriate margin of discretion, it concludes that the weight was unfair and unreasonable. In this respect, the level of scrutiny is undoubtedly more intense than it is when a decision is subject to review on traditional **Wednesbury** grounds, where the court usually refuses to examine the weight accorded by the decision-maker to the various relevant factors."

23. This reference to intensity of consideration must be a reference back to the important decision of the Court of Appeal in Regina (on the application of Mahmood) v the Secretary of State for the Home Department [2001] 1 WLR 840 where, in particular, in the judgment of Laws LJ, he points out, and the proposition is accepted and followed in other cases, that the intensity of review in a public law case would depend on the subject matter.

24. However, Mr Ground relies on another passage of Dyson LJ's judgment which has particular reference to issues of planning. At paragraph 35 he refers to the discussion at paragraph 3.26 of the book of Human Rights Law and Practice of which Lord Lester of Herne Hill QC and David Pannick QC are the general editors. He said as follows:

> "They identify the following factors: (a) The nature of the Convention right: is the right absolute or (as in the case of Article 8) does it require a balance to be struck? The court is less likely to defer to the opinion of the decision-maker in the former case than the latter; (b) The extent to which the issues require consideration of social, economic or political factors. The court will usually accord

considerable deference in such cases because it is not expert in the realm of policy-making, nor should it be because it is not democratically elected or accountable; (c) The extent to which the court has special expertise, for example in relation to criminal matters;"

25. Mr Ground submits, and I shall refer to other authorities to which he drew my attention later, that particularly in the area of planning the court must accord such deference to the views of the planning authorities, and to Inspectors who have the planning expertise and, in particular, that the court does not usually, save in respect of certain very specialist judges, have the expertise which would enable judges to second guess an experienced Inspector.

26. At this stage I shall refer only to the decision of the House of Lords in Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 759 where at 780A Lord Hoffman underlies the ordinary presumption that matters of planning judgment are best left to the Inspector, and that the Wednesbury test is one which enables a fair reconsideration to be given to the decision of an Inspector without reconsidering, or reassessing, the planning merits of the application.

27. If necessary Mr Ground submits, however, that if the court is obliged, or chooses, to reconsider the decision of the Inspector in this case, it would, and should, come to the same conclusions, and find that there has not been a weighing exercise carried out which results in a disproportionate interference with Article 8, because of the priority in this case, at the end of the day, of the disastrous planning impact, as he submits it to be, and as he submits the Inspector found.

28. I turn then to my conclusions as to Articles 8 and 14. First I agree that the case here is not simply one of interference with an Article 8 right but what there has, or may have, been is a discriminatory interference bringing Article 14 into play.

29. Secondly, if in relation to an ordinary resident applying for a similar planning application there were no suitable alternative accommodation, it would be so decided by an Inspector and that factor, ie the availability of alternative accommodation, would thus not be taken into account against him. The question here must be whether the availability, and/or the refused offer, of unsuitable accommodation should have been held against this Appellant.

30. Thirdly, in my judgment, in certain appropriate circumstances it can amount to a breach of Articles 8 and 14 to weigh in the balance and hold against a Gypsy applying for planning permission, or indeed resisting eviction from Council or private land, that he or she has refused conventional housing accommodation as being contrary to his or her culture. Such circumstances, in my judgment, are and should be, limited, just as they are if, for example, it is to be alleged similarly to be impermissible, in relevant circumstances, to hold it against or penalise a religious or strictly observant Christian, Jew or Muslim because he or she will not, and thus cannot, work on certain days, or to hold it against, or penalise, a strictly observant Buddhist, Muslim, Jew or Sikh because he eats or will not eat certain foods, or will or will not wear certain clothing. It is not, and cannot be, a formality to establish this, and the onus is upon the person such as a Gypsy who seeks to establish it.

