JOHN HEARNE v. SECRETARY OF STATE FOR WALES and CARMARTHENSHIRE COUNTY COUNCIL [1999] EWHC Admin 494 (25th May, 1999)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST No: CO/2038/98

Royal Courts of Justice,
Strand,
London, WC2.

Tuesday, 25th May 1999

Before:

MR JUSTICE COLLINS

B E T W E E N:

JOHN HEARNE

- v -

(1) THE SECRETARY OF STATE FOR WALES
(2) CARMARTHENSHIRE COUNTY COUNCIL

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1. MR A. MASTERS (instructed by Messrs Battens, Yeovil) appeared on behalf of the Appellant.

2. MISS A. ROBINSON (instructed by Treasury Solicitors) appeared on behalf of the First Respondent.

3. The Second Respondent was not represented by Counsel.

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4. Computerised transcript of Smith Bernal Reporting Ltd.

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J U D G M E N T
(As Approved by the Court)
Tuesday, 25th May 1999

5. MR JUSTICE COLLINS: This is an appeal under section 289 of the Town and Country Planning Act 1990 against the decision of an inspector upholding with some amendments two enforcement notices which have been served against the appellant. The first notice alleged a change of use from agriculture to the siting of a residential caravan and an ancillary chalet and sheds, and the second the erection of a concrete block wall and deposit of hardcore to form a vehicular hardstanding and widening of access. The issue relates to the approach that the Inspector adopted to the appellant's status as a gypsy. He was and had been brought up as a gypsy, but the Inspector found that he had given up that status at the time he moved on to the land, because he intended to settle there and to cease altogether his nomadic lifestyle.

6. Two points, essentially, have been taken on the appeal: first, was there evidence to support the Inspector's finding of fact? Secondly, if there was, what was the material time at which his gypsy status should be material to consideration of the deemed planning application in respect of the enforcement notices?

7. The second point arises as a result of a decision of Mr Lionel Read Q.C sitting as a Deputy Judge in

Runnymede Borough Council v Secretary of State for the Environment [1992] JPL 178.

8. I need not go into the circumstances in any great detail, since both counsel have accepted that if the Inspector's approach to the gypsy status was erroneous then the matter must go back. If, on the other hand, he was correct, and he was both entitled to find as he did that the gypsy status had been given up and that in those circumstances the planning application had to be considered on its planning merits without any consideration of the appellant's gypsy status, then the decision cannot be impugned.

9. The first point, namely that the Inspector's findings of fact were ones he was not entitled to reach, was raised in the course of the hearing. Miss Robinson on behalf of the Secretary of State objected that that point had not been made in the Notice of Motion and certainly appeared nowhere in the Appellant's skeleton argument. The nearest that one gets to it in the Notice of Motion is perhaps in paragraph 6, where it is asserted:

"Further the Inspector erred when reaching the aforesaid findings and conclusions when there was not evidence to support them, and to which no reasonable person in the position of the Inspector, properly directing herself on the relevant material and issues, could have reached and/or failed to give adequate, accurate and intelligible reasons for reaching such conclusions."

10. That is a very general paragraph, as is obvious, and was not focusing on any specific finding of fact. As I say, there was nothing to give any further indication of what finding was in issue and why in the skeleton argument. Accordingly, Miss Robinson made the point that if it had been appreciated that the Inspector's findings in this regard were under attack, it might have been necessary for evidence to be produced to show that they were properly based on evidence.

11. I will have, obviously, to set out the Inspector's findings and his reasons for them as stated in his decision, but it seems to me, to anticipate my finding, that the evidence that he refers to is quite sufficient to justify the finding that he makes. Accordingly, it is quite unnecessary for the respondent to consider the production of any further material.