31. Fourthly, in order for this to be established in this kind of case, ie a planning decision, the Inspector must first be satisfied of the Gypsy status of such a party. It seems to me to be important to speak of a Gypsy, notwithstanding the risk that it may be possibly offensive, or be regarded as politically incorrect to do so, because using some other more fashionable words such as traveller, or new age traveller, or new traveller, does not allow the status to be so easily defined or appreciated as distinctive. Not all Gypsies are Romanies, so to be a Romany is neither necessary or sufficient (see per Diplock LJ in Mills v Cooper (1967) 2 QB 459 and 467). Not all itinerants or nomads or travellers, not to speak of new travellers, are Gypsies. It may be perfectly possible to describe holiday-makers or free-wheelers as travellers, nomads or itinerants. Travel-writers or journalists may be described as travellers. Plainly sales representatives can be described as itinerant travellers. Gypsy status has been recognised as playing a specific role in the area where there are questions of the environment, planning law, common land and enclosures, of the provision of caravan sites, and in the various statutes which have, from time to time, either assisted, supervised, controlled or limited the Gypsy way of life. In 1960 the Caravan Sites Control and Development Act 1960

was passed. It was recognised that that caused certain problems and so the Caravan Sites Act 1968 was passed. Then in 1994 the Government changed the position, repealed much of the 1968 Act and introduced the Criminal Justice and Public Order Act 1994. In relation to all those considerations it seems to me important that there should be a clear understanding that what is being referred to is someone that is perfectly distinguishable, and the use of the word “Gypsy” appears to me to enable, or best enable, a definition to be arrived at. Indeed there have been a number of authorities in which questions relating to such definition have been canvassed and, in particular, I have been referred to the decision of the Court of Appeal in R v South Hampshire District Council ex parte Gibb [1994] 4 All ER at page 1012.

32. Fifthly, Gypsy status for this purpose can be arrived at by consideration of the following:

(i) whether the person and, if appropriate, his family live in a caravan which, for definition purposes, can include a mobile home;

(ii) whether such person is Romany and/or subscribes to the Gypsy culture. In paragraph 73 of the judgment of the European Court of Human Rights in Chapman the majority judgment of the court reads as follows:

> “The court considers that the applicant's occupation of her caravan is an integral part of her **ethnic** identity as a gipsy, reflecting the long tradition of that minority of following a travelling lifestyle... 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.”

With respect, I would suggest that the definition of the identity as an ethnic identity in that judgment overlooks what I have already indicated, namely the fact that in order to qualify as a Gypsy, as I understand it, it would not be necessary for such a person to be Romany. Of course it is possible for there to be, and is, intermarriage between Romanies and non-Romanies but, in any event, there will be, and are, many Gypsies who are not part of the strict, as it used to be, tribe of Romanies with what I understand, and Lord Diplock understood, to be said to be an ancestry in India. In those circumstances I would prefer to have considered that what the European Court of Human Rights is there referring to is not an ethnic identity but a cultural identity.

(iii) whether the person is itinerant or nomadic for a substantial proportion of the year.

(iv) whether such itinerance is linked to the person's livelihood. Here I refer to the words of Leggatt LJ in R v South Hams District Council and another, ex parte Gibb at 1024C. He said:

> “... I have come to the conclusion that Parliament must have recognised and assumed the characteristic of nomads and also of gipsies that it is in order to make or seek a living that they move from place to place. It is because they have no fixed abode and no fixed employment that gipsies live in caravans, so that they can both have a home and go where work is. It may be seasonal or sporadic, regular or occasional; to reach it they must use the caravans in which they live...”

33. Sixthly, of course, a person may have Gypsy status without all the cultural trappings, beliefs, tenets or way of life of a Gypsy, just as Jews, Muslims, Hindus or Christians may not subscribe to, or comply with, all the tenets of their faith or religion. In order for the issue to be arrived at with which I have to deal, the person must satisfy the Inspector that he and/or his family do indeed subscribe to the relevant tenet or feature of Gypsy life in question here, namely that he or she genuinely has, and abides by, a proscription of, and/or an aversion to, conventional housing: to bricks and mortar. Many Gypsies, certainly many Romanies, as I understand it, do not, and are not, prepared to live in bricks and mortar, but many, perhaps even many Romanies, may well do or are prepared to do so, and each particular person or family must establish the position to the satisfaction of the Inspector.

34. Seventhly, if such be established then, in my judgment, bricks and mortar, if offered, are unsuitable, just as would be the offer of a rat infested barn. It would be contrary to Articles 8 and 14 to expect such a person

to accept conventional housing and to hold it against him or her that he has not accepted it, or is not prepared to accept it, even as a last resort factor.

35. Eighthly, this does not mean that in such a case planning permission must or will be granted. An authority or an Inspector may still, having considered the planning factors, and the personal circumstances of the applicant or appellant, including the fact that there is no accessible or alternative site or suitable accommodation, refuse planning permission. Equally even if planning permission were granted it may be subject to conditions intended to reflect and to respond to any change in the existing factors of Gypsy status, including itinerance: for example, one limiting the proportion of the year for which the caravan could be stationed.

36. In this case it is clear that the four factors of Gypsy status, to which I referred, were, for the purpose of the informal hearing which took place before the Inspector, not challenged and/or were accepted. At paragraph 7 of the decision letter the Inspector said as follows:

> "... my predecessor accepted in 1998 that the appellant was a gypsy and it was said for the Council that it had no evidence of any change. It seems that the appellant's normal practice is to travel to fruit farms in Surrey and East Anglia for two or three periods of six weeks between May and October. During the winter, he seeks work on local farms and carries on general dealing. In my opinion, that is sufficient, because it was held in **Greenwich LBC v Powell** (1989) 1 All ER 65 that a person may be a gypsy even though he leads a nomadic life only seasonally and regularly returns for part of the year to the same place where he has a fixed abode."

37. The written evidence or submissions, so far as concerned the conventional housing factor, comprised as follows: paragraph 4.8 of the written statement of Mr Alan Bringlow, on behalf of the Council, read:

> "The Council's Housing Department did receive on 29 October 1998 an application for rehousing and they were offered temporary accommodation. This was turned down stating they would rather wait for an offer of permanent accommodation. In about May 1999, an offer of permanent accommodation was made for the property at 11 Leybourne Dell, Benenden. The offer was made by the High Weald Housing Association. The appellants failed to respond to this offer and because of this, the Council has now discharged any duty to them under the Housing Acts."

38. The fact that the Council no longer had such a duty was set out and referred to in the submissions made on behalf of the Appellant. In such submissions it was also stated as follows:

> "It is unreasonable to expect the appellant to live in a house, just as it would be unreasonable to expect people who have lived in a house all or most of their lives to spend the whole year in a caravan."

39. It is unclear what, if any, informal oral evidence was given on either side before the Inspector, but it is plain that the issue was, at any rate, to some extent, further canvassed. For convenience I set out again the relevant paragraphs of the Inspector's conclusions. In paragraph 18:

> "It is accepted that the Council has offered permanent accommodation, but Mrs Clarke, who also has close family in the area, has never lived in a conventional house and found the prospect distressing."

40. In paragraph 21:

> "It is unfortunate, in my view, that the appellant felt unable to accept the offer of permanent housing. However, it is not unknown for gypsy families to find that such accommodation would represent an unacceptable change in their lifestyle, and I have no reason to doubt the evidence of Mrs Clarke in that respect."

41. I reach the following conclusions:

(1) It is not clear what the Inspector's conclusion was in relation to the issue of conventional housing. Did the Inspector conclude that the Clarkes or, at any rate, Mrs Clarke, had a settled and immutable antipathy to conventional housing rooted in their gypsy culture? The Appellant and his family had, it seems, from Mr

Bringlow's evidence, made an application for housing at one stage, but then not taken up the offer. Mr Ground invites me to say that the Inspector was consequently sceptical of the genuineness of Mrs Clarke's position, and that that is why he took her refusal into account; but he does not say so. Indeed he says, turning around the words that he has used into one sentence: “I have no reason to doubt the evidence of Mrs Clarke that such accommodation [that is conventional housing] would represent an unacceptable change in their lifestyle.”