12. I should now set out the relevant findings in the Inspector's decision letter.

13. He deals with the gypsy point in paragraph 14 and onwards. What he says is this, at 14:

"This brings me to the second issue. It was argued on your behalf at the inquiry that you are a gypsy and permission should be granted since national and Local Plan policies do not rule out the provision of sites for gypsies in the open countryside. Although the use appears to conflict with [the relevant policy] from the Local Plan Inspector's report and the published modifications I am satisfied that any application for a gypsy caravan site must be considered against the criteria in the new Policy" -- which he then identifies -- "included in the published modifications. This states that proposals for gypsy caravan sites will be permitted provided a number of criteria are satisfied."

14. I need not read any more of that paragraph.

"15: National policy on the provision of gypsy sites is set out in Circular 2/94, one of the main intentions being to ensure that the planning system recognises the need for accommodation consistent with gypsies' nomadic lifestyle. However, this Circular makes it clear that status as a gypsy confers no special rights or exemptions under planning legislation. Proposals for such sites should be determined in accordance with the development plan, unless material considerations indicate otherwise, and solely in relation to land-use factors, as with any other planning application. Locations outside existing settlements are not ruled out and paragraph 14 confirms that sites on the outskirts of built up areas may be appropriate. Nevertheless, the circular stresses that encroachment on open countryside should be avoided and, whilst it is stated that gypsy sites might be acceptable in rural locations, the need for consistency with other policies, including those for the countryside and the environment, is emphasised. The Circular states that the aim should be to secure provision appropriate to gypsies' accommodation needs while protecting amenity."

"16: Before these policies can be applied, it is necessary to consider whether, at the time you moved on to the site you were a gypsy since this is disputed by the Council. Section 24 of the Caravan Sites and Control of Development Act 1960 defines gypsies as 'persons of a nomadic habit of life, whatever their race or origin'. Additional advice is given in Circular 76/94 which refers to the case of
R v South Hams District Council and another,
ex parte Gibb [1994] 4 All ER 1012 in which the Court of Appeal held that gypsies meant persons who wander or travel for the purpose of making or seeking their livelihood."

"17: You state that you were born to a gypsy family on the Gower Peninsula and have lived in tents and caravans all of your life and have moved around the country taking temporary work. You have travelled to various parts of England fruit picking. In August 1996 you gave your address as Cats Hold Quarry, Monkton, Pembroke and state that you lived there when employed in the area either potato or fruit picking. You lived on an unofficial site at Briton Ferry for about 5 years before moving to the appeal site. During that period you went to other places from Briton Ferry seeking work, either fruit or potato picking, taking your caravan with you each time. From this evidence I am satisfied that you came within the definition of a gypsy prior to moving to the site."

"18: Nevertheless, you confirmed in reply to cross-examination under oath at the inquiry that you intend to give up the nomadic way of life so that your children have the chance to settle and that you wish to build a permanent dwelling on the land. It is your intention to settle permanently here and you have provided a letter confirming that you would be starting permanent employment as a yard maintenance man in Gorseinon, Swansea on 13 April 1998. You were also on a Training Course in Llanelli for long-distance lorry drivers. Therefore, whilst you may have been a gypsy in the past, your evidence confirms that you move onto this land with the intention of settling on it permanently and giving up the nomadic way of life. It is also clear that you are no longer wandering or travelling for the purpose of making or seeking your livelihood, as you have done in the past. The only conclusion which I can reach is that you are no longer a gypsy as defined in Circular 76/94 and that you gave up gypsy status when you moved on to the land."

"19: In these circumstances it would be inappropriate to consider the use of this land as a caravan site against policies which are designed to recognise the need for accommodation consistent with a gypsies' nomadic lifestyle. Since it is your intention to settle permanently on the site and give up this lifestyle, your use of the land should be considered in the same way as any other proposal for a residential caravan site in the countryside. Whilst I sympathise with your reasons for wishing to settle permanently, the planning policies which apply to your use of the land must be the same as would apply to anyone wishing to implement this use. For the reasons set out above, the use of this land as a residential caravan site is contrary to long-standing national and local policies for the countryside."

15. I do not think that it is necessary to read any more of the decision letter since, as I have said, it is accepted that the question raised as to the gypsy status is determinative of this appeal.

16. Mr Masters on behalf of the appellant made the point that it was wrong to assume that, merely because a person who was a gypsy intended to settle permanently in a place, he must be taken to have given up his gypsy status. He drew attention to certain paragraphs in the relevant circular which make it plain that it was anticipated that in certain circumstances gypsy sites should be intended for those gypsies who wanted a permanent place to settle, and there was nothing, therefore, necessarily inconsistent with the concept of a permanent settlement and the retention of the status as a gypsy.

17. It is, in my view, necessary always to recognise that that is indeed the case; it is not sufficient to take away a person's gypsy status that he intends to settle somewhere permanently. It does require something more, and that something more is to be found in clear evidence that he not only intends to settle, but he intends to give up and perhaps has in an appropriate case given up his nomadic way of life altogether. If

the evidence supports that contention then, in my judgment, as a matter of fact an inspector is entitled to find that the gypsy status has indeed been abandoned. That is what this inspector did. He did not simply rely upon the fact that the appellant was moving to settled or permanent accommodation, but he went further and, as is clear from what he said in the first sentence of paragraph 18, he relied on the stated intention of the applicant to give up his nomadic way of life: that intention was supported by the production of evidence that the appellant had obtained a job and was training for another job.

18. It is in this context necessary to refer to the relevant circular. I have been referred by Mr Masters to Circular 1/94, which is the number of the circular issued by the Department of the Environment, Circular 2/94 being the same circular issued by the Welsh office. Since 1/94 is the one that is printed in the Planning Encyclopaedia, it has been convenient to refer to it.

19. Its introduction in paragraph 1 states as follows:

"This Circular revises guidance on the planning aspects of sites for caravans which provide accommodation for gypsies. It applies equally to local authorities' own sites and to applications for planning permission from gypsies themselves or from others wishing to develop land for use as a gypsycaravan site. The circular comes into effect immediately. Its main intentions are 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."

20. Then paragraph 4:

"The proposed repeal of local authorities' duty to provide gypsy sites is expected to lead to more applications for private gypsy sites. The Government recognises that many gypsies would prefer to find and buy their own sites to develop and manage. More private sites should release pitches on Local Authority sites for gypsies most in need of public provision."

"5: Gypsies are defined in section 16 of the 1968 act as persons of nomadic habit of life, whatever their race or origin."

21. Pausing there, that definition is the same as is now carried forward into the Criminal Justice and Public Order Act of 1994.

22. Going back to the Circular:

"References to gypsies in this Circular are references to gypsies in that sense."

Then 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 trade 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 3 of the Housing Act of 1985."

23. I can then I think go on to paragraph 16, which reads:

"Many gypsies prefer to run their businesses from the site on which their caravans are stationed. Local planning authorities should wherever possible identify in their development plans gypsy size suitable for mixed residential and business uses, having regard to the safety of the occupants and their children. If mixed sites are not practicable, authorities should consider the scope for identifying separate sites for residential and for business purposes in close proximity to one another."

"17: Given the variety of occupations in which gypsies are engaged, there is no simple profile of an ideal gypsy site, but there are a number of characteristics which may help local planning authorities to identify appropriate sites whether publicly or privately owned. Three main types of site are referred to here for guidance: 1, sites for settled occupation; 2, temporary stopping places and 3, transit sites. Even families who settle on sites may travel periodically, especially during the summer months. So there is often a need for transit sites for gypsies who are passing through a particular area."

Then 19:

"Private sites for settled occupation are generally small accommodating pitches for individual or extended families without on-site business activities. Small sites can often be less obtrusive. Temporary stopping places and transit sites might also be small, except on routes frequented by those gypsy groups which travel in large numbers."