(2) It is also not clear what the Inspector was taking into account. Was it that the Appellant and his family had refused such accommodation in the past; or was it that there was, or could be, such accommodation available if push came to shove? If the former, then such a conclusion would be close to the concept of intentional homelessness found to be compatible with the Human Rights Act in Poplar Housing and Regeneration Community Association Limited v Donoghue [2001] 3 WLR 183, CA, but would render it the more important to be entirely clear and fair about such a decision, and whether such a refusal was, or was not, a reasonable course by a person refusing the offer. If the latter, then that could be evidence of the scepticism of the Inspector, or it could be the Inspector's conclusion that the conventional accommodation could, or should, be taken up, notwithstanding its unsuitability.

(3) It is also not entirely clear how the Inspector would have decided if he did not take into account the availability of, or the refusal of, the offer of conventional housing. Thus, for example, it was part of

42. Mr Ground's submission, which one could perfectly well understand, that if, by virtue of Articles 8 or 14, or otherwise, the existence of conventional housing were ignored and there thus was no alternative housing available, would the Inspector still have refused the planning permission? Or was the existence of the albeit unattractive, or possibly unsuitable (if he so found) alternative accommodation a small residual factor in the weighing exercise, such as to bring the issue down on one side rather than the other?

43. It certainly appears to me unclear as to which way the Inspector would have decided; whether what he called the “somewhat of a detraction” in paragraph 21 did indeed serve to minimise for him the problem of the personal circumstances of the claimant, so as to bring the balance down on the one side rather than the other, or whether, in any event, the power and strength of the planning circumstances in this case in the interests of the public as a whole would have brought the weighing scales down against the planning application, even if there had been no previous offer and, in terms, it was stated that the likely consequence was indeed an illegal roadside pitch.

44. I conclude that the decision must be quashed and the matter be returned for a formal hearing carried out in accordance with the guidance I have set out. The decision will need to be made afresh on the issue of Gypsy status, then on the question of conventional housing, and whether reference to its availability would, on the facts, be in breach of Articles 8 and 14; and if it be ruled out, then whether planning permission should or should not be granted and if granted be permanent or temporary, conditional or unconditional. The reality here is that either the Inspector impermissibly took into account legally irrelevant considerations or, at any rate, that, by virtue of the erroneous approach that was taken in this informal hearing, he made insufficient findings for me to be sure that he did not take into account irrelevant considerations. In those circumstances the decision should be quashed. As I have indicated, it does not follow that planning permission will be granted. It may well be that, on a weighing exercise, the force of the planning considerations may nevertheless prevail, on the one hand, or indeed, on the other hand, that an Inspector might reach the conclusion that there was not, in this case, by virtue of the facts, a genuine and immutable cultural aversion to conventional housing, such that it would be possible, within Articles 8 and 14, to take into account the availability of alternative accommodation of the conventional kind and/or the refusal of the housing association's offer. I leave it to a fresh inquiry to have those matters carefully considered. I am entirely satisfied, however, that the result of the present inquiry cannot stand.

45. In those circumstances I do not need to deal with the second issue raised by the Claimant, but out of courtesy I should say just a little. The refusal of planning permission, after fully considering the planning considerations on the one side and the personal circumstances on the other, is obviously a decision which can interfere with human rights, and in this case the human rights of gypsies, just as can a decision to

enforce a Possession Order, or to bring proceedings under section 77 of the Criminal Justice and Prevention of Disorder Act 1994 against them. Such decisions must be taken after weighing matters in the balance. I am told that the issue may arise in relation to the grant of an injunction in favour of the Council against a Gypsy who had lost a planning application, in a pending appeal before the Court of Appeal in the very proceedings in which Porter v the United Kingdom application number 47953/99, to which I refer, was, on reference from the Court of Appeal, considered by the European Court of Human Rights on the issue of admissibility.