24. I think that is all that I need read from that Circular. I was also referred to Circular 18/94 which deals with the approach to the then new provisions of the Criminal Justice and Public Order Act and makes the point that local authorities should not automatically decide to evict, particularly when the effect of such eviction would merely mean that the gypsies in question transferred to another site where the nuisance alleged against them would be perhaps worse. Furthermore, it was necessary always to have regard to humanitarian considerations and bear those in mind when deciding whether a particular gypsy encampment should be moved on. The humanitarian considerations are also relevant in deciding on planning issues within Circular 1/94; so much has been decided by the courts in a number of cases.

25. However, all this presupposes that one is dealing with a gypsy site. Mr Masters submitted that the reference to settled occupation in paragraph 17 and 19 of the Circular indicated that the Minister had recognised that gypsies might want to settle down and that therefore in deciding whether they should be permitted to settle in a particular place the planning considerations relevant to them should be applied. Accordingly, submitted

26. Mr Masters, it was inappropriate to approach the case as the Inspector did, namely asking himself whether in settling where he was proposing to settle the appellant was intending to cease to be a gypsy.

Provided he was a gypsy when he moved on to the land, as was the case, his intention for the future was not a relevant consideration. That, submitted Mr Masters, was consistent with the language of the Circular and its approach. Indeed, he suggested that it was implicit in the Circular that encouragement should be given to local planning authorities to permit gypsies to settle permanently on sites because that would free the pressure on the provision of other sites in the relevant area.

27. At first blush, there is undoubtedly a tension between the concept of settled occupation and the nomadic lifestyle which is essential to enable a person to fall within the description of gypsy, but the tension is more apparent than real. It is, submits Miss Robinson, merely putting into effect the approach which was made by the House of Lords in Greenwich LBC v Powell 1989 AC 995. That was a case which concerned the eviction of gypsies from a caravan site and the question at issue was whether the site in question was a protected site within the meaning of section 5 of the Mobile Homes Act of 1983. The County Court judge had decided that it was such a protected site. Their Lordships decided that that was wrong.

28. At page 1011, Lord Bridge of Harwich, who gave the only reasoned speech, referred to the then Circular, which was Circular 28/77, and to the notes which, as he said, observed perspicaciously:

"The criterion nomadic habit of life leads to a certain ambiguity, especially in relation to gypsies who settle for lengthy periods on authorised sites."

29. Lord Bridge at 1011F continues:

"But later passages in the notes firmly grasp the nettle of this ambiguity and encourage local authorities to provide sites to accommodate gypsies in four categories as follows: 1, emergency stopping places; 2, transit or short stay sites; 3, residential sites. 4, permanent sites for long-term residential use. The last of these categories can only have had in contemplation sites such as that of Thistlebrook to which gypsies return year after year as their permanent residence, but from which they set forth at certain seasons to pursue their traditional nomadic way of life. Secondly, there is ample evidence that the policy advocated in the Circular with regard to permanent sites for long-term residential use has been recognised by the Secretary of State as an appropriate criterion before 1977 for application under section 12 of the Act of 1968 in deciding whether adequate provision had been made in the Local Authority area for the accommodation of gypsies to justify designation of the area."

30. He then goes on to consider that, and he continues at letter B on page 1012:

"These considerations confirm me in the opinion that even if there is an ambiguity in the definition of gypsies in section 16 of the Act of 1968, the intention of the legislature in the Act of 1983 was clearly to exclude from the definition of protected site sites such as that at Thistlebrook provided by local authorities in discharge of their duty under section 6 of the act of 1968 to accommodate those who may bona fide believe to be gypsies because they are nomadic for part of the year notwithstanding that they establish a permanent residence on the site by returning from year to year. Such a site will not become a protected site, even if some of the erstwhile nomads, as well they may, give up their nomadic way of life entirely. It would be different of course if the Local Authority adopted a policy of offering vacancies on the site for static residence with fixed full time employment, but this is hardly ever likely to happen."

31. Now the approach there, as I see it, is to look at the site and to decide whether the individual site is or is not to be categorised as a gypsy site. The fact that some on that site may have given up the nomadic way of life, for whatever reason, will not disqualify the site as a whole. Equally, it is necessary that the site is essentially provided for those who have not wholly given up the nomadic way of life, and the identification in the Circular of permanent sites for long-term residential use seems to me to carry the same meaning as appears in the present circular, namely settled.

32. The point, of course, is that the Circular is dealing with gypsies and a gypsy cannot qualify as such unless he retains the nomadic lifestyle which is essential for that description to apply. It need not be a nomadic lifestyle which is carried on throughout the year. It is possible, and indeed understandable, that gypsy families should wish to have a permanent place, if only perhaps to enable the children to go to a local school, but the nomadic existence can still exist, albeit it is only at particular times and perhaps during relatively short periods of the year.

33. What is not consistent with the setting up of a gypsy site is the concept that no one on that site will maintain a nomadic existence at all.

34. So here I am prepared to assume that a single individual, or a single family, setting up on land is capable of being designated as a gypsy site (although I am bound to say I have my doubts about it). The contrary has not been argued and, as I say, I am prepared to assume that is so, but, of course, it does mean that if the evidence is clear that the individual who is the only occupant of that site, and the only proposed occupant of that site, is going to live there not as a gypsy at all, but having given up his nomadic lifestyle, it is easy, or easier, to decide that the site is not indeed a gypsy site.

35. That seems to me to be the approach that ought to be adopted and it is consistent with the approach that the Inspector in this case did adopt.

36. Mr Masters submits that it was not open to the Inspector to approach the matter in that way, because it is contrary to the decision to which I made reference earlier, Runnymede BC v Secretary of State for the Environment [1992] JPL 178.

37. The report of the case is not entirely full and it is not easy to see what the precise facts found were, but it seems likely that the case was really decided on an issue of fact, namely whether the Inspector's findings that the individual in question in that case had not given up his gypsy status were findings which could be assailed in law.

38. The facts which led the Inspector to his conclusion are set out from paragraph 13 of the decision letter, which appears on page 178 of the report:

"Your client's second ground of appeal rests upon his status as a gypsy. Both he and his wife had come from gypsy families and had travelled throughout their childhood and youth. They had virtually no education. They had never wanted to live on official gypsy sites, and in any case there was no pitch available in the district. They had twice settled in a mobile home in their own land in Buckinghamshire, but had been forced to move following planning enforcement action. Having also travelled in the Chertsey area, they had purchased the appeal site and farm in 1988 and still hoped to make the farm viable. Their 4 children were happily and successfully settled in local schools, demonstrated by letters from head-teachers, and the youngest child, who was asthmatic, relied on regular trips to a local hospital

where his condition was being successfully treated. Although the parents still regarded themselves as gypsies, the family wanted to remain permanently at the appeal site."

39. Those findings do not go so far as to indicate that the Inspector decided, or indeed ought to have decided, that the parents had given up their gypsy status. Although they wanted to remain permanently at the appeal site, that was not of itself necessarily inconsistent with the retention of the nomadic status; so much is clear, from, for example, Greenwich LBC v Powell , which I have already cited. If that be right, then the Inspector's conclusion that the respondent in that case remained a gypsy was a conclusion which could not be assailed, and therefore the decision of Mr Lionel Read was clearly right.

40. But in the course of his judgment, the learned Deputy Judge seems to have gone somewhat further. Having set out the factual issues, he says in the middle of page 179:

"The relevance of this conclusion was that on questions of fact the Inspector was the final judge. The court could only interfere with any conclusion of fact if it involved error of law. In this case, that meant, whether he in any way had misdirected himself on any matter of law in reaching his conclusion on fact and whether there was evidence on which he could reasonably in the Wednesbury sense, have reached that conclusion. The only matter of law which arose in the Inspector's consideration of the second respondent's status was the time at which it fell to be decided that the second respondent's habit of life was in fact nomadic. The point was of relevance and indeed of crucial importance because when the second respondent had moved to a mobile home on the appeal site he had intended, as the Inspector found, to remain there permanently. In short, if his habit of life before then had justified the description 'nomadic', he had intended to cease to be a nomad on his move to the appeal site."