46. However my own gut reaction, limited to the issue of a judicial review of a planning decision, is as follows:

(1) there must be a role for the Administrative Court in checking whether there has been a manifest breach of the Convention, even if the approach of the authority or tribunal, sought to be reviewed, does not offend against a common-law or statutory regime. Thus in Daly if their Lordships had been persuaded to say that the decision under the prison regulations or rules justified the interference with the privileged correspondence at common-law (although, in the event, they decided it did not) they could still have concluded that they could not justify such an interference under the Convention. So too in the recent decision of Hatton and Others v United Kingdom in the European Court of Human Rights number 36022/97 relating to flights at night at Heathrow Airport. The conclusion of the European Court at paragraph 114 and 115 provides that the court concluded that:

> "judicial review was not an effective remedy on the grounds that the domestic courts defined policy issues so broadly that it was not possible for the applicants to make their Convention points regarding their rights under Article 8 of the Convention in the domestic courts."

But it appears to me that for that to work there must be what I have indicated to be a manifest breach of an Article. An invasion of the privilege of a prisoner in relation to interference with his correspondence would appear to be a potential area in which the court would say that, whatever the proper procedures which have been carried out by the prison authorities, they themselves could not be justified under the Convention.

(2) However, judicial review and the procedures of the Administrative Court are not apt for a rehearing of the evidence. There is very rarely any role for, or indeed need or facilities for, oral evidence or cross-examination in the Administrative Court, nor will there be available on the Bench the same expertise as there is in the specialist first instance decision-maker.

(3) It is, in my judgment, neither desirable nor appropriate for the Administrative Court to set itself up to second guess planning decisions, and there is every support in the authorities, to which I have been referred, for that proposition. I refer first to the very words of the European Court of Human Rights in Chapman at paragraph 92:

> "The judgment in any particular case by the national authorities that there are legitimate planning objections to a particular use of a site is one which the court is not well equipped to challenge. It cannot visit each site to assess the impact of a particular proposal on a particular area in terms of impact on beauty, traffic conditions, sewerage and water facilities, educational facilities, medical facilities, employment opportunities and so. Because planning inspectors visit the site, hear the arguments on all sides and allow examination of witnesses, they are better situated than the court to weigh the arguments. Hence, as the court observed in **Buckley v UK** [1996] ECHR 20348/92 at para 75, 'in so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation', although it remains open to the court to conclude that there has been a manifest error of appreciation by the national authorities."

47. The court further stated:

> " 123.The government, agreeing with the majority of the Commission, considered that in light of **Bryan v UK** [1995] ECHR 19178/91 the scope of review provided by the High Court concerning planning decisions satisfied the requirements of Art 6, notwithstanding that the court would not revisit the facts of the case.

> 124. The court recalls that in the case of **Bryan v UK** [1995] ECHR 19178/91 at paras 34-47 it held that in the specialised area of town planning law full review of the facts may not be required by Art 6 of the Convention. It finds in this case that the scope of review of the High Court, which was available to the applicant after a public procedure before an inspector, was sufficient in this case to comply with Art 6(1). It enabled a decision to be challenged on the basis that it was perverse, irrational, had no basis on the evidence or had been made with reference to irrelevant factors or without regard to relevant factors. This may be regarded as affording adequate judicial control of the administrative decisions in issue."

48. Those paragraphs have been cited with approval in R (Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2001] 2 WLR 1389, the recent decision of the House of Lords at paras 37, 63, 121, 122, 165 and 195 (see also at 76, 88 and 117). In the decision of the European Court on the admissibility of the Porter case, to which I have referred, at page 9 of the judgment, the European Court said as follows:

> "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."

49. In the recent decision of Sullivan J, a judge very experienced in this field, in Buckland and Boswell and Others (unreported) [2001] EWHC Admin 524, 22nd June 2001, he said as follows at paragraph 46:

> "It was said that the inspector misdirected himself as to the issue of proportionality. In an Article 8 case the inspector had to consider whether the interference with the claimant's Article 8(1) rights was proportionate. It was for the local planning authority to justify the interference with the claimant's rights. The inspector had to evaluate 'the nature and extent of the detriment to this particular site... the scale and extent of the threat to road safety and whether conditions might reduce the threat balanced against the scale and nature of interference found under the first limb [of Article 8(1)]."