41. It is not entirely clear from the passage set out in the Inspector's report that that conclusion is one which was justified. There was no finding that he had intended to cease to be a nomad because, as I say, the mere fact that he intended to settle permanently did not preclude him from retaining his status as a gypsy. If, on the other hand, there was further evidence which ought to have led the Inspector to decide that he had ceased to be a gypsy then the learned Deputy Judge does not specifically refer to it.

42. In any event, that was the approach that the learned judge took, deciding that the time at which the status had been lost was crucial. He goes on:

"Mr Sales, who appeared for the second respondent, fairly, and correctly, conceded that. But the question he submitted for the purposes of Circular 28/77, which the Inspector was applying, was whether the second respondent was a gypsy and hence a nomad before he moved to the appeal site, since it was then that Government policy suggested that it might be necessary to accept the establishment of a gypsy site in the Green Belt, assuming, and the contrary was not argued by the council, that one mobile home could be a gypsy site for this purpose. He (the Deputy Judge) agreed with that submission. To suggest otherwise would be out of accord with the whole tenor of Government policy.

"Hence, the question to decide was whether there was evidence on which, without unreasonableness, the Inspector could have concluded that the second respondent's habit of life immediately before he moved from a mobile home on the appeal site was, in ordinary English, 'nomadic'."

43. With the greatest of respect to the learned Deputy Judge, I cannot agree with that approach. I say that with the greatest of deference, knowing that I am disagreeing with the view of a very experienced planning counsel and also with a decision which has stood, so far as I am aware, since 1991.

44. Nevertheless, as it seems to me, it is the site that matters. If this was to be a gypsy site, that is to say a site to accommodate a person who maintains a nomadic lifestyle, then it falls within the Circular. If it is not to be a gypsy site, then it cannot, as I see it, fall within the Circular and must be subject to the ordinary planning approach, which would be applicable to determining whether a particular development was or was not appropriate.

45. It cannot matter when precisely the status of gypsy was lost. The point, surely, must be whether that status was going to be retained following the development in question, or, putting it the other way round, was the development for someone who was going to retain his gypsy status?

46. Thus, as it seems to me, the approach of the Inspector, as set out in his decision letter and particularly in the sentences at the outset of paragraph 19, was correct. I remind myself he said:

"In these circumstances it would be inappropriate to consider the use of this land as a caravan site against policies which are designed to recognise the need for accommodation consistent with a gypsies' nomadic lifestyle. Since it is your intention to settle permanently on the site and to give up this lifestyle, your use of the land should be considered in the same way as any other proposal for a residential caravan site in the countryside."

47. It is to be noted that the Inspector correctly adds to the intention to settle permanently the intention to give up the nomadic lifestyle, and he is not falling into the error of assuming that the intention to settle permanently is of itself necessarily inconsistent with the retention of **gypsy** status. There was, in my judgment, material to justify the finding of fact, and once that finding of fact was made the question of the appellant's gypsy status fell by the wayside for the purpose of determining the planning applications under the appeal against the enforcement notices.

48. That being so, I find no error of law in the approach adopted by the Inspector and it must follow that this appeal is dismissed.

49. I heard argument yesterday, because Mr Masters was unable to present today, as to whether there should be leave to appeal, and recognising that I am disagreeing with a decision which has stood for some time, it seems to me that it was right to grant leave to appeal, and that I do.

50. The only other order I need make is an order for costs in favour of the respondents, but since the appellant is legally aided, that order will be subject to the usual limitation in relation to non-enforcement.

51. MISS ROBINSON: My Lord, I am very grateful. As I indicated yesterday, those instructing me have served a schedule on the appellant in case your Lordship wished to exercise the power to assess costs summarily.

52. MR JUSTICE COLLINS: I have considered that and I have thought about it a bit overnight, but I do not think this is an appropriate case to assess, and it is almost certainly academic in any event.

53. MISS ROBINSON: Thank you very much.