50. At paragraph 57:

> "Although the court [the European Court in Chapman] was there concerned with its own power to review decisions in the planning field made by national authorities, much the same arguments apply to the High Court's ability to review inspector's decisions. The court does not visit the site; it is not familiar with many of the policy considerations that will be relevant; it does not hear evidence. There may be greater scope for 'a proportionality approach' in other contexts, such as prisoners' rights."

51. He then cites, with approval, the paragraphs 123 and 124 in Chapman, to which I have already referred. Finally he says at paragraph 59:

> "For the purposes of the present appeal, it is unnecessary to decide whether, and if so to what extent, proportionality may be a ground of review in the Town and Country Planning context. It is sufficient to say that in the light of paragraph 124 of the European Court of Human Rights judgment in Chapman, recently endorsed by the House of Lords in Alconbury, there is no possible basis for the submission that this court should satisfy itself that the inspector struck the right balance between green belt and special landscape area policy, and the claimants' Article 8 rights. Striking that balance was a matter for the inspector, using his own planning expertise in the light of all the evidence, including, most importantly in so many planning cases, the site visit."

52. Had I been satisfied on the first issue that the Inspector had made a decision which accorded with Articles 8 and 14 on the issue of conventional housing, and accordingly carried out his balancing act, without, at any rate potentially, including in it a consideration which should not have been included, I would not have interfered on any other ground. The appeal is allowed.

53. MR WILLERS: Thank you very much, my Lord. Your Lordship will remember that Mr Ground suggested that he may well wish to apply for permission to appeal. Miss Boyd appears on behalf of the Borough

Council today. She does have those dates to avoid. I am not sure whether or not we can fix a date now on the basis that he may wish to come back and argue that permission. There is also the issue as to costs which we said we would reserve.

54. MR JUSTICE BURTON: As we indicated yesterday, there is clearly something to argue about on costs. Certainly I will listen to Miss Boyd on the question of dates. We will not hear a very long hearing. What I would like to do is to say that in so far as Mr Ground is going to seek leave to appeal I would expect him - I have said this to Miss Boyd - him to have a draft notice so that I can at least see what, if any other, is the basis on which he seeks leave to appeal where a good deal of my conclusion has been in his favour and another good deal of my decision has been grounded upon the particular facts of this particular Inspector's decision and the way that it was framed. But the second matter is that if either of you are going to seek to ask for costs and to ask for a summary assessment plainly then the schedules should be dealt with before the hearing. If you are only asking for detailed assessment, then we will only be arguing about the impact of where, if anywhere, the costs should fall or a proportion of them--

55. MR WILLERS: Certainly, my Lord, I understand. We have canvassed, we would suggest, the date of Friday, 19th October as being a date when I think we can both attend. I do not know if that is a date.

56. MR JUSTICE BURTON: I am sure that is satisfactory.

57. MR WILLERS: Would it be something that we would need to take up with the List Office?

58. MR JUSTICE BURTON: Yes, Miss Boyd, does that seem sensible? You have been helpfully here listening to today's judgment. I notice you were taking a note of it. What might be sensible is to see if you can get an extradited transcript so that it can be considered in written form by Mr Ground, particularly if we are going to have as long as Friday week before we come on. Does that seem sensible?

59. MISS BOYD: It does, yes.

60. MR JUSTICE BURTON: If the transcript reaches me to look at for the weekend then I can make any necessary corrections over the weekend and with luck Mr Ground should have the transcript by say Tuesday, which will at least give him time to formulate any grounds of appeal that he wishes to pursue. I am not in any way indicating that I am likely to grant permission but at least what I do want is that you will know the basis of any application in time for the hearing so that we are not simply talking about permission to appeal in the abstract. I will indicate if either of you are going to ask for summary assessment the time for service of any schedule is now